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On behalf of the Organizing Committee of the XXII World Congress of Philosophy of Law and Social Philosophy

I hereby certify:

That Prof. José Renato Gaziero Cella will take part in the Working Group B.12 and will present a paper with the title "The Critic of Habermas to the Idea of Legitimacy in Weber and Kelsen".

And this certificate is given under my hand in Granada 2 of Mars 2005.

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ABSTRACT

Title: The Critic of Habermas to the Idea of Legitimacy in Weber and Kelsen

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WEBER, in his typology of legitimate dominance, refering to the *legal-rational dominance* that characterizes the modern social orders, built a positivist concept of legitimacy, where the legitimacy of the dominance is based on the faith in the legality. That conception shifts the problem of the legitimacy of Law to the subject of the proceedings by which the Law is produced. KELSEN, when writing *Reine Rechislehre*, borrows the thought of WEBER concerning the legitimacy, which is inserted into legality. Therefore, as Law is self-legitimized by its own formal juridical proceedings, it does not need any external basis. This construction is exactly what allows the acknowledgement of the autonomy of Law, which is underlying every juridical-philosophical discussion since HOBBES. HABERMAS, on the other hand, wants to reaffirm the connections amongst Law, morals and politics, and for that represents the counterpoint of the positivist posture. HABERMAS, in *Theory of the Communicative Action*, makes an analysis of the thought of WEBER based on the theory of social rationalization, vehemently criticizing the concept of legitimacy that WEBER attributed to the legal dominance. This concept, which is fundamental for the faith in the legality, originates the conception that the legitimation of the modern Law happens by means of the proceedings. HABERMAS points out a paradox in that conception: "The faith in the legality can only create legitimacy if the legitimacy of the juridical order that determines what is legal is supposed beforehand." By highlighting that contradiction, HABERMAS questions the legitimacy of the proceeedings, because the "...faith in the legality of the proceedings cannot engender legitimacy *per se*, that is, by the simple virtue of the correction of the proceedings of the related positive order." However, to base the legitimacy of Law in the proceedings does not solve the problem, it just shifts it to the proceedings themselves. The question concerning what legitimizes the *proceedings that legitimates* remains. There is que question that HABERMAS comes across when intending to analyze the problem of the legitimacy of the modern Law. It is exactly rethinking the subject of the rational basis that HABERMAS will try to build a new concept of legitimacy. The redefinition of the idea of legitimacy will make him defend that the morals are neither mere complementation, nor independent of Law, as believed the positivists, but that there is a *relation* between them.

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THE CRITIC OF HABERMAS TO THE IDEA OF LEGITIMACY IN WEBER AND KELSEN

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Introduction. 1. The legitimacy for Max Weber. 2. The legitimacy for Hans Kelsen. 3. The Critic of Habermas to the Positivist Concept of Legitimacy. Final considerations. Bibliographical references.

Introduction

The juridical positivism[3] reaches the XX century almost deformed. HANS KELSEN (1881-1973) had the task of *purifying* the law science object of everything that was considered strange to it, because, according to this author, one "... of the most important tasks of a general theory of law is to determine the specific reality of its object."[4]

According to CHAÏM PERELMAN, HANS KELSEN'S juridical positivism:

> "... presents law as a nested system of rules, that differs of a purely formal system because the inferior rule is not to be deduced from the superior rule by purely formal transformations, as it is in logic or mathematics, but from the determination of the conditions according to which the creation of inferior rules can be authorized, with the efficacy of the system of the presupposed adhesion depending on a fundamental rule, the *Grundnorm*, that will be the original Constitution.
>
> Contrarily to a formal system, purely static, law will be conceived as a dynamic system, the superior rule that determines the situation where the one to whom the authority of exercising a legal, legislative, executive or judiciary power is given, can freely choose a line of conduct, since it is not against the superior rule." [5]

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[3] Some affirm that it is not possible to make any analogies between the so-called juridical positivism and the philosophical positivism, under the risk of committing rude errors. According to NORBERTO BOBBIO'S teachings, the "expression 'juridical positivism' does not originate from the 'positivism' in the philosophical sense, although in the last century [century XIX] there has been a certain connection between the two terms, given that some juridical positivists were also positivists in the philosophical sense: but in their origins (that are in the beginning of the century XIX) they have nothing to do with the philosophical positivism - so much it is true that, while the first appears in Germany, the second appears in France. The expression 'juridical positivism' originates from the locution positive law opposed to that of natural law. To understand the meaning of the juridical positivism, therefore, it is necessary to explain the meaning of the expression positive law" (BOBBIO, Norberto. **O positivismo jurídico: lições de filosofia do direito**, p. 15). For MIGUEL REALE, "positive law is the one that has, or already had, or is about to have validity and efficacy" (REALE, Miguel. **Filosofia do direito**, p. 601), what is confirmed by TERCIO SAMPAIO FERRAZ JR., for who "positive law (...) is that one that is worth because of a decision and that only for the strength of a new decision can be revoked" (FERRAZ JR., Tercio Sampaio. **Direito, retórica e comunicação**, p. 157).

[4] KELSEN, Hans. **Teoria geral do direito e do estado**, prefácio, p. XXIX.

[5] PERELMAN, Chaïm. **Lógica jurídica**, p. 91-92.

As for that aspect, where the fundamental rule[6] is "... the basis of validity and the unifying principle of the rules of an order"〃[7] acting on a dynamic system, the rules will be considered valid since they are originated from a competent authority (indicated by the order) and that they take its basis of validity from a superior rule, obeying the proceedings (also indicated by the system). The validity of the rules, therefore, does not depend on its content, fact that, after the World War II[8], rose again the controversy of the legitimacy[9] of the instituting power of an order, which starts to be a juridical problem again.

The theory of KELSEN has a skeptical posture when admitting the theory that, when there is the possibility of divergent interpretations of the same rule, the interpreter will be responsible by choosing, discretely, the solution that seems to be the best, because the science of the law, for him, is not capable of supplying safe criteria of decision:

> "... qualified to act legally, and within the prescribed rules, the legislator, the public administrator or the judge have freedom to act. The legislator has freedom to vote any law that is not contrary to the superior rules. The judge, person in charge of saying the

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[6] The more developed positivist doctrines use as criterion of identification of the legal system a key rule. It is the case of HANS KELSEN'S fundamental rule or the rule of recognition of HERBERT HART. The rule of recognition of HART consists of a social practice that establishes that the rules that satisfy certain condition are valid. Each normative system has its own recognition rule and its content varies and is an empiric question. There are normative systems that recognize as the source of the law a sacred book, or the law, or the habits, or several sources at the same time. The rule for recognition is the criterion used by HART to identify a legal system and to find the validity of all its derived rules. The validity test consists of verifying if a rule exists, if it is valid before the recognition rule, because it is from it that all the rules should get their validity.

