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Politics, law, and the sacred: a conceptual analysis

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The sacred is a source of legitimacy for political rule, while at the same time remaining always beyond politics and law. This article examines this intersection and interaction of religion, politics and law as a semantic field, focusing on the conceptual analysis of practices. First, the article addresses and challenges the myth of a purely secular and contractarian international order, allegedly created by the Peace of Westphalia. Second, it shows how this contractarian metaphor generated the notion of the 'sacralisation of the people' in modernity, and it was transfigured into the 'nation' as the source of legitimacy for politics and law. Third, the article develops a critical assessment of the human rights discourse and on the potential of imperial projects — of a 'rule of lawyers' instead of a rule of law. I also argue that 'religions' do not have the monopoly for millenarian derailments, since even 'secular' projects, such as human rights, have that crusading potential. Modern law cannot effectively dispense with the 'sacred', and perhaps even with politics, by substituting abstract entities such as 'human rights' for it.
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Introduction

The 'return' of religion has not only engendered new conflicts in world politics, but also fundamentally challenged the Western political project, which allegedly rests on a strict separation of the public and private sphere. Religion is supposed to play a role only within the confines of the latter, as it is considered a 'privately held belief'. Of course, this project is neither shared by all Westerners, nor is it necessarily persuasive to other cultures. Thus within the emerging global sphere it is by no means clear whether such a strict separation can muster assent.(Barbato and Kratochwil 2009: 1–24) For this reason some thinkers, such as Habermas (2003) or Connolly (1999), among many, have attempted to formulate a new approach in which ways of overcoming the displacement of religions to the 'private/personal' realm are explored, in order to harness the semantic potential of religion for the establishment of a discourse on global order, while avoiding at the same time the establishment of a

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particular orthodoxy or of a millenarian political projects based on the notion of absolute 'truth'.

Irrespective of what we think of the realisability of those proposals, one thing seems clear: that the strict dichotomy of religion and politics cannot be consistently maintained, precisely because the freedom of religion is one of the fundamental rights protected by law, and thus religion, the state, and politics are intertwined. In this article I want to probe the *conceptual problems* that are engendered by these links. In doing so I want to correct that part of the Westphalian myth which maintains that the 'secular politics' of modernity had its origin in this 'contractual' settlement. Certainly the pre-eminence of the pope was substantially diminished thereby, since state churches supplanted the encompassing notion of a church of all believers, but it took some time before the semantics of 'religion' and 'rule' mutated from a public and official concern to a largely 'private' affair.

While these arguments are certainly not new, it is useful to mention some of these points in passing, since much of the traditional international relations literature does not fully appreciate the 'historicity' or the complexity of the conceptual problems, and therefore cuts itself off from understanding certain problems of contemporary world politics. Four points seem relevant in this context. There is first the methodological issue that derives from the widely shared assumption (propagated e.g. by positivism) that the social world can be studied in the same way as 'natural facts' (the world 'out there'), and that the problem of meaning, so important for social theory, is one of reference (this is a chair, not a dog!). But if meaning is not simple reference — what does, for example, 'sovereignty' correspond to since we cannot point to a 'thing' in the outer world — then meaning is conveyed by how we *use* our concepts, as Wittgenstein suggested. In other words — and this is my second point — meanings are embedded in the links a concept has to other concepts within a semantic field, as Quine also showed (Quine 1980: 20–46, quote at 42f).[1] In the case of sovereignty we get at its meaning not through 'definitions' or simple abstraction from observations, but through an analysis of the related concepts, such as domestic jurisdiction, autonomy, self-defence, citizenship, diplomacy, etc. The issue is no longer one of 'matching' a concept with an object in the 'world', but of investigating the semantic field and the practices that are thereby allowed, enjoined, or demanded. Such an investigation has by its very nature to become 'historical', as we are examining how conceptual change works itself out in the self-understanding of the actors in actual practice, and in the critical reflections on this process of social reproduction. Such an analysis obviously cannot be reduced to some 'history of ideas' (who said what), or to some grand narrative, such as that of 'progress', where meaning derives from where something is placed (is it 'progressive' or 'reactionary', is the West (East) in 'ascendancy' or in 'decline'?).

This leads me to my third point. In order not to fall victim to such errors, I want to show that, despite the decline of organised religion, the 'secularisation' thesis (see Norris and Inglehart 2004; for an opposing view see Berger 1999; also Hurd 2008; Taylor 2007) of public life is problematic. It not only misses important elements in the increasingly global discourse that disconnects 'religion' from the state and concrete societies, but it fails to show why and how this process exhibits quite different patterns in different regions of the world. This calls into question the unidirectional secularisation narrative and the different, but related, 'end of history' argument. Since I have dealt with some of these issues in another place I do not want to rehearse those arguments further (Barbato and Kratochwil 2009).

Fourth, both debates submerge the conceptual issues in a narrative of progress by treating them as problems that are either largely passé or ought to be handled by insisting on a purely secular conception of the 'primacy of the right over the good'. By focusing here on the semantic interplay of politics, law, and the 'sacred' — since it is the latter that bestows legitimacy on the other two by linking them *(religare*) to some source that is 'set apart' — I want to show that the narrative of progress is hardly 'progressive' (in the sense of increasing our understanding), since the problems are not passé but still with us. In addition, the heuristic fruitfulness of the approach outlined here lies in examining the semantic field of religion and politics through the prism of 'law', thereby also challenging some of the fundamental tenets of traditional (international) law and of 'cosmopolitan' politics. It suggests that 'religions' have not the monopoly for millenarian derailments, since even 'secular' projects, such as human rights, have that crusading potential. The reason for this at first surprising fact is that clashes between incompatible values that characterise the realm of *praxis* must be meditated by historically contingent *political* means, not by logical fiats (assumptions, definitions)[2] or allegedly foundational arguments, be they based on God, reason, nature, or subjective rights.

As in the case of modern deontological ethics from Kant onwards, which focused mainly on the problem of the justifiability of norms, the real problems of *praxis* lie in the dilemmas created by colliding duties or in bringing a concrete problem under different descriptions which require (justify) different norms. Concrete problems are only marginally helped by establishing the validity of these norms due to their rootedness in universal values. Thus to depict the legal system as a system of norms — without due account that closure can be reached only in the act of interpretation of the law — seems misleading. Rather, such a perspective stresses the need for an agreement on certain shared practices instead of making the assent to certain norms dependent upon their derivation from universal principles.

