

# The Dialectics of Sovereignty and Property

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*Respectively in the public and in the private spheres, both sovereignty and property are expressions of the turn to the primacy of the interests of the individual at the beginning of the Modern Ages: in the first case this primacy is related to the individual state, in the second to the individual economic actor. The centrality of individuality, as the most distinguishing feature of modern thinking, thus lies at the basis of the interconnection between the two concepts. This is developed according to three distinct patterns. In the light of the first pattern, sovereignty degenerates into a mere means in the service of defending private interests, thereby eluding its fundamental public function. On the other hand, from the perspective of the second pattern, individual property leaves the private domain, claiming absoluteness and presuming to replace the public dimension. Both these patterns reflect one-sided relations in which the two terms — sovereignty and property — merge in opposite ways, but always losing their specific content and rationale in the context of the social order. The third pattern is the only one in which sovereignty and property maintain their respective functions, with the two elements synergistically contributing to a social order in which public sphere and private dimension are both recognized as essential components. Here, public sovereignty and private property are co-essential insofar as sovereignty derives from individual will, private property is fundamental for the individual to pursue the personal self-realization that lies at the basis of his/her legitimation of sovereignty, and — finally — public power is at the service of defending the rights and interests of all individuals.*

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## INTRODUCTION

Sovereignty can be described as the condition in which a legitimate political actor is self-reliant or autonomous, in the sense that it does not have to recognize any other rules than those it has assigned to itself. To avoid misunderstandings, a clarification regarding this definition is due. Indeed, the traditional understanding of sovereignty implies that the sovereign political actor does not consider itself bound by any obligation towards noncitizens. Yet this conclusion is not necessary: it depends, indeed, on how legitimacy and autonomy are conceived of. If legitimacy is understood as involving responsibility also towards those who are not members of the polity,<sup>1</sup> and autonomy is ascribed to actors who are aware of their plural belongings — in particular of their being part of an individual polity as well as of humanity as a whole — then sovereignty need not be related to selfishness and to indifference towards others.<sup>2</sup> In any event, be it selfishly particularistic or open to universalism and cosmopolitanism, sovereignty is a concept located predominantly in the public sphere: it is the public actor — specifically the state — that claims to be sovereign in order to implement a certain idea of the common good. On the contrary, property — as the entitlement to possess resources that enable the individual to pursue his or her preferences — belongs essentially to the private domain.

Despite their belonging respectively to the opposite sides of the traditional divide between public and private, sovereignty and property are deeply intertwined in many senses.<sup>3</sup> Respectively in the public and in the private spheres, both sovereignty and property are expressions of the turn to the primacy of the interests of the individual at the beginning of modernity: in the first case this primacy is related to the individual state, in the second to the individual economic actor. As is stressed in Part I, the new centrality of individuality thus lies at the basis of the interconnection between the two concepts and

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1 With regard to the arguments for and against the existence of an obligation of solidarity towards aliens, see Sergio Dellavalle, *Opening the Forum to the "Others": Is There an Obligation to Take Non-National Interests into Account Within National Political and Juridical Decision-Making-Processes?*, 6 GÖTTINGER J. INT'L L. 217 (2014).

2 On the conditions for a solidaristic concept of legitimate sovereignty, see Sergio Dellavalle, *On Sovereignty, Legitimacy, and Solidarity; Or: How Can a Solidaristic Idea of Sovereignty Be Justified?*, 16 THEORETICAL INQUIRIES L. 367 (2015).

3 The interconnection between sovereignty and property, as well as the problems that can arise from not maintaining a basic distinction between their respective fields of application, was already pointed out, ninety years ago, by Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8 (1927).

the praxis of their development. Yet the correlation between sovereignty and property takes not just one form; rather, it has evolved in the course of time into three different patterns. Two of them reflect one-sided relations in which the two terms — sovereignty and property — merge in opposite ways, but always losing their specific contents and rationale in the context of the social order. As a result, according to the first pattern, which is examined in Part II, sovereignty degenerates into a mere means in the service of defending private interests, thereby eluding its fundamental public function. On the contrary, from the perspective of the second pattern, which is examined in Part III, individual property leaves the private domain, claiming absoluteness and presuming to replace the public dimension. On this understanding, the system of private property is assumed to be not only independent of the public domain, but downright “constitutional” in essence. Not recognizing any power above itself, the system of private property demands sovereignty.

The third pattern, which is examined in Part IV, is the only one in which sovereignty and property maintain their respective functions, with the two elements synergistically contributing to a social order in which public sphere and private dimension are both recognized as essential components. Here, public sovereignty and private property are co-essential insofar as sovereignty derives from individual will, private property is fundamental for the individual to pursue the personal self-realization that lies at the basis of his/her legitimation of sovereignty, and — finally — public power is at the service of defending the rights and interests of all individuals. The main contents of the research, with the addition of some concluding remarks, are then summarized in Part V.

## I. SOVEREIGNTY AND PROPERTY: TWO CONCEPTS AT THE SERVICE OF THE DEVELOPMENT OF INDIVIDUALITY

Sovereignty and property are both conceptual products of the rise of individuality in the transition from the Middle Ages to the Modern Ages.<sup>4</sup> More specifically,

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4 Martti Koskenniemi has recently led the interconnection between sovereignty and property back rather to the “dark side” of the shift to modernity in the Western world, i.e., to the imperialistic denial of collective identity and possession. See Martti Koskenniemi, *Histories of International Law: Significance and Problems for a Critical View*, 27 *TEMPLE INT’L & COMP. L.J.* 215 (2013); Martti Koskenniemi, *Sovereignty, Property and Empire: Early Modern English Contexts*, 18 *THEORETICAL INQUIRIES L.* 355 (2017). The necessary recognition of the “dark side” of the modern rise of individualism should not make us blind, however, to the “bright side” that might have been present as well. In my contribution, I will rather concentrate on this second aspect.

the concept of sovereignty expresses the rising awareness that the public interest of the individual political community — or its idea of the common good — cannot be simply led back to the primacy of the homeostasis of the *holon*, and eventually sacrificed on its altar. On the other hand — moving from the public to the private dimension — it was the recognition of the search for the highest payoffs by the individual economic actor as a value, which took the form of a growing acknowledgment and protection of property, that challenged in an unprecedented way the idea that the homeostasis of the community as a whole should be seen as by far more important than the self-realization of its individual members.

Starting with the public dimension, the role of the rise of sovereignty in boosting the principle of individuality becomes evident if we bear in mind how public power was understood before the paradigmatic revolution that led to modernity. In fact, in the ancient world the single public power was regarded as aiming primarily at pursuing not self-reliance, but an internal social balance that reflected a general idea of world order. As a result of this attitude, both Plato's "justice"<sup>5</sup> and Aristotle's "happiness"<sup>6</sup> — as the most influential concepts of the political philosophy of antiquity — express attempts, quite different in their theoretical approach but united in their main purpose, to stabilize interactions within the political community, rather than to strengthen its stance vis-à-vis competing polities. Admittedly, some other ancient authors, the most prominent of whom is surely Thucydides, concentrate their analysis more on the conflict between poleis than on the reasons for internal balance. Nevertheless, even in their view the proneness to resorting to war in order to resolve inter-state divergences is a pathology to be prevented, though a frequent one; indeed, it results from a loss of stability in favor of an increase in unfettered selfishness, which eventually leads to the unleashing of the more disruptive tendencies of human nature.<sup>7</sup> In any case, the aim of a well-ordered public power in ancient thought never consisted in defending individual preferences.

Even more distant — if possible — from the idea of the self-reliance of the individual polity was the political philosophy of the Middle Ages. Here, the public power of the single political community was conceived as part of a superior order of natural or divine origin. In fact, as we can see in the works of Thomas Aquinas, human law is always derived, in a first step,

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5 PLATO, *REPUBLIC* bk. II, 367e et seq. (1901).

6 ARISTOTLE, *NICHOMACHEAN ETHICS* bk. I ch. 5, 1097a et seq. (1890); ARISTOTELES, *POLITICS* bk. VII, ch. 2, 1324 et seq. (1967) [hereinafter ARISTOTLE, *POLITICS*].

7 THUCYDIDES, *THE PELOPONNESIAN WAR* bk. I, para. 75 et seq. (Thomas Hobbes trans., Univ. of Mich. Press 1959) (431 B.C.); *id.* bk. III, para. 82.

from natural law,<sup>8</sup> and in a second from eternal law, from which every just law must be drawn.<sup>9</sup> Furthermore, “civil law” as the law of the social and political community has the task of guaranteeing the realization of the moral “last end” of all human beings, which is — as in Aristotle’s moral philosophy — “happiness.”<sup>10</sup> And “happiness” — also here analogously to the vision of the Greek philosopher — does not consist of wealth, honor, glory, power, or pleasure, but of the search for the theoretical truth — being here in a Christian context, of the contemplation of God.<sup>11</sup> Against this background, Dante Alighieri went so far as to say that the only legitimate public power, namely the “universal monarchy,” does not have to guarantee peace, liberty and justice either for the sake of the individual’s wellbeing, or for the advantage of some specific social or political group, but only in order to enable all human beings to concentrate on the theological “last end.”<sup>12</sup>

As a consequence of this approach, public power is only legitimate if it does not intend to maximize selfish gains, but shapes its actions and rules in a way which is consistent with the universal law that governs the whole cosmos, thus bringing humans nearer to their creator. Therefore, it was not until the transition to modernity — with the paradigmatic revolution, in the theories of order, from holism to individualism<sup>13</sup> — that individual authority vested with public power openly claimed to aim at just pursuing its own interests, without any fear of thereby committing a kind of hubris against natural or divine law.<sup>14</sup> The concept of sovereignty was one of the most significant effects of the epochal change of the dominant paradigm of social order that characterized the beginning of the Modern Ages.

