

**POLITICS, CONSTITUTION AND NOMOS: The Constitutional Theories of  
Schmitt and Arendt**

**Daniel Capecchi Nunes<sup>123</sup>**

**ABSTRACT**

The present article aims to analyze and, subsequently, to compare the concepts of constitutional philosophies from Hannah Arendt and Carl Schmitt. Despite the ideological differences that separate the two authors, the hypothesis of this article is that certain theoretical affinities allow an explanation of the constitutional phenomenon in a political perspective. This perspective is extremely relevant to the current state of the debate concerning the relation between politics and constitution - dominated by a vision which separates and quietens the first. In this sense, in order to set out the discussion, a brief overview is made of their theories and biographies intending to contextualize them in a historical, political and philosophical way. Further, the concepts of "unity", "representation", "identity" and "political", from the work of Schmitt, are compared with those of "power", "freedom", "action" and "common world", from Arendt's theoretical framework. This comparison's purpose is to demonstrate that the authors base their political and constitutional theories in a similar vision of the political phenomenon. Finally, is reached the concept of Nomos, whose meaning allows us to understand the relation between politics and the constitution, in the work of both authors. The aforementioned concept allows the analysis of the political and constitutional order through a dynamic perspective, inserting politics within the constitutional structure and displacing the first to the status of a *conditio sine qua non* for the foundation and existence of the second.

**Keywords: Hannah Arendt, Carl Schmitt, Nomos, Normativism.**

**A POLÍTICA, A CONSTITUIÇÃO E O NOMOS: As Teorias Constitucionais de  
Schmitt e Arendt.**

**RESUMO**

O presente artigo pretende fazer uma análise e, posteriormente, um cotejamento de conceitos das filosofias constitucionais de Hannah Arendt e Carl Schmitt. Não obstante as divergências

---

<sup>1</sup> Graduation Student from Rio de Janeiro State University.

This article was translated by Ana Luiza Calil and authorized for publication by the author in 26/06/2014. This author was invited by the Editorial contribute to this issue.

<sup>2</sup> This article was presented in the *XI Simposio Nacional de Direito Constitucional*, which took place between May 1st – 3rd, in the work group of “Contemporary Constitutional Theory and Philosophy”, being considered, with an honorable mention, the best work in the group.

<sup>3</sup> Dedicatory from the author: this work is dedicated to the Prof. Gustavo Sénéchal de Goffredo who, beyond my professor, is a reason for inspiration, to Tereza Cristina Capecchi, my mother, e à Ana Luiza Fernandes Calil, my love.

ideológicas que separam os dois autores, a hipótese do artigo é que certas afinidades teóricas possibilitam uma explicação do fenômeno constitucional em uma perspectiva política. Tal perspectiva é extremamente relevante para o estado atual do debate acerca da relação entre política e constituição – dominado por uma visão que os aparta e silencia a primeira. Nessa toada, com o intuito de introduzir a discussão, é feito um breve panorama de suas teorias e biografias com o escopo de contextualizá-los histórica, política e filosoficamente. Mais adiante, os conceitos de “unidade”, “representação”, “identidade” e de “político”, da obra de Schmitt, são comparados com os de “poder”, “liberdade”, “ação” e “mundo comum”, do arcabouço teórico arendtiano. Tal cotejamento objetiva demonstrar que os autores fundamentam suas teorias políticas e constitucionais em uma visão semelhante do fenômeno político. Por fim, chega-se ao conceito de Nomos, cujo sentido permite compreender a relação entre política e constituição na obra de ambos os autores. É que o supracitado conceito permite analisar a política e a ordem constitucional através de uma perspectiva dinâmica, inserindo a política no interior da estrutura constitucional e alçando a primeira ao status de *conditio sine qua non* de fundação e existência da segunda.

**Palavras-chave: Hannah Arendt, Carl Schmitt, Nomos, Normativismo.**

## **I) Introduction**

Entonces comprendí que su cobardía era irreparable. Le rogué torpemente que se cuidara y me despedí. Me abochornaba ese hombre con miedo, como si yo fuera el cobarde, no Vincent Moon. Lo que hace un hombre es como si lo hicieran todos los hombres. Por eso no es injusto que una desobediencia en un jardín contamine al género humano; por eso no es injusto que la crucifixión de un solo judío baste para salvarlo. Acaso Schopenhauer tiene razón: yo soy los otros, cualquier hombre es todos los hombres, Shakespeare es de algún modo el miserable John Vincent Moon.

Jorge Luis Borges. La Forma de la Espada.<sup>4</sup>

Before the politician is the darkness - or silence - chaotic wilderness of disjointed relations, which do not find their balance point. Then, coming out of nowhere, an external force sets the limits of a new world. It establishes, in the middle of the non-political desert, an oasis surrounded by delicate walls - recognized in the picture of a new law. It is a decision, constitutive action, which establishes a new living space and sustains amid the constant weathering that reach the walls of the new reality, from then on, the politics.

Gradually, new meanings are being established and a web of relationships unites all men. Promises and oblivion provide the emergence of this new sphere of relations.

---

<sup>4</sup> BORGES, Jorge Luis. Ficciones. 3ª ed. España: Debolsillo Contemporánea, 2012. P. 143

And there will be this same promises and oblivion that will ensure its permanence. While the desert of the non-political is a constant and invasive reality, the public sphere, in other side, emerges as an exception, as a joint effort, whose consequences are absolutely unpredictable.

By using the excerpt from Borges, we argue that from the moment of the foundation, the subjects that previously lived in an apolitical lost desert, and now inhabit a common world, will share the same risks and rewards of being in a collective space. In such a way that the cowardice of one of them will have the power to embarrass everyone else and courage of another can redeem them. Thus, within the walls of the common world "*cualquier hombre es todos los hombres*," each man is all men.

The foundation moment of the juridical-political order and its relation with the subsequent support of this order will be the theme of a great part of the work of the two authors discussed in this article and, therefore, it will also be the object of our study. Both Hannah Arendt as Carl Schmitt demonstrate, in their own ways, a deep concern to comprehend the dimension of the political order, beyond its legal and formal boundaries. The description of the constitution process of the political order and its posterior maintenance will permeate their keys to understand the world. Furthermore, in a sense, the importance of the political subject as a constituent and constituted power founded will be the keynote of most of their questions. Christian J Emdem (2008, p 127), whose ideas are going to be developed in this work, in an excellent exposition, states that

In Both Arendt and Schmitt, then, political can precedes the establishment of legal norms and institutional political order. The freedom inherent in political action creates for Arendt the possibility of the new, unpredictable and unforeseen: political action is "the capacity of beginning something anew". Likewise, for Schmitt sovereignty only exists in a moment of emergency, or exception, that does not conform to previous experience and, as such, cannot be administered technically within the framework of existing law. Indeed, Schmitt's claim that "the legal order rests on a decision and not on a norm" mirrors Arendt's claim for the primacy of political action over any legal or institutional order – it is, after all, through action that freedom come into existence in the public realm

The classic doctrine of Constitutional law considers that the original foundation process would be the justification for the other processes that will result in the existence of the theory of constituent and constituted power, elaborated by Sieyès – theory that sets

the tone for the existence of politics within the constitutional universe. In his classic work, "What is the Third Estate?", the French author categorically asserts the existence of a moment "characterized by the play of individual wills. The [political] association is the work of these wills; they are the origin of all power" (SIEYÈS, 2002, p. 51).

The process, however, is followed by two subsequent phases. In the second, still fraught with politicization, they form a collective will, able to move the collectivity of individual wills as one will. The third and final stage is the exhaustion of the full participation of politics in the existence of the constitutional entities. At this moment, the participation ceases to be conducted directly by the wills and begin to be exercised by a *gouvernement exercé par procuration*.