Similarly, while important value questions have re-entered the political discourse in the name of 'human rights', relatively scant attention is paid in

mainstream IR theory to the constitutive *political* implications of these conceptual innovations (Shapcott 2001; Reus-Smit 2004), although their system-transforming capacity is recognised in political theory (Linklater 1997) and humanitarian law. But even here the critical reader is frequently surprised by the optimism, even naiveté of the analysis, as if no fundamental rethinking were required, and the state project could now be projected onto the global sphere with the only question remaining of how 'thick' or 'thin' the institutional structures and new political identities would have to be. To that extent, the new developments such as *jus cogens* and obligations *erga omnes*, or the emerging 'community of courts', or the transnational networks of norm entrepreneurs, are simply taken as harbingers of a 'cosmopolitan' turn in world politics. Here everything seems to fit like a hand in a glove, by which the liberal project with its primacy of the 'right' over the 'good' — best exemplified in Rawl's *Law of the Peoples* (Rawls 1993a, b) — reaches its completion.

Admittedly, I am quite sceptical of such 'designs' and their teleologies, and suggest instead that a more fine-grained analysis of the semantic field of law, the sacred, and politics is required. Such an analysis has to transcend the conceptual fetters of a history of progress, of the communitarian/cosmopolitan divide, of the secularisation debate, or even of the Schmittian/Kelsenian dichotomies of law and politics. In this respect I argue that with the emergence of the human rights discourse — which can be taken as a 'religion for agnostics' — some of the very same problems arise at the intersection of politics, law, and religion that we encountered before with more traditional faiths. To that extent, my analysis is not primarily interested in mapping what 'faith-based' organisation do and how they have become part of global civil society, but is concerned rather with the viability of the political project alleging that through the emergence of law based on 'human dignity' the difficulties of the historical mediations between politics and the 'sacred' can be avoided. In short, this paper is a critical gloss of some parts of international relations theory, of certain strands of international political theory, and of some approaches to human rights law.

It is the inevitable tension between the universal claims embodied in many religions and the actual limitations engendered by the plurality of different societies and political systems that interests me both historically and analytically. I maintain that today we witness again the clash between a universalist creed centred on 'human dignity'[3] and the contingencies of history and politics. To that extent, the problem of 'religion' is not just limited to some traditional faiths, or some historical experiences that have been overtaken by events, as the secularisation debate suggests. Rather, 'religion' stands for a system of meaning that provides guidance by taking certain things 'out' of the ordinary and keeping them separate and beyond reach by 'sacralising' them. This 'separation' between the sacred and the profane was used by Durkheim (1912/1965) and other

sociologists of religion in order to assess religion's role in social life. Since under present conditions the link between the law and its legitimising source, that is, God, the state, or the 'people', has been eclipsed, the question arises whether 'human dignity' can provide such a 'sacred' foundation as is sometimes intimated by the 'cosmopolitan' or 'world order' discourses,[4] or whether such attempts are likely to derail into millenarian and/or imperial projects (for a critical assessment, see Marks 1997; Koskenniemi 2004).

One could — with reason — object to such a project, as it seems to be nearly entirely based on the 'Western' tradition and its conceptual puzzles. They are not necessarily the same ones that would emerge from an examination of other traditions or from a comparative analysis. My justification of limiting my analysis to the Western traditions is threefold. For one, given the limitations of an article one could hardly do justice to the complexities arising out of an engagement with another tradition or out of a comparison of several of them. While this may sound like a cop-out, there is a second, more substantial, reason for staying the proposed course. For better or for worse, international law and the discourse of subjective human rights — admittedly Western creations and perhaps conceptual creations of debatable merits — have become the mainstay of the international discourse on 'world order' which attempts to link domestic, sub-national and supranational institutions and practices. While it certainly would be quite heroic to assume that we have reached a 'consensus' or that this discourse is able to satisfy the criteria of an 'ideal speech situation' *à la* Habermas or of Rawl's *Laws of the People* (Rawls 1993b) — even though the latter might well turn out to be 'imperial project', as suggested below — they do represent a discursive formation that not only philosophers and lawyers, but also practitioners (from those in foreign ministries to those working in NGOs) use. To that extent, an examination of the semantics of this discourse is hardly an idle undertaking.

Again, irrespective of the conclusions we might draw from the above analysis, the interdependencies between law, religion and politics in this 'Western' discourse do not seem accidental, but point to their necessary intertwining in different political projects over time. As Carl Schmitt (Schmitt 1922/2005) and Eric Voegelin (Voegelin 1986, 1952) observed — though from quite contrary perspectives — most modern political concepts have their roots in religion. But there is even more to it, and this represents actually my strongest reason for engaging the problem of politics, religion and law through a 'case study' rather than large-scale multivariate analysis, as I claim that hereby a heuristically fruitful framework for comparative analysis could emerge that leads us far beyond the particular case.

As the historical record shows, new forms of political rule appeared in a variety of places and periods together with the advent of 'higher' religions, and the question of whether this shows that a 'universal' structure is at work or that it is perhaps only a historical coincidence can be left for further research. The

fact remains that in lieu of the a-cephalic orders of segmented societies, *hierarchies* formed and the incorporation of various 'tribes' into one 'people' or 'realm' became possible (for an extended discussion see Luhmann 1999). Here 'the people' of the Covenant uniting under God's law provides the historical example and also the template for later re-enactments, as in the case of the Puritans. The Pharaonic Empire and the Aristotelian *synoikismos* of various Greek clans under a new 'political' law represent another historic instance of the same phenomenon (Maier 1990). As the etymology of this new principle of social differentiation (hierarchy) suggests, the connection between 'rule*' (archein*) and the 'sacred' (*hieros*) is deeply embedded in our political imagination and language, even if historical ruptures and different trajectories have reconfigured these links significantly. In short, I want to examine this intersection of law, religion, and politics by focusing on the 'sacralised' source that bestows legitimacy for political rule, but which remains a 'source' always beyond politics and law.

Bearing these considerations in mind I develop my argument in the following steps. In the next section I address the myth of a purely secular, contractarian international order created by Westphalia, since this seemed the only rational way of managing the unbridgeable religious differences that had led to an exhausting war. That this interpretation needs some modification is evidenced by the fact that well into the 19th century international treaties were often concluded by the invocation of the 'most holy and undivided trinity',[5] which showed the continued relevance of religious symbolism. Similarly, the main source of legitimisation in politics remained the *Dei gratia* principle (by the grace of God), domestically as well as internationally, until the time when 'the people' become the ultimate source of legitimation.