While sovereignty is a concept that was created — or, at least, significantly re-conceptualized and decisively re-founded — at the dawn of modernity, individual property, to the contrary, was well-known also to the ancient and medieval world. Yet, before the Modern Ages it was often openly despised or, in

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8 THOMAS AQUINAS, *SUMMA THEOLOGICA* pt. II, sec. I, question 95, art. 2 (Christian Classics 1981) (1265-1273).

9 *Id.* question 93, art. 3.

10 *Id.* question 1.

11 *Id.* question 2.

12 DANTE ALIGHIERI, *DE MONARCHIA* bk. I, chs. IV, XI, XII (Utet 1986) (1310-1314) (translated to English in DANTE ALIGHIERI, *MONARCHY* (Prue Shaw trans., 1996)).

13 On the paradigms of social order and their revolutions, see SERGIO DELLAVALLE, *DALLA COMUNITÀ PARTICOLARE ALL’ORDINE UNIVERSALE, VOL. I: I PARADIGMI STORICI [FROM THE INDIVIDUAL COMMUNITIES TO UNIVERSAL ORDER, VOL. I: THE HISTORIC PARADIGMS]* 22 (2011).

14 NICCOLÒ MACHIAVELLI, *IL PRINCIPE* (Einaudi 1995) (1513) (translated to English in NICCOLÒ MACHIAVELLI, *THE PRINCE* (Rufus Goodwin trans., 2007)).

the most favorable case, regarded as a necessary evil. Plato's uncompromising proscription of private property in his vision of the perfect politeia is well-known,<sup>15</sup> and the anti-individualistic attitude that is connected with this interdiction has been regarded as the fundament of a prototypical conception of the illiberal state.<sup>16</sup> Moreover, Plato strictly rejected the notion of importing nonessential goods and, in general, free trade — as the most evident expression of the freedom of the economic agent acting for his/her own advantage — in the name of the self-sufficiency of the polis.<sup>17</sup> Adopting a less radical approach, Aristotle admitted some practical advantages of commerce,<sup>18</sup> but condemned the purpose of profit.<sup>19</sup> Indeed, in his political philosophy private property was generally accepted, but had to be limited to the amount that guarantees the means for a well-functioning household, while “retail trade,” insofar as it aims at accumulating wealth, “is justly censured.”<sup>20</sup> In fact, in a world where the individual had to realize itself as a citizen or in the domain of speculation, the selfish pursuit of wealth and personal priorities was regarded as a moral failure and a threat to common values.

The contempt towards economic activity with the sole intention of individual advantage was subsequently embraced in the Roman Republic, as attested to by Cicero who despised small-scale trade thought to be limited to the service of greedy selfishness, but accepted large-scale commerce which was considered to be an advantage for the redistribution of goods on a cosmopolitan scale.<sup>21</sup> We can see here a dim glimmer of the revaluation of commerce which took place in the Hellenistic world, going on to influence the understanding of trade during the Roman Empire. This conception, known as the “doctrine of universal economy,” assessed the activity of trade downright positively, but only insofar as it contributes to the reestablishment of a worldwide homeostasis endangered by the unequal distribution of resources, and not because it might favor the accumulation of resources at the disposal of individual preferences.<sup>22</sup> Anyway, even this cautious reassessment of free economic activity was

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15 PLATO, *supra* note 5, bk. V, 464b et seq.

16 KARL POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 1 (5th ed. 1995) (originally published in 1945).

17 PLATO, *NOMOI — LAWS* bk. VIII, 847b et seq. (1926).

18 ARISTOTELES, *POLITICS*, *supra* note 6, bk. VII, ch. 5, 1327a (1967).

19 *Id.* bk. VII, ch. 6, 1327a.

20 *Id.* bk. I, ch. 10, 1258b.

21 MARCUS TULLIUS CICERO, *DE OFFICIIS* bk. I, ch. 42, no. 151 (1913).

22 DOUGLAS A. IRWIN, *AGAINST THE TIDE* 15 (1996); Armin von Bogdandy & Sergio Dellavalle, *The Lex Mercatoria of Systems Theory: Localisation, Reconstruction and Criticism from a Public Law Perspective*, 4 *TRANSNAT'L LEGAL THEORY* 59, 62 (2013).

short-lived: as Christendom became the dominant religion of the Western world, the condemnation of commerce and the marginalization of the social significance of private property were reaffirmed in a no less severe and radical form than in antiquity.<sup>23</sup>

Against the religious background that dominated the Middle Ages, in which human beings had to strive for eternity, the significance conceded to private property could not but be marginal. It was once again Aquinas who expressed with the highest systematic clarity the attitude shared by his contemporaries: private property has to be recognized as a necessary social and legal institution,<sup>24</sup> but only if it serves to consolidate and guarantee the status of the possessor within a static understanding of society as a predetermined holon.<sup>25</sup> It is almost superfluous to say that this is precisely the opposite of the conception that locates the social meaning of private property in its capacity to improve the social condition of individuals or to implement personal preferences according to a dynamic conception of social interaction. Only with the shift to the Modern Ages was individual property eventually acknowledged as an essential instrument for the self-realization of those who are endowed with it.<sup>26</sup>

To sum up, both the idea that the main purpose of the public power should consist in defending the individuality of the community, as well as the conviction that private property is an essential value to be protected because it makes the self-realization of individuals possible, were largely unknown in antiquity and in the Middle Ages. It was with the paradigmatic turn to individualism, and thus with the assertion that the individual cannot be reduced to the primacy of the whole, that sovereignty became the champion of the defense of the principle of individuality in the public sphere, while the protection of private property took on the same task in the private dimension. Being offspring of the same intellectual attitude, sovereignty and property were destined to merge and collide. The following Parts deal with the different ways in which this happened.

## II. SOVEREIGNTY AS PROPERTY

I assume — as a presupposition of the analysis — that sovereignty is given when a public power is autonomous, while property consists of the possession

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23 IRWIN, *supra* note 22, at 17.

24 AQUINAS, *supra* note 8, pt. II, sec. II, question 66, art. 2.

25 *Id.* question 32, art. 6.

26 IRWIN, *supra* note 22, at 21; HUGO GROTIUS, *DE JURE BELLI AC PACIS* bk. II, ch. 2 (William S. Hein & Co. 1995) (1646).

of resources by private agents in order to realize their priorities.<sup>27</sup> On this basis, the first pattern of the interconnection of the two concepts — which I propose to call “sovereignty as property” — refers to the situation in which self-reliant public power is supposed to serve mainly, if not exclusively, the private purposes of some members of the political community. By doing so, sovereign power necessarily gives up its originally distinctive publicness, since a power can only be genuinely public if it expresses the common interests and values that all members of the political community have reflexively contributed, at least potentially, to elaborate. We can identify three variants of the pattern of “sovereignty going private”: the political (A); the nationalist (B); and the technocratic (C).

### A. Political Sovereignty

The first way in which the sovereign colonizes property by seizing the civil society to his/her own advantage can be defined as specifically *political* insofar as sovereignty is essentially regarded as an act of will by the public power. In this sense, the ineludible feature, here, is the capacity to take *political* decisions, and not the assumption of a pre-political belonging, as in the second variant, or the assumption of a superior knowledge as in the third.

This understanding is the most ancient and goes as far back as to Jean Bodin as the very framer of the modern concept of sovereignty. According to Bodin’s groundbreaking definition, the public power — or “power vested in a commonwealth (république)”<sup>28</sup> — is sovereign insofar as it is “absolute and perpetual.”<sup>29</sup> The perpetuity of power means that a political agent can be regarded as a sovereign only if the exercise of its prerogatives has no time limit. In other words, an elected magistrate cannot be seen as a “sovereign”: in fact, a true “sovereign” has to be forever “sovereign,” and not just for a while. However, more important in the context of the present analysis is the second essential feature of sovereignty, i.e., its absoluteness. This attribute refers to the circumstance that truly sovereign power has to be self-reliant and must not obey any rule coming from outside. Precisely in this claim lies the contribution that the concept of sovereignty has made to the development of an idea of public power more related to the defense of the interests of the single polity

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27 See Hanoch Dagan & Avihay Dorfman, *The Human Right to Private Property*, 18 THEORETICAL INQUIRIES L. 391 (2017).

28 JEAN BODIN, SIX LIVRES DE LA RÉPUBLIQUE 85 (Imprimerie de Jean de Tournes 1579) (translated to English in JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH, bk. I, ch. VIII (M.J. Tooley trans., 1955)).

