Journal of Economics and Administrative Sciences, 24(4): 646-658, 2023
DOI: 10.37880/cumuiibf.1334339

Journal of Economics and Administrative Sciences

| esjournal.cumhuriyet.edu.tr | Founded: 2000 Available online, ISSN: 1303-1279 Publisher: Sivas Cumhuriyet Üniversitesi

Rethinking State-Law Relations Through the Kelsen-Schmitt Debate: A Critical Introduction

Erdal Kurğan[1,a,*]

[1]*Marmara University, Institute of Middle East and Islamic Countries, Department of Sociology and Anthropology of Middle East, İstanbul, Türkiye*
**Corresponding author*

Research Article

History

Received: 28/07/2023
Accepted: 03/10/2023

ABSTRACT

This article examines state-law relations in modern states by comparing the ideas of Carl Schmitt and Hans Kelsen. In this context, the article will first discuss what modern law is and from where its differences emerge. Next, the article will examine Hans Kelsen's conceptualization of *Grundnorm* [basic norm], which formed constitutions in modern states, as a source of legitimacy in the modern state. The article compares the state-law relationship that Kelsen constructed upon the basis of his Pure Theory of Law to Carl Schmitt's consideration of law as the decision of the sovereign. Although Kelsen accepted law as a thing-in-itself and intensified his efforts to build an objective science, juridical science presents a legitimacy in factual order, despite this not being Kelsen's goal. Kelsen, however, neglected what is political and failed to examine the appearance of factual order/law within the practical social order and their relationship. On the other hand, Schmitt's emphasis on sovereignty as the constituent will and unique source of legitimacy did not get much closer to Kelsen's approach to constructing law with *Grundnorm*. With regard to the political and political unity, Schmitt's approach was based on factual order by defining the law in terms of the extraordinary decision of the sovereign as a being identical to the society/people. This article's approach to understanding the modern state attaches importance both to Kelsen's emphasis on juridical science as well as equivalent value to the notion of sovereignty that Schmitt had rightfully developed. The last section of this article argues that the state-law relationship in modern states emerged through both *Grundnorm* and sovereignty as a partnership of both.

Keywords: Grundnorm, Sovereignty, Pure Theory of Law, Decisionism

Kelsen-Schmitt Tartışması Aracılığıyla Devlet-Hukuk İlişkisini Yeniden Düşünmek: Eleştirel Bir Giriş

Süreç

Geliş: 28/07/2023
Kabul: 03/10/2023

ÖZ

Bu makale, modern devlette hukuk-devlet ilişkisini Carl Schmitt ve Hans Kelsen'in fikirlerini mukayese ederek incelemektedir. Bu bağlamda, önce modern hukukun ne olduğunu, feodal dönemden farklarının hangi noktalarda ortaya çıktığını tartışmaktadır. Ardından, Hans Kelsen'in modern devlette anayasayı ve normlar hiyerarşisini yaratan '*Grundnorm*' kavramsallaştırması, modern devlette meşruiyet kaynağı olarak incelenmektedir. Kelsen, hukuku politik olandan ayrıştırarak, Kantçı anlamda 'kendinde şey olarak hukuk' anlayışını savunmaktadır. Hukuku politik, tarihsel ve kültürel olandan ayrıştırarak onun otonom bir alanda yaratıldığını (ya da yaratılması gerektiğini) ileri sürmektedir. Burada Kelsen'in politik olanın önemini ıskalamış olduğu, olgusal düzenin ya da hukukun pratik sosyal düzendeki görünümü ve ilişkilerini incelemeyi yadsıdığı iddia edilmektedir. Diğer taraftan Schmitt ise, modern devletin kurucu iradesi ve tek meşruiyet kaynağı olan egemenliğe yaptığı vurgu ile Kelsen'in davet ettiği güzergaha –hukukun *Grundnorm*'la inşasına- pek yanaşmamıştır. Schmitt politik olan ve politik birlik üzerinden, hukuku toplumla/halkla özdeş olan egemenin olağanüstü haldeki 'karar'ı üzerinden tanımlayarak olgusal düzeni baz almıştır. Bu çalışmada modern devletin anlaşılabilmesi için kabul edilen yaklaşım ise, hem Kelsen'in hukuk bilimine yaptığı vurguyu önemsemekte hem de Schmitt'in haklı olarak gündeme getirdiği *egemenlik* nosyonuna eşit değer vermektedir. Daha doğrusu, modern devletin anlaşılabilmesi için mezkur iki hukuk kuramcısının da beraber okunup, hem hukuk kuramının hem de egemenlik kavramının modern devlet için vaz geçilmez olduğunu iddia etmektedir.

Anahtar Kelimeler: Grundnorm, Egemenlik, Egemenin Kararı, Saf Hukuk Kuramı

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[a] *erdal.kurgan@marmara.edu.tr* *https://orcid.org/0000-0002-6668-2804*

How to Cite: Kurğan, E. (2023). Rethinking State-Law Relations Through the Kelsen-Schmitt Debate: A Critical Introduction, Journal of Economics and Administrative Sciences, 24(4), 646-658. DOI: 10.37880/cumuiibf.1334339

Introduction

The notion of society, which defines the modern coexistence of people, necessitates the notions of state and law. The existence of society having a certain order is based solely on the existence of laws and a state. The social contract has been defined with different nuances by Thomas Hobbes, John Locke, and J. J. Rousseau in modern political philosophy and is exposed based on this truth. However, the character of the relationship between state and law and the issue of which one is more decisive is open to debate. For this reason, many theorists who share the basic philosophical assumptions of the modern state have put forward different ideas in discussions regarding the state-law relationship.

This article examines the state-law relationship in modern states by comparing the ideas of two doctrinaires, Carl Schmitt and Hans Kelsen. While making this comparison in the article, my primary objective is to investigate the underlying mechanism of the emergence and sustainability of how legal systems function in modern states. My main argument in the article is that the relationship modern states have with law can on one hand be embodied through the notion of sovereignty, while the creation of law can on the other hand be embodied through the hierarchy of norms. In other words, the concretization and historicization of the creation of law and the notion of sovereignty depend on the simultaneous coexistence of sovereignty and a hierarchy of norms. This cannot be established on a purely theoretical basis. However, a sovereign who decides the existence of a state of emergency should not mean that he normalizes the state of emergency. The *Grundnorm* that is decided in a state of emergency is and should be the source of the hierarchy of norms under normal circumstances.

In the article, I will first focus on the emergence of modern law starting from the feudal period and touching upon the early modern period and then examine the emergence of the modern state and its relationship with the law. In order to do this, one must undoubtedly start by focusing on the last millennium in Western Europe. Although studying the last millennium of Western Europe and how it reveals the modern state is difficult, it will be done in three general parts. While Weber did this in his *Economy and Society* (Weber, 1978, p. 1085), others have taken a different approach who did not consider *Ständestaat* [corporative state] as a specific category or period.[1] However, in any case, the environment that shaped and nurtured the political relationship of the feudal period was the Carolingian Empire (Bloch, 2005, pp. 59–76; Le Goff, 2017, pp. 50–61). As Poggi (1978, p. 17) stated, the feudal order that had been established in these lands evolved into *Ständestaat* between the 12th-14th centuries, which then evolved into absolutism between the 16th-17th centuries. In the post-18th-19th centuries, absolutism was dissolved and the state of law emerged with certain changes that Poggi referred to as the "rise of civil society."

