Taming Sovereignty

by Sergio Dellavalle[*]

1.   The Overcoming of the Sovereign Monster

After the medieval communitas christiana dissolved and the biased and sometimes openly hypocritical project of a Christian universalism was dismissed, the notion of sovereignty became the beacon of the Westphalian setup of the Western world. In view of the overwhelming power of sovereignty, 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 the projects—in particular those penned by William Penn[1] and Immanuel Kant[2]—by far preceded later developments 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 nineteenth century's rise in nationalism. As a result, sovereignty has been one of the predominant factors—if not the most important element of all—on the Western political stage in the last two centuries. From there, it has increasingly expanded its influence on non-Western countries, too.
Sovereignty, however, is not only powerful but also dangerous. In fact, the state has often been perceived as a "cold monster" because of its claim to unconstrained sovereignty: if public power does not recognise any factual limitation, then it can easily transform its own citizens into passive subjects without rights or autonomy, oppress other political communities and deny any obligation towards their members. If we want to overcome the potential monster-like quality of public power, its traditional understanding has thus to be transmuted into a benign form of social, political and legal order, which implies what we can call the taming of sovereignty. On closer inspection, sovereign public power exerts its potentially freedom-threatening activity on two levels: the internal dimension, in which it can curtail the entitlements of the social community for whose political organisation it is responsible; and the external dimension, in which public power claims the right—precisely because of its unfettered sovereignty—to wage war, occupy and exploit foreign territories ex jure imperii, as well as to ignore the fate of foreign populations. As a result of the twofold menace that grows out of the historically established idea of sovereignty, the conversion of its usual understanding into a

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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*, ed. By Wilhelm Weischedel, 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).

benign concept is also characterised by two stages: one focused on the democratisation of sovereignty in the internal domain of the state, and the other concerning its redefinition to make it compatible with international or cosmopolitan obligations.

Taming sovereignty amounts to no less than a profound change in the way in which the fundamental patterns of social order are understood. Furthermore, since this reconceptualisation impacts, at the same time, two dimensions of social and political life—one that is internal to the individual political community, and another that transcends it—we can reasonably assume from the outset that it must entail more than just one paradigmatic revolution. Yet, what is the conceptual pattern that lies at the basis of the idea of unconstrained sovereignty? In addition, what are the paradigmatic revolutions that are necessary to tame sovereign public power? To better understand the question, I introduce in my analysis the theory of the so-called *paradigms of order*,[3] whose conceptual framework is briefly described in Section 2. In a further step, I focus on the traditional concept of sovereignty and on the paradigm of order that supports it (Section 3.). The two following Sections are then dedicated to the paradigmatic revolutions that were— and to some extent still are—necessary to conceive a sovereignty which is, at the same time, democratic (Section 4) and open to cosmopolitanism (Section 5). Some final remarks about the conceptual conditions to meet for laying down a new idea of sovereignty will conclude the inquiry (Section 6).

2.   The Paradigms of Order

Little doubt can be raised to the fact that no society can exist without some form of social order. Indeed, order is an essential component of social life. More specifically, we can maintain that a society is well-ordered when it is ruled by individually accepted, collectively shared and functionally effective norms. Those norms have three distinct tasks to fulfil. First, they make interactions among the members of the social community predictable. Second, conflicts are conveyed into procedures that make their peaceful settlement possible, thus preventing disruptive consequences for social cohesion. Third, rules guarantee a sufficient level of cooperation amongst 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, a significant majority of them—subjectively consider the rules justified and substantially beneficial.

Though necessary in general, social order takes, in particular, quite different forms. In fact, we can identify a certain number of distinct understandings of how the society should be organised 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

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[3] Sergio Dellavalle, *Paradigms of Social Order*, Palgrave Macmillan, London/New York 2021.

specify the conditions for a society to be considered well-ordered. 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 extent 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 of humankind? The second claim regards 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 placed second. Turning the priority upside down, 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 of whether the rules of a society, for it to be well-ordered, need to be strictly consistent with each other and hierarchically organised, or order can also be conceived as a plurality of normative systems that overlap and dialogically interact with one another.

