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**The Sceptic and the Law
Truth, Law and Justice in Modern Philosophy**

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**THE SCEPTIC AND THE LAW
TRUTH, LAW AND JUSTICE IN MODERN PHILOSOPHY**

By Philippe Raynaud*

Abstract

Generally, one considers that there is a strong connection between legal positivism and a specific interpretation of democracy. This argument found its classical formulation in Hans Kelsen's work, which considers that scepticism about the ends of human action is the ultimate foundation of democracy. This paper presents a genealogy of the "positivist" scepticism, from the period of the religious Wars of 16th century to contemporary discussion of democracy and constitutionalism. It shows how an argument invented by Hobbes in defence of absolutism became an important part of democracy, not only in legal theory or in political philosophy, but also in contemporary common sense. It also discusses the conventional vision of "legal positivism", by highlighting the permanence of opposite views on anthropology and on political science, which appear in the works of Hobbes and Hume and are still present in contemporary discussions.

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The starting point of this research is an interrogation about the question of Truth in modern politics, as it can be understood from the point of view of contemporary legal philosophy.¹ My purpose is to give an historical analysis of an argument, whose best expression can be found in Kelsen; according this argument, there is at least some affinity between the preference for democratic government and a philosophical choice for a moral relativism which itself is founded on something like a “moral scepticism”. Kelsen is specially explicit on this question, but he is not an exception: in fact, one can consider that the most important legal positivists of XXth century were democrats and that they generally have an “emotivist” and “anti-cognitivist” philosophy which can be considered as “sceptical”.

Before going farther, I would like to start with two tentative definitions. I call “moral scepticism” the position which considers that, even if one can find good reasons to prefer certain norms or certain actions to others, practical questions are not relevant for the category of “truth” and depend on choices which cannot be ultimately founded by “reason” and/or by nature. As for “legal positivism”, it refers to a precise position in Philosophy of Law, which considers that, even if positivist Law can be reasonably contested from a moral or a political point of view, a legal critique is and must inherently be internal, because no Law can exist outside the positive Law. My starting point is that, at the very heart of the positivist philosophy of law, there is an argument which begins with Hobbes, and continues as a filigrane throughout the history of positivism up to contemporary scholars such as my friend Michel Troper, and which evidently implies something like a moral scepticism, in order to posit a clear distinction between law and morals.

The inventor of this argument is Hobbes, in a well-known and highly controversial sentence: *Auctoritas non veritas facit legem* – it is the authority and not the Truth that makes Law. Its most recent development expression lies in Troper’s well-known theory of argumentation – which is itself a radicalisation

¹ See Philippe Raynaud, “Truth and Power in Modern Politics”, in *Truth and Public Place*, Springer Publishing, 2009; French version in Philippe Raynaud, *Le juge et le philosophe*, Paris, Armand Colin, 2008, pp. 255-271.

of a kelsenian argument – which poses that interpretation is an act of the “will” and not of “knowledge”, even if, for good reasons, judges never admit that they are simply doing what they want when they interpret a legal norm.²

If law was ultimately founded in “truth” (which could be indifferently religious, moral or scientific), the production of law would be essentially a discovery and the power should be given to those who know this truth or the “values” that derive from it. Inversely, the pre-eminence of “authority” in the production of Law comes from the uncertainty of truth in practical questions. In Hobbes himself, this doctrine leads to an “absolutist” theory of the State : law is made by a *sovereign* who is the real creator of law and who has the last word in all questions of interpretation. In modern positivism, it is not only compatible with democracy, political liberalism and even constitutionalism, but this “sceptical relativism” appears as a condition of liberalism and of democracy: the protection of the rights of individual depends from legal order rather than from moral “values”, and both the legitimacy of the government of people and of the plurality of opinions are incompatible with the affirmation of some absolute and knowable values.³

However, we must notice that, even if some eminent authors like Jeremy Waldron or, in France, Michel Troper, hold to some kind of democratic positivism, this position is evidently not dominant in contemporary legal thought. Generally speaking, although most contemporary Lawyers can be considered as “positivists” in so far as they rely on positive Law rather than on philosophical arguments, most Legal Philosophers do not want to be positivists, because they consider that legal positivism lacks the moral foundations that are necessary to produce good Law and not only to give plausible solutions to the day to day cases that a lawyer can encounter. Most contemporary thinkers are democrats, but they think that democracy requires not only majority rule but also the prevalence of

² Michel Troper, « Justice constitutionnelle et démocratie », in *Pour une théorie juridique de l'Etat*, Paris, P.U.F., coll. « Léviathan », 1993, pp. 328-346 ; « « Kelsen et le contrôle de constitutionnalité des lois » in *La théorie du droit, le droit, l'Etat, op. cit.* pp. 173-194 ; « Marshall, Kelsen, Barak et le sophisme constitutionnaliste », in Elisabeth Zoller (éd.), *Marbury v. Madison : 1803-2003. Un dialogue franco-américain*, Dalloz, 2003, pp. 215-228.

³ Michel Troper, « Positivism juridique et démocratie », in Philippe Raynaud and Stéphane Rials, *Dictionnaire de philosophie politique*, 2nd ed., Paris, PUF, coll. « Quadrige », 2003, p. 580.

rational argumentation over mere decision or even compromise and, according to the dominant opinion, this prevalence cannot be really founded in the positivist paradigm. This tendency is visible in continental thought as well as in the English-speaking world, as we can see by comparing two eminent authors such as, on the one hand, Ronald Dworkin, and, on the other hand, Jürgen Habermas. The first one began his work with a criticism of Hart, which can be considered as the most important attack against legal positivism during the second half of 20th century. Hart had proposed a profound revision of the classical theory of sovereignty in order to give a place to the figure of judge (and of judge-made law). Dworkin thought that this approach fell short in several respects and he proposed a new philosophy of Law (and of “rights”); beyond the hartian distinction between different kinds of rules, he affirmed that law is not only made of *rules* but also of *principles*, which are above the authority of any political institution and which the judges must apply but cannot really “make.”⁴ Dworkin is not an advocate of “Natural Law” because he claims that the principles are in a certain sense immanent to the positive law (to the “living constitution”), but he is nonetheless anti-positivist in so far as he considers that the judge must apply “standards” which do not owe their validity to the authority which “posed” them but which come from some general idea of justice and fairness or, even more generally, from some “moral” dimension of the law⁵. The second one, whose reflection starts from a radical criticism of the “decisionist” legacy of Carl Schmitt and, before him, of Max Weber, has developed a rich work which includes a substantial evolution from Marxism to left-wing Liberalism.⁶ One of his central thesis has always been that true modernity implies superiority of Truth over Will or Authority, which corresponds to the revolutionary legacy of modern Natural Law.⁷

I am more “positivist” than these eminent thinkers, but I consider that there is some truth in their criticisms, which hinges on the relation between

⁴ Ronald Dworkin, *Taking Rights seriously*, (TRS) Cambridge Mass., Harvard U.P., 1977, p. 22-28, 71-80.

⁵ TRS, p. 22.

⁶ Jürgen Habermas, *Theorie und Praxis*, ch. 8, French translation, Paris, Payot, 1978, tome 2, pp. 87-113.

⁷ See *L'espace public*, 1962, ch. IV, § 13, French translation, Paris, Payot, 1978, pp. 112 sq.

democracy, legal positivism and moral scepticism, and which has something to do with the place of “reason” and “truth” in modern democracy. The problem that I wish to study has two sides. From an historical point of view, the most striking question is to understand how an argument invented in order to legitimate absolute monarchy could become compatible with modern democracy or even necessary to its foundation. But this historical question leads to a more “normative” one, which concerns the cogency of the positivist-sceptical argument. This one can be understood in two ways. The first is that ultimate questions of justice or morality, which underlie legal controversies, cannot be solved by reason alone, and that the best is to trust the competent authority: it resembles the catholic solution to the controversies on questions of faith, which is probably not a very good democratic model. The second is more radical, and some people may think it that is rather cynical : it considers that in fact, the question of the “true” interpretation of the law doesn’t really matter, for the interpretation is not a question of knowledge (or of truth) but a question of will and power; let us call it the Humpty-Dumpty side of legal positivism. If we accept the first interpretation, we shall have some difficulties to show that “positivist” gives a good foundation for democracy. If we choose the second one, we are at risk to be accused of something like “nihilism”, which, according to the dominant conception of “democracy” and “liberalism”, is certainly not a good trend. In this inquiry, I shall lean on three authors – Montaigne, Hobbes and Hume - who are certainly not good democrats, but who are commonly connected to legal positivism, or to moral scepticism and relativism, or two both positions. After an analysis of their thought about the question of truth in politics, law and morals, I shall try to give a brief presentation of their cogency in contemporary debate.

I/ *Montaigne, the King and the Judge.*

The emergence of the Modern State, which is the precondition of the development of Human Rights, is closely connected to the religious wars which divided Europe after the Reformation. Securing the State's sovereignty, which usually meant that of the Monarch, was the precondition of religious peace. This required the subordination in one way or the other of religious authorities to political ones. In England, the conflict was prevented, then limited, by the constitution of the Church of England as a national Church which pretended to be both catholic and protestant, and was legitimised by an imperial theory of English Monarchy according which the King was the supreme authority in religious matters. The first flourishing of Protestantism in England can hardly be seen as a triumph of religious freedom: Catholics were not burned as heretics but they could be sentenced to death as traitors, and protestant dissenters were not very happy under Anglican rule. Leaving aside the Dutch Republic, the principal route to "toleration" in continental Europe was exemplified by France, more specifically the growth of absolutism since François 1st to Henri IV. In France, three developments converged to the end of the religious wars : a) the formal victory of Catholicism with the conversion of Henri de Navarre on his ascension to the throne; b) the Edit de Nantes, which imposed tolerance of Protestants against radical Catholics of the "*Ligue*" and c) the reinforcement of the King's authority to the detriment of other legal powers such as the *Parlement* of Paris. Henri's crowning is viewed traditionally a victory of the so-called "*parti des politiques*", that is of the group of Magistrates, Lawyers and Philosophers who thought that the King should stand above religious conflict in order to make peace within the Kingdom. If they comprised a "parti", its ranks were obviously heterogeneous. There are, however, some important common ideas among its members, which concern the interpretation of the traditional "constitution" of French Monarchy and which lead to the emergence of the doctrine of "*souveraineté*" and to the development of the so-called "absolute" Monarchy; we can see the logic of this position in the work of two of their most eminent figures, Michel de l'Hospital and, with some reservations, Jean Bodin.