Before examining the modern meanings of law and legitimacy in this context, the feudal era must be remembered, because the legal practices during the feudal period and the understanding of law after the birth of the modern state have radical differences. Secularity and rationality are two fundamental dimensions of this radical difference. In order to understand these better, the article will first present what legal practices existed in the feudal period and then examine the epistemic assumptions of modern law and its relation to the state.

Legal Practices During the Feudal Era: Words and Customs

The point that attracts attention in all studies made regarding the legal order of the Middle Ages and the feudal era is the absence of written documents in judicial cases during these periods. Although compilations remaining from the Roman Law existed until the 9th-10th centuries alongside the statuary decrees issued by barbarian emperors, these do not coincide with daily life, because:

The most serious problem was that no book was capable of deciding everything. Whole aspects of social life—relations inside the manor, ties between man and man, in which feudalism was already foreshadowed—were only very imperfectly covered by the texts, and often not at all. Thus, by the side of the written law, there already existed a zone of purely oral tradition. One of the most important characteristics of […] the feudal regime was that this margin increased beyond all bounds, to the point where in certain countries it encroached on the whole domain of law. (Bloch, 2005, p. 109)

Whether the remnants of Roman Law or the barbaric laws of such groups as the Carolingians, the final bases for justice were the dictums that had been inherited orally. These orally conveyed customs, which consisted of traditions, represented the primary sources for regulating the entirety of social life (Le Goff, 2017, p. 362). The power of words was supported by practice and constituted the generality of law. In this context, no legal system can be mentioned as having specific borders until at least the 9th-11th centuries. Due to the variability in law, it was also flexible and malleable at a level not visible in other orders. The reason for this flexibility was the absence of the habit of keeping written records of laws or trials. The majority of courts contented themselves with oral declarations for their verdicts, and judges expected investigations to be reconducted in the case of a mistrial if the parties were still alive (Bloch, 2005, pp. 196–197). Even in agreements, writing was used to record the witnesses to the agreements. This record of witnesses to the agreement ensured that they could be summoned when liabilities

[1] See Perry Anderson, (2013), *Passages From Antiquity To Feudalism*, Verso Press.

under the agreement had to be fulfilled. Due to the agreement itself not being recorded, no written format exists that was acceptable as a direct witness.

The construction of laws was made possible through practice and repetition (orally or daily practice) rather than in writing. Memory was the sole guarantee for the oral customs and traditions that emerged when writing was not the basic reference. But just as forgetfulness can maim memory, such lawsuits can be misunderstood and conveyed erroneously. This is one reason why no one mentions any law belonging to certain borders during the feudal era.

In addition, when customs are accepted as the source of law, the law that governs the individuals is the law that their ancestors had applied customarily. Therefore, mentioning any sole customary law is impossible. Even the laws of two small rural communities that were very similar at the beginning would become entirely different from one another after a few generations unless they were fixed in writing.

An intense fragmentation was previously said to have occurred during the feudal period and ecclesiastics to have mainly used writing. Many legal matters became dependent on oral customs due to the fact that Latin, being the common language of old written legal texts, was not known outside of the church. Apart from the meanings of the concepts of customs and tradition, the basic reason this conclusion has been reached is that the majority of trials were conducted by administrators, the majority of whom were illiterate. This can be added as another reason for the weakness of written law during the feudal era.

As the *Ständestaat* order slowly took form, the need for writing and written law became widespread. The activities of those who were raised in Bologna schools during the Gregorian revolution and thereafter (Le Goff, 2017, pp. 102–103) at different locations of the European continent raised awareness of writing and popularized education on the Roman principles of law. Even the church began teaching these legal texts despite much opposition (Bloch, 2005, pp. 116–120). Therefore, just as the *homo juridicus* [legal person] was being born on one hand, so was a tool discovered for legitimizing the monarch/king on the other.

The Anthropology of Modern Law: Modern Law and Politics

There is no possibility of understanding the relationship between Law and Politics by simply knowing the precedence between them because no such thing exists. According to the points taken as references, the hierarchical character of the relationship differs; the law at times could be acknowledged as *a priori* and as the theoretical or transcendent ground constructing politics, while at other times it was the opposite. Therefore, while studying the law-politics relationship, this study will not be interested in determining the hierarchical zero point of the relationship between them. However, another point that needs to be clarified is the definition of these disciplines. In this context, human sociability can be expressed as the common point among the definitions of politics.[2] All regulations concerning human sociality, whether originating from a transcendental source[3] or from power relations, define politics and fall within its scope. However, when defining law or rather what is considered the legitimate law, finding similar general or common definitions is very difficult.

The answers given to the question about what law is can be divided into two basic approaches. However, one must be aware of the deficiencies in this reduction, such as viewing things too generally or underestimating their differences. This is because each approach has different explanations with many nuances. Going back to the question regarding the nature of law, these two main approaches can be ranged as: i) idealistic or ii) non-idealistic. The idealist approach is dualistic and voluntaristic in order to be self-consistent. Acknowledging that it acts with purpose is necessary for this voluntarism. Meanwhile, the non-idealist (materialist) approach is monistic and immanent (Akal, 2017, p. 25).

Idealism has a dualist structure as it conveys the material/concrete world to the ideational/abstract one. At the same time, idealism implies the wisdom and purpose of what must be. This implication also points to will, which determines the goal. The idealist approach often refers to natural law. This approach needs to be assessed at the two differing points of the theory of traditional/classical natural law and the practice of modern natural law. Traditional/classical natural law places the will that built the absolute/universal law as God or nature, whereas modern natural law places this subject as the rational man or state. The modern voluntarist positivist approach, being fundamentally opposed to religious legitimization, is thus also evaluated at this stage.

Meanwhile, materialism is considered monist as it rejects the distinction between material and immaterial fact. The idealist approach of conveying facts to ideals is unable to provide a concrete response to the question of ‘what the conveyer has responded to’ or ‘what it is’ and ‘what is unrealistic to the materialist’. For the materialist who claims that the idealistic answer is metaphysical, this answer is insufficient. The perspective that gives weight to the part-sum relation without considering the abstract and the transcendent center to which the subject will be sent along with its creative will and purpose is materialist, monist, and immanent (Akal, 2017, p. 26). In other words, it represents a materialist, structuralist approach.

[2] Definitions for politics have been made in the literature by such philosophers as Plato, Aristo, Agustin, A. Thomas, Marsilius, Vitoria, Machiavelli, Spinoza, T. Hobbes, J. Locke, and Rousseau.

