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ABSTRACT

The concept of sovereignty implies the self-determination of political power. It does not entail, however, any assumption either about whether this power is legitimate and, if so, how its legitimation is realized, or about the extension of the power that is supposed to be sovereign. Thus, political power could be perfectly indifferent to democratic legitimacy or to global injustice, while being nevertheless recognized as sovereign. Since the concept of sovereignty was originally developed within the context of a paradigm of social, political and legal order according to which the well-ordered society is limited in its extension and governed through a top-down chain of authority, it is not surprising that questions like democratic legitimacy and global justice were simply ignored by its supporters. Yet, three major paradigmatic revolutions took place that have shaken the conceptual foundations of social order on which the idea of sovereignty was originally built, so that three corresponding challenges were posed to its traditional understanding. A first paradigmatic revolution from holism to individualism shifted the barycentre of the well-ordered society from a kind of predetermined unity of the community to the individuals. As a result, the legitimacy of sovereign power could no longer be taken for granted because of the passive acceptance of tradition or of an alleged mythological or divine "truth". On the contrary, it was expected, from then on, that the sovereign power was legitimated "bottom-up", i.e. by the reflexive consent of the citizens. According to this premise, absolutistic sovereignty was transformed into popular sovereignty. A second paradigmatic revolution expanded the boundaries of the well-ordered society to include, at least potentially, the whole humankind. Consequently, if it was to be justified, sovereign power had to adapt to the new situation by accepting global responsibility. The third and more recent paradigmatic revolution regarding the idea of the well-ordered society finally affected the assumption that the well-ordered society should always be conceived of as unitary, i.e., as a hierarchical and self-reliant pyramid of norms and institutions. Instead, following some contemporary theories, a society can also be considered well-ordered if composed of a plurality of systems of norms and institutions which are not related to one another in a hierarchical form, but through horizontal interconnections. Within the context of legal and institutional pluralism, sovereignty itself has to differentiate, so as to express the variety of individual cultural belongings and political affiliations that characterize the postnational constellation. In conclusion, if sovereignty is to be seen as a value, its concept has to meet the challenges deriving from all three major paradigmatic revolutions, which means it has to become consistent with the normative requirements of democratic government as well as with the variable geometry and the global responsibility of a necessarily interconnected world.

KEYWORDS:

sovereignty, legitimacy, responsibility, paradigms of social order, paradigmatic revolutions, communicative paradigm

On Legitimate Sovereignty and Global Responsibility

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1.   Is Sovereignty Still a Value?

For a long time, questioning the value of sovereignty would have seemed senseless. After the dis-
solution of the medieval communitas christiana and the overcoming of the biased, if not utterly
hypocritical, project of a Christian universalism, the notion of sovereignty had become the beacon
of the Westphalian setup of the Western world. In view of the overwhelming power of sovereign-
ty, only a few voices were raised, in particular by the thinkers who are remembered as the drafters
of the modern peace projects. Yet, although some of them – in particular those penned by William
Penn[1] and Immanuel Kant[2] – anticipated later developments by far and were destined to become,
at least in Kant's case, a steady point of reference of political theory, their influence at the time of
their drafting was rather limited, or it was promptly silenced by the rise of nineteenth century's
nationalism. As a result, sovereignty dominated the Western political stage for roughly one and a
half centuries.

        After that period, however, deep-going doubts began to be expressed on whether this no-
tion should still be granted the status of a cornerstone of political theory or, instead, it should be
dismissed without regret. The first and foremost reason for the change of attitude was the convic-
tion that the unrestrained sovereignty of the individual state, combined with the ideology of the
exclusive and superior identity of the nation as it had been developed by the political romanticism,
was at the root of the disgraceful oppression that Western countries brought to almost the entire
rest of the world through colonialism and imperialism, as well as of the horrors of two world wars
and, finally, of the unprecedented moral breakdown of the Shoah. The second reason for a more
sceptical view on sovereignty was related to the emergence of the globalization phenomenon,
which seemed to make the presumptuous self-reliance of sovereign states obsolete. Indeed, even
if we were to assume that the economic globalization, as we have known it in the last decades, is
going to stall or recede, we would have to recognize, nonetheless, that some problems – such as
climate change, loss of biodiversity, global justice and security – can only be adequately tackled
with a common effort.

        Faced with the stronger awareness of the dark side of sovereignty, on the one hand, and
with the inescapability of global cooperation, at least in some fields, on the other, it is now more
than justified to ask whether sovereignty is still a value. To answer this question, it has to be speci-
fied, first, that for sovereignty to have a specific value – or, which is actually the same, to be a val-
ue in itself – it should be essentially linked to a social good that is no less worth being protected in

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[1]   William Penn, An Essay towards the Present and Future Peace of Europe (1693), in: William Penn, The Political
       Writings, Liberty Fund, Indianapolis 2002, 401–419, Section III, at 404 et seq.
[2]   Immanuel Kant, Zum ewigen Frieden. Ein philosophischer Entwurf, in: Immanuel Kant, Werkausgabe, Wilhelm
       Weischedel ed., Suhrkamp, Frankfurt a. M. 1977, Vol. XI, 193–251 (English translation by H. B. Nisbet: Perpetual
       Peace: A Philosophical Sketch, in: Immanuel Kant, Political Writings, Cambridge University Press, Cambridge/New
       York 1991, 93–130).

times of global interconnections than ever before. In other words, it is necessary to identify a good which is always essential for the functioning of society – regardless of whether this is understood as a global community or not – and to the definition of which sovereignty plays a fundamental role. On the basis of the conditions under which that good can be best preserved in our times, it will be possible to address the question whether sovereignty can still contribute to the task while maintaining the content that has been traditionally attributed to its concept, or it should be redefined so as to adapt to the new challenges. I propose that the good, which is connected to sovereignty and on the basis of which the content of sovereignty is assessed, be identified with social order. Indeed, little doubt can be raised on the fact that no society can exist without some form of social order, i.e., of rules that makes interactions peaceful, predictable and, in the most favourable of cases, cooperative. Secondly, it is also indubitable that the notion of sovereignty has significantly contributed to how social order has been understood, with particular reference to the relations among political communities, but also, to some extent, to the way in which the individual communities have been internally organized. Thirdly, since the idea of social order has gone through some deep-going ruptures, which have changed how we define the "well-ordered" society, the question has to be addressed on whether sovereignty – in its traditional form or in a renewed guise – can still be regarded as a pillar of the kind of social order that is necessary to meet the current challenges.

Against the background of these introductory considerations, the next section presents the concept of the paradigms of order, i.e., of the different ways in which the well-ordered society can be conceived of with reference to its extension, to its ontological basis and to its unitary or post-unitary (pluralist) structure. Considering the contents of the distinct paradigms of order, it will be shown that the traditional notion of sovereignty, as it was elaborated at the beginning of Western Modern Ages, perfectly fits into the most ancient of all paradigms, according to which the well-ordered society cannot but be limited in its range, holistic or organic – which means community-based and not individual-based – with regard to its ontological fundament, and unitary in its structure (2.). During the centuries, the idea of the well-ordered society has passed through three major paradigmatic revolutions, each of them affecting one of the dimensions that characterize a paradigm of order, namely its extension, its ontological basis and the structure of order, respectively. The third section focuses on the paradigmatic revolution that shifted the ontological fundament of order from the community as a whole (holon) to the individuals, and on how absolute sovereignty was transformed – as a reaction to this shift – into the sovereignty of the people or popular sovereignty (3.).