Michel de l'Hospital, the great advocate of religious peace, tried to impose at the "Colloque de Poissy" (1561) a theological compromise between Catholics and Protestants with an Anglican-like flavor. He was also a legal activist who continually sought to weaken the "Parlement de Paris" and to consolidate the authority of royal power. For instance, he imposed the "Ordonnance" of Moulins (1566), which limits the ability of the *Parlement de Paris* to register Laws and he insisted constantly that the King and the King alone has the "*souveraineté*", that is had the power to make the law and to change it. ⁸ In fact, the search of the religious peace and the case for royal supremacy were for him one and the same struggle, as we can see in his important speech of January 3rd 1562. This speech is an address to the magistrates of the Parliament of Paris, in which Michel de l'Hospital explained why they must accept without restriction the first "Edit" of Toleration for the Protestants which was to be published. In the traditional, "parliamentary", vision of French Monarchy, the most important function of the Parliament was to verify the conformity of the Law to the eternal justice, which was ultimately founded in God. Now, this doctrine was challenged by the fact of religious division of France, which seemed incompatible with the unity of Truth; ⁹ the answer of L'Hospital to this challenge was potentially revolutionary : "one must not consider if the Law is just in itself, but if it is convenient to the times and the men for which it is made". In fact, L'Hospital does not deny the existence of absolute justice in itself, but he considers that the subjects cannot know it and that King is the only one, in such an obscure case, to know what it implies. In one side, the pre-eminence of the divine wisdom, which implies "the subordination of the city to a transcendent order",¹⁰ is preserved – to the benefit of the King, which becomes more distant from the kingdom than he was before. In the other side, this exhaustion of the King opens the way to what we should retrospectively consider as a "secularization" of politics, which has itself to faces. The power of King is strengthened by his supposed proximity with God, which emancipates

⁸ See Michel de l'Hospital, *Discours sur la majorité de Charles IX et trois autres discours*, éd. par Robert Descimon, Paris, Imprimerie Nationale, 1995.

⁹ See Arlette Jouanna, *Le pouvoir absolu. Naissance de l'imaginaire politique de la royauté*, Paris, Gallimard, « L'esprit de la cité », 2013, p. 153.

¹⁰ *Id.*, *ibid.*, p. 154.

him from the traditional – judicial and religious – authorities, and his reason becomes more efficient and more “instrumental”. But this rise of the royal power is the condition of the dissociation between law and religion, which is made possible by the distinction between truth and politics. The King remains “*le roi très chrétien*” and, as such, he is probably not neutral between the two conflicting churches. But he is neutral from a legal or political point of view, because the problem is political and not religious: “the question is not here *de constituenda religio, sed de constituenda Republica* [not of the establishment of religion, but of the establishment of the Republic]. And many can be *cives, qui non erunt Christiani*” [citizens, who will not be Christians]”.¹¹ The sacralisation of the royal power induces the emancipation of society from religion: the magistrates lose the power that they had when they acted as “Christians”, but all the subjects become “citizens” even if they are not recognized as true Christians.

In a certain way, Michel de l’Hospital tells that “it is the (royal) authority and not the (religious) Truth that makes Law”, and his position is founded on a profound scepticism about the capacity of common reason to resolve the ultimate questions. But the great “Chancelier” is not a modern “positivist” and even less a relativist: the fact that religious truth cannot directly create Law does not mean that human law is not ultimately ordered to natural or divine Law. If we want to understand the intellectual context in which Michel de l’Hospital takes place, we can consider the work of one of the great philosophers of his time Jean Bodin, whose political choices were close to those of the *Chancelier*.

Bodin (1529-1596) does not belong to the same generation as L’Hospital (1504-1573), and his political and philosophical project is not exactly the same : L’Hospital simply affirmed the capacity of the King to transcend the religious division of France, Bodin tries to define the nature of the “*souveraineté*” which is for him an “absolute power” (“*puissance absolue*”), which is defined by the power to give the law but also to change it and, if necessary, to deviate from it.¹² The idea that the King can make exceptions to the Law in case of necessity is not in

¹¹ Quoted in Arlette Jouanna, p. 153-154.

¹² Perhaps Bodin was philosophically a “politique”, but he became also at the end of his life a member of the “Ligue”, probably because he was perplexed by the evolution of the French monarchy; he represented this oxymoron : a moderate “ligueur”.

itself new, but Bodin gives to this possibility a new signification: the traditional supreme power *could* become absolute in some extreme situations, the “*souverain*” is *originally* absolute and has for that reason the power to make laws which fix the rights and obligations of everybody and gives its form to the political body as a whole.

So, Bodin is rightly considered as one of the important theorists of the “modern State”, due to this theory of “*Souveraineté*”, which does not only affirm the pre-eminence of King on other authorities, but proposes a real doctrine of the State in the modern sense. The bodinian sovereign has really the “competence of the competence” and his power is not simply to judge according to a law of justice but to make laws by his own will. On the other side, this supreme magistrate who can make – and change – the Law, and who is only accountable before God, is neither a “master” nor a feudal Lord. His subjects are not his property and they remain “free” under his “absolute” power; moreover, he has not the caesarean “right of life and death”. So, it is also possible to find in Bodin’s great book *Les six livres de la République* something like an emerging doctrine of Human Rights, when he argues that political power is instituted in order to protect the individual’s natural right to “*sûreté*”.¹³ But, modern as he is, this philosopher of “*Souveraineté*” is still far from Hobbes because of his conception of natural Law as a limit to the sovereign power. For Hobbes, the Natural Law, which is basically equalitarian, binds the individual, to whom it commands to transfer his rights to the sovereign in order to preserve his life: ¹⁴ the affirmation of “Law of Nature” does not imply any reference to a transcendent Law which should be incorporated in the State. On the contrary, Bodin accepts the traditional vision of Natural Law as principle of justice above positive laws. Of course, he is not a simple heir of the medieval philosophers. His religious faith is uncertain: he belonged to catholic circles but there are reasons to think that he was sympathetic to Judaism and it is certainly significant that he never mentions any

¹³ See Blandine Kriegel, *Les chemins de l’Etat*, Paris, Calmann-Lévy, 1994.

¹⁴ Hobbes, *Leviathan*, Ch. XIV, “A law of nature, *lex naturalis*, is a precept, or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his life, or taketh away the means of preserving the same, and to omit that by which he thinketh it may be best preserved.”

Christian source, even from the New Testament, in his works. Moreover, his conception of natural Law is Platonic more than Aristotelian; so, he was certainly neither a sceptic on moral questions, nor a “legal positivist” – and he doesn’t show any devotion to equality. He celebrates the divine harmony of Justice in the familiar way of Renaissance and he speaks about hierarchy or degree as the Ulysses of *Troilus and Cressida*.

So, even if we can find some elements of a modern theory of State in the first supporters of royal sovereignty, their philosophy is far from Hobbes’s. If Hobbes’s theory of State is formally close to Bodin’s doctrine, his philosophy is also an answer to another tendency in the Philosophy of the Renaissance: the rebirth of scepticism.¹⁵ The question of scepticism is omnipresent during this period, notably in the controversies between Catholics and Protestants, in which, as Richard Popkin showed,¹⁶ scepticism is very often used by Catholics against the “dogmatism” of Protestants and their pretensions to find certainty in the study of the Bible. Later, scepticism was more often directed against religion itself, but it began as an argument in favour of authority - namely the authority of the Church and of its traditions - against individual pretensions of “conscience”. In this configuration, the case of Montaigne is especially interesting: it is impossible to determine his religion with certainty, but his major arguments are evidently directed against Protestants and one knows that, despite his hostility towards the protestant “*nouvelletés*”, he was above all in search of religious peace. Bodin is “absolutist” but not concerned by scepticism. Montaigne is, if not sceptical, at least responsive to sceptical arguments. However, his “philosophy of Law” is much more favourable to pre-absolutist Law than to the views of “Politiques” such as Bodin and Michel de L’Hospital. His view of law culminates in an apology for Custom (*Essays*, 1, 23, “De la coutume et de ne changer aisément une loi reçue”[“Of Custom, and that we should not easily change a Law”]), by contrast to positive legislation. The relation of Montaigne to Hobbes’s Philosophy of Law is quite similar to the relation between his scepticism and

¹⁵ See Richard Tuck, *Hobbes : a very short Introduction*, 2nd ed., Oxford UP, 2002.

¹⁶ Richard Popkin, *The History of Scepticism from Savonarola to Bayle*. Third, enlarged, edition, Oxford University Press, 2003.

Descartes's foundation of science: it does not end with a new certainty but with an ironic acceptance of the legacy of the past.

The thesis of a “positivist” Montaigne has been argued for by many scholars. German historian Hugo Friedrich even compares him with Hobbes.¹⁷ For Friedrich, Montaigne is positivist for two reasons : Montaigne is opposed to the Idea of a “Natural Law” – universal, immutable, rational and certain - and he thinks that the origin of Law is generally obscure, contingent, uncertain and even unjust.¹⁸ In fact, these arguments are not specially “positivist”, but they imply a certain defiance towards reason's relevance in the discovery of justice or in the formation of Law. The idea of the obscure origins of Law is inherent in the logic of the Ancient Law: it emphasizes the fact that law is not the product of human reason or will, but it does not imply any contestation of constituted authorities or powers. On the contrary, it suggests that, if the foundation of power is contingent, power is nevertheless above contestation (“*indisponible*”); for example, supreme power which originates in an usurpation becomes legitimate and can claim the obedience of people if it has been sustained over a *certain time* : “ *Or les loix se maintiennent en credit, non par ce qu'elles sont justes, mais par ce qu'elles sont loix. C'est le fondement mystique de leur autorité : elles n'en ont point d'autre. Qui bien leur sert. Elles sont souvent faictes par des sots. Plus souvent par des gens, qui en haine d'equalité ont faute d'equité : Mais tousjours par des hommes, auteurs vains et irresolus*”.¹⁹ [“Now, the laws keep up their credit, not for being just, but because they are laws; 'tis the mystic foundation of their authority; they have no other, and it well answers their purpose. They are often made by fools, still oftener by men who, out of hatred to equality, fail in equity; but always by men, vain and irresolute authors”].». Montaigne's thesis, which Pascal took up after him, is that of “*arcani imperii*”, which can also be found after him in many criticisms of legal modernity, from James I to Burke. Friedrich notes justly that the argumentation against natural Law comes from ancient scepticism (and even from the Sophists), but we must also notice that the criticism

¹⁷ Hugo Friedrich, *Montaigne* (2nd ed. 1967), French transl., Paris, Gallimard, 1967, p. 203.

¹⁸ *Les Essais*, II, 12 (“apologie de Raymond de Sebonde »).

¹⁹ *Ibid.*, III, 13 (“De l'expérience”).

of the incapacity of the Law to adapt to the infinite diversity of the cases which appear in experience is also a Platonic (and Aristotelian) *topos*, which has a central place in classic doctrines of Law. Maybe Montaigne is opposed to the proto-modern idea of Natural Law that we can find in thinkers like Bodin, but one cannot say that he completely breaks with the classic idea of Law.

As many historians have observed, Natural Law becomes revolutionary in modern times; conversely, the idea of the historicity or of the relativity of Law can be “conservative”. This is obviously the case in Montaigne, whose “conservatism” is a commonplace of criticism. The most famous expression of this conservative inspiration is the chapter I, XXII, “De la coustume, et de ne changer aisement une loy receue”. In this well-known text, Montaigne begins with a long list of strange customs, which shows, in one side, the infinite diversity of laws and mores, but which, in the other side, is also a proof of the strength of the laws and customs, which can shape the character of people, and make the custom a second nature. As one knows, the argument is highly polemical: it is directed against Reformation, which provoked dissensions and civil wars without real motive. But, if Montaigne says that one must not change *easily* the Law, he doesn’t say that one must *never* change the Law. He concludes this chapter with the very audacious idea that, if necessity seems to contradict the letter of the Law, the rulers must interpret the laws suspend their application or even change the signification of words rather than change them. In one way, this procedure respects the general conservative principle according which law must as long as possible remained unchanged; in the other side, the counterpart of the respect of law and custom is the recognition of the eminent importance of the rulers, who can only govern “according to the laws” but also “to the laws” when public necessity demands it : “*C’est de quoy Plutarque loue Philipoemen, qu’étant né pour commander, il scavoit non seulement commander selon les loix, mais aux loix mesmes, quand la nécessité publique le requeroit*” [“and Plutarch commends Philipoemen, that being born to command, he knew how to do it, not only according to the laws but also to overrule even the laws themselves, when the public necessity so required”(I, 22, Pléiade, p. 127).