In the subsequent section I investigate what happens if, together with sovereignty and the state, 'the people' have also largely disappeared and the abstract ideal of 'human dignity' serves now this legitimising function. I use ideal types for tracing the changes in the semantic field, rather than attempting to provide a full-fledged explanation in a causal, or 'evolutionary' form (Luhmann 1980, 2002). Since this piece is a conceptual analysis and not a predictive/explanatory account, it resembles more a 'constitutive' explanation (Wendt 1999: ch. 2). I also do not want to suggest that a 'world law' or 'cosmopolitan law', that is a law free from, and superior to, politics, is in the offing. As a matter of fact, the conclusion (the last section) casts a critical look on the human rights discourse and on the potential of imperial projects, or of a 'rule of lawyers' instead of a 'rule of law'.

Westphalia and the 'people' as a 'source' of law

According to the classical lore popular among lawyers (Gross 1948) and international relations specialists, it was Westphalia that brought about the

decisive break with medieval 'universalism'. It not only removed the pope from politics but laid the foundation for the modern secular order both domestically and internationally. As such, these assertions are, if not downright wrong, at least essentially misleading, as the discussion below suggests. Without entering into an extensive debate about the accuracy of these characterisations, which has engendered a huge literature, some brief remarks are in order.

For one, historical research has shown that Westphalia was not a radical new beginning, but rather a midpoint in the slow transformation of feudal society into territorial orders (Ossiander 2001). Similarly, although interventions for religious purposes were no longer self-justifying after the Westphalian settlement, something far from a 'secular' order developed. Four political 'mediations' were of particular importance in finding a way to deal with the problems that had led to one of the longest and bloodiest conflicts. The first concerned the illegitimacy of religious 'pretexts' for justifying interventions, while at the same time rooting membership in the club of 'sovereigns' in a common tradition of the *res publica Christiana*. A second mediation concerned the acceptance of 'exile' for religious dissenters and their 'toleration' elsewhere. A third implied the modification of the *cuius regio eius religio* rule since changes in the profession of faith by the sovereign was after Westphalia no longer binding upon the subjects. The fourth mediation consisted in a carefully designed 'corporate' compromise between Protestants and Catholics in the institutional make-up of the Holy Roman Empire (for a discussion on the constitution of the Empire see Aretin 1993–97, particularly the first volume) (or also several city governments) which attempted to insure domestic tranquillity rather than simply 'debunking' religion as a fact of socio-political relevance.

Thus religion continued to play a constitutive role (Philipott 2001) in supplying the legitimacy for the ruling houses — the *Dei gratia* invocation as ultimate source of authority did not cease — but also buttressed the emerging bureaucratic order of the state and justified the 'disciplining' of their respective populations. For the first time political authorities possessed the means of reaching their subjects where before only an indirect relationship had existed, via their overlords and lesser nobles. Thus aside from the impetus of war-making and of furthering commerce (in order to finance war-making) — rightly emphasised by Hintze (1975: ch. 5) and Tilly (1992) — the role of 'established churches' for the state project can hardly be underestimated, as Schilling (1992) has shown.

Similarly, although indubitably the power of the pope significantly declined, this was perhaps less the effect of secularism than of the de-feudalisation of societies, which deprived the pontiff of a significant source of power. Under the old practices of medieval politics the pope was not only accorded the right to dispose of the titles of all 'islands' (Sicily!), or of land wrested from the 'infidels'

(East Prussia), but also to mediate disputes between vassals and their lord, and exceptionally also transfer titles in case the overlord's conduct was considered not in keeping with his obligations (Grewe 2000: chs. 1–3). Although this power never went so far as to deny the right to rule of a wayward lord — even though some canon lawyers made such a claim — it led to the significant practice of 'infoedeisation'. This practice was the basis of the threats and bargains between the pope and the feudal nobility, of which the 'ban' (connected with absolving the subordinates from any obedience to their overlord) and emperor Henry IV's desperate journey to Canossa (1077) are good examples. The last inklings of this controversy, cast in the more general terms of the 'supremacy' of either spiritual or secular power, can be seen in the exchange between Cardinal Belarmine and Hobbes in the 17th century.

True, the pope's protest of some of the terms of the Westphalian peace no longer carried a veto power even among catholic princes; nevertheless, he continued to wield considerable influence. After all, he did manage to get the coalition together to repel the last attack of the Ottoman Empire on Hapsburg (1683) and thus saved not only Vienna and the Empire but the existence of the *res publica Christiana*. This latter term was used by the new 'sovereigns' to signal their membership in a larger system. It demarcated the insiders from the outsiders, although some 'system-transcending' relations, such as the alliance between Louis XIV and the Sublime Porte, existed. However, such alliances were considered illegitimate, except *in extremis* (Grotius 1625/1925: 190). In a similar fashion, the religious legitimisation of Ottoman power as rulers over all 'true believers' prevented a secular, merely contractual, understanding of the emerging 'system', and it took until the treaty of Paris (1856) ending the Crimean War to incorporate the Sublime Porte into the sanitised version of the club of now 'civilised' nations.

How much the 'symbolic power' of religion still mattered even in the beginning of the 19th century can be seen from the fact that long after the victory of 'reason' and of the 'nation' as the ultimate legitimating sources, Napoleon, as an opportunistic *parvenu* of this revolution, still found it necessary to receive a crown from the pope. In short, in contrast to the narrative of epochs, or of progress in which 'ideas' or social forces appear and disappear like the figures in a pageant, we see that even transformative changes seldom result in the total elimination of the previous elements (Tocqueville 1835/1840/1952). As in the case of evolution, new species usually do not simply displace existing species, but rather give rise to new configurations with new equilibria and niches, in which the new and old coexist.

Furthermore, even in cases where concepts emerge with radically new meanings the question remains whether or not they can be interpreted as total displacements instead of only taking over (some of) the functions of the replaced concepts. The cult of 'reason' during the French revolution soon took

on religious overtones and Robespierre's crusade for 'virtue' had all the trappings of messianic enthusiasm. This is not to deny the strongly anti-clerical character of the revolution and the stridency of the *laicité* argument that still reverberates in French politics today. But it does call into question the traditional notion of 'secularisation' through progressive enlightenment[6] — quite aside from the fact that the enlightenment project also comprised a good number of Deists and Pietists, who were anti-establishment and perhaps even anti-clerical, but certainly not 'secularists' in the modern sense.