This new form of government has to be limited by three fundamental ideas. The first is that the community does not give up its will, because it is an inalienable property, it is merely a delegation of it; the second idea is that the group of delegates never will be able to exercise total power, it must always be limited by the boundaries established by the community in order to maintain order and, finally, the group of delegates have not the ability to change the limits of the powers that were given to them by the community (SIÉYES, 2002, pp. 52-54).

It is in the transition from the second to the third phase of the constitution of the political communities that arises the importance of the classical theory of the constituent power that will be responsible to establish the limits in which the constituted power shall act. In other words, the constituent power will set the delegation limits of the power to the group of delegates and, thereafter, limit the exercise of political power (SIÉYES, 2002, pp. 52-54).

Though, after the foundation moment, the explosion of the political light in the apolitical darkness becomes a distant fact, almost mythological. The politics resumes itself to the exercise of the estate activities and the Law, gradually, loses its political nature - despite its absolutely political origin. Epistemologically, Kelsen's legal positivism, in his attempt to create a Pure Theory of Law, will create conceptual tools to scientifically achieve this separation (KELSEN, 2009).

This background is the starting point to our exposition about the theories from Hannah Arendt and Carl Schmitt. The main purpose is to raise the possibility of a larger debate on the position that politics can effectively occupy in its relation, often conflicted, with the Law. In order to do so, it will be analyzed the approach between the categories of “friend/enemy”, “unity”, “identity” and “representation” of Schmitt with the concepts of “action”, “common world” and “power” of Arendt. As the finish line of this analysis, we will analyze which is the role of the concept of “*nomos*”, present in the work of both authors, in the politicization of the constitutional theory.

## **2 Carl Schmitt and Hannah Arendt: an (almost) impossible approximation**

The construction of an association between the theories of Carl Schmitt and Hannah Arendt is not a simple task. As it will be seen latter, their thoughts, bibliography sources and even biographies are separated by an abysm whose bridges we pretend to construct. There are authors that studying their works presents strongly divergent opinions on the fertility of this connection. So, this turns the issue polemic.

However, as it has been already mentioned, the connection point, that would justify the approximation between them, it would be their critical visions in respect to a normative and neo-kantian perspective from politics and, by consequence, of the own law. Christian J. Emden (2008, p.111) does the best description of the reasons that have inspired the elaboration of the present article:

Despite the seemingly obvious differences between Schmitt and Arendt, it is interesting to note that much of the renewed interest in their understanding of the political has been triggered by a growing skepticism with regard to liberal political thought, such as John Rawls’ theory of justice and Kantian models of communicative action and discourse ethics, which both Jürgen Habermas and Ulrich Beck have sought to establish as models for a deliberative democracy with cosmopolitan reach

Moreover, the vision brought by Hans Sluga (2008, p.42) states that Arendt agrees, specifically, with the critic from Schmitt to the normative tradition in the political philosophy. Both gave attention, rather than that, to the analysis of the political concepts.

Thus, our hypothesis is that the use of the two authors who had worried directly to the question of the politics in the Law, in opposition to the traditional normative and neo-kantian perspectives – as, for example, the one from Kelsen – may provide useful tools for political epistemological framework for analyzing the legal phenomenon.

In the foreground, from the biographical point of view, both are separated by positions they occupied in the Nazi Germany. Hannah Arendt was Jewish and lived totalitarian persecution, although she has had time to flee Europe before suffering more serious consequences<sup>5</sup>. Carl Schmitt, in its turn, was an important defender of the national-socialism<sup>6</sup>, being impossible to deny his involvement and his fruitful collaboration, highlighting, yet, his latter seclusion of the center of the political power in the last years of the regime<sup>7</sup>.

Still in the bibliographic perspective, Carl Schmitt did not mentioned Hannah Arendt in any of his most famous works<sup>8</sup>. However, Hannah Arendt, at least three times, mentioned him directly<sup>9</sup>. The first was in 1946, when developing a critic of a book that dealt with the holocaust matter. In this short article, the author considers Schmitt as one of the various intellectuals who have contributed with the regime, but she describes his

---

<sup>5</sup> On an interview in which she speaks about many details of her personal life, Hannah Arendt speaks a little about her first impressions of the nazism and the way she reacted to it: ARENDT: I intend to emigrate anyhow. I thought immediately that Jews could not stay. I did not intend to run around Germany as a second-class citizen, so to speak, in whatever form. In addition, I thought that things would just get worse and worse. Nevertheless, in the end I did not leave in such a peaceful way. And I must say that gives me a certain satisfaction. I was arrested, and had to leave the country illegally – I will tell you how in a minute – and that was instant gratification for me. I thought at least I had done something! At least I am not “Innocent”. No one could say that of me!”. (ARENDR, 2005, p. 5).

<sup>6</sup> A brutal example of this involvement can be found in the text "The Führer protects the legal order" given by the author in defense of Hitler speech. It is in this direction that he says: "The Führer protects the right of the worst abuse, when he at the moment of danger creates the right unmediated, under his leadership (Führertum) and as Supreme Judge: (Schmitt and cites Hitler) -" In this hour I was responsible for the fate of German nation and thereby the supreme judge of the German people. The true leader (Führer) is always also a judge. "Leadership (Führertum) exudes the judiciary (Richtertum). Who wants to separate both or even oppose to them transforms the judged in the counter-leader (Gegenführer) or in an instrument of the counter-leader and seek to paralyze (aus den Angeln heben) the state with the help of the judiciary. Here is a method often experienced the destruction not only of the state but also of the legal order" (SCHMITT, In MACEDO JR., 2011b. p. 178).

<sup>7</sup> After the war, Carl Schmitt justified his position as that of Captain Benito Cereno, Melville's character. He was a captain who commanded a slave ship called St. Dominick, during the course of the journey, the slaves dominated the vessel and forced the captain to sail it Cereno, even against their will. According to Carl Schmitt, this would be his relationship with the Nazi party during the war. See, i.e., AGAMBEN, Giorgio. *Un Giurista Davanti a se Stesso*. Italia: Neri Pozza, 2011. p. 11

<sup>8</sup> In the literature, there is mention of an article of Schmitt in which he mentions Arendt, as informs Christian J. Emden (2008, p. 112). However, it was impossible to verify the veracity of this information, in view of the bibliographic and linguistic difficulties involving the abovementioned text.

<sup>9</sup> It should be done a short note on the Eichmann in Jerusalem, in which she refers to one of the defense assistant of Eichmann as a Schmitt disciple. See ARENDT, Hannah. *Eichmann in Jerusalem: a report on the banality of evil*. United States of America: Penguin Books, 2006. p. 145

role as something smaller and, then, as the other intellectual collaborators, he should be studied deeply in the period before the Nazism (ARENDR, 2005, p. 201).

Latter, in her work “Origins of the Totalitarianism”, she takes a similar direction of the article published in 1946, mentioning Carl Schmitt as one of those intellectuals that facilitate the Nazism’s development, but that could not be responsible for it. Furthermore, the author comments on Schmitt

It should be studied in details the career of German erudits (...) Valeria a pena estudar em detalhe a carreira dos eruditos alemães, comparativamente poucos [em relação aos soviéticos], que foram além da mera cooperação e ofereceram seus serviços por serem nazistas convictos. (...) Interesting is the case of Carl Schmitt, whose genius theories on the end of democracy and the liberal regime still constitute an impressive reading (ARENDR, 2012b. p. 561).

In this context, Hannah Arendt wanted to relief the guilty of those persons who she named “elite members”, whose work would have been important to the strength of the totalitarianism. In the author’s perspective, the domination structure would have its origins in the underground course of European history and the responsibility for the spread and inspiration of those movements could not only be attributed to any intellectual. This would be the case of Carl Schmitt.