The two further paradigmatic revolutions – which are addressed in the fourth and fifth sections – expanded the well-ordered society so as to potentially include the whole humankind, on the one hand, and changed its internal structure from a hierarchical pyramid to a heterarchical network of interacting legal systems on the other. Adapting the notion of sovereignty to these two paradigmatic revolutions proved to be much more challenging than in the case of the transition to popular sovereignty. Indeed, if we are going to accept that the well-ordered society can – and even should – become cosmopolitan, then the old particularistic idea of sovereignty seems to be inevitably doomed. Yet, the question is not as easy and one-sided as it seems at first sight. In fact, the concept of sovereignty – especially, in its form as popular sovereignty – still expresses the fundamental importance of the self-determination and self-government of the political community, which cannot even be suppressed in times of globalization or in front of the justified striving for cosmopolitanism (4.). Facing opposite tendencies – the need for the self-government of the citizens which is embedded in the notion of popular sovereignty, on the one hand, and the necessity

to take responsibility on a global scale, on the other – the concept of sovereignty undergoes a further profound transformation. Within this complex and still ongoing process, the most important element consists in a redefinition of the notion of legitimacy. Indeed, while the paradigmatic revolution from holism to individualism made clear that sovereign power is only justified if it is legitimated bottom-up by those who are subject to it, the shift from particularism to universalism points out that sovereign power needs insofar a further qualification as it has to take into account the consequences of its decision for those who do not belong to the domestic political community on which sovereignty is based. Making popular sovereignty in the single community compatible with global responsibility could be regarded as an impossible mission – if the most recent paradigmatic revolution from the unitary to the pluralist idea of order had not come to the aid. Indeed, in a post-unitary conception of order the sovereignty of the single political community can arguably coexist with its imperative commitment to cross-border justice and freedom (5.). The last section summarizes the conditions under which sovereignty can still be considered a value, inasmuch as it refers to a bottom-up legitimated, globally open and internally plural political authority (6.).

2.   The Paradigms of Order and the Traditional Concept of Sovereignty

Order is an essential component of social life. More specifically, we can maintain that a society is to be considered well-ordered when it is ruled by individually accepted, collectively shared and functionally effective norms. Those norms have to perform three different tasks. First, they make interactions among the members of the social community predictable. Secondly, conflicts are conveyed into procedures so as to make their peaceful settlement possible, thus preventing disruptive consequences for social cohesion. Thirdly, rules guarantee a sufficient level of synergy between the members of the social community. This claim does not imply that social order, to be accepted, always needs to take the form of a Pareto optimal solution; rather, it only requires that all members of the society – or, at least, the great majority of them – subjectively consider the rules justified and substantially beneficial.

Though necessary in general, social order may be defined, in particular, in quite different ways. In other words, we can identify a certain number of distinct understandings of how the society should be organized in order to be justifiably regarded as "well-ordered". Those understandings make up what we can define as the "paradigms of order". In a broad sense, a "paradigm" is a set of concepts that build the preconditions for the use of theoretical and practical reason in a certain time and related to a specific matter. Therefore, a paradigm of order is a set of fundamental concepts that specify the conditions for a society to be considered well-ordered. When the conditions of social life have changed so much that the concepts characterizing the predominant paradigm no longer meet the requirements for a justifiable idea of order, a so-called paradigmatic revolution takes place. As a result, a new conception of order is developed, which is assumed to be better capable of understanding and justifying the new social condition as well as of giving a more correct advice for action.

Every paradigm of order – and, thus, the set of concepts that make it up – entails three claims concerning essential elements of its constitutive structure. The first claim refers to the extension of the well-ordered society: is it inevitably limited in its range, so that every social, political, ethnic or religious community must have its own idea of order, which is incompatible with any other? Or could the well-ordered society comprise the whole humankind? The second claim re-

gards the ontological basis of order: according to the holistic interpretation, it is the community in its entirety that provides the ontological basis, while the individuals are put in second place. Turning upside down the priority, in the individualistic understanding of order it is the individuals who freely create the rules and the society only exists to protect their rights and interests. The third claim is related to the question on whether the rules of a society, for it to be well-ordered, need to be strictly consistent with each other and hierarchically organized, or order can also be conceived as a plurality of normative systems that overlap and dialogically interact with one another.

The most ancient Western pattern of order maintained that a society, to be well-ordered, must be particularistic (as opposed to universalistic), i.e., limited in its range, holistic (as opposed to individualistic), which means based on the supposedly organic community of its members, and unitary, namely based on a self-reliant, self-consistent and hierarchical normative structure. This holistic-particularistic paradigm of order dates back at least to ancient Greece, thus to well before the modern concept of sovereignty was formulated. Nonetheless, no doubts can exist on the fact that modern sovereignty entirely belongs to this paradigm. That the traditional concept of sovereignty is nothing but a variant of holistic particularism was already made intrinsically clear – obviously, without any reference to the theory of the paradigms of order – by Jean Bodin as the great architect of the modern idea of sovereign power. First, Bodin's sovereignty was particularistic because it centred public power on the individual will of the specific sovereign authority.[3] Coherently, holders of "absolute and perpetual" sovereign power do not admit any horizontal interferences of same-level authorities, nor do they accept the possibility of a cosmopolitan extension of order, which could also erode the absoluteness of their social and political control. Although Bodin made reference to the boundaries that natural or divine law may impose on the exercise of sovereignty, the limitations that derive from them are, in the end, quite modest.[4] In fact, holders of sovereign authority are granted the right to interpret the suprapositive norms in complete autonomy, i.e., without any secular or ecclesiastic control. Secondly, the holistic or organic character of Bodin's sovereignty is sufficiently proved by his use of Aristotle's theory of the familistic origin of the political community – right at the beginning of his most influential work – in order to provide the sovereign polity with a robust ontological fundament.[5] According to this conception, the organizational structure of the family also serves as a model for the political community as a whole. As a consequence, the interests of the latter would deserve more consideration – from Bodin's standpoint – than those of its individual members, precisely as priority is traditionally given to the unity and destiny of the family as against the strive for individual independence. Thirdly, the internal structure of the sovereign "commonwealth" (république) is unequivocally unitary and hierarchical, with the decision-making competence firmly put in the hands of the authority in charge. Although Bodin conceded that the sovereign may be limited by intermediate levels of power, as those embodied by the Estates, in the end these mid-level institutions are strictly submitted to the apex of the political pyramid.[6]

Sovereignty has been, right from the outset, one of the most fundamental conceptual pillars supporting the holistic-particularistic paradigm of order. Therefore, it is not surprising that four main contemporary variants of the paradigm – each of them pointing at one specific aspect of holistic-particularistic rationality – still regard sovereignty as a crucial component of any well-ordered

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[3]   Jean Bodin, Six livres de la république, Imprimerie de Jean de Tournes, Lyon 1579 (1st ed. 1576), Book I, Chapter VIII, at 85 (English transl. by M.J. Tooley, Blackwell, Oxford 1955).
[4]   Ibid., Book I, Chapter VIII, at 91 et seq.
[5]   Ibid., Book I, Chapter I, at 1.
[6]   Ibid., Book I, Chapter VIII, at 98 et seq.

