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From *Nomos* to *Lex*: Hannah Arendt on Law, Politics, and Order

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Abstract

'What is politics?' is an omnipresent question in Hannah Arendt's work and one which is broadly explored in countless publications. 'What is law?', in contrast, is a question which has not been of much interest to Arendt scholarship to date. There is a good reason for this: Arendt's engagement with law seems not to be systematic but, rather, episodic and sporadic. However, on the basis of three different discourses – historical, political-theoretical, and legal-philosophical – I shall point out that Arendt's dealing with legal questions takes place on a continuous basis and should be regarded as crucial for a proper understanding of her thoughts. I shall argue that with her shift from the Greek conception of law as *nomos* to the Roman *lex*, Arendt seeks to de-substantiate the concept of law and to highlight the relationship-establishing dimension of law. Both attempts are important for overcoming the dichotomy of law and politics within constitutionalism and for paving the way to a different understanding of legal rationality which seeks not to isolate law from the political sphere but rather to interact with it.

Keywords

Arendt; constitutionalism; Europe; inter-war period; law; *lex*; nation-state; *nomos*; order; politics; sovereignty

'What is politics?'[1] is an omnipresent question in Hannah Arendt's work and one which is broadly explored in countless publications. 'What is law?', in contrast, is a question which has not been of much interest within Arendt scholarship to date.[2] There is a good reason for this: in none of her writings are questions about the 'essence of law'[3] explicitly addressed. Her engagement with law seems not to be systematic but rather episodic and sporadic. However, on the basis of three different discourses – historical, political-theoretical, and legal-philosophical – I shall point out that Arendt's dealing with legal questions takes place on a continuous basis and should be regarded as crucial for a proper understanding of her thoughts. What I

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1 H. Arendt, *Was ist Politik? Fragmente aus dem Nachlaß* (2003).

2 Some exceptions are J. Tamineaux, 'Athens and Rome', in D. Villa (ed.), *The Cambridge Companion to Hannah Arendt* (2005), 165; J. Waldron, 'Arendt's Constitutional Politics', ibid., 201; S. Rosenmüller, '"Rechte als Zäune"? Hannah Arendt und das Problem des Urteilens', in C. Kupke et al. (eds.), *Andersheit, Fremdheit Exklusion* (2009); J. Klabbers, 'Possible Islands of Predictability: The Legal Thought of Hannah Arendt', (2007) 20 LJIL 1; H. Lindahl, 'Give and Take: Arendt and the Nomos of Political Community', (2006) 32 *Philosophy and Social Criticism* 881; C. Volk, *Die Ordnung der Freiheit* (2010).

3 H. Arendt, *On Violence* (1970), 39.

try to elucidate in the following is that Arendt's thoughts are concerned with an adequate arrangement of law, politics, and order – the triad of constitutionalism.

Her considerations on Eichmann and the aporias of human rights in *Origins of Totalitarianism* are very well-known passages in her work in which her addressing of legal questions is apparent. Nevertheless, by discussing these topics, the literature on Arendt stays within the scope of the specific question itself and does not relate Arendt's considerations to more general ones about the essence, meaning, and function of law as such. To give an example: the wording 'a right to have rights'[4] has been analysed and discussed from a moral-philosophical point of view,[5] and it has been questioned whether or not human rights do contain aporias,[6] or expound the interrelationship between human rights and democratic popular sovereignty.[7] The same is true for Arendt's book on Eichmann: Arendt's remarks on 'transformative justice'[8] and on the category of crimes against humanity, her response to the legal principle of *nulla poena sine lege*, her ideal verdict at the end of the book, and her plea for an international criminal court are all themes which have been broadly discussed within Arendt scholarship. These legal-theoretical and legal-philosophical considerations have never, however, been related to questions about the status of law in her own thoughts.

I shall break with this approach. In the first part of my paper I shall show to what extent Arendt's considerations of the European inter-war period are concerned with the problem of legal and political order. Against the background of the minority and refugee problem of the European inter-war period, the question of the reliability, stability, and durability of a political order embodied by the nation-state becomes the linchpin of Arendt's analysis.

For her, the nation-state is a form of government based on such principles as the people's right to self-determination, the equation of state and nation, the idea of democratic sovereignty of the people, state sovereignty, and constitutionality and the rule of law. In particular, the idea of constitutionality and the rule of law is pivotal for the stability, security, and reliability of a nation-state order. Hence, for Arendt, the United States is a republic and not a nation-state. Moreover, she does not consider National-Socialist Germany, fascist Italy, authoritarian Poland, or Hungary under the regency of Horthy nation-states. Fundamental characteristics of a nation-state form of government, according to Arendt, had been dissolved. In all the cases mentioned the principle of legal government and of the rule of law as well as the idea of the people's sovereignty had been perverted. Above all, Nazi racism

4 H. Arendt, *Elemente und Ursprünge totaler Herrschaft. Antisemitismus, Imperialismus, totale Herrschaft* (2003), 614.

5 See, *inter alia*, F. Michelman, 'Parsing "a Right to Have Rights"', (1996) 3 *Constellations* 200; C. Lefort, *Democracy and Political Theory* (1988); E. Balibar, '(De)constructing the Human as Human Institution: A Reflection on the Coherence of Hannah Arendt's Practical Philosophy', in Heinrich-Böll-Stiftung (ed.), *Hannah Arendt: Verborgene Tradition – Unzeitgemäße Aktualität?* (2007), 261; S. Parekh, 'A Meaningful Place in the World: Hannah Arendt on the Nature of Human Rights', (2004) 3 *Journal of Human Rights* 41; S. Benhabib, *The Rights of Others* (2004).

6 H. Brunkhorst, 'Sind Menschenrechte Aporien? Kritische Bemerkungen zu einer These Hannah Arendts', (1996) 3 *Kritische Justiz* 335; H. Brunkhorst, *Hannah Arendt* (1999), 95.

7 Benhabib, *supra* note 5, at 60–9.

8 L. Bilsky, *Transformative Justice: Israeli Identity on Trial* (2004).

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and ideology – with regard to territory and to the term 'people' – had abolished the idea of the nation-state. In addition, National Socialist ideas had destroyed the institutional structure of the state.

From this perspective on the term 'nation-state' it is, at this point, crucial to understand, that, for Arendt, the refugee and minority problem reveals the 'internal disintegration of an order of nation-states'[9] and the impracticality of its concepts in a globalized world. In a nutshell, the 'decline of the nation-state',[10] as Arendt puts it, means the breakdown of the legal and constitutional order of the European nation-states even before the Second World War.

In the second part of my paper, I shall unveil two profound political-theoretical examinations – one of the work of Jean-Jacques Rousseau and the other of Max Weber – in Arendt's work, centred, once more, on the relation between politics, law, and order. While one can extrapolate, from Arendt's engagement with Rousseau, the critique of a concept of the political which makes claims for its primacy against previous legal agreements, her discussion of Max Weber challenges the duality of law and politics and the related notion of the rationality of law as being completely independent from politics. I shall argue that in Arendt's notion of constitutionalism, law and politics refer internally to each other; they are interrelated. This internal reference has to be taken seriously. Each sphere – the sphere of law and the sphere of the political – has to take the requirements of the other sphere into consideration. If this is not the case, and one sphere is prioritized within a political system, then this political system harms the durability and stability of its political and constitutional order.