To that extent, the similarities between religious concepts and our 'modern' political vocabulary (Schmitt 1922/2005; Voegelin 1986) is not so surprising after all. It is surprising only if we have bought into the problematic belief that existential issues — and both religion and politics deal with existential issues — are cognitive only, and that 'progress' consists not only in leading man out of his ignorance but in suppressing the 'irrationality' of his emotions. Here Hobbes — certainly not an opponent of the rational pursuit satisfying one's desires — saw perhaps more clearly that a political association cannot be based only on the 'rational pursuit' of individual interests and on dispute settlement. Precisely because various 'sources of quarrel' such as envy and honour are endemic to social life, the indifference of the 'rational actor' — who is neither envious nor benevolent — can only be the result of the new 'discipline' to which the 'subject' has to submit. But such a project is possible only when the sovereign is able to keep all members in 'awe'. It is therefore no accident that it is not 'interests' but that 'awe' which the 'mortal God' — the new Leviathan — inspires, that makes the 'pursuit of happiness' by the subjects possible. Significantly, 'awe' refers to the ambivalence of emotions, comprising both attraction and repulsion (the awful), that is deeply implicated with the 'sacred', as students of religion (Otto 1971), and most recently Agamben (1998), have pointed out.

Here I do not want to follow up on these thoughts, frequently adduced as an explanation for why religions can become sources of destructive violence even though they provide — at least in their 'higher' forms — powerful symbolisations of the unity of mankind (Appelby 2000). Rather I want to focus on the mediating role of 'law' for modern politics. Order is now created largely through 'legislation' as law is *made* and no longer simply discovered in either God's will, in nature, or in customs. Order is also no longer the result of periodic rites and sacrifices, as the rite of *hieros gamos*, or the reading of entrails, or the sacrifices performed by the *pontifex maximus*, show. Different from those traditional and primordial means of 'setting things right', which have their origin in magic and which prescribe certain detailed *activities*, law tackles the problem of creating order *cognitively*. The advantage of such a strategy lies partly in its 'impersonal' character, which addresses all (i.e. a potentially unlimited audience) and is not dependent on actual presence at those 'restorative events' or even on actual existential experiences (which e.g.

cults or rites try to re-enact). Thus the original 'awe' can now increasingly be transformed into a question of ascertaining the 'validity' of a law, which in turn can be done by tracing the specific law back to a 'source'. Here of course the 'legislator' in the continental tradition and the 'judge' making the law in the common law tradition become the most salient sources.

In short, such a 'cognitive turn' allows for the proliferation of norms answering to greater social differentiation and to the 'practical' problems arising from it. It frees law from the archaic notions that social order can only be maintained by answering to violations through identical retributions. By internalising validity and thus reducing legitimacy to 'legality' — so that the question why some prescription is binding can be answered by looking to the 'authorising' (secondary) rule — law attains (near) closure (Hart 1961). Nevertheless, there remains the issue of the 'extra' legal legitimising source — be it the authorising *Grundnorm* or the several 'sources' — that transcends law and resists a reduction of the problem of validity to one of legality. Occasionally this leads to some rather strange formulations, such as in the case of the international committee of lawyers assessing the Kosovo intervention. In their report they came to the conclusion that the intervention was 'illegal' but 'legitimate' (Independent International Commission on Kosovo 2000). In short, behind the internal justification ('legality') there always looms the issue of an 'ultimate' authorisation, be it 'the people' or some other 'source' that is put beyond reach and beyond the ordinary.

Thus even Kant, with all his emphasis on 'reason', invokes the 'sacred', although it has here more the semblance of a (useful?) fiction than the appearance of some encounter with the transcendent. But if intrinsic to the notion of the 'sacred' is its being 'set aside' — as something that has to be treated differently than the common or profane — as Durkheim (1912/1965) argues, then we find even here some 'religious' roots for the concept of law. In one rather strange section of his *Metaphysics of Morals* Kant writes in regard to the obligatory character of law and its legitimising source:

> If a subject having pondered over the ultimate origin of the authority now ruling wanted to resist this authority, he would be punished, got rid off or expelled (as an outlaw *(exlex)* in accordance with the laws of this authority, that is with every right. — A law that is so holy (inviolable) that it is already a crime even to call it in doubt in a practical way, and so to suspend its effect for a moment, is thought as if it must have arisen not from human beings but from some highest, flawless lawgiver; and that it is what the saying 'All authority is from God' means. This saying is not an assertion about the historical basis of the civil constitution; it instead sets forth an idea as a practical principle of reason: the principle that the presently existing authority ought to be obeyed, whatever its origin. (Kant 1797/1996: 462)

Similar arguments are made by Rousseau, not only about the 'lawgiver' (Rousseau 1762/1976: 22f) who is endowed with near-divine capacities, but also when he 'socialises' the people by 'removing' them from the daily encounters and particular deals they make with each other, by distinguishing the *volonté generale* from the *volonté de tous*. The individual as part of 'the people' has to keep personal preferences in abeyance, having to choose in accordance with criteria that would be best for all. 'The people' are also distinguished from the existing multitude, since they emerge out of the *alienation totale* and the moral change induced by the social contract, which substitutes in man's conduct 'justice for injustice' and transforms him 'from a stupid and ignorant animal into an intelligent being and a man' (*ibid.*: 42ff).

But precisely because the concept of the 'people' requires such a distancing from the ongoing interactions, it widens the perspective of the agents, since the choices of today will affect future generations. Only in this way can the community be constituted as an ongoing and trans-generational concern. In the same vein, being one 'people' also presupposes a common recognition of who belongs to 'us' and who is a 'stranger'. But the reflection of who 'we' are also raises the question of where we came from (for a more general discussion, see Kratochwil 2006). It is therefore no accident that soon the 'nation' — with its allusions to the presumed 'naturalness' of a common ancestry — replaces the 'state' as the centre of attention.[7] As a matter of fact, it is not 'consent' or participation in common matters — a crucial element underlying the ancient concept of the *res publica* — but the *nation* that lends legitimacy to the state.