For us, this apparent compliancy towards the rulers or the princes evokes immediately Machiavelli, and the theories of “raison d’état” which flourished later during 17th century. Indeed, Montaigne knows Machiavelli and, as Friedrich showed it, he is closer to him than most commentators believe; but the real interest of Montaigne is that he reasons in pre-Machiavellian terms, because his implicit reference is the classical, Aristotelian, doctrine of Prudence.

Of course, Montaigne is not a classical Aristotelian philosopher and even less a Thomist theologian. Whether sincere or opportunist, the fideism of the *Apologie de Raymond de Sebonde* (II, 12) excludes the mediation Thomas sought between Aristotelian reason and Christian faith. If Montaigne has had some (aristocratic) republican ideal during his youth, in the times of his friendship with La Boétie, his political action during his maturity never went beyond the limits of common loyalty to the King. Moreover, Montaigne doesn’t show any belief in Aristotle’s physics, nor any interest for his metaphysics. But we can find many indices that he was aware of Aristotelian conception in Ethics and, as Francis Goyet recently showed it,²⁰ many passages of the *Essays* can be understood in an Aristotelian way. The criticism of pretensions of reason, and the apology of “experience” is neither anticipation of modern science, neither simple apology of common sense: it takes place in a subtle construction, in which prudence (*phronesis*) is more than *cunning* (*metis*),²¹ because it implies high-level skills, results of a long practice of judging practical questions – and notably public affairs. In an epoch of exhaustion of the power of monarchs by political urgency and religious wars, which pushes to emphasizes the prudence of Prince (and to reinterpret his virtue as a Machiavellian “*virtu*”), Montaigne remains faithful to his condition of magistrate and of judge: he chooses the “*orgueil du juge*” (judge’s pride) and not the “*orgueil du Prince*” (Prince’s pride).

This choice can be understood in several complementary ways. It shows the refusal by Montaigne of the proto-absolutist conceptions of Bodin and L’Hospital, to the benefit of “Parlements” and, probably, it implies or explains a

²⁰ Francis Goyet, *Les Audaces de la prudence. Littérature et politique aux XVI^e et XVII^e siècles*, Paris, Editions Classiques Garnier, 2009.

²¹ See Francis Goyet, op. cit., p. 319-328.

certain proximity with moderate “*ligueurs*” rather than with “*politiques*”. It authorizes some “Machiavellianism” of the Prince, because “*le bien public implique qu’on trahisse et qu’on mente*” an even “*qu’on “assassine*” (“public good necessitates treason, lie and even murder”) but it confines it within strict limits; the authority of the King is not alone the source of the Laws: he is not “*souverain*” in the bodinian sense (III, 1, “De l’utile et de l’honneste”). This position is also the result of a subtle reinterpretation of the Platonic and Aristotelian criticism of the imperfection of the Law.

In his dialogue *The Statesman (Politikos)*, Plato shows that the Law is by definition unable to adapt to the infinite diversity of circumstances and of cases and he concludes from this point that, in a perfect city, power should be attributed to a “royal man” who is wise and virtuous enough to answer every questions : the true “*Politikos*” is legislator, but he can at every moment change the laws or even depart from them, because of his science which can include concrete an singular things. But for Plato, the existence of the real Statesman is highly improbable, and in most cases, the best choice – the second best ! – is a strict Rule of Law, in which everybody (included the rulers) obey the Laws, and in which the judges cannot deviate from the legal norm. In *Nicomachean Ethics*, Aristotle gives a different answer to the question of the imperfection of the Laws : *equity* is “justice better than justice”, and the equitable man (who resembles a judge more than a Prince) must make up for the lacks of Law.²² Montaigne has his own vision of the problem, but he is obviously closer to Aristotle than to Plato:

Pourtant, l'opinion de celui-là ne me plaist guere, qui pensoit par la multitude des loix, brider l'autorité des juges, en leur taillant leurs morceaux. Il ne sentoit point, qu'il y a autant de liberté et d'estenduë à l'interpretation des loix, qu'à leur façon. Et ceux-là se moquent, qui pensent appetisser nos debats, et les arrester, en nous r'appellant à l'expresse parole de la Bible. D'autant que nostre esprit ne trouve pas le champ moins spatieux, à contreroller le sens d'autrui, qu'à représenter le sien : Et comme s'il y avoit moins d'animosité et d'aspreté à gloser qu'à inventer. Nous voyons, combien il se trompoit. Car nous avons en France, plus de loix que tout le reste du monde ensemble ; et plus qu'il

²² See Philippe Raynaud, *Le juge et le philosophe*, Paris, Armand Colin, 2008, pp. 89-102.

n'en faudroit à reigler tous les mondes d'Epicurus : *Ut olim flagitiis, sic nunc legibus laboramus* : et si avons tant laissé à opiner et decider à nos juges, qu'il ne fut jamais liberté si puissante et si licencieuse. Qu'ont gagné nos législateurs à choisir cent mille especes et faicts particuliers, et y attacher cent mille loix ? Ce nombre n'a aucune proportion, avec l'infinie diversité des actions humaines. La multiplication de nos inventions, n'arrivera pas à la variation des exemples. Adjustez y en cent fois autant : il n'advient pas pourtant, que des evenemens à venir, il s'en trouve aucun, qui en tout ce grand nombre de milliers d'evenemens choisis et enregistrez, en rencontre un, auquel il se puisse joindre et apparier, si exactement, qu'il n'y reste quelque circonstance et diversité, qui requiere diverse consideration de jugement. Il y a peu de relation de nos actions, qui sont en perpetuelle mutation, avec les loix fixes et immobiles. Les plus desirables, ce sont les plus rares, plus simples, et generales : Et encore crois-je, qu'il vaudroit mieux n'en avoir point du tout, que de les avoir en tel nombre que nous avons (III, 13, p. 1111-1112).²³

Montaigne's model is a moderate monarchy, where the King is legislator, but within a traditional constitution in which the legislation is limited to the making of general rules that the judges can widely interpret. It is compatible with a modern idea of distribution of powers but, in fact, it is basically Aristotelian: the law is made by the supreme power (*kuriotatos*), that is, in the case of France, the

²³“And yet I am not much pleased with his opinion, who thought by the multitude of laws to curb the authority of judges in cutting out for them their several parcels; he was not aware that there is as much liberty and latitude in the interpretation of laws as in their form; and they but fool themselves, who think to lessen and stop our disputes by recalling us to the express words of the Bible: forasmuch as our mind does not find the field less spacious wherein to controvert the sense of another than to deliver his own; and as if there were less animosity and tartness in commentary than in invention. We see how much he was mistaken, for we have more laws in France than all the rest of the world put together, and more than would be necessary for the government of all the worlds of Epicurus: *“Ut olim flagitiis, sic nunc legibus, laboramus* [“As we were formerly by crimes, we are now overburdened by laws”, Tacitus, *Annal*, iii, 25]”. We have left so much to the opinions and decisions of our judges that there never was so full a liberty or so full a license. What have our legislators gained by culling out a hundred thousand particular cases, and by applying to these a hundred thousand laws? This number holds no manner of proportion with the infinite diversity of human actions; the multiplication of our inventions will never arrive at the variety of examples; add to these a hundred times as many more, it will still not happen that, of events to come, there shall one be found that, in this vast number of millions of events so chosen and recorded, shall so tally with any other one, and be so exactly coupled and matched with it that there will not remain some circumstance and diversity which will require a diverse judgment. There is little relation betwixt our actions, which are in perpetual mutation, and fixed and immutable laws; the most to be desired are those that are the most rare, the most simple and general; and I am even of opinion that we had better have none at all than to have them in so prodigious a number as we have”.

King, and the judge makes up for the lacks and the imperfections of the law, but the functions of these authorities are determined by a constitution which is not the product of deliberate will but which is in relation with the nature of the political community. As Aristotle suggests it, and as Montesquieu will again say it, Monarchy gives a greater importance to judges and magistrates than Republics – and overall than democratic Republics; but this central place of judge supposes that they have the intellectual virtue of prudence, which is the product of a long education and training and is not susceptible of an equalitarian distribution. From a general or metaphysical point of view, the acknowledgement of the diversity of opinions brings to a certain equalitarianism: “*On dit communément que le plus juste partage que nature nous aye fait de graces, c'est celui du sens: car il n'est aucun qui ne se contente de ce qu'elle luy en a distribué, n'est-ce pas raison ? qui verroit au delà, il verroit au delà de sa veüe* [It is commonly said that the fairest share of her favors that our nature has given us is that of sense: for there is no one who is not pleased with what she has distributed to him of it]» (II, 17). But this equalitarianism is not relevant in social sphere : from a modern democratic point of view, Montaigne is desperately elitist and even a snob,²⁴ and his political vision is clearly aristocratic, especially devoted to an aristocracy whose political authority derives from justice powers (Courts) more than war and whose independence from the prince's “court” is the source of special pride. So, Montaigne accepts the idea that Law is an “absolute imperative”,²⁵ to which we must obey because it is legal and not because we think it is just : “*On corrompt l'office du commander, quand on y obéit par discretion, non par subjection*”.²⁶ [To obey more upon the account of understanding than of subjection, is to corrupt the office of command]. But this obedience concerns all legitimate authorities, and, so great is the authority of the King, he is not really “sovereign”.

²⁴ James Supple, *Arms versus Letters. The Military and Literary Ideals in the Essais of Montaigne*, Oxford, Clarendon, Press, 1984. For a discussion of Montaigne's “snobbism”, see Francis Goyet, *op. cit.*, p. 279-292.

²⁵ Arlette Jouanna, *op. cit.*, p. 251.

²⁶ *Essays*, I, ch. XVII.

So, we find in early modern France proto-modern theories of State and of absolute monarchy which are founded on a doctrine of Natural Law, and at the same time “sceptical” criticism of justice and Law which brings to the legitimatization of a moderate government and of a hierarchical society. In Montaigne, the consequences of scepticism are narrowly limited by a classical vision of practical reason and of legal order. If metaphysics is dubious and religion beyond reason, there is a sort of rationality in public sphere, which depends on « Prudence » more than on reason; so, the indefinite diversity of opinions does not necessarily bring to war, if some hierarchy exists, which makes possible the rule of relatively enlightened, “prudent” and skilled elites. In this context, the relevant model of State is neither the Machiavellian “*stato*” nor the Bodinian “republic”: it is a moderate monarchy, in which the latent power of custom underlies royal law-making and the latter is completed by the interpretation of judges. The real positivist revolution happens with Hobbes, whose theory of State and Sovereignty pushes asides all matters of prudence and affirms radically the fundamental equality of men; this, in turn, deconstructs the figure of Judge. The Hobbesian revolution starts from a rhetorical emphasis on the uncertainty of morals, religious and judicial “truths” but, for him, the solution of the political problem requires a new foundation of science which itself is anything but sceptical. Hume’s later invention of a new sceptical philosophy produced a subtle and deep criticism of Hobbes’s construction.