social, political and legal community. According to a first present-day variant of holistic particularism, public power – as the barycentre of the well-ordered society – has its origin in the apodictic assertion of will made by a sovereign social actor, firmly rooted in the factual terrain of power.[7] In other words, sovereignty is deemed essential to social, political and legal order because the rationality that lies at the basis of order would necessarily require free and firm acts of political will, carried out by a self-reliant entity that constitutes itself precisely through the first and most essential of those acts, namely through the creation of the constitutional framework of the polity.[8] A second strand of contemporary holistic particularism – which has been especially developed within the context of German constitutional theory – locates the roots of public power's legitimacy in the national identity of the people (Volk). Some authors define this identity as being essentially based on elements like a common "geographic and geopolitical situation, historic origin and experience, cultural specificity, economic necessities of the people, natural and political conditions,"[9] which are all independent of individual decision or preference[10] and are assumed to forge the members of the community into a "community of destiny".[11] Others – like Dieter Grimm – rather point at the linguistic unity as the glue that holds the community together and makes meaningful communication possible.[12] Yet, regardless of which factor is more stressed as the fundament of the community's identity, all exponents of the ethno-nationalistic strand of holistic particularism always maintain that rationality is inevitably embedded in the unique characteristics of the Volk. As a result, defending the sovereignty of the nation is regarded as the most necessary condition to preserve the rational quality of the political and legal interaction and discourse – a quality that would be lost in the confusing turn to a cosmopolitan constitutionalism.[13]

According to a third approach of contemporary holistic particularism, the understanding of rationality is explicitly negative and defensive. In other words, social rationality would not basically be implemented through positive actions aiming to build up the institutions of society, but – negatively – by finding the means for rejecting the threat coming from outside. The most rational endeavour consists, therefore, in organizing the "friends" in order to prepare for the existential struggle against the external "enemies". Under these circumstances, an unrestricted sovereign power vested in the political institutions of the community becomes a precious, even indispensable instrument to uphold its self-determination and very existence. This understanding of sovereignty as essentially rooted in conflict was elaborated for the first time by Carl Schmitt.[14] However, some distinctive elements of his theory can also be detected – quite in a less radical and bellicose guise – in more recent works, like those of Samuel Huntington. In particular, Huntington first claims that the identity of a political community always implies distinctiveness. Thus, in order to know what it is, the community must put itself against an "other",[15] and Huntington goes so far as

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[7]   Martin Loughlin, Foundations of Public Law, Oxford University Press, Oxford/New York 2010, at 216
[8]   Ibid., at 208 et seq.
[9]   Josef Isensee, Staat und Verfassung, in: Josef Isensee and Paul Kirchhof (eds.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, Band I: Grundlagen von Staat und Verfassung, Müller, Heidelberg 1992, at 634.
[10]   Paul Kirchhof, Der deutsche Staat im Prozess der europäischen Integration, in: Isensee/Kirchhof (note 9), at 869.
[11]   Isensee (note 9), at 634.
[12]   Dieter Grimm, Braucht Europa eine Verfasssung?, 50 JuristenZeitung 581 (1995).
[13]   Dieter Grimm, The Constitution in the Process of Denationalization, 12 Constellations 447 (2005).
[14]   Carl Schmitt, Der Begriff des Politischen (1932), Duncker & Humblot, Berlin 1963, at 20 et seq. (English transl. by George Schwab, The University of Chicago Press, Chicago/London 2007, at 25 et seq.)
[15]   Samuel P. Huntington, Who Are We? The Challenges to America's National Identity, Simon & Schuster, New York 2004, at 24 et seq.

to say that the "other" has to be explicitly perceived as an "enemy".[16] Secondly, he states that the most relevant geopolitical division line in times of globalization is not the traditional nation any longer, but a much larger entity, namely the "civilization", which is grounded – quite like Schmitt's "large-range-order" hegemonic powers –[17] not on many unifying elements, as it was in the case of the traditional concept of nation, but just on a limited number of common features, or even on just one of them. The role that race played in Schmitt is taken up, in Huntington's work, by culture and, in particular, religion.[18] The fourth and last variant of holistic particularism, which still puts sovereignty at the centre of its idea of social, political and legal order, focuses primarily on the criticism of international law.[19] To strengthen the scepticism against the normative quality of international law, Jack Goldsmith and Eric Posner have recently applied the epistemological framework of rational choice to legal theory.[20] Following the rational choice assumption that only selfishness is rational, a political community would only act rationally – i.e., it would increase its payoffs – if it does not bind itself to supra-state rules, or if it does so only in the case that these rules are evidently at the service of its immediate interests. From this perspective, selfish policies and the upholding of an unrestrained sovereignty would be the most rational choice simply because we cannot precisely know what the preferences of other polities are or what their next actions are going to be.

Each one of these variants of contemporary holistic particularism has its own weaknesses and can be subjected to specific critiques. What is important here, however, is to stress that the traditional concept of sovereignty is central to all of them, making it still very influential in political thinking. Yet, holistic particularism did not remain unchallenged, so that, if sovereignty was to survive even under the aegis of a different conception of order, its supporters had necessarily to reshape the contours of its notion.

3. From Holism to Individualism: The Rise of Popular Sovereignty

One of the paradigmatic revolutions through which the conception of the well-ordered society went during the centuries and even the millennia – not the first one, yet, as we will see in the next section – affected the claim regarding the ontological basis of social order. Following the holistic-particularistic paradigm, the community as a whole is assumed as the basis of the well-ordered society, so that it is considered to have more value – in its totality – not only than each one of the individual members of the community but also than their total sum. The turn to individualism was introduced by René Descartes with his theory of knowledge which was based on two elements: the very individual capacity of questioning generally established theories and of creating new ones by means of the unprejudiced, purely rational thinking of the knowing subject, on the one hand, and the identification of a method for ensuring that those theories were universally accepted as

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[16]   Ibid., at 258 et seq., 357 et seq.
[17]   Carl Schmitt, Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte, Deutscher Rechtsverlag, Berlin/Wien 1939.
[18]   Samuel P. Huntington, The Clash of Civilizations and the Remaking of World Order, Simon & Schuster, New York 1996.
[19]   Jeremy A. Rabkin, Why Sovereignty Matters?, AEI Press, Washington, DC, 1998.
[20]   Jack L. Goldsmith, Eric A. Posner, The Limits of International Law, Oxford University Press, Oxford/New York 2005.

true on the other.[21] Only a few years later, it was Thomas Hobbes who extended the individualistic paradigm, which was destined to become the distinctive pattern of modern philosophy, from the theory of knowledge to political philosophy.[22] More specifically, he put the centre of social order in the rights, interests and rational capacity of the individuals, so that public power was only justified if it aimed at the protection of individual rights and interests. To underline the individualistic character of the foundation of public power, the establishment of political and legal institutions endowed with authority was regarded, in the strand of modern political philosophy that began with Hobbes, as the result of a contract – mostly of fictitious nature – among those who were willing to come together in order to form a "body politic".