All these important 'historical' problems do not come into focus by the master metaphor of modern politics, that is, the 'contract', which 'assumes' that these questions have been settled. After all, people must know who the others are with whom they contract, and they must develop non-myopic conception of a self and of their interests in order to keep this resulting association an ongoing concern. As all contractarians realise, the social contract *is* special. It is not simply a contract that one can easily undo by a contrary action or by opting out (with or without compensation). But if this is the case, then the specific nature of *political obligation* has to be addressed (for a more extensive discussion, see Kratochwil 1994).

Liberal contractarians do this badly, either by assuming the permanence of the contract or by arguing that otherwise a return to the state of nature is inevitable (Hobbes). Another alternative is to construe the state as a mutual 'benefit association' and to 'imply' consent by such innocent acts like 'travelling on a highway', as does Locke. But his solution of 'implied consent' is problematic, as any presumption that an action implies consent requires a prior rule to that effect. Of course, such rules can be passed even for future generations, but it is not clear what 'consent' is then doing here. It is the *rule* that has been passed by others (my forebears) and not my voluntary

uptake which is then decisive. Without some presupposed notion that the laws of a community are binding on its 'members', to which they *qua members* owe loyalty, the argument becomes incoherent. Rawls's construction of a 'just' community suffers from the same problem. He simply *assumes* that the problem of membership has been solved. Here Carl Schmitt saw the problem more clearly. Issues of membership *are* 'political' in the foundational sense (Schmitt 1927/1996), and they cannot be resolved by the application of universal principles (such as common humanity, universal reason, or whatever).

It is in this way that 'the people' come to see themselves as the authors of their laws, and in this way a 'constitution' can claim 'loyalty' and respect for the limiting and enabling conditions of political order. Obviously, the duties flowing from loyalty are quite different from those resulting from contracts or universal norms. To that extent, the specific obligations do not sit well with the attempts of an ethics that tries to 'ground' all obligations in universal principles. The only duties that are particular and accepted in this foundational discourse are the ones that derive from contractual undertakings. But even here the foundation is provided by the universal principle that promises have to be kept.

What the rhetoric of universalism simply leaves out, however, are those duties which are more contingent and cannot be directly derived from 'ultimate' principles. This is the case with 'loyalty': it is owed to those people and institutions who define us as *historical* particular subjects, that is, establish who we 'are'. One might be obliged to strangers, due to promises made or to the general principles underlying their status as persons which require recognition. But one can be only 'loyal' to friends and others who are or have become part of 'us'. Loyalty connects us to particular groups and invokes specific historical experiences. It cannot be tailor-made as a freestanding 'de-contextualised' structure that is imposed upon a group. The 'law' must be the repository of peoples' particular experiences and of meaning, even if the produced 'text' satisfies the criteria of justice and makes reference to universal human values. Consequently, Hirschman considers 'loyalty' as one of the fundamental social mechanisms that cannot be reduced to either 'exit' or 'voice' (Hirschman 1970).

The usual tendency to explain, for instance, our political obligations in terms of the 'justice' of the regime whose subject we are misses precisely the point that we, as for example Frenchmen, have special obligations to abide by French law and not by those of Australia or Switzerland, even if the latter are also 'just regimes'. These 'special obligations' are therefore not the result of the benefits we receive in the pursuit of our goals — as we could be tolerated outsiders — or from the general maxim that laws are necessary to avoid conflict and regulate interferences. Even universal values that are part of our political projects will not do. Rather, the obligations derive from the realisation of who we are as historical beings.

The issue here is not to rehash the mistaken idea of a 'primordial' existence of a people that 'gives' itself a constitution, or to argue that since this 'theory' is clearly problematic, any other 'multitude' can be integrated through contract. The point is rather to understand that law is not only a coordination device, regulating the interactions among 'rational' self-interested actors, but also a vehicle of sense-making whose constitutive function is deeply embedded in our historical experiences and our political imagination. To that extent it is true that 'the people' is not a pre-political 'fact' but rather a strategy of sense-making, in which 'fictions' are established and put beyond question, as the Kantian quote above indicated. In short, the notion of politics is narrower than that of justice and wider at the same time. It is narrower since it introduces *particularity* as an important dimension of meaning and sense-making in human life; and it is at the same time wider by showing that, aside from common universal concerns arising out of our status as persons and agents, there are those obligations which are the result of particular positions and roles in which we find ourselves as members of families, corporations, states, or nations. To that extent, we have to realise that such 'special' duties and rights are apparently an unavoidable part of our social life.

The universality of 'human dignity'

This rather philosophical argument is of decisive importance for international law and its role in present international politics. Given that the existing state boundaries are less and less able to serve their steering purposes in a globalised world and, given that migration flows have dramatically altered the composition of historical 'peoples' or 'nations', the question is of how 'law' is able to respond to these changes. But equally important is the delegitimisation of 'the people' and their 'will' as ultimate source of law, perhaps due to the atrocities of the Nazi regimes and the persistence of genocidal tendencies in the present. Here the invocation of universal human rights, the growth of transnational legal networks, or even of a tutelary notion of sovereignty, making its exercise dependent on the 'responsibility to protect' (International Commission on Intervention and State Sovereignty 2001), have been interpreted as harbingers of the growth of a new 'cosmopolitan law'. They promise to revolutionise international law and make out of the 'practical association' (Nardin 1983) a 'constitutional' order for mankind (Fassbender 1998).

These are of course important developments, which have all spurred their own debates on constitutionalisation, or the inherent fragmentation of the international legal order, or the judicialisation of world politics (Abbott *et al.* 2000), or on transnational 'principled' networks and their impact, or on the growth of transnational administrative (for a further discussion see Krisch

2006) law, to name just a few. Here I shall limit myself to the question of how these changes have had an impact on bestowing legitimacy through sacralisation. Thus my focus is — in keeping with the argument made above — not so much on the causal account of the spread of ideas, or on the issue of origin. My interest is rather the internal dynamics of the semantic field and the change in legal and political practice thereby engendered.

As we have seen, within historical time, custom (*mos maiorum*), the law of God, of nature, and later, the 'will' of the sovereign, and — when sovereignty became an attribute of the *populus* — of the 'people', all have served this function. This of course spawned debates whether international law was really law since it does not possess a clear hierarchy of norms, and even if we accepted that its 'sources' provided viable 'secondary rules', their heterogeneity and the lack of a clear reference point such as the *salus publica*, or the will of the people, made it often even difficult to decide what the law is.