II/ *Hobbes and the Sovereign State.*

The importance of scepticism's legacy in Hobbes' intellectual formation is a commonplace, brilliantly developed by Richard Popkin and, more recently, by Richard Tuck. Of course it does not imply that Hobbes was, ultimately, a philosophical sceptic. Nonetheless, we can remark that, starting with similar arguments than Descartes,²⁷ Hobbes arrives to a very different conception of science. Descartes' science is natural science, mathematical more than experimental, it has an *a priori* certainty and it gives the true knowledge of what Nature *is*;²⁸ inversely the politics of Descartes remains prudent in both classical and modern sense of the word. Hobbes' science does not give us *a priori* knowledge of Nature but it is capable of certainty whereas we are confronted by creations of our mind, that is, Hobbes says, in Mathematics and in practical – moral and political questions : we create moral concepts and political institutions and we can understand them by a genetic knowledge, analogous to Geometry.²⁹ So, Political Science is superior to natural science, since we do not “make” nature as we “make” political institutions and legal norms.

In this original conception of science, which is neither Cartesian nor Baconian, a rational science is possible, and it can use introspection, because all men are moved by the same passions. But this political science has nothing to do with opinions or notions of common political life, because this one is the place of indefinite conflicts, which are in fact aggravated by the approximate equivalence of intelligences. By this, Hobbes breaks with two basic aspects of Aristotelian politics. On one side, Hobbes's man is not a “political animal” : the entire theory of the state of nature argues against this idea. On the other side, there is an unavoidable empty space between true science and simple opinion, and the very idea of “prudence” is totally ruined: “For prudence is but experience; which

²⁷ Descartes and Hobbes both starts with the Montaigne's idea that general satisfaction about distribution of judgement or common sense is the proof or at least a presumption of a fair distribution of this capacity.

²⁸ The limitation or the finitude of our understanding comes from the creation of eternal truths by God, which manifests the radical difference between His understanding and ours.

²⁹ The classical analysis of this point is Cassirer's in *Das Erkenntnisproblem*, vol. II.

equal time, equally bestows on all men, in those things they equally apply themselves unto”.³⁰

Hobbes’ vision of man promotes the idea of political science at the same time that it denies the denial of political competence of any pre-existing authority: theoretical dogmatism is inseparable from practical scepticism. Leo Strauss once noticed that Hobbes, well-known as an advocate of absolutist monarchy, can also be considered as one of the true founders of modern liberalism, because he is the first philosopher to affirm absolute priority of (subjective) *Right* in law and politics. This modernity of Hobbes comes from a radically *egalitarian* and *individualist* point of view, which contrasts evidently with main themes of classical political philosophy, Aristotelian as well as Platonist. This egalitarianism is itself inseparable from the moral scepticism of Hobbes and of his refusal of any claim to found politics on natural superiority and/or a capacity for a better knowledge of truth. In *Leviathan*, Hobbes gives two major arguments in favour of natural equality, which itself remains the foundation of political contract, even after the creation of the State. The first argument denies that inequality of strength could generate a right to domination: “the difference between man, and man, is not so considerable, as that one man can thereupon claim to any benefit, to which another may not pretend, as well as he. For as the strength of body, the weakest has strength enough to kill the strongest, either by secret machination, either by confederacy with others, that are in the same danger with himself.”³¹ The second one, that we have already met, subverts the idea that the political power should be given to the wisest or to the most “prudent” people : “And as the faculties of the mind (...), I find yet a greater equality among men, that of strength. For prudence is but experience; which equal time, equally bestows on all men, in those things they equally apply themselves unto”. In fact, the pretensions of the so-called wise men to a political privilege are themselves a product of equality, which pushes every man to believe in his own superiority in prudence or judgement : “For such is the nature of men, that howsoever they may acknowledge many others to be more witty, or more

³⁰ *Leviathan*, Ch. XIII.

³¹ *Léviathan*, chap. 13, Oxford, Oxford U.P., coll. *World Classics*, 1996, p. 82.

eloquent, or more learned; yet they will hardly believe there be many so wise as themselves; for they see their own wit at hand, and other men's at a distance. But this proveth rather that men are in that point equal, than unequal. For there is not ordinarily a greater sign of equal distribution of anything, than that every man is contented with his share".³²

The political consequences of hobbesian egalitarianism are well known and, for sure, they are not very sympathetic to our democratic and liberal minds: the result of equality of individuals is not friendship but universal conflict between them, from which the sole escape is creation of an absolutist State that provides everybody security in return for the renunciation of natural freedom. But there is something in this argumentation which makes evident sense for us, modern democrats: it is directed against the claims and pretensions of aristocratic elites and religious authority, of which the affirmation "*auctoritas non veritas facit legem*"³³ is for Hobbes a clear denial. Hobbes's argument depends on *reductio ad absurdum* that can be summed up in the following way: if one supposes that the ultimate source of Law is some true doctrine, which tells what is permitted and what is forbidden, the consequence is not that "Truth" makes "Law" but that power is in the hands of the (legally) *authentic interpreter of the doctrine*: in fact, *the interpretation expresses the interpreter's will* as much and even more than the *doctrine's truth*. In the context of *Leviathan*, dissent about the interpretation of Holy Scripture is especially relevant. If, for example, the Decalogue is the foundation of Law, difficulties begin as soon as the first commandment. How is the idea of a single God to be interpreted? Jews and Christians disagree on this and so do different Christian churches. In fact, Hobbes' argument is not absolutely new, but he gives a new interpretation of it. In most cases, the argument seeks to reinforce the authority of the interpret (for example a judge) and to minimize that of the apparent Law-giver. It is probably the case in the sentence of Bishop Hoadly which Gray, Hart and Troper like to quote: "Whoever hath an *absolute authority to interpret any*

³² *Id., Ibid.*

³³ This well-known sentence of *Leviathan*, ch. XXVI, only appears in the *Latin* version (french translation, Paris, Vrin, 2004, p. 210, which is here more concise - and more striking - than the English one (*op. cit.*, p. 183).

written spoken laws, it is *he* who is truly the *Law-giver* to all intents and purposes, and no the person who first wrote or spoke them”.³⁴ In Hobbes, the first aim is to reaffirm the authority of the sovereign or Law-giver, the *maker* of the Law to the detriment of the interpreters. These ones can present their claims in two ways: some authorities as the Pope and the Roman Church can demand a “spiritual” power above “temporal” power,³⁵ other more simply say that, as interpreters, they give the real sense of the Law, as Common Lawyers do. Hobbes’s formula indicates at the same time the superiority of civil sovereign on spiritual power and the fact that, as author of the Law, he is superior to any interpreter; Hobbes does not only emphasize the importance of interpretation. As my friend Michel Troper would say, he thinks that interpretation is a matter of will and not of truth. Consequently, he diminishes the relevance of Truth in favour of will and potentially reduces legitimate authority to legal power.

This doctrine implies a new definition of “Law” – as *lex* as well as *jus*, which supposes a triple break with (1) the classical idea of relation between Law and morals, (2) the Aristotelian idea of *dikaion* and, last but not least, (3) the English tradition of Common Law.

1/ As many historians of legal and political philosophy remarked it, there is something common between all the classical conceptions of “law” (*nomos, lex*), which one can find in Aristotle, Plato and Cicero but also in medieval times (Christian and Islamic) : this is the idea that the first function of the Law is to help men to become both virtuous and happy – happy *because* virtuous. Aristotle, who gives a synthesis of traditional Greek views and of Platonic reflection, distinguishes three types of legality: the Law is *coercive* and *repressive* for the ignorant, *educative* for those who can become virtuous, but for the best –

³⁴ Quoted in H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, Oxford, Clarendon Press, 1983, p. 129.

³⁵ In fact, this conflict between spiritual power (Pope) and temporal power (Emperor) is the real origin of the modern notion of sovereignty, which was *de facto* invented by Pope Gregory. For him, the Pope has the power to draw the limits between spiritual and temporal; in modern words he has the “competence on the competence”, which is the first condition of sovereignty. Defenders of Emperor (or of King) have the same basic argument that they turn to the benefice of “temporal” sovereign.

the wise – virtuous life is in some way above the Law.³⁶ Revealed religions takes up this doctrine, with a least esteem for reason and for “philosophers” and, in fact, this view underlies the so-called “traditional” conception of the relation of Law and Morals. In the Hart-Devlin controversy on homosexuality, for example, Lord Devlin clearly belongs to this tradition. If “legal positivism” is based on the separation of Law and Morals, then Hobbes’ philosophy is the first to give a clear formulation of this distinction. In Hobbes, Law is, as it was in tradition, a commandment of a supreme power which indicates the boundary between licit and illicit. However, this boundary no longer aims to make people virtuous and happy; it simply makes coexistence possible among individuals whose “rights” were absolute and in conflict in the state of nature. Of course, the citizen considers the command and his own obedience to be products of morality: for him, some actions and conducts are prohibited because they are bad or even “evil”. In fact, it is the Law rather pre-existing morality that makes actions bad or evil by prohibiting them : the function of Law is to produce peace more than virtue. We can see the polemical shift of this doctrine in Hobbes’s *Historical Narration Concerning Heresy and the Punishment thereof*, which turns the question of his own eventual “heresies” in a purely legal problem; they do not concern theology but the positive definition of what the King considers as “heresy”. *Auctoritas non veritas facit legem* : the problem is not to know if a doctrine is true or false but if it is formally legal and or illegal. In an Hegelian language, one could say that the truth of Hobbes’s doctrine of Law is the secular modern State, which begins with the emphatic affirmation of the theological competence of the sovereign.

2/ In fact, it is not precise to say that classical thought does not know distinction between Law and morals, but what we find within this tradition concerns in fact “law” as “*dikaion*” (as “just”) more than as legislation. In both Plato and Aristotle, the first function of the legislation is to educate citizens, but it is not the only function of Law. In *Nicomachean Ethics*, V, the discussion of Justice distinguishes distributive and corrective justice, which implies a more

³⁶ See Solange Vernières, *Ethique et politique chez Aristote. Phusis, ethos, nomos*, Paris, PUF, 1995.

subtle view of the relations between *nomos* and *dikaion*. Distributive justice concerns the repartition of goods and honours among citizens. It depends of the nature of the city's designation of some actions or habits as more honourable than others and it requires "geometric" equality. By contrast, corrective justice, which is the specific competence of judge and of *dikaion* can sometimes be indifferent to the morality of the litigants: "For it makes no difference whether a good man has defrauded a bad man or a bad one a good one, nor whether it is a good or a bad man that has committed adultery; "merely asking whether one has done and the other suffered injustice, whether one inflicted and the other has sustained damage".³⁷ Where the duty of the law-giver is to give a command which works top down, the function of the judge is to *find* the "right" in an "horizontal" or even bottom-up process. As Michel Villey showed it, the core of the Aristotelian vision of Law is the idea of its *jurisdictional* nature, which is inseparable from the experience of trial : the "right" and/or the Law is said after a litigation, which only can be solved with the intervention of a an impartial third party, independent from the litigants and not involved in the case. So, the Law (as "*jus*") has two distinct functions: besides the ethical-political function of education to just actions, it must also "give to each his own", which sometimes requires to leave asides the virtues of the litigants. This vision implies a distinction between law and morals, but it is not the same as in modern Law, which is founded by Hobbes and is underlying in all modern conceptions, including Kant's Philosophy of Law, because it was the solution of the theologico-political problem of which modern State. However, something of the Aristotelian theory survives in Hobbes's construction. In Aristotle, Man is a political animal, and the "just" or the "right" (*dikaion*) is found on the occasion of a litigation, and this one is resolved by an impartial third party, which is closer to a judge than to a law-giver. In Hobbes, men are not naturally inclined to live in political communities, but what makes political life possible is the institution of Law. But the advent of Law is only possible if men decide to put an end to their litigations and conflicts thanks to an impartial third party – who just happens to be a

³⁷ *Nicomachean Ethics*, V, 7, 1132a 2-7.

sovereign and not only a *judge* or a even a legislative power. Here lies the Hobbesian revolution: the political philosophy is reduced to philosophy of Law, but the Law is understood from the point of view of the *Sovereign* which *makes* it and not of the *Judge* which *discovers* it.