Hobbes is generally regarded as the second founding father, along with Bodin, of the modern concept of sovereignty. However, there is a significant difference between their ideas of sovereignty, which can substantially be traced back to opposite approaches with reference to the question of the origin of public power. In Bodin's view, the political community is conceived as an enlarged family; therefore, as according to the traditional patriarchal understanding of the family – not only in Bodin's times – the head of the family exercises his power on the basis of an alleged natural law, it is the very same law of nature that legitimates the authority of the sovereign. In both cases, power – as well as authority, which can be defined as the implementation of power – descends from above, i.e., from a supposedly self-evident order of nature, to the person who wields power, and from this to those who are expected to abide by his rules. A similar top-down approach also characterized for long time the Catholic political theology. As Francisco de Vitoria – one of the most significant exponents of Catholic political thought – specified in the first half of the sixteenth century, legitimate power is assumed to be transferred from God, its only original and supreme holder, to the mundane rulers.[23] Vitoria's interpretation may seem to be distant from our present-day sensibility; yet, a glimpse of the idea that sovereign authority is only legitimate when it respects the higher laws of God still reverberates in the contemporary notion of human dignity.[24] Indeed, if political power has to protect human dignity in order to obtain legitimacy, and the Catholic Church claims for itself the right to define what human dignity is, then the consequence cannot but be that the Church still maintains the pretension — albeit indirectly — of possessing the key to sovereign power and that the interpretation of the law of God should still influence the secular political and juridical order.

However, the currently most influential top-down interpretation of sovereign power has to be sought elsewhere, namely in what we can call the technocratic understanding of sovereignty. The idea that a specifically technocratic form of power can be identified was formulated for the first time by Max Weber, although he did not use the word "technocratic" to define it, but simply

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[21]   René Descartes, Discours de la Méthode (1637), Reclam, Stuttgart 2001 (English translation by John Veitch, Project Gutenberg, http://www.gutenberg.org/ebooks/59); René Descartes, Meditationes de Prima Philosophia (1641), Reclam, Stuttgart 1986 (English translation by John Cottingham: Meditations on First Philosophy, Cambridge University Press, Cambridge/New York 1996).

[22]   Thomas Hobbes, Elementa philosophica de Cive (1642), Johan. Jac. Flick 1782 (English translation by Richard Tuck and Michael Silverthorne: On the Citizen, Cambridge University Press, Cambridge/New York 1998); Thomas Hobbes, Leviathan, or the Matter, Form, and Power of a Commonwealth Ecclesiastical and Civil (1651), Clarendon Press, Oxford 1929.

[23]   Francisco de Vitoria, Relectio de potestate civili (1528), Question 1, Article 7, § 10, Question 1, Article 7, § 10, at 18, in: Francisco de Vitoria, Political Writings, Anthony Padgen and Jeremy Lawrance eds., Cambridge University Press, Cambridge/New York 2012, 1–44, at 18.

[24]   Christopher McCrudden (ed.), Understanding Human Dignity, The British Academy by Oxford University Press, Oxford 2013; Marta Cartabia, Andrea Simoncini (eds.), Pope Benedict XVI's Legal Thought: A Dialogue on the Foundation of Law, Cambridge University Press, Cambridge/New York 2015.

referred to it as the public power characterized by "rational" legitimacy.[25] The rationally legitimate power is typified, according to Weber, by an effective legal system in order to regulate social relations and to give predictability to interactions; an efficient bureaucracy with hierarchical structure; and, finally, the presumption that the holders of power and, in general, the members of the bureaucratic apparatus are endowed with better skills and superior knowledge. Thus, the identification with the political community by the citizens is only expressed through passive obedience to law and authority. As a result, insofar as the technocratic public power is vested with sovereignty, this latter is derived from a quality which is intrinsically possessed by the holders of power, thus falling from above on the submissive recipients of authoritative decisions, without the governed being actively involved in the decision-making process.

In all these three variants – be it justified by natural or divine law, or be it based on the assumption of a superior competence with which the power holders are presumably endowed – sovereignty is always legitimated top-down. In this sense, it is still consistent with the holistic paradigm of order. Yet, because Hobbes led the paradigmatic revolution from holism to individualism, also his notion of sovereignty had to be made fit for the new conceptual framework. In his view, the Commonwealth is not the original and axiologically highest entity in the ethical world, but rather a tool that humans give to themselves in order to achieve social stability. Thus, legitimacy of sovereign power is insofar ascending as it arises from the original freedom and self-reliance of the individuals who create the institutions of public power through an autonomous act of will. Through the foundational contract, they transfer their original rights – or at least part of them – to the hereby created authority, with the purpose of guaranteeing an adequate protection of the subjective entitlements on the basis of a bottom-up legitimation process. Thus, according to modern contractualism, sovereignty is legitimate only if it aims at safeguarding fundamental rights and is grounded on a freely and explicitly expressed people's consent.

Hobbes's turn to an individualistic understanding of order set the conditions for a deep-going redefinition of sovereignty. Nevertheless, the consequences of his revolutionary step did not become completely manifest in his work. In fact, from Hobbes's pessimistic perspective social order can be safeguarded only if the individuals give up all their rights, excluding the right to life protection and — very partially — the right to negative liberty as the freedom to pursue economic activities in order to achieve "happiness," yet only insofar as this does not jeopardize the guarantee of social peace and order.[26] Ultimately, Hobbes's bottom-up legitimated sovereignty ended up denying its original rationale, while becoming an unnatural and lastly self-deceiving instrument of absolutism. Yet, the seeds were sown and destined to germinate – while producing an offspring more coherent with the original purpose – for a period of time lasting from the end of the seventeenth century to the present days. Starting with John Locke's liberalism,[27] passing through Jean-Jacques Rousseau's passionate defence of democracy,[28] to temporarily end with the deliberative theories of the late twentieth century[29] – just to make some examples – the notion of sovereign

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[25] Max Weber, Wirtschaft und Gesellschaft, Mohr, Tübingen 1922, at 122 et seq. (English translation ed. by Guenther Roth and Claus Wittich: Economy and Society, University of California Press, Berkeley 1978, at 212 et seq.).

[26] Hobbes, De Cive (note 22), Part II, Chapter XIII, at 217 et seq. (English: at 142 et seq.); Hobbes, Leviathan (note 22), Chapter XVII, at 128 et seq.

[27] John Locke, Two Treatises on Government (1690), Yale University Press, New Haven/London 2003.

[28] Jean-Jacques Rousseau, Du contract social, ou principes du droit politique (1762), Garnier-Flammarion, Paris 1966 (English translation: The Social Contract, in: Rousseau, The Social Contract and the First and Second Discourses, Susan Dunn ed., Yale University Press, New Haven/London 2002, 149–254).

[29] John Rawls, A Theory of Justice (1971), Harvard University Press, Cambridge (MA), 1999; John Rawls, Political Liberalism (1993), Columbia University Press, New York 1996; Jürgen Habermas, Faktizität und Geltung. Beiträge

power that puts the individuals at the centre of order always relies on ascending or bottom-up legitimation. Insofar as the community of those who were entitled to provide the legitimation of public power was progressively extended to comprise all citizens, the idea of sovereign power was finally qualified as people's or popular sovereignty.

