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Editorial Introduction

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Editor of the Journal

This first issue of a new series of East-West studies presents the proceedings of the international conference held at the University of Tallinn on 28 and 29 October 2021. The conference was titled *Still a Cold Monster? Rise and Decline of Modern State*, and it was sponsored by SOGOLAS, the School of Society, Governance and Law of the University of Tallinn. The topic discussed was the role of the state in an increasingly privatised, globalised and digitalised society. In the last thirty years, national societies have been undergone profound transformations. The first was the promise of a new global order, inaugurated by the end of the Cold War and the collapse of the Soviet Union. A new age of peace and global conversation was opened—or so it was universally believed. We thus observed a dramatisation of commitment to international law in internal affairs and the supranational dislocation of some of the traditional tools of national sovereignty. Markets were liberalised, and capital could flow freely across borders without being hindered by tariffs or borders. Within national societies, state intervention in the economy quite quickly withered away. We also observed the emergence of a third industrial revolution, one where computers and robots are replacing human beings, machines and motors. Rules seem to be replaced by algorithms. Digital platforms and the internet are irretrievably the space where people conduct their conversations and meetings. Now, these platforms are not publicly, but rather privately run, and managed and owned by tycoons, rapidly crowned as oligarchs. The state in this panorama seems to be losing its traditional grasp on societies and, with it, its proper function and special legitimacy.

Could one then say that we are facing the death of the state? This is the question we were confronted with in the Tallinn conference, a disquieting question that serves as the red thread of all the articles we are publishing in this special issue. The other question, related to this one, is the following. If we are losing the state, should we consider this loss as something determinable to our civil condition? In many doctrines and in several political theories, the state has been seen as a kind of "cold monster" (to use Nietzsche's words). People were somehow repelled by the bureaucratic and abstract nature of state organisation, being also worried about its asserted monopoly of violence over society. Should we now repeat Nietzsche's curse on the state? Once we are losing it, should we be happy about such an epochal loss? Are we not losing, together with the state, basic goods of social life, such as public care, social security, welfare, and last but not least, sovereignty— "government of the people, by the people, for the people," in Abraham Lincoln's words? Could we do without a state in the frantic and perilous arena of international relations? The final question is thus: Is the state still a cold monster? Or should we review our curse upon it, or our suspicion of it, and rehabilitate its role within society and in the international arena?

Now, this is the ground we have trodden at the Tallinn conference, and this is the theme this special issue addresses. The answers to our three questions remain unanswered. Nonetheless, in the conference, there was some basic consensus about what is a plausible thesis in the brave new world we are approaching in the twenty-first century. The state as the holder of the public

sphere and as the protecting agency of public goods, as a space where not only private interests and whims, but rather shared care and a reasonable, civic conversation, have the upper hand: such a state still has a lot to say and to contribute to a civilised and free mode of human coexistence

Can the State Carry Out Such a Thing as a Digital Transformation?

Daniel Innerarity

It is commonly accepted that we should strive for a digital transformation of society: it is one of the European Union's principal strategic guidelines, there are now many ministries that employ that name, businesses and universities have placed people in charge of the initiative and, even in families, our children—acting, as it were, as our Chief Digital Officers—offer advice about new and sometimes hostile digital environments. It is worth asking whether this outpouring of goals, designations and positions was preceded and accompanied by corresponding reflection on what a transformation of this size means and whether we have correctly understood the relationship between technology and society. The failure (or incomplete success) of some of the transformations that have been attempted can be explained precisely because the attempted interventions were external, infrequent or insufficiently negotiated with the society they were meant to transform.

When one wants to realise a transformation, one must first understand what it consists of, what differentiates it from the things that merely inject money into a sector or focus on a flagship project, without realising the in-depth changes that were the goal. In this regard, it is not helpful to focus on "disruption," which suggests that technological innovations elbow their way in and are nearly ungovernable. It is somewhat facile to make declarations about the end (of work, even of that which is human) and about the advent of new eras. In reality, social changes are less abrupt and more given to continuous and shared intervention than to a type of magic that makes things appear and disappear. Digital transformations demand reflection about the problems that exist, the structures that should be digitally transformed and the ways in which people, the actors and the corresponding institutions should be involved. Let us not forget that the true subject of digital transformation is society; what must be digitally transformed is society, not the State.

When we talk about transformation, we are referring to something more radical than an evolution or a development where an object, which remains identical, experiences a slight modification. Transformative processes are those in which the object itself undergoes change. A digital transformation does not entail the transposition of an analogue product into a digital one or of an analogue process into one carried out through digital means. If it is a transformation, there will be a change in both the product and the process. It will not be the same thing done in a different way, but something distinct and new, whether it is an administrative act, a communication, teaching and learning, attention, cultural consumption, privacy or business. Anyone who believes that digitalisation will entail doing the same thing as before, while only the process changes, is mistaken. In the history of humanity, the movement from one means to another (orality, writing, digitalisation) has always also meant a profound change in the thing being done (reading, buying, teaching, governing, entertainment). Communications have changed with email, not only in velocity but also in intensity and quality. When computers or virtual classes are introduced, they are not simply another method; they imply profound

transformations in educational activities. Digital administrations modify the relationship between citizens and the State when it comes to proximity, accessibility and trust, to the extent that the technology may represent very different things for distinct population groups and be seen as a facilitator or a barrier.

Social transformations have two enemies: poor comprehension and poor implementation, but I would like to emphasise the first of these. Many failed transformations stem from a conceptual error, from poor comprehension of what is at stake. We think of technology as a totality that is only accidentally related to society, that "impacts" society, that must be "controlled," to which some ethical components should be "added" to humanise it, and in this way, we lose sight of the extent to which technology and society are connected. This dualism leads to various errors. The utopia that believes that technology solves everything and the dystopia that sees nothing in it but danger have a profoundly ahistorical vision that localises power only in technology and not in the way people appropriate it. This diagnostic error also explains the fact that the ethics of technology are dominated by an externalist focus, envisioned as a type of "guardian of the limits." If we thought about technology as a complete reality, intertwined with society, then ethics would not mean a protection of "humanity" against "technology," but would consist of experiencing and evaluating technological mediations, with the goal of explicitly configuring the ways they contribute to shaping the subjects in our technological culture (Verbeek, 2011, pp. 40–41). There are no purely technological solutions for complex problems, such as those that are raised and addressed by digitalisation. Technology is socially constructed and acts in social contexts where its validity is ultimately at stake.

Unlike a planning process, transformation is a procedure with open results. It is not fully predictable how society will finally appropriate governmental actions focused on that process. The social transformations that were put into motion by digital hyperconnectivity are not predetermined by those technologies. They emerge from the ways in which those technologies and the practices that develop around them are culturally understood, socially organised and legally regulated. Anyone who wants to change a sociotechnical system needs to understand both what the technological problem is and the social context in which the problem should be addressed. We need to understand the technology, and we need to understand society, but most importantly, we must understand how the two things interact. We should think about technology and society at the same time and examine the ways they are interconnected.

The fact is that society does not behave neutrally when it comes to digitalisation. It is not an inert space that meekly receives technopolitical prescriptions. Society is not a "start-up," an experimental model that can be expanded upon later. Instead, it is the space in which each of the decisions taken about digitalisation has its impact, sometimes with irreparable results. Digitalisation makes more acute the thing that always happens when a technology is introduced in society: the result is rarely exactly what was expected and that is largely due to the vitality of society, which makes the technology its own in unexpected ways.

Research from the last thirty years about the sociology of technology has developed a series of concepts about the relationship between technology and

society that are very relevant for the debate about digital transformation. In the first place, we should stop thinking that technology is something that is present in a complete fashion, at our disposition, offering itself unquestionably as the best solution for a permanent problem, or threatening us, like something that has an impact on us but that we are unable to configure in any way. Technology is always the result of a process of negotiation between different technologies, economic interests, social expectations, legal requirements and the political configuration. This is the case for railroads, refrigerators, bridges and algorithms (Bijker & Law, 1992). Another contribution is the concept of "affordance" to explain that technology does not determine social structures but that it opens possibilities of action (Hutchby, 2001, p. 444; Latour, 2017, p. 124; Evans et al., 2017, p. 36). This concept refers to the structural relationships between artefacts and the users who make possible or limit certain actions in a given situation.

In the context of digital transformation, people and computers are entering into an intriguing symbiosis. It is not only that algorithms act upon us, but that we act upon algorithms. When we use algorithms, we modify and reconfigure them. The algorithms of machine learning are developed in an environment that is social, not geological, so they are continually being shaped according to the user's input (Bucher, 2018, pp. 94–95). From this standpoint, the most important thing is not only the algorithm's effects on social actors, but the interrelationship between the algorithms and the social acts of adapting them: "a recursive loop between the calculations of the algorithm and the 'calculations' of people" (Gillespie, 2014, p. 183).

The fact that algorithms can be used to resist the power of those who programmed them does not mean that perfect balance is restored between the two entities, but that technological power is not employed upon passive subjects. Those relationships, no matter how asymmetrical they may be, are dynamic, incidental, socially constructed and constantly renegotiated (Bonini & Treré, 2024). In the end, the social power of algorithms—especially in the context of machine learning—stems from recursive relationships between people and algorithms. These are encounters that do not take place in a single direction; people limit and expand the ability of algorithms. The activity of an algorithm can be read as the outline of the ways in which its encounters with the social world are evaluated. Here, we see a clear manifestation of Foucault's idea that power is a transformative ability that always implies forms of resistance (1976).