All paradigms of order change over time to adapt to new social situations, so that each one of them has developed distinct variants. However, sometimes the conditions of social life go through processes of transformation which are so far-reaching that the concepts that characterise the established paradigms no longer fulfil the requirements for a justifiable idea of order. In those cases, a so-called *paradigmatic revolution* takes place. As a result, an innovative 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. An interesting feature distinguishes the paradigms of social order from those of natural sciences: while the latter tend to be completely replaced when a paradigmatic revolution occurs and to never reappear again—or, if they reemerge, they do so on the basis of a conceptual framework that barely has anything in common with its predecessor—the paradigms of social order never die. In other words, each new paradigm introduces an unprecedented view of social order, but the old one(s) is (are) still there and, after a more or less long period of decline, can be rediscovered with some adjustments to make it (them) suitable to meet the latest challenges.

3.   The Traditional Concept of Sovereignty and Its Current Variants

If considered from the point of view of the theory of the paradigms of order, the traditional idea of sovereignty perfectly mirrors the most ancient Western pattern of order. According to the first paradigm of order, 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, sovereignty's affinity to particularistic holism becomes clear if we consider how the concept was framed 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.[4] Accordingly, holders of "absolute and perpetual" sovereign power do not admit any horizontal interference by 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.[5] In fact, holders of sovereign authority are granted the right to interpret the supra-positive norms in complete autonomy, i.e., without any secular or ecclesiastic control.

Second, 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.[6] According to this conception, the organisational 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. Third, 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.[7]

As one of the most distinctive formulations of the holistic-particularistic paradigm of order, sovereignty in its traditional meaning is still a constant presence in the political debate. We could say that it is even more so today than in previous decades, which clearly hints at a resurgence of the old view—a phenomenon that is not untypical of how the paradigms of social order evolve over time. More specifically, we can identify four main contemporary variants of the holistic-particularistic paradigm. Each of them points to one specific aspect of holistic-particularistic rationality and all still regard sovereignty as a crucial component of any well-ordered social, political and legal community. A first present-day variant of holistic particularism holds that the origin of public power lies in the apodictic assertion of will made by a sovereign social actor firmly rooted in the real world.[8] Sovereignty is here viewed as essential to social, political, and legal order because it is assumed that the rationality that underpins order necessarily requires free and firm acts of political will on the part of an unconstrained power. As a result, a self-reliant entity constitutes itself precisely by performing the first and most

[4] 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).
[5] Ibid., Book I, Chapter VIII, at 91 et seq.
[6] Ibid., Book I, Chapter I, at 1.
[7] Ibid., Book I, Chapter VIII, at 98 et seq.
[8] Martin Loughlin, *Foundations of Public Law*, Oxford University Press, Oxford/New York 2010, at 216

fundamental political act, namely the creation of a sovereign constitutional framework for the polity.[9]

The second strand of contemporary holistic particularism—which has been particularly developed within the context of German constitutional theory—focuses on the national identity of the people (*Volk*) as the source of the legitimacy of public power. 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,"[10] which are all independent of individual decision or preference[11] and are assumed to forge the members of the community into a "community of destiny".[12] Others, like Dieter Grimm, rather point at linguistic unity as the glue that holds the community together and makes meaningful communication possible.[13] Yet, regardless of which factor is more stressed as the fundament of the community's identity, 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.[14]

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 organising the "friends" in order to prepare for the existential struggle against the external "enemies". Under these circumstances, 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.[15] However, some distinctive elements of his theory can also be detected, 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",[16] and Huntington goes so far as to say that the "other"

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[9] Ibid., at 208 et seq.

[10] 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.

[11] Paul Kirchhof, 'Der deutsche Staat im Prozess der europäischen Integration', in: Isensee/Kirchhof (note 10), at 869.

[12] Isensee (note 10), at 634.

[13] Dieter Grimm, 'Braucht Europa eine Verfasssung?', 50 JuristenZeitung (1995) 581–591.

[14] Dieter Grimm, 'The Constitution in the Process of Denationalization', 12 *Constellations* (2005) 447–463.