Other notable mention is in “What is freedom?”, text from 1960, in which she discusses relevant matters concerning the concept of action and freedom, in her opinion contrary to the sovereignty as a single will. In Arendt’s opinion, that vision would be completely wrong, because it would exclude the plurality inherent to the exercise of the politics and would transform the relation of the citizens in an archipelago in opposition to its net nature. (ARENDR, 2000, P. 460)

Philosophically, the approximation of the two have to be done with a serious of reservations, as, without ignoring the contact points that we seek to deepen in this work, it is possible to affirm that both are found in almost opposite sides in the political perspective. While Arendt values the role of the individual and reaffirms its indispensability in the formation of politics, Schmitt transforms politics in a homogenizing binary structure – composed by the concepts friend/enemy.

Lastly, it is important to note that Hannah Arendt writes in a world that tries to recuperate from the horror of World War II and lives sorely the Cold War for as much as

Carl Schmitt writes the most part of his work on the remaining sharps of Weimar Republic, being present in the establishment of the basis of the Third Reich and its ascension. Between the manner of the two to live and to comprehend the world, there is an evident disruption, whose extension, many times huge, is seek to be overcome. ,

Thus, we must clarify that our analysis of the theory of Carl Schmitt will be done obliquely, in such a way that the use of his writings will have scope to approach Hannah Arendt from the legal debate without, however, lead to the ultimate consequences his decisionist reflections. Metaphorically, Carl Schmitt will make concessions regarding some of his premises to turn possible and fruitful the debate with Hannah Arendt.

### **3 Action and Common World in Arendt**

To speak of politics as politics, to speak of politics as speech concerned with the creation or perpetuation of the precondition of such speech, is really to claim that the purpose of politics is politics, that politics (when authentic) exists for its own sake. That means in part that authentic politics cannot be contaminated by the necessary or the useful, but rather has an affinity to all beautiful things, to the realm of the aesthetic. (KATEB, 2000, p. 134).

In Hannah Arendt's political thought, the concepts of action and common world – or public realm – will have a fundamental importance. This is because both arises as two independent spheres that dignify politics giving to it an axiological autonomy. In other words, action and common world create a proper space to the politician, in which politics is made by itself and in its own interest.

According to Arendt, the human condition is marked by an intrinsic relation with the appearances, what is to say: we are invisible receptors of the world's existing appearances and, also, we are object of others appearance receptors (ARENDR, 2008)<sup>10</sup>. From the political point of view, the public realm is a space in which, the same way, men appear one to the other. However, in this space in particular, what reveals them is the discourse and the action and is through both that men acquire their freedom.

---

<sup>10</sup> Toda a leitura do primeiro capítulo intitulado “Aparência” da obra “A Vida do Espírito” é de grande valia para entender o sentido da aparência e do ser na filosofia arendtiana.

In this sense, Arendt distinguishes the two main meanings of the term “public”, attributing to the second a proper political sense and affirms that:

(...) the term "public" signifies the world itself, in so far as it is common to all of us and distinguished from our privately owned place in it. This world, however, is not identical with the earth or with nature, as the limited space for the movement of men and the general condition of organic life. It is related, rather, to the human artifact, the fabrication of human hands, as well as to affairs which go on among those who inhabit the man-made world together. To live together in the world means essentially that a world of things is between those who have it in common, as a table is located between those who sit around it; the world, like every in-between, relates and separates men at the same time. The public realm, as the common world, gathers us together and yet prevents our falling over each other, so to speak. (...). (ARENDDT, 2010, p.64)

Then, the common world is composed by a circularity, as it is an appearance space, it possibilities the emergence of the conditions to the discourse and to the action and, by consequence, it is through the both that it still exists.

So, the action, more specifically, would emerge as a double. On one hand, this is what deprive man of his interiority and take him to show himself to others and, on the other hand, the action would have a constructor role - the sum of the actions of all men would be the common world (ARENDDT, 2010, p. 224). Allegorically, it would be the same as to treat all men, concomitantly, as actors and set designers in one piece. Therefore, the actions undertaken in the course of the show, would have the power to establish the relationships between the characters and simultaneously build the scenario where there would happen the play. In the absence of an author, the scenario would not be established in the same way and in the absence of all them, thereafter, there would not have any play or scenario. So to the author (2010, p. 249):

The space of appearance comes into being wherever men are together in the manner of speech and action, and therefore predates and precedes all formal constitution of the public realm and the various forms of government, that is, the various forms in which the public realm can be organized. Its peculiarity is that, unlike the spaces which are the work of our hands, it does not survive the actuality of the movement which brought it into being, but disappears not only with the dispersal of men—as in the case of great catastrophes when the body politic of a people is destroyed—but with the disappearance or arrest of the activities themselves. Wherever people gather together, it is potentially there, but only potentially, not necessarily and not forever.

The "gift of action" would bring eternally the new to the world, always renewing the stage by means of new actors, which is the main characteristic of human existence. In such a way that the spontaneity of the actors in their actions, and in the constitution of the stage, would turn the future unforeseeable. (ARENDR, 2012b, p. 531 e 2010, pp. 235-240).

Another important aspect of the combination of actions is the constitution of freedom. That's because freedom in Arendt's view, would have as a necessary foundation the existence of an area of common action for men, "in which men could be inserted through words and deeds." (ARENDR, 1997, p. 194).

It is based on this concern of the extinction of liberty by totalitarian instruments, whose results can be disastrous, through a way, and with the search for the continuity of political order of freedom, through the other, that come the value of establishing a new constitutional order in the work of Arendt. The Constitution emerges as a pact, as a promise which constitutes the limits of the new order, thus enabling the rise of liberty and binding subjects. In the words of Arendt (2011, p. 344):

(...)So, promise and force, combining and agreeing are the means of maintaining the existence of power; always when men can preserve the power arising between them during any particular action or gesture, they are already in the process of founding a stable terrain structure, so to speak, that harbors its added power of joint action process. The human faculty of making and keeping promises keeps an element of the human ability to construct the world. Just as the promises and agreements address the future and provide stability in the ocean of uncertainties of the future, where the unpredictable can erupt from all sides, just as the human capacity to constitute, establish and build the world always refer to our "successors" and "posterity" than ourselves and our times.(...)

It is noteworthy the distinction Arendt makes between liberation and freedom. Liberation is the struggle against unjustified restrictions of freedom, that is, to protect property, the right to come and go or the life, for example, against the arbitrariness of the authorities. Freedom, however, would be a further step, that it would have been discovered, modern, in the fight for liberation rights during the American Revolution.

Besides being a struggle against authoritarian constraints of the monarchy, the struggle for freedom would be the result of the rediscovery of public realm. At the exact moment that the American revolutionaries gathered in search of their freedom, they acknowledged themselves in a public sphere in which they could unfold to each other

through speech and action. From the moment of this discovery, the freedom struggle assumed the role of protagonist in those struggles that culminated in the pre-federation documents and, finally, in the Constitution of 1787 (ARENDR, 2011, p.60-61).

#### **4 The problem of the political birth of the law – Sovereignty in Schmitt and Arendt's critic**

The basic paradox of Carl Schmitt's political decisionism – the rule of law ultimately hinges on an abyssal act of violence (violent imposition) which is grounded in itself; that is, every positive order to which this act refers, to legitimize itself, is self-referentially posited by this act itself – is that his very polemics against liberal-democratic formalism inexorably gets caught in the formalist trap. Schmitt targets the utilitarian-enlightened grounding of political in some presupposed set of neutral-universal norms of strategic rules which (should) regulate the interplay of individual interest (either in the guise of legal normativism à la Kelsen, or in the guise of economic utilitarianism) (ZIZEK, 1999, p. 18)

Prior to enter properly in the sovereignty theory from Carl Schmitt, it is important to make a reservation. As it has been already suggested, previously, in chapter II, our utilization of Carl Schmitt's theories has a purpose that is not the resurrection – or the fortification – of the totalitarian ideas. Agreeing with Chantal Mouffe (2009, p.57), it is believed that

(...) Schmitt is an adversary from whom we can learn, because we can draw on his insights. Turning them against him, we should use them to formulate a better understanding of liberal democracy, one that acknowledge its paradoxical nature.