Both the introduction of human rights and, later, of the more abstract notion of 'human dignity' seemed to provide a way out of the well-known conundrum of a positivist conception of international law (McDougal 1966). But the question remains if such a conceptual move is able to deliver what it seems to promise: the emergence of a cosmopolitan law based on universal principles. Kant's caveat concerning the critical inquiry into the 'ultimate origins of the authority now ruling' and his limitation of cosmopolitan right to a right 'to visit' (Kant 1795/1996: 328) rather than opting for a fully fledged panoply of subjective rights, should give us pause.

Somehow it seems however that these principles such as human dignity are so compelling because of their universality and because they can dispense with any political and historical mediation. But despite near-universal rhetorical support for human rights, democracy, and the rule of law, and the considerable material resources committed to their implementation, the record of these programmes shows that they can be successful only if the 'subjects' are persuaded to 'cooperate' (Carother 2006). Obviously, 'local knowledge', shared interpretations, and 'politics' still matter. But this recognition considerably undermines claims to universality, 'innateness', or a supreme value that can bestow legitimacy on a trans-historical canon of rights.

At this point some clarification concerning the language game of 'universality' seems in order. In keeping with the intentions of the paper I want to examine what kind of 'work' the invocation of universal values does in political and legal arguments. This raises several conceptual problems. On the most basic level 'universality' is opposed to 'particularity' and thus seems to suggest that the universal is to be preferred to the particular. This is in keeping with the Kantian idea that, for example, laws should be equally applied to 'all' cases similarly situated, and universality as 'universalisability' provides a defence against capricious exceptions and idiosyncratic justifications.

When law differentiated itself from custom, and when the encounter with other societies showed the great variability of existing norms, the sophists' challenge was that law was not derived from the value of justice but was a function of strengths, that is, the right of the stronger, or at best, a convention (the *physei/ thesei* debate). It was countered by an appeal to 'nature' or to a cosmic order, so that only a law in agreement with these universal standards could claim validity. Here Antigone's plea justifying her resistance to Creon's law is often adduced, as was the stoic conception of law based on the existence of cosmic order.

There are three problems with those arguments. For one, there is the equivocation of 'law' that does not distinguish between a nomic generality, exemplified, for example, by the law of gravity, and normative claims to universality. Without a belief that normative ordering can be deduced from ontology, this derivation of a legal (or moral) obligation from the 'order of things' is problematic. Similar difficulties arise in the context of the 'greater inclusiveness' argument, often mentioned by advocates of 'cosmopolitan' law. Anyone familiar with the actual Sophoclean *text* of the drama (as opposed to some of the current interpretations linking it to some stoic notions of 'cosmic' law) will notice that Antigone's plea for burying her bother is based on the old custom predating the polis. It imposed particular duties on family members and the clan. It is against this 'particularity' that Creon's edict was directed, forbidding burials of anyone killed in civil unrest. It tried to establish a more 'inclusive' order, that is, a law applicable to all citizens, in order to end the feuding among the powerful families. When Antigone appeals to a standard 'behind' all law — which supposedly lends validity to the particular law — she actually wants to have her actions respected in terms of the particularistic custom and not of the more inclusive law now 'universally' binding all citizens, or perhaps even all mankind. Thus the 'universal' she appeals to is not the abstract and more inclusive 'universal' but the concrete particular, based on a way of life of a traditional society. This might seem a controversial interpretation, but as Segal (1983) has shown, Antigone's arguments address (in the guise of events in a mythical past) important political arguments that were occasioned by the Cleisthenic reforms in Athens and the conflict between matrilineal and patrilineal descent for organising politics. The vocabulary used is here of particular importance (and usually gets lost in translation).[8] Thus something more is going on here than just dealing with a problem in terms of the formal categories of extension, whereby the more general contains the particular, as, for example, Kristeva argues with cosmopolitan intent — *pace* Montesquieu.[9]

The example raises two further issues: one, that the concept of universality is equivocal, and two, that it is not freestanding, so that without further specifications, arguments of universality do very little work. Prominent here

are issues of exclusion *vs* that extension that interact in the use of the term 'universal'. On the one hand 'universality', when used in the sense of universalisability, serves as a criterion of exclusion, separating a core of norms which we distil from existing normative catalogues or idiosyncratic prescriptions and which we consider as binding on 'rational' beings. Thus when considered in this sense, the term cannot be 'wider' in the way that the more general is in an extensional sense. The other use is precisely based on extension: the more frequent *is* then the more universal, as its observed commonality is taken as an indication of 'what people want'. But again it is easy to see that the argument about a common practice hides an additional normative premise, and is not simply a statement of scope. This problem is well-known from the discussion of 'custom' in (international) law. Since not all common regularities, such as getting a stylish haircut or drinking tea at certain time, have normative standing, this 'pull' is often supplied by arguing that the regularity is an indication of an underlying 'value'. Among global 'constitutionalists' and even in the International Law Commission one finds prominent advocates who maintain not only that the legal system contains a hierarchy of norms, but that this hierarchy corresponds to a set of global values that should inform the law-making process. Here the convergence on a particular prescription is taken — perhaps in a Right-Hegelian fashion — as an indication of an underlying universal value at work.

But such a nearly causal inference seems rather heroic. For one, values like principles or norms in general provide 'reasons' for action but are not their efficient cause. To that extent, the conclusion from an effect back to the value as its cause is logically doubly problematic.[10] Even such a fundamental norm as the one against torture might get adopted not necessarily because of the realisation of a common global value. Alternatives could be that, for example, we know that torture 'does not work' (since frequently it does not deliver the crucial information, even though victims will admit to anything), or that — based on historical experience — the non-prohibition creates significant negative externalities, or that it is counterproductive by creating 'martyrs', etc. Of course, many, perhaps most of us, might be deeply shocked by the affront to human dignity. But this does not entitle us to jump to the conclusion that a universal value explains such an agreement. Given the widespread use of torture, the many 'reservations' attached to the legal instruments and the nature of the lenient remedies for violations — especially when read in conjunction of the abandonment of the notion of criminal responsibility by states — makes one wonder whether the universal value argument can be sustained.