3/ The most significant effect of the Hobbesian revolution is a complete subversion of the traditional architecture of English Law, and notably of the Common Law as it was interpreted by classical theorists like Coke.³⁸ The Common Law tradition is the fruit of a peculiar evolution of English Law. In England as in other countries of Europe like France, the development of the modern State made possible a rationalization of political power. This was done through institutionalization of royal power, which ceases to be simple domination, and it made possible a greater predictability of law through the imposition of a uniform « common » law in the Kingdom. In England, the Courts – specially the Royal Court - had a great importance in the process, because they gave the royal Power the centralized system that it needed to govern, without making him the first source of Law. The importance of « Common Law » has something to do with a distinctive feature of English legal language, in which the distinction between *Law* and *Right* is not exactly the same as in Greek, Latin and most European modern Languages: Law designates as well the legal order as a whole (“le droit”, “Recht” and so on) as the legislation, and this has many consequences in the understanding of every sort of Law. This is especially important for Common Law itself. Today, in a basically positivist culture, one says that « Common Law » is simply judge-made Law, by distinction with legislation. In the traditional conception, the *Common Law* was not conceived as “Judge-made Law”; Common Law pre-exists to its formulation and it is simply *discovered* by a judge who, for that reason, is the “mouth of the law”. So there is a real distinction between Common Law and Statute law. The latter is really *made* by a political authority and based on its own views about justice. Coke, who of course was one of the principal adversaries of Hobbes, provided the classical

³⁸ I take here an analysis that I already presented in “*Law et Right*”, in Barbara Cassin (ed.), *Vocabulaire européen de la philosophie*, Paris, Le Seuil, 2004, reprinted in Philippe Raynaud, *Trois révolutions de la liberté. Angleterre, Amérique, France*, Paris, PUF, coll. “Léviathan”, 2009, pp. 71-90.

formulation of this idea. Coke both minimized and maximized the authority and the science of the judge. On one side, the judge is not legislator and he does not « make » law : *judex est lex loquens*, his function is to say what law is (*jus dicere*). Even if the identity of the Legislator who made it is here problematic,³⁹ the “Common Law” is really a “Law”: it binds the judges but gives a foundation to their authority, which comes from a quasi-transcendent rationality. On the other side, we can know this law and the reason which animates it only over time. The resulting knowledge requires an « artificial reason », founded on prudence and accumulated experience ; law supposes specific specialized skills, which are irreducible to « natural reason » (*nemo nascitur artifex*); judges have achieved this skill by excellence. Hobbes’s reinterpretation reverses completely the doctrine of Coke and other classical Common-Lawyers; In the beginning of the 14th chapter of *Leviathan*, he totally refuses the English amphibology of “Law” by affirming a clear distinction between “Law” (*lex*) and “right” (*jus*): “A law of nature, *lex naturalis*, is a precept, or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his life, or taketh away the means of preserving the same, and to omit that by which he thinketh it may be best preserved. For though they that speak of this subject use to confound *jus* and *lex*, right and law, yet they ought to be distinguished, because right consisteth in liberty to do, or to forbear; whereas law determineth and bindeth to one of them: so that law and right differ as much as obligation and liberty, which in one and the same matter are inconsistent”. The best text about this subject is the *Dialogue of the Common Law*, which put on stage the opposition between Coke’s tradition and the new rationalist and “legicentrist” philosophy through a dialogue between a “lawyer” and a “philosopher”. Hobbes clearly imputes to Coke the confusion between *law* and *right* and he proposes a powerful criticism of the tradition of Common-lawyers, by showing that the modern idea of Sovereignty is the only one which can give coherence to English Law. The first target of the *Dialogue...* is naturally the authority of the judges of Common Law that the predominant tradition considered as founded on «artificial reason» produced by legal studies.

³⁹ But maybe the idea that a “Law” requires above all a legislator is a modern prejudice initiated by Bodin and Hobbes.

Hobbes attack is founded at the same time on « natural reason » and on the authority of the legislator. On the one hand, there is no other reason than natural reason, and there is no special dignity of the legal art; on the other hand, the wisdom of judges cannot give by itself legal force to their decisions, because « that is not wisdom, but authority which makes the law ». So, the authority of judges looks like that of Pope, of fanatics or of platonic philosophers : it is an usurpation of sovereign prerogative in the name of truth. Inversely, the sovereign is the real supreme judge, and his decisions are founded on natural reason and not on an alleged “artificial reason”. Still, if Hobbes argues in favor of legislative and royal supremacy, he does not deny the normative power of judges so long as they remain subordinate to the supreme power: Common Law can exist and even develop because it is authorized by the Crown. Contrary to Coke’s magistrates, Hobbes’s judge can explicitly “make” law but his power is in fact more limited.

The Hobbesian revolution is radical and its effects are decisive on the two main currents of modern politics – liberalism and absolutism - which can both claim Hobbes’s legacy. In philosophy of Law, it proposes a new relation of ethics and Law, founded in the distinction of external constraint and internal morality, which can be assumed by Kantians as well as by utilitarians; in the English legal thought, it opens the way to the great tradition which culminates with Austin and, above all, Bentham. Of course, Bentham is no more a defender of absolute monarchy, but he is the real successor of the author of Leviathan. The utilitarian anthropology takes over the basic thesis of Hobbes through the mediation of Helvetius and Holbach: Man is a being defined by need and desire, whose first aim is to minimize pain and to maximize pleasure. Above all, Bentham’s vision of the English Law is the same as Hobbes’s. For Bentham as for Hobbes, the aim is to rationalize the English law thanks to a reduction of the influence of judges to the benefit of the political authorities, and the project implies the affirmation of “natural reason” against judicial culture. There are naturally differences between Hobbes and Bentham: the first is a rebel heir of the classical tradition, who wants to give a new foundation to the science of man but who thinks as a classic philosopher, the second is above all an activist, who is convinced that he has found a definitive principle to decide every ethical or political question. In

Hobbes, the criticism or tradition and of new claims of religious reformers or of republican politicians implies the foundation of a new political regime, but it does not require a militant transformation, of society, since the conditions of peace are established. In Bentham, the Hobbesian scepticism towards traditions becomes a tool of social reform which announces many contemporary causes (from gay rights to animal rights). This enlargement of the goals of politics is visible with the passage from the security to the “Greatest Happiness of the Great Number”: Hobbes’s Leviathan provides only the first condition of Bentham’s program. Beneath this activism is an absolute faith in the rationality of the utilitarian creed: scepticism is reversed in a new dogmatism. The opposite tradition in English-speaking world, which covers a very large scope, politically and historically, starts with the reaffirmation of some common law doctrines against Hobbesian constructivism and legicentrism. The influence of this tradition is evident in great conservative thinkers like Burke, but it is not less important for liberal progressive thinkers like Dworkin, whose radical refusal of any kind of moral, legal or even aesthetic scepticism or relativism goes with a strictly “Cokean” interpretation of the law. Before focusing on contemporary issues, I would like to discuss the legal and political philosophy of the greatest modern sceptic, who is currently considered as one of the most important forerunners of “Utilitarianism”, but whose philosophy is quite the opposite of Bentham’s jurisprudence.

III/ Hume's theory of Justice.

The conventional vision of the place of Hume in the History of Philosophy of Law is essentially founded on **one** text, a well-known passage of the *Treatise of Human Nature* (THN) :

In every system of morality, which I have hitherto met with, I have always remarked, that the author proceeds for some time in the ordinary ways of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when all of a sudden I am surprised to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with an *ought*, or an *ought not*. This change is imperceptible; but is however, of the last consequence. For as this *ought*, or *ought not*, expresses some new relation or affirmation, 'tis necessary that it should be observed and explained; and at the same time that a reason should be given; for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it. But as authors do not commonly use this precaution, I shall presume to recommend it to the readers; and am persuaded, that this small attention would subvert all the vulgar systems of morality, and let us see, that the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceived by reason (*Treatise of Human Nature*, Book III, Part I, section I).

In this text, Hume is supposed to have discovered a “Law “ (the “Hume’s Law”), which is generally understood as the affirmation of absolute hiatus between “is” and “ought” and is often seen as an anticipation of Kelsen’s dichotomy between “*Sein*” und *Sollen*”. If we consider that Hume is also considered as the greatest of modern “sceptics” and as one of the first modern “relativist”, it is tempting to think that, in a different context, we should find in his work something very similar to the combination of epistemic scepticism, logical positivism and relativist politics which is characteristic of the Viennese philosopher. Of course, it is difficult to present Hume as a fervent democrat, and most commentators would agree on the fact the political orientation of the “scepticism” is not really the same in the two authors. But the fact remains that Hume and Kelsen seem to have the same adversaries as well as the same admirers – and that the discussion of contemporary legal positivism begins very often by an examination of the so-

called Hume's Law. What I will try to show here is that, whatever the similarities between the arguments of the two authors, not only their politics, but also their conception of Law, their ethics and their political philosophy are entirely different : Kelsen is not a humean philosopher – and Hume is not a “legal positivist”.

Let us begin with the reasons for which the comparison is possible, that is that allow us to attribute to Hume himself has some responsibility in the emergence the “Hume's Law”. The main object of the chapter of Hume's *Treatise* (*THN*, III, I, 1) is not to show that there is never relation between “is” and “ought” but to prove that “Moral distinctions [are] not derived from reason”. The foundation of the argument is in Book II, where we can read another well-known sentence: “reason is and ought only the slave of the passions”. This thesis presents two sides, which both indicate the total irrelevance of reason for the values or for the interests of life. On one side, even if our moral evaluations can sometimes thwart some of our passions, these evaluations are not themselves coming from reason, which is not their source; in fact we cannot base morals on the idea of duty or obligation because all evaluations have their roots in some passion. On the other side, reason can only judge by demonstration, when it starts from abstract relations between ideas, or by probability, when it leans on relations between objects that we know by experience but in both cases it can produce neither an action nor a volition. So reason does not determine action, no more than it inspires it and there is nothing like “practical reason”. Reason can only help us to fulfill our desires or to accomplish our will. So, we can say that, as “slave of the passion”, reason is what philosophers of the School of Frankfurt call “instrumental reason”. In so far as this negation of practical reason is characteristic of “scepticism” and of “legal positivism”, the commonplace which binds “Hume's law” to this type of philosophy of law or jurisprudence makes really sense. But the negation of “is/ought” connection and the reduction of reason to the slave of passions are not the last word of Hume's moral philosophy, which includes thesis which are very different from the common version of positivism.