The most famous formulation of Carl Schmitt in respect to the sovereign is that in which he affirms (2012, p.1) "Sovereign is the one who decides on the exception". Such expression may appear, in a glance, a paradox. But, taking a deeper look, it is noted that it puts side to side two fundamental political moments to the existence of the Law: its birth and its death.

To the German author, the exception is the moment in which the own juridical order is found threatened in its normal conditions of existence. In other words, exception is any possibility of the juridical order, simply, to collapse, independent of its warlike, economic or social origin. Being threatened the legal order, it is set the moment of the

exception (SCHMITT, 2012, p 6). Consequently, when deciding on the time that the exception exists, the sovereign, in reverse, also decides the time when it does not exist. That is, the normality of the application of law rests on the sovereign decision that is based on factual and political conditions of the external world itself. The law can not be oblivious to politics. In the words of Schmitt (2012, p. 1):

Precisely a philosophy of concrete life must be interested in it to the highest degree. The exception can be more important to it than the rule, not because the seriousness of an insight goes deeper than the clear generalizations inferred from what ordinarily repeats itself. The exception is more interesting than the rule. The rule proves nothing, the exception proves everything: It confirms not only the rule but also its existence, which derives only from the exception; In the exception the power of real life breaks through the crust of mechanism that has become torpid by repetition.

Thereby, the sovereign is both inside and outside the legal order, as it decides simultaneously on the exception and on the normality. This phenomenon is called the "*paradox of sovereignty*" by Giorgio Agamben (2005, p.19), explained as follows: "This means that the paradox can be formulated thus: "the law is outside itself" or: "I, the sovereign, who I am outside the law, declare that there is nothing outside the law"."

That mentioned finding of Schmitt generates a huge theoretical problem for normative theories of law, which tend to substantiate its own legal order in a purely normative level. Either in the hypothetical fundamental norm of Kelsen (2009, p. 35) or in the critique of Austin's theory of sovereignty in Hart (HART, 2009)<sup>11</sup>. The rule itself does not have the power to explain the existence of the legal order that is, at all times, threatened and protected by the political reality. More than that, the legal order itself contains the terms of its suspension, in order to avoid its destruction. So that, during the period of the exception, the Law does not cease to exist, it is only suspended. It is highly interesting the description that Bernardo Ferreira (2009, p.109) does of the importance of the unforeseeable at the thought of the German author:

Thus, as opposed to the abstract generality of the duty ("should be") to be normative, being the "real life" Schmitt presents itself as something that has, by its very nature, a potentially exceptional, extraordinary character. The "reality" is the land of the imponderable and contingent, what does not obey any rational criterion calculability and deductibility, can not be defined and planned in advance. Therefore, it is significant that the image Schmitt proposes

---

<sup>11</sup> See, specifically, the five first chapters of HART, O Conceito de Direito. See also RAZ, O Conceito de Sistema Jurídico: uma introdução à teoria dos sistemas jurídicos. Trad. Marcelo Brandão Cipolla. São Paulo: Editora WMF Martins Fontes, 2012.

the exception: it is, he said, "not classified under the" what "disturbs the unity and order of the rationalist scheme". In the exception, the "real life" shows up as something that can not be contained within the parameters of a normative rationality, but at the same time needs to be ruled legally. [...] The issue of "concrete" in Schmitt is associated with the inability to establish ordinary life on bases and incontrovertible affirmation of the need to recognize that the order your own background clutter.

The presence of the unforeseeable as a marking feature of the existing nature of the legal order leads directly to the questions proposed by Arendt in her philosophy of action. Moreover, it is not difficult to associate an author that sees, in freedom and action, true instruments to realize miracles (ARENDT, 2000, p. 460) with an author like Schmitt who has, as one of his main works, a "Political Theology".

It is noted, however, that while for Arendt the unforeseeable and the new are the "raison d'être" of politics and, so, of the legal order. To Schmitt, the legal order identifies itself with the formalism that he insists in identifying in authors like Kelsen, keeping the new and the unforeseeable external to the Law, what justifies the constant moments of exception that would suspend the legal order in the name of its integrity. As it shows the excerpt from Zizek, Schmitt is not able to run away from the legal formalism that he criticizes so much.

In respect to the sovereign theory, the divergences between Arendt and Schmitt get deeper in the moment of defining who and what should be the subject(s) of sovereignty. From the perspective of Schmitt, inspired in Hobbes, the sovereignty should be possessed by a "who", that owns the power over all the other subjects. While Arendt's theory of power is based on plurality.

For Arendt, power does not exist as property of only one individual. In reality, the power can only arise from the relation and organization of various persons around a determined structure of government. Furthermore, by saying that a determined person is in the power, obviously, what is meant is that is not that the person, per se, is the owner of that power, but that a group of people acts on its behalf (ARENDT, 2012a, p. 44).

On hers "What is freedom", the author makes a direct critic of Rousseau's perspective of sovereignty – among modern theorists, she will consider Carl Schmitt as one of the most capable defenders of the notion of sovereignty. Arendt says that Schmitt recognizes clearly that the root of sovereignty is the will: the sovereignty will be the one that wishes and commands (ARENDT, 2000, p. 460).

To the author, in reverse, the freedom that comes from political action is totally incompatible with the sovereignty of the will, in a way that both even may exist simultaneously. This because sovereignty presupposes a prevalence of an individualist will, either from the sovereign or of a group, as the promises and laces related to the future, essential to the moment of the political foundation, loses completely their sense.

It is needed, for that man to be a sovereign or to be part of a sovereign group that he surrenders completely to the absolute of his will or to the absolute of the certain general will of a group. It turns impossible, therefore, the creation of the most basic condition for freedom, which is the plurality of agents linked by ties of equality. In the words of Arendt (2000, p. 455):

Under human conditions, which are determined by the fact that not man but men live on the Earth, freedom and sovereignty are so little identical that they cannot even exist simultaneously. Where men wish to be sovereign, as individuals or as organized groups, they must submit to the oppression of the will, be this the individual will with which I fore myself, or the “general will” of an organized group. If men wish to be free, it is precisely sovereignty they must renounce.

A paradox situation is then created. While Schmitt exposes, like Arendt, the fragility of the legal order and its deep connection with the world of politics, he also establishes the idea of a sovereignty of the will that is capable of suspending the legal order – and, in this moment, is totally opposed to Arendt.

Considering the freedom and power derived from the sovereignty in opposition to the freedom of will, it is necessary to comprehend the role that the first two occupy in the birth and death of the legal order, moments in which sovereignty reveals itself fully. Inside the Arendt’s theory, the violence and the power will be the two elements that explain the two live moments of the legal order.

Violence is the use of a force to a determined finality, it has an instrumental character, the protection or the destruction of the legal order, for example. Power, however, as it was seen, is a result of the plurality of convivences and it has not an instrumental function. The power justifies to itself, it is auto-referring, the existence of the polis is the own reason for its maintenance, the exercise of politics seeks only to dignify it, in such a way that there is not a finality, an instrumental function, after the establishment of the power.