Since much has already been written on Arendt's concept of the political, I shall only briefly outline in the third and final part to what extent her concept of the political tries to overcome these shortcomings. I shall focus, rather, on her considerations of a revised version of the concept of law. In opposition to the traditional perspective which identifies law with the will and command of the sovereign – the so-called 'imperative conception of law'[11] – I shall show that Arendt compares law to the rules of a game which establishes relations between people. I shall argue that with her shift from the Greek conception of law as *nomos* to the Roman *lex*, Arendt seeks to *de-substantiate* the concept of law and highlights the relationship-establishing dimension of law. Both attempts are important in trying to overcome the dichotomy of law and politics and to pave the way to a different understanding of legal rationality which seeks not to isolate law from the political sphere but rather to interact with it. However, I shall contend that Arendt's attempt to de-substantiate the concept of law and to emphasize the relationships between people established by law reaches its limit insofar as it is itself based on tacit assumptions which are prior to legal agreements and cannot be generated *only* by the political process itself. In the course of the argument, I shall demonstrate to what extent Arendt continuously elaborated

9 H. Arendt, *Origins of Totalitarianism* (1994), 270.
10 Ibid., at 267.
11 Arendt, *supra* note 3, at 41.

on the role, function, and meaning of law and how these questions became crucial for her entire political work.

1. Law, politics, and order from a historical perspective: Arendt on the European inter-war period

Since Bodin the question of political order has been the central question of state theory; in the inter-war period German political thinkers in particular centred their critique of the *System Weimar* on the question of order – regardless of their political and ideological positions. Max Weber, for instance, states that the main purpose of the state was 'to enforce its system of order'.[12] Hans Kelsen asserts that 'the modern state is essentially a coercive order – a centralized coercive order'.[13] For Carl Schmitt, the 'public safety and order' represent not only the highest 'state interest'[14] but also the basis for his theory of sovereignty. Additionally, he later describes his own state theory as 'concrete order thinking'.[15] Rudolf Smend defines the state as a rule that exists 'by virtue of an order'.[16] For Hermann Heller the 'question of the relation between rule and order' is the 'basic problem of all state-theories'.[17]

By following Arendt's argumentation in *The Origins of Totalitarianism*, I shall point out that her claim about the collapse of the nation-state is a direct attack on the terminology and principles of the leading state and sovereignty theorists of the Weimar Republic, especially Carl Schmitt. First, the common belief in the creation of a state order according to the theory of the national will as the 'sole legitimate criterion'[18] led to ethnic hatred that was prevalent in the 1920s and 1930s, and made communication between the political entities difficult, if not impossible (section 1.1). Second, the postulation of the homogeneity of a nation started the de-assimilation process that not only generated political conflicts but also diminished a nation's sovereignty on issues such as 'emigration, naturalization, nationality, and expulsion'[19] (section 1.2). Finally, unilateralism in questions of security and public safety as an expression of state sovereignty led to the inability of the nation-state to act, and it was, therefore, forced to dissolve its constitutional foundation without solving the problem. Due to their enormous loss of authority and power, many European states had relinquished the nation-state as a form of government long before the Second World War and had instead established totalitarian, fascist, or authoritarian regimes or had replaced the parliamentary constitutional state with a party dictatorship (section 1.3). In other words, Arendt's examination in *Origins of Totalitarianism* of the situation of refugees and minorities within a nation-state order

12 M. Weber, *Economy and Society: An Outline of Interpretive Sociology* (1978), vol. 2, 55.
13 H. Kelsen, *Pure Theory of Law* (2002), 54.
14 C. Schmitt, *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität* (2004), 13.
15 C. Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens* (1993), 10.
16 R. Smend, 'Staat und Politik', in Smend, *Staatsrechtliche Abhandlungen und andere Aufsätze* (1994), 363, at 368.
17 H. Heller, 'Die Souveränität. Ein Beitrag zur Theorie des Staats- und Völkerrechts', in Heller, *Gesammelte Schriften. Recht, Staat, Macht* (1971), vol. 2, 31, at 57. For a general and illuminating overview see A. Anter, *Die Macht der Ordnung. Aspekte einer Grundkategorie des Politischen* (2007), 226.
18 E. Renan, *Was ist eine Nation?* (1996), 36.
19 Arendt, *supra* note 9, at 278.

can also be interpreted as her comment on the debates between the state theorists and legal scholars of that time. In this regard, Arendt assumes that within a Europe based on the principles of a nation-state order, 'a guaranteed peace on earth is as utopian as the squaring of the circle'.[20]

1.1. The right to national self-determination and the decline of order

The right to national self-determination is one of the fundamental principles of the European nation-state model. Ernest Renan once stated that 'the wish of the nation . . . [is] the sole legitimate criterion, the one to which one must always return'.[21] Most of the state theorists of the Weimar Republic also rely on this assumption that a singular collective subject, namely the nation, has the exclusive right to determine its future.[22]

From her analyses of the European inter-war period, I shall unfold the potential of the principle of national self-determination to threaten and endanger political stability. Since only a few nations could be accorded 'national self-determination and sovereignty' in the aftermath of the First World War, I shall elucidate with reference to Arendt how this liberating idea of self-determination became an instrument of repression. Arendt argues that against this background the newly established states in eastern and south-eastern Europe quickly found themselves in the role of the oppressor. The 'nationally frustrated peoples',[23] on the other hand, became aware 'that true freedom, true emancipation, and true popular sovereignty could be attained only with full national emancipation'.[24] Understood as a sign of national emancipation, the right to self-determination was considered a universal justification, according to international law, for oppressive political actions by the new nation-states as well as for independence movements of minority groups. This dialectic of repression and autonomy coexisted with ethnic hatred that in the inter-war period 'began to play a central role in public affairs everywhere'.[25]

In order to clarify the historical background, one needs to emphasize that before 1914 millions of people in Europe were denied the right to self-determination. After the First World War this situation was no longer tenable. For one thing, political constraints forced the established nation-states to fill the power void that ensued after the collapse of the Austro-Hungarian monarchy, the rule of the Russian tsar, and the Ottoman Empire. Second, as the old European nation-states were being confronted in their colonies with independence movements, it would only have been possible to deny the ethnic groups in eastern and south-eastern Europe national

20 H. Arendt, 'Thoughts on Politics and Revolution: A Commentary', in Arendt, *Crisis of the Republic* (1972), 199, at 229. In greater length and detail I explicated Arendt's assumption of the decline of order with reference to the four paradoxes of the nation-state in C. Volk, 'The Decline of Order: Hannah Arendt and the Paradoxes of the Nation-State', in S. Benhabib (ed.), *Politics in Dark Times: Encounters with Hannah Arendt* (2010, forthcoming).