We are, therefore, facing the great challenge of how to bring technological development and social realities together. Technology does not prescribe only one possible development; in its encounter with society, many options arise: it is contested, it is used for something other than what was foreseen by its designer, inclusive uses are demanded. In sum: a dialogue of options is produced that suggests technological pluralism, a diversity of ways of viewing technology through its social implementation. A good indication that this is what happens with technologies in our societies is that, at a global level, if we consider what the United States, the European Union or China think and do with artificial intelligence, digitalisation acquires formats that are very distinct, with models that bring together technology, the state and the marketplace in diverse and even antagonistic fashions. The project of introducing artificial intelligence in Spanish or other languages is an example of

the potential pluralisation of technology: it would foreground different visions of the world, and there would be increased accessibility for many people. If we talk about political or moral pluralism, we should also talk about "technological diversity;" about pluralism in relation to technology, which is neither unquestionable, immediately applicable nor unique.

The reason many transitions, in this and other areas, have failed is found in the mechanical and vertical application of new requirements without sufficient attention to the diversity of people affected and without including them in the process. The case of the ecological transition and the resulting protests by farmers reveals how hard it is to reconcile what should be done and the ramifications for a particular sector of society. Failed transformations stem from not developing a successful process of negotiation that would lead to a sustainable and satisfactory solution for everyone. Resistance to change should not be interpreted as some perverse type of boycott; instead, it often reveals that those who are promoting change have not successfully facilitated it, negotiated it and made its advantages clear to everyone.

As with any other type of transformation, we must examine the things that could make the digital transformation slower than ideal and the undesirable effects that could be produced by careless implementation. It is often the case that the imperative for digital transformation makes us value velocity over results, reaction over reflection. Its promoters tend to have an "action bias" that leads them to act before understanding. This leads to speed without reflection, adaptation without decision-making, direction without agreement, technology without society.

Solutions are often sought not *through* technology but *in* technology, making it an end in and of itself. I am referring to an immediate and unthinking "application" of technology to social problems, with the hope that this will lead to a quick and seamless resolution. Digital transformation provides many examples of technology's social blindness, such as: the error of believing that a digitalised administration is necessarily a closer administration; trying to respond to increased demands for healthcare only with health telematics; providing personal computers in schools or creating the virtual classrooms that were necessary during the pandemic without developing the corresponding training needed by students and teachers; encouraging companies to develop digital business models regardless of whether they have the necessary capacity and whether there is a market for them. But it is worth keeping sight of the fact that if technology alone is not the solution, neither is it the problem. The problem is a lack of thoughtfulness when it comes to bringing technology and society together. There are digital divides and other types of inequalities that the digital transformation can either correct or aggravate, depending not on the nature of technology, but on the policies with which it is implemented.

As with any other profound transformation of society, digital transformation demands at least two things: thoughtfulness and inclusion. Social transformations are produced less through speed than resulting from the quality of a continuous process. It makes no sense to gain speed at the cost of supressing moments of reflection, debate and inclusion. We cannot forego the necessary step of analysing problems and needs before beginning the process of negotiation, without which there will be no successful social transformations. The processes of digital transformation should be configured in an inclusive fashion. We must keep in mind the heterogeneity of the social groups involved

in or targeted by the strategy of digital transformation: rural and urban environments, different generations, people with a range of educational levels, diverse economic situations and the gender inequalities that condition access to and use of technology.

The difficult crossroads faced by globalisation efforts stem from the fact that, on the one hand, we need to accelerate our processes to keep up with rapid technological developments, but on the other hand, the necessary negotiations (legislative, regulatory, democratic) are increasingly complex, which slows down the time for action. We can bemoan this imbalance, but we should not forget that without an inclusive social debate, every political initiative is condemned to a lack of understanding and support from society, both of which are necessary for a true digital transformation.

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Politics and Antipolitics in the Modern State: Reflections on the French and American Experiences

Dick Howard

The legitimacy of the modern state in the United States and in France is paradoxical; both claim to have been founded on the experience of *revolution*, a radical break with their historical past that is realized by their creation of a *republic* based on equal rights that are valued as universal. In both cases, this revolutionary foundation made solidification of republican institutions problematic; normal discontents, conflicts of interest and ideological differences did not dissipate over time as the optimists had hoped; the universal principles that founded the republican state could be invoked to transform particular griefs into universal wrongs whose eradication demanded the refoundation of the republic on which the state was founded to denounce the triumph of special interest and to demand thefoundation of a new constitution that would assure true equality. This dialectic between universal principle and its particular realisation was illustrated in Hegel's analysis of the French revolution in the *Phenomenology of Spirit* (1807); the philosopher had little to say about its American cousin, but it retrospectively clarifies some problems implicit in its republican institutions. In both cases, the conflict between universal principle and its realisation was resolved politically by the emergence of *democracy*. However, in the French case, their political revolution sought to create what I will call a *democratic republic*, whereas the three decades following the Americans' victorious war of independence from the British monarchy gradually instituted what I will call a *republican democracy*. I will explain and illustrate why this apparently semantic distinction has implications that are both analytic and political.

I.

The dialectic diagnosed by Hegel was present almost from the outset of the French revolution; the abstract universality of the revolutionary triad–liberté, égalité, fraternité—formed a stellar constellation that could not be found in terrestrial institutions. The principle of *liberté* seems to have been localised first in the political sphere; the *nuit du 4 août* eliminated rule by aristocracy, but social privilege returned soon enough in the shape of a commercial, then an industrial, and more recently an intellectual aristocracy. As a result, political *liberté* shaded into (the quest for) social égalité; the promised political *liberté* was an empty form whose realisation depended on material conditions for its practical exercise. Equal voting rights were only a first stage during which various forms of political equality—limited and, and male-only (in spite of protests by women)—were experimented with; permutations of material equality were tried, before the idea of an equal *status* for all persons in the eyes of all were recognised—although today a new dialectic threatens to transform this new equality in the form of "identity politics." In the French case, the same dialectical (or 'paradoxical') logic that led *liberté* in practice to shade into recognition of social *égalité* turned that demand toward the search for that *fraternité* that seemed for a moment to have been realised on July 14, 1790, in the *Fête de la Fédération*. The contradiction between universal claims to freedom and equality seemed to have been overcome for a moment when the new principle found its incarnation in the masses gathered on the Champs de Mars. Our German Virgil's chronicle of the adventures of the dialectic takes up the next twist of the story with the account of the *fraternité-*

terreur when universal brotherhood was imposed from above, by the humanitarian invention of Dr. Guillotin, or its threat, which revealed again the gap between universal principle and its realisation. Thermidor brought the triadic constellation of principle to earth; but like the moon, it would illuminate the night over the next centuries, and not only in France.

The century of French history inaugurated by its revolution was eventful; its broad outline illustrates the dialectical dilemmas that were condensed in its early years. The years of conquest that, at least at the outset, sought to spread the principles of 1789 across Europe were also those that transformed Bonaparte into Napoleon, the republic into an empire for an expansion without geographical limit, unified only by the person of the emperor and the legitimacy incarnated in armed masses represented by the chain of his victories. When Napoleon's attempted imperial resurrection during the *100 Days* was finaly doomed with the defeat at Waterloo, the politics of the restored Bourbons tried to pretend that the revolution had left no traces, ignoring the lunar reflection of the principles of the revolutionary triad that did not disappear because its realisation had failed, leaving its ideals intact. . Political freedom was demanded now by *social* interests that had benefitted from the previous forms of material equality; they in turn would find new fraternal forms that were reinforced while widening their conquests. This was the moment of republican liberalism when, in 1830, the dreams of political Restoration were awakened to the social reality first represented by the liberal Orléanist monarchy, which promised a new kind of *social* prosperity identified with the name of Guizot and, still more, with his slogan, *enrichissez-vous*. Many tried: some succeeded, others were excluded. But the excluded were not alone; they were all excluded together, their condition was equal, their exclusion political, and brotherhood was a rare commodity in the marketplace… save among the ideas competing with one another to represent the triangle of revolutionary values.

In February 1848, a renewed revolution emerged as the excluded found that their social interests coincided with their demand for political rights against monarchical exclusivity. While this revolution introduced universal suffrage, it was only briefly able to realise a social transformation: its promise of the "right to work" remained an unfulfilled wish. The failure of universal suffrage without a material foundation engendered false fraternity among the electors, who cast their lot with Louis Napoleon Bonaparte, claiming legitimacy as the nephew of Napoleon. False hopes were quickly dashed by armed force when—only months later, in June 1848—workers without work banded together to demand the promised equality. The jaws of the dialectic had in fact remained open because the proponents of democratic suffrage had written into their republican constitution a provision that they imagined could ensure political equality, simply by treating the elected president like all other citizens by making him ineligible for a second term in office. Their institutions established the principles governing the office (of the presidency) without considering the particular character of the officeholder. Although democratically elected, the nephew of Bonaparte still nourished imperial dreams; as his term in office neared its end, he launched a coup d'état whose success was crowned by a popular referendum submitted to a defeated electorate who harboured neither the political hopes of February 1848 nor the social vision of June. The demise of the Second Republic was quickly followed by the years of the Second Empire (1852-1870). The cycle was aptly described by Karl Marx, a worthy successor to Hegel, from whom he had learned to appreciate the paradoxes of dialectics: "[t]he first time is tragedy, the second is farce"was Marx's lapidary summation of the French political dilemma. The farce

came to an inglorious conclusion eighteen years later when the emperor, facing renewed political demands from those who had benefitted socially from the imperial expansion, embarked on an adventurous war with a newly united Germany, which ended with the disastrous defeat at Sedan.