[3] This transcendence may be any of the pagan gods or the God of monotheistic traditions, as well as the humanist, self-referential metaphysics of the natural rights fiction.

The monist immanent approach assumes that one and only one legal definition cannot be made due to being structural and that each different social structure defines the law differently. The approach does not accept any single reference, claim transcendental values to be universal, or a thing to be good/bad or right/wrong in and of itself. Therefore, this approach makes no mention of a constant idea of justice or an absolute morality or ethics that is valid in general. The categories in which the social world is constructed are created and shaped by people in the final analysis. Similar to culture, however, these categories also simultaneously shape people. In this context, Bourdieu's claim is meaningful, as he implies, that it is not excessive to say that the law creates the social world, as long as one remembers it was created by the social world (Bourdieu, 1986). The noteworthy aspect here is the negation of the tradition of the Enlightenment.

After Kant (1996), the Enlightenment claimed to have established its philosophical and epistemological foundations in the most stable form as rational intelligence and implies absolute and universal laws through its transcendental emphasis. Kant stated the constructive subject of the law is the rational mind through the rational construction of moral and legal laws. In other words, the rational individual can arrive at the universal/absolute rule of law and ethics through reason. Nevertheless, one should not regard Kant as the first representative of this train of thought, as Rousseau, Grotius, and Suarez (Akal, 2013) can also be mentioned as the thinkers who talked about universal law before Kant. These thinkers spoke of the universal law in the debates on natural law regarding a secular basis. However, one must keep in mind that these were also based on traditional/classical natural law discussions. The controversy over the possibility of a universal law among the proponents of classical natural law occurred between the Augustinian tradition and Thomas Aquinas before the modern period. While both approaches advocate the natural law in principle, Augustine put God as the first will and believed in the limitlessness of His will. This prescribes God as being able to create at will, including the laws that are supposed to exist in nature, and suggests that God cannot be bound by any law. However, Thomas Aquinas believed this to be impossible and argued for the possibility of arriving at the law through reason because God limits His own will to the laws He created immanent to nature and therefore God's will is both the source and limitation of natural law (Akal, 2017, pp. 92–101). In this context, from the 16th century, the central idea of natural law shifted away from the central God to the rational mind beginning in the 16th century through the tradition that followed in Thomas' footprints. Here, however, one must not fall into the idea that the high-profile dichotomy of will versus reason in the debates on the nature and source of the law is wrong at one point, for both God's will and man's intelligence have one point in common: to have a will in the creation of the law.

After mentioning these points regarding the zero point of the law and the issue of will, the article needs to touch upon the most practical and legitimate aspect of law in the modern state. To do this, the article needs to discuss the distinctive characteristics of the modern state: legitimacy and rationality, which leads directly to Max Weber's rationality and legal opinions.

Beyond the above-mentioned natural law debates, the rationalization of law according to Weber is based on two basic assumptions: one is the separation of law and ethics, and the other is the law as a deductive and consistent system. In other words, the rationalization of the law consists of: i) the differentiations that result in the independence of the law from the ethics and ii) a predictable formalization basis going forward. Weber provides this rationalization irrespective of chronology in four ideal stages: a) the primitive, in which the law is formal and irrational, b) the traditional in which law is substantive and irrational, c) a transitional stage of natural law in which the law is substantive and rational, and d) modern law, which is formal and rational (Weber 1978, pp. 809–815, 852–855). In this case, Weber considers substantive rationality in law (which must be referred to as modern natural law) to be a pre-modern situation (Lash, 2013, p. 142).

According to Weber, the essentialist and rational law is found in theocratic legal systems (i.e., traditional/classical natural law), natural law (i.e., modern natural law), and welfare-type law aimed at social justice (i.e., volitional positivist lawyering). Such a law is essentialist in its ultimate value and is also rational to the extent that it has been systematized by academically trained church or legal scholars (Kronman, 1983, p. 78). The science of natural law, being the purest form of the value rationality for Weber, bridges the gap between traditional law and modern law. Natural law is pre-modern to the extent that the rules of ethics and law have not yet been separated. In addition, natural law is pre-modern also in the sense that it ignores a process of legal change, as it assumes a set of fixed legal principles (Lash, 2013, p. 143). Therefore, Weber was unable to defend natural law theories nor, more generally, the essentialist rational legal theories within modernity. However, the anti-Enlightenment criticism that emerged after the 1960s gave way to other struggles, and starting in the 1970s, new approaches had appeared in the metaphysics immanent to the Enlightenment as idealism. These approaches broke away from the metaphysical assumptions of natural law based on the Enlightenment and instead settled natural law into a deliberative discourse (Rawls, 1972; Dworkin, 1977). However, these new approaches can be said to follow or imitate the contractarian fiction, for the issue of rights that subjects entrust to the third party (the State) is fictive in the contractarian tradition and constitutes a zero point. In other words, similar to this zero point that was designed to get out of the speculative natural state, the boundaries of negotiation are too speculative to implement.

The point that Weber addressed and fully defended in *Economy and Society* (1978) is the legal positivism based on formal rationality. As Lash stated:

Full rationalization of the law comes about only in modern formal rationality, in which the process of intellectualization begins to question and then undercut the very rational foundations of natural law itself. Thus, modern formally rational law is characterized by a separation of law and ethics, a focus on enactment in the absence of meta-juristic principles, the clear and consistent separation of general legal rules from particular legal events that can be subsumed by those rules, and an enhanced importance for the intentions of legal actors. (Lash, 2013, p. 278)

Weber's (1978, p. 656) formally rational legal positivism assumed a "logically clear, internally consistent [*sic*] gapless system of rules, under which [*sic*] all conceivable fact situations must be capable of being logically subsumed."

Although legal positivism insists contra natural-law theory that 'the law is the commands of the state', its seamless, rational, clear, and consistent legal system must in the end be based on a fundamental norm. This norm cannot, as in natural-law theory, be rationally justified. And this norm - which serves as a guiding principle for the entire system of legal rules - can be such that the system effectively serves class or national interests. (Lash, 2013, p. 145)

Two Theorists of the Modern State: Kelsen and Schmitt

The theoretical relationship of the modern state with politics and law can be read through two theoreticians: Hans Kelsen and Carl Schmitt (2015). While Kelsen preceded law and places it in an existential center for the state, Schmitt put the political at the center and connected the existence of the modern state to this. Thus, through both Kelsen and Schmitt, one can say that the modern state cannot be understood without mentioning the concept of positive law, and of course parliament is the legislative body through which the law was created using norms and politics. In other words, law and politics as the two founding elements of the modern state are essential to the issue of legitimacy. Therefore, Kelsen's views will be examined first, followed by Schmitt's.