When Hume says that deduction of the “ought” from “is” is often unfounded, and that reason cannot elucidate the relation between vice and virtue, he does not say that the “ought” is entirely arbitrary or that it has no natural basis. After all, the *magnum opus* of (young) Hume is a treatise on *human nature*, and human nature *is* to a certain extent “nature”. The counterpart of the negation of the power of reason in moral questions is the thesis that, if moral distinctions do not derive from reason, they derive from a “moral sense”. In a similar way, the fact that the nature of things is not in itself the basis of morality does not mean that there is no “natural” basis at all for moral evaluation but that this basis is internal and not founded on relations between things : there is something like a “relativism” of Hume, but it is founded on a naturalist psychology.

Hume gives a very original interpretation of the doctrine of moral sense, which implies a complete reconstruction of moral philosophy.⁴⁰ Hume’s moral philosophy belongs to a tradition, that of Scottish Moralists, which is very different from the English (and French) Utilitarianism. The core of this tradition is a couple of notions - moral sense and sympathy – which make possible a third way between, on one side, the doctrines of interest and egoism and on the other, the moral rationalism of Platonic tradition. The essential of the doctrine is already present in Francis Hutcheson’s work, who defines moral sense as the faculty to receive perceptions which make us able to condemn or to approve some facts independently from the advantage we can find in them. This definition implies a radical criticism of all the reduction of moral motivations to “amour-propre”, which is common to Hobbes, to French moralists like La Rochefoucauld and to jansenist theologians like Pierre Nicole; in the philosophy of moral sense, “sympathy” is the natural counterpart of interest, which enables human being to go beyond egoism. On the other side, the idea of “moral sense” insists on the fact that morality does not derive from reason, but from an intermediate faculty, by which the sensible works to surpass itself.

⁴⁰ On all these questions, see Philippe Raynaud, *La politesse des Lumières. Les lois, les mœurs, les manières*, Paris, Gallimard, coll. « L’esprit de la cité », October 2013, ch. IV, pp. 89-120.

In one way, Hume proposes a radicalization of the classical theory of moral sense: he accentuates the hiatus between interest and sympathy, and at the same time, he aggravates the criticism of the pretensions of reason. But this reformulation is also a subversion, or a “deconstruction” of what remains from classic and Christian tradition in the first theories of moral sense. In Shaftesbury, by example, we find a philosophy which is very far from orthodox Christianity – because it refuses the dogma of original sin - but which takes over the notion of Providence and proposes a new theodicy in which the human sociability acquires progressively a cosmopolitan signification. Sympathy and moral sense are the instruments of Providence in a meaningful world in which there is no rupture between well-understood self-interest, love of neighbour, patriotism and devotion to the entire mankind. Hume modifies this vision both in his vision of nature and in his moral philosophy: he refuses natural theology and in does not think that sympathy can lead to cosmopolitanism.

The refusal of natural theology is in fact the true meaning of the so-called “Hume’s Law”: even if scepticism prohibits an explicit negation of Providence or of God, all the Hume’s doctrine is such that one can do without Providence, in an Universe where even the idea of causality itself has become uncertain.

The second point is generally underestimated by commentators, but has been admirably analysed by Gilles Deleuze.⁴¹ Hume expressly refuses the idea that man would be essentially egoist, as Hobbes or La Rochefoucauld believe it. For him, what is characteristic is partiality or limited generosity rather than self-love or egoism; it explains why men are capable to sacrifice their interest or their welfare to their family or to people with whom they have real and strong links, but it does not imply that such an attitude could be universalized.

On the one hand, this doctrine is obviously faithful to the theories of moral sympathy. Its core consists in a criticism of the model of natural egoism, which underlies both the Christian or Christian-like theories (Nicole, La Rochefoucauld) and the secular, materialist theories of political obligation (Hobbes).⁴² It is

⁴¹ Gilles Deleuze, *Empirisme et subjectivité*, Paris, PUF.

⁴² See for example Nicole, « De la charité et de l’amour-propre », in *Essais de Morale*, edited by Laurent Thirouin, Paris, PUF, coll. « Philosophie morale », 1999, p. 381 : « Quoiqu’il n’y ait rien

opposed to the genealogic and reductionist logic of these doctrines: generosity cannot be reduced to selfishness without *petitio principii*. Moreover, Hume refuses the legalist and repressive concept of law which goes with reductionist anthropology; for Hume, contrarily to Hobbes, political order (“Justice”) does not come from the repression of natural disorder: it is an *artificial extension of natural passions* – selfishness, sympathy etc. So, true statesman is not the legislative power but the “legislator” in a more classic sense. His task is less to give laws in order to constraint free individuals to coexist than to create *institutions* which make possible the extension of the cooperation beyond the original limits of sympathy and which facilitate the creation of larger communities. However, if constraint is not its first object, political power remains necessary because of the partiality of human nature, which is the counterpart of its generosity. So, all institutions are essentially precarious; human interrelations can indefinitely be multiplied and enlarged, which explains how patriotism is possible in big countries, but partiality of sympathy is as such insurmountable: “But though this generosity must be acknowledged to the honor of human nature, we may at the same time remark, that so noble an affection, instead of fitting men for large societies, is almost as contrary to them, as the most narrow selfishness. For while each person loves himself better than any other single person, and in his love to others bears the greatest affection to his relations and acquaintance, this must necessarily produce an opposition of passions, and a consequent opposition of actions; which cannot but be dangerous to the new-established union”.

This thesis, combined with the idea the scarcity of goods, includes in fact a complete theory of justice. Justice is not a natural virtue, in the sense that sympathy implies partiality, and that moral common sense does not object to that,⁴³ but as Man is an “inventive species”, he is necessarily induced to invent

de si opposé à la charité qui rapporte tout à Dieu, que l’amour-propre qui rapporte tout à soi, il n’y a rien néanmoins de si semblable aux effets de la charité que ceux de l’amour-propre. Car il marche tellement par les mêmes voies, qu’on ne saurait presque mieux marquer celles où la charité nous doit porter, qu’en découvrant celles que prend un amour-propre éclairé, qui sait, connaître ses vrais intérêts, et qui tend par raison à la fin qu’il se propose.»

⁴³ “A man naturally loves his children better than his nephews, his nephews better than his cousins, his cousins better than strangers, where everything else is equal”.

rules of justice which, though arbitrary, are not artificial. Justice would be useless if riches was indefinitely abundant or if human generosity had no limits; it would be impossible if men, pursuing their interest “without precaution”, were always violent. Justice is based on inventive capacity of men who, thanks to reason, custom and imagination, establish conventions for cooperation and social stability, but it is not in itself founded on universal benevolence, nor on universality of the Laws of reason: justice comes only from selfishness and limited generosity playing their role under the condition of scarcity.

In a certain way, this doctrine can be seen as more optimistic than that of Hobbes and even than that of the so-called “republicans” theories inspired by Machiavelli or Harrington. *Contra* Hobbes, we can see that coexistence of egoist interests is not the only object of politics and, if we consider the inventive capacity of men, we can even imagine a progressive enlargement of freedom which could make possible great republics in large states which Machiavellian tradition thought impossible. But this optimism has a logical or natural limit: whatever our hopes are, we cannot think of a universal republic or a world-wide State. So, Hume accepts all the « Scottish » objections against Hobbes and other reductionists but he does not think of a natural development from selfishness to cosmopolitanism through sympathy. But he rejects also the basis of what will later be the Kantian solution of this question, which entrusts to the natural design or to the providence the task of the realization of a universal community of nations⁴⁴.

This anthropology implies a philosophy of Law which is not “naturalist” without being purely “positivist”; it is connected, on one side, with a precise interpretation of the contemporary debates on English Politics and of its philosophical implications consequences, and, on the other side, with an interesting reflexion on the nature of philosophical discourse and of its task regarding legal and political problems.

⁴⁴ In an seminal paper, Douglas Adair has shown the importance of Hume’s philosophy in the formation of United States as “great Republic” (Douglas Adair, “That Politics can be reduced to a Science”. David Hume, Madison and the Tenth Federalist », *Hinting Library Quaterly*, 1957, 20, p. 205-229. Maybe this humean orientation could also enlighten the reluctance, in spite of Wilson’s legacy, of the Great Republic towards cosmopolitan trends in contemporary institution and politics.

For Hume, justice is not a “natural virtue”, but it does not mean that the rules of justice are independent from human nature : “To avoid giving offence, I must here observe, that when I deny justice to be a natural virtue, I make use of the word, natural, only as opposed to artificial. In another sense of the word; as no principle of the human mind is more natural than a sense of virtue; so no virtue is more natural than justice. Mankind is an inventive species; and where an invention is obvious and absolutely necessary, it may as properly be said to be natural as anything that proceeds immediately from original principles, without the intervention of thought or reflection. Though the rules of justice be artificial, they are not arbitrary. Nor is the expression improper to call them Laws of Nature; if by natural we understand what is common to any species, or even if we confine it to mean what is inseparable from the species” (*THN*, III, ii, 1)⁴⁵. So, if we accept the idea that the rules of justice are incorporated in the law, it is difficult to pretend that there is no relation between “is” and “ought” or that the order of norms has no relation with that of facts. Inversely, if the rules of justice are an extension of some features of human nature, the law itself is the fruit of invention, and it does not derive directly from a natural foundation.

Human societies go to an indeterminate future but they try to conserve older kind of solidarities. This insight is basis of Hume’s “conservatism” and its character is as far from the conservative ideology of Tories as it is from Whig the liberal orthodoxy. Hume accepts the results of liberal revolution, but he refuses the illusion of a rational reconstruction of political order as well as the reactionary dream of an integral restoration of past. The foundation of Liberty requires stability of institutions, historical continuity and a translation of innovations in the language of tradition. It does not prohibit innovation and Hume could have easily adopted the well-known maxim of Lampedusa’s hero: “everything must change so nothing changes”. This Liberal conservatism accepts the idea that politics and economy obey to some “natural” necessities, but this does not imply passivity of political power, nor it authorizes the idea of a perfect coincidence between political and natural order. Society, justice and Law are the

⁴⁵ In the *Enquiry concerning the Principles of Morals*, the distinction between nature and artifices disappears, which reinforces the naturalist aspect of the argument.

fruits of an artifice which must be continually corrected by government, even if leads to oppose to traditions and to change respected customs. This vision implies symmetrical criticisms of Whig and of Tory principles. For the Whigs, the promise of the social contract (the original contract) is the foundation of the rights and obligations of rulers and of citizens. For Hume, it not the promise which, as source of natural duties, « authorizes » government or « oblige » citizens, it is the government which gives authority to promises because it gives them warrants. The source of loyalty is not consent, but utility ; a regime is not legitimate because it is accepted, it is accepted because it is legitimate and it can invoke other principles than consent to be obeyed. “Original consent » is a good reason to obey, but it is not indispensable to the establishment of Government. Inversely, obedience has no transcendent foundation, and the Tory principle of « passive obedience » has no meaning if the government is unable to give advantages to his subjects and notably to warrant their security.