The vainglorious French emperor was taken prisoner, but the victorious Germans seemed to have overplayed their hand by not recognising the attempts by moderate republicans to re-form the republic: faced with the German demands to disarm, the working class of Paris refused to surrender. Their self-governing defensive unity, the *Commune*, took over political leadership while also introducing egalitarian reforms. Although it lasted only 72 days before being crushed in blood, the Commune left its mark in French history—and beyond. Karl Marx's pamphlet, *The Civil War in France*, written during these events, claimed to see in the Commune "the *form*at last discovered" in which the proletariat could liberate itself; it was a form of self-government in which the opposition between the political state and civil society had been overcome. Because Marx's claim was only formal, it was easily forgotten by the reformist leaders of the new Social-Democratic leftist parties drew from their experience as industrialization proceeded apace and a new century began; on the contrary, they insisted that the republican political institutions provided the necessary framework within which social reform would become possible. The time for true revolution seemed to have passed for four decades when, to everyone's surprise, world war broke out in 1914, only to be followed—(in retrospect: dialectically)—by the Bolshevik seizure of power in Russia in 1917—which itself claimed legitimation as a phase in inevitable world revolution. A crucial section of Lenin's explanation of the revolutionary goals of "soviet" institutions in his 1917 pamphlet, State and Revolution, returns to the unfinished experience of the Paris Commune, stressing particularly Marx's idea that it was the "form at least discovered" for liberation of the proletariat. *This is the root of the idea of a "democratic republic,"* it seeks or claims to have overcome the opposition between state and society, between politics and economics, and between leaders and followers. With the democratic republic, the jaws of the political dialectic are to be finally closed as form and content, ideal and reality are united. *And,* with its failure to realise these promises, the illusory dialectical idealism of Hegel can be—as the young Marx had claimed in his early philosophical development—stood back on its feet.

This conceptual history of the French pursuit of a *democratic republic* suggests that it was perhaps no simple accident that communism in its Bolshevik guise found deep roots in France; Stalin's totalitarian regime seemed to be both willing and able to realise the goals of the most radical phases of the Jacobin Terror. When Stalin explained the need to strengthen the state by means of ruthless purges, whether accompanied by show-trials or not, as the precondition for its abolition, it was not only French leftists who could easily understand the scene playing before their eyes, whether or not they supported its means (i.e., Bolshevik and totalitarian), or even its goals (i.e., "communism"). For the same reason, when the Soviet Union showed not only its economic feet of clay but the fundamentally totalitarian political foundation on which it was built—being both anti-democratic and anti-republican at once—the resulting so-called "Solzhenitsyn shock," coupled with the new popularity of anti-totalitarianism and the quasi-disappearance of the Communist party (which was not the result of François Mitterrand's clever politics), was deep and ultimately definitive. Today, the political theatre is thin, *aimless* and unmoored, absurd in form and content; it is as if Karl Marx has been replaced by Luigi Pirandello, save that there are more than six characters searching for an author(ity). The quest for a democratic

republic culminates (as Lenin, but not Marx, wished), in the triumph of *antipolitics*; anarchy in the guise of democracy. In short, the same legitimation that explains the rise of the "democratic republic" is a powerful factor in its present-day decline. *Anti-politics is ruled by the irascible goddess known as TINA, "there is no alternative," accompanied by the nostalgia for an imagined past whose chthonic solidity offers an anecdote to anarchic individualism or technological wish fulfilment.*

At the same time, anti-politics is a *modern* form of politics! It is today referred to by pejorative labels like *populism*, *identity-politics*, or twentieth century communist or fascist forms of *totalitarianism*, but it can also take an apparently more benign form referred to by concepts like *neo-capitalism, illiberalism,* or formalist *constitutionalism.* To clarify the reasons that anti-politics is indeed a form of modern politics, however paradoxical the claim first appears, I will return to the origins of modern politics, which, as explained above, can be illustrated by the American and French revolutionary experiences.

II.

The origins of the two revolutions were treated together as products, as well as expressions of a so-called "Atlantic Revolution" that heralded what the American historian R.R. Palmer described in his two-volume [NO ITALICS HERE! study as *The Age of Democratic Revolution* (1959 and 1964). Palmer's work became a classic of—as well as an expression of Cold War historiography. As an accomplished academic historian, Palmer was looking for historical similarities rather than principled differences. Nonetheless, such differences were apparent to contemporaries such as Edmund Burke, whose insights were made explicit for a wider public by the conservative German diplomat Friedrich Gentz in his account of the "*Origins and Principles of the American Revolution, Compared with the Origin and Principles of the French Revolution*" (1800). The book was immediately translated by an American diplomat in Berlin—John Quincy Adams, son of the American president, and later himself elected president—as a weapon in his father's losing re-election campaign against Thomas Jefferson. The details of Gentz's work, whose debt to Burke's *Reflections on the French Revolution* was evident, are of no present concern. It is more important to stress that his American translator was fully aware of the paradoxical antinomies found in the course of the two revolutions that became evident in the battle with the rising Jeffersonians. One such antinomy is expressed in the difference between the French attraction to the idea of a "democratic republic" and the Americans' at first unintentional creation of what I call a *republican democracy.*

Compared with the ambitious social projects that drove the French revolution, the American revolution appears to be, as Gentz argued, a "defensive revolution." The colonists thought of themselves as "true Englishmen" who had expatriated themselves to virgin lands free from the corruption of an aristocratic monarchy; their self-defence was an affirmation of the "rights of an Englishman" against the corruption of their colonial masters. This consanguinity of principle was expressed in the largely non-violent revolt that played out in the 13 colonies in the decade between the end of the Seven Years' War with the Treaty of Paris in 1763 and the outbreak of armed conflict officialised by the "Declaration of Independence" in 1776. It was no accident that the just-concluded continental war had been called the "French and Indian War" by the colonists. It became clear that wars change their participants and goals, transforming the ostensible principles for which they were fought. A clear example is found in the life of George Washington, who was among the defeated British generals at Fort Necessity in 1758 became commander-in-chief of the rebel armies in 1775 to

whom the British surrendered at Yorktown in 1781, effectively recognising American independence with the same Washington as its first president.

The political form adopted by the new nation was at its outset a "confederation" of independent former imperial colonies, jealous of their independence; their de facto constitution was defined by the "Articles of Confederation." Their composition was diverse as were their reasons for rebellion: some were predominantly agricultural, based on small self-sufficient farmers, others slave-based plantations, while artisan manufacturing took place in towns, and growing cities were oriented to foreign commerce (not infrequently smuggled, as in the case of tiny Rhode Island, which, not by coincidence, would be the last to ratify the federal constitution proposed in 1787). These economic differences do not explain the instability of the confederal government; its problem was political: the autarchic self-sufficiency of each of the newly independent states that not only led to instability but offered a temptation for foreign invasion—the British were still in Canada, the French in Louisiana, the Spanish in Florida and Mexico. Determined to act, leaders from the states met in Philadelphia in 1787. Their ostensible and public goal was to reform the Articles of Confederation; but, as the hot summer months wore on, their deliberations proposed a new, *federal* constitution. I will return to its structure in a moment; more important was their recognition that *popular* ratification in each state separately was necessary to assure the legitimacy of the new institutions. As in the debates leading from protests in 1763 to the demand for independence in 1776, anticipation of the weight of the choice and a relatively large literate public encouraged the circulation of a vast number of pamphlets, often reprinted in local newspapers and commented on in others. The opposition accepted (unwisely) the label of "Anti-Federalists;" their criticisms turned largely around the purported anti-democratic features of the new institutions. The major arguments of the federalist supporters were presented in a series of 85 essays published under the classical-republican pseudonym of "Publius" by Alexander Hamilton, James Madison and John Jay. Tactically adept, the articles had first appeared in newspapers published in different states before being collected as a unitary argument in *The Federalist Papers*. As a result of this public process of deliberation, the ratification debate was already a national national concern before the vote in the individual states; the legitimacy of the new, federal republic was based on this deliberative democratic expression of popular sovereignty. The pseudonymous identity of the author, *Publius*, strategically chosen, incited political debate with the inward-directed Anti-Federalists, who claimed to support democratic immediacy against the republican constitutionalism.

The institutional structure of the new constitution could be called "defensive," reflecting the struggles for independence at the birth of the new republic. The members of the Convention were well versed in classical political theories and Roman history; they were also products of the scientific age of Enlightenment, which offered the political ideal of government as a dynamic balance of forces able to produce what the historian Michael Kammen called "a machine that would go forever" without the arbitrary power of a ruler. They sought compromises that would satisfy the norms of political theory and local interests that could not be ignored. Their goal was to create a "government of laws, not of men." At the same time, the vision of a continental future that had arisen during the struggle for independence remained a latent presence. In effect, the newly independent nation was being transformed from "these united states" into "the United States." This fact would take on a growing importance, particularly as the

powers of the presidency grew to form a so-called "imperial presidency" after the mid-twentieth century.

The constitution proposes a delicate series of institutional "checks and balances" that can be used and strengthened by each of the countervailing and separate powers that are joined together in the unitary federal sovereign republic. Although this structure of unity-in-difference was clearly marked out, one practical feature in the constitution marked a significant innovation: the provision for amendment proved to be an essential feature of the democratic governance of the "republic of laws." This provision played a significant role in the first years of the constitution. Madison came to accept one of the major Anti-Federalist critiques; he proposed a series of amendments to the constitution known as the "Bill of Rights."