As a name outside of the positivist voluntarist conception of law, Hans Kelsen claimed that the law must be a pure science beyond the assumption of the natural law. In this context, the theoretical framework about either the relation between the modern state understanding and the law or the relation of the law to its internal structure is very important. In particular, the hierarchy of norms upon which constitutions are built and the establishment of the theoretical bases that make international law possible from a neo-Kantian approach makes this important. Kelsen examined the relationship that political power (i.e., state power) has with the law in the context of the constitution and entered into a productive and serious debate with Carl Schmitt, another law theorist in the 20th century. This fruitful debate took place mainly in the context of sovereignty, law, and the Constitution and has maintained its importance to the present. In this context, the study first needs to touch upon *The Pure Theory of Law*, which Kelsen (1934) had built and see how he established the state-law relation.

Constructing the Law as a Thing in Itself: The Pure Theory of Law and the State

Kelsen (1934) claimed his work, *The Pure Theory of Law*, to be a theory of law entirely separate from all elements of political ideology and natural sciences, to be conscious of the autonomy of the research object (i.e., law), and therefore to be a theory of law conscious of its own unique character. During the historical period in which he constructed his theory, mention must be made of a similar situation that was still going on: Legal science had been reduced, both explicitly and implicitly, almost entirely to legal policy. In other words, the law was being evaluated not based on its own autonomy but in the context of its function and the instrumental relation between it and politics (i.e., the holder of political power). Since the very beginning, Kelsen's main purpose was to raise the law to the level of a real science, a social science. His thoughts on jurisprudence were about developing the tendencies that focus on not the shape of the law itself but a cognition about it and nothing else and then placing the results from this cognition at the top of all the sciences (i.e., to approximate universal objectivity and certainty; Kelsen, 2016, p. xix). As is clear from Kelsen's words, he was speaking of a neo-Kantian certainty and universality. This claim is important for Kelsen, because he will claim this is the only legitimate way, apart from sovereignty, to make a supra-state international order possible.

Pure theory basically offers no third way besides natural law theory and legal positivism. As Kelsen (2016, p. xx) stated, pure theory is legal positivism's own critique toward positivist voluntarist law. Therefore, the primary opponents were also positivist jurists. However, the conflict led to serious debates in many circles, notably among legal positivists. Contrary to what one may initially take as the source of the conflict, the position of the jurisprudence within this debate or the consequences of it were not the primary reason. Essentially, the cause was about the relationship between law and the political, the obvious divisions between them, and the long tradition of voicing political demands on behalf of the jurisprudence being abandoned. This was such a tradition where an objective authority would be resorted to when political demands were expressed that could not be rescued from subjective ideas. Even when they appeared to have an absolute value of a religion/nation/ideology/class with purely good intent.

Kelsen's (2016, p. xxii) aim was to separate law from politics (i.e., from the state) while making the law a self-proclaimed entity. Hence, the basic criticism that had been brought was that fully excluding the theory from *the political* would also cause it to diverge from the complex and intricate tides of life (sociality) and thus make it worthless as the science. Another critique from the other side was that pure theory does not meet its own

methodological requirements and means nothing more than self-expression as a certain political value. Every group of politicians, from liberal or social democrats to fascists, from capitalist statists to Bolsheviks criticized this pure theory of being political. Kelsen (2016, p. xxii-xxiii) mentioned how the theory of these criticisms is precisely pure (i.e., a politically purified and self-proclaimed principle of law).

Kelsen's pure theory of law is, in itself, the theory of positive law, not the legal system of any state. It is not an interpretation of any certain national or international legal norms. It is the general theory of law. Therefore, Kelsen's pure theory of law aims purely and simply to know the object of examination; it only means to know what the law is, seeks the answer of how to make the law, and has no concern for what needs to be done or how to do it. In other words, the pure theory of law is not concerned with the creation policy of law, as that is a direct political issue.

The Law and the Modern State

The legal system in the modern state is a seamless and interconnected system through the hierarchy of norms. This hierarchical system, which is connected to *Grundnorm* in the final judgment, sees the law as being in motion in a continuous process of self-renewing creation. In this dynamic system, the real function of the legal norm is assumed to be for forcing people to behave in a certain way. Once this is accepted, the ultimate point in assessing the creation of the legal norm is whom norms place under obligation as the subject of the law and who participates in its creation (i.e., whether or not the obligations occur at the subject behest or in opposition). Identifying the state's form with its constitution becomes imprisonment by recognizing that the act includes the law (Kelsen, 2016, p. 114). However, the problem of state form as a method of legal creation cannot come only at the constitutional level; therefore, the problem does not merely refer to the constitution. On the contrary, it emerges in all dimensions; especially in the process of extracting singular norms.

The creation of singular norms in modern law is built upon the distinction between private and public law. Private law represents an equal legal relationship between subjects who are at equal levels. In the case of public law, the relation is represented between two subjects (i.e., the subject and the subjected), one of whom is legally superior to the another. A typical Public-Law relationship occurs between the state and its citizens. Private legal relations are also defined as legal relations in a narrow sense by placing them across from public law relations as power/sovereign relations. Thus, the distinction between private and public law constitutes an opposition between law and power (e.g., non-legal or semi-legal power), particularly between the law and the state. The typical relationship of public law involves the normative, obligatory administrative directives issued by an administrative body of the state, while the typical relationship of private law involves legal transactions, contracts in particular. Parties are legally obliged to treat each other a certain way in a mutually exclusive manner. However, the critical difference is that, while parties contribute equally to the creation of norms in contracts, the administrative directives of public law receive no contributions from the party subject to the obligation (Kelsen, 2016, pp. 115–116). Kelsen's pure theory of law transforms the oppositions between private and public law as well as the opposition between the absolute and constant non-system of traditional law into an opposition internal to the system. Thus, the opposition emerges from being something absolute to something that is relative. Presenting the antagonism of betting as an absolute contradiction between law and power (or law and state power) creates an illusion in the field of public law. This is the illusion that the field of public law (i.e., constitutional and administrative law and their particular political importance) cannot be at the same level as the field of private law. Namely, the field of public law is regarded as the real scope of the law. The legal limitations in the field of private law cannot possibly be the same as those in public law, because public law acquires a legal identity independent from the law due to state and public interests. Thus, in the case of an exception, the realization of the state goal can exceed the law. According to Kelsen (2016, pp. 118–119), the paradox is that the existential landscape of the state represents a jurisdiction independent from the law. The restrictions placed by written ordinances, despite their current state, can neglect all rights when necessary, and this tendency exists not only in autocracies but also in democracies and monarchies.

Providing an absolute contrast between private and public law creates the illusion that the field of public law, especially the constitution and administrative law, is the exclusive domain of political power and that the political power is entirely removed from the private domain. However, the opposition between private and political is impossible without a reference to subjective rights. This assumes private rights to be at least as political as public rights (Kelsen, 2016, pp. 51–56).

Law and Politics or Sovereignty: Dualism

Most modern legal and political theories assume that a dualism exists between the state and the law. On the basis of this assumption, the contrast lies between private and public law as previously mentioned. The state, actually being another form of law, is stated as being positioned opposite the law in one aspect, while also basically being a legal phenomenon in another. According to Kelsen, this dualism arises from the traditional theory that characterizes the state as an entity independent of the legal system while also accepting it as the subject (i.e., legal person) with legal obligations and rights (Kelsen, 2016, p. 120).