As he will show it in ulterior texts, the point of view of Hume is that of a philosopher who is in search of truth and science, but who acknowledges that he has some affinities with the world of gentlemen. The *Treatise of Human nature* had little success and, after this failure, Hume choose the more easy-reading form of the essay, who was for him the best for his times, because it makes possible to unite the two worlds who constitutes the “elegant part of humanity”, the “learned” and the “conversable”.⁴⁶ For Hume, these two rival worlds are the expressions of two conceptions of knowledge and of two types of humanity which cannot be confused, but which have interest to go together. If conversation refuses the serious subjects, it becomes boring as well as useless, and if science is too far from the good society, it turns abstract and chimerical. So the philosopher must remain close to the *gentlemen*, and behave like a « gallant man » but his knowledge remains this of “abstruse” thinkers , which are much better than “superficial thinkers who tell no more than what we can learn in a café”. So, there is some similarity between Hume and Montaigne: both thinkers plea for a certain form of prudence against abstraction and, in both cases, this apology of

⁴⁶ “Of Essay writing”, *Essays Moral, Political, and Literary*, III, 1.

prudence and moderation goes with an elitist conception of politics. But Hume's reference is not the judge or the magistrate: it is the gentleman-philosopher who, in one hand, is an "*homme du monde*" whose public action takes place in a representative government but who, in the other hand, is distant from the current interpretations of the regime of his country. So the relevance of prudence is weaker in Hume than in Montaigne: if there is no practical reason, the political prudence is closer to experience than to wisdom.

Unlike Hobbes, Hume, as Burke after him, looks faithful to the tradition of Common Law, which seems to underlie his general conception of history and of progress, but he does not assume the interpretation of English history which generally goes with Common Law culture. If one considers the *Treatise*, the explication of the growth of Government (from obedience to fundamental laws) could suggest an historic vision of the constitution, which, for England, turns the Whig orthodoxy against itself, as obedience precedes consent in the development of constitution. If we consider the *History of England*, we can see that Hume refuses the whole Whig history of England. In the volumes which treat of the period of the two revolutions, he is as indulgent with the Stuarts as he is puzzled or perplexed about the "enthusiasm" and even the "fanaticism" of their adversaries. He says that the principles of Constitution were ignored until the victory of the Parliament, which obviously means that they have no historical foundation. In the *Appendix III* of the *History of the House of Tudor*, he gives his own vision of the "Ancient Constitution" ; Elisabeth was an absolute monarch, and such was the logic or the Constitution « before the settlement of our present plan of liberty»,⁴⁷ and the «Constitutions» which existed before Elisabeth were not better: "The English Constitution, like all others, has been in a state of continual fluctuation".⁴⁸

This analysis of "Hume's Philosophical Politics" suggests what I shall call a "thin" interpretation of the so-called "Hume's law". The first target of Hume is the doctrine which postulates that it is always possible and even easy to judge (and to condemn) the existing state of affairs in the name of a principle given by

⁴⁷ *History of England, Liberty Fund*, t. IV, p. 355.

⁴⁸ *Ibid.*

reason and/or discovered in nature: reason is instrumental, not legislative, and the nature has no internal finality which could be invoked against positive Law. In the language of contemporary meta-ethics, Hume is probably “emotivist” and not “rationalist”, but, sure, he does not argue in favor of an absolute hiatus between “nature” and Law, in so far as there is some link between law and justice, which is a natural virtue. But this scholastic discussion is not the most important point. In fact, the principal problem of the current interpretation of the “Hume’s Law” is that it suggests a division of moral sciences between “descriptive” and “normative” such that, if we accept it, we can no more give any signification to the entire moral work of Hume, notably to the *Essays*. The *Essays* suppose a relation between philosophers of “gentlemen” that we could call “Ciceronian”;⁴⁹ Hume speaks the language of cultivated common sense and, if he does not *confound* the register of blame and praise with that of description, he does not *separate* them. Furthermore, this “art of writing” places Hume in the Aristotelian tradition of political philosophy which, by opposition to the platonic one, makes sense of the common civic representations and debates.⁵⁰ In fact, the real point is that the moral and political philosophy of Hume, as modern as it is, is in several points quasi “Aristotelian”. Take, for example, the Essay “On the standard of taste”, about aesthetic feelings. It starts with a perfectly sensualist and *subjectivist* explanation of the relative stability of aesthetic evaluations through centuries, which is supposed to come from the common conformation of human bodies and of senses. But it introduces in this explanation an “elitist” element which is very close to Aristotelian “prudence” (even if the rationalist and cosmologic background of it is gone). The principles of the taste are universal, but few people are really capable of giving their judgment or their feeling as standard of taste; taste depends of “delicateness”, “practice” and “experience”: it has the same elitist dimension that we have noted in Montaigne’s conception of Law; as Hume himself considers that moral (and political) sentiments grow in a similar way as aesthetic ones, there is no reason to deny the same dimension to his vision of law

⁴⁹ On Cicero’s contribution to the art of writing in philosophy, see Claire Auvray-Assayas, *Cicéron*, Paris, Ed. Belles-Lettres, 2006.

⁵⁰ See Philippe Raynaud, “Philosophie politique”, in Philippe Raynaud and Stéphane Rials, *Dictionnaire de Philosophie politique*, Paris, PUF, 2003.

and politics. The Aristotelian element of Hume's politics is also noticeable in the fact that, even if he insists on the importance of mores and manners and on the capacity of human being to invent new combinations of passions, he continues, contrarily to Montesquieu, to explain these "social" facts par the differences of political regimes rather than to explain laws by mores and manners.⁵¹ If we compare his position with that some of eminent contemporaries, we see that, because of his refusal of the "*grand récit*" of the Common Law, Hume could not be annexed by an author as Dworkin; his entire construction is opposed to the idea of a "*Living Constitution*", the coherence of which could be "discovered" by the judges: the history of Law is no more coherent than the natural world. Hume is not a natural right philosopher nor is he a theorist of the "Law's Empire". Is he for that a "positivist"? He certainly is not a Kelsenian: his theory treats of justice more than of Law, he does not affirm a radical separation between *Sein* and *Sollen*, and his politics are very different from that of the great legal theorist of Democracy. Scepticism and distinction between « is » and « ought » are not sufficient to give a "positivist" theory.

⁵¹ On the relations between Montesquieu and Hume, see Philippe Raynaud, *La politesse des Lumières. Les lois, les mœurs, les manières, op. cit.*

IV/ *Truth, Law and Rights in modern Jurisprudence.*

Even if one accepts that contemporary legal positivism owes something to the ethical scepticism of Hobbes or of Hume, it does not imply that legal positivists are simply “Hobbesian” or “Humean”, which would be all the more surprising as they are generally “democrats”. However, I think that the connexion between democratic positivism and classical sceptical arguments is neither contingent nor purely historical, but that it is both philosophically relevant and politically significant: their philosophical adversaries have real affinities with the theories that Hobbes or Hume fight against and their vision of political order keeps something of the first modern theories of State and Society. In order to show that continuity between classical and contemporary “positivism”, I will start with a brief exposition of Kelsen’s theory of democracy before discussing the subtle views of Hart about the relation between Law and Morals.

A. Legal positivism and democratic theory.

Kelsen is not so famous in the English-speaking world than in continental Europe but it is not dubious than, among the specialists of legal philosophy, he is considered as one of the most important “positivist” legal theorists. On one side, he gives a perfect example of a radically anti-naturalist theory, which goes to the ultimate consequences of the positivist “position” by the radical distinction between “truth” and “validity” but, on the other side, he abandons many thesis which were considered as typically “positivist”, as the subordination of Law to State, the “voluntarist” theory of the creation of Law or the opposition between creation and application of Law. My argument will be that Kelsen’s legal thought is totally coherent with his political theory and that both of them can be understood as contemporary rediscovery or reformulation of Hobbesian questions. In Hobbes’s as in Kelsen’s principles, there is a fundamental link between the conception of the origin or of the nature of Law (“*auctoritas, non veritas facit legem*”) and the recognition of natural equality. In the evolution which leads from the first to the second, all the components of legal philosophy are submitted to a coherent series of transformations, which also makes possible the transition from an apology of absolute monarchy to a theory of democracy.

1/ In Hobbes's philosophy, the idea that Law is made by (political) authority and not by "truth" is inseparable from a polemic against all the traditional claimants to the pre-eminence in the knowledge of "Right" or of Law: the platonic philosophers, the ecclesiastic hierarchy (notably the Pope) - and the traditional English (Common)-Lawyers. The authority of the Sovereign evidently implies that subjects must obey his commands as if they were founded of Truth, but its origin is not in a natural superiority: on the opposite, the artificial creation of "Leviathan" presupposes the natural equality of men. In fact, the efficiency of the Supreme Power implies the fall of the traditional authorities, whose influence was founded on a "moral" vision of the function of the Law, where the new "Sovereign" uses Law as a mean to make peace and to promote pacific coexistence of the diverse ends that individuals pursue. The will of the sovereign has absolutely supremacy on any individual will, but the ruin of the traditional authorities mean that no style of life or, as we should say, no "value" has natural superiority one another. The argument of Kelsen in favour of equality is basically the same: it comes not from natural dignity of persons but from the impossibility to demonstrate any absolute Truth on which Law and Politics should be founded; it is evidently coherent with the refusal of any "natural law" opposite or superior to positive Law. However, there is a major difference between the two philosophies, since Kelsen considers that his "relativism" leads to democracy, where "absolutism" in politics has affinity with the philosophical affirmation of "absolute" truth. In Hobbes's political philosophy, uncertainty about religious or moral truth makes the absolute power necessary; in Kelsen's theory, it makes democracy possible and legitimate. This *summa divisio* of politics between "democracy" and "autocracy" has an analogon in philosophy: the metaphysic vision of philosophers like Heraclites or Plato was « autocratic » when the empiricist and relativist conceptions of the Sophists as, in modernity, empiricism or criticism are sympathetic to democracy. So, "autocratic" politics is metaphysical and archaic, and modern or positive thought is virtually or potentially democratic and liberal.

2/ The replacement of authoritarian politics by modern democracy is underlying in all the inflexions that Kelsen introduces in the classical models of

legal positivism. Traditionally, one considers that legal positivism considers Law as a production of the State, or at least as conditioned by recognition by the state. One of the most well-known – but also one of the most misunderstood – views of Kelsen is directed against this classical theory: for Kelsen, State does not precede Law because Law and State are *identical*. This argument is not only theoretical: it is polemical and directed against the German” theory of the “self-limitation” (*Selbstbindung*) or of the “self-obligation” (*Selbstverpflichtung*) of the State. This theory was currently used to legitimate the model of the “*Rechstaat*” (the State which obeys to the Law and respects the rights of its subjects) but it had an authoritarian side, which is precisely what Kelsen wants to unmask: if the State obeys the Law because of a self-obligation, Law and Rights are the result of a favour that the State (that is, in fact, the rulers) concede to its subjects. So the meaning or the identification of State and Law is a “de-sacralisation” or “de-fetishization”, the effect of which is to destroy an efficient “ideology of legitimisation”.⁵² Most of the arguments of Kelsen have the same polemical dimension. When he criticizes the distinction between “private Law” and “public Law”, his targets are, on one hand, the “publicist” arguments in favour of the autonomy of executive power and, on the other hand, the liberal illusion of an absolute independence of private sphere.⁵³ The most important change that Kelsen introduces in Legal positivism (from “voluntarism” to “normativism”, from the hierarchy of organs of the State to the hierarchy of norms) lies on this refusal of the authoritarian legacy of traditional positivism. In the same way, the evolution of his thought concerning the office or judge turns the principle “*auctoritas non veritas facit legem*” against the exclusive predominance of legislative power.⁵⁴ Finally, the same principle implies also that the validity of norms depends exclusively on the condition of their production and not of their

⁵² Hans Kelsen, *Pure Theory of Law*.