29 *Id.*



as an individual entity. Before the postulation of sovereignty, public power had to locate its actions within the broader context of a worldwide order so that it had to validate its decisions as consistent with the task of maintaining a stable and well-balanced political structure, in antiquity, or with the aim of implementing the divine law in the theology of the Middle Ages. Sovereign public power, to the contrary, needs a merely self-referential justification, i.e., it is required only to defend its actions by reference to the protection of its own — indeed individual and often openly selfish — interests and priorities.

Bodin did not pass over the boundaries that natural or divine law may impose on the exercise of sovereign power in silence. In fact, he explicitly concedes that sovereign power has to be regarded as limited by the commands of God and nature.<sup>30</sup> Nonetheless, in Bodin's understanding such a limitation is eventually rather irrelevant: indeed, the holder of sovereign authority, being nothing less than the secular imago of the almighty God, has the right to interpret freely, i.e., without any secular or ecclesiastic control, the norms deriving from natural or divine law. Furthermore, no effective remedy against violation is provided. Put in the hands of a sovereign power, political decisions will aim only at fostering the advantages of the single polity. The explicit selfishness of the traditional conception of sovereignty<sup>31</sup> has been condemned — with some good reasons — as being incompatible with the core idea of international law and order,<sup>32</sup> as well as a powerful instrument for imperialistic purposes.<sup>33</sup>

Given Bodin's absolute conception of sovereignty, the problem arises as to why it should be considered subordinate to a privatistic understanding of power, thereby eluding the very essence of the public political dimension. To understand this aspect, it is necessary to address a further question, concerning who should be considered the holder of sovereign prerogatives in Bodin's view. The answer can be found in how he re-proposes the Aristotelian theory of the familistic origin of the commonwealth.<sup>34</sup> According to this conception, the political community is assumed to originate not only genetically but also

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30 *Id.* at 91 et seq. (in the English version: bk. I, ch. VIII).

31 As already mentioned above, the “traditional” understanding of sovereignty is no conceptual necessity, but only an option. Indeed, “sovereignty” can also be interpreted — with some significant theoretical adjustments — in a post-traditional and non-egoistic way. See, for more details, Dellavalle, *supra* note 2, and *infra* Part IV.

32 HEINRICH KIPP, *VÖLKERORDNUNG UND VÖLKERRECHT IM MITTELALTER* [THE ORDER OF THE PEOPLES AND THE *JUS GENTIUM* IN THE MIDDLE AGES] 124 (1950).

33 HANS Kelsen, *REINE RECHTSLEHRE* 153 (1934) (translated to English in HANS Kelsen, *PURE THEORY OF LAW* (Max Knight trans., 1967)).

34 BODIN, *supra* note 28, at 1 (in the English version: bk. I, ch. I).

— which is even more important — conceptually from an association of families. Therefore, since the family “is not only the true source and origin of the commonwealth, but also its principal constituent,”<sup>35</sup> the organizational structure of the family serves as a model also for the political community as a whole. As a result, just as the authority in the family — at least in the male-centered organization of the family that Bodin had in mind — belongs to the patriarch, in the same way the power in the commonwealth has to be bestowed on the head of the state, more precisely on the monarch.

Yet — we may object — the monarch is nothing but an individual himself, with very specific and personal priorities, which are likely to be imposed, due to his unfettered power, on the decisions concerning the whole community. Nevertheless, this risk of an immediate identification of the personal interests of a single person with the resolutions regarding the community as a whole — thus reducing public sovereignty to private property — could be prevented through two different institutional precautions. First, it is true indeed that the monarch is presumed to exercise a *public* function, so that he should be seen as something essentially distinct from a *private* person. However, the publicness of the role played by the monarch can be guaranteed only through a mediation between his actions and the will of his subjects — a mediation which should be brought into effect by powerful Estates. This is precisely *not* the case in Bodin’s vision of the absolutistic state: in his conception, in fact, the Estates are strictly subordinates to the prince, not being provided with any control competence,<sup>36</sup> so that the prince is lastly not bound by the law (*legibus solutus*).<sup>37</sup>

Nonetheless, if the *public* control that should prevent a problematic identification of the preferences of the monarch with the advantage of the community is lacking, a second, rather *private*, strategy could be applied. This would consist in preserving a private domain, based on individual property and well-secured against abuses by the crown. Indeed, Bodin explicitly claims that “the prince cannot take his subjects’ property without just and reasonable cause,” unless he breaks the laws of God and of nature,<sup>38</sup> and that the respect for liberty and property of the subjects distinguishes the just prince from the tyrant.<sup>39</sup> However, he also adds that “natural reason instructs us that the public good must be preferred to the particular, and that subjects should give up not only their mutual antagonisms and animosities, but also their possessions, for

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35 *Id.* at 7 (in the English version: bk. I, ch. II).

36 *Id.* at 98 et seq. (in the English version: bk. I, ch. VIII).

37 *Id.* at 92 (in the English version: bk. I, ch. VIII).

38 *Id.* at 109 (in the English version: bk. I, ch. VIII).

39 *Id.* at 190 (in the English version: bk. II, ch. II).

the safety of the commonwealth.”<sup>40</sup> Furthermore, he maintains that “every citizen is a subject since his liberty is limited by the sovereign power to which he owes obedience,”<sup>41</sup> whereas — once again — no institution representing the interests of the citizens (or, rather, of the subjects) and vested with sufficient competencies is established. Put in the hands of a sovereign power lacking effective control, the protection of liberty and property of the citizens is lastly at the mercy of the arbitrary will of the monarch.

Three elements characterize Bodin’s theory of sovereignty and its risk of degenerating into the mere defense of private interests. First, the highest principle of political life is not located in the rights and interests of the citizens, but in the benefit to the community understood as a whole. Second, the advantage of the head of state is presumed to be identical to the wellbeing of the whole community. In this sense, Bodin’s concept of sovereignty is in the service of an essentially private interest insofar as it is shaped according to a *familistic* presupposition: in fact, the sovereign is here the monarch who governs his political community in the same way in which a father rules his family. Third, no powerful institution is entrusted with the task of protecting the rights of the citizens — or, rather, of the subjects — against possible abuses by the monarch. Given these premises, the sovereign might easily promote his own personal priorities, presenting them as a general advantage and transforming sovereignty into a means in support of dynastic priorities, quite detached from an effectively inclusive understanding of the common good.

Some aspects of Bodin’s way of “privatizing sovereignty” surely belong to the past, at least in the Western world. This holds, in particular, in regard to his dynastic understanding of sovereignty. However, other elements — which constitute the core of political sovereignty — have far from vanished from the horizon of political theory. In particular, the idea that sovereignty consists in the exercise of authority by the public power, whereas little attention is dedicated to the source of authority and its legitimation, still remains one of the most influential interpretations of the concept.<sup>42</sup> Against this background, the sovereign power transforms the resources of the civil society into instruments for the exclusive achievement of its goals. Moreover, since the procedures for the inclusion of the stakeholders seem to be considered rather marginal, the sovereign power is at risk of being controlled by an elite which is disconnected from the broader aspirations of the members of the society. As a consequence, sovereignty loses its publicness and its justification as one of the bulwarks of

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40 *Id.* at 92 (in the English version: bk. I, ch. VIII).

41 *Id.* at 48 (in the English version: bk. I, ch. VI).

42 *See, e.g.*, MARTIN LOUGHLIN, *FOUNDATIONS OF PUBLIC LAW* (2010).

the common good. Sovereignty and property merge — both thereby losing a great deal of their meaning and functions.

## B. Nationalist Sovereignty

At the dawn of the nineteenth century, the crisis of the dynastic conception of sovereignty brought about a redefinition of the notion in order to include a more active participation of the governed. As a result, political sovereignty gave way to *popular* sovereignty. It was the *Déclaration des Droits de l'Homme et du Citoyen* of 1789 (*Declaration of the Rights of Man and of the Citizen*) that in Article 3 stated, laying down a milestone on the way to the abolition of tyranny in Europe, that “the principle of any sovereignty resides essentially in the nation.”<sup>43</sup> On this basis, however, the question was then how the concept of “nation” should be interpreted. According to the understanding expressed in the French *Déclaration*, the “nation” is the community of citizens, empowered through the establishment of their representative assembly and thus guaranteeing that the sovereignty that is bestowed upon it preserves a true publicness.

Yet this is not the only way in which the “nation” was conceived of. Indeed, a second interpretation was developed in the context of German political romanticism,<sup>44</sup> soon spreading all over the Western world and even beyond. In this second meaning, the “nation” is regarded not as an association of individuals — every one of them with his/her own preferences to be mediated through procedures in order to work out a shared idea of the common good — but as something unitary, a single “people” or *Volk*, characterized by a strong and unique identity.<sup>45</sup> This identity, furthermore, is not seen as the result of social processes of *reflexive communication*, but as something based in pre-rational collective experiences of *ethnic belonging*.<sup>46</sup> Thus, the nation is perceived as a reality which is no less immediate than the single person — and almost as natural. As a result, according to its ethnic understanding, the nation is essentially conceived of as an individual itself.