[15] Carl Schmitt, *Der Begriff des Politischen* (1932), Duncker & Humblot, Berlin 1963, pp. 20 ff. (English transl. by George Schwab, The University of Chicago Press, Chicago/London 2007, pp. 25 ff.)

[16] Samuel P. Huntington, *Who Are We? The Challenges to America's National Identity*, Simon & Schuster, New York 2004, pp 24 ff.

has to be explicitly perceived as an "enemy".[17] Second, he states that the most relevant geopolitical division line in times of globalisation is not the traditional nation any longer, but a much larger entity, namely the "civilisation", which is grounded—quite like Schmitt's "large-range-order" hegemonic powers[18]—not on many unifying elements, as it was in the traditional concept of the nation, but just on a limited number of common features, or even on just one of them. The role that race played in Schmitt's thought is taken up, in Huntington's work, by culture and, in particular, religion.[19]

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.[20] To strengthen scepticism concerning the normative quality of international law, Jack Goldsmith and Eric Posner applied the epistemological framework of rational choice to legal theory.[21] Following the rational choice assumption that selfishness is the inevitable outcome of rational behaviour, a political community would act rationally—i.e., it would increase its payoffs—by not binding itself to supra-state rules, or, in the case that it decides to accept, nonetheless, supra-state obligations, it does so on the condition that these rules are at the service of its immediate interests. From this perspective, selfish policies and the upholding of 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.

4.   The Democratisation of Sovereignty

The current variants of the idea of an undisputed sovereignty are clearly different from one another and each of them is characterised by its own weaknesses. Nevertheless, what is important here is that the main assumptions that distinguish the holistic-particularistic paradigm of order are central to all of them. However, holistic particularism did not remain unchallenged, and the paradigmatic revolutions, which brought about a temporary decline of the holistic-particularistic paradigm, also triggered the twofold taming of sovereignty. As for the first step of this taming, namely the transition to a bottom-up understanding of public power,[22] this can be led back to the paradigmatic revolution that affected the claim

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[17] Ibid., pp. 258 ff., 357 ff.

[18] Carl Schmitt, Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte, Deutscher Rechtsverlag, Berlin/Wien 1939.

[19] Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order*, Simon & Schuster, New York 1996.

[20] Jeremy A. Rabkin, *Why Sovereignty Matters*, AEI Press, Washington, DC, 1998.

[21] Jack L. Goldsmith, Eric A. Posner, *The Limits of International Law*, Oxford University Press, Oxford/New York 2005.

[22] This assertion does not imply that the current variants of the traditional idea of sovereignty reject any form of popular participation. The problem consists rather in the fact that they tend to interpret the "people" as something intrinsically unitary, so that the main task of the sovereign power is to be seen in its capacity to become the undisputed and immediate "voice of the people", while the real participation of the stakeholders is ultimately secondary. It is quite superfluous to say that democracy, on the contrary, is precisely centred on

regarding the ontological basis of social order. [23] 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 true* on the other.[24] 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.[25] More specifically, he put the centre of social order in the rights, interests and rational capacity of 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 the head of the family exercises his power on the basis of an alleged natural law according to the traditional patriarchal understanding of the family, 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 natural order, to the person who wields power, and from there to those who are expected to abide by his rules. A similar top-down approach also characterised, for a long time, 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

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that participation. As a result, the danger of a populist or autocratic drift seems to be coessential not only to the old concept of sovereignty but also to its contemporary versions.

[23] Historically, as we will see in the next Section, this was not the first paradigmatic revolution. Nevertheless, it is the first one I refer to in my analysis for the simple reason that, when it appeared, sovereignty was the dominant form of the holistic-particularistic paradigm of order. Therefore, the transition to the individualistic paradigm was also the first challenge to which the idea of sovereignty was explicitly exposed.

[24] 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).

[25] 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.

from God, its only original and supreme holder, to the mundane rulers.[26] 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.[27] 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—that it possesses the key to sovereign power and that its interpretation of the law of God should still influence the secular political and legal 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 referred to it as the public power characterised by "rational" legitimacy.[28] 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; by an efficient bureaucracy with a hierarchical structure; and, finally, by 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, identification of the citizens with the political community 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.