Another apparently anti-democratic feature of the new institutions was the existence of a senate, which had classically been the aristocratic branch of government in the classical vision of the Roman republic. What place did a senate have in a democracy, asked the Anti-Federalists. The traditional answer is that the senate is needed to restrain impetuous action by the popular House; it was to act like a saucer, cooling the heated brew contained in the cup. That reply only seemed to confirm the anti-democratic character of the constitution. The Federalist Papers' explanation turns on a *distinction between direct and representative democracy*. Writing as Publius in *Federalist* #63, Madison pointed out that in the classical constitutions the represented classes were assumed to be wholly present (i.e., not just represented) in 'their' specific institutions, whereas the sovereign people had no place or presence. The American constitution, Publius argued, is different: the people are represented in all institutions; they have no unique (institutional or physical) representative; this omnipresence of a non-localisable *demos* is the motor that constantly renews the democratic dynamic. In this way, the republican democracy makes use of the idea of *political representation*, which, like the constitution itself, is never an exact reproduction of the process it represents; its nature is subject to debate and, eventually, to amendment. As a form of government, political representation does not pretend to *incarnate* the sovereign people but to be a reflection of – and on – not only the present state of affairs but also of a desirable future that is arguably part of its potential reality. Two hundred fifty years of republican democracy in the U.S. can be interpreted as a series of dynamic conflicts among the separate and distinct powers of government and the diverse forces that animate them.

A final illustration of the working of the American form of a republican democracy will help illustrate the actual functioning of the republican democracy at its origins. The unanimity supporting the presidency of George Washington began to fracture with the choice of his successor. The election of 1796 was contested by two inchoate parties, which would congeal in 1800 to form a bipartite *system*, a unity in its division. The Federalists (led by vice-president John Adams) and the Democratic-Republicans (led by Secretary of State, Thomas Jefferson. The development of political parties had not been anticipated in the constitution; the bitter rivalry of their partisans appeared to contemporaries as a threat to the republic. The election of 1796 reflected the danger; Adams became president, but his rival, Jefferson, who had received more votes than Adams' co-candidate, was awarded the vice-presidency. As vice-president, Jefferson had little power; but his partisans, led by James Madison in the House of representatives, played a role in blocking many of President Adams' proposals. The election of 1800 was therefore decisive, bitterly contested, overlaid by ideological venom reflecting

the continental conflict between "Jacobins" and "Monarchists." The Jeffersonians' victory appeared to polemicists as the "Revolution of 1800."

The application of those French political categories to American institutions should not obscure the fact that power passed *peacefully* from the Federalists to the Democratic-Republicans; the vanquished did not disappear from the political stage in a violent *coup*. This was an innovation in political history; it reflects the way in which a unitary republic can make room for the democratic activity of the citizenry. The novelty of this republican-democratic dynamic was not clear to the actors at the time—for example, Jefferson's partisans still called themselves "Democratic-Republicans"—but it would become explicit in a decisive decision in which the Supreme Court affirmed *its* role as a distinct institution whose *power* derived from its guardianship of the *principles* of the constitution. The occasion was provided by the case of *Marbury v. Madison,* in 1803. In the waning hours before Jefferson took the oath of office, Adams made several "midnight" patronage appointments; the incoming secretary of state, James Madison, refused to certify these nominations, including that of Marbury. The conflict came before the high Court, whose Chief Justice, John Marshall, had been a staunch Federalist politician before his nomination by Adams in early 1801. In his new judicial role, Marshall could not be seen to act as a partisan; he had to defend the constitution, which was the basis of the court's own power.

Speaking for the Court, Marshall argued first that Madison had been wrong to refuse the certification because it is the constitution, *not the temporary majority*, that expresses sovereignty in a republic. Indeed, according to Anglo-American common law, "where there is a right there is a remedy." However, the ruling continued, the Supreme Court was not the proper agency to *execute* that remedy; the role of the court is *limited* to the defence and protection of the constitution. And, concluded Marshall, because the law to which Marbury appealed for remedy (the Judiciary Act of 1790) itself violates the constitution by giving excess power to the Congress that voted its passage, there is no judicial remedy available to Marbury. Marshall's reasoning has come to be accepted by jurists; the constitution itself, *not* its constituent powers *nor* a temporary electoral majority is the guarantor of the republic.

In effect, there seems to be no explicit constitutional protection for democracy as real or realizable in itself, as was the effect of the Court's refusal to deliver his lawful commission to Marbury; on the other hand, the citizenry can fall victim to the temptation to equate a *temporary* majority opinion with the will of the *demos* which is never in reality a single unified whole. Both of these options become forms of *antipolitics*. Constitutional structures and juridical reasoning cannot stand on their own; their *legitimacy* ultimately depends on political choices and citizen action. In a word: the symmetrical political institutions seen in the French attempt to realise a *democratic republic* and present in America's republican democracy hold up a mirror that illustrates the ways in which each of these states could suffer a *loss of legitimacy*. I conclude with a well-known anecdote from the time of the American Founding. Benjamin Franklin was a delegate to the constitutional convention, whose proceedings had taken place behind closed doors. As the delegates emerged from the final session, a woman approached Franklin with a question: "What kind of government are we to have?" The elderly sage replied simply: "A republic, if you can keep it."

III.

Benjamin Franklin's political imperative may have been coined in the late 18th century; but it remains a , and not only for today's Americans—whose institutions were maintained by the (perhaps antipolitical) intervention of the

Supreme Court in the contested election of 2000 but were threatened only two decades later by the antipolitical demagogy of former President Donald Trump and his MAGA partisans in 2020, who remain an antipolitical threat.. It is not only U.S. citizens who face the challenge but also all those nations that have become democracies in the intervening years and centuries, particularly those formerly under colonial or totalitarian domination. The choice is easy to portray in theory, as I have tried here to show; and even harder to put into practice! As doubts spring up and authority is contested in an increasingly complex and interconnected nation, itself a participant in an increasingly global world of nations, it is the task that must be mastered, and at times reconquered by *politics*; recognition of this political imperative is necessary if the always present *antipolitical* temptation that is inherent in modern democracy is to be avoided. Neither institutional arrangements nor the immediate participation of the citizenry; faced with unexpected conditions, neither a republican constitution nor a democratic citizenry can ensure that what I have called a *republican democracy* can perdure.

Statehood 3.0: Temptations and Restraints

Leif Kalev

Introduction

States are once again undergoing a major transformation, this time catalysed by digitalisation, the ongoing integration of digital technologies and digitised data across the economy and society (Eurofound, 2024) but also including automation and other aspects. Digital transformation can be characterised as increasingly capable systems, increasingly integrated technology and increasingly quantified society (Susskind, 2020).

There are diverse optimistic and pessimistic accounts on digitalisation and its implications but what can be learned by linking digitalisation and statehood more specifically? What are the key aspects to keep an eye on in the currently unfolding transformation of statehood from a political and governance studies perspective?

In this article, I first discuss the concept and key aspects of the state and elaborate the concept of statehood 3.0 as related to the earlier types. Then I discuss the opportunities opened by digital transformation and develop the idea of temptations and restraints created by it. The temptations and restraints are then more closely studied in two key areas of state operation: transforming sovereignty and neoliberal governance. This builds the basis for a concluding discussion of the key aspects relevant in developing a human-centred statehood 3.0.

Discussing the relationship between digitalisation and statehood, we need to keep in mind that while the technological aspects of digitalisation create the basis for transformation(s) it will nevertheless most likely be shaped by human and contextual factors, at least based on historical experience. Thus, to discuss the transformations in statehood, politics and governance we should contextualise it historically with human and relational aspects in mind.

Transformations in the operation of the state

There are many and diverse ways to understand and define the state (see, for example, Nelson, 2006; Marinetto, 2007; Bevir and Rhodes, 2010; Pierson, 2011; Jessop, 2015; Vesting, 2022). To first develop a broad understanding, I build on two sources that outline the key features of the state. The Montevideo Convention (1933), a major legal source, defines the state as having a permanent population, a defined territory, a government and the capacity to enter into relations with other states.

Offering a more detailed account along these lines, Pierson (2011, p. 6) identifies nine key features of the modern state: (monopoly) control of the means of violence, territoriality, sovereignty, constitutionality (including also the state aims and purposes), impersonal power (also including the rule of law), public bureaucracy, authority/legitimacy, citizenship, and taxation (also including welfare).

Statehood can be defined as the condition of being an independent state or nation (e.g., Collins Dictionary, 2024). In this concept, the focus is on the capacity to operate as a state, a quality that may be more or less advanced and runs in parallel with the more formal aspects. Here, the key issue is how the power centre and the citizenry relate and interact in their territory and towards other states. In this process, the political and governance arrangements, citizenry and territory are constantly (re-)constituted, as are all the features of the state (see, for example, Finer, 1999a; Finer, 1999b; Finer, 1999c; Rae, 2002; Pierson, 2011; Hameiri 2010; Jessop, 2015).

One can have more pessimistic and optimistic, more cynical and hopeful views on the state and statehood. This is a partial answer to the overarching question of whether the state is a monster, as the answer to this will very much depend on the perspective. But whatever the level of optimism or cynicism, the key issue is the evolution of the state as a way to dominate, to generate a certain level of social order and organisation, and manage human communities, not only top-down, but also collaboratively, and to an extent, bottom up.

The idea for the concept of statehood 3.0 came from the development of the Internet. There are three clear-cut generations of Internet as for now: we likely remember the one-sided flow of information in Web 1.0, the original Web; then we experienced Web 2.0, which is mostly related to social media and bottom-up content production. Now, for some time already, we are in the environment of Web 3.0; it continues the previous generation, but also includes algorithm-based steering and control. What you see from Web 3.0 is based on algorithms. There is a huge amount of information, but only some of it reaches you. This is not entirely based on your choice, although it's based on calculations of your preferences. (For some time, the concept of Web 4.0 based on artificial intelligence has also been around, but here I discuss it as part of 3.0.)

How to apply this to statehood? Building on works on the development of the state (e.g. Jellinek, 1914; Schmitt, 1963; Poggi, 1990; Finer, 1999a; Finer, 1999b; Finer, 1999c; Mann, 1986, 1993, 2012, 2013), we can identify two major generations of state organisation so far: the traditional state and the modern state. A modern state is clearly demarcated, well organised, relatively centralised and purposefully governed and came to fruition in the 19th century Western world, having evolved since the 15th century. The traditional state, in this analysis, refers to a wide range of various territorial power arrangements that preceded the modern state and were looser in terms of organisation, but nevertheless had some of it.