[7] BOBBIO, N. **Teoria do ordenamento jurídico**. p. 62.

[8] Many Nazi officials, in their defenses in the Tribunal of Nuremberg, invoked the theory of KELSEN with the aim of demonstrating that they acted legally, considering that the discriminatory rules that gave it effectiveness had been inserted in the German legal system, in other words, they were just executing orders, so that, if they had not executed them, then there would be illegality capable of condemning them.

[9] By legitimacy we adopted the same notion conceived by MARIA CELESTE DOS SANTOS, that adduces: "In the usual juridical language, the words legality and legitimacy do not have a clearly defined and differentiated meaning; it is spoken indiscriminately about legality and of legitimacy to mark the conformity of certain activities of the State with the effective rules of the legal system. To avoid misunderstandings we used the expression legitimacy to indicate, in general terms, the criterion of justification of the power, the 'title' for which it dictates its commands and demands obedience on the part of those to who it is made and that are considered 'ruled' by it. In that sense, the legitimacy becomes a question of legitimation and presupposes the legality, that is, the existence of a legal system and of a power that dictates commands of conformity with its own dispositions. Legitimacy, therefore, justifies legality, because it gives the authority charisma to the power: it is a sign that is added to the denomination, the strength that the State exercises in 'name of the law'" (SANTOS, Maria Celeste Cordeiro Leite. **Poder jurídico e violência simbólica**, p. 111-112).

> law in specific cases, has the freedom of choosing the best interpretation possible of a text.
> The pure theory of law, just as elaborated by Kelsen, to continue being scientific, should eliminate of its investigation area any references to opinions of value, to the idea of justice, to natural law, and to everything that concerns morals, politics or ideology. The science of law would worry about conditions of legitimacy, validity of the juridical acts and their accordance to the rules that authorize them. Kelsen recognized that the judge is not a mere robot, as the law he applies, allowing several interpretations, give him certain latitude, but the choice among those interpretations depends, not on the science of law nor on knowledge, but on a free and arbitrary will, that a scientific research, focused and unbiased, cannot guide in any way." [10]

The two problems of the juridical positivism showed above (that are not limited to the theory of KELSEN, but also include NORBERTO BOBBIO's and, mainly, HERBERT HART': the one of legitimacy in relation to legality; and the one of discretion in relation to legality, have been generating the most interesting, and maybe the most important, juridical-philosophical debates of the present time.[11]

The present communication will be linked to the problem of legitimacy in face of legality, above all starting from the ideas that JÜRGEN HABERMAS (1929 -) has been manifesting to that respect.

1. The legitimacy for Max Weber

It is important to analyze the critic of HABERMAS to the positivist concept of legality, with emphasis in the problem of legitimacy of the modern positive law.[12]

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[10] PERELMAN, C. **Lógica jurídica**, p. 92-93.

[11] What is searched is to overcome the positivist point of view where the law prevails on the morals. It is intended to find a basis (moral) to the law without appealing, however, to the natural law. (O que se procura é superar o ponto de vista positivista em que o direito prevalece sobre a moral. Pretende-se encontrar um fundamento (moral) ao direito sem recorrer, no entanto, ao direito natural.)

[12] For BOBBIO, "... It is not possible to understand the enormous relevance given by Weber to the theme of the legitimacy - and many do not understand it - if the retaking of a classic theme of the political philosophy is not noticed: the theme of the basis of the power. Presenting legality as a central category of the theory of the State, Weber intends to answer the traditional question: 'what is the last reason for which, in the whole stable and organized society, there are the ones that rule and the ones ruled; and the relation between them is not a relation in fact, but a relation among the law, on the part of the rulers, of commanding, and the duty, on the part of the ruled, of obeying?" (BOBBIO, Norberto. Teoria geral da política, p. 140-141). To those questions we can add, according to JOÃO MAURÍCIO ADEOTADO, the following ones: "... in what measure the expression 'illegitimate government makes sense (or not)'? How is it possible that so many submit themselves to the guidelines of so few? Is there any rigorous criterion in the word 'legality' or is it just of one more 'word' that the professional politicians and jurists like so much? What justifies the fact of the so-called civil obedience? What is the difference between the order given by a judge or policeman and the one of a thief or an enemy in the war? What is the role of the legal system in those conditions?" Qual o papel do ordenamento jurídico nessas condições?" (ADEODATO, João

The thoughts of MAX WEBER (1864-1920) and KELSEN will be confronted to the thoughts of HABERMAS. The choice was not made at random. WEBER built a positivist concept of legitimacy that permeates all discussions on the theme until nowadays. In effect, it is based on him that HANS KELSEN examines the legitimacy in its pure theory of law. HABERMAS tries to reaffirm the connections amongst law, morals and politics, and because of that represents the counterpoint of those thoughts, as he opens the hermetic cell where WEBER and KELSEN had locked the legal system as they used a positivist concept of legitimacy.

So, the analysis will be centered in the following points: a) the concept of legitimacy that WEBER develops in his typology of the legitimate dominance and of its application in what concerns the legal-rational dominance; b) the use given by KELSEN to that concept; and c) finally, the central critic developed by HABERMAS, still concerning the concept of legitimacy, in his Theory of Communicative Action.

In his work *Economy and Society*[13], WEBER makes use of the concept of legitimacy to differentiate the pure types of dominance[14]. For that, WEBER considers the premise that, in function of the legitimacy class on which certain dominance is based, its basic characteristics change, for instance its administrative staff and its own way of performance. It is seen then, that the legitimacy is considered a key criterion to differentiate the pure types of dominance.

When understanding dominance as the "... probability of obedience to a certain charge"[15], WEBER gets to the following concept of legitimacy: "probability [of a dominance] to be treated practically and maintained in an important proportion"[16].

Maurício. **A legitimação pelo procedimento juridicamente organizado: notas à teoria de iklas luhmann**. *In*: Ética e Retórica: Para uma Teoria da Dogmática Jurídica. São Paulo: Saraiva, 2002, p. 55).

[13] WEBER, Max. **Economia y sociedad**. 2. ed. Tranlation by José Medina Echavarría et alii, México: Fondo de Cultura Econômica, 11. Reimpressão, 1997.

14 Cf. WEBER, Max. **Os três tipos puros de dominação legítima**. *In*: COHN, Gabriel (org.). Weber: Sociologia, v. 13, São Paulo: Ática, 1979.

[15] WEBER, M. **Economia y sociedad**, p. 171. The author defines the power as the possibility of imposing his own will to the others, starting from the teleologic model of the action: an individual (or a group that can be considered as an individual) has an objective and chooses the appropriate means to accomplish it. The success of the action consists of provoking in the world a state of things that corresponds to the proposed objective. As that success depends on the behavior of another individual, the actor should have the means that induce in the other the desired behavior. It is that capacity of disposition on means that make it possible to influence the will of somebody else that MAX WEBER denominates power. (WEBER, M. **Economia y sociedad**, p. 171).