21 Renan, *supra* note 18, at 36.

22 For Weber, the idea of the German nation is an 'ultimate value' (see A. Anter, *Max Webers Theorie des modernen Staates: Herkunft, Struktur und Bedeutung* (1995), 208). For Schmitt see, e.g., Schmitt, *supra* note 14, at 53; for Smend see R. Smend, 'Verfassung und Verfassungsrecht', in H. Koch (ed.), *Seminar: Die juristische Methode im Staatsrecht. Über Grenzen von Verfassungs- und Gesetzesbindung* (1977), 318, at 335.

23 Arendt, *supra* note 9, at 271.

24 Ibid., at 272.

25 Ibid., at 268.

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self-determination using military violence – an option that was deemed unimaginable after the shocking experiences of modern war. The peace agreements of 1919–20 represented the attempt to preserve a Europe organized in nation-states, to defend the idea of the nation-state as the basis of the peace and order of the twentieth century, and 'to conserve the European status quo'.[26] Since a different, federal, supra-national solution was not feasible, the idea of national self-determination was extended to the whole of Europe.

However, it is important to emphasize that it was not possible simply to apply the nation-state theme to eastern and south-eastern Europe. None of the newly structured regions could fulfil the requirements on which traditional nation-states such as France rested; none of these territories were uni-national. On the contrary, they all comprised a colourful mix of ethnic groups that defined themselves as political groups. Arendt refers to Mussolini, who maintained that the fundamental problem of Czechoslovakia was that it was not Czecho-Slovakia only but rather 'Czech-Germano-Polono-Magyaro-Rutheno-Rumano-Slovakia'.[27] The aim was to create nation-states on the grounds of the right to self-determination, yet the result were 'nationalities-states'.[28]

Arendt assumed that the leading politicians of the old nation-states hoped that the nationality problems in eastern and south-eastern Europe could be channelled with the help of minority treaties. While the 'important' ethnic groups could participate in administration and government, the other smaller ethnic splinter groups were to surrender the right to national emancipation in favour of the right to use their own language, to run their own schools, to practise their own religion, and so on. By doing this, European statesmen believed that the decisive steps had been undertaken to secure political order in those parts of Europe as well. The reality that was emerging, however, looked different. First, the minority treaties that had been designed as exceptions became the rule. There was no region in eastern and south-eastern Europe that was not coveted by several nationalities simultaneously. Second, the classifications into nations based on these divisions seemed equally artificial. This situation that was deemed unacceptable by the minorities and led to separatist attempts everywhere was accompanied by a policy of 'systematic obstruction'.[29] Looking at their own minorities across the border, many newly created states also considered the drawing of the borders unsatisfactory, which led to numerous border conflicts that partly escalated into border wars. Early on it became apparent that, if the constellations were 'unsuited', intra-state conflicts between the main population and minorities or even between minorities themselves could very quickly lead to inter-state conflicts. With Arendt one comes to the conclusion 'that the European status quo could not be preserved and that it became clear only after the downfall of the last remnants of European autocracy that Europe had been ruled by a system

26 Ibid., at 271.
27 Ibid., at 270.
28 Arendt, *supra* note 4, at 567.
29 Ibid., at 567.

which had never taken into account or responded to the needs of at least 25 percent of her population'.[30]

Moreover, very early on it became clear that the older powers of Europe were not willing to consider the minorities or the minority system. From the start, the new states complained of 'an open breach of promise and discrimination'[31] between the newly created and the established states, such as France, that excluded themselves without compromise from the minority system. Seen from the perspective of the principle of national self-determination, the minority treaties 'implied restriction on national sovereignty [that] would have affected the national sovereignty of the older European powers'.[32] Not one of the older powers was prepared and willing to undergo this. Thus the potential for conflict that the minority system carried was not only evident in eastern and south-eastern Europe, but gradually affected the relation between the new and the older powers.

Despite peace agreements, minority contracts, and other political treaties, the European nation-states were not 'capable of bringing order to this chaos of reciprocal hate'.[33] It is important to emphasize that in such an atmosphere of ethnic hatred, 'practical consideration and the silent acknowledgment of common interests',[34] as the idea of nation-states once envisaged, became impossible. Instantly it became apparent '*that full national sovereignty was possible only as long as the comity of European nations existed*'. Only as long as the '*spirit of unorganized solidarity and agreement*'[35] existed among the sovereign states was it possible that a balance of the different interests on the one hand and respect for the sovereignty of the other nation-states on the other could lead to a functioning political order. Without that 'spirit' the situation very quickly resulted in those '*deadly conflicts*'[36] that should have been prevented from the perspective of the established nation-states and against the backdrop of the experiences of the disaster of the First World War.

1.2. The principle of homogeneity and the decline of order

Without doubt the principle of national homogeneity is crucial in Carl Schmitt's work and his concept of a political community. A common race, language, culture, and tradition awake the 'sensibility of being different' and 'generate the national energy' and the 'awareness of belonging to a community with a common fate or destiny'[37] . For Schmitt, this kind of 'awareness of belonging to' is the precondition for judging 'whether the adversary intends to negate his opponent's way of life and therefore must be repulsed or fought in order to preserve one's own form of existence'.[38] Carl Schmitt was not alone; many German state theorists of that period

30 Arendt, *supra* note 9, at 271.
31 Ibid., at 270.
32 Ibid., at 273.
33 Arendt, *supra* note 4, at 561.
34 Arendt, *supra* note 9, at 278.
35 Ibid., at 278 (emphasis added).
36 Ibid., at 278 (emphasis added).
37 C. Schmitt, *Crisis of Parliamentary Democracy* (1988), 75.
38 C. Schmitt, *The Concept of the Political* (2007), 27.

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could not think of a political order which is not based on national homogeneity.[39] Arendt, in contrast, criticizes the principle of national homogeneity because it led to a spiral of de-assimilation and de-naturalization. She starts her political critique with reference to the phenomenon of statelessness and argues that the path to an agreement on international asylum and refugee regulations was obstructed by the general atmosphere of chauvinistic ethnic hatred and the fear of the loss of sovereignty. Referring to her thoughts, I shall argue that the European states, paradoxically, 'lost' the power to exercise those sovereignty rights that had been the domain of national sovereignty, namely 'sovereignty . . . in matters of emigration, naturalization, nationality, and expulsion'.[40] What does this mean in detail?

The state's capacity to allow persons to stay on its territory was based on the option to expel them to neighbouring countries or to their original home countries. Only when the state was legally as well as factually in a position to refuse residency, was it in a position to grant the right to residency. With the de facto stateless refugees, this possibility was abolished. It was not possible to expel them because no country would take them. Since they did not belong to a state, they were 'undeportable'.[41] This 'undeportability' of refugees, in particular, and the ensuing collapse of the asylum system had consequences for the sovereignty of the nation-state when determining those who were granted permission to stay and those who had to leave the country. Although the solution would have been to guarantee fundamental rights and naturalization, this possibility was blocked in numerous ways. First, it is obvious that such a naturalization process could only be carried out on the basis of international agreements to which all nation-states would have to adhere. But every country, as a prisoner of the logic of national sovereignty, insisted on its sovereignty, and this, complemented by the poisonous atmosphere of ethnic hatred, made an international solution unthinkable.