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43 *Déclaration des Droits de l'Homme et du Citoyen* 1789, art. 3, LEGIFRANCE, <https://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789> (last visited Mar. 20, 2017) (“Le principe de toute souveraineté réside essentiellement dans la nation.”). For English translation, see *Declaration of the Rights of Man and of the Citizen*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Declaration\\_of\\_the\\_Rights\\_of\\_Man\\_and\\_of\\_the\\_Citizen](https://en.wikipedia.org/wiki/Declaration_of_the_Rights_of_Man_and_of_the_Citizen) (last modified Mar. 20, 2017).

44 ADAM H. MÜLLER, *DIE ELEMENTE DER STAATSKUNST* [ELEMENTS OF STATECRAFT] (Fischer 1922) (1809).

45 ANTHONY D. SMITH, *NATIONAL IDENTITY* 1 (1991).

46 *Id.* at 19.

The conception of the nation — or rather of the *Volk* — as an exclusive entity characterized by the tendency to pursue its own interests and to defend its specific identity has found its way also into constitutional adjudication.<sup>47</sup> Remarkable examples of the influence of nationalistic thinking on constitutional discourse can be found in two statements issued by the German Federal Constitutional Court (*Bundesverfassungsgericht*), generally known as the *Maastricht Urteil* of October 12, 1993<sup>48</sup> and the *Lissabon Urteil* of June 30, 2009,<sup>49</sup> as well as in a declaration of the Spanish *Tribunal Constitucional* of December 13, 2004.<sup>50</sup> More specifically, the *Tribunal Constitucional* claimed in its declaration that the transfer of competences to supranational institutions could only be acceptable if the law on which such institutions are based is compatible with the fundamental principles of the domestic legal order. In principle, this would not raise any problem from the point of view of a postnational concept of sovereignty if the Court had not added the reference to “material limits” (*limites materiales*) to the conferral of competences upon supranational organizations. In the interpretation of the Court, these “limits” are given by “the respect for the sovereignty of the State, or our basic constitutional structures and of the system of fundamental principles and values set forth in our Constitution, where the fundamental rights acquire their own substantive nature.”<sup>51</sup> Through the juxtaposition of the protection of fundamental rights with state sovereignty — wrongly presented as self-evident — the *Tribunal Constitucional* ruled out the possibility that a multilayered system of shared sovereignty could take on the same level of safeguarding rights and values. Therefore, the only constitutional system that properly protects the most essential conditions of social life is assumed to be the one based on the sovereignty of the nation-state.

The two abovementioned statements of the *Bundesverfassungsgericht* go in the same direction, although with a much more radical attitude.<sup>52</sup> In the statement

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47 Sergio Dellavalle, *Lost in Transition? From Domestic Integration Through National Constitutions to Supranational Integration Through European Constitutionalism*, in *THE CONSTITUTIONAL INTEGRITY OF THE EUROPEAN UNION* 89, 107 (Fabian Amtenbrink & Peter A.J. van den Berg eds., 2010).

48 12 BVERFGE 89, 155 (Ger.).

49 48 BVERFGE 497 (Ger.).

50 *Declaracion de 13 de diciembre de 2004*, TRIBUNAL CONSTITUCIONAL (Mar. 4, 2005), <http://www.boe.es/boe/dias/2005/01/04/pdfs/T00005-00021.pdf>.

51 *Id.* § II.2.

52 In general, however, the jurisprudence of the *Bundesverfassungsgericht* as regards the defense of national sovereignty against the transfer of competences to supranational institutions is rather vacillating. For an analysis, see Dellavalle, *supra* note 47, at 110 et seq.

of 1993, the Court asserted that the nation-state shall maintain its sovereignty<sup>53</sup> in order to guarantee democratic legitimacy. By contrast, a supranational democracy will never be really possible inasmuch as, from the point of view laid down extensively in the statement, democracy always depends on the existence of “pre-judicial preconditions.”<sup>54</sup> In plain language, this is nothing other than the “relative spiritual, social, and political homogeneity” of the “state people” (*Staatsvolk*).<sup>55</sup> A substantial, pre-judicial as well as a pre-political identity of the *Volk* — not primarily the deliberative processes involving the citizens and the rules laid down to make interaction peaceful and cooperative — is seen, thus, as the condition for democratic legitimacy and social integration. For that reason, supranational integration and multilevel constitutionalism shall never go so far as to threaten national identity and sovereignty. The approach expressed in the statement on the Maastricht Treaty was reiterated, then, in the statement of 2009, concerning the constitutionality of the Lisbon Treaty. The explicit target of the criticism, here, is the European Parliament which — in the words of the Court — “is not a body of representation of a sovereign European people.”<sup>56</sup> The main reason is that a “true” parliament should be the expression of the self-determination of a people (*Volk*),<sup>57</sup> organized in the form of a “sovereign statehood” (*souveräne Staatlichkeit*).<sup>58</sup> The conclusion is that democratic legitimacy only exists in the nation-state, and the nation-state can only survive if it maintains its exclusive sovereignty. Or, from a different standpoint, sovereignty does not essentially depend on the participation by the citizens, but rather on the existence of a pre-political national identity.

We have here the second variant of the pattern of “sovereignty as property.” In the nationalistic variant of sovereignty, the actor characterized by particularistic interests is not the monarch or a detached political elite, but a collective super-individual, a megalanthropos which nonetheless is no less prone than the prince or the self-reliant holders of political power to transforming the public sphere into an arena of exclusively egoistic self-realization. As a manifestation of the particularistic will of an individual nation, sovereignty is still subject to the selfish preferences which are generally accorded to the single actor. Surely, the publicness of sovereignty seems to be more convincing in this second variant of sovereignty going private, since the decisions of the sovereign

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53 12 BV<sub>ERFGE</sub> 89, 103, 155 (Ger.).

54 Dellavalle, *supra* note 47, at 98.

55 *Id.* at 101.

56 48 BV<sub>ERFGE</sub> 497 (Ger.).

57 Dellavalle, *supra* note 47, at 268.

58 *Id.* at 216.

power are thought to be bound by the interest of the people. Nevertheless, this impression may turn out to be rather wrong for at least two reasons.

The first reason is that the assumption that the people itself has to be conceived of as an individuality simply ignores the fact that every social reality — and therefore also the “people” — is not an organic unity, but a sum of individuals and social groups with different interests and values.<sup>59</sup> In this sense, the idea of the “nation” is the result of a political project<sup>60</sup> and the concept of a unitary “people” is nothing but a juridical fiction.<sup>61</sup> As a consequence, every presupposition of social unity always runs the risk of constraining plurality and the discourse that has to develop between individuals and groups. Only such a discourse can help to achieve a consensus or at least a compromise which — far from being assumed from the outset — cannot but be the result of dialogue and sometimes also of democratically formalized conflicts. Furthermore, the idea of the organic unity of the “people” may come together with the presence of elites, characterized by a rather weak democratic legitimacy but a strong charismatic authority, which might be tempted to use their power for their own advantage.<sup>62</sup> Under these conditions, the alleged publicness of popular sovereignty unveils a core that is no less private and irreflexive than in any other elitist tradition, be it dynastic, technocratic, or simply political.

The second reason why the concept of popular sovereignty within the borders of a single nation has to be seen as rather incomplete refers to the plural status of individuals. Indeed, if we admit that individuals are not only citizens of a single polity but also members of the whole community of humankind, then also the public power of the individual political community has to justify its legitimacy on both levels: the parochial dimension in the service of its citizens, and the cosmopolitan with reference to the justified claims of noncitizens. In other words, a sovereign power accomplishes its public task and is therefore properly legitimate only if it takes into account not only the democratic input and the interests of its citizens but also the reasonable

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59 For an interpretation of the “nation” not as a unity with a predetermined identity, but as the result of historical processes, mostly driven by social and intellectual elites, see ERNEST GELLNER, *NATIONS AND NATIONALISM* (1983); LIAH GREENFELD, *NATIONALISM: FIVE ROADS TO MODERNITY* (1992); and ERIC J. HOBBSBAWM, *NATION AND NATIONALISM SINCE 1780* (1990).

60 For the opposite interpretation, see Joseph M. Whitmeyer, *Elites and Popular Nationalism*, 53 *BRIT. J. SOC.* 321 (2002).

61 HANS KELSEN, *VOM WESEN UND WERT DER DEMOKRATIE [ON THE ESSENCE AND VALUE OF DEMOCRACY]* 15 et seq. (1929).

62 NORBERT ELIAS, *STUDIEN ÜBER DIE DEUTSCHEN 199* (4th ed. 1990) (originally published in 1989) (translated to English in NORBERT ELIAS, *THE GERMANS* (Eric Dunning & Stephen Mennell trans., 1996)).

requests of noncitizens, insofar as they are affected by its decisions. On the basis of this understanding, the sovereign power that shuts the door against aliens betrays a significant aspect of its obligation to publicness. In fact, if the privatization of sovereignty consists in using it just for selfish purposes, then also the attitude of a sovereign nation that refuses any responsibility towards what happens beyond its borders cannot but be considered a form of an unsatisfactory merging of the two concepts of sovereignty and property.