We can denote the traditional state statehood as 1.0. Statehood 1.0 was relatively weak in its organisational capacity and in terms of infrastructure and outreach towards every citizen and every location. Statehood 2.0 is the main reference for modern states, based on the idea of cohesion, in terms of politics, identity, administration, clear borders, and so on.

Building on this, we could characterise statehood 3.0 as the information and technology-rich state of contemporary times and the (near) future, which is based on the organisation of the modern state but in many ways functions differently from that. I'm mostly referring to the new developments of recent decades, especially, but not only, those of information and communication technology, automation, development of all kinds of new devices, artificial intelligence and other related aspects. With a view to the main elements of the state (e.g., Jessop, 2015) a selection of the main differences between statehood 1.0, 2.0 and 3.0 is presented in the following table.

Table 1.
***Statehood 1.0, 2.0 and 3.0*.**

Characteristic	Statehood 1.0	Statehood 2.0	Statehood 3.0
Territory	Internally diverse within the frontiers	Relatively homogenous within clearly demarcated borders	Area within and beyond national borders that is governable with technological support
Population	Subjects to the ruler	Citizens of a nation state	Citizens who are empowered, steered and controlled
Organising power	Ruler and his court	State apparatus	Digitally amplified ensemble of state institutions
State idea	Glory of ruler (and often god(s))	National state project	Some hegemonic but contested state project

Source: author

For this article, the key difference between statehood 2.0 and statehood 3.0 is how cohesion, organisation and control are reached. In the modern state, it is based on human control of and over the political leaders, citizens, political party leaders, policemen, military, teachers—whoever. Technology is used, of course, but those who control and who are controlled are human beings. In statehood 3.0, it is much more manifold, diverse and impersonal as technology has a significant role, both as the instrument and object of cohesion, organisation and control—and maybe even more.

Originally, there was much discussion, especially in optimistic globalisation literature, of the state somehow fading away and dissolving into a social fabric, being replaced by markets, networks, global flows and movements and so on (see, for example, Ohmae, 1991; Kuper, 2004). A soberer view, focusing on the transformation of the state instead of its dissolution, regained prevalence relatively quickly (e.g., Sørensen, 2004).

But what I argue here is that in recent decades rather a contrary process has taken place. Instead of the state weakening, it has been strengthened by the new technologies. While 30 years ago the Internet was heralded as an extra-state space beyond control, it is now developing into a controllable environment and, moreover, a vehicle for control The new technologies enable a new level of cohesion, control and organisation, and in a much more impersonal way. There are possibilities and limits in this—temptations and restraints—and this is what we discuss next.

Opportunities, temptations and restraints in statehood 3.0

Digitalisation has opened up new opportunities for the state in the development of information- and communication-based technologies, automation, and development of artificial intelligence. This is something that is ongoing, but we can sketch out some main features.

We need to analytically separate the different aspects of this technological change. The aspect we are more familiar with is probably all kinds of communication systems—internet, Zoom, whatever—that enable us to have more information, discussions etc. But information and communication technologies also have different uses.

From another point of view, digitalisation has resulted in various monitoring solutions. It can also lead to huge databases containing information about human beings that can be accessed only by a few people, probably officials, and utilised for a purpose. Here, analytics and access are of key importance.

In the past decade or so, we have also seen the development of autonomous devices. This can be better seen from the illustrations here. We already have drones that fly and can deliver post or kill someone. We have autonomous weapons, weapon systems and so on.

The effects of both monitoring and autonomous devices are amplified by artificial intelligence: this is the machine's ability to perform some cognitive functions we usually associate with human minds, such as perceiving, reasoning, learning, interacting with the environment, problem-solving, and even exercising creativity (McKinsey & Company, 2024). We can speak of intelligent systems developing a course of action, implementing it via digital solutions and adjusting it based on monitoring the environment and learning from this.

As we see, the contemporary technological revolution has many aspects, but, at least nowadays, it must eventually come down to human beings whose capacities for organising and control are greatly enhanced. While both the companies and state bodies can use these opportunities, we can easily conclude that states as central authorities seem to win more from having the capacity-enhancing devices, databases, resources, and so on (see, for example, Bigo et al., 2019; Susskind, 2020).

The winners include both the small states, who can function as normal states, and the very large states, who can expand their power and influence across borders much more easily. But it is easy to see that the larger states win disproportionately, and in any case the opportunities of organisation and control for the central public authorities expand more than for the rest of society, especially the regular citizens.

But maybe human beings can also win out. Ordinary citizens will also have more information and tools, more comfortable homes, equipment and so on. It's not only a one-way development, so the future power relations are, to an extent, open. But we cannot forget that in comparison to devices human beings tend to be more emotional and can often be manipulated, thus a good awareness, education and restraint are needed to be sufficiently autonomous in this new situation. And the trend, at least for now, is towards greater central organisation and control possibilities.

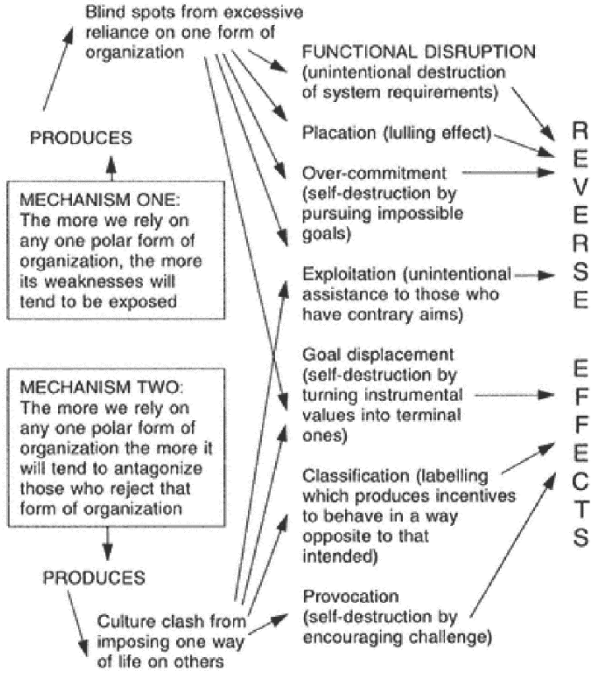
What are the digitalisation-related temptations and restraints in statehood 3.0? With regard to temptations my thinking is based on the idea that if one has new capacities at his or her disposal, one will be interested in making use of these new capacities and will test their limits. We have a tendency towards technological optimism, and much can be done with the new capabilities opened up by digitalisation. Consequently, there is a temptation to try, use and, possibly over-use these new opportunities.

My understanding of restraints and their mechanisms is much based on Christopher Hood (1998), who has demonstrated that all the ways of governing, emphasising different aspects of human nature and different ways to steer human beings, can be over-exploited. All of them are partly perfect and partly internally

flawed; that is why if you adopt just one political and governing strategy you will eventually run into difficulties, as has been seen various times in history.

Hood himself developed this perception in the context of public management. Over-reliance on one strategy leads you to its overuse, with reverse effects and resulting problems: with the hierarchical strategy, over-reliance on dominance leads to failures in too loftily launched grand projects; the egalitarian could result in endless discussions; the individualist strategy is prone to cynical overuse; and the fatalist one to endless passivity. The general logic is presented in the following figure.

Figure 1.
Reverse effects of overuse of governance strategies.



Source: Hood (1998, p. 218).

We can also use a similar perspective for broader political and governance processes and again seek restraints for digitalisation-based temptations. I see such restraints emerging in two ways. One way is related to automatic restraints. If you focus only on one strategy, there will come a point when you will not get forward anymore in most situations: you need to develop a new perspective and adjust the strategy. This is what I see as an automatic restraint; something that is, in a way, built into the system.

The other restraints do not emerge automatically but need to be set up, and this requires much more work and elaboration, and—which is probably the harder part—much willpower. Here, I will mostly discuss the automatic restraints of new technology-rich states. But of course, I will also give some thoughts about those restraints that likely do not emerge automatically and need to be consciously developed.

To study the temptations and restraints in greater depth, I now focus on two areas where issues arise in state operation. The first area is the transformation of sovereignty related to digitalisation, with a focus on the new forms of dominance and inequality in the international arena, although there are consequences as well. The second area is more domestic: it is the relationship of

neoliberal governance to democracy and citizenship—but of course, this also has some international implications.

Temptations and restraints in transforming sovereignty

Sovereignty is a manifold concept (see, among others, Laski, 1921; Bartelson, 1995, 2011; Krasner, 1999, 2009, 2012; MacCormick, 1999; Kalmo & Skinner, 2010; Cohen, 2012; Inocencio, 2014). Concisely put, it can be understood as the supreme authority in the polity (e.g., Bartelson, 2011), be it legally or politically based (e.g., MacCormick, 1999), exclusive or meta-governance style (Bodinian vs. Althusian tradition, e.g., Inocencio, 2014; Bell & Hindmoor, 2009), etc. Krasner (2012, p. 6) outlines seven classical elements of sovereignty: territory, population, effective domestic hierarchy of control, *de jure* constitutional independence, *de facto* absence of external authority, international recognition, and the ability to regulate trans-border flows.

The conventional concept of sovereignty that superseded the earlier prince-based understanding developed up to the 19th century through the four sequential steps of territorialisation, depersonalisation, absolutisation and popularisation (Bartelson 1995, 2011). Nowadays we can speak of a new game of sovereignty that is based on much more interaction among the states and regulated intervention. The legal core of sovereignty is intact, but the operational mechanisms have started to change, both internationally and in the domestic arena (Sorensen, 2004).