To Arendt, power and violence are concepts that deny themselves mutually, not being able to coexist – the same as freedom and sovereignty, as already mentioned before. Additionally, the violence, the difference of power, will never have a constitutive intent, it will never establish its own foundations of permanence, and it does not achieve to create a public realm in which man can cohabit on equality, as does the power. *In verbis*:

To switch for a moment to conceptual language: Power is indeed of the essence of all government, but violence is not. Violence is by nature instrumental: like all means, it always stands in need of guidance and justification through the end it pursues. And what needs justification by something else cannot be the essence of anything. [...] Power is in the same category: it is, as they say, “and end in itself” (This, of course, is not to deny that governments pursue policies and employ their power to achieve prescribed goals. But the power structure itself precedes and outlasts all aims, so that power, far from being the means to an end, is actually the very condition enabling a group of people to think and act in terms of the means-end category). (ARENDR, 2012a, p.51)

Outlining the difference between power and violence, on one hand, and sovereignty and freedom, on the other, it turns possible the phenomenon of exception. To do so, it is only needed to note the moments of birth and death of the legal order of freedom as moments of violence, sovereignty and, so, inexistence of power. Power and freedom will only exist in the absence of action of violence and sovereignty as government instruments.

Such affirmative would create the condition to, for example, reevaluate, critically, the legitimacy of the legal orders that constantly uses exception to perpetuate their existence. Moreover, freedom and power arises as important theoretic instruments to the analysis and deconstruction of legal orders founded on violence.

From the legal point of view, it would remain the impossibility of existence of a legal order understood completely apart from the world of politics. As so, it is enough to recognize that the moment prior to the emergence and subsequent to the annihilation of law are intrinsically linked with issues of violence, while the moments of its full life are founded on full power and plurality of political stocks.

In other words, a legal order unconcerned with the conditions of freedom and the maintenance of the power that founded it, is a legal order doomed to failure. More than that, the kelsenian object, the rule from the pure theory of law, it would be an impossible object, as a purely legal content would absolutely nonexistent. In a simple metaphor,

politics emerges as the root of the law, thus bringing the conditions for its birth and, later, existence – it is not possible to understand the vital mechanisms of a tree without looking, also, for its roots.

### **5 Carl Schmitt and Hannah Arendt – Representation and Sovereignty reinterpreted**

The situation of the parliamentary system has now become extremely critical, because the evolution of modern mass democracy turned the public, argumentative discussion in a simple empty formality. Some rules of current parliamentary law, especially the provisions regarding the autonomy of deputies and the opening of sessions, appear instead as a useless, pathetic and even superfluous ornamentation, as if someone painted red flames in a modern system of central heaters central to convey the illusion of a burning fire. (SCHMITT, 1996, p. 8)

The process that leads politics, in the Constitutional Estate, to the representative parliamentary moment and the epistemological attempts to separate Law from Politics are part of the same process. It is not impossible to make an association between the hypothetical fundamental rule in its relation to the normative system and the role exercised by the constituent power in the face of constituted power.

It is the same movement. That is to say, the theory of the constituent and constituted power is the first foundation of a legal science completely detached from political circumstances.

The pillar of an order is founded centered in the rule, within the limits established by the constituent power. Accordingly, after a critical study of the political roots of the law, it should make a study of the positions of Arendt and Schmitt regarding the representative system.

In one of his most important works, the Theory of the Constitution, published in 1928, Carl Schmitt develops a perspective on the relation between individuals and of the States which is based on oscillation between two principles, said to be formal, namely the representation and identity. Before explaining them, it is noteworthy that, for the author, the state is nothing more than a moment of the political situation of a people, their *status*. It is not, then, of an autonomous entity in relation to the unity of a people, but, in reality, of an entity that establishes itself and is constituted in the political relations that arise in that unity (SCHMITT, 2011d, p.270).

The first principle – the representation – would be established in an indirect relation of recognition between state structures and the people as a whole – similarly to what was shown by Sieyès in “What is the Third State?”. The second – of the identity –, in its turn, would have as a mark a direct relation of recognition between the people and the state structures. In other words, in representation the citizen would see their opinions and desires reflected through representatives in the state structures, while in the identity, the citizen would perceive himself as part of a unit that makes up the State. In the words of Schmitt (2011d, pp. 270-271):

[E]l pueblo puede alcanzar y mantener de dos modos distintos la situación de la unidad política. Puede ser capaz de actuación política, ya en su realidad inmediata –por virtud de una homogeneidad fuerte y consciente a consecuencia de firmes fronteras naturales, o por cualesquiera otras razones -, y entonces es una unidad política con magnitud real – actual en su *identidad inmediata* – consigo misma. Este principio de la identidad del pueblo, existente en un momento dado, consigo mismo, como unidad política, se base en que no hay ningún Estado sin pueblo, y por ello, un pueblo ha de estar siempre realmente presente como magnitud efectiva. El principio contrapuesto parte de la idea de que la unidad política del pueblo como tal nunca puede hallarse presente en identidad real, y por ello tiene que estar siempre representada personalmente por hombres.

To the author, no existent State could be founded exclusively in any of the two concepts. The composition of the political structure of the States would be classified in lower or higher levels of representation and identity (SCHMITT, 2011d, p. 282).

Another interesting aspect of Schmitt’s identification and unity theory is the issue of representation in Parliamentary State. In accordance with the author, true representation happens only in public realm (SCHMITT, 2011d, p. 274).

Thus, for parliament to be considered the legitimate representative of national unity is necessary that its decisions are made publicly, so that when the performance of parliament abandons its public aspect, it loses its prerogative "to be the representative of the political unity of people" (SCHMITT, 2011d, p. 282).

In his witness vision of the fall of the Weimar Republic, Schmitt asserts that the parliament of mass democracies was nothing more than an artifice, veneer of legitimacy, to decisions taken in the shadows and all the parliamentary process a mere hoax, simple "red flames [painted] in the heaters of a modern central system of heating to convey the

illusion of a burning fire "(SCHMITT 1996, p. 8). So the bond of identity between people in mass democracies and the parliaments was absolutely nonexistent.

For Arendt, the issue of representation arises as "a decision on the dignity of the political sphere itself" (ARENDRT 2011, p. 299). Her analysis of the parliamentary system arises in assessing the results of the American Revolution, which, for her, failed to meet all its aims. This is because, although it had established a constitution capable to guarantee basic liberation rights against authoritarian constraints, it was unable to generate the atmosphere of freedom in this revolutionary moment. What, to the author, in the long term, would be responsible for the own decay of republican spirit in the United States. Arendt says (2011, pp. 345-346.)

In terms of current institutions, is in Parliament and in Congress, where it moves among its peers, which materializes the political life of a member of representative government, no matter how much time you can spend on a campaign, trying to garner votes and listen to the electorate. The critical issue is not just that this is just an obvious cheap imitation of dialogue in the modern party government, in which the voter can only consent or to refuse to ratify a choice (except for American primary) is done without it, and even consists of the flagrant abuses, such as the introduction of the trade policy elites own methods, in which the relation between representative and voter turns in the relationship between seller and buyer. Even if there is communication between representative and voter, between nation and Parliament [...] that communication is never between equals, but between those who wish to govern and those who are governed.

The big difference, however, between the perspectives of Hannah Arendt and Carl Schmitt is that for the first, the solution is the creation of spaces of freedom and power, in which the agents can prove the public realm and, thereafter, incorporate it, while for the second, as we know, the solution is in totalitarian hypothesis.

Returning to the ideas of unity and identity of the people, it is important to assert that it is through them that arises the concept of the political in the work of Carl Schmitt. The politic would have in its own context the differentiation between friend and enemy. This, obviously, would not represent the total jettisoning of the concept of other distinctions as the aesthetics (ugly and beautiful) or moral (good and bad) as an example (SCHMITT, 1992, pp. 51-52). Although other criteria can influence the choice of who will be the enemies and friends - such as religion - the autonomy of this difference is that enables its existence as a concept itself.