[16] WEBER, M. Idem, ibidem.

Therefore, it is for the faith in its legitimacy that a dominance keeps independent of the specific and subjective reasons of each of the dominated, to obey the orders that are imposed to them, the stability of a dominance is in the generic faith in its legitimacy.

WEBER, when developing his typology, identifies three possible bases for the legitimacy of the political dominance: a) the traditional basis rests on the faith in the tradition[17]; b) the charismatic basis rests on the faith in special qualities of a person; and c) the rational basis rests on the faith in the legality.[18]

The rational basis identified by WEBER is especially important, because, for the author, the stability of the legal dominance characteristic of our time rests on it. It would be the faith in the legality that would result in the submission of those dominated, the form of dominance characterized by the positivation of law and a predominantly bureaucratic staff in the State[19].

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[17] JOÃO MAURÍCIO ADEODATO, when talking about the traditional or pre-modern basis, sees in it three fundamental characteristics: "1. The extrinsic character of what you intend is the basis of the legitimacy, considering that both the divine orders and the supposedly evident orders of practical reason as for 'organic will' of the individualized people appear as unconditioned pillars, external, previous and superior to the rules that the power instituted imposes to the society. 2. The ethical content that such doctrines show through ideals as Truth, Justice, Love or even the Revelation, transcendent parameters to which all the members of the society should be subordinated; the power is seen as something that is fruit of another being that is valid and not of functions or established relations for the men in his political action. The basis in itself is not political, but ethical. 3. The notion of legitimacy is used to limit the use of the power and to avoid its tendencies to self-perpetuation; the secular rulers are mere protectors and not owners of the civil society. All the ones who order and obey are subordinate to a common basis" (ADEODATO, João Maurício. **A legitimação pelo procedimento juridicamente organizado: notas à teoria de niklas luhmann**. *In*: Ética e Retórica: Para uma Teoria da Dogmática Jurídica. São Paulo: Saraiva, 2002, p. 56).

[18] In the rational basis the problem of the legality is not external anymore but it comes from within, it starts to be self-constituted. The introduction of the idea of legality, as JOÃO MAURÍCIO ADEODATO adduces, is an attempt of curing the deficiencies of the traditional basis without being "in the empiricist ingenuousness of the contractualism of the classic juridical naturalism, to justify the political dominance and the need for legitimation". For the author, "... the phenomenon of the legislation was already an old acquaintance of most civilizations. What is new here it is the persuasion that the legislated rule of law is the only legitimate source of the law, starting from the principle that the law form a systematic and united whole, sufficiently widespread to settle any jurisprudence conflicts. '...The legality means nothing else than the existence of an assigned group of laws, structured in function (a) of a concept of public power that differentiates the fields of action of the public and private sections, and (b) of the accordance of all of the acts not just practiced by those governed, but also by the own rulers'.... the legalism is based on the idea that the own act of legislating drains the genesis of the law, and the whole juridical-political universe can be embraced by the law" (ADEODATO, João Maurício. **A legitimação pelo procedimento juridicamente organizado: notas à teoria de niklas luhmann**. *In*: Ética e Retórica: Para uma Teoria da Dogmática Jurídica. São Paulo: Saraiva, 2002, p. 59-60).

[19] In few words, State, for WEBER, is a political grouping that maintains the monopoly of the legitimate physical embarrassment. It implicates to say that the State presents a rationalization of the law, a rational administration and an institutionalized strength. That concept of State in WEBER is used to analyze the political phenomena. As JULIEN FREUND says, the political activity of the State is defined by the fact of taking place in a territory, element that separates the interior and the exterior. It is also defined in the fact

In effect, the basic idea of the legal-rational dominance is that "... any law can be created and modified by an act correctly sanctioned as for the form." [20]

WEBER, when founding the legitimacy of the legal dominance on the faith in the Legitimacy and, therefore, in the possibility of the creation and modification of the law, it comes to a new problem: what is legal? This recognition of what is legal or not becomes the key for the legitimacy of rational basis.

With that WEBER shifts the problem of legitimacy from the positive law to the subject of the proceedings by which the law is produced and modified. It is the concrete *formal proceeding* that will allow an identification of what is legal or not, and also, it is in the faith in what is identified as legal that the legitimacy of that type of dominance type will live. Therefore, in last analysis, the fundamental stone of the legitimacy of the modern juridical building, in the thought of Weber, becomes the faith in a certain proceeding that allows the identification of the law.

It is important to observe that the construction described above introduces the legitimacy inside the legality. As the law is self-legitimated by its own formal juridical proceeding, it does not need any external base. It is exactly that construction that will allow the acknowledgement of the law autonomy that is underlying to every juridical-philosophical discussion since THOMAS HOBBES[21], just to

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that "the ones that inhabit inside the borders of the grouping adopt a behavior that is guided significantly according to that territory and the corresponding community, in the sense that its activity is conditioned by the authority entrusted for the order, eventually by the use of the embarrassment and the need to defend its particularity". The third element that defines the political activity is the strength and the eventual use of violence. JULIEN FREUND affirms to be possible to conclude that in WEBER the domain is in the political center. Then the definition of politics "as the activity that vindicates for the authority installed in a territory the right for the domain, with the possibility to use, in case of need, the strength or the violence, to maintain the internal order and the opportunities that elapse of it, or to defend the community against external threats" (cf. FREUND, Julien. **Sociologia de max weber**. 2. ed. Translation by Luís Cláudio de Castro e Costa, Rio de Janeiro: Forense, 1975, p. 160-161).

[20] WEBER, M., Op cit., p. 174.

[21] The political doctrine of HOBBES does not agree with the juridical naturalist idea that a jurisprudence of universal character can be derived of the reason, because, according to that author "... the law is not the expression of the reason but a manifestation of the sovereign will" (PERELMAN, Chaïm. **Lógica jurídica: nova retórica**. Translation by Vergínia K. Pupi, São Paulo: Martins Fontes, 1998, p. 18). According to BOBBIO, the political doctrine of HOBBES maybe is the most complete and consequent theory of the juridical positivism, so that "if we want to find a complete and consequent theory of the juridical positivism, we should send ourselves to THOMAS HOBBES'S political doctrine, whose fundamental characteristic (...) actually consists of having given a fatal blow in the classic juridical naturalism" (BOBBIO, Norberto. **Teoría general del derecho**, 2. ed. Translation by Jorge Guerrero R., Bogotá: Temis, 3. reimpressão, 1999, p. 31). For HOBBES, there is not another criterion of the fair or the unfair except the positivist law, in other words, only what is ordered by the sovereign is fair, by the simple fact of being ordered; and it is only unfair what is prohibited, by the fact of being prohibited. BOBBIO presents a good description of the steps that allowed HOBBES to reach a so radical conclusion as the

have an author as referential. In fact, it is that autonomy that many times is invoked to differentiate the modern and the old law, and it is also pointed as one of the primordial differences between the legal-rational dominance and the other two types of dominance, traditional and charismatic, both dependent on factors external to the law: the tradition and the charisma, respectively.