4. From Particularism to Universalism: The End of Sovereignty

Long before the transition from holism to individualism occurred, another paradigmatic revolution had changed the way in which social order was conceived. In this case, the claim affected did not regard the extension of order. According to the new approach, the well-ordered society was not assumed to be necessarily limited to the specific community any longer – with each individual community having its idiosyncratic and incommensurable internal order – but was rather believed to be capable, in principle, of including the whole humankind. By marking the transition from particularism to universalism, the first paradigmatic revolution sealed for the first time the birth of a new idea of order. Although the old paradigm managed to survive under different guises until the present day, the previous condition, according to which holistic particularism was the only way to conceive of the well-ordered society, had gone lost forever. However, while the first paradigmatic revolution reversed the claim regarding the extension of order, nothing changed with reference to the other contents of the paradigm: social order was still based on the assumption of an organic ontological fundament, and order had to be unitary. Therefore, due to its characteristics, the paradigm of order that emerged from the first paradigmatic revolution can be defined as holistic universalism.

The notion of a universal order was probably introduced for the first time in the history of thought by the Buddhist philosophy through the concept of dharma as the "natural order of the universe".[30] A couple of centuries later, the same turn towards universalism was taken in the Western world by the Stoic philosophy.[31] More specifically, Stoic universalism was based on three unprecedented assumptions. First, the whole world – both in its natural as well as in its social, political and legal dimension – is governed by a unique and, thus, universal logos as a principle of an all-encompassing rationality. Secondly, from this logos a nomos (law) is derived, which is no less universal and is assumed to shape all worldwide interactions between human beings according to rational principles. Thirdly, the universal nomos sets the framework for the nomoi (laws) of the individual polities, so that these are to be recognized as legitimate and valid only if they are not in contrast with the superior nomos of the world.

Stoicism was, in general, rather alien to the world, and so was also its cosmopolitan proposal. Yet, many elements of its conception were passed on to the nascent Christian philosophy: significantly, both the cosmopolitan idea of order and the concept of a universal natural reason – as well as of a natural law which is assumed to be based on it – were among them. In fact, since the idea of the cosmopolitan human community was made depending on the worldwide predomi-

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zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats, Suhrkamp, Frankfurt a. M. 1992 (English translation by William Rehg: Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy, The MIT Press, Cambridge (MA), 1996, 2nd ed.).

[30] Rebecca Redwood French, Mark A. Nathan (eds.), Buddhism and Law, Cambridge University Press, Cambridge/New York 2014, at 4.

[31] Johannes von Arnim, Stoicorum veterum fragmenta, Teubneri, Lipsiae 1905, Vol. I and Vol. III.

nance of only one religion, Christian universalism was flawed from the very outset. As a result, starting from the seventeenth century, Western supporters of universalism progressively cut the ties with its religious component, while trying to ground cosmopolitanism on purely rational justifications. However, regardless whether the arguments in favour of universalism were religious or not, the perspectives for the supporters of sovereignty under the dominance of the universalistic paradigm of order could not but be dire. Indeed, according to the Christian theology of the Middle Ages, even though it was acknowledged – in the most favourable cases – that "divine right ... does not annul human right,"[32] state sovereignty was ultimately reduced to almost nothing under the unlimited dominance of the papacy, which was assumed to possess not only the highest spiritual power but also the highest temporal authority.[33] The Catholic theology – which can be seen as the legitimate heir of its medieval predecessor – carried on largely the same view, albeit modernized through some adjustments. For instance, in the work of Francisco Suárez – arguably the most sophisticated and innovative product of early modern Catholic political theology – undisputed mundane authority was recognized to individual states, irrespective of them being Christian or not. Nevertheless, the holders of public power in all these states had to obey natural law, which – due to its tight connection to divine law – was subject to the binding interpretation of the Church.[34] On that basis, the pope had the right to directly depose a Christian king who had violated natural law, as well as to legitimate a military action against a non-Christian prince who had committed the same crime or had persecuted Christians, thereby hindering the spread of the Christian Gospel.[35] It is almost superfluous to underline the difference that separates, on this point, Suárez's view from Bodin's theory of sovereignty, in which no other authority is in charge of the interpretation of natural law but the mundane sovereign.

On the Protestant side of modern Christian thinking there was a well-grounded mistrust of political and religious universalism, which reminded, respectively, of imperial oppression and papist persecution. The result was that more room was given to the sovereignty of individual states. This option implied, however, that the only foundation for a worldwide order was located in the assumption of a universal validity of human reason.[36] While the idea of a cosmopolitan order was thereby made independent of the intrinsically discriminatory pretension of a worldwide authority under Christian rule, the turn to purely natural law as the basis of universalism also marked a step backwards inasmuch as it gave up on the political and legal formulation of the cosmopolis. Being conceived only in terms of general principles of natural law, the idea of world order remained a matter for "comforters",[37] while world constitutionalism, if properly understood, necessarily needs a clearly identifiable legal framework. The step to the establishment

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[32] Thomas Aquinas, Summa theologica [1265–1273], W. Benton-Encyclopedia Britannica, Chicago 1980, Part II, Section II, Question 12, Article 2.

[33] Thomas Aquinas, Political Writings, R. W. Dyson ed., Cambridge University press, Cambridge/New York 2004, at 278; Fieschi, Apparatus super quinque lib[ris] decr[etalium] et super decretalibus (ca. 1245), Lugduni 1535 (1st ed. 1477), Book II, Chapter II, para. 2.

[34] Francisco Suarez, De legibus, ac Deo legislatore (1612), in: Francisco Suarez, Selections from three Works, Clarendon Press, Oxford 1944, Book III, [Introduction], para. 2, at 361 et seq.; Book III, Chapter II, para. 6, at 376; Book III, Chapter IV, para. 7, at 387.

[35] Francisco Suárez, Defensio fidei catholicae et apostolicae adversus Anglicanae sectae errores (1613), in: Suarez, Selections from three Works (note 34), Book VI, Chapter IV, para. 15 et seq., at 718 et seq.

[36] Hugo Grotius, De Jure Belli ac Pacis (1625), English: The Rights of War and Peace, Richard Tuck ed., Liberty Fund, Indianapolis 2005; Samuel Pufendorf, De jure naturae et gentium libri octo (1672), complete English translation by Basil Kennet, Lichfield et al., Oxford 1703; partial English translation by Michael J. Seidler, in: Samuel Pufendorf, The Political Writings, Craig L. Carr ed., Oxford University Press, Oxford/New York 1994.

[37] Kant, Zum ewigen Frieden (note 2), at 210 (English: at 103).

of a cosmopolitan legal order – though rejecting, at the same time, any previous supraposition with divine law or religious authority – was taken by Kant. In particular, he introduced for the first time a tripartition of public law, in which the third part – going from the most specific to the most general and inclusive – is what he unequivocally defined as "cosmopolitan law" (jus cosmopoliticum).[38] Beside the law of the state – as the first part of his system of public law – and the law between states – or international law as the second part of it – cosmopolitan law included principles and rules that govern the interactions between human beings as such, regardless of their respective national belonging and citizenship.