Second, the refugees' acceptance of assimilation as a prerequisite for naturalization was not to be assumed. Aside from the wish for national self-determination, the renaissance of nationalism and the pursuit of national homogeneity also changed the refugee profile. Previously, refugees had been individuals singled out for persecution who had fled over the frontier. Now entire ethnic groups were on the move, which, due to group dynamics, were unable to assimilate. Instead, they actually triggered a process of 'de-assimilation' in the already naturalized citizens in the host countries with the same ethnic roots.[42] What I want to highlight is that the transformation of an ethnically connotated notion of national homogeneity became a decisive political factor. This does not mean, though, that the minorities in eastern and south-eastern Europe did not previously have an ethno-nationalistic feeling of belonging together.[43] Now, however, under the situation of exile and deportation,

39 See, e.g., Smend, *supra* note 22, at 341.
40 Arendt, *supra* note 9, at 278.
41 Ibid., at 276.
42 In this respect, Arendt argues that this was the case with 'Armenians and Italians in France, for example, and with Jews everywhere' (Arendt, *supra* note 9, at 285.)
43 The ethnic groups involved were people whose national consciousness had only recently been awakened following the example of the Western nations. Instead of looking back on to a history of 'stateness', and

the affiliation with an ethnic group attained decisive new importance in the old nation-states as well. When people lose all their external worldly securities such as their rights and even their home countries, their origin becomes the central reference point and a crucial source of solidarity. The 'humanitarianism of brotherhood' – which means nothing other than 'that the element common to all men is not the world, but human nature'[44] – has, for Arendt, always replaced by its warmth, for all humiliated people in dark times, the light of a mutual world. Although ethnic origins had no political significance for the now naturalized and assimilated members of the same ethnic group and was, thus, only a question of cultural background, these people now felt attracted by this new notion of nationality. The negative effects, spawned by the waves of refugees in the already settled people with their sense of belonging, increased the fear of the old nation-states of being led into a 'dangerous' multinational state. This fear originated in the difficulties of the nation-states in dealing with other national groups, and prevented, third, any considerations of a naturalization policy.

Nevertheless, the nation-state governments had to react to the increasing number of refugees and the accompanying process of de-assimilation. Arendt argues that when it became clear that borders could not be completely sealed by any means, governments started to revoke already granted naturalizations. The problem was that de-naturalization was just as ineffectual as naturalization and did not really offer a solution. On the contrary, the tragedy of 'the legislation of denationalization'[45] in the 1920s was that once a state, as a reaction to the influx of refugees, started nullifying once-granted citizenships, bordering states felt forced to follow suit. The result was that the de-naturalization laws were passed across all Europe, and led to a 'wave of mass-denationalization'.[46] In a long footnote, Arendt depicts how in 1922 the de-naturalization laws started in Belgium and how states such as Turkey, Austria, and France, among others, did the same.[47] The legal foundations for these 'de-naturalization' laws were so vaguely formulated that they did not express more than the police guidelines for the treatment of the 'undesirable alien'.[48] Far beyond referring to any actual offence, the laws were dressed in barely tangible formulations and spoke of '*manquant gravement à leurs devoirs de citoyen belge*'; of 'not "worthy of Italian citizenship"'; or of the denationalization of those of its new citizens 'who committed acts contrary to the interests of France'.[49]

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linking nationality with the legal institutions of the state, Arendt argues in the tradition of Meinecke, distinguishing between the concept of state-nation and cultural nation, that in these ethnic groups the concept of nationality 'had not yet developed beyond the inarticulateness of ethnic consciousness'. In contrast to the Western understanding of nationality, 'their national quality appeared to be much more a portable private matter, inherent in their very personality, than a matter of public concern and civilization' (Arendt, *supra* note 9, at 231). In short, in eastern and south-eastern Europe the concept of a nation-state had an ethnic connotation from the beginning.

44 H. Arendt, 'On Humanity in Dark Times: Thoughts about Lessing', in H. Arendt (ed.), *Men in Dark Times* (1995), 3, 16.

45 Arendt, *supra* note 4, at 585.

46 Ibid., at 585.

47 Arendt, *supra* note 9, at 279.

48 Ibid., at 283.

49 Ibid., at 279.

In the interests of safeguarding national homogeneity, the denationalization laws spread from country to country and statelessness increased, which in turn started a process of de-assimilation to which states reacted with the further withdrawal of citizenship. This only set off the whole process again in an escalated form. Not only were the living conditions of the refugees affected by this escalation, but also the situation of the nation-states, whose scope for action declined with round after round of denationalization. With reference to Arendt, I describe a spiral of denationalization and de-assimilation, or de-assimilation and denationalization, that rendered ineffectual the legal tools of naturalization and deportation possessed by the nation-state. This clearly highlighted how far and under what conditions national jurisdiction could affect international response and to what extent the principle of national homogeneity contributed to the chaos of the European inter-war period.

1.3. The principle of state sovereignty and the decline of order

The principle of state sovereignty – that is, the idea that the state is the last instance of legal and political decision-making and the one and only subject of international law – was a common and leading principle not only in German state theory but also in international law. Arendt argues that this 'dogma of state sovereignty'[50] led to a situation in which the nation-states were unable to act within the scope of their democratic constitutional order and were forced to suspend the rule of law in order to confront the problems.

In order to unfold Arendt's argument it is important to point out that most refugees of the inter-war period were stateless, and as such they stood outside any legal order. Since the stateless refugee was not a 'juridical person',[51] the situation could not be tackled on a legal level; that is, with the means of governance characteristic of a constitutional state. Arendt argues that because of the fact of the stateless person, who represented the 'anomaly for whom the general law did not provide,'[52] every government was forced 'into admittedly illegal acts'.[53] The paradox that became apparent was that the stateless person, whose statelessness was due to the fact that the state tries to maintain its sovereignty with respect to 'emigration, naturalization, nationality, and expulsion', managed to manoeuvre the state into a position where it acted outside its own legal order, and started 'to undermine *legality in the internal affairs of the affected states* and *its international relations*'.[54] In other words, stateless people endangered the 'nation-state as a legal and constitutional state, i.e. they jeopardized it in its foundations'.[55]

In order to exemplify the undermining of 'international relations', I shall refer to Arendt's explanations of deportation practices. The idea of national sovereignty

50 Kelsen, *supra* note 13, at 346.
51 Arendt, *supra* note 9, at 447.
52 Ibid., at 286.
53 Ibid., at 283 f.
54 Arendt, *supra* note 4, at 592 (emphasis added); and see Arendt, *supra* note 9, at 284.
55 H. Arendt, 'Nationalstaat und Demokratie' (2006), available at http://hannaharendt.net/documents/nationalstaatII.html.

inhibited the nation-state from renouncing its 'right' to deport the stateless refugees. The 'right to expel' is considered as a core principle of territorial sovereignty. However, it was not possible to expel stateless people on legal grounds, since no other state was there to receive them. If the particular state wanted to preserve its territorial sovereignty it had to deport the stateless person without complying with, or even against, international agreements. The result was a steady increase in non-legal deportation practices and the increase of 'illegality in the inter-state border traffic'.[56] In clandestine actions, the police smuggled stateless persons over the border into the neighbouring country. Obviously, the refugees were in breach of the immigration laws of that country and, thus, offended its rights of sovereignty. The neighbouring country, following the same logic in its turn, took the stateless refugees to the next state one night later.[57] The spread of such deportation practices revealed in all clarity that it was impossible to acknowledge the legal and sovereign sphere on the basis of the principles of a nation-state order and that this led to the 'deadly conflicts' one had wanted to avoid after the experiences of the First World War.