That is exactly the transformation of the legitimacy problem in a proceeding problem, and the consequent absorption of the legitimacy by the legality is what will be the theoretical base so that HANS KELSEN[22] can lapidate the Weberian theory, as seen in the following topic.

2. The legitimacy for Hans Kelsen

KELSEN seeks, with the pure theory of law, to develop a juridical theory "... purified of every political ideology and every element of the natural science"[23]

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above described, where the content of the moral values and justice are considered conventional (therefore contingent) and not pre-existent or decurrent of the reason (perpetual and necessary), as the juridical naturalists sustained: "How does HOBBES get to this radical conclusion? HOBBES is deductive and, as all the deductive ones, for him what counts is that the conclusion comes off strictly from the premises. (...) Well, the fundamental right that helps the men in the nature state is deciding, each one according to their own desires and interests, what is fair or unfair, what makes the nature state does not have any criterion to do this distinction, besides the free will and the individual's power. In the passage from the nature state to the civil state, the individuals transfer all their natural rights to the sovereign, besides the right of deciding what is fair or unfair and, therefore, from the moment the civil state was constituted, the only criterion of what is fair and unfair is the sovereign's will. This Hobbesian doctrine is linked to the conception of the pure conventionality of the moral values and therefore of the justice, according to which there is not fair by nature, but only fair in a conventional way (also for this aspect the Hobbesian doctrine is the antithesis of the juridical naturalist doctrine). In the nature state there is neither fair nor unfair because valid conventions do not exist. In the civil state fair and unfair live in the common agreement of the individuals of attributing to the sovereign the power of deciding the fair and the unfair. Therefore, for HOBBES, the validity of a rule of law and of its justice is not different, because the justice and injustice are born together with the positive law, in other words, concomitantly with the validity. While in a nature state there is no valid right, as either there is justice; when the State appears the justice is born, but it is born concomitantly with the positive law, that is why where there is no law there is no justice and where there is justice it is because there is a constituted system of positive law" (BOBBIO, Norberto. **Teoría general del derecho**, 2. ed. Translation by Jorge Guerrero R., Bogotá: Temis, 3. reimpressão, 1999, p. 31-32).

[22] KELSEN can be inserted in the line denominated normativism, which, according to JOÃO MAURÍCIO ADEODATO, "enlarges the borders of the legalism of the juridical dogmatic school, taking the attempts of logical analysis of the social order ahead, just as the 'jurisprudence of the concepts' had made in Germany. For that he also refuses the traditional concept of legality (inspired in Rousseau) as guardian of the legitimacy against the risks of an arbitrary power. The legality starts to be put beside the legitimacy, as different ways to justify the effective power. Here, the logical formula is not taken only from the law, the perspective is inverted: it is of a logical axiom that the law takes its basis of legitimacy from what Kelsen denominated 'fundamental rule' (Grundnorm)" (ADEODATO, João Maurício. **A legitimação pelo procedimento juridicamente organizado: notas à teoria de niklas luhmann**. *In*: Ética e Retórica: Para uma Teoria da Dogmática Jurídica. São Paulo: Saraiva, 2002, p. 60).

[23] KELSEN, Hans. **Teoria pura do direito**, prefácio à 1 ed., p. XI.

elements and to elevate the juridical order to a "... genuine science, from a science of the spirit." [24]

In his search for a pure science, he circumscribes his study object, which is the law, isolating it from any external influences. The law that HANS KELSEN analyzes is then a law totally separate from the morals and the politics and, therefore, it deserves an absolute autonomy.

The concept of legitimacy built by WEBER is easily absorbed by the pure theory of law, giving autonomy to his study object (the law) and making possible the explanation and justification of its dynamism. The positivist theory of KELSEN takes the Weberian concept to its limit, but ends up revealing some distortions.

KELSEN defines the principle of the Legitimacy as the "... principle that the rule of a juridical order is valid until its validity expires in a certain manner through this same juridical order, or even until it is substituted by the validity of another rule of this juridical order... "[25]

Once more the problem of the legitimacy of a legal system is placed into the question of the proceedings. Moreover, in the definition of KELSEN, the proceeding is clearly inside the juridical order, because it should necessarily be determined by it. It is observed that the legitimacy is compared to the legality: everything that is legal, that is, that executes the certain proceeding for the juridical order, is also legitimate.

KELSEN notices, however, that the concept of legitimacy is only applied in a stable juridical order[26], what makes him examine the limiting situation of a revolution, where the instituted power is subdued and substituted by the revolutionary power, being able to modify the constitution, or even to substitute it.

In that situation, the author observes that, the fundamental rule, which is the validity base for all the others is substituted by a new one, modifying, therefore, the validity base of the whole juridical order. If the new constitution modifies the

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[24] KELSEN, H. Idem, ibidem.
[25] KELSEN, H. Op cit., p. 233.
[26] It should be observed an inversion of the initial problem that WEBER intended to solve when defining the legitimacy as the probability of conservation of a certain type of dominance. With the shift of the problem to the question of the proceedings, KELSEN ends up affirming that his concept of legitimacy is only applied to a stable jurisprudence. Then, the Weberian concept begins to face problems.

proceedings through which valid rules are produced, the question of the rules that had been produced under the aegis of the old constitution appears, but they continue being valid, because, as it happens in general in those revolutions, great part of the juridical building is intact.[27]

The answer to that question is given in the following way: there is just a change in the validity base, the old rules continue with the same content, but under a new validity base, the new constitution.

When ascertaining the possibility of coexistence of rules produced under different proceedings (under basis of different validities) and the possibility of the termination of rules by the mode determined by juridical order different from the one that had instituted the same rules, it becomes impossible to sustain that the legitimacy is exclusively linked to the proceeding.