Slightly more than a century after Kant's writings – and following a long period in which a renaissance of sovereignty under the aegis of nationalism had dominated the political stage – the apotheosis on the way to the legalization of universalism was reached in the work of Hans Kelsen. His unquestionably courageous proposal aimed at creating a radically monist legal system, in which international law – not with reference to its part comprising inter-state law, but to its component qualifying as supra-state law – was put, for the first time in the history of legal theory, at the apex of the hierarchy of norms. As a result, state law – even constitutional law – was authorized to govern social interaction only within the framework established by international law.[39] In doing so, Kelsen prevented any kind of conflict between national and international norms since supremacy was always recognized to the latter. As he openly admitted, his construction of the legal system was destined to end any serious pretension of sovereignty by the single states.[40] Indeed, from the viewpoint of Kelsen's pacifism, sovereignty is essentially an ideological instrument for the justification of political selfishness and aggression, thus unequivocally at odds with any serious idea of cosmopolitan order.[41] On the other hand, a thoroughly legalized and centralized order – like the one for which Kelsen pleaded – also has its downsides. In fact, Kant had already admonished that public power can develop into a "soulless despotism", when located far away from those who have to abide by its rules.[42] Furthermore, the notion of sovereignty not only symbolizes the self-reliant defiance by the individual political community against any prospect of a well-ordered worldwide society but also stands – if understood as citizens' sovereignty – for democratic self-government and for the values of freedom and justice which are enshrined into national constitutions.

5. From the Unitary to the Post-unitary Conception of Order: How to Reconcile Sovereignty with Global Responsibility

At this point, we seem to face an irresolvable dilemma: either we opt for the radical cosmopolitanism of a worldwide system of institutions and binding norms, with the consequence that we would

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[38] Ibid., at 203 (English: at 98 et seq.); Immanuel Kant, Die Metaphysik der Sitten (1797), in: Kant, Werkausgabe (note 2), Vol. VIII, 309–634, Part I/II, § 62, at 475 et seq. (English translation by Mary J. Gregor: The Metaphysics of Morals, Cambridge University Press, Cambridge/New York 1991, at 158 et seq.).

[39] Hans Kelsen, Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik, Deuticke, Leipzig/Wien 1934, at 147 et seq. (English translation from the Second German Edition of 1960 by Max Knight, University of California Press, Berkeley/Los Angeles 1967, at 336 et seq.); Hans Kelsen, Peace through Law, University of North Carolina Press, Chapel Hill 1944, at 35.

[40] Kelsen, Reine Rechtslehre (note 39), at 142 and 153 (English: at 342 et seq.).

[41] Hans Kelsen, Das Problem der Souveränität und die Theorie des Völkerrechts (1920), Scientia, Aalen 1981.

[42] Kant, Zum ewigen Frieden (note 2), at 225 (English: at 113).

nourish the hope – though distant – to foster universal justice and peace, but at the cost not only of pursuing an ideal that verges on a chimaera but also of putting at risk the principle of self-government and constitutional freedom. Or we prefer sovereignty, with the promise of political autonomy and constitutional freedom, but also with a substantial indifference towards the responsibility that we bear towards those humans who are not members of our political community. Yet, this responsibility is unquestionable, first, because we all share the same planet and the problems that affect it lastly touch us all; secondly, because we interact with fellow humans far beyond the borders of our nation – and all the more in times of globalized information and exchanges –; and, thirdly, decisions taken by a political community, in particular by the most powerful ones, may impact on the quality of life of individuals far beyond its borders.[43] A decisive help to break the stalemate was offered by the third radical change regarding the way in which the well-ordered society is understood.

The third paradigmatic revolution in the theories of order occurred just a few decades ago and involved what has been described before as the third element that is always present in a paradigm of order, namely the assertion concerning the unitary or non-unitary character of a well-ordered society. Regardless of whether they were particularistic or universalistic on the one hand, holistic or individualistic on the other, the paradigms of order before the third paradigmatic revolution were all characterized by a unitary idea of order. In other words, in all these previous paradigms, the institutional structure and the system of norms are considered "well-ordered" only if they are organized as a coherent, vertical and hierarchical unity, or as a pyramid in which conflicts between different institutions and norms have to be resolved by defining which institution or norm, respectively, has priority over the conflicting one. Instead, the third paradigmatic revolution has paved the way for an understanding of order in which the well-ordered society is conceived of as a polyarchic, horizontal and interconnected structure that reminds us more of a network than of a pyramid. In this social, political and legal configuration of interrelated decision-makers, conflicts of institutions and norms are not considered a dangerous threat for order. Rather, they can be operationalized in discursive procedures aiming at reaching consent and not at establishing – or re-establishing – hierarchy. In some implementations of the post-unitary conception of order a kind of superiority of certain norms or institutions remains; yet, this priority is not grounded in the capability of displaying hard power, but in the disposal of superior legitimacy resources.[44] On the basis of a conception of order according to which the coexistence of interacting and overlapping systems of institutions and norms is considered acceptable, if not even desirable, what was barely imaginable before becomes finally possible. Concretely, sovereignty can be maintained as a fundamental expression of the self-government of the political community, while global responsibility is reaffirmed at the same time. Against this theoretical background, however, sovereignty cannot be conceived as absolute any longer, but only as relative, in the sense that the affirmation of self-determination has always to be compatible with the obligations towards individuals who do not belong to the political community, but are nevertheless affected by its decisions.

Among the different patterns of order that emerged from the turn to a pluralist idea of the well-ordered society, the communicative paradigm provides the most useful organon for the re-definition of the notion of sovereignty. According to the fundamental assumption of the commu-

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[43]   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 Journal of International Law 217–257 (2014).

[44]   Sergio Dellavalle, Addressing Diversity in Post-unitary Theories of Order, 40 Oxford Journal of Legal Studies (2020), forthcoming.

nicative paradigm, society is made up of a lifeworld of intersubjective relations, which is character-ized by different forms of interaction.[45] Put differently, social life has a variety of dimensions, cor-responding to the diversity of our social needs – and each interaction has the task of developing one of those dimensions. In the broad context of society, many interactions (or forms of commu-nication) unfold, which have not only different aims – each of them related to the specific social need that the interaction is apt to satisfy – but also distinct contents of the discourses that shape and characterize those very same communications.[46] A quite significant category of social interac-tions, for instance, is expressed by discourses focusing on the clarification of the existential condi-tion of the individuals involved, on their cultural identity or religious beliefs. This kind of discourses cannot qualify as political because, even if all of us may be involved in some variant of them, the answers that are proposed in order to define the existential, cultural or religious identities of the individuals involved are not – and cannot – be shared by all members of the society. Indeed, common responses to the question about "who we are" cut across the social fabric, building communication communities which, even if utterly influential and important for the enhancement of our existential self-awareness, never overlap with the society in its entirety. As a result, the def-inition of sovereignty – which is insofar essentially political as it necessarily involves all members of the polis – should not be mingled with questions concerning cultural or religious identity.