The last criteria to set the political division would be the possibility of war. Friends are all those who, in a possibility of conflict, would be allied to fight against a common evil. On the other side, enemy would always be that external threat, the foreigner that would represent the possible west of the constituted unity (SCHMITT, 1992, p. 60).

The criteria of the friend/enemy could be associated with the matter of the language as an instrument of political concretion. In the best Greek tradition, we could say that friend would be all those who are capable to speak the same language and debate in the ἀγορᾶ (agora), while the enemies would be the barbarians whose existence, oblivious to the common world of the Greeks and their language, would represent a constant threat of extinction.

With regard to pluralism and homogenization of the unity, it is important to clarify that the establishment of a political unity opposed to the other does not necessarily mean overcoming the individualities rather than the totality of the politic. The main point lies in the fact that, despite all internal differences that there may be between members of the same unit, in case of a war, they would be willing to fight in defense of their identity. If the connection between the members of this group is not so powerful to the point of triggering a fight in defense of the unit, there will be no need to talk about the politic. In the words of the author himself (1992, p 65.)

The word "sovereignty" here has a good sense, in the same way that "unity". This does not mean, in any way, that all individuality being of each person belonging to a political unit would have to be determined and controlled by the policy, or that a centralized system would destroy any other organization or corporation. [...] Anyway: as a consequence of the orientation according to the possible extreme case the effective fight against an actual enemy, the political unity, necessarily, or is the decisive drive to the friend-enemy grouping, and in that sense (not some sovereign absolute) sense, or it simply does not exist.

This homogenizing perspective of the political process seems, at first sight, absolutely incompatible with Arendt's politics perspective. Indeed, the author herself seems quite refractory to this conception of politics, as she demonstrates in *The Origins of Totalitarianism*. Arendt states that (2012b, p 258.)

From a political standpoint, tribal nationalism always insists that is surrounded by "a world of enemies", "one against all", and that there is a fundamental difference between this people and all others. Affirms that the people are unique, individual, incompatible with all others, and denies theoretically the

very possibility of a common mankind long before it was used to destroy the good mankind.

However, two factors ultimately reconcile this vision of politics focused on a primary unity, which can not be regarded as humanity itself.

In the foreground, despite the ambivalence of Arendt regarding the nation-state, the empirical recognition that human rights directly dependent on the rights of the citizen of a State to be recognized endorses, indirectly, the sight of friend/enemy from Schmitt . That is, the individuals must constitute some particular political unit to have their rights recognized, so that the politics itself - dependent, at first, of these basic rights - does not exist outside of the political units (ARENDR, 2012b, p. 258).

In the background, the own nature of the public realm that requires a deep bond of equality between its constituent subjects does not, a priori, allow the existence of political humanity. The exercise of freedom does not dispense an identification between the various subjects that make up the politics. This characteristic, perhaps, come as close for both Arendt and Schmitt because both drank directly from Greek sources to find the grounds for their theories. The agonism of the individual who acts and discourses is based on the existence of a unit of equals. Arendt explains (2012b, p. 344):

Freedom, in all places where it existed as reality always had spatial boundaries. This is very clear in relation to the largest and most elementary of all negative liberties, freedom of movement; the boundaries of national territory or the walls of the city-state covering and protecting a space within which men could move freely. International treaties and guarantees offer an extension of this freedom territorially bounded citizens outside the country, but even under modern conditions still evident coincidence of freedom and limited space. What is true freedom of movement also applies largely to freedom in general. The freedom in the positive sense is possible only between equals, and equality itself is by no means a principle of universal validity, and it is also only applicable with limitations and even within certain spatial limits. (...)

Other thing that this approach of the thoughts of Carl Schmitt and Hannah Arendt makes clear is the fact that the legal systems and public spaces enjoy a special quirk that allows us to think in terms of politics and political policies. The potential antagonism of different units enables each to enjoy a unique identity assigned by the plural contributions of its various agents. Thus precluding the existence of a single object with respect to the legal phenomenon, intrinsically linked to each unit and creating, therefore, varied phenomena that require different tools to be understood.

From this, we see the relevance of the concept of Nomos, as espoused by Heraclitus in pre-Socratic philosophy whose value shared by Schmitt and Arendt, is extremely relevant to the scope to make a political epistemological framework of law. Says HeráclitoA From this, we see the relevance of the concept of Nomos, as espoused by Heraclitus in pre-Socratic philosophy whose value shared by Schmitt and Arendt, is extremely relevant to the scope to make a political epistemological framework of law. Heraclitus says (2000, p. 92): “μάχεσθαι γρηὶ τὸν δῆμον ὑπὲρ τοῦ νόμου ὅκωσπερ τείχεος” (The people should fight for the Nomos like as for a wall).

## 6 Hannah Arendt, Carl Schmitt and the Nomos<sup>12</sup> of the Polis

And he who becomes master of a city accustomed to freedom and does not destroy it, may expect to be destroyed by it, for in rebellion it has always the watch-word of liberty and its ancient privileges as a rallying point, which neither time nor benefits will ever cause it to forget. And what ever you may do or provide against, they never forget that name or their privileges unless they are disunited or dispersed but at every chance they immediately rally to them, as Pisa after the hundred years she had been held in bondage by the Florentines (...) But in republics there is more vitality, greater hatred, and more desire for vengeance, which will never permit them to allow the memory of their former liberty to rest; so that the safest way is to destroy them or to reside there. (MACHIAVELLI, 2011, p. 26)

When writing the fifth chapter of what would become his most famous work, Machiavelli establishes an interesting link, whose meaning is strongly related to the object of our study. For, the Florentine author, the love of freedom and love for the (old) laws were intrinsically linked. It is to say, a people who once knew freedom and that had its own laws, in other words, who lived in a republic, would never forget it. This would have been the reason that, for example, led the revolt of Pisa even after a hundred years of Florentine domination. This association between freedom and laws (or customs) is the key to understanding the sense that Arendt and Schmitt give to the word nomos. Freeman and the Republic, when dominated, do not only fight for their freedom, but also for its legal system, it is only through and within **its** legal system that **their** freedom can exist.

---

<sup>12</sup> Although Arendt uses "law" as a translation of the word nomos, in her work, there is a concern to delineate the meaning of this translation into modern languages. Thus, to avoid confusion and even an absolute contradiction to the criticisms of Schmitt that will be in the front will be described; we will avoid using a word by another. For an overview of the meaning of nomos word and its translation, see ARENDT, Hannah. *The Human Condition*, 1998. p. 194.

It is the need of a common space and instrumental conditions for the exercise of freedom that inspires Hannah Arendt to develop her theory of the *nomos*. Analyzing the origin of the *polis*, their roles and relations in the Greek world, she shows that men in search of freedom - in reference to the discussion already made on the American Revolution - need a framework that on the one hand, harbored their existence as public entities and, on the other hand, guarantee the continuity of their words and deeds. That new space, men could interact and could seek the no-enrichment.

However, it is noteworthy that the concept of *polis* is not identical with that of the **physical** space of the city's existence, so the *polis* would not be the city-state, would not be Athens or Sparta, but the common world and, therefore, **political** that would be constituted among those citizens. Carl Schmitt, in turn, as we have seen, argues that the State is nothing more than the situation of a people (SCHMITT, 2011d, p. 270). In this sense, the author's own words (2010, p 248.)

Strictly speaking, the *polis* is not the city-state in its physical location; is a community organization that results from acting and speaking together, and its true space lies between people living together for that purpose, no matter where they are. "Wherever you go it will be a *polis*": these famous words came not only to be the motto of the Greek colonization, but expressed the conviction that action and speech create a space between the participants can be located properly in almost any time and place. It is the space of appearance, in the broadest sense of the word, ie, the space in which I appear to others and others to me; where men exist not merely like other living or inanimate things but make their appearance explicitly.