In addition to the illegality of the border traffic, undermining the legality of internal affairs is another argument made by Arendt. I shall look at this argument from two perspectives: first, the spread of illegality in society and, second, the 'transformation of legal relations and standards'.[58]

The spread of illegality in society resulted directly from the increasing number of refugees and was linked to the fact that people without residence and work permits were simply forced to act outside the pale of the law in order to secure their existence. Arendt explains how an increase in illegal refugees changed everyday life in society especially by its leading to certain forms of illegality such as any kind of illicit work.[59] Moreover, she outlines that the 'defiance of the authority of laws' should be regarded as an 'explicit sign of the inner instability and vulnerability of existing governments and legal systems'.[60] The second aspect of explaining how legality in internal affairs was undermined could be explained with what Arendt means by the 'transformation of legal relations and standards': since the authorities were afraid that humane treatment would lure potential refugees, the police were bestowed with exceptional powers hitherto unknown. The foundation of the separation of power was thereby steadily undermined. The police were allowed to choose their own methods to combat the refugee problem. With this direct power over people, they had the right to expel refugees without trial, without a judicial order, and without a legal examination of the facts.[61] Through this 'spectral mixture'[62] of

56 Arendt, *supra* note 4, at 594.
57 Arendt, *supra* note 9, at 283.
58 Another aspect of the decline of 'legality of internal affairs' is the 'transformation of the juridical system' on which I elaborated in greater detail in Volk, *supra* note 20.
59 Arendt, *supra* note 9, at 279.
60 H. Arendt, 'Civil Disobedience', in Arendt, *Crisis of the Republic* (1972), 49, at 69.
61 Arendt, *supra* note 9, at 287.
62 W. Benjamin, *Reflections: Essays, Aphorisms, Autobiographical Writings* (1986), 286.

law-positing and law-preserving, the constitutional bodies lost their reputation and their authority.[63]

Of course, one could argue with Carl Schmitt that to suspend constitutionality and the rule of law on nearly all levels of the political system demonstrates the state's claim of sovereignty. For Arendt, Schmitt's narrow state-theoretical perspective on a nation-state order, however, both ignores completely the heritage of the Enlightenment embodied in the nation-state and falls short of recognizing that such a suspension of the rule of law will not lead to stable and durable political order. With respect to the political meaning of human rights, Arendt points out the danger that threatens a nation-state's order by the non-realization of its inherited moral and legal standards. In the declaration of human rights of the French Revolution, the liberal and free democratic content of the nation-state found its most distinct expression and became a pillar of democratic constitutionalism. From her examination, I take the argument that with an obvious political disregard of human rights the nation-state loses a central legitimation principle of its order. 'Mass-statelessness',[64] the rightlessness of the refugees, their difficult humanitarian situation, and their illegality revealed that the moral and liberal aspects of a nation-state constitution and the talk of inalienable human rights 'were mere prejudice, hypocrisy, and cowardice'.[65] Thereby the nation-state not only denied the enlightened and liberal idea of human rights, but also ridiculed 'the political apprehensions of the fully developed nation-states'.[66] This undermined again the authority of an entire political order. The result was that supporters of the idea of a democratic nation-state order, such as politicians, parliamentarians, journalists, and intellectuals, among others, lost their power to convince people in the political debate about the interpretation and evaluation of events and developments. They thus missed the opportunity to highlight the vital differences between an authoritarian form of government and a constitutional government, and to warn of the consequences of a systemic shift that the radical left-wing or right-wing parties and movements would create. Due to the politics of the nation-state 'the mere phrase "human rights" . . . became for all concerned – victims, persecutors, and onlookers alike – the evidence of hopeless idealism or fumbling feeble-minded hypocrisy'.[67] Trying to convince the world of the liberal and free democratic potential of this form of government becomes a farce.[68]

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63 As an example, Arendt describes how in France an expulsion order by the police received disproportionately higher priority and had more serious consequences than that of the home secretary, despite the fact that the police were constitutionally subordinated to the home secretary (Arendt, *supra* note 9, at 287).

64 Ibid., at 298.

65 Ibid., at 269.

66 Ibid., at xvii.

67 Ibid., at 269.

68 This leads us to another argument that we can put forward against Carl Schmitt's perspective: of what does Schmitt consider a political order to consist? who is the sovereign? These questions lead further into Schmitt's work and away from my attempt to highlight the significance of legal questions in Arendt's thought. Nevertheless, on examining Schmitt's work with regard to these issues one is confronted with plenty of inconsistencies and contradictions in his work. His definition of the concept of order varies from a Catholic-theological design in his early work, to a cultural-national concept in *Crisis of Parliamentary Democracy*, to a racist, National Socialist one in *Über die drei Arten des rechtswissenschaftlichen Denkens* (On the Three Types of Juristic Thought). Hermann Heller had already, in his own paper on sovereignty in 1927, criticized the concept of sovereignty in Schmitt's work. Heller states that Schmitt is 'inherently contradictory

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Although Arendt therefore agrees that police conduct as well as the systemic shifts within the state resulted from the jeopardized order brought about by the refugee problem, she, unlike Schmitt, takes the liberal and constitutional characteristics of a nation-state structure very seriously and criticizes those systemic shifts. For Arendt, the 'decline of the nation-state'[69] is more than just the end of a form of government. Along with the nation-state, '*a whole way of life*'[70] perished and its moral standards and values vanished from public life. This was one precondition for what Arendt later described as the 'totality of the moral collapse'[71] in Europe.

2. Law, politics, and order from a political-theoretical perspective: Arendt on Weber and Rousseau

The decline of the nation-state is a decline in its political and legal order. This is one result of her considerations of the refugee and minority problems in *Origins of Totalitarianism*. To take this perspective allows us to consider more generally the interrelationship between politics and law for her version of constitutionalism. Although Arendt's critique is related to a historical context, I shall unfold two political-theoretical elaborations in her work, explicating the inappropriateness of both the concept of the political and the concept of law and constitutionality accompanying a nation-state order as elements of constitutionalism.

Arendt's critique of the nation-state's paradigm of the political is a critique of Rousseau's *volonté générale*. For Arendt, we have been confronted with a new paradigm of the political since the French Revolution: the so-called politics of the general will or 'the rule of public interest'. What is new is that solidarity and identity within a political community is generated by common feelings and emotions among the citizenry; Arendt calls it '*Herzenspatriotismus*' – 'the patriotism of hearts'.[72] During her engagement with Rousseau in *On Revolution* she outlines – and criticizes – a concept of the political which emphasizes a general will formed through affective and emotional empathy rather than by a discursive–democratic debate.[73] Due to its alleged moral supremacy, this emotionally formed general will calls for absolute sovereignty and claims *potestas legibus soluta*. With the rise of the political idea of the nation, this concept of the general will became the dominating paradigm of the political.