On the contrary, political interaction affects all individuals being part of the social fabric, re-gardless of how broad this fabric is, and therefore impacts on the notion of sovereignty. Every kind of interaction needs rules in order to make communication well-ordered, i.e., peaceful, coopera-tive and effective. Yet, the rules that govern the political sphere – unlike those that lie at the basis of the communication about "who we are" – are positive and binding laws; furthermore, insofar as the norms regulate matters of common concern, the corpus juris that comprises them is referred to as public law. Two forms of political interaction can be identified, both of them focusing on the question about "how we should respond to the questions of common concern". The first refers to discourses addressing the organization of public life within a limited territory and with reference to the community of individuals living in that territory or to those individuals who, even though not living there, maintain nevertheless a special relationship to the territory and to its community. This is what we can call a national political community, which is here understood as a "nation of citizens", thus being devoid – unlike the interpretation described in a former section –[47] of any ethnic connotation.[48] The questions addressed in the national political discourse should not touch on beliefs or the existential search for the meaning of individual life. Rather, in order to include in-to the discourse all citizens of the national political community, the questions must have a rather practical content, being limited to issues like the distribution of resources, the organization of the social subsystems and the form of government. Consequently, the identity forged by the common interaction concerning the question on "how to respond to questions of common concern within the borders of a limited political community" is not substantive, in the sense that it does not aim

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[45]   Karl-Otto Apel, Transformation der Philosophie, Suhrkamp, Frankfurt a. M. 1973; Karl-Otto Apel, Diskurs und Verantwortung, Suhrkamp, Frankfurt a. M. 1990; Karl-Otto Apel, Selected Essays, Eduardo Mendieta ed., Human-ities Press, Atlantic Highlands (NJ) 1996; Jürgen Habermas, Theorie des kommunikativen Handelns, Suhrkamp, Frankfurt a. M. 1981 (English translation by Thomas McCarthy: The Theory of Communicative Action, Beacon Press, Boston 1987, 3rd ed., Vol. II).

[46]   Jürgen Habermas, Erläuterungen zur Diskursethik, Suhrkamp, Frankfurt a. M. 1991 (English translation by Ciaran Cronin: Justification and Application, MIT Press, Cambridge (MA)/London 2001, first published 1993).

[47]   See note 9 et seq.

[48]   Jürgen Habermas, Die postnationale Konstellation, Suhrkamp, Frankfurt a. M. 1998 (English translation by Max Pensky: The Postnational Constellation, MIT Press, Cambridge (MA)/London 2001).

at touching on a deep existential dimension. Rather, it is formal inasmuch as it is centred around the interiorization of the rules of political communication. Within the formal framework of political rules, each existential, cultural or religious community can find the proper space to thrive and cultivate its interests.

The second form of political interaction refers to the fact that individuals also meet and interact with each other outside the borders of single states, regardless of their belonging to a specific political community. This level of interaction is also governed by law, more precisely by the corpus juris of cosmopolitan law, consisting of those principles and rules that guarantee a peaceful and cooperative interaction between humans within the most general context of communication, namely beyond the condition of being citizens of an individual state. Embedded in these rules and principles is the fundamental recognition that we owe to every human being as the consequence of the universal capacity to communicate. The discourse of cosmopolitan interaction – shaped by cosmopolitan law – addresses the question on "how to respond to questions of common concern to the whole humankind". In their systematics of public law, the exponents of the communicative paradigm of order – and most explicitly Jürgen Habermas – take up Kant's tripartition,[49] but reinterpret it from an intersubjective perspective.[50] Along the path of their groundbreaking predecessor, domestic public law regulates, at the first level, the interactions between citizens of each single political community as well as between these citizens and the institutions of the same polity. The use of communicative reason and the application of its normative prerequisites guarantee, here, that decisions are taken through deliberative processes based on the reflexive involvement of the citizens. Thus, legitimate sovereignty — according to the communicative paradigm — necessarily takes a "bottom-up" form. At the second level, international public law addresses the relations between citizens of different states insofar as they are primarily regarded as citizens of the state; therefore, the relations between individuals which are here the object of regulation are processed through the form of relations between states. Lastly, at the third level, cosmopolitan law is applied to the direct interactions between individuals from different states as well as between individuals and the states of which they are not citizens.

As regards the legal system, the communicative paradigm of order paves the way to a conception in which the manifold articulation of the legal system is fully recognized, but in a way which is quite different from the analysis and vision of the exponents of radical legal pluralism.[51] In this latter approach, the affirmation of pluralism leads to the recognition of incommensurable legal systems – each of them with its own rationality and raison d'être – and to the rejection of any kind of overarching rational principle or institutional structure that should unite, to a certain extent, all of them. However, the way in which the legal system is understood by the supporters of radical legal pluralism risks bringing about both a weakening of the normativity of the law – due to the blurring of the distinction between "laws" and "norms" – and a substantial neglect towards the question of legitimacy. On the contrary, the communicative paradigm embeds plurality into an

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49 See note 38.

50 Jürgen Habermas, Der gespaltene Westen, Suhrkamp, Frankfurt a. M. 2001 (English translation by Ciaran Cronin: The Divided West, Polity Press, Cambridge 2006); Jürgen Habermas, Eine politische Verfassung für die pluralistische Weltgesellschaft?, 38 Kritische Justiz 222 (2005); Jürgen Habermas, Kommunikative Rationalität und grenzüberschreitende Politik: eine Replik, in: in: Peter Niesen & Benjamin Herborth (eds.), Anarchie der kommunikativen Freiheit, Suhrkamp, Frankfurt a. M. 2007, at 439 et seq.; Jürgen Habermas, Konstitutionalisierung des Völkerrechts und die Legitimationsprobleme einer verfassten Weltgemeinschaft, in: Winfried Brugger, Ulfried Neumann & Stephan Kirste (eds.), Rechtsphilosophie im 21. Jahrhundert, Suhrkamp, Frankfurt a. M. 2008, at 368 et seq.

51 Nico Krisch, Beyond Constitutionalism, Oxford University Press, Oxford/New York 2010; Paul Schiff Berman, Global Legal Pluralism, Cambridge University Press, Cambridge/New York 2012.

all-encompassing structure, held together by the implementation of communicative reason in all dimensions of society and, therefore, also in all legal subsystems. As a post-unitary, non-hierarchical and non-pyramidal whole, the legal system of the communicative paradigm takes the form of a constitutionalism beyond the borders of the nation state, the cosmopolitan dimension of which, due to its acknowledgment of diversity, is quite different from the old ideas of the "world state" or of the civitas maxima. Furthermore, the communicative paradigm of order deals thoroughly with the question of how highest standards of democratic legitimacy can be maintained in a post-unitary and postnational constellation, for instance by developing solutions based on the notion of "dual democracy".[52]

It has already been pointed out that the communicative idea of social order, with its specific merging of plurality with a non-hierarchical but all-encompassing normative and institutional structure, is heavily relying on a distinctive concept of rationality. In fact, being no exception to the other patterns of order, the communicative paradigm is grounded on a solid epistemological foundation, which is applied in both its theoretical and practical domains. Yet, unlike the strand of holistic particularism that employs the rational choice theory to justify the allegedly superior rationality of egoistic behaviour,[53] communicative reason first regards a cooperative approach as the most suitable way to guarantee a long-term advantage and a Pareto optimal solution. Secondly, in contrast to another form of holistic particularism,[54] rationality is not embedded in national language or ethnicity. Thirdly, it does not make ontological assumptions either, like the non-falsifiable, natural-law-based presupposition of the factual existence – and not of the possibility – of a humanity with shared values and principles, which has exercised so much influence on the contemporary criticism of sovereignty and on the theory of the constitutionalization of international law.[55] In a different vein, according to Habermas, the rationality of communication depends on three conditions. From an objective perspective, discursive communication can achieve its goal only if all those involved mutually presuppose that the assertions are true (in the sense that the propositions refer to real situations or facts). Furthermore, from a subjective perspective, the speakers mutually assume that they are acting truthfully (in the sense that they are committed to fair-minded purposes and are sincerely persuaded that their assertions meet the conditions for truth). Finally, from an intersubjective perspective, the speakers interact according to the principles of rightness (in the sense that they accept that their assertions have to meet the criteria for a general and mutual acknowledgement by all participants in the communication).[56]

The concept of rationality of the communicative paradigm has five relevant consequences for the present inquiry. First, because meaningful communication is always depending on the mutual recognition by the members of the communication community without authoritative interfer-

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52 Anne Peters, Dual Democracy, in: Jan Klabbers, Anne Peters & Geir Ulfstein (eds.), The Constitutionalization of International Law, Oxford University Press, Oxford/New York 2009, 263.