### C. Technocratic Sovereignty

The third variant of “sovereignty as property” has developed rather recently and is related to the creation and rapid increase of networks of global governance.<sup>63</sup> In particular, it is related to executive, expertise-based international organizations<sup>64</sup> — strictly connected with a further expanding phenomenon, namely global administrative law<sup>65</sup> — as well as to international judicial institutions.<sup>66</sup> The first problem that has to be addressed by analyzing the third variant of “sovereignty as property” is whether we can properly speak of “sovereignty” as regards the post-traditional exercise of public authority. Indeed, power is implemented here, as regards both the procedures to take decisions as well as their enforcement, in a quite different way than in the first two variants of the pattern. However, against the background of the postnational constellation, sovereignty need not be understood as exclusive any longer: resorting to a more flexible and up-to-date conception, it can be defined as the effective exercise of public power over a particular population and regarding a certain kind of social interaction.<sup>67</sup> On the basis of this redefinition, sovereign power can overcome the original understanding as a monad and be reconceived as a network. Furthermore — and again within the postnational horizon — public power does not need to rely only on “hard” means of enforcement in order to be effective. To the contrary, public authorities are not only deeply interconnected but also undoubtedly capable of realizing their tasks by resorting largely or even uniquely to “soft” instruments. Thus, on the basis of the ineludible updating of the concept of

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63 ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

64 THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS (Armin Von Bogdandy et al. eds., 2009) (largely pre-published in Symposium, *The Exercise of Public Authority by International Institutions*, 9 GERMAN L.J. 1375 (2008)).

65 Benedict Kingsbury, Nico Krisch & Robert Steward, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 (2005).

66 ARMIN VON BOGDANDY & INGO VENZKE, *INTERNATIONAL JUDICIAL LAWMAKING* (2012).

67 See Dellavalle, *supra* note 2.



sovereignty, the power exercised by international public authorities has to be regarded, in fact, as a contemporary expression of “sovereignty.”

In contrast to the increasing number of fields of application of international public authority and its no less growing effects, its legitimacy remains rather shaky.<sup>68</sup> Many attempts have been made to overcome the deficit. None, however, is really satisfying. Some of them seem simply to miss the point that makes democratic legitimacy special and particularly valuable. One of the strategies that aim at justifying the legitimacy of technocratic decision-making is, for instance, the reduction of legitimacy to legality or to judicial control.<sup>69</sup> However, legitimacy is thus deprived of its most relevant feature, at least if we assume a democratic standpoint. Indeed, the conditions for a norm or a decision to be regarded as legitimate cannot only be that they are issued on the basis of generally recognized procedural rules and that they can be submitted to judicial scrutiny. A further element is ineludible from the democratic perspective, namely that norms and decisions are the outcome of the reflexive participation of the citizens, so that the procedural and judicial framework has its fundamental *raison d'être* in guaranteeing that the participation of the citizens is fair and inclusive. The same shortcoming can also be observed as regards other strategies for the legitimation of technocratic rule. Among these, an outstanding position is taken by the theory of the “output-legitimacy,”<sup>70</sup> according to which an institutional framework and its decisions are to be considered legitimate if they produce social conditions that the populace tacitly accepts as generally advantageous. The most recent variant of this theory goes as far as to speak of an “administrative legitimacy” as a distinctive feature of the European Union.<sup>71</sup>

What all these attempts to provide a legitimation for technocratic governance are missing is the recognition that legitimacy, to be qualified as democratic, requires participation. This point was — and is — well known to all the most significant thinkers and politicians who, over the centuries, have been — and are — influential advocates of the democratic organization of the polity. From Pericles’s speech during the Peloponnesian War<sup>72</sup> to Kant’s outlining of the

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68 The deficit does not concern only the executive branch of international public authority, but also its judicial dimension. See ARMIN VON BOGDANDY & INGO VENZKE, *IN WHOSE NAME?* (2014).

69 Rüdiger Wolfrum, *Legitimacy of International Law and the Exercise of Administrative Functions*, 9 GERMAN L.J. 2039 (2008).

70 See, e.g., FRITZ W. SCHARPE, *GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC?* (1999).

71 Peter L. Lindseth, *Equilibrium, Demoi-cracy, and Delegation in the Crisis of European Integration*, 15 GERMAN L.J. 529 (2014).

72 THUCYDIDES, *supra* note 7, bk. II, para. 35 et seq. (see especially para. 37).

principle of *volenti non fit iniuria*;<sup>73</sup> from Lincoln's Gettysburg Address<sup>74</sup> to the most recent formulations of a theory of deliberative democracy,<sup>75</sup> the idea of democratic legitimacy has always been that, in principle, no one knows better than the citizens themselves what suits them best. Some rulers may have more knowledge or skills than the average citizen. Yet without the control coming from the civil society, reflexively expressed through democratic procedures of participation, such knowledge and skills, as well as the power that pretends to be justified by them, can easily be used to the benefit of those in charge. The question may take on new nuances in times characterized by the spread of social networks, the uncontrolled dissemination of fake news and the oblivion of fact-checking. Surely, the unprecedented situation — at least since the beginning of modernity — should lead to more reflections on the essence of participation, on what its conditions are and on how they can be safeguarded. However, the conclusion that unfettered technocratic governance will yield a better outcome is far from self-evident. Actually, who could guarantee — also under these new circumstances — that the elites are working for the citizens, if not the scrutiny by the citizens themselves?

Some supporters of technocratic governance show some sensibility for the necessity of a proper involvement of the ruled. Their proposals range from requesting more transparency for the expertise-based decision-making-processes and more deliberative inclusion of the stakeholders,<sup>76</sup> to a communicative reformulation of a participatory exercise of international public authority based on discourse theory.<sup>77</sup> However, without clearly formulated and compelling

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73 IMMANUEL KANT, *Die Metaphysik der Sitten*, in VIII WERKAUSGABE, § 46, at 432 (Suhrkamp 1977) (1797) (translated to English in IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary Gregor trans., 1996)). As regards Kant, it must be specified that he was not — at least not in his wording — an advocate of democracy, but rather of republicanism. However, his understanding of the “republic” is largely identical with our concept of democracy since this includes, in contrast to the ancient or Rousseauian ideas of democracy, the principle of the division of powers.

74 Abraham Lincoln, *The Gettysburg Address* (Nov. 19, 1863), <https://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm>.

75 AMY GUTMANN & DENNIS F. THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* (2004); JÜRGEN HABERMAS, *FAKTIZITÄT UND GELTUNG. BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHTSSTAATS* (1992) (translated to English in JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* (William Rehg trans., 1996)); CARLOS NINO, *THE CONSTITUTION OF DELIBERATIVE DEMOCRACY* (1996).

76 SLAUGHTER, *supra* note 63, at 231 et seq.

77 MATTHIAS GOLDMANN, *INTERNATIONALE ÖFFENTLICHE GEWALT* [INTERNATIONAL PUBLIC AUTHORITY] 245 (2015).

rules that guarantee real inclusion and a sufficient neutralization of social and economic power within the decision-making-process — conditions that characterize the proper exercise of democracy — even promising proposals are destined to remain impaired. The task of democratic legitimacy consists in creating a sphere, neutralized as far as possible with regard to social and economic power, in which all citizens — or, in the most wide-ranging understanding, all those concerned, including noncitizens — deliberate in order to specify shared interests and the way to meet common questions. If these conditions are not fulfilled, the decision-making process risks degenerating — also due to the deepening of social and economic inequality<sup>78</sup> — into an instrument for defending the benefit of the most powerful. Under such circumstances, the governance institutions of the transnational domain are doomed to be reduced to a technocracy at the service of self-reproducing elites,<sup>79</sup> and sovereignty, also in this most updated variant, again sees its publicness fading away and being replaced by the private selfishness of the few.

### III. PROPERTY AS SOVEREIGNTY

The second pattern of the dialectics of sovereignty and property refers to those authors who claim absoluteness for the system of private property. In this view, private property is not the instrument for the self-realization of single individuals, who have then to establish the public dimension of shared issues characterized by inclusive participation and deliberation. Rather, it is transformed into a self-reliant sphere that purports to be sovereign insofar as no public instance is accepted as located above it.

In the theoretical panorama, the absolutization of the system of private property is a relatively new phenomenon. Traditionally, indeed, it had been prevented — even in the theories most prone to recognizing the positive role of private property — by the unchallenged presence of at least one of two different assumptions, both maintaining, though in quite separate forms, the superiority of the public sphere. The first assumption is that the protection of private property and free trade is justified, lastly, as an instrument for the increase of the wealth of the nation, therefore by an explicitly *public* interest. The second assumption maintains, instead, that the legal system of property,

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78 THOMAS PIKETTY, *CAPITAL IN THE 21<sup>ST</sup> CENTURY* (Arthur Goldhammer trans., 2014).

79 JÜRGEN HABERMAS, *IM SOG DER TECHNOKRATIE* 82 et seq. (2013) (translated to English in JÜRGEN HABERMAS, *THE LURE OF TECHNOCRACY* (Ciarin Cronin trans., 2015)); WOLFGANG STREECK, *BUYING TIME: THE DELAYED CRISIS OF DEMOCRATIC CAPITALISM* (2014).

as part of private law, can only be validated by the intervention of public power and through its legal means.