KELSEN then sees himself forced to introduce a new element, limiting of the principle of legitimacy above described: the government's effectiveness[28]. Then

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[27] According to JOÃO MAURÍCIO ADEODATO, the thought of KELSEN has opened the doors for a realistic posture, because the "...theoretical consequence of the axiologic neutrality attempted by the normativist positivism, from which Kelsen was the example here, was not delayed. The political power already starts to nominate something that is valid because it has a function in the structure of the system, provoking the identification between validity and functionality: everything that works is valid, and power is everything that makes people obey. So, violence also starts to be considered a form of power. The legitimacy is not derived from what is legal or from the vertical compatibility of juridical rules, but from the simple obedience: everything that it produces is power - and legitimate. Identified the concepts of effectiveness and legitimacy, this starts to be deduced from the ability of the power in settling the eventual conflicts and avoid crises in the social environment, in other words, the legitimacy assumes a merely ideological 'content' and a character only instrumental. It is seen that the contemporary realism goes far away than the normativism of Kelsen in the attempt of emptying the concept of legitimacy of some content" (ADEODATO, João Maurício. **A legitimação pelo procedimento juridicamente organizado: notas à teoria de niklas luhmann**. *In*: Ética e Retórica: Para uma Teoria da Dogmática Jurídica. São Paulo: Saraiva, 2002, p. 61).

[28] As MÁRIO G. LOSANO adduces, the "...pure theory of the law has as object the normativity, not the reality: it was with that argument that Kelsen rebutted the critics that were driven to him by the sociological theories. However, the pure theory of the law also takes into account the reality when it should define its main object, in other words, the validity. It was already said that for Kelsen the validity of the rule and its existence in the juridical sense are the same thing. Kelsen bases the existence of the rule in the juridical sense using neither the reality nor the value, but the 'must-be' (Sollen), obscure concept of Kantian origin that is not possible to illustrate here. The world of the nature is the world of the 'be'; the world of the law is the world of the 'must-be'; therefore, the pure jurist should just be in charge of this last one, without reaching the borders of the first (that is for the specialists of the natural sciences). The 'must-be' permeates the juridical order and, consequently, it is the basis of the validity of all its rules of law: in other words, the validity of a rule of law is ascertained being ascertained that it belongs to a certain order. A juridical order, for Kelsen, is built by hierarchical degrees, where the validity of the inferior is inferred from the superior, in a process of validity delegation (in other words, of the 'must-be') that goes down from the constitution to the law and from the last to the sentence. After building that hierarchical structure to maintain the distinction between the world of the 'be' and the one of the 'must-be', the pure theory of

the acknowledgement that "... the effective government, that, based in an effective Constitution, establishes general and individual effective rules, is the legitimate government of the State."[29]

The legitimate dominance, in that conception, becomes then to be the effective one, and consequently, the proceeding will only exercise its role of legitimizing the juridical order starting from the moment that it is founded in an effective power (legitimate and effective).

What can be ascertained from the Kelsenian construction of the legitimacy concept is an inversion of the problem proposed by WEBER. It proposed a typology of the dominance that used as basic criterion the different legitimacy classes, being that the probability of maintenance of a certain dominance type.

In the case of legal dominance, the base of the legitimacy is pointed as being of rational and identified disposition as *the faith in the legality*. For that faith to exist it is necessary a proceeding that identifies what is and what is not legal. Then, the problem of what is legitimate is switched to the question of the proceedings that allows that identification.

KELSEN starts from that notion to affirm the legitimacy of an autonomous legal system. However, when he takes that reasoning to a limiting situation (a revolution), the proceedings do not work as a legitimation factor anymore.

On that exact moment the legitimation factor becomes the effectiveness of the instituted power, and it is from that effectiveness that the legitimacy of the new

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the law faces a difficulty: the coherence with its methodological presupposition of purity is irreconcilable with the juridical reality that it wants to describe. Actually, for a rule of law to be valid, it must be also effective: in other words, the respect is not enough to certain formalities in the establishment of the rule, but it is necessary that, in fact, the rule established is also indeed applied. Kelsen is forced to admit that 'as much a juridical order as a whole as an isolated rule of law, they lose the validity when they stop being effective'. In other words, to answer the question from which he builds all his theory (in other words, which are the formal presuppositions for the validity of a rule of law), Hans Kelsen needs to resign the rigorous separation between the natural world and the normative world, between 'be' and 'must-be'" (LOSANO, Mario G. *In*: italian edition preface, KELSEN, Hans. **O problema da justiça**, p. XVIII-XIX).

[29] KELSEN, H. Obra citada, p. 234. That is one of the points of the theory of KELSEN that suffered the most contusing critics, which were denominated by MÁRIO G. LOSANO as immanent critics (cf. LOSANO, Mario G. *In*: italian edition preface, KELSEN, Hans. **O problema da justiça**, p. VII-XXXIII). (KELSEN, H. Op cit., p. 234.

power and the subsequent restoration of the legality come[30]. It is important to notice that the legitimacy, in the formal sense that WEBER gives to it, stops being the factor that generates the stability of the dominance to become a consequence of that stability that, ultimately, is a result of the effectiveness of the political power.

With that distortion the concept of legitimacy created by WEBER and reaffirmed by KELSEN becomes too narrow to understand the juridical phenomenon that characterizes the modernity.

It is necessary to look for a wider concept, capable of accomplishing that task. It is exactly that that HABERMAS searches, as it is inferred from his critic to the Weberian concept, whose outlines can be located in the *Theory of the Communicative Action*[31], as it will be seen next.

3. The Critic of Habermas to the Positivist Concept of Legitimacy

HABERMAS, in his *Theory of the Communicative Action*, makes an analysis of the thought of WEBER, guided by the theory of the social rationalization. More than an analysis, the chapter dedicated to the Weberian thought is a *dialogue* where HABERMAS identifies certain deficiencies and incongruities. In that dialogue HABERMAS makes a vehement critic to the concept of legitimacy that WEBER attributed to the legal dominance.

That concept that, as seen above, is fundamental for the faith in the legality, originates the conception that the legitimation of the modern law happens through the proceedings. HABERMAS points to a paradox in that conception: "The faith in the legality can only create legitimacy if the legitimacy of the juridical order that determines what is legal is supposed beforehand."[32]

When pointing that contradiction, HABERMAS is questioning the legitimacy of the proceeding itself, because the "...faith in the legality of a proceeding

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[30] TERCIO SAMPAIO FERRAZ JR. assumes, in his pragmatic theory of the validity, a change of the validity pattern describing an oscillation between the pattern-legality and the pattern-effectiveness: "... The pattern-effectiveness is in use when a new rule-origin appears. Since then, the pattern-legality returns" (FERRAZ JR., Tercio Sampaio. **Introdução ao estudo do direito: técnica, decisão, dominação**, p. 192). That pattern change is similar to the question asked by KELSEN, mentioned above. However, KELSEN does not admit a pattern change, but just a limitation of the principle of legitimacy.

[31] HABERMAS, Jürgen. **Teoría de la acción comunicativa**. Madrid: Taurus, 1987.
[32] HABERMAS, J. Op. cit., p. 343.

cannot engender legitimacy *per se*, that is, for the simple virtue of the proceeding correction of the positive order."[33]

However, base the legitimacy of the law in the proceeding does not solve the problem, just moves it to the proceeding. The question continues to be what gives legitimacy to the *legitimating proceeding*[34]. This is the question HABERMAS comes across when intending to analyze the problem of the legitimacy of the modern law.