Be sovereignty 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, in all these three variants sovereign power 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, his notion of sovereignty also 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 *ascending* insofar 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

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

[27] 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.

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

contract, they transfer their original rights—or at least part of them—to the authority created hereby, 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-seated 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 protection of life 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 jeopardise the guarantee of social peace and order. [29] Ultimately, Hobbes's bottom-up-legitimated sovereignty ended up denying its original rationale, while becoming an unnatural and ultimately 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 lasting from the end of the seventeenth century to the present days. Starting with John Locke's liberalism,[30] passing through Jean-Jacques Rousseau's passionate defence of democracy,[31] to temporarily end with the deliberative theories of the late twentieth century[32]—just to take some examples—the notion of sovereign 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*.

5. Sovereignty and Cosmopolitanism

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 no longer assumed to be limited to the specific community, with each individual community having its idiosyncratic and incommensurable internal order, but was rather believed to be capable, in

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[29] Hobbes, De Cive (note 25), Part II, Chapter XIII, pp. 217 ff. (English: pp. 142 ff.); Hobbes, Leviathan (note 25), Chapter XVII, pp. 128 ff..

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

[31] 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).

[32] 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 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.).

principle, of including the whole of 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, was 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".[33] A couple of centuries later, the same turn towards universalism was taken in the Western world by the Stoic philosophy.[34] 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. Second, 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. Third, the universal *nomos* sets the framework for the *nomoi* (laws) of the individual polities, so that these are to be recognised as legitimate and valid only if they do not conflict with the superior *nomos* of the world.

Stoicism was, in general, rather alien to the world, and so also was 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 dependent on the worldwide predominance 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 of 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,"[35] state sovereignty was ultimately reduced to almost nothing under the unlimited dominance of the papacy, which was assumed to possess not only the highest

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

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

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

spiritual power but also the highest temporal authority. [36] Catholic theology, which can be seen as the legitimate heir of its medieval predecessor, carried on largely the same view, albeit modernised 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 recognised 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 delivered by the Church. [37] On that basis, the pope had the right to directly depose a Christian king who had violated natural law, as well as to legitimate 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. [38] 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 authority other than the mundane sovereign is in charge of the interpretation of natural law.

On the Protestant side of modern Christian thinking there was a well-grounded mistrust of political and religious universalism, which recalled, respectively, 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 the universal validity of human reason. [39] 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", [40] while world constitutionalism, if properly understood, necessarily needs a clearly identifiable legal framework. The step to the establishment of a cosmopolitan *legal* order—though rejecting, at the same time, any previous overlapping 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

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

[37] 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, p. 387.

[38] Francisco Suárez, 'Defensio fidei catholicae et apostolicae adversus Anglicanae sectae errores' (1613), in: Suarez, *Selections from three Works* (note 37), Book VI, Chapter IV, para. 15 ff., pp. 718 ff.

[39] 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.

[40] Kant, 'Zum ewigen Frieden' (note 2), p. 210 (English: p. 103).

he unequivocally defined as "cosmopolitan law" (*jus cosmopoliticum*).[41] 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 to 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 legalisation 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 the part of it that involved inter-state law, but to the part considered supra-state law—was placed, 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 authorised to govern social interaction only within the framework established by international law.[42] In doing so, Kelsen prevented any kind of conflict between national and international norms, since supremacy was always associated with the latter. As he openly admitted, his construction of the legal system was designed to end any serious pretension to sovereignty by the single states.[43] 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.[44] On the other hand, a thoroughly legalised and centralised 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.[45] Furthermore, the notion of sovereignty not only symbolises self-reliant defiance by an 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.

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 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 the constitutional guarantee of fundamental rights, but also substantially indifferent to the responsibility that we bear towards those humans

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

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

[43] Kelsen, *Reine Rechtslehre* (note 42), at 142 and 153 (English: at 342 et seq.).

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

[45] Kant, 'Zum ewigen Frieden' (note 2), p. 225 (English: p. 113).