The first kind of limitation of the system of private property characterizes the attitude of all the — mainly British — authors who supported the theory of free trade between the second half of the eighteenth century and the first half of the nineteenth century. The most significant example is the very framer of the theory of free trade, namely Adam Smith. At first glance, Smith seems to plea for a reversal of the traditional hierarchy between the public and private domains. In his understanding, indeed, it was not the economic failure of private actors but the inefficiency and wastefulness of public administrations that impoverished nations. The best guarantee for growth and prosperity, therefore, is not provided by the activities of the public sector but by “the uniform, constant, and uninterrupted effort of every man to better his condition.”<sup>80</sup> For the first time the pursuit of self-interest by individuals, based on private property and leading to its further accumulation, was considered the condition for the wealth of the whole society. Despite the indisputable novelty of this theory, when it comes to specify the “last end” of social life, Smith’s vision features an unexpected turnaround. Indeed, according to Smith the main goal of the pursuit of private interests is not private, but collective welfare. Furthermore, welfare is not understood in global terms but from the perspective of the primacy of the nation.<sup>81</sup> As a result, even in the view of the first and most committed partisan of free trade, individual interest and private property have to cede priority to the public dimension consisting of the wellbeing of the national community. In doing so, Smith maintains and guarantees the independence of political sovereignty from private property. Far from being an exception, his moderate restoration of public priority after initially shaking the traditional hierarchy between public and private expresses the prevailing view among the economists who supported free trade across the eighteenth and nineteenth centuries.<sup>82</sup>

While according to Smith and the economists who shared his view the reaffirmation of the supremacy of the dimension of public interest has prevalently an *ethical* and *political* character, the other way to prevent the private self-reliance based on property from any aspiration to absoluteness and, thus, to

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80 ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* bk. II, ch. III (Pickering 1995) (1776).

81 ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* bk. VI, ch. II, para. 29 (Millar 1790) (1759).

82 See JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY* bk. III, ch. 17, para. 13 et seq. (Green & Co. 1909) (1848); DAVID RICARDO, *ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* 89 (Batoche Books 2001) (1817).

sovereignty resorts to *doctrinal* considerations concerning the structure of the legal system and the relations between its parts. In his seminal work, *System des heutigen Römischen Rechts* — one of the foundational texts of the doctrine of continental *civil law* — Friedrich Carl von Savigny laid down the systematic reasons why private law cannot be regarded as self-sufficient.<sup>83</sup> Although his interest was concentrated mainly on private law, so that he surely cannot be suspected of partisanship in favor of public law, nonetheless he maintained that private law cannot be founded only on itself, but always needs the fundamental support of public law and authority.<sup>84</sup> Besides the consideration that private law shall always find its deeper sense within the context of the higher interest of the *Volk*<sup>85</sup> — which is, so to speak, a *völkisch* version of the same argument that we have already seen developed in Smith's texts — according to Savigny private law depends on public law for three specifically *juridical* functions which it cannot accomplish in itself. The first is the *nomopoesis*: private law is created through public law procedures.<sup>86</sup> The second is the establishment of civil law procedures against the fortuity of interactions between private actors.<sup>87</sup> The third, lastly, is the establishment of criminal law to punish the breach of private agreements when this is assumed to have consequences for the legal order of the whole community.<sup>88</sup> The consequence that we can draw from these limitations of private law — and thus also of the law of private property — presented by Savigny is that private law cannot autonomously *validate* itself: for private law to be valid and effective, therefore, a solid public law system must be established above it.

The recent private law theory — at least in its more uncompromising approaches — has developed a conception of the independence of private law which rejects both abovementioned constraints: Smith's ethical reservation as well as Savigny's systematic-doctrinal restraint. The conceptual *organon* that has made this radicalization possible has been delivered mainly by systems theory, and secondarily by postmodernism. The contribution of systems theory consists, first, in the assumption that no supra-systemic rationality can be detected by the observer while analyzing social interactions, or displayed by the agent

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83 FRIEDRICH CARL VON SAVIGNY, *SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS* (1840) (translated to English in FRIEDRICH CARL VON SAVIGNY, *SYSTEM OF MODERN ROMAN LAW* (William Holloway trans., 1979)).

84 We can find a similar argument, although from a rather philosophical point of view and surely from a more public law-centered perspective, also in the contract theory of state. See, e.g., KANT, *supra* note 73, at 365 § 8.

85 SAVIGNY, *supra* note 83, bk. I, ch. 1, §§ 9, 21, 24.

86 *Id.* at 24.

87 *Id.* at 25.

88 *Id.* at 26.

while acting in the context of such interactions.<sup>89</sup> As a result, no subjective or intersubjective rationality and no lifeworld are assumed to exist beyond the functional rationalities of systems. Furthermore, social subsystems are regarded as being involved in a process of continuous globalization<sup>90</sup> and differentiation,<sup>91</sup> while they maintain in their internal functioning an autopoietic *modus operandi*<sup>92</sup> which accounts for their “operative closeness” towards the world outside, or — as Niklas Luhmann calls it — against the “environment.”<sup>93</sup> Lastly, law is defined as a subsystem for the stabilization of normative expectations.<sup>94</sup> As for its part, postmodern thinking has contributed by introducing a radical and, in this form, almost unprecedented skepticism regarding both the idea of universal reason<sup>95</sup> and the project of a worldwide order based on the possibility of inclusive deliberative processes shaped by public law.<sup>96</sup>

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- 89 NIKLAS LUHMANN, *DIE GESELLSCHAFT DER GESELLSCHAFT* 874 (1997) (translated to English in NIKLAS LUHMANN, *THEORY OF SOCIETY* (Rhodes Barrett trans., 2012)).
- 90 *Id.* at 145; NIKLAS LUHMANN, *DAS RECHT DER GESELLSCHAFT* 572 (1993) (translated to English in NIKLAS LUHMANN, *LAW AS A SOCIAL SYSTEM* (Klaus A. Zeigert trans., 2004)); Gunther Teubner, “*Global Bukowina*”: *Legal Pluralism in the World Society*, in *GLOBAL LAW WITHOUT A STATE* 3 (Gunther Teubner ed., 1997).
- 91 LUHMANN, *supra* note 89, at 78; Andreas Fischer-Lescano & Gunther Teubner, *Fragmentierung des Weltrechts: Vernetzung globaler Regimes statt etatistischer Rechtseinheit* [*Fragmentation of the Global Legal System*], in *WELTSTAAT UND WELTSTAATLICHKEIT. BEOBACHTUNGEN GLOBALER POLITISCHER STRUKTURBILDUNG* [WORLD STATE AND WORLD STATEHOOD] 37 (Mathias Albert & Rudolf Stichweh eds., 2007).
- 92 LUHMANN, *supra* note 89, at 65 et seq., 92 et seq., 102 et seq.
- 93 *Id.* at 60 et seq.
- 94 LUHMANN, *supra* note 90, at 60 et seq., 125 et seq., 131, 143.
- 95 MICHEL FOUCAULT, *HISTOIRE DE LA FOLIE À L’ÂGE CLASSIQUE* (1961) (translated to English in MICHEL FOUCAULT, *MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON* (Richard Howard trans., 2006)); MICHEL FOUCAULT, *LES MOTS ET LES CHOSSES* (1966) (translated to English in MICHEL FOUCAULT, *THE ORDER OF THINGS* (1970)); MICHEL FOUCAULT, *L’ORDRE DU DISCOURS* (1971) (translated to English in MICHEL FOUCAULT, *ARCHAEOLOGY OF KNOWLEDGE* (Alan M. Sheridan trans., 2002)); MICHEL FOUCAULT, *SURVEILLER ET PUNIR* (1975) (translated to English in MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan M. Sheridan trans., Pantheon Books 1977)); MICHEL FOUCAULT, *HISTOIRE DE LA SEXUALITÉ, I: LA VOLONTÉ DE SAVOIR* (1976) (translated to English in MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME I: THE WILL TO KNOWLEDGE* (Robert Hurley trans., 1978)); MICHEL FOUCAULT, *The Subject and Power*, in MICHEL FOUCAULT: *BEYOND STRUCTURALISM AND HERMENEUTICS* 208 (H.L. Dreyfus & P. Rabinow eds., 1982).
- 96 Martti Koskeniemi, *International Legislation Today: Limits and Possibilities*, 23 *WIS. INT’L L.J.* 1 (2005).

On the basis of these theoretical premises, contemporary private law theorists — in particular Gunther Teubner as the author who radicalized, probably more than anyone else, the approach in this field — have elaborated a conception of private law and of the legal system of globalized private property as an autopoietic legal regime. As far as the ethical and political priority of the public domain is concerned, as it was — and still is — present in almost the entire tradition of political philosophy and even in the work of many of the economists who plead for the centrality of private interests, the conception of private law influenced by systems theory rejects it not by proposing to turn the hierarchy between public and private upside down, but by stressing the independence of the two spheres.<sup>97</sup> Since according to systems theory each subsystem operates according to its own specific rationality, with no relation of mutual interdependence or of hierarchy with other subsystems, the question is not whether the public domain shall be situated above or beneath the private dimension. Rather, the different subsystems are seen as coexistent beside one another, each of them perfectly self-sufficient and autonomous.