When trying to identify why WEBER makes this mistake, HABERMAS finds only a possibility: WEBER appeals for a secondary tradicionalization of the proceeding, not considering the rational presuppositions materialized in the institutions. In spite of being conscious that there are rational basis in the institution of the proceedings, WEBER puts those basis in suspension, believing that, once the proceeding exist, people no more worry about its rational basis and it becomes a type of tradition.

For HABERMAS, even in those cases where the proceeding is under a *tradicionalization* effect, what gives the legitimate character to a legal decision is the trust in the rational basis underlying the legal system as a whole. Like this, the question of the rational basis remains, that, for the theoretical of the communicative action, permeates the whole modern law.

It is exactly rethinking the question of the rational basis that HABERMAS will try to build a new legitimacy concept. A wider concept, capable of understanding the totality of the phenomenon, leaving aside the addictions and positivist biases that ended up taking, according to him, to mistaken interpretations that justified them.

HABERMAS sketches his concept of legitimacy, although in an unfinished way, in a work entitled *¿Como es Posible la Legitimidad por Via de la Legalidad?*[35], where he defends the theory that the modern law is not disconnected of the morals and the politics. Contrarily, it is in the relation with the morals, limited by its

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[33] HABERMAS, J. Idem, p. 344.

[35] HABERMAS, Jürgen. **¿Como es posible la legitimidad por via de la legalidad?** *In*: Revista Doxa n. 5, 1988.

relation with the politics, which is the legitimacy of the positive law, characteristic of our society.

To build this complex of relations, HABERMAS starts from an analysis of the pre-modern law, in which he identifies the coexistence of a sacred law and a profane law. The sacred law is the factor that legitimates the decisions. Therefore, the prince can only act within the extent in which is legitimated by the sacred law. It was unconditioned and based on the faith in religious images of the world, which dominated the pre-modern structures of conscience.

That coexistence of the profane law and the sacred law shows an internal tension of the law: the one between its instrumental character and its non-instrumental character. The instrumental character of the law concerned the profane bureaucratic law, and was used as means to reach political objectives. The non-instrumental character was found in the unconditionality of the sacred law, presupposed in the judicial regulation of the conflicts by the bureaucratic law.

However, when the phenomenon of the positivation of the law happens, the religious images of the world are already reduced to persuasions of subjective disposition. That invalidates the sacred law as the support of a profane law, more and more complex and, starting from it, in constant mutation. The law is without that character of unconditionality that gave legitimacy to the responsible political power for instituting it.

In that situation, so that the law is not reduced to the imposition of a sovereign's charges (reduction protected by all the followers of HOBBES), what would take its absorption by the politics and the consequent decomposition of the concept of politics, it is important to look for another legitimacy basis to be capable of assuring that moment of unconditionality that existed before. That is the search that HABERMAS intends to do. Only like this the law can maintain the character of obligation that before was given to it by the authority of the sacred law.

HABERMAS starts his search for the basis of the modern law observing that, only when conventional morals appears (where the law rules are previous, independent on the situation and linked for everyone), it becomes possible the appearance of an organized political power through a coercive law. That can happen because, according to HABERMAS, only when the power in fact receives a normative

authority given by a law rule and that has this moral and conventional character (and it is on that moment that it becomes legitimate) it can impose rules of law politically.

That makes HABERMAS conclude that the basis of the modern law can only be in its relation with the morals: "... that moment of unconditionality that, including the modern law, constitutes a counterbalance to the political instrumentalization of the law, is due to the interlacement of the politics and the law with the morals"[36]. It is not a matter of traditional morals, founded in a mythical interpretation of the world, but of conventional autonomous morals, that presents its own rationality.

In that sense, the rational natural law, overcame in the century XIX due to the complexity that the modern society reached, was the first attempt of building that interlacement between post-traditional morals[37] and the law, linking it to the beginnings of that and putting it on the backdrop of a procedural rationality (the social contract is nothing else that a hypothetical proceeding that morally justifies the power exercised through the positive law).

The key of the concept of Habermasian legitimacy lives in the procedural rationality of a practical-moral reason: "This demands that we distinguish between rules and principles and justificatory proceedings, proceedings according to which we can analyze if the rules, to the light of the valid principles, can count with the assent of all."[38]

That practical reason has as nucleus the idea of impartiality. The legitimacy of the law can only be obtained through proceedings that assure the impartiality of the opinions (in the case of the application of the rules) and of the will (in

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[36] HABERMAS, J. Idem, p. 25.

[37] What HABERMAS considers as post-traditional morals is the autonomous morals, governed by an own criterion of rationality and fruit of the disenchantment of the images of the world described in the theory of the social rationalization of WEBER. According to this author the evolution of the religious images of the world takes to the autonomy of three spheres of rationality governed by independent criteria: the cognitive-instrumental sphere, the practical-moral sphere and the aesthetic-expressive sphere. About it see the analysis that HABERMAS does concerning the thought of WEBER in the theory of the communicative action.

[38] HABERMAS, J. Op. Cit., p. 29.

the case of its production) through an argument that justifies and find the rules.[39] Those proceedings should be institutionalized in the positive law, allowing moral discourses.

At this point we can ask the following question: supposing the application of that procedural justice so that there is the production of rules according to the criterion of the impartiality, why those rules need then to be institutionalized in the form of juridical rules? Would not it be enough to be just moral rules? HABERMAS answers that question with the acknowledgement that the post-traditional morals have a motivational deficit, in other words, the autonomous morals lacks that connection with the concrete edacity characteristic of the traditional morals.

So, the agents of a given society can rationally identify (always according to a practical reason) the rules that follow the proceeding, but these do not have that motivational strength that impelled them to accomplish in practice their moral judgments. The rules start to be demandable only as those that follow them expect that all the others also act in its accordance.

There is the need of the juridical institutionalization. To guarantee the general application within a deadline of the rules relative to important functional problems and resolution of conflicts and matters of social importance, it is necessary the positivation of that rule by a political power capable of coercively assuring it. Only this way the insecurity problems generated in a complex of purely moral rules can be avoided. In this sense, the law complements the morals, correcting its motivational weakness through coercion.

When demanding a political power to institute it, the law shows its other face: its instrumental character. The political power uses juridical rules, justified and based through a discourse that mixes moral and political arguments, to reach political objectives. Therefore, HABERMAS affirms that "... the law is located between politics and morals."[40]

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[39] Cf. HABERMAS, J. Idem, p. 39, where the theories of justice of JOHN RAWLS are analyzed (cf. RAWLS, John. **Uma teoria da justiça**. Translation by Almiro Pisetta, Lenita M. R. Esteves, São Paulo: Martins Fontes, 1997), KOHLBER and K. O. APEL - denominated procedimental theories of the justice - the ones which, when dealing with the theme of the elaboration of the proceedings as basis of impartiality of the rules, represent, according to HABERMAS, serious proposals that allow the practical analyze of questions from a moral point of view.