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and not tenable'. Apart from his 'inadequacies with reference to international law' (Heller, *supra* note 17, at 89 (my translations)), for Heller, too, it remains unclear who should act as the sovereign according to Schmitt's theory. Heller supposes that for Schmitt the *Reichspräsident* takes up this position but, as Heller continues, Schmitt actually avoided a clear answer. In *Der Hüter der Verfassung* some years later Schmitt explicitly repudiated the possibility of the *Reichspräsident* being the sovereign (C. Schmitt, *Der Hüter der Verfassung* (1996), 132). From Arendt's perspective the polemical remark springs to mind that the problem with which many state theorists were faced, namely to define the sovereign – and Heller did not satisfactorily solve it at all – was possibly due to the political situation of the inter-war period and the fact that there was nobody who was in the position to execute the alleged sovereignty rights unilaterally and at the same time to stabilize the political order of the community.

69 Arendt, *supra* note 9, at 267.

70 Arendt, *supra* note 1, at 226 (emphasis added).

71 H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (2006), 125.

72 H. Arendt, *Über die Revolution* (2000), 124.

73 Ibid., at 112.

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Such a paradigm of politics represented by an emotionally formed *volonté générale* is in her eyes incompatible with an autonomous legal sphere. The reason is that the claim for sovereignty of the general will can only be integrated into the legal system by formulating greater parts or fundamental principles in the style of blanket clauses. As outlined above, asylum law, minority law, immigration law, and criminal law are Arendt's examples. If this is the case, and crucial parts of the legal system are based on blanket clauses, then the legal order loses its reliability.

Why and to what extent is the general will's claim to sovereignty accompanied by blanket clauses? If the will is always what it ought to be just because the will is, as in Rousseau,[74] or is always the 'highest law', as Sieyès states, [75] then no law can be legitimately enforced against it. Such a claim, however, can only be integrated into the legal system by blanket clauses because they undermine the legal definiteness of a legal rule through unspecified clauses. To give Arendt's example about residence law: in order to integrate claim for sovereignty of the general will into the legal system, one needs to embed an unspecified clause, such as 'reasons of public safety and order', among a couple of specified conditions within residence law, such as no criminal record, language ability, or others. If such a blanket clause is not embedded in the law, then the right to residence – by fulfilling all the other requirements – has to be enforced even against an alleged 'public interest'. Enforcing a law against the public interest is incompatible with the sovereignty of the general will. Therefore, to embed blanket clauses in the legal system seems to be the solution, because they help to reserve a seat for the claim of popular sovereignty even within the juridical system. As a consequence, law is in danger of degenerating into a puppet of political interests and into becoming the command of the sovereign.

However, Arendt criticizes the traditional notion of law and constitutionality as well: her critique of the rule of the law is a critique of Max Weber. I elaborated and reconstructed this discussion mainly from Arendt's remarks in *Origins of Totalitarianism* and *On Violence*.[76] For Weber, as well as for Kelsen, the rationality of modern law results from the fact that *Rechtsfindung* – the course of justice – and *Rechtsschöpfung* – the creation of laws – are independent of 'norms of different qualitative dignity', such as morality, religion, or politics, and only follow the rules of legal formalism, exercised by an administrative and juridical elite. This brings Weber to the conclusion that 'today the most common form of legitimacy is the belief in legality, the compliance with enactments which are formally correct and which have been made in the accustomed manner'.[77]

Arendt outlines in her critique of Weber the fact that she does not want to miss the reliability and verifiability of rational law in her version of constitutionalism. This notion of law is doubtful, however, if the rule of law means that for the sake of rational political outcomes the participation of the citizen in the political decision-making process should be minimized, or if this notion of law and constitutionality

74 J.-J. Rousseau, *The Social Contract*, ed. V. Gourevitch (1997), 52.
75 E. Sieyès, *Was ist der dritte Stand?* (1998), 83
76 Volk, *supra* note 2, at 119–208.
77 Weber, *supra* note 12, at 35.

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requires that the course of justice and the creation of laws are completely detached from public opinion and are only the business of an administrative elite of jurists. Arendt doubts that such a concept of law is able to fulfil its purpose, namely to stabilize the political order. Such a concept of law leads to bureaucratization and juridification of public–political life. It undermines the political meaning of those public spaces and debates where citizens could come together and engage in a process of opinion formation. As a consequence, in Arendt's eyes, the increase of juridification leads to the depoliticization of the public realm. This in turn results in *politischer Erfahrungslosigkeit*, a lack of political (democratic) experience-making; it results in *Praxisentzug*,[78] a lack of democratic competence of the citizens, and in mistrust of the political elites. This either leads to political apathy or provides the ideal breeding ground for antidemocratic and populist movements. Both do anything but stabilize the democratic culture and political order of a community.

Without doubt, Weber himself seeks to absorb the irrationalities caused by the modern juridification of public life by means of a 'plebiscitary leadership democracy'. The charismatic leader should contribute vitality, enthusiasm, and emotion to the life of a modern political community which for the rest of the day is mainly dominated by the cold rationality of legal bureaucracy. However, Weber's 'leadership democracy with a machine'[79] continues the traditional, dichotomous relation between law and politics. Either the democratic leader overrules the formal postulates of the judiciary and administration with reference to the material postulates of the reason of state or, due to social tensions and struggles, the parliamentarians undermine legal formalism by 'pathetic, moral claims ("justice", "human dignity")'.[80] While Weber seems to appreciate the materialization of law in the first case but adamantly refuses it in the other case, his political preferences become obvious. However, this also reveals that for Weber, the autonomy of politics can only be preserved at the expense of the autonomy of the legal sphere – and vice versa. For him, the two types of rationality, the one of law and the one of politics, are incompatible with each other.

For Arendt, not only does Rousseau's radical-democratic version – the primacy of politics – harm individual legal entitlements, but, under the dictate of the claim for sovereignty of the general will, the legal system decays. The trust in reliable laws and a stable political order will vanish, as Arendt puts it.[81] This would be the end of constitutionalism. On the other hand, her critique of Weber highlights the negative consequences of a juridification of the political. Law and politics refer internally to each other; they are interrelated. In an Arendtian version of constitutionalism, the sphere of law needs to take the interests of an active and vivid citizenry into consideration. At the same time, this version of constitutionalism requires that the political sphere needs to be aware of the fact that the stability of the community also depends on the autonomy of the legal sphere which is guaranteed by its own

78 H. Arendt, *Macht und Gewalt* (1998), 80.
79 M. Weber, 'Politics as a Vocation', in Weber, *From Max Weber*, ed. and trans. H. H. Gerth and C. W. Mills (1946),77, at 113.
80 M. Weber, *Wirtschaft und Gesellschaft* (1976), 507.
81 Arendt, *supra* note 72, at 115.

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constitutional procedures, competences, and legal modes or methods of decision-making in the course and finding of justice. If this is not the case – if primacy is given to one of the spheres within a political system, arguing either for the sovereignty of law or for popular sovereignty – then this political system harms the durability and stability of its political order. Against this background, Arendt argues for the de-hierarchization of the relation between law and politics in her version of constitutionalism.