On the other hand, the simple structuration and the desire to constitute a common space would not be sufficient to ensure the success of this company. The *polis* would need both a substantive protection - walls - as a structural protection - their rules of political life, the *nomos* (ARENDR 2010, 243 p.). At that moment, emerges with all its force, the importance of *nomos* - and hence its linguistic ambiguity. That's because the Greek word *nomos* had a double meaning, surpassing that of our word "law", meaning either a limitation of the own citizens' act and the space of existence of the *polis*. Thus, "[a] law [nomos] is an established and erected walls (...) inside which creates a real political sphere where men freely circulate (ARENDR, 2009, p. 243)."

Therefore, the *nomos* arise both as a precondition for the existence of the *polis*, as support condition for its permanence. That's because the *nomos* would allow men to know the limits of their performance both from a political and territorial point of view. In

addition, while the barbarians were subject to the power of their king, Athenian citizens were subject to its laws, that made them equal and free (ARENDR, 2009, P. 244). In the author's words (2009, p 231.)

For the Greek way of thinking, freedom, therefore, had roots in a place, to which was attached, and by which it was defined, a space of freedom whose boundaries coincide with the walls of the city, the polis, or, more exactly, its agora.

Besides, the actions by their unpredictable and uncontrollable nature would have to have a space in which stability is not lost in a multitude of ways and fall in the historic oblivion. In other words, citizens need to be preserved in a world where freedom, in Arendt's sense, that simply did not exist (ARENDR 2010, p. 247).

The space that opposes the public domain, in which there are no political freedom and relations, is called "desert" by Arendt (2009, p. 253) and, in its essence and in a radicalized way, reproduces the phenomenon of totalitarianism (2012b, p. 277), representing a constant threat to freedom.

So, the foundation of the nomos in each political unit depends on the needs and contributions of the agents that compose it. That is, there is no universal model of nomos that can be applied over any terrain, the nomos emerges as an artisan work. As the walls of the polis to be effective require the understanding of geographical features of the city that it will protect, a nomos is really efficient when it worries about the dangers offered by each unit with its proper public sphere. It is true that sometimes the problems presented to the units can be the same, however, in most cases, given the unpredictability arising from the nature of politics, the challenges and dangers of every political and legal order are peculiar to each reality.

Hence the relevance of the already abovementioned fragment of Heraclitus ("The people should fight for the Nomos like as for a wall "), the word nomos itself would come from the Greek word *nemein* - distribute, possess (which was distributed), to inhabit – and, therefore, the rapprochement between walls and laws within the meaning of nomos, would be clear (ARENDR 2010, p. 77, footnote 62).

Concerning Schmitt, his theory about the nomos is linked to the attempt to explain the context of international law in Europe<sup>13</sup> after World War II, such intent is done

---

<sup>13</sup> In this work, the issue relating to the international law will not be dealt with.

through his book "The Nomos of the Earth."<sup>14</sup> It is, again, a critique on the normative concept of law.

Much like the interpretation of Hannah Arendt way, Carl Schmitt approaches the concept of nomos that of territorial space. To this end, the author seeks to avoid the translation of the Greek word by word "law." Such a position would be justified by the loaded tradition that the word "law" would bring in addendum, the very characterization of the term "law" as a "must be" opposed to a "being", which is incompatibilizaria with the territorial nature of the term (SCHMITT, 2011a, p. 58).

Much like the interpretation of Hannah Arendt, Carl Schmitt approaches the concept of nomos to that of territorial space. To do so, the author seeks to avoid the translation of the Greek word by word "law." Such a position would be justified by the loaded tradition that the word "law" would bring in addendum, the characterization of the term "law" as a "should be" opposed to a "be", which would not be compatible with the territorial nature of the term (SCHMITT, 2011a, p. 58).

Advancing in his explanation, Schmitt criticizes the modern perspective of law, whose appearance is merely positivist, linked to what he calls "Bureaucratic State", so that the more substantial concept of nomos could not identify in any way with the abstract "law". Nomos represent the territorial, social, political and religious division that would characterize a particular legal order, its meaning would exceed, by far, one of the modern abstract "law". In the words of the author himself (SCHMITT, 2011a, p 58.)

Nomos, unlike [the law], *nemein* comes from a word that means both "split" and "grazing" [Weiden]. The nomos is therefore immediate way in which one perceives clearly the political and social order of a people, the first measurement and division of pasture, ie the occupation of land and the concrete system which this division is derived [...] nomos is the measure that distribute the land and the soil of the land by placing it in a particular political, social and religious order. Measure, order and form constitute here a concrete spatial unit. Occupation of land, the foundation of a city or a colony becomes visible the prefectures with which a tribe, a people or a group becomes inactive, in other words, arises historically and demarcate a part of land as field strength of a

---

<sup>14</sup> Justifying his attempt of reusing the concept, Schmitt writes: If, despite all this [the misuse of the term by European scholars], I employ the term nomos again in its original sense, do not do it in order to artificially revive buried myths or to evoke empty shadows. The term nomos is used by us because it has the property of preserving cognitions that arise from the current world problems against a legal positivist plot, in particular the danger of being confused with terms and concepts pertaining to the legal culture of the state of the nineteenth century. SCHMITT, 2011a. p. 57

system. (...) In particular, the nomos can be defined as a wall, considering the wall is also based on sacred location.

However, the author argues that during the Hellenistic period itself, the meaning of the word nomos was being corrupted by the power of the Sophists, to a point which may now be associated with the positivist and modern sense of the word "law." Such a change would be justified by the interest of the sophists to transform the prefectures in "mere provision or rule" (SCHMITT, 2011a, p. 66). From the historical point of view, the need for a new understanding of the word nomos was on the decline of the polis and the rise of the cult of political power holders.

Thus, there is a clear similarity between the meanings attributed to the word nomos by the two German authors. Although Schmitt focuses primarily on territorial and political senses, the interpretation that Arendt makes of the Hellenic society and its sense of freedom in the realm of nomos is fully compatible, considering that, according to Arendt herself, the existence of freedom requires a protected space, its own space, which has a territorial, legal and political aspect.

This connection point, more than all the other pointed, makes possible to realize that the existence of politics, freedom, action and power have as a fundamental prerequisite the foundation of a legal order, more than that, a legal, political, sociological and territorial order which is limiting and founder of freedom in direction to a determined unit.

## **7 Conclusion**

"E Polo: - Every time I describe a city I am saying something about Venice".

[Khan] – When I ask you about other cities, I want to hear about them. And about Venice, when I ask you about Venice.

[Polo] – To distinguish other cities qualities, I must speak of a first city that remains implicit. For me it is Venice.

[Khan] –You should then begin each tale of your travels from the departure, describing Venice as it is, all of it, not omitting anything you remember of it" (CALVINO, *The Invisible Cities*. Ed. Harcourt Brace & Company, 1974, Florida. p. 86)

The purpose of this paper is not - nor could it be - to establish definitive conclusions regarding the possibility of a joint critical of Hannah Arendt and Carl Schmitt to the normative model of legal science. What was intended here was to perform a provocative analysis of the proper limits of such a model which, in our view, become patent as being collated with the key concepts of the authors used.

Firstly, the thought of Schmitt and Arendt intend to oppose to the traditional normative theories of law and politics. Both normativism of Kelsen which centralizes the phenomenon of law in a pure and distant rule that is distant of the world as well as a view that restricts the political stage of the congresses and parliaments, do not appear sufficient to explain the legal phenomenon and the political phenomenon for the two authors.

The opposition of the two authors to these normative models that will justify the attempt to create bridges between the abyss that separates them. In this sense, both the ideological, bibliographic and biographical differences are set aside on behalf of an attempted contribution to critical normativism. However, it must be clear that the use of Schmitt is inspired by the desire to learn from him and to use his concepts against him - or against its attempt to establish a totalitarian state.