The theory of private law recognizes that an individual's legal personality exists temporally and

logically before the legal system. Similarly, the theory of public law recognizes the state, which is the collective union of will and action, to be independent and preceded by law. However, the theory of the state precisely assumes that public law represents the state as the creator of the law and at the same time attaches itself to the law created by the state. In other words, the state as a supra-legal entity is assumed as both a pre-assumption of law and to presuppose the law; it takes liabilities and rights from the law that it created. At the same time, this approach also reduces the law directly to code.

According to Kelsen (2016, pp. 122–123), this dualism is purely ideological. The conception of the state as a different entity from the law allows the law to be created while also allowing the law to create the legitimacy of the state. The state that emerges from a lean concentration of power makes it a *Rechtsstaat* [legal state], one that has created and legitimized itself. This new form of legitimacy becomes replaced as long as the religious-metaphysical legitimacy in classical/traditional natural law ceases to exist. The contradiction here is still in place with no solution: On the one hand, the state is defined as a legal person, while on the other hand it is accepted as a power that exceeds the law.

The possibility of removing the ideological function of dualism is that the state as a social structure is seen as a system of human behavior. The opportunity is having the state be understood as a legal order. The common point of the state and the law is that they are compulsory social systems. The separating qualities of both the state and the law are the same compulsory actions. These two social systems must be the same, because the same social community (i.e., citizens and political-legal systems) cannot be built at the same time by two different systems. Therefore, the state is a legal order. It is not just any legal order but the legal order that reaches a certain centrality and establishes a functional division of labor. Otherwise, the need would have existed to build a state or the previously mentioned *Ständestaat* for legal practices in the feudal period. The feudal period, however, had no central courts issuing singular norms, nor were these norms passed along through compulsory actions. Only as a result of historical and political evolution did central organs emerge from the process of social division of labor to construct the modern state.

Because no better legal system exists than the modern state's legal system, the state itself has become the system of the supreme rule of law. In this context, the application of the modern state's sovereignty and legal system is limited to its territorial area. This corresponds to both the country and the citizens to whom the civil actions arising from the legal system can be applied. Moreover, the problems related to the validity and creation of the legal system are also the main issues of political theory. In this context, Kelsen (2016, pp. 125–130) regarded politics such as the state to be identical to legal theory, expressing the law (positive law) not to be a legitimate apparatus of the state in just the same way as legitimizing the law is a tautology of the state. However, Kelsen (p. 134) appeared to have forgotten that he had also assumed the action of legitimization to be subjective rather than objective and political theory and the theory of law to be identical. Despite stressing the fact that the law must be an objective science, the legitimacy debates entered into the field of politics, and this aspect of law was forgotten.

Schmitt: Law as the Writ of Sovereignty

The concept of Law that Hans Kelsen constructed within his pure theory of law rendered the state and law to be identical. Even political theory is occasionally included in this identicality. However, having entered a serious intellectual and theoretical argument with Kelsen during the 20th century, Car Schmitt denied this identicality and constructed the state-law relation from an entirely different point. Similar to Kelsen, Schmitt had received criticisms from many spectrums of the political array. The paths of many different sections, primarily composed of liberal political theoreticians, intersected with Schmitt. Schmitt was always on the agenda, whether for refreshing faith (i.e., seeking legitimate grounds for political and legal acceptances) or for finding a scapegoat (i.e., assuming him to have been the theoretician of political dictators).

Schmitt's conceptualization of law is not independent from government and politics, for the law does not consider itself to be autonomous or independent nor to be reduceable to acts directly. In all spaces where sovereignty is beyond discussion, one assumes that the law and the state cannot be fully comprehended. In other words, one cannot comprehend the state-law relationship without understanding the political connotation between the concept of sovereignty and all it entails.

Normativism and the Dualism of Law

Schmitt means the notion of rule of law when he mentions the modern State. German intellectual academic studies only approached the state as an organized social structure of society after the romantic and idealist traditions. As a result of the national unity in particular that arrived after Hegel and that could not be established with Bismarck, the state itself was conceived as a metaphysical unity. For Hegel (2001, pp. 194–266), the state is the form where the entity rises within itself in a perfect and complete manner. In this sense, the state represents a corporate order that has attained national unity within a country's territorial borders and that has found its authentic representation and identicality in sovereignty. Schmitt conducted his discussion on law and politics within the scope of this tradition while keeping united the theory of the rule of law and its political conceptualizations. According to Schmitt, the state possesses two different souls. The first of these is the concept of tangible/factual order as understood within the framework of his political notion, and the other is the rule of Law (Bezci, 2006, pp. 91–92).

Similar to Kelsen, Schmitt also spoke from within legal positivism. He also similarly directed his criticisms toward the acceptance through legal positivism. Such as his basic criticism was the dualism that was present in the field of law. However, the dualism that Schmitt discussed was not the dualism between private and public law as Kelsen argued. Schmitt instead criticized the dualism that is assumed to present in a rule-of-law state between positive and natural law.

Modern political theory is known to distinguish between natural law and positive law mainly within the context of legal order. Whereas during the traditional period, the divine laws or universal laws that were innate to nature represented fundamental/natural laws, and the laws or traditions that were created under these within the legal hierarchy could not conflict with such natural laws. Natural laws represent the benchmark and reference of justice. During the modern period however, this divine natural law became secularized, and the laws that had been declared just by God were now constructed using rational intelligence. Although the idea of God had been dismissed from legal creation processes in this scope, some divine and inalienable fundamental/universal laws were believed to exist for modern positive law. The rights provided regarding the notion of human rights emanate from this context. One uses the codifications states make in favor of natural laws (i.e., legislative activities) to overcome the dualism between the state-created positive law and the aforementioned natural law.

For Schmitt (2004, p. 3), the modern rule-of-law state was a "legislative state." The feature of a legislative state that possesses a political public structure is that it considers the making of norms to be the highest expression of public will. As the structure that emerges pursuant to such norm-making, law subjects all public functions, activities, and structures to itself. The rule-of-law state that was seen in the tradition of the European continent after the 19th century was in fact an entirely legislative state, (i.e., a parliamentary legislative state). Parliament has a supreme and central position as a legislative organ because it conducts the making of norms with the title of lawmaker (pp. 3–4). The issue of legitimacy comes into play at this point. Is the legitimacy of legal norms based on the positive laws previously passed by the parliament, or does legitimacy actually result from the legal processes themself (i.e., from the authority/sovereignty of the lawmaker; Bezci, 2006, pp. 91–93)?