The distinction of three aspects of sovereignty – internal, external and popular – is well known. Internal sovereignty denotes the ability of state authorities to control the territory and the people. External sovereignty signifies the international recognition of independence and the government's ability to freely operate in the international arena (see, for example, Inocencio, 2014). Popular sovereignty has a different reference ground: the ability of people (citizens) to define collective priorities and make decisions, which is the basis of democratic statehood (see, for example, Bourke and Skinner, 2016). In more ambitious approaches, popular sovereignty can be seen as a precondition for the external (recognition) and even internal (legitimacy) sovereignty. These aspects are presented in the following table.

Table 2.

Aspects of sovereignty.

Aspect of sovereignty	**General characterisation**
Internal	The ability of state authorities to control the territory and the people. Systematic organisation of public authority, finance and force, clearly defined population, territorial integrity.
External	International recognition of independence and the government's ability to freely operate in the international arena, diplomatic contacts with other states, membership in international organisations.
Popular	The ability of people (citizens) to define collective priorities and make (and change) binding decisions. Constitution founded on the rule of the people, decision-making according to a set of rules, reasonable expectation that fellow citizens comply with decisions and share outcomes, regular possibility to change decision-makers.

Source: Kalev, Jakobson 2022.

These aspects have developed historically at different speeds and in different ways, and are thus only compatible to a limited extent, even if they are relatively reconciled in a modernist setting. In the contemporary international system, we see new dynamics partly due precisely to the new opportunities for state governments. Using their new opportunities, the state governments can expand their outreach and influence transnationally. This leads to an increase of internal-type sovereignty at the relative expense of the external type (Kalev & Jakobson, 2022).

Bartelson (2011) discusses this as the governmentalisation of sovereignty, as it will become more homogeneously constructed, assessed, and also performed across the globe. Hameiri (2010) outlines how such a governmentalised sovereignty runs into another set of difficulties because of human agency. For example, studying state-building interventions in the world, he demonstrates that even if you go in with a clear-cut plan, you will become embedded in local contexts. These will also shape those who intervene, not only those who are inside.

The development towards more internal-type sovereignty opportunities also leads to more hegemonic ambitions and related strategies, a fuzzier process of international politics, and increased asymmetry of power among the states and in the international system. It also fosters the resurgence of realism in the international arena, although this need not be limited to that development.

Thus, we can conclude that the new technological opportunities create temptations for attempting more power and dominance of the (larger) state governments, but at least as long as these are steered by humans the results will likely not be uniform and the international power balance is still constantly evolving, albeit more or less along realist or some other lines. Such a dynamic can be seen as an automatic restraint, at least to the point that we have more than one capable state in the international arena.

Another aspect of this process is more domestically oriented and creates a bridge to studying neoliberal technocratic governance. Capable and interested states operating across borders, of course, utilise the new resources available. Just to give a couple examples, they utilise cyberattacks against strategic targets; one might remember the problems of Iranian nuclear power due to cyberattacks, or how general Qasim Solaimani was killed by a remotely operated drone.

This creates new insecurity and a resulting process of securitisation (Buzan et al., 1998; Nyers, 2009; Omand, 2010; Guillaume & Huysmans, 2013). This is the idea, I would say, of hyper politicising some aspects of life. When you politicise, you have several viewpoints and you have arguments in between different viewpoints. When you hyper-politicise, you try to depict something as so huge a threat that there is just one answer, no others, and you are able to deliver. So, over-securitisation is something that can be built up as a feeling, and this is largely based on media – social media, mass media, whatever. This builds a justification for more top-down strategies that claim to be on good intentions.

We have had new EU databases on people justified by Schengen free movement. We have seen other databases, several other measures and a new layer of documentation of people based on COVID prevention. But these nice, securitising initiatives also build up a new layer of top-down governance in the Western states. It is largely anonymous. Most people just have glimpses of it, and it is quite extensive, relatively precise, and could be backed up by quite small forces; when you know where to go, you don't need police everywhere, just as

one example. We see state capacities extending to new domains, and this concerns both international and domestic arenas.

Temptations and restraints in digitalising neoliberal governance

In recent decades we can speak of a process of technocratisation and the divergence of vote-seeking frontstage politics and backstage policy-making in the Western world, especially Europe (e.g., Papadopoulos, 2013). It is often characterised as the new public management doctrine (e.g., Christensen & Laegreid, 2002; Pollitt & Bouckert, 2017; Sootla & Kalev, 2020) or neoliberalism (Crouch, 2011; Davies, 2014). For us, both are relevant, as the doctrine highlights the strategies and tools, and neoliberalism the justifications for a new style of governing.

Although new public management has evolved through many generations (e.g., Hay, 2007) and is quite diverse in practice, its managerial-technocratic focus is well handled by its main tools, which are presented in the following table. More broadly, its core purpose is to manage inputs and outputs in a way that ensures economy and responsiveness to consumers through managers operating based on performance targets, borrowing many methods and tools from private sector management. Thus, efficiency is achieved by considerable top-down, if sometimes interactive, technocratisation.

Table 3.

The new public management toolkit.

Market-inspired reforms	**Governance reforms**
• *Privatisation* of state assets and certain services • *Internal markets* – separating purchasers from providers within the public sector to create new markets, e.g. care for elderly • *Performance budgeting* – results-oriented, target-driven budgeting • *Performance contracts* and *pay-for-performance* – establishing performance targets for departments and individualised pay scales for public employees • *Programme review* – systematic analysis of costs and benefits of individual programmes • *Compulsory competitive tendering* – services delivered by the private or voluntary sector • *One-stop-shops* – coordination of programmes through one delivery system to eliminate duplication • *Invest to save budgets* – venture capital for oiling the wheels of government • *Quality standards* – applying principles of quality	• *Decentralisation* – moving responsibility for programme delivery and delegating budgetary authority from central government to provincial or local governments or neighbourhoods • *Open government* – freedom of information, e-government and public engagement mechanisms – e.g. citizens' juries and other deliberative forums • *Standards in public life* – constituting effective public administration frameworks (e.g. executive machinery, departments, planning and coordination mechanisms) • Development of *codes of ethical practice* (e.g., codes of conduct, transparency, accountability, effective audit, monitoring and evaluation) • *Collaborative government* with *stakeholders* • *Co-production* with citizens

management, e.g., Citizens' Charters, 'Best Value' or 'Comprehensive Performance Assessments', public service agreements	
Deregulatory/regulatory reform • *Personnel deregulation* – open competition in recruitment, performance-related pay and elimination of civil service controls over hiring, firing, promotion, etc. • *Purchasing deregulation* – permits individual organisations to make decisions about procurement, rather than using centralised purchasing organisations • Creation of *new regulatory bodies* to supervise privatisation and collaborative governance	**Competence reforms – increasing the capacity of public servants to act** • *Staff audits* to determine what personnel is on hand • *Getting the right people into the administration*, partly by stronger incentives to attract and retain them, partly by changing objectives and procedures in an effort to make the work situation more challenging and rewarding, and • *Establishing integrated training programmes* through the establishment of a civil service college/schools of government and professional skills for government/occupational skills/professional accreditation • Coaching and mentoring • Capability review

Source: Evans and Stoker (2022, pp. 148-149)

The reason I discuss neoliberal governance is not only based on its prevalence. The key issue is that it has liberty as its core claim. The manifold techniques of neoliberal governing are, to a large extent, based on the idea of liberating people—at least in a way (see, for example, Davies, 2014). The idea is to make individuals freer, more capable of acting in certain ways, and the governance tools should support this. In addition to the toolbox, there are also several other techniques, such as monitoring, securitisation, communication, and so on. The main focus is similar, nudging people towards some desired ways of behaviour and away from the undesired.

The problem in contemporary neoliberal governance is that there is a relatively narrow understanding of freedom and its enhancement. If people are not egoistic and individualistic in their private and public activities, they are seen as deviating and in need of some indoctrination and stronger measures: this element of a clear-cut truth is actually alien to most of the liberal tradition. Another problem is that there have already been for some time very divergent views and recipes within neoliberalism (e.g. Crouch, 2011; Davies 2014). But the managerial public administrators can nevertheless use their toolkit to steer people to act along the lines of whatever neoliberal rationality currently prevails.

The traditional ideas on which representative government, liberal democracy and citizen agency were founded are currently considerably eroded in contemporary neoliberal governance, and mostly in the guise of doing good. We have different emancipatory activities, surveillance, documentation, post-democratic trends and so on that erode the separation of public and private sphere, immunity, citizens' basic status, functioning representative government,

and so on. We need new kinds of restraints here, for example, for immunity or privacy in the contemporary age of exposure.

It is easy to see how digitalisation amplifies the possibilities of neoliberal governance, as its mainly unit-based approach to accounting and management is easily reconcilable with digital logic, and digitalisation vastly increases the amount of data and capacity for calculation. This could easily lead to over-exploitation of logic, seeking ever more ambitious strategies to steer society. Digitalisation strengthens the temptation towards more managerialism and (semi-) authoritarianism.

This (semi-)authoritarianism is not something that is a clear-cut dictatorship. It is more about managing people in rational ways and carrying them along into co-governance initiatives. In this logic, we have people participating in governing activities, but not as democratic decision-makers. The compounding of such governance and digitalisation could create very dangerous combinations in terms of democracy.

So far, there has also been an automatic restraint on the temptation of comprehensive technocratic steering, even if it sometimes emerges slowly. The experience so far has always been that the ambitious systems of data-based steering (e.g., PPBS) and planned economy (e.g., the Soviet system) have failed over time due to unintended side-effects (see also Sootla & Kalev, 2020). Even the less ambitious particular solutions of neoliberal governance run into difficulties and paradoxes, as in many real-life situations efficiency is turned upside down, etc. (e.g., Hibou, 2015).