[40] HABERMAS, J. Idem, p. 42.

As it was sketched, more than a mere complementation of the morals with the law, HABERMAS defends an interlacement between them. This is verified by the observation that there is space in the positive law for moral arguments that justify and base it. There is the migration of morals purely procedural (without normative content) for the inside of the law.

In that context, both (law and morals) are limited through mutual proceedings. The juridical proceedings leave a certain space so that the moral discourse is accomplished (made to the light of valid principles that justify and base the rules), fundamental for its legitimation. However, that space is modeled by the politics. The political fights determine how much of that space is occupied by a moral discourse and how much is occupied by functional requirements that rise the moral principles. Finally, the legitimating relation between law and morals is regulated by the politics that also end up depending on that relation, because from it the political power extracts its legitimacy.

With that relation among morals, law and politics, HABERMAS gets to the "... idea of a State of Law, with division of powers, that extracts its legitimacy from a rationality that can guarantee the impartiality of the legislative and judicial proceedings".[41] That idea works as a critical *standard* that allows the assessment of the constitutional reality, once it "... is not limited to abstractly oppose to a reality that does not correspond to it. Before everything the procedural rationality (...) constitutes (...) the only dimension that remains in which it is possible to assure to the positive law a moment of unconditionality and an immune structure of contingent attacks."[42]

When facing the law as a system open to procedural questions of moral stamp and deeply influenced by the politics, HABERMAS brings to the center of the juridical reflection questions that the positivist jurists believed not to be their responsibility. It goes even beyond, raising controversies that the positivists thought to have solved. HABERMAS rises, therefore, the controversies of the justice, of the democracy and of the autonomy of the law.

The question of the justice, from the advent of the juridical positivism, was relegated to the moral philosophy, but with HABERMAS it is brought to the center

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[41] HABERMAS, J. Idem, p. 37.
[42] HABERMAS, J. Idem, ibidem.

of the question of the legitimacy. It is through the procedural justice of moral character, with its nucleus founded in the idea of impartiality that HABERMAS believes to be possible to guarantee to the modern law its authority and, consequently, its obligation character.

The modern jurist, when involved with the application and production of rules, under penalty of making the law susceptible to contingent attacks, should always be concerned with the accomplishment of these proceedings of *impartial collective decision making*. Having in view the difficulties of theoretically conceiving a proceeding that assures that impartiality in the current complex societies, and later, of applying it in those societies, this is the big challenge for the jurist today: to be always questioning the rational proceeding through which the basis and justification of the rules happen. That proceeding should be always open to rational critics through the discourse and, therefore, it is continually being rebuilt by the participants of the discourse.

Here comes a second question for which HABERMAS gets the attention: who are the participants of the discourse? That is the controversy of the democracy. When the theoretician of the communicative action gets to the conclusion that the basis of the modern legitimacy lives in procedural morals, he consequently demands the participation, in some way to be defined by the proceedings, of those that will be influenced by the rules created or applied. But there are no previous criteria, so that only with the participation of everyone in the discourse the impartiality that the practical reason demands can be guaranteed.[43]

Under that focus the following question rises: to what extent the modern democratic proceeding, based on pillars as the rule of the majority and the political representation, gets to execute the legitimacy presupposition presented by HABERMAS? That makes us to rethink the form of the individuals' participation in a democracy. How to guarantee that *discursive formation of the collective will*?

Those two questions represent a range of very complex problems that appear when settling down a connection among law, politics and morals. Besides, they

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[43] "The basis of the system of rights (fundamental rights and positive rights), with the aid of the principle of the discourse, can be explained starting from the principle of the democracy, form that assumes the argumentative intersubjectivity, in the discourse of legitimation of rights, expressed as: 'D: the action rules are valid when all the possible ones reached could give they assent, in the quality of participants of rational speeches" (LUDWIG, Celso Luiz. **Razão comunicativa e direito em habermas**, p. 10-11).

reintroduce the problem of the autonomy of the law in other terms. If it is not possible to characterize the law as a closed system anymore, the concept of autonomy of the legal system defended by the positivists is weakened, what stipulates an independence of the law to any external factors. Where is the autonomy of the law? Or would it stop being autonomous?

HABERMAS' proposal is that the autonomy of the law is exactly in its interlacement with the morals and politics. It is that relation among the three fields that gives the law the possibility to be autonomous. That is what impedes the juridical phenomenon to be dissolved either in pure moral considerations, or in pure political imposition. Therefore, HABERMAS says, "...autonomous is a legal system, only as the institutionalized proceedings for the legislation and the administration of justice guarantee an impartial formation of the will and the opinion, and through it, allow that an instrumental rationality of ethical type is introduced, in the law and in the morals. There is no autonomous law without accomplished democracy".[44]

With those considerations concerning HABERMAS' thought on the phenomenon of the legitimacy, it is seen that the problem of the morals is far away from being something that does not deserve the jurists' concern, as it intends - or intended - the juridical positivism.

Final Considerations

HANS KELSEN'S thought is influenced by KANT, WEBER and by the neopositivism of the Vienna Circle, in which, in fact, he had a seat before exiling in the United States of America. From the neopositivism he takes the idea that the science should be neutral, what takes to the search of a methodological purity based on the absence of opinions of value[45] and on the systematic unit of the science, in other words,

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[44] HABERMAS, J. Op. cit. p. 45.

[45] MÁRIO G. LOSANO, when pointing out some objections to the thought of KELSEN, demonstrates that the fundamental rule is not a Kelsenian rule, fact directly linked to the limits of the pure theory of the law in its relation with the world of the values. According to LOSANO, "Hans Kelsen affirms that the pure theory of the law has as object the normativity, not the reality, and with that argument rebuttes the critics that were driven to him by the juridical naturalist theories. However, if we go back through the whole hierarchical structure of the rules that delegate validity to each other, we will get to the fundamental rule, in other words, to that where the Kelsenian construction is based: it is the first source of the validity of the whole juridical order. Kelsen, however, should admit that it is not a juridical rule in the sense defined by the pure theory of the law. For that, in fact, just the rules stated by the legislator are juridical; the

the notion of science in the thought of KELSEN is based on the philosophical presuppositions of the Neokantian school.

With effect, besides the rejection of the opinions of value, the general conception that HANS KELSEN has of the science and its delimitation of the juridical science are responsible for the idea that each science should constitute a whole methodologically unitary and, therefore, that the object of the science is determined, before anything else, by its method, in other words, by its way to observe and understand things.