3. Law, politics, and order from a legal-philosophical perspective: Arendt on the relationship-establishing dimension of law

Wherever and whenever Arendt identifies political actions and events as successful, as well-proven political experiences, namely when she speaks about the sections and societies of the French Revolution,[82] about town halls,[83] or the ward system of the Hungarian Revolution,[84] she always praises 'structured politics'.[85] 'Structured politics' relies on 'basic rules of political procedure',[86] such as, among other things, appearing in person within democratic discourse, having the right to debate and discuss in public, needing to justify one's own opinion with good reasons in the presence of others and when engaging with other opinions. These rules are the precondition of the possibility of acting together as free and equal persons, and ban the 'undifferentiated welling-up of mass opinion in an extra-parliamentary context that so worried her'.[87] However, as Richard Bellamy pointed out in a different context, these principles of a republican political order – Arendt usually speaks about the 'syntax and grammar of political actions'[88] – are at the same time products of political acting together.

> Being essentially an argument from democracy, it must surely rest on both a set of constitutional democratic rights and a *demos*. But the norms do not in any sense precede or frame the practice of dialogue, they are intrinsic to it and only emerge within it. Thus, there is no pre-existing consensus on rights.[89]

These remarks about a successful and well-proven political experience should give us an idea about what Arendt has in mind when she speaks about a durable and stable political order. Such an order is not meant to be static; rather, it could be characterized as a dialectic of acting and preserving. To preserve the political order is possible only through political acting. Only through acting with each other does one experience the political meaning of the constitution and the rules of a democratic public sphere. Acting with each other is possible only as long as those

82 Ibid., at 311.
83 Ibid., at 338.
84 H. Arendt, *Die ungarische Revolution und der totalitäre Imperialismus* (1958), 46.
85 Waldron, *supra* note 2, at 210.
86 Ibid., at 210.
87 Ibid.
88 Arendt, *supra* note 72, at 224.
89 R. Bellamy, 'Sovereignty, Post-sovereignty and Pre-sovereignty: Three Models of State, Democracy and Rights within the EU', in N. Walker (ed.), *Sovereignty in Transition* (2006), 167, at 184.

persons who are acting are aware that the political power which is a result of their acting together will vanish as soon as they do not follow the above-drafted principles – the syntax and grammar of political acting. Seen from this perspective, I argue that Arendt's concept of the political tries to integrate the awareness of the need both for acting and for preserving. By doing so, this provides the basis for de-hierarchizing the relationship between law and politics and linking together constitution and democracy, preservation and action in her version of constitutionalism.

While authors like Waldron or Tamineaux have already spelled out the interrelation between acting and power in Arendt's thought and, by doing so, made it possible to explain how a certain notion of law fits into her concept of the political and even becomes the *conditio sine qua non* of a durable and stable constellation of power, some light still needs to be shed on Arendt's notion of law.[90] I start with her assumption that the notion of the 'imperative conception of law' is based on a fallacy. The reason for this is that power as 'the essence of all government'[91] is generated by consent among people and, therefore, expresses a kind of reciprocity. Especially in her consideration of the nature of revolution, Arendt outlines reciprocity as a crucial feature of the concept of power. The breakdown of public authority at the moment of revolution stresses the fact that, in the end, the alleged obedience to the laws depends mainly on public opinion and general consent. This brings her to the conclusion that laws should not be seen as an expression of command or as the legal will of the sovereign but should, rather, describe, reveal, and arrange the relations among people within a political community. Seen from the perspective of her new interpretation of the political, for Arendt laws are the legally formalized expression of agreements.

Arendt's notion of law as a relational concept, which reveals the social relations between the people of a political community, could be traced back to Montesquieu. Montesquieu, too, conceived of law not as the substance of the sovereign will but as an expression of the relations between people in a polity. Montesquieu came to this conclusion because he differentiated between philosophical and political freedom. While the first is based on the individual 'I shall', the second refers to an 'I can' – that is, to something like being empowered by others.[92] Only where people are reciprocally empowered to act could one speak about political freedom. Based on this notion of empowerment, for Arendt Montesquieu interprets law as 'rapport, the relation subsisting between different entities'.[93] For Montesquieu, 'a law is merely

90 In my interpretation of Arendt's legal thought as a shift from *nomos* to *lex*, I disagree with Hans Lindahl's reading. Lindahl is convinced that, for Arendt, '*nomos* deserves conceptual and political priority over other, derivative conceptions of law' (Lindahl, *supra* note 2, at 884). In Lindahl's eyes, this is the case because of Arendt's 'strong claim that the legal closure of space is constitutive for political community as such' (ibid., at 884). Lindahl, in my eyes, not only misses the fact that Arendt argues in favour of a relational conception of law but also that she understands space in terms of relational space – a notion of space that corresponds to her concept of the political – and, therefore, departs from the notion of a political community which still relies on the container theory of space, with its strong emphasis on boundaries. (Cf. I. Ley, 'Verfassung ohne Grenzen? Zur Bedeutung von Grenzen im postnationalen Konstitutionalismus', in I. Pernice et al. (eds.), *Europa jenseits seiner Grenzen – Politologische, historische und juristische Perspektiven* (2009), 91, at 91 ff.)

91 Arendt, *supra* note 3, at 53.

92 Montesquieu, *The Spirit of Laws*, trans. G. D. H. Cole (1952), 84.

93 H. Arendt, *The Promise of Politics* (2007), 183.

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what relates two things and therefore is relative by definition'.[94] He was able to reinterpret political freedom and the essence of law in such a way because his entire political thinking was rooted deeply in the Roman tradition. His considerations on law, on *loi*, are in line with Roman legal thinking and its idea of *lex* – and not in the Greek tradition of *nomos*. To unfold Arendt's legal-philosophical thinking, the difference between *lex* and *nomos* is crucial: while the Greek *nomos* expresses the idea of demarcation, the Roman *lex* stands for relationship.

> For the Roman *lex*, which was very different from and even contrary to what the Greeks understood by *nomos*, actually means 'lasting tie' and very quickly came to mean 'contract', whether between private citizens or as a treaty between nations. *Consequently a law is something that links human beings together, and it comes into being not by diktat or by an act of force but rather through mutual agreement* . . . For the Greeks, law is neither an agreement nor a contract; it certainly does not arise between men in the back-and-forth exchange of words and action . . . [The Greeks seek] to set limits to action by means of the *nomos* and to interpret the law not as a link and a relationship, but rather as an enclosing border that no one should overstep.[95]

Arendt juxtaposes the political experiences of the Romans, embedded in their concept of *lex*, against the Greek *nomos*. While stressing the notion of mutual agreement as the crucial feature of law, the Roman *lex* demonstrates the relation-establishing dimension of law. Arendt, therefore, explicitly talks about the 'contractual character of law' and characterizes the Roman concept as a 'political concept of law'.[96] To be sure, what makes the Roman concept of law a political one is its relation-establishing character. Such a concept of law perfectly suits a notion of the political which emphasizes 'acting in concert'. In this case, the rationality of law does not result from the will of a well-educated administrative and juridical elite sticking to the rules of legal formalism, but from its ability to open and establish a political space in which acting together can be realized. In other words, the purpose and rationality of the legal system, in her eyes, is to preserve the syntax and grammar of democratic political acting and to maintain the rules of an active public-political sphere.