Yet, even if we admit that systems theory has delivered the epistemological *organon* for a conception of society as made up of self-reliant subsystems with no suprasystemic subjective or intersubjective rationality — and some doubts may be justified as to whether this conception is really convincing<sup>98</sup> — nonetheless the problem remains as regards the self-validation of the system of private law and property. Teubner recognizes that the idea of a private law that derives its validity from the spontaneous interaction of its actors is difficult to justify. Nevertheless, the system of private law — he claims — has developed three specific strategies in order to validate itself autonomously.<sup>99</sup> We have seen that the first problem of the self-validation of private law consists in the lack of an internal private-law set of norms with the aim of specifying the procedures for the production of secondary norms. Thus, to produce private law norms, the system of private law would have to resort to public law. The answer of the autonomous system of private law to this problem has been the establishment of an *internal hierarchy of norms*, i.e., a primary system of non-public-law-based and spontaneous norms as a legal basis for the generation of secondary norms. The second deficit of a presumably self-reliant system of private law is the apparent contingency and uniqueness of every single private law agreement between private agents which — according to the traditional doctrine — makes the intervention of public power necessary in order to guarantee predictable and

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97 Teubner, *supra* note 90.

98 Bogdandy & Dellavalle, *supra* note 22, at 78 et seq.

99 Teubner, *supra* note 90, at 16.

consistent procedures. The reaction resorts in this case to what Teubner calls a “temporalization” of contingency. This means, concretely, that the single contract between private actors is superseded by iterated processes in which a standardization of rules occurs insofar as the contract both refers to the past and projects into the future. The third shortcoming is related to the system of private law’s presumed incapacity to enforce by itself the respect of its own rules, so that the public authority has to assist by establishing criminal law. The response, here, is *externalization*: the system of private law and property “externalizes the fatal self-validation of contract by referring conditions of validity and future conflicts to external ‘non-contractual’ institutions which are nevertheless ‘contractual,’ since they are a sheer internal product of the contract itself.”<sup>100</sup> In other words, the private law system provides institutions with arbitration functions that monitor the validity and execution of norms. Although these institutions are created by means of private law, they overcome the spontaneous private law dimension because of their institutional nature.

Since in Teubner’s interpretation the system of private law and property does not recognize any higher authority, and given that, by definition, a power that autonomously enforces a self-sufficient set of rules is regarded as sovereign, the logical consequence, assuming these premises, cannot but be that the system of private law and property claims to be *sovereign*. This claim is even more reinforced by Teubner’s redefinition of the concept of “constitution.”<sup>101</sup> According to the usual understanding, the constitution is a set of norms that contains the fundamental rules of interaction within a community, thus giving legal form to its essential values and self-understanding. This specific *public* dimension of the concept of constitution is rejected by the radical private law theory represented by Teubner. The essential conceptual innovation consists in reducing the “constitution” merely to the set of norms that specify the procedures for the creation of secondary rules.<sup>102</sup> Against this background, every legal subsystem with a two-level normative structure — i.e., with a set of primary norms and a second set of secondary norms, the legitimacy of which depends on whether they have been produced on the basis of the rules laid down in the primary set — would deserve to be called a “constitution.”

A legal subsystem would be qualified as a “constitution,” therefore, regardless of whether this subsystem addresses questions of general and shared interests,

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100 *Id.*

101 GUNTHER TEUBNER, *CONSTITUTIONAL FRAGMENTS* (2012).

102 Gunther Teubner, *Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie* [*Global Civil Constitutions as Alternatives to the Statist Constitutional Theory*], 63 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* [J. COMP. PUB. L. & INT’L L.] 1, 13 (2003).



thus laying down the fundamentals of social life, or refers only to the regulation of interactions between private agents in matters concerning primarily or exclusively their priorities. Because “constitutions” governing the interactions of private actors — or “global civil constitutions”<sup>103</sup> — are supposed to be at the same level as *public* constitutions and no less self-sufficient or “sovereign” than them, the public domain is largely deprived of its traditional functions. First, it has no reason or authority to impose allegedly higher common interests on the system of private property. Second, also questions of justice<sup>104</sup> and the discussion concerning the definition of shared issues are transferred from the political sphere of the public dimension to the subsystem-internal domain and rationality of private constitutions.<sup>105</sup>

Yet a self-reliant and therefore sovereign “constitutional” system, which is downgraded to a set of norms regulating the creation of secondary rules or, even more, to a merely “civil” dimension based on private law, loses the reference to what is actually *constitutional sovereignty*. Indeed, this is essentially connected to the legitimation generated by political representation as it is contained in the democratic processes laid down by constitutional law. Precisely this element accounts for the political character of the constitution as well as for its specific *public* quality. If the legal system of private property becomes sovereign, the public sphere, with its essential task of determining through inclusive, power-blind and democratic processes the common interests of the community, is doomed to wither away.

#### IV. THE SYNERGY OF SOVEREIGNTY AND PROPERTY

In both patterns analyzed in the former Parts, neither sovereignty nor property live up to their social functions: sovereignty loses its “public” dimension and property is not conceived of in a way that guarantees that every individual has the resources to shape his/her specific personality by pursuing his/her preferences insofar as this striving does not impair the chances for others to do the same. In order to overcome both deficiencies, some conceptual readjustments have to be introduced. In particular, all those involved by a specific public power should be regarded as equal in their right to realize their

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103 *Id.* at 6 et seq.

104 Gunther Teubner, *Selbstsubversive Gerechtigkeit: Kontingenz-oder Transzendenzformel des Rechts?* [*Self-Overcoming Justice: Formula of Legal Contingency or of Transcendence?*], 29 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE [GER. J.L. & Soc’y] 9 (2008).

105 Gunther Teubner, *State Policies in Private Law? A Comment on Hanoch Dagan*, 56 AM. J. COMP. L. 835 (2008).

priorities as well as in their capacity to take reasonable decisions concerning their present options and future destiny. This includes the citizens of a single political community, noncitizens insofar as they are involved by decisions taken by a political community, and all human beings from a cosmopolitan perspective. Furthermore, sovereign power cannot be seen simply as a “brute fact”; in order to be legitimate, it has to be understood as the result of the free and reflexive will of those who are obliged to respect its decisions.

These conceptual corrections, in fact, are anything but new in the history of Western political thought, since they were already introduced for the first time by the thinkers who, centuries ago, formulated the contract theory of state. Political contractualism is a further result of the paradigmatic revolution from holism to individualism that characterized the transition to the Modern Ages in Western culture<sup>106</sup> and decisively contributed to the creation of the concept of sovereignty and to the rehabilitation of private property.<sup>107</sup> The foundations of the contract theory of state were laid down by Thomas Hobbes in the middle of the seventeenth century,<sup>108</sup> then taken up and adapted to different political preferences by some of the most outstanding Western philosophers of modern rationalism and enlightenment, including John Locke,<sup>109</sup> Jean-Jacques Rousseau<sup>110</sup> and Immanuel Kant.<sup>111</sup> Even the most recent revival of contractualism from a deliberative background<sup>112</sup> as well as the communicative paradigm of political philosophy can be regarded as legitimate successors of modern contractualism, albeit with some reservations due to quite distinct epistemological premises.<sup>113</sup> Starting from the central tenet of the priority

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106 DELLAVALLE, *supra* note 13, at 184; Dellavalle, *supra* note 2, at 373.

107 See DELLAVALLE, *supra* note 13.

108 THOMAS HOBBS, *DE CIVE* (Royston 1651) (1642) [hereinafter HOBBS, *DE CIVE*]; THOMAS HOBBS, *LEVIATHAN, OR THE MATTER, FORM, AND POWER OF A COMMONWEALTH ECCLESIASTICAL AND CIVIL* (Crooke 1651) [hereinafter HOBBS, *LEVIATHAN*].

109 JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Awnsham-Churchill 1690).

110 JEAN-JACQUES ROUSSEAU, *DU CONTRACT SOCIAL, OU PRINCIPES DU DROIT POLITIQUE* (Garnier-Flammarion 1966) (1762) (translated to English in JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Maurice Cranston trans., 1968)).

111 IMMANUEL KANT, *Zum ewigen Frieden. Ein philosophischer Entwurf*, in XI WERKAUSGABE 193, 203 (Suhrkamp 1977) (1795) (translated to English in IMMANUEL KANT, *TOWARDS PERPETUAL PEACE AND OTHER WRITINGS ON POLITICS, PEACE, AND HISTORY* 67 (Pauline Kleingeld ed., David L. Colclasure trans., 2006)).

112 JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

113 HABERMAS, *supra* note 75. On the continuity between modern individualism and the communicative political theory, see Armin von Bogdandy & Sergio Dellavalle, *Universalism Renewed: Habermas' Theory of International Order in Light of Competing Paradigms*, 10 GER. L.J. 5 (2009).

of the individual, political contractualism generated the conditions for the development of both the liberal and the democratic theory of society and state.