The concept of the liberal rule-of-law state mostly manifests a normative approach that mainly intends to limit legitimacy to legality. For Schmitt, however, the emphasis on legality disregards sovereignty, which is the real source of legitimacy, and cripples legitimacy. Although Kelsen did not seek legitimacy in his pure theory of law, he did open the door to normative legitimacy as he neglected sovereignty. Because Kelsen viewed the effort for legitimacy as a subjective behavior that did not match with the objective theory of law, the duty of this theory is not to seek or create legitimacy. In this context, Kelsen solved the problem of the concept of sovereignty by negating it. The result of his deduction was that the concept of sovereignty must be radically repressed. This is in fact the old liberal negation of the state *vis-a-vis* law and the disregard for the independent problem of the realization of law. His theory of the sovereignty of laws rests on the thesis that it is not the state but law that is sovereign (Schmitt, 2005, p. 21). Laws are what reign, not humans, authorities, or emperors. Stated more clearly, laws do not reign, they are only accepted as norms. Empery and brute force shall no longer exist from now on. Anyone wishing to establish an empery through force should do so "on a legal" basis or "in the name of the law" (Schmitt, 2004, p. 4). The organization of a legislative state is always based on the principle of separating legislative and executive activities. The purpose of this is to build the fundamental legitimacy of the legality that lies behind the empery of depersonalized norms. The basis of a closed system of legality is obedience, and it justifies this to eliminate all forms of the right to resistance. At this point, the characteristic appearance of the legal order is law, and the characteristic justification of the use of force by the State is legality (Schmitt, 2004, p. 5).

For Schmitt, the state does not represent an organization that purely results from power concentration, as Kelsen had claimed. Power does not prove anything with regard to the law; as Jean-Jacques Rousseau stated in agreement with the spirit of his time, "Force is a physical power; the pistol that the robber holds is also a symbol of power" (as cited in Schmitt, 2005, pp. 17–18). As an entity that is procreated by sovereignty, the state has an interim status as the creator of law and as an entity that is governed by the same. Schmitt manifests an approach that does not clearly distinguish between an order that justifies a specific system of norms from an order of political realities (Schmitt, 2016, p. vii). For a political union in this context, Schmitt not only considered a legal-political union to be mandatory, but also the union of the state, society, and nation. However, this union is out of the question in a legislative state, because a liberal legislative state (i.e., a parliamentarian rule-of-law state) denies the state-civil society dichotomy (or state-individual dichotomy) on the grounds of democratic theory. At the same time, no homogeneity exists between the civil society and the individuals that compromise the society. In the presence of such acceptances, the emphasis of parliamentarian democracy on popular will through a formalistic normative approach in fact damages itself and imperils its own legitimacy. In other words, when the will of the State is separated from the popular will through democratic insistence, the meaning of the same democratic insistence will depict all expressions from society as law and present society with a judicial rank within the law. A law that exists in a democracy represents the existing society's instant will. In practical terms, this means the will by the instant majority of voting citizens. This represents a figurative law making; however, no homogeneity actually exists between the individuals that

compromise the civil society, which is what liberal theory assumes. Therefore, an instant decision by the majority of society results from the unreal homogeneity of the long-term democratic majority (Schmitt, 2004, pp. 28–29). In practical terms, this represents a paradoxical conflict with liberal democratic pluralism. The solution that Schmitt introduced for this was democratic homogeneity (i.e., identicality; Frye, 1966, pp. 818–830). Strictly speaking, this entails identicality between state and society, between the rulers and the ruled, between the subject and object of state authority, between society and its representation in parliament, and between the state and voters (Schmitt, 1988, p. 42). The triangulation point here is the identicality of the authentic representation and the self.

Meanwhile, Schmitt identified three extraordinary lawmakers within the constitutional order apart from legality during extraordinary moments of crisis where the parliament is unable to produce a solution due to not being able to achieve homogeneity. Accordingly, parliament as the ordinary lawmaker appointed by legality may not perform the functions of these extraordinary lawmakers: 1) *Ratione materiae* [the authority of the *Reichstag* to revise the constitution with a two-thirds majority vote), 2) *Ratione supremitatis* (a referendum authority from society), and 3) *Ratione necessitatis* (authority of the Reich chairman to implement the article of state of emergency). The following can be concluded from this: Ensuring the legitimacy of the order of legality results from the legality itself; contrarily, however, the legality of the legitimate order can be legitimized. In such a case, centers that grant legitimacy precede legality. Extraordinary lawmakers both ensure legitimacy and create the basis of legality. On one other hand, the ordinary lawmaker owes its existence to the extraordinary lawmaker. Positivist and normative theories of law overlook this point (Kardeş, 2015, p. 257).

The Zero Point of Law: Decision

In the hierarchy of the norms he created, Hans Kelsen legitimized all norms by connecting them to a single senior-norm: the *Grundnorm* [basic norm]. The consistency of the legal system and the presence of no gaps therein reveal the totality of all sub-norms through each other and the *Grundnorm* that precedes them. In fact, the pure theory of law gives away its own transcendental core (Kelsen, 2016, pp. 69–75). For Schmitt, however, the *Grundnorm* did not exist at the beginning of the law's construction, *Grund-nahme* [conquest] existed at the beginning (1995, p. 581), which means the sovereign made the decision after the conquest.

Schmitt was previously asserted to believe the state to have two souls and to therefore be comprised of legal order and of objective order (the political). Schmitt used determinateness in order to surpass normativism during discussions on the constitution. Here, he surpassed the impersonality of normativity and transcended into the decision's perception of personal reign to perception of the decision. While doing this, though he assumed the presence of democratic identicality (i.e., authentic representation) mentioned above. The sovereign as the determiner of the legal exception (i.e., state of emergency) does not create the law (Schmitt, 2016, p. 13); but only validates the law through their decision and are permitted to violate existing rules in order to preserve the legal order. A sovereign's decision does not possess unlimited power. As the main source of law, the society's right to live limits the sovereign's decision making ability. Still, the legitimacy behind the sovereign's decision is the support from the political union for this decision. In other words, the decision-maker is sovereign due to his authentic representing the political union (Bezci, 2006, p. 107).

Legitimacy: State, Law, and Sovereignty

The legitimacy issue has existential significance as it determines the zero point of both politics and law. Although Kelsen accepted law as the thing-in-itself and intensified his efforts to build an objective science, juridical science presents legitimacy in factual order, even if this was not Kelsen's goal. Meanwhile, Kelsen neglected the concept of the political and failed to examine the appearance of factual order (i.e., law) within the practical social order or their relationship. On the other hand, Schmitt did not get much closer to Kelsen's approach (i.e., building the law through *Grundnorm* with his emphasis on sovereignty as the constituent will and unique source of legitimacy. Schmitt's approach with regard to the political and political unity was based on factual order by defining the law in terms of the sovereign's extraordinary decision being identical to that of society/people. The approach toward understanding the modern state in this article both attaches importance to Kelsen's emphasis on juridical science as well as equivalent value to the notion of sovereignty as Schmitt had rightfully developed. More precisely, the claim is made that both jurists should be analyzed together to understand the modern state, and that both the theory of law and the notion of sovereignty are indispensable for the modern state. This paper examines sovereignty as a basic legal-political notion that enables the modern state by distinguishing it from the conventional approaches of state and law while also in another sense bringing divine will down to Earth.