That assertion is understood in the sense that the science does not describe entities as they are, but that the object of the scientific system is constituted by the angle of view that is defined by the way that the problem is formulated and dealt. Science, therefore, according to that Neokantian terminology, is a whole ordered, a cognition system corresponding to the formulation of the problem. The central element of the science is, therefore, for KELSEN, the method, not the object; the scientist, like this, seeks the construction of a formal theory, not substantial.

The pure theory of law is a theory that intends only and exclusively to know its object. It tries to answer this question: What is and how is the law? It does not matter to him knowing how the law should be or done. It is juridical science and not law politics, in other words, the matter are the commands of must-be contained in the rules that, once valid, should be recognized independently of their contents or of the fact of being or not observed by their addressees. In that same line of thought the justice

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fundamental rule, differently, 'should be presupposed, since it cannot be imposed by an authority, whose jurisdiction should rest on still higher rule'. The game of words does not solve the problem: if the fundamental rule is not a positive rule of law, it is something that the jurist accepts with base on his evaluation of justice or of opportunity, in other words, based on a choice that, for Kelsen, is not scientific because it is irrational (or better, subjective). If, however, the fundamental rule is gnoseologic to close up in an unitary system the several normative levels, we are facing a theoretical element (belonging to the world of the nature, of the 'be') that conditions the existence of a rule (belonging to the world of the law, of the 'must-be'); passage that Hans Kelsen considers irreconcilable with the presupposition of methodological purity. However, answering to his opponents,... Kelsen had pointed without hesitating to the columns of Hercules of the whole juridical theory, the extreme border of the law, beyond which a different world opens up: 'The problem of the natural law is the eternal problem of what is behind the positive law. And who seeks an answer will find – I am afraid - neither the absolute truth of metaphysics nor the absolute justice of a natural law. Who lifts that veil without closing the eyes sees himself staring at the power of Gorgona'" (LOSANO, Mario G. *In*: italian edition preface, KELSEN, Hans. **O problema da justiça**, p. XIX-XX).

is seen as an irrational idea impossible of being objectively taken by the juridical science.

For KELSEN, in fact, the only possibility to speak objectively in justice would be comparing justice to legitimacy: "In that sense, the 'justice' means legality", taking from it the formal rule of the justice, according to which it is "'fair' that a general rule is applied in all the cases in that, in agreement with its content, this rule should be applied. It is 'unfair' that it is applied in a case, but not in another similar case. And that seems 'unfair' without taking into account the value of the general rule, being the application of this the point in question here. The justice, in the legality sense, is a quality that does not link with the content of a juridical order, but with its application."[46]

Due to those considerations, it was seen that the thought of WEBER in what refers to the idea of legitimation by the proceeding was revealed entirely compatible with the ideas of KELSEN, from where one can deduce that something is fair as it is legal; and it is legal as it is legitimate; and it is legitimate as it observes the proceedings.

However, as it was observed starting from HABERMAS' critics, the problem of the legitimacy was just moved from the legitimacy to the proceeding: what makes the proceeding a legitimate way to establish laws?

With that question HABERMAS changes it totally, a kind of normative *turn*, and he argues that the legal institutional disposition (legitimacy) creates, in modern societies, the legitimacy of the order, assuming it fulfils certain democratic criteria. The

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[46] KELSEN, Hans. **Teoria geral do direito e do estado**, p. 20. Notice that what is called equality in the law does not mean anything else except the application of the law in accordance to itself, it means, "... correct application, whatever is the content of the law. The equality in the law is not, therefore, equality, or else accordance to the rule" (ABELLÁN, Marina Gascón. **La técnica del precedente y la argumentación racional**, p. 57). That interpretation of the thought of KELSEN is also given by CELSO ANTÔNIO BANDEIRA DE MELLO: "With effect, Kelsen well demonstrated that the equality before the law would not have any peculiar significance. The relevant sense of the isonomic principle is in the obligation of the equality in the own law, it is worth to say, understood as a limit for the law. That is why he registered the following: 'To put (the problem) of the equality before the law, is simply to put that the organs of application of the law are not entitled of taking into consideration nothing except the distinctions made in the law to be applied, what is reduced to simply affirm the principle of the regularity of the application of the law in general; principle that is immanent to every jurisprudence and the principle of the legality of the application of the law, that it is immanent the all of the laws - in other terms, the principle that the rules should be applied according to the rules.' (Teoria Pura do Direito, french translation of the 2º german edition, by Ch. Einsenmann, Paris, Dalloz, 1962, p.190)" (MELLO, Celso Antônio Bandeira de. **Conteúdo jurídico do princípio da igualdade**, note 2, p. 10). (KELSEN, Hans. **Teoria geral do direito e do estado**, p. 20).

legitimacy depends on the legal order, on the discursive law and on the institutionalized democratic power. For that order to have be valid and be indeed legitimate it needs to have elaborated their laws (constitution, legislation); the rules of its application (public administration); and the forms of control (judiciary), through the argumentative ways that characterize the theoretical, ethical and practical discourses.

The democratic criteria mentioned by HABERMAS would never accept, for instance, a social order as the German Nazism. In opposition, that disposition would be considered legitimate in the Weberian sense for being an order where there was the affective adhesion of most of the Germans to ADOLPH HITLER'S regime, everything in consonance with the foreseen proceeding.

With effect, under the point of view of the thought of WEBER, the legality of the social order imposed by the Nazi party starting from its ascension to the power in 1933 - especially regarding its anti-Semitic posture and the imposition of discriminatory rules - that reformulated the laws of the Republic of Weimar basing on a legal system based in the law and guaranteed by the government, it would be recognized as totally legitimate, because WEBER would not have rational arguments to contest that social order.

In consideration, HABERMAS builds arguments capable of denying legitimacy to orders as the Nazi, although he has observed the proceedings for the production of laws. According to HABERMAS, the Nazi social order can even be factual (legal and legitimate), but it would never be valid, because a social order will only be able to be considered valid if, and only if, their rules and laws are democratically elaborated, with the involvement of every citizen and every party interested.

So, the Nazi regime, in HABERMAS' thought, would not be considered valid because its rules and laws were not able to – from the moral and rational point of view - be considered fair and correct for everyone and by everyone, as, although the criterion of approval was observed for the majority, what would have been approved was exclusion of participants of the discourse, what is not admitted, because democracy only takes place with the effective participation of the minorities and the respect for their opinions, under penalty of becoming the dictatorship of the majority.

Before the demands that this perspective contains, HABERMAS recognizes that there is not yet, at the present time, any effective social order that has

validity in the discursive sense that is attributed to him by his thought. In other words, the effective democratic societies, that with no doubt are factual, they still do not fulfill all of the democratic criteria, all of the discursive and rational principles demanded to constitute a normative disposition.

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