How revolutionary the contract theory of state was can easily be seen if we compare Hobbes's concept of sovereignty with Bodin's, which had been formulated just a few decades earlier. In general, Bodin and Hobbes are both regarded as the founders of the idea of absolute sovereign power. In this sense, they are commonly located within the horizon of the same political project with a largely identical outcome. Yet this conclusion is far from exhaustive. Indeed, Bodin's sovereign power derives its absoluteness from a natural condition of superiority.<sup>114</sup> To the contrary, Hobbes's concept is the product of a free decision of the members of the community, who — originally free and not subject to any natural authority — come to the conclusion that the most reasonable guarantee of a peaceful life consists in handing over all original rights, with only marginal exceptions, to a sovereign vested with almost unlimited competences.<sup>115</sup> Thus, while Bodin's sovereign is generated by nature or God, which or who created an original condition of diversity among human beings, Hobbes's sovereign power arises from the very basis of the social community. Moreover, the bottom-up conception of political power of contractualism is not only new if compared to Bodin's absolutistic theory, but also unprecedented if set against previous ideas of popular power. Indeed, visions of popular power — or even of democracy — had been elaborated already in ancient times<sup>116</sup> as well as within the context of Calvinist political theology.<sup>117</sup> In both cases, however, the will of the people was limited by predetermined constraints based on uncontested mythological or theological truths. In contractualism, instead, no restriction is supposed to exist but the rights, interests and reason of the involved.

The instruments that contractualism uses to realize the synergy of sovereignty and property by maintaining the publicness of the former and the centrality of the irreducible individuality of all involved that should characterize the latter are twofold. First, the authors who belong to this strand of political thinking

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114 *See supra* Part II.

115 HOBBS, *DE CIVE*, *supra* note 108, bk. II, ch. V, para. 7; HOBBS, *LEVIATHAN*, *supra* note 108, bk. XVII.

116 THUCYDIDES, *supra* note 7, bk. II, para. 37 et seq.

117 THÉODORE DE BÈZE, *DU DROIT DES MAGISTRATS SUR LEUR SUBJECTS* (EDHIS 1977) (1575) (translated to English in THEODORE BEZA, *CONCERNING THE RIGHTS OF RULERS OVER THEIR SUBJECTS AND THE DUTY OF SUBJECTS TOWARDS THEIR RULERS* (Henry-Louis Gonin trans.), <http://www.constitution.org/cmt/beza/magistrates.htm> (last visited Mar. 17, 2017)); JOHANNES ALTHUSIUS, *POLITICA METHODICE DIGESTA* (Harvard University Press 1932) (1614) (translated to English in JOHANNES ALTHUSIUS, *POLITICA* (Frederick Smith Carney trans., 1992)).

resort to a private law concept, namely the contract, to explain and justify the creation of a sovereign public power. By doing so, they switch over, for the first time in history, from the traditional verticality of sovereign power as a quasi-natural constant opposed to politically passive subjects, to an understanding of power as a variable depending on the reflexive decisions of politically active and horizontally organized citizens. Furthermore, the option in favor of the contract as the fundament of public power makes it clear that the state should not be seen simply as a “given fact,” as an administrative monster that — grounded on tradition and not seldom on brute force — swallows the rights and interests of the subjects independently of their will and to the benefit of the rulers. Rather, it can also be conceived of as an instrument based on fundamental agreements and at the service of the citizens.

The second feature of the contractualistic synergy of sovereignty and property refers to the centrality of a private sphere for the individuals to build that kind of reflexive personality that distinguishes a citizen from a subject and creates the basis for a legitimate and functioning political life. It is essential for the development of sound individual personalities that every member of the community can pursue his/her priorities insofar as these preferences do not conflict with the justified rights of others. For this purpose, individual resources — and, thus, private property — are needed. The defense of private property plays therefore a significant role in the conception of all exponents of political contractualism, with differences according to their diverging political views. In fact, the gamut ranges quite widely, from Hobbes’s rather marginal right to private “happiness” that individuals retain after having transferred most rights to the newly established public power,<sup>118</sup> to Locke’s minimal state as the guarantor of private interests,<sup>119</sup> with Kant — who strongly supported private property, but also considered public autonomy, not private interests, as the main goal of the *societas civilis* — situated about in the middle.<sup>120</sup> Anyway, no supporter of contractualism ever backed the idea of a sovereign power structurally bound to the interests of the few,<sup>121</sup> or of a system of private property that substitutes for the public domain.

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118 HOBBS, DE CIVE, *supra* note 108, bk. II, ch. XIII, para. 2 et seq.; HOBBS, LEVIATHAN, *supra* note 108, bk. XVI.

119 LOCKE, *supra* note 109, bk. II, ch. IX, para. 123 et seq.

120 KANT, *supra* note 73, § 8, at 365, § 46, at 432.

121 Contractualism derives sovereign power from the reflexive will of all those involved. In principle, no restriction is due from the conceptual point of view. Nevertheless, many restrictions were actually applied as a consequence of the prejudices that afflicted the society in which the authors lived. It is always disturbing — just to make an example — to read how Kant justified the exclusion

However, if a very central position is assigned to private property, and since private wealth tends to accumulate in the hands of a small number of members of the society, an acute problem of injustice is likely to arise, putting at risk the unity of private property and individual emancipation that characterized the original articulation of contractualism. The question is how property can be safeguarded in its quality as an instrument for the free development of the personality of all individuals. Interestingly, the issue of property limitation for the sake of justice was addressed early in the history of contractualism. The fact that we can find it in the works of the radical democrat Rousseau may be less surprising;<sup>122</sup> to the contrary, it is quite astonishing that even the “liberal” Locke seems to be perfectly aware of the risks of an unlimited right to property.<sup>123</sup> In John Rawls’s rediscovery of contract theory, the response to the problem has taken the more formal shape of a Pareto optimal solution, in the sense that inequality of property and resources can only be justified insofar as the less privileged also benefit from this.<sup>124</sup> Beyond traditional contractualism, the limitation of private property in order to maintain equal and just chances for all has been seen as the task of a communicatively grounded political power which is committed to safeguarding all human and citizens’ rights, including the social ones.<sup>125</sup> Or, from a private law perspective, it has been seen as an intersubjective duty of private individuals, even before the public power intervenes and regardless of what it may do to meet the challenge.<sup>126</sup>

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from political participation of some social groups, in particular women and employed workers. *See id.* § 46, at 432 et seq.

122 Rousseau criticized the unlimited expansion of private possession which can jeopardize social cohesion and may be seen as the root of many of the worst social pathologies. *See* Jean-Jacques Rousseau, *Discours sur l’Origine de l’Inégalité parmi les Hommes*, in JEAN-JACQUES ROUSSEAU, *SCHRIFTEN ZUR KULTURKRITIK* 61 (Meiner 1983) (1755) (translated to English in JEAN-JACQUES ROUSSEAU, *DISCOURSE ON THE ORIGIN OF INEQUALITY* (Donald A. Cress trans., 1992)). Yet after the stipulation of the “social contract” property is officially recognized and protected, *see* ROUSSEAU, *supra* note 110, bk. I, ch. IX, but should be limited in its amount, *id.* bk. III, ch. IV.

123 LOCKE, *supra* note 109, bk. II, ch. V, para. 35.

124 JOHN RAWLS, *A THEORY OF JUSTICE* 57, 263 (rev. ed. 1999) (originally published in 1971).

125 HABERMAS, *supra* note 75, at 151 et seq.

126 Dagan & Dorfman, *supra* note 27; Hanoach Dagan & Avihay Dorfman, *Just Relationships*, 116 *COLUM. L. REV.* 1395 (2016).

## V. CONCLUSION: FROM SELF-DENYING COLONIZATION TO SYNERGY

Sovereignty and property are treacherous twins. They are related because they both originate from the turn to individualism at the beginning of the Modern Ages. Each of them, however, maybe as a consequence of their historical and conceptual connection, also tends to incorporate the other side, subverting it to its own purposes. Yet, by colonizing the other side, both sovereignty and property deny their own respective functions, thus giving up the core element of their social *raison d'être*. In fact, absolute sovereignty — be it political, nationalist, or technocratic — seizes civil society, making it to the property of a small group of individuals. In doing so, nonetheless, it loses its specific publicness in the service of common interests, transforming public power into a support for the selfish benefits of the few. Analogously, but in mirror-inverted perspective, the system of private property has laid claim to possessing constitutional rank. This ambition gives expression to the growing relevance of economic global players, which are hardly willing to submit to the supremacy of shared interests, regardless of whether these are embedded in national or international public laws and practices. The constitutionalization of the system of private property, however, also jeopardizes the social meaning of property, which should consist in guaranteeing the means for the self-realization of every individual.

Does the self-denying mutual colonization of sovereignty and property mean that no balance can be found between them? Not necessarily. In fact, a third perspective is possible, from which sovereignty and property can coexist while perfectly maintaining their respective spheres of realization and functions. In this third implementation — or stage — of their dialectics, sovereignty and property support each other synergistically, but under the condition that three main requirements are satisfied. First, sovereignty has to be understood not as a power that precedes individual decisions and may degenerate into an instrument in the hands of privileged individuals or social groups, but as a creation of the free will of all those involved. Second, private property should always acknowledge the superiority of a public dimension in which shared interests are discursively formulated. And, third, private property should be guaranteed, as an instrument of self-realization, to every member of society. If we want to lead the possible solution back to its more concise expression, we could say that the three core principles are: freedom of all, participation by all, and justice for all.