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 ultimately touch us all; second, because we interact with fellow humans far beyond the borders of our nation, and all the more in times of globalised information and exchanges; and, third, decisions taken by a political community, in particular by the most powerful ones, may impact the quality of life of individuals far beyond its borders.[46] 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, paradigms of order before the third paradigmatic revolution were all characterised 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 organised 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 paved the way for an understanding of order in which the well-ordered society is conceived 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 to order. Rather, they can be operationalised 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.[47] 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 can no longer be conceived as *absolute*, but only as *relative*, in the sense that the affirmation of self-determination has always to be compatible with obligations towards individuals who do not belong to the political community, but are nevertheless affected by its decisions.

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[46] 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* (2014) 217–257.

[47] Sergio Dellavalle, 'Addressing Diversity in Post-unitary Theories of Order', 40 *Oxford Journal of Legal Studies* (2020) 347–376.

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 redefining the notion of sovereignty. According to the fundamental assumption of the communicative paradigm, society is made up of a *lifeworld of intersubjective relations*, which is characterised by *different forms of interaction*.[48] Put differently, social life has a variety of dimensions, corresponding 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 communication) 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 characterise those very same communications.[49] A quite significant category of social interactions, for instance, is expressed by discourses focusing on clarifying the existential condition of the individuals involved, on their cultural identity or religious beliefs. Discourses of this kind 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 of "who we are" cut across the social fabric, building communication communities which, even if utterly influential and important in enhancing our existential self-awareness, never overlap with the society in its entirety. As a result, the definition of sovereignty—which is essentially political in that 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, regardless of how broad this fabric is, and therefore impacts the notion of sovereignty. Every kind of interaction needs rules in order to make communication well-ordered, i.e., peaceful, cooperative 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 of "how we should respond to the questions of common concern". The first refers to discourses addressing the organisation of public life within a limited territory and with reference to the community of individuals living in that territory or to those individuals who, despite 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

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[48] 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., Humanities 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).

[49] 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).

described in a former section[50]—of any ethnic connotation.[51] 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 be included in 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 organisation of the social subsystems and the form of government. Consequently, the identity forged by the common interaction concerning the question of "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 to touch on a deep existential dimension. Rather, it is formal inasmuch as it is centred around the interiorisation 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 which 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 of "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,[52] but reinterpret it from an intersubjective perspective.[53] 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 interactions 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

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[50] See note 10 et seq.

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

[52] See note 41.

[53] 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* (2005) 222–247; Jürgen Habermas, 'Kommunikative Rationalität und grenzüberschreitende Politik: eine Replik', in: Peter Niesen & Benjamin Herborth (eds.), *Anarchie der kommunikativen Freiheit*, Suhrkamp, Frankfurt a. M. 2007, pp. 439 ff.; 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, pp. 368 ff.

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 articulations of the legal system are fully recognised, but in a way which is quite different from the analysis and vision of the exponents of radical legal pluralism.[54] 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, to a certain extent, unite 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. In contrast, the communicative paradigm embeds plurality into an 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*. Within this framework, national sovereignty still plays a significant role, although only a *relative* and not an *absolute* one, in the sense that national sovereign powers have to recognise their obligation towards the worldwide community of humankind. Furthermore, the communicative paradigm of order deals thoroughly with the question of how the highest standards of democratic legitimacy can be maintained in a post-unitary and post-national constellation; for instance, by developing solutions based on the notion of "dual democracy".[55]

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 reliant 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,[56] communicative reason first regards a cooperative approach as the most suitable way to guarantee a long-term advantage and a Pareto optimal solution. Second, in contrast to another form of holistic particularism,[57] rationality is not embedded in national language or ethnicity. Third, it does not make ontological assumptions, 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

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

[55] 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.

[56] See note 21.