But even if we accept it *arguendo,* our problems are not over. Values, like principles, are compatible with diametrically opposed rules implementing them, so that the hierachisation of norms, principles, and values quickly loses its ordering function. For example, the realisation of peace through

disarmament was the dominant lore after WWI. But during the Cold War, 'peace' was based on deterrence and arms control, necessitating rearmament. Both regimes can preserve peace, but point in different directions. Similarly, the recent emphasis on 'robust peace-keeping' seems quite at odds with the original idea of preserving peace through policing a border by means of neutral 'observers' serving at the pleasure of the parties to a conflict. In any case, practical choices call for judgment and political mediations. These choices are contingent, since usually a multiplicity of values is at stake that defy a fixed ordering once and for all, and since the situations are normally describable in a variety of ways, requiring a choice among different rules and different value trade-offs. Here de-contextualised values are of little help despite their 'universality'.

The best indication that appeals to the supreme value of human dignity do little work is provided by the ever-expanding catalogue of human rights, bridging the gap between the lofty values and actual practice. Furthermore, the move to subjective rights implies that everything desirable has now to be recast in the language of individual rights. Democracy suddenly becomes an individual 'right to democracy', the environment is protected by the subjective 'right to a clean environment', and 'development' is somehow wished into existence by the postulation of a 'right to development' (Barsh 1991). It needs not much reflection to conclude that the construal of these 'rights' is the result of considerable conceptual befuddlement. The last 'right' at least can arguably be understood as a 'manifesto claim', that is, as a grievance. In the absence of a clearly defined class of correlative duty-bearers, a flaw in the existing order is identified, awaiting further specific initiatives to address the problem.

The other two 'rights' are simply based on faulty reasoning. To put it bluntly, the 'right' to democracy is not a human right accruing to human agents as part of their status as agents. Since democracy is a way of organising a society for collective purposes, not a subjective right inherent in, or explicating the notion of, personhood or agency, it involves a category mistake of the first order not to see this difference (Cohen 2004). Similar difficulties arise if the protection of the commons is 'derived' from an individual 'human right'. A more appropriate conceptualisation would be one of common ownership that explicitly prohibits individual appropriation and individual taking. But this requires something like a notion of 'corporate' rights which are irreducible to individual rights.

Since the 'protection' of individual rights is now the *spiritus rector* of the legal enterprise, the notion of 'crime' and of prosecution becomes important. This is, of course, a *novum* for international law, whose classical 'countermeasures' — including acts of force — were only designed to bring the wayward state back into the fold. But given the enormity of the task, that is, providing equal and universal justice, it is hardly surprising that such

aspirations have to be sacrificed on the altar of contingent reality. The result is an ever-widening gap between aspiration and practice. Most grave breaches of law in the international arena are still dealt with by 'oversight', as Rwanda, Darfour, and Srebrenica demonstrate, and one need not be a 'realist' to see that particular interest and saliency, rather than universal values, do most of the explaining.

But even in cases of humanitarian intervention or criminal prosecution — admittedly few and far between — there are some conceptual issues worth pondering. Justice is not to be gained through the even-handed and general application of existing rules by independent judges, who are subject to the constraints of a constitution or particular political system. Instead, law is supposed to work quasi-freestanding in the newly opened up space of international 'universality' and through some form of 'exemplary justice', which is occasionally visited upon individuals, be they state agents or 'private' persons. My suspicion is that the persuasive force of individual 'criminalisation' in international law has less to do with its expected effectiveness or its prospective ordering function — as a matter of fact, the record of highly selective enforcement makes a mockery of that hope — and more to do with the ideology of 'progress' (Haltern 2006). It is the near-messianic hope for a transformative change resulting from the contestation of the state's monopoly of legitimate force. True, the right to punish was always a jealously guarded right of states. But whether sporadic verdicts of tribunals 'above' the state can instil new loyalties by speaking in the name of 'human dignity', 'collective humanity', or the 'international community' seems rather doubtful.

The imprecision of naming the authority for holding individuals 'responsible' is telling. Is the relevant group the community of states, the 'domestic' order which has incorporated certain universal principles, the 'peoples' of the world, or 'humanity' at large? These are no idle verbal games. It seems that having purged law of all historical peculiarities and contingencies, the identifiable thrust of the argument requires a narrative of the end of the state, or even of 'history'. In this sense, 'humanity' itself and not only 'mankind' in its contingent diversity becomes the all-encompassing point of reference. Both the 'peoples' and the (concrete) people of a given order have vanished. What remains is 'human dignity' as the ultimate source from which all law emanates and to which it refers back (Slaughter and Burke-White 1990; Slaughter 2004: 267).

But since 'humanity' cannot act, the Schmittian question of *quis judicabit* is the real problem. In short, such a state of affairs is an open invitation for imperial projects, pursued perhaps somewhat quixotically by enthusiasts who see norms 'cascading' (but strangely enough never degenerating, or giving rise to disregard and circumventions), by an 'activist' judiciary — hardly rooted in a constitutional structure and a functioning political process — or by great powers, perhaps even by a coalition of the willing, who feel empowered by the

universalist nature of their goals. Politics, eliminated because of its contingent and particular character, is likely to return with a vengeance. It will do so not as the 'art of the possible', but more likely as a fundamentalist creed which is cynically manipulated, or, still worse, is actually believed, engendering what Durkheim called 'religious effervescence'.

Conclusion

In a way the discussion has brought us back to the beginning, although with a more sceptical take on the secularist notion that law under conditions of modernity can effectively dispense with the 'sacred', and perhaps even with politics, by substituting 'human rights' for it. Instead of beginning, as is usual, with some 'operational' definitions of religion, law, and politics that treat the social world as if it consisted of 'natural kinds', I argued for an analysis of how law, politics and religion interact in a semantic field. Since the social world is one of artifice, our concepts are not mere descriptions or icons of a pre-existing reality, but constitutive of our world. But such an analysis necessarily becomes also 'historical' since it is through the configurations and their changes that the meaning of the terms is disclosed.

As a first step I examined therefore the 'secular myth' of Westphalia. The historical record is clear: far from a purely secular order based on contract, what emerged from Westphalia were the 'establishment' churches and the legitimisation of rulers by means of the *Dei gratia* principle. Several *political* solutions were found for the intractable problems that had pitted Protestant dissent against Catholic orthodoxy.