This restraint is based on human nature. When you seek to steer people towards a very specific way of life, they become very talented at finding sideways directions to undermine both the operation and legitimacy of the system, as exemplified under several ideology-based authoritarian regimes. And of course for any more seriously liberal perspective you become uneasy as the requirements grow and become too heavy for people. Instead of liberating them, they could act as some kind of excessive steering mechanism, resulting in neurosis and its therapeutic governance. This is very much against the ideas in early neoliberalism of empowering people to achieve more.

This may change with the rise of artificial intelligence and further automation. If you have more capable, autonomous and agile systems of steering and control, ambitious top-down governance could be more sustainable. In this case, we need something different from the existing balances. There is some chance that new-style automatic restraints will emerge, but it is more likely here that new restraints need to be purposefully created.

Conclusion: a human-centred statehood 3.0

We have now seen that while digitalisation clearly leads to transformations in statehood, these can unfold in many ways and forms, and there is a considerable, continuous human role in the outcomes that will emerge. We already see how the modern international system somehow reemerges in a new shape. Most likely, we will also see some resurgence of representative government in the Western states, but we need to transform the old balances into the new, technology-rich context.

We have discussed the temptations towards more top down, technocratic and even autocratic governance based on new digital capacities. But we have also seen the restraints on these temptations, some of which likely emerge automatically while others need to be set up. In order to support human-centred

and democratic development of statehood 3.0 we need to pay attention that the system functions as it should. For this, we can find many insights from the studies of statehood, citizenship, democracy, politics, policy and governance.

A crucial aspect to bear in mind is that adapting and steering digitalisation needs to be done with a human-centred view. The political needs to be defined around human beings, as it has so far always been. All the three aspects of the political – politics as contestation over power and aims, policy as the concrete governance strategy and polity as its environment – are based on the idea that human-induced change in the environment is possible. In this way, the political is also the centrepiece of innovation, including political renewal. At the heart of it are different approaches, rationalities, human debates and choices based on them.

The political starts when there are a number of relatively sensible options, opportunities for progress that can be discussed and debated and then put into practice. It is built on human (im)perfection and creativity and thus there is no one truth, nor a single rationality. This differs from the natural inevitability of the unconscious or dogmatic reliance on one incontestable truth (hegemonic, monopoly-seeking religion or ideology). When a dogma or inevitability is contested, the political unfolds. Thus, politics, policy and polity are a profoundly human phenomenon: unlike technocratic phenomena, political debates and choices cannot be instrumentalised and automated.

We need to observe and ensure the representative democratic system functions as it is expected, or if we want to change the system or some of its elements, we do it thoughtfully and address the side-effects if necessary. A democratic state is expected to operate based on the following general logic: people articulate their views, the more active ones coalesce to promote these views, run for elections, and, if successful, make decisions and shape policies. In this process, experts and parliamentary support structures also play a role. The government then implements policies with the help of various governance strategies, institutions and tools. Key institutions balance and control each other to prevent power from concentrating in one place and becoming absolute. The functioning of a democratic state also needs a shared vision of a common future that can be collaboratively improved.

There are several studies highlighting challenges to the contemporary democratic system (e.g., Papadopoulos, 2013; Blüdhorn, 2013) but several lines of improvement have also been suggested (e.g., Kalev, 2017; Evans & Stoker, 2022). We need to re-strengthen the existing democratic political and governance institutions, facilitate education in democratic citizenship and develop a broader civility. A selection of such measures needs to be implemented, with specific attention to the effects of digitalisation (e.g. Susskind, 2020), designing and developing balancing mechanisms and, more broadly, the underlying principles of digital solutions in the advancement of organisational models and social technologies.

To return to the overarching question, we cannot say that the state is a cold monster nowadays. Despite ongoing digitalisation, it is still largely human-based and, consequently, uncold to a considerable extent. For human-centred development, we need to keep it this way. We need to overcome the temptations of digitalisation for politics and governance by further developing the restraints, building on the experiences of the previous periods. This will be a hard task but, in all likelihood, a doable one.

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Constitutional Review in Estonia – a Model for 30 Years?

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1. Constitutional adjudication in Estonia: brief historical and theoretical overview

Although constitutional review in a sense similar to Kelsen's did not exist before the 1992 Constitution of the Republic of Estonia came into force, some elements of a right to a judicial review similar to the US judicial review model existed during the interwar period. The first, extremely democratic, constitution of 1920 did not contain any explicit provision of constitutional adjudication. Instead, it contained a rather vague provision, which then was interpreted by the Riigikohus (the Supreme Court) as the basis for judicial review.

The difficulty in providing an adequate overview of the historical development of constitutional adjudication can be traced back to the two fundamental theoretical counterpositions regarding the definition of constitutional adjudication, i.e., whether the Estonian system corresponds to a diffuse (i.e. decentralised or dispersed) or rather a concentrated (i.e., centralised) model.

According to a recent approach, the judicial review in Estonia can be dated back to the 11th of May 1926. The case in question concerned a decision of the Minister of the Interior concerning the law on the election of the county councils. With this decision, the minister annulled the electoral list of a certain voters' association in the county council elections of 1923 and, consequently, terminated the mandates in the county council members obtained by the candidates on that list. Kaarel Baars was an attorney, a member of the voters' association in question and a member of one of the county councils. Together with several other members of county councils who had faced similar fate, he challenged this decision in court. One of their central arguments was that the change made in the composition of the county councils was unconstitutional. The case reached the Riigikohus, who declared inter alia:

> The Estonian courts must act in accordance with §86 PS 1920, and according to this, every court in which the question is raised that a certain piece of legislation does not comply with the Constitution is entitled and obliged to give an answer to this question. In deciding the question whether an ordinary piece of legislation is in accordance with the Constitution, the court must act in the same manner as in deciding whether a mandatory regulation is in accordance with the legislation. If the court finds that the mandatory regulation is contrary to the legislation, it must disapply it, and the court must also disapply the piece of legislation if the court finds that it is contrary to the Constitution.

According to the current state of research, this judgment can be considered the beginning of judicial review in Estonia. More precisely, this early development forms the historical background for the partially represented opinion in the legal literature, according to which the Estonian constitutional adjudication mechanism is even today similar to that of the pre-war system.

The practice of judicial review described above did not last long. From 1934 onwards, the Estonian constitution became authoritarian and democratic elements, including the judicial review, were either abolished or, little by little, vanished on their own. In 1940–1941 and 1944–1991, Estonia, like Latvia and Lithuania, was occupied by the Soviet Union, and 1941–1944 by National Socialist Germany. During this period of more than 50 years, constitutional review did not exist.

The present court system stems from a pre-constitutional law that was adopted in the transitional period. The new Courts Act was drawn up at the end of the 1980s and passed by the Supreme Council in 1991 after the formal restoration of independence, but before the adoption of the new constitution in 1992. The model of this newly invented court system was based on the pre-war model, influenced strongly by the Courts Code of 1938. The constitutional review part has been simply added to that. At the Constitutional Assembly neither the court system nor the constitutional adjudication model was profoundly debated. However, Klaus Berchtold, the Austrian expert invited to the Constitutional Assembly, commented on the draft constitution and pointed out some issues connected to the originally planned system of judicial review: "And if I am correct […] all these courts have the competence to decide whether there has been an infringement of human rights or not. If that is correct, […] this is the point that should probably be discussed. If this is correct, you may face difficulties if there are a great number of courts which may decide on human rights. […] It might be asked whether the Riigikohus [will] be in a position to guarantee, so to say, a certain unity of jurisprudence. This is the point which should be reconsidered and I have not found clear indication in your draft whether these courts could be competent in human rights cases which arise out of activities of administrative authorities." In this way, Klaus Berchtold touched upon the central problem of the judicial review model put forward by the 1926 judgment of Riigikohus and addressed the main issue that is inherent to the Estonian constitutional review model: the incompatible dichotomy of diffuse and concentrated elements of review.

The Constitution of 1992 re-established the Riigikohus in §148(1) No. 3 and §149(3). In particular §149(3), second sentence, and §152(2) can be seen as clear expressions of a concentrated constitutional review model because they constitute monopolised competence of the Riigikohus to invalidate a piece of legislation. This is the central characteristic of the concentrated review model. However, the prevailing theoretical understanding of the constitutional adjudication and constitutional interpretation have so far, at least partly, remained on the level of the pre-war case law of the Riigikohus.

Constitutional procedural law is provided for in more detail by the Constitutional Review Court Procedure Act (PSJKS). The first PSJKS of 1993 was rather brief and simply structured, having only 27 articles. The first hearing of the Riigikohus in a constitutional review case took place on 27 May 1993. Riigikohus rendered its first constitutional review judgement on 22 June 1993. The PSJKS 1993 was replaced by the new PSJKS in 2002, which is far more detailed.

2. Institutional framework, composition and appointment of judges of the Riigikohus

Riigikohus is the highest court in Estonia and unifies the functions of the final instance of civil, criminal, and administrative jurisdictions. But Riigikohus is a constitutional court, too. Constitutional provision, which places the highest ordinary and administrative jurisdiction above constitutional jurisdiction, seems to express the secondary nature of the latter. Such a combination of different functions has been described with good reasons as unique, as one of a kind, as exceptional, as peculiar or as an entirely unknown and untested institutional configuration.

In line with the fact that Estonia is a small state, Riigikohus consists of only 19 judges. The Administrative, Criminal and Civil Chambers are permanent chambers and 18 of the 19 judges are assigned to these chambers. Only the Chief Justice of the Riigikohus is not assigned to any of these chambers.