In her effort to demonstrate the fruitfulness of the political sphere, Hannah Arendt uses a concept of action and freedom present in the human condition. That is, in her opinion, men can at any time, as long as they acknowledge themselves as equals and seek the constitution of their freedom, found an order based on a plural power. Parliaments facing to itself and a class of politicians are not sufficient to exhaust the human ability to constitute the new and the freedom. The action, inherently human capacity, is the biggest cause of the unpredictable and ever new.

Schmitt, basing on the theory of the state of exception - that is the moment in which the existence of law is threatened - demonstrates that the specific genetic conditions, of annihilation and of maintenance of law reside in a political will that is both inside and outside the order. Moreover, its objective is to demonstrate the weakness of formal theories of constitution of the legal phenomenon, because in his opinion they are unable to deal with the issue of exception.

So, the author posits his theory of the sovereign as one that is capable of deciding on the exception. That's when Hannah Arendt seems to disagree. Arendt is a profound critique of theories of sovereignty, especially in its subjectivist bias. The attempt to create a single will responsible - either starting with one or more individuals - for operating a plurality of agents, it does not seem compatible with the idea of freedom.

It is the theory of violence in opposition to power that will explain the situation of exception in the eyes of Arendt. While power is a plural construction founded on a desire to exercise freedom and therefore, with no instrumental foundation, violence is always the sheer force exerted to a finality. Thus, the space for violence is that which comes before and after the foundation of liberty.

This association between the time of "sovereign" and time of "normality" with violence and power, allows an accurate analysis of the legal system, evaluating its legitimacy through the use that they make of the exception and if, effectively in its limits, freedom is realized at some point.

Then, the issue of representation was the object of analysis, using, on one hand, the criticism of Schmitt's to the inability of representative power to effectively stay connected to the people that it purports to represent, and, secondly, of the Hannah Arendt inability to provide the same power the dimension of political existence to the people of its constituency.

The duality friend/enemy present in the work of Schmitt was used to demonstrate the limitations present in Arendt's own liberal theory that is not possible to ignore the phenomenon of the unit to ensure freedom and the exercise of rights. As a result of this is the inherent peculiarity of every legal and political order that will give rise to private instruments to understand its operation - building up one more critique to the possibilities of a normative theory. It is this discussion that will lead to the emergence of the debate over the nomos, the last chapter of the work.

The concept of nomos, present in Western thought since Heraclitus, will be another connection point between the theories of Schmitt and Arendt. The second will focus on the genealogical aspect of nomos that will arise with the walls designed to protect the

*polis*, the public space of coexistence among men. Giving emphasis that the *nomos* emerges as a work of artisans in order to perpetuate freedom.

Schmitt, in turn, will highlight the specificity inherent in the concept of *nomos*, which seeks, always referring to a geographical, temporal and political specific as opposed to an abstract and normative concept of law.

Both authors, as analyzing the concept of *nomos*, seem to emphasize the importance of a local analysis of the legal phenomenon, with proper tools for understanding each space. Even the phenomenon of freedom can not be analyzed abstracting the conditions of power or violence to which every people is subject throughout its history. An exercise of freedom is not the one that consecrates it as one word in some Magna Carta. An exercise of freedom is one that also creates the possible conditions to be free and, therefore, to speak and act among equals.

#### **References:**

AGAMBEN, Giorgio. *Homo Sacer: Il Potere Sovrano e la Nuda Vita*. Torino: Giulio Einaudi, 2005.

\_\_\_\_\_. *Quel Che Resta di Auschwitz*. 12<sup>a</sup> reimp. Italia: Bollati, 2010.

\_\_\_\_\_. (org.) *Introduzione: Un Giurista Davanti a se Stesso*. Italia: Neri Pozza, 2011

ARENDDT, Hannah. *A Condição Humana*. Trad. Roberto Raposo. 11<sup>a</sup> ed. Rio de Janeiro: Forense Universitária, 2010.

\_\_\_\_\_. *A Vida do Espírito*. Trad. Cesar Augusto R. de Almeida, Antônio Abranches e Helena Franco Martins. Rio de Janeiro: 2008.

\_\_\_\_\_. *Eichmann in Jerusalem: a report on the banality of evil*. United States of America: Penguin Books, 2006.

\_\_\_\_\_. *Entre o Passado e o Futuro*. Trad. Mauro W. Barbosa de Almeida. São Paulo: Editora Perspectiva, 1997.

\_\_\_\_\_. *Essays in Understanding: 1930- 1954*. Edited by Jeremy Kohn New York: Harcout, Brace & CO, 2005.

\_\_\_\_\_. *On Violence*. United States of America: Harcourt, 2012a.

\_\_\_\_\_. Origens do Totalitarismo. Trad. Roberto Raposo. São Paulo: Companhia das Letras, 2012b.

\_\_\_\_\_. Sobre a Revolução. Trad. de Denise Bottmann. São Paulo: Companhia das Letras, 2011.

\_\_\_\_\_. The Portable Hannah Arendt. United States: Penguin Classics, 2000.

EMDEN, Christian J. Carl Schmitt, Hannah Arendt, and the Limits of Liberalism. In. Telos Spring 2008 vol. 2008 no. 142.

FERREIRA, Bernardo. O Risco do Político: crítica ao liberalismo e teoria política no pensamento de Carl Schmitt. Belo Horizonte: Editora UFMG; Rio de Janeiro: IUPERJ, 2009.

FREUD, Sigmund. The Future of an Illusion. In. The Freud Reader. Edited by Peter Gay. 1ª ed. Great Britain: Vintage, 1995.

HERÁCLITO in Os Pré-Socráticos: vida e obra. Org. José Cavalcante de Souza. São Paulo: Editora Nova Cultura, 2000.

KATEB, George. Political Action: Its nature and advantages. In. The Cambridge Companion to Hannah Arendt. Org. Dana Villa. 1ª ed. Cambridge: Cambridge University Press, 2000.

KELSEN, Hans. Teoria Pura do Direito. Trad. João Baptista Machado. 8ª ed. São Paulo: Editora WMF Martins Fontes, 2009.

MOUFFE, Chantal. The Democratic Paradox. London: Verso, 2009.

SCHMITT, Carl. A Crise da Democracia Parlamentar. Trad. Inês Lohbauer. São Paulo: Scritta, 1996.

\_\_\_\_\_. Il Nomos della Terra. Trad. Emanuele Castrucci. Italia: Adelphi, 2011a.

\_\_\_\_\_. O Conceito do Político. Trad. Alvaro L. M. Valls. Petrópolis: Editora Vozes, 1992.

\_\_\_\_\_. O Führer Protege o Direito. In MACEDO JR., Ronaldo Porto. Carl Schmitt e a Fundamentação do Direito. Trad. Peter Naumann. São Paulo: Saraiva, 2011b.

\_\_\_\_\_. Political Theology. Trad. George Schwab. United States of America: Chicago University Press, 2012.

\_\_\_\_\_. Stato, Movimento, Popolo. In. Un Giurista Davanti a se Stesso. Org. Giorgio Agamben. Italia: Neri Pozza, 2011c.

\_\_\_\_\_. Teoría de la Constitución. Trad. Francisco Ayala. Madrid: Alianza Editorial, 2011d.

SIÈYÈS, Emmanuel J. Qu'est-ce que le Tiers état ? 1ª edição. France :Édition du Bouche, 2002.

SLUGA, Hans. The Pluralism of the Political: From Carl Schmitt to Hannah Arendt. In. Telos Spring 2008 vol. 2008 no. 142.

ZIZEK, Slavoj. Carl Schmitt in the Age of Post-Politics. In. The Challenge of Carl Schmitt. Org. Chantal Mouffe. London: Verso, 1999.