The Source of Authority and the Singularity of its Usage: Sovereignty

Modern political theory (such as in assumptions of Hobbes, Locke etc.) has a dualistic attitude regarding legitimacy. The natural law assumption claims human beings to have universal rights independent from positive rights while also claiming that the normative rules built by positive law hold humans accountable. Those who hold the accountability are, of course, the legal institutions that take their power from the legal sovereignty.

This article has noted legitimacy to have mainly been defined in the pre-Modern era through the oral tradition of the customs during the feudal period. Following the reintroduction of script in the creation and transfer of law, the approach this article has defined as traditional/classical natural law became dominant, and the basic resource of legitimacy in this period were the rules that had been created or come out of divine will. These rules are immanent in nature and the universe as well as in humanity and society's own nature and design both the political order (e.g., king, palace, *stände* [corporate] councils) and social roles. Therefore, natural laws are assumed to have already existed prior to the rulers as a set of binding rules, directly or indirectly breeding legal rules to which rulers themself owed their own legitimacy (Gierke, 2013, p. 130). In other words, a ruler is not legitimate in the sense that they are appointed by a clear divine order; rather, they are legitimate because the rulers emerge as a result of the natural and basic law of the social order created by God (Duguit, 2013, pp. 390–391). Any criticism from the secular camp against the mainstream approach is considered to be equivalent to an aberration and subversion of order. Therefore, the forerunners of the theorists such as T. Aquinas, Suarez, Vitoria, and Grotius who opened the way to secular thought later mostly had a clerical past and paved the way to secularity by making references to Christian theology.

All of these names accept the limitation of the divine will through natural law as the zero point and as a thing left to the positive law that would arise in the future. However, in order for positive law to emerge, the modern state that creates positive law with normative arrangements needs to come into being first.

Law shifted to modernity through the concept of sovereignty. The process of sovereignty defines the law and the political while at the same time highlights legitimacy as the joint determinant of law and politics. As such, the form of sovereignty (i.e., way it is accepted) also determines the legitimacy. In this context, political science widely accepts Machiavelli to have reinforced and spread state as a term in the modern sense. In his works, Machiavelli mentioned the issues of exercising power over a specific land and a specific people as well as their control and regulation; this would be defined as the essential feature of the state as a term (D'entreves, 2013, pp. 195–197). At this stage, however, Machiavelli spoke about the practical order of politics without making a theoretical discussion on legitimacy. In this context, J. Bodin, who regarded political power as the first condition of social life, closed the points Machiavelli left open using the concept of sovereignty and paved the way for the modern state authority (Schmitt, 2013, p. 247).

The characteristics of sovereignty involve the place where the modern state and authority have appeared: Sovereignty is absolute, sovereignty is permanent, and sovereignty is indivisible/inalienable. According to Bodin, sovereignty as the highest power providing order cannot be constrained by any material force other than itself. This is because the sovereignty of a ruler who is given certain limits under certain obligations and conditions is not a true sovereignty. However, Bodin places the natural law that is assumed to be superior to material power over the sovereign under normal conditions. Regarding the question as to what extent the sovereign is confined by the rules and responsible to the rules, Bodin stated that the expressions are binding because the power to assign responsibility is based on natural law. In extraordinary circumstances, however, this bond is cut in accordance with general and natural fundamental principles. "In general, the responsibility of the prince to the vassals or the people continues as long as it is in the interest of the people to fulfill the promise; but in case of urgent needs, the commitment ceases" (Schmitt, 2005, pp. 8–9). The absoluteness of sovereignty allows rulers to make rules in favor of their vassals and to abolish rules the ruler had already made. However, the ruler cannot make a rule that restricts the ruler's self. Such a restriction goes against the nature of sovereignty for a ruler who does not relinquish sovereignty, which is absolute, of their own will. This is because an authority that is restricted by a specific duration or that can be terminated by someone else does not correspond to sovereignty. The sovereign maintains sovereignty as long as they live. The sovereignty does not die after the ruler dies; the right of sovereignty instead passes on to the next sovereign. Thus, a dichotomy is established between the mortal and immortal body of the ruler, and the permanence of sovereignty is thus sustained (Kantorowicz, 1957, p. 408). In other words, sovereignty is the spiritual personality of the ruler and is transcendental and immortal. Finally, the absolute and permanent characteristics of sovereignty view its own division as logically impossible.

Bodin's ideas on sovereignty were his contribution to the philosophy of politics and law and has always been one of Schmitt's basic references. Although Bodin had a perspective toward natural law, his view of sovereignty's absoluteness and immanence in the political organization set a theoretical basis that allowed Schmitt to explain the suspension of law in extraordinary and exceptional situations.

The secular construction of the modern state in political philosophy was truly only possible with T. Hobbes' development of Bodin's conceptualization of sovereignty. Still, although the theoretical contributions from Bodin and Hobbes were quite important, the sovereignty in the liberal parliamentary democracies of the 19th and 20th centuries had reached a rather different point. The separation of legislative, executive, and judicial branches and making them elements to balance one another were equivalent to the division of sovereignty in the classical sense. Sovereignty can even be said to have restrained itself through the dichotomy between natural and positive law. Therefore, Schmitt (1988) stated liberal parliamentary democracy to be a crisis for the modern state and even argued the liberal theory of politics and law to have weakened the modern state by undermining its sovereignty (Schmitt, 2005). Still, although Schmitt had made correct points, the liberal parliamentary democracy

of the 19th and 20th centuries had come to a new point. In fact, this point was not alien to Schmitt: The sovereignty belonged to the nation instead of a king or ruler!

The sovereignty that had historically grown through divinity was purified from Christian metaphysics at some point but unable to become fully independent from metaphysics. In this context, Western thought/philosophy should be described as metaphysics. Whether Platonist idealism or Aristotelian materialism, metaphysical involves the judgment of existence, where 'the existence' includes social beings and finds existential meaning and where the judgment is about its reality/truth (Heidegger, 2009). In this context, secular law and politics should be accepted as having a metaphysical meaning and claim and therefore refer to universal human rights as well as inalienable (i.e., transcendent) and sacred rights, even in the age of secular nation states.

Upon returning to the issue of national sovereignty, this doctrine also assumes political power to possess something divine. As is often said, political power has set the divine right of the people in place of the right of the king. In turn, this shows that the theocratic doctrine undoubtedly has had a direct influence on the doctrine of national sovereignty (Duguit, 2013, p. 391). These days, the sources of legitimacy are the national assemblies and their actions as the appearance of the national sovereignty. However, with their normative or supra-normative actions, these are the places where one can see the soul of God or hear God's footsteps, and who knows if Hegel had predicted this?

Concluding Remarks

While trying to place the law in an autonomous position independent of politics, Hans Kelsen wanted to limit the decisiveness of politics. The reason for this limitation was to prevent the law from arbitrary acts of politics or from becoming an instrument of the law's political interest groups (Baume, 2009, p. 369). However, Kelsen's concern contradicted his acceptance that every current constitution is a legitimate one. This is because a power that has seized power through any coup and makes its own constitution is considered legitimate currently. This in turn nullifies the scientific efforts of Kelsen, who had built the hierarchy of norms on the basis of *Grundnorm*, as well as his justification for preventing the abuse of law by political interests.