Although Arendt is convinced that the Greek concept of law is 'pre-political', in the sense that the laws, designed by a lawgiver, are there first and foremost to establish the political realm – like the walls of the city – in which further political action and interaction could take place, it is crucial to emphasize that, for her, the relation-establishing dimension of law is also present in the idea of *nomos*. In contrast to the Roman concept, however, this relation-establishing dimension is far from obvious; rather, it only becomes apparent by means of the pre-philosophical writings of the Hellenistic city-states. According to these writings, it was the pursuit of immortality which motivated people to engage in political affairs. This also explains the central function of poets and historians in the Hellenistic city-states. For the Hellenistic

94 Ibid., at 184.
95 Ibid. (emphasis added).
96 Arendt, *supra* note 72, at 244.

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pursuit of immortality, however, laws were not of less importance at all:

> The great advantage of the polis organization of public life was that the polis, because of the stabilizing force of its wall of law, could impart to human affairs a solidity that human action itself, in its intrinsic futility and dependence on the immortalizing praise of poets, can never possess. Because it surrounded itself with a permanent wall of law, the polis as a unity could claim to ensure that whatever happened or was done within it would not perish with the life of the doer or endurer, but live on in the memory of future generations.[97]

The Greek concept of law was unable to establish relationships between the city states. This is what distinguishes it from the Roman *lex*. However, due to its 'stabilizing force' and 'permanent wall', the Greek *nomos* guaranteed that political agents would stay 'in the memory of future generations' and, by doing so, and within the Greek political patterns of thought, the laws helped to establish a relation between the citizens of the polis. Thus, similarly to the Roman *lex*, we can also unpack the relation-establishing dimension within the Greek notion of *nomos*. However, this forces us to consider anew the idea of demarcation and the notion of boundary, which we mainly ascribed to the Greek concept of law. What becomes apparent, then, is the fact that even the Roman concept of *lex* is ambivalent with respect to boundary and demarcation. To illustrate the ambivalence, Arendt refers to ancient Carthage as an example. With respect to military force, Carthage was on a par with Rome 'and simultaneously embodied a principle opposed to Rome's'.[98] What the history of the two empires reveals is that the Roman political principle of contract and relationship between partners could not be applied in each and every instance. Therefore, Arendt concludes,

> The price the Greeks paid for this form-giving power of their *nomos* was their inability to build an empire, and there is no doubt that all Hellas ultimately perished because of the *nomos* of the poleis, the city-states, which though they were able to proliferate as colonies could never join together and unite in a permanent alliance. But we can say with equal justification that the Romans were also victim of their law, of their *lex*, which, although it allowed them to establish lasting ties and alliances wherever they went, was in itself unlimited and thus forced them against their own will – indeed absent any will to power or lust for domination – to rule the entire globe, a dominion that once achieved could only collapse.[99]

This passage underlines that the horizon of political experiences and the pattern of political thoughts manifest themselves within the respective concepts of law and, by doing so, point to the internal relationship between law and politics. At the same time, the paradigm of the political is closely interconnected with culture, religion, society, and so on. Therefore, even if Arendt points out that the Romans lacked 'any will to power or lust for domination', their understanding and notion of law sought to establish a 'relationship between partners'.[100] Carthage, however, was not willing to enter into such a relationship and, therefore, became in the eyes

97 H. Arendt, 'The Great Tradition I: Law and Power', (2007) 74 *Social research* 713, at 716.
98 Arendt, *supra* note 93, at 181.
99 Ibid., at 187.
100 Ibid., at 186.

of Rome a 'rogue state' which had to be destroyed. Ulrich Preuß refers to this kind of danger accompanying the idea of global constitutionalization as the 'Achilles heel of an appealing project'.[101] Although laws are not necessarily an expression of domination and command, this kind of danger maintains that there is no neutral, no apolitical law as such. Each and every concept of law carries and conveys its notion of a good life[102] – and although one could corroborate this notion with very good reason, there seems to be no doubt that one needs to be aware that enforcing laws against another culture 'without ambivalences and with a consistently clear conscience'[103] is not possible.

4. Conclusion

In this paper I have argued that questions within Hannah Arendt's work about the essence, function, and meaning of law are crucial, and that these questions are closely connected with those about politics and order. In the first part of the paper, my analysis elaborates Arendt's critical assessment of the stability and durability of the legal and constitutional order of the European nation-states from a more historical perspective. My core argument was that Arendt's assumption about the 'decline of the nation-state' means the decline of the rule of law. Hence the problem of order is also a problem of legal order, manifested by the transformation of democratic nation-states into authoritarian regimes. The 'decline of the nation-state' is not only the end of a form of government, but, along with this form of government, moral values and standards also vanished from public life. Furthermore, I tried to show how her reflections on the European inter-war period could also be interpreted as a response to the political consideration of state-theorists of that time – Carl Schmitt, in particular. In the second part I briefly referred to Arendt's political-theoretical critique of Rousseau and Weber and its significance for her version of constitutionalism. Her criticism of Weber and Rousseau is again motivated and justified with reference to law, politics, and order, the triad of constitutionalism. Neither the primacy of law nor that of politics will in her eyes lead to a stable and durable order. Arendt herself, therefore, pleads neither for the sovereignty of law nor for popular sovereignty, but for a post-sovereign constitutionalism in which the relation between law and politics is de-hierachized.[104] Departing from her political-theoretical critique, I turned towards her legal-philosophical engagement and posed the question about the essence of law in her thoughts. To some extent, Arendt develops the concept against the background of the Roman *lex* played against the Greek *nomos* and, by doing so, she brings the relationship-establishing dimension

101 U. Preuß, 'Souveränität – Zwischenbemerkungen zu einem Schlüsselbegriff des Politischen', in T. Stein et al. (eds.), *Souveränität, Recht, Moral. Die Grundlagen politischer Gemeinschaft* (2007), 313, at 332 – my translation of Preuß, who speaks about 'die Achillesferse des an sich sympathischen Projektes'.

102 M. Koskenniemi, 'The Politics of International Law' (1990) 1 EJIL 4.

103 A. Wellmer, 'Menschenrechte und Demokratie', in S. Gosepath et al. (eds.), *Philosophie der Menschenrechte* (1998), 265, at 288.

104 In this article I have not dwelt in great detail on Arendt's idea of post-sovereign constitutionalism and her plea to de-hierarchize the relation between law and politics. I shall do so in the future, but have already elaborated some ideas in Volk, *supra* note 2, at 208–79.

of law to the fore. In contrast to the traditional notion of rationality based on the duality of law and politics, the rationality of such a conception of law derives from its ability to establish a public space in which an active and vivid citizenry could act. Although she seeks to de-substantiate the concept of law in order to overcome its 'imperative conception', I stressed the fact that for her the Roman concept of *lex* implicitly relies on the idea of a 'relationship between partners' – without doubt a demanding idea. Through the back door, and due to the structure of the specific concept of law, a version of the good life creeps in which seeks to establish a common world of partners. For certain, one could give good reason for such a version of a global political order. However, it also reveals that law is neither apolitical nor neutral, but always internally interconnected with politics.