In keeping with my argument about the need to look at law, religion and politics not as separate 'objects' but as a semantic field, I inquired into the 'sacralisation' of 'the people' in modernity. This notion emerged from the contractarian metaphor but was soon transfigured into the 'nation' bestowing legitimacy onto the state and its laws. In a second attempt I examined the difficulties of a legal order which has 'sources' of, but lacks a central point of reference for, legitimisation, as is the case in international law. This leads then either to the conceptualisation of a secondary order based on the 'self-limitation' of sovereigns, or on their 'consent' as the main source of legitimation. With the dissolution of the nation-state, the alleged convergence on 'human dignity' has to serve as the ultimate foundation.

My critical questions and doubts were less based on the 'foundational' elements in the human rights discourse but rather on the 'abstract' universality that this strategy implies. Having eliminated crucial terms from the discourse, or denuded the remaining ones of any historical and political context — even the 'person' seems to have disappeared — the pride of place is now given to an

abstract 'human dignity'. As the 'universal' value it needs, of course, to be concretised again. This is done by a motley array of subjective rights declared to be 'human rights'. The result is a strange mixture of an abstract, sacralised humanity and a quite specific way of life that supposedly best instantiates it. This, I argued, is not an innocent conceptual move. Despite the 'political neutrality' bestowed upon these rights by 'universality', they are likely to invite imperial or millenarian political projects. Those derailments of politics are familiar from fundamentalist religious conflicts, when the goals pursued are no longer treated as fallible political experiments, but become self-justifying ordinances.

But if we are not to engage in imperial projects, the *political mediations* rather than abstract universal norms and values should be our concern. This might be less inspiring than the goal of liberating mankind. But whatever is lacking in the more modest goals of actual political projects in limited, imperfect orders, we have to realise that this 'lack' is simply a reflection of the human condition, all dreams of omnipotence notwithstanding. Thus, despite the various dilemmas we encounter, despite the lack of secure answers to existential questions, and despite the pervasiveness of conflict, the world is not simply a war of all against all, or a Manichean struggle between the children of light and the children of darkness. As certainly as there is no one answer to the existential problems, there are certainly *some* answers to *some* of our problems in practical life. Finding them without the comfort of totalising ideologies or messianic promises by keeping the 'sacred' sacred, that is, separate, is the predicament we all share as finite, historical beings.

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Notes

1 The totality of our so-called knowledge or beliefs, from the most casual matters of geography and history to the profound laws of atomic physics or even pure mathematics and logic is a man-made fabric which impinges on experience only along the edges. Or, to change the figure, total science is like a field of force whose boundary conditions are experience. A conflict with experience at the periphery occasions readjustments in the interior of the field. Truth values have to be redistributed over some of our statements. 'Reevaluation of some statements entails reevaluation of others, because of their logical interconnections- … Having reevaluated one statement we must reevaluate some others, which may be statements logically connected with the first or may be the statements of logical connections themselves. But the total field is so underdetermined by its boundary conditions, experience, that there is much latitude of choice as to what statements to re-evaluate in the light of any single contrary experiences. No particular experiences are linked with any particular statements in the interior of the field, except indirectly through considerations of equilibrium affecting the field as a whole.

If this vie is right, it is misleading to speak of the empirical content of an individual statement-especially if it is a statement at all remote from the experiential periphery of the field'.

2 In this context Hobbes Leviathan it is no accident that the sovereign is the 'fixer of signs' and that this 'performance' allows for no contestation. Here the problem of praxis is reduced to one of 'truth' which is authoritatively established by 'command'. One of the implication of this semantics is all 'knowledge', even that of governance has to satisfy the criteria of logic and 'theory' (unequivocality, universality, necessity etc.). Against the Aristotelian tradition that conceptualises the realm of praxis quite differently, he tries to establish an episteme that proceeds 'more geometrico', that is in the way in which the theorems in geometry are derived from — as Descartes would later say — 'indubitable' assumptions.

3 See for instance the preamble of the International Covenant on Civil and Political Rights: 'Recognizing that these rights derive from the inherent dignity of the human person', entered into force 23 March, 1996, 999 UN Treaty Series, 171.

4 For the latter see the former Myres McDougal's prolific writings in international law. For a programmatic statement see McDougal (1966).

5 See the Treaty of Paris in 1783, and aside from common European practice, even the US signed treaties with such a preamble as in the case of a treaty with Russia (1832) and with Paraguay (1859). I owe this thought to an email from Michael Myerson, Prof. of Law at University of Baltimore.

6 In sociology the secularisation argument was attacked first by Thomas Luckmann (1967) and its criticism engendered the later work by Thomas Berger (1990).

7 Of course the physical reality of 'birth' establishes nothing since it is only by connecting the institutional fact of 'citizenship' with this physical (brute) fact — in Searle's parlance — that establishes my status as a member. Consequently, not nature but 'the law' is determinative and other bases for ascription might be provided (naturalisation).

8 See, for example, Antigone's plea with Creon (verse 522–523) and with her 'common self-wombed sister' Ismene. As Segal suggests:
'The tie trough blood alone through the womb, Antigone makes the basis of her philia, *Philia* which includes notions of love, loyalty, friendship and kinship, is another fundamental point of division between Creon and Antigone, …'.
Creon: The enemy (*echthros*) is not a loved one (*philos)*, not even when he is dead.
Antigone: It is my nature to share not in enmity, but in loving (*symphilein*)
Creon here repeats his political definition of philos from his first speech (182–183) but now it is opposed by Antiogone's fierce personal loyalties. Once more the sameness of the womb cuts through the principle of differentiation that separates *philos* from *echthros*. Creon's politisation of burial distinguishes between the two brothers as hostile political forces. 'The one he promotes in honor, the other he dishonors' (22). To Antigone, however, those 'of the same womb' are worthy of the same degree of honor (time) and love (philia). Segal, 'Antigone …' note 59 above, at 173f.

9 Julia Kristeva (1993: 28) quotes Montesquieu in her plea for a 'more inclusive cosmopolitanism':
If I knew something useful to myself and detrimental to my family, I would reject it from my mind. If I knew something useful to my family, but not to my homeland, I would try to forget it. If I knew something useful to my homeland, but detrimental … to mankind I would consider it a crime.

10 It is doubly faulty since values like norms values are contra-factually valid, they do not cause a result in a causally efficient manner. Two, in logic the reversal of the inference from 'if p the "q", is invalid (i.e., if we observe q and infer p. This conclusion could only be justified if the proposition is: if and only if p then q' : if it rains the street is wet, but the street being wet does not establish rain as the antecedent cause, since it might be due to a break of the water main or to street cleaning.

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