While the creation of the *Grundnorm* occurs with regard to the extraordinary, the sub-norms attached to it take place in the ordinary legal order. Kelsen did not discuss when, how, or by whom *Grundnorm* was created. In other words, Kelsen did not explain *Grundnorm*'s creation at all (Raz, 2013, p. 1074). While criticizing the excessive involvement of the law in everyday politics, he constructed a notion and order of law that was ahistorical and independent of the political. What Schmitt stated about this zero point where law is dehistoricized was correct: The creation of law cannot take place in a pure state independent of the historical and without context. Sovereignty is what should create the *Grundnorm* by its decision, which would thus historicize this de-historicized order of Kelsen.

Another issue involves the implementation of norms. One needs to accept that the application of norms is not independent of concrete reality but is influenced by personal decisions (Buldur, 2019, p. 137), because the mere content of the norm does not specify how the norm will be applied. The sovereign/ruler who will implement the norm decides by establishing a relationship between the norm and the actual world. Therefore, Schmitt argued that legal practices cannot be completely independent of the arbitrariness of the sovereign decision maker (Delacroix, 2005, p. 37). As I have declared above, the concretization and historicization of law creation and the notion of sovereignty depend on the simultaneous coexistence of sovereignty and the hierarchy of norms. This cannot be established on a purely theoretical basis. However, contrary to Schmitt, the sovereign's decision regarding a state of emergency should not mean that the ruler is normalizing the state of emergency. The *Grundnorm* that is decided in the state of emergency is and should remain the source of the hierarchy of norms under normal circumstances.

The linking of a norm to a higher norm should actually prove that the upper norm determines the lower one. In other words, the hierarchy of norms to which Kelsen only formally adhered cannot fully guarantee the creation of the lesser norms independent of the content of the upper norms. While the formalist process of law creation adheres to *Grundnorm*, other norms will not be independent of each other in terms of content. In addition, the indirect legitimacy of every power that makes the law valid does not reveal a politico-legal existence different from the power of the sovereign who makes the decision regarding the exception in practice.

Expanded Abstract

This article examines state-law relations in modern states by comparing the ideas of Carl Schmitt and Hans Kelsen. The theoretical relation of the modern state with politics and law can be read through two theoreticians: Hans Kelsen and Carl Schmitt. While Kelsen preceded law and placed it in an existential center for the state, Schmitt put the political at the center and connected the existence of the modern state to this. Thus, through both Kelsen and Schmitt, one can say that the modern state cannot be understood without mentioning the concept of positive law, and of course parliament is the legislative body through which the law was created using norms and politics. In other words, law and politics as the two founding elements of the modern state are essential to the issue of legitimacy.

In this context, the article first discusses what modern law is and from where its differences emerge. While making this comparison, the article's main purpose is to investigate the mechanism of the emergence and sustainability of how legal systems function in modern

states. Its main argument is that the relationship modern states have with law can on one hand be embodied through the notion of sovereignty, while the creation of law can on the other hand be embodied through the hierarchy of norms. In other words, the concretization and historicization of the creation of law and the notion of sovereignty depend on the simultaneous coexistence of sovereignty and a hierarchy of norms.

Kelsen claimed his work, *The Pure Theory of Law*, to be a theory of law entirely separate from all elements of political ideology and natural sciences, to be conscious of the autonomy of the research object (i.e., law), and therefore to be a theory of law conscious of its own unique character. During the historical period in which he constructed his theory, mention must be made of a similar situation that was still going on: Legal science had been reduced, both explicitly and implicitly, almost entirely to legal policy. In other words, the law was being evaluated not based on its own autonomy but in the context of its function and the instrumental relation between it and politics (i.e., the holder of political power). Since the very beginning, Kelsen's main purpose was to raise the law to the level of a real science, a social science. His thoughts on jurisprudence were about developing tendencies that focus on not the shape of the law itself but a cognition about it and nothing else and then placing the results from this cognition at the top of all the sciences (i.e., to approximate universal objectivity and certainty). As it is clear from Kelsen's words, he was speaking of a neo-Kantian certainty and universality. This bet is important for Kelsen because he will claim this is the only legitimate way, apart from sovereignty, to make a supra-state international order possible.

As a name outside of the positivist voluntarist conception of law, Hans Kelsen claimed that the law must be a pure science beyond the assumption of the natural law. In this context, the theoretical framework about either the relation between the modern state understanding and the law or the relation of the law to its internal structure is very important. In particular, the hierarchy of norms upon which constitutions are built and the establishment of the theoretical bases that make international law possible from a neo-Kantian approach makes this important. Kelsen examined the relationship that political power (i.e., state power) has with the law in the context of the constitution and entered into a productive and serious debate with Carl Schmitt. This fruitful debate took place mainly in the context of sovereignty, law, and the Constitution and has maintained its importance to the present.

The concept of Law that Hans Kelsen constructed within his pure theory of law rendered the state and law to be identical. Even political theory is occasionally included in this identicality. However, having entered a serious intellectual and theoretical argument with Kelsen during the 20th century, Car Schmitt denied this identicality and constructed the state-law relation from an entirely different point. Similar to Kelsen, Schmitt had received criticisms from many spectrums of the political array. The paths of many different sections, primarily composed of liberal political theoreticians, intersected with Schmitt. Schmitt was always on the agenda, whether for refreshing faith (i.e., seeking legitimate grounds for political and legal acceptances) or for finding a scapegoat (i.e., assuming him to have been the theoretician of political dictators).

Schmitt conceptualization of law is not independent from government and politics, for the law does not consider itself to be autonomous or independent nor to be reducible to acts directly. In all spaces where sovereignty is beyond discussion, one assumes that the law and the state cannot be fully comprehended. In other words, one cannot comprehend the state-law relationship without understanding the political connotation between the concept of sovereignty and all it entails.

The article compares the state-law relationship that Kelsen constructed upon the basis of his Pure Theory of Law to Carl Schmitt's consideration of law as the decision of the sovereign. Although Kelsen accepted law as a thing-in-itself and intensified his efforts to build an objective science, juridical science presents a legitimacy in factual order, despite this not being Kelsen's goal. Kelsen, however, neglected what is political and failed to examine the appearance of factual order/law within the practical social order and their relationship. On the other hand, Schmitt's emphasis on sovereignty as the constituent will and unique source of legitimacy did not get much closer to Kelsen's approach to constructing law with *Grundnorm*. With regard to the political and political unity, Schmitt's approach was based on factual order by defining the law in terms of the extraordinary decision of the sovereign as a being identical to the society/people. This article's approach to understanding the modern state attaches both importance to Kelsen's emphasis on juridical science as well as equivalent value to the notion of sovereignty that Schmitt had rightfully developed. The last section of this article argues that the state-law relationship in modern states emerged through both *Grundnorm* and sovereignty as a partnership of both.

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