53 See note 20.

54 See note 9 et seq.

55 Christian Tomuschat. International Law: Ensuring the Survival of Mankind on the Eve of a New Century, in: "Collected Courses of The Hague Academy of International Law", vol. 281, Nijhoff, The Hague 1999; Mehrdad Payandeh, Internationales Gemeinschaftsrecht, Springer, Heidelberg/New York 2010.

56 Jürgen Habermas, Nachmetaphysisches Denken, Suhrkamp, Frankfurt a. M. 1988 (English translation by William Mark Hohengarten: Postmetaphysical Thinking, Polity Press, Cambridge 1992); Jürgen Habermas, Vorstudien und Ergänzungen zur Theorie des kommunikativen Handelns, Suhrkamp, Frankfurt a. M. 1984 (English translation by Barbara Fultner: On the Pragmatics of Social Interaction, MIT Press, Cambridge (MA)/London 2001); Jürgen Habermas, Wahrheit und Rechtfertigung, Suhrkamp, Frankfurt a. M. 1999 (English translation by Barbara Fultner: Truth and Justification, Polity Press, Cambridge 2003).

ence from outside, the communicative community itself has to be defined as self-determined and thus sovereign. Secondly, since decisions meant to have a truth content are to be taken on the basis of a democratic exchange of arguments and must be approved by the communication community, legitimacy is unquestionably ascending or bottom-up. Thirdly, being highly formal, the criteria of the rational discourse inherently strive for universalization. Put differently, since the normative core of communication cannot be connected to any kind of selfish or ethnic-centred priority, the well-ordered society must have a worldwide range. Fourthly, though being essentially universalistic, the well-ordered society built around the communicative paradigm does not rule out the legitimacy and partial autonomy of the domestic dimension either. Fifthly, the tensions between domestic sovereignty and cosmopolitan responsibility are not resolved by recurring to hierarchy, but through the dialogue between the different dimensions of social life.[57]

Following the communicative paradigm, every one of us participates in a number of different interactions, while maintaining his or her personal and distinctive integrity. This implies a significant novelty as regards the relation between the national and the cosmopolitan communities. Indeed, according to the previously analysed paradigms of order, the individual is always seen either as belonging to a limited and particularistic polity, or as being essentially part of the worldwide community of humankind. Instead, if we consider the issue from the viewpoint of the communicative paradigm, each individual is – at the same time and without irresolvable contradictions – a citizen of a specific national society and a member of the universal community of humankind. Therefore, as citizens of a national community, the individuals take part in decision-making-processes that foster domestic interests. But, since they are also members of the global communication community, domestic decisions must be weighed against the obligations that we have towards our fellow humans on a global scale. Imbuing all dimensions of social life, communicative rationality provides the organon to deal with the frictions that may arise from the twofold loyalties on the basis of mutual recognition and according to the principle of the best argument.

6.   The Blueprint of a New Concept of Sovereignty

Sovereignty is insofar a value as it contributes to provide a good that is essential to social life. The good to whose strengthening sovereignty always gave a significant support is social order. In fact, no doubts can be raised on the central importance of sovereignty for the shaping of what is identified as a well-ordered society. Equally indisputable is that its notion was initially conceived to support an idea of social order that was limited in its extension, centred on the homogeneity of the political community as well as rather dismissive of individual rights, and constructed as a hierarchical pyramid of institutions and norms. In continuity with the past, sovereignty is still often used to support the contemporary versions of this understanding of social order. Yet, during the centuries the notion of the well-ordered society has changed its shape, while new paradigms of order have been developed in contrast with the original holistic particularism in which sovereignty was embedded.

Western Modern Ages introduced a reversal in how the ontological basis of social order was traditionally understood. According to political contractualism and to the many theories that were inspired by it, the centerpoint of social order is not the homogeneous community, but the individ-

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[57]   Sergio Dellavalle, Squaring the Circle: How the Right to Refuge Can Be Reconciled with the Right to Political Identity, 16 International Journal of Constitutional Law 776 (2018).

ual. As a result, the establishment of public power as well as the decisions taken by it are justified only if they are legitimated bottom-up, i.e., by the citizens. The impact on the notion of sovereignty led to its transformation into a conceptual instrument for the support of an ascending vision of political authority. Following the transition to people's sovereignty, public power can arguably be regarded as legitimately sovereign only under the condition that it is confirmed by the reflexive will of the governed. Another paradigmatic revolution, which happened much earlier, brought about the idea that social order can be extended to a cosmopolitan range. Since sovereignty is intrinsically linked to the organization of public power within the borders of an identifiable political community, cosmopolitanism represented insofar a mortal threat to the idea of sovereign authority as it blurred the contours of the individual community, up to the utterly denial of its very existence. The possibility of a compromise between the sovereign identity of the individual political community and the responsibility that derives from the common destiny of humankind was reintroduced by the most recent paradigmatic revolution, which provided the theoretical means for a pluralist, but nonetheless coherent vision of public power. On the basis of the communicative paradigm of order, the defence of the political identity – and, therefore, of its sovereignty – can coexist with the commitment to solidarity towards the cosmopolitan community of human beings. Even if we admit that the obligations that arise from being a citizen of a nation state are necessarily "thicker" than those that we have towards all other fellow humans, the two levels do not exclude, but rather reinforce each other.

To the extent that those changes in the understanding of order can arguably be considered an improvement, sovereignty is still to be regarded as a value only if it is proved that its concept can be adapted to the progressive reinterpretation of the well-ordered society. This leads to the conclusion that sovereignty, to have a value in our times, must be given a fundamentally different meaning than originally intended. Indeed, sovereignty – as it was framed by Bodin – meant nothing more than the assertion that public power does not have to recognize any superior or equivalent power in its domain. To the extent that the question of legitimacy was addressed, Bodin was content to draw it from natural law. Nor has the position of the supporters of the traditional concept of sovereignty much changed in recent times. Yet, the paradigmatic revolution from holism to individualism made clear that the legitimation of public power by the citizens matters, so that sovereignty can be accepted only if it comes from the people. Furthermore, full legitimacy is exclusively given under the condition that all aspects of the acting and legitimating individuals are brought into play. In other words, if the dimension of the individuals as citizens of a specific political community is realized through their participation in the national decision-making-processes, their no less essential facet as members of the community of humankind has to be implemented through the responsibility that the sovereign polity shows towards the "others". Drawing the strands together, an updated and normatively upgraded notion of sovereignty means that a political power qualifies as sovereign if it is legitimated by the citizens and, while keeping in mind the interests of the polity, also acts as a "trustee of humanity".[58]

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[58]   Eyal Benvenisti, Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders, in: 107 The American Journal of International Law 295 (2013).