⁵³ On this question, see Philippe Raynaud, *Le juge et le philosophe*, III, ch. Iv, Paris, Armand Colin, 2008.

⁵⁴ In his *General theory of Law and State* (1945), Kelsen accepted the classical idea that the office of judge is to “apply” the Law and to follow the intention (explicit or not) or the legislator; in the second edition of *Pure theory of Law* (1960), he implicitly accepts the idea that the interpretation by the judge can create (new) Law.

truth: the Hobbesian distinction between truth and Law remains the ultimate foundation of legal theory.

3/ In Hobbes's philosophy, the refusal of any "natural" hierarchy between the ends or the values that men pursue, does not mean that there is not any "natural" basis to the creation of legal and political order. Hobbes evidently has an anthropology or a theory of human nature – which allows him to use the language of "natural Law" when he describes the way by which men understand the necessity of Leviathan; this anthropology is essentially individualist but it implies that there is some "natural" relation between men – the state of war, caused by scarcity, rivalry and vain glory. Kelsen's anthropology is close to Hobbes's, but it is less pessimistic so that it can avoid the hypothesis of the war of all men against all men (or at least minimize its importance). The two "postulates of our practical reason" that are underlying the democratic ideal express to "basic instincts" of the social being – the resistance of the individual to social constraint and his refusal to be dominated by his fellowmen, which comes from his innate self-esteem. Pure theory of Law proves that, since State and Law are identical, the State is not the transcendent source of the Law. Political theory shows that, since Democracy is a prolongation of natural freedom, the State cannot be a mystical entity above persons.

B. Law, Morals and Human Nature.

Kelsen's theory of Law is both a radicalisation and a "deconstruction" of the first legal positivism: it makes explicit the ultimate consequences of the pre-eminence of "authority" on "truth", which paradoxically ends up undermining the authoritarian component of the State. But Kelsen maintains a major argument of classical positivism, which is the effort to reduce all legal rules to "primary norms" of constraint which sanctions violation of Law. In Hart's philosophy, a similar starting point - a criticism of the classical theory of "sovereignty", which is directed against its "authoritarian" tendency – brings to a very different conception of the nature of Law. Where Kelsen posed the identity of State and Law in order to exorcise the spectre of absolute (imperial) State, Hart shows,

against Austin,⁵⁵ that Law consists in *rules*, which can have diverse authors and cannot be reduced to a « command » of a supreme power (like British Parliament) or to the application of it. This criticism of the “command theory” is not only directed against the top-down vision of legal power which this theory suggests; beyond that, it affects also one fundamental feature of standard positivist theories that one finds in Kelsen as well as in Bentham : the reduction of all laws or rules to the “penal” model or legal constraint or sanction. As Hart notices, one of the most important defect of the command theory is to mask an important “distinction between types legal rules which are in fact radically different:

Some laws require men to act in a certain way or to abstain from acting whether they wish or not. The criminal law consists largely of rules of this sort: like commands, they are simply “obeyed” or “disobeyed”. But other legal rules are presented to society in quite different ways and have quite different functions. They provide facilities more or less elaborate for individuals to create structures of rights and duties for the conduct of life within the coercive framework of the law. Such are the rules enabling individuals to make contracts, wills, and trusts, and generally to mould their legal relations with others. Such rules, unlike the criminal law, are not factors designed to obstruct wishes and choices of an antisocial sort. On the contrary, these rules provide facilities for the realization of wishes and choices. They do not say (like commands) “do this whether you wish or not”, but rather “if you wish to do this, here is the way to do it”. Under these rules we exercise powers, make claims and assert rights.⁵⁶

According to this description of law, legal rules are not reducible to legal constraint because a large part of them are artifices that we use to facilitate our actions. One could say that, with Hart, we leave the world of Hobbes to enter in the world of Hume: the end of Law is not only to repress natural egoism or to prevent the war of all men against all men, but to create institutions which make possible the deployment of the natural capacity of men to produce artifices in

⁵⁵ J. Austin, *The Province of Jurisprudence Determined*, 1832.

⁵⁶ H. L. A. Hart, « Positivism and the Separation of Law and Morals », in R. M. Dworkin (ed.), *The Philosophy of Law*, Oxford UP, 1977, p. 20.

order to enlarge their sphere of activity. Hart is perfectly aware of the philosophical implications of his theory. In fact, his discussion of Austin brings him to put in question many arguments of the classical positivism, which is more homogenous than it seems,⁵⁷ so, he gives a new formulation of the relation of Laws and morals, he replaces the problematic of hierarchy of norms thanks to the concept of the “rule or recognition” which brings to put into question many arguments of the classical positivism and to give a new formulation of the conflict between Natural Law and positivism. It is evidently impossible to discuss all these views here; so, I will just notice that the “Humean” dimension of the philosophy of Hart is perfectly explicit in some of his most important works, and that the most significant references to Hume’s philosophy do not concern the so-called is/ought problem but the anthropology and the theory of Justice. In *The Concept of Law*, he offers an outline of the “minimal content of Natural Law” which gives a central place to “limited altruism” and which bases on it the possibility of justice. The fact that the rules of Law and Morals have their origin in the search of security does not imply that men are purely egoist; rules are necessary because men are not angels but they would be impossible if they were devils.⁵⁸

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So, we have seen three models of modern “scepticism” in relation with political philosophy and jurisprudence. The three of them have two things in common: they take note of the crisis or of Aristotelian physics and of traditional Ptolemaic cosmology, which ruins or at least endangers the idea of a natural foundation of law, of civil inequality and of public morality, they are witnesses or at least commentators of the great divisions caused by Reformation and by Religion wars,

⁵⁷ See for example *Id., ibid.*, p. 21, on the dependence of Kelsen’s normativism from an implicit “theory of command”.

⁵⁸ H. L. Hart, *The Concept of Law*, Oxford, Clarendon Press, 2nd ed. 1994, p. 196. On this text, see Neil Mac Cormick, *H. L. A. Hart, Stanford Law Books*, 2008, p. 117-124.

which leads to the ascension of modern State. What differentiates and even opposes them is no less important.

In Montaigne, the legacy of Aristotle is somewhat preserved, but it is reduced to a doctrine of prudence, which gives a classical theory of Law, made from the point of view of the judge, in a context in which civil inequality is a precondition of the power of magistrates. Montaigne's "positivism" needs royal power, but not sovereignty, and his "scepticism" is not opposed to hierarchy.

Hobbes rejects totally Aristotelianism : he reduces prudence to experience, he negates the political nature of human being, and he gives to the sovereign the function of "impartial third" who defined the "*dikaion*" in Aristotelian ethics. He is at the same time radically equalitarian and apologist of absolutism; that's leads him to a voluntarist-positivist doctrine which gives a (limited) autonomy to the judge in a context which is politically absolutist but philosophically liberal.

Hume is a sceptical metaphysician in the full sense, and his moral philosophy excludes the idea of a legislation of practical reason, but his "philosophical politics" is at the same time less equalitarian and less individualist than Hobbes's doctrine and his "is-ought" doctrine is more "naturalist" than the conventional vision suggests.

From contemporary point of view, Hobbes is at first sight the most relevant of the three authors. More than Machiavelli himself, Hobbes is the real founding father of modern politics, and liberalism is in many ways a *radicalization* of Hobbesian thought, which just happens to turn against the State the claims which come from the priority of "rights". Hobbes's pessimist anthropology can seem choking, but we remain Hobbesian on the major questions of the relation between Law and politics and of the finality of political order. For Hobbes, the source of Law stays in legitimate authority and the first problem of political order is to create and to institutionalize a legitimate power. Contemporary democracies do not reason differently : the legitimacy of rulers depend at first on the process – legal or legalized afterwards – which gives them the power and the first function of state is not to make people happy and even less virtuous but to create the conditions of free and pacific coexistence of free individuals ; democratic States seemed to go beyond this mission with the rise of

Welfare State, but, since that, they paradoxically came back to their Hobbesian fundamentals : except for fragile compromises as “workfare » institutions, the “social rights” have no “moral” conditions and, if the State legislate on moral questions, the reason of its action is supposed to the promotion of minimalist “morals”, neutral towards divisions of society, specially “religious”.

The history of moral philosophy and of jurisprudence confirms the pertinence and the cogency of the Hobbesian foundation. Utilitarianism, at least in the form that Bentham gave to it, is no more than a rewriting of Hobbes in the new context produced by Enlightenment and by the rise of democracy. Bentham does not hesitate to affirm that a true moral doctrine exists, but he negates all the ideals which could put a hierarchy between men through the hierarchy of their ends. Kelsen builds his theory of democracy – and his theory of law - on a sceptical position which denies at the same time the political pertinence of truth and the pre-existence of law before the creation of norms, and which implies a formalist vision of legal order. Even an “anti-positivist” author like Dworkin, who tried in his last book to propose a non-sceptical moral philosophy, including a doctrine of “good life” accepts the fact that respect of the diversity of the ends that men search must remain the *ultima ratio* of just politics.⁵⁹

The pertinence of the doctrine of Hobbes is nowhere so visible than in the great authors who, as Kant in 18th century or Rawls in 20th tried to go beyond utilitarianism in order to give a better foundation to the certainty of morals or to the inalienability of “rights”. Kantian formalism implies a radicalization of the criticism of Aristotle, with the denial of the morality of prudence and Kant’s jurisprudence affirms priority of Law on politics and of legal philosophy on political philosophy. Rawlsian liberalism starts with the suspension of all particular world vision which could subordinate rights to « objective » ends ; it implies the disqualification of all « perfectionist » visions of political order, in order to subordinate the quest of « good life” to the coexistence of free individuals (this naturally imply a drastic reduction of the scope of legitimate political positions). Everything goes as if the development of the doctrine of

⁵⁹ See Ronald Dworkin, *Justice for Hedgehogs*, Cambridge Mas., *The Belknap Press*, 2011.

(subjective) rights could not limit the powers of the State, except by the ever more rigorous affirmation of the ontological priority of rights on all the ends that men can choose. The only remedy to the expansion of Leviathan lies in Hobbesian assumption of natural equality, and freedom, of men.

When we consider the origins of modernity, it is difficult to deny the strength of the Hobbesian foundation of modern State, but is as much difficult to pretend that Hobbes's philosophy gives a full description of our experience of politics or even of Law. We need distinction between Law and morals, but we do not easily accept a complete separation between them, and that is the reason for which one finds always some reference to "nature" or to "justice" in the more "positivist" theories. This difficulty of positivism to give a full comprehension of the Law's Empire gives some chance to other doctrines like that of Hume's "philosophical politics » (Forbes), which suggests a third way for understanding the law-making process, beyond the opposition between natural Law and voluntarist positivism : there is neither law nor rights in nature but Law is one of the artifices which human nature produces to enlarge its capacities.⁶⁰ As for the "prudence" of Montaigne, which is founded on a pre-modern philosophy and which is part of an argument in favor of an aristocracy of lawyers, it seems relevant as intermediary between abstract rational law and concrete tasks of the judge, and this relevance is not weakened but augmented by the anti-equalitarian bias of Montaigne, in so far as it makes sense of the real position of Courts in the development of Law. The Courts could not survive if people saw only in them offices legally authorized to interpret the Law. The whole edifice of Law would fall if people did not imagine that, in some way, "truth" and not (only) authority makes the Law.

⁶⁰ See the stimulating analyses of Philippe de Lara in "Le droit et la coutume", *Annuaire de l'Institut Michel Villey*, to be published.