[57] See note 10 ff.

of the constitutionalisation of international law.[58] 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 their 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).[59]

The concept of rationality of the communicative paradigm has five relevant consequences for a redefinition of sovereignty. First, because meaningful communication always depends on mutual recognition by the members of the communication community without interference from an outside authority, the communicative community itself is defined as self-determined and thus sovereign. Second, 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. Consequently, legitimate sovereignty has to be democratic. Third, being highly formal, the criteria of the rational discourse inherently strive for universalisation. 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. As a result, sovereignty cannot be unlimited. Fourth, though essentially universalistic, the well-ordered society built around the communicative paradigm does not rule out the legitimacy and partial autonomy of the domestic dimension. Fifth, the tensions between domestic sovereignty and cosmopolitan responsibility are not resolved by referring to hierarchy, but through dialogue among the different dimensions of social life.[60]

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 significant novelty as regards the relationship between 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

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[58] 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.

[59] 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).

[60] 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* (2018) 776–805.

community, 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 frictions that may arise from these twofold loyalties on the basis of mutual recognition and according to the principle of the best argument.

6. *Towards a Democratic and Cosmopolitan Sovereignty*

Although the modern concept of sovereignty was first developed in the sixteenth century, its conceptual framework goes much further back, to the first paradigm of social order, i.e., to holistic particularism. The same paradigmatic reference still characterises all current versions of the idea of unconstrained sovereignty, despite their differences in detail. Significantly, it is in the theoretical framework of holistic particularism that the threatening dimension of the sovereign monster takes shape and is justified. Since the whole of the community has more value than its individual parts, it seems to be reasonable to assume that the sovereign power embodies a rationale which goes beyond the defence of the rights and interests of the citizens. The superiority of the whole of the community if compared to individuals is always considered unquestionable, regardless of whether it is based on sheer power or on a specific and questionable interpretation of natural law. As for the understanding of external relations, then the claim that order is only possible within the single social and political community ends up disqualifying any attempt to create a rules-based cosmopolitan law. Once again, it does not matter much whether this attitude is justified through the reference to the cruel struggle for survival in the jungle of international relations, or through the assumption that selfish cautiousness is the most rational approach.

Given these premises, the taming of sovereignty towards both the inside and the outside required two different historical and intellectual processes, which were made possible by no less than three paradigmatic revolutions concerning the idea of social order. At first, the emergence of the individualistic paradigm transformed the internal dimension of sovereignty by claiming that sovereign power can only be regarded as legitimate if it has an ascending or bottom-up structure. In other words, sovereignty was limited, from then on, through the obligation to rely on the consent of those who have to abide by the rules. Although, as has been shown in a former Section, we still have influential political theories which, more or less openly, at least partially circumvent the idea that ascending consent is the only criterion for the legitimacy of the domestic public power, this first step in taming sovereignty can rely not only on a robust conceptual framework but also on a well-established constitutional tradition in the liberal democracies.

Far less developed is the second prong of the way to a tamed sovereignty, i.e., the improvement that should culminate in making it compatible with cosmopolitan obligations, which means with duties that we owe to the whole of humankind, regardless of citizenship and national belonging. This process needed two paradigmatic revolutions. The first opened the gate to conceiving all human beings as part of a cosmopolitan community. If taken to its extreme, however, the idea

of an all-encompassing *cosmópolis* necessarily leads to the complete dismissal of the concept of sovereignty, including the perspective of people's self-determination. In this sense, it would also sideline or even cancel the well-founded understanding of legitimate sovereignty as the result of bottom-up participation, which was ushered in by the transition from the holistic to the individualistic paradigm of order. To avoid this undesirable consequence, a third paradigmatic revolution was indispensable, which redefined order as a post-unitary, pluralist and heterarchic condition. Under these circumstances, it is possible to conceive a multilayered system of public power and democratically legitimate sovereign states that are nonetheless committed to cosmopolitan obligations towards non-citizens. With reference to this conception, however, we have to admit that, while the theoretical background is arguably consistent enough, its realisation is still in its early stages at best. Even worse, some events in the last years put more distance between us and the idea of a cosmopolitan sovereignty, making it a kind of remote regulative idea. Yet, regulative ideas are essential as incentives to make the world better on the basis of a reasonable project. Paraphrasing Hegel, I could conclude by saying that, even if we have to recognise that the reality is not as rational as it could and should be, there is no theoretical or practical necessity to give up on the hope that one day, and possibly soon, it will indeed become rational.