The key elements of the appointment proceedings of the judges are provided for in the Constitution. Pursuant to the Constitution, the Chief Justice of the Riigikohus is appointed to office by the Parliament on a proposal of the President of the Republic. His term, according to the Courts Act, is nine years, but as an appointed judge and having not yet reached the maximum age of office for judges, he has the right to remain a member of the Riigikohus after the end of his term of office as the Chief Justice until he resigns or reaches the general maximum age of office for judges.

The other 18 judges of the Riigikohus are appointed to office by the Parliament on a proposal of the Chief Justice of the Riigikohus. In the selection process, the opinion of the Council for the Administration of the Courts must be heard but the Chief Justice is not bound by the opinion. Although Parliament makes the final decision, it can only accept or reject the candidate put forward by the Chief Justice. Recruitment is therefore primarily the responsibility of the Chief Justice, who increasingly involves presiding judges of the permanent chambers and even all judges of the Supreme Court in the decision-making process.

The power of constitutional review is exercised either by the Constitutional Review Chamber or, alternatively, by the Riigikohus *en banc*. The Riigikohus *en banc* is composed of all judges of the Riigikohus, i.e., of 19 judges, and is chaired by the Chief Justice. The Constitutional Review Chamber of the Riigikohus comprises of nine judges of the Riigikohus. The Chief Justice of the Riigikohus shall chair the Constitutional Review Chamber and is its only permanent member. Other members of the Constitutional Review Chamber shall be appointed by the Riigikohus *en banc* for four years, taking into consideration the opinion of the Administrative, Criminal and Civil Chambers, and having regard to the most equal possible representation of the permanent chambers in the Constitutional Review Chamber. Specialisation in constitutional law is not necessary. Thus, the Constitutional Review Chamber, unlike other chambers, is an *ad hoc* chamber on the basis of voluntary membership and with a regular term of four years. In a sense, it somewhat resembles a task force rather than a chamber in the proper sense.

Since there is no legal obligation for any judge of the Riigikohus to join the Constitutional Review Chamber and the work performed there is in addition to the main task of working in one of the permanent chambers, membership of the Constitutional Review Chamber must not necessarily rotate among all the judges of the Riigikohus. Therefore, presupposing that after the ending of the four-year

term no other member of the home chamber is interested, the appointment to the Constitutional Review Chamber may be renewed.

To sum up, in Estonia, the sole difference between the highest ordinary and administrative judges and the constitutional judges is that the former have just volunteered for the Constitutional Review Chamber and were accepted for this task by their colleagues. This institutional framework reflects the secondary nature of constitutional review function in the Constitution. Although most cases of constitutional review will be decided by the Constitutional Review Chamber, the case is occasionally referred to the Riigikohus *en banc*. In these individual cases, all highest ordinary and administrative judges become constitutional judges on an *ad hoc* basis. Again, this clearly expresses the secondary nature of constitutional adjudication.

3. Where does the competence for constitutional review lie?

a. Powers of the Riigikohus

The key norms that define the constitutional review powers of the Riigikohus are §149(3)2 of the Constitution, according to which the Riigikohus shall "also" be the court of constitutional review, and §152(2), which states that the Riigikohus shall declare invalid any law or other legal act that is in conflict with the letter and spirit of the Constitution. According to the Constitution, the invalidation competence, that is constituted by the latter provision, lies exclusively with the Riigikohus. This is a clear constitutional indication in favour of the concentrated constitutional review model (please see above).

Inside the Riigikohus, the power of constitutional review is exercised either by the Constitutional Review Chamber or, alternatively, by the Riigikohus *en banc*. As a rule, the proceedings are conducted before the Constitutional Review Chamber, which usually sits as a five-member panel. The Constitutional Review Chamber decides by far the most constitutional review cases.

The Riigikohus *en banc* has two different kinds of competencies: jurisdiction-related and those not related to the jurisdiction. The latter catalogue consists of competencies such as making a proposal to the President to appoint a judge to office or release a judge from office. These cases are administrative activities to which administrative procedural law, not procedural law, is applicable. As far as jurisdiction-related powers are concerned, a case can come before the Riigikohus *en banc* in three different ways. First, there are special exclusive constitutional review competencies of the Riigikohus *en banc* that involve proceedings in order to declare a member of Parliament, the President of the Republic, the Chancellor of Justice or the Auditor General permanently incapable of performing their duties, to terminate the mandate of a member of the Parliament or to terminate the activities of a political party. Second, a matter of constitutional review that was initially supposed to be heard by the Constitutional Review Chamber may be referred by the latter to the Riigikohus *en banc* because the chamber deems it necessary that the case be disposed of by the Riigikohus *en banc*. The third possibility is that a permanent chamber, which actually has jurisdiction over the case, deems it necessary to refer the case to the Riigikohus *en banc*. In this case, there are again two options.

First, the permanent chamber may refer a question of constitutional review, i.e., a question of the constitutionality of a legislative act, to the Riigikohus *en*

banc. The precondition of such a reference is that the permanent chamber (or a special panel) holds a legislative act or omission to adopt such an act, which is relevant to the adjudication of the concrete case, for the status of being contrary to the Constitution. The second option is that the majority of the permanent chamber adopts a position that differs from a legal principle or opinion concerning the application of a law that the Riigikohus *en banc* has hitherto recognised, or in the view of the majority of the permanent chamber, disposition of the case by the Riigikohus *en banc* is important from the point of view of uniform application of the law, and the question of constitutional review arises during the proceedings of the Riigikohus *en banc*.

b. Constitutional review proceedings

There is a debate on how many types of proceedings the PSJKS of 2002 contains. There is a catalogue of proceedings in §2 PSJKS which is not exhaustive and does not match the systematicity of the rest of the law. At this point, it is assumed that different procedures should not be combined with each other and all different constitutional review proceedings will be considered as separate proceedings. Accordingly, 14 different proceedings following from the Constitution and from the text of the PSJKS can be identified:

1. Proactive abstract norm control initiated by the President of the Republic;
2. Reactive abstract norm control initiated by the Chancellor of Justice;
3. Autonomy complaint of local governments;
4. The concrete norm control;
5. Complaint about a resolution of the Parliament;
6. Complaint of a member of Parliament or of a faction about a decision of the Board of the Parliament;
7. Complaint about a resolution of the President of the Republic;
8. Request to declare the President of the Republic, a member of the Parliament, the Chancellor of Justice or the Auditor General permanently incapable of performing his or her duties;
9. Request to terminate the mandate of a member of the Parliament;
10. Request to grant consent to the President of the Parliament acting as the President of the Republic to declare extraordinary elections of the Parliament or to refuse to promulgate an Act of the Parliament;
11. Request to terminate the activities of a political party;
12. Complaint against the actions of a body organising elections or a decision or actions of an electoral committee;
13. Protest by the National Electoral Committee;
14. Petition by the Parliament.

Not all of the listed proceedings are equally important. Proceedings of significant importance are the abstract norm control proceedings initiated by the President of the Republic or by the Chancellor of Justice and the right of local government councils to challenge a legislative act or regulation if it is contrary to the constitutional guarantees of local governments. The most important type of proceedings of the present review architecture is the concrete norm control, which may be initiated by any court that concludes that a piece of legislation, the validity of which its decision depends on, is unconstitutional.

This procedure seems to be similar to Austrian, Belgian, French, German, Greek, Italian and Spanish concrete norm control proceedings. In all these

jurisdictions, judges have the right to ask the Constitutional Court for an opinion on the constitutionality of the relevant legislative act if they deem it necessary before a final decision in the case is made. Thus, the review model is incidental and proactive. In Estonia, however, according to the prevailing interpretation of the Constitution (and similarly, for example, to Portugal) the constitutional review proceedings start when a court has made a decision in the case, i.e., as a rule, has delivered the judgement or – in procedural matters – the ruling. It is thus (not being principal), *ex post facto* and reactive. Thus, the main difference of the Estonian concrete norm control system is that in Estonia the start of constitutional review proceedings depends on the prevailing opinion on the prior final decision in the case.

The most important question related to the concrete norm control proceedings concerns the debate whether the Riigikohus' interpretation of the Constitution, according to which the lower-level court should always deliver a final decision prior to initiating the constitutional review, is correct. This interpretation is the clearest expression of the diffuse theory of constitutional review (see above). As a supporting argument, a shorter duration of the proceedings could be put forward. Nevertheless, the present understanding of the initiation of the concrete norm control has been criticised in the literature. The main argument of the critics is the possibility that when the Riigikohus does not follow the opinion of the lower-level court on the unconstitutionality of the legislative act left unapplied, the judgment of the lower-level court might stay in force if none of the parties appeals the decision. A court decision that leaves a valid legislative act unapplied is itself unconstitutional. This problem would not occur in a system of constitutional review that follows the concentrated theory, e.g., when the lower-level courts obtain a preliminary ruling from the Riigikohus and only after that render their final decision.

A constitutional review judgment shall be adopted by a simple majority vote under the principle of confidentiality of deliberations. Judges shall resolve any differences that arise in the process of deciding the case by a vote. No judge has the right to abstain from voting or remain undecided. The presiding judge shall vote last. In the case of an equal division of votes, the vote of the presiding judge shall be decisive.

The publication of dissenting opinions to final judgments is permitted. The possibility of dissenting opinions is foreseen by the PSJKS, pursuant to which a judge, or several judges, who disagree with the judgment or the reasons, may append a (joint) dissenting opinion to the judgment. This opinion shall be submitted by the time of pronouncement of the judgment and signed by all the judges concerned. Dissenting opinions will be published together with the judgment, both in the Official Journal and on the website of the Riigikohus.

C. Diffuseness of and access to the constitutional adjudication

In the light of the above discussion, the fundamental question of sufficient access to the constitutional adjudication arises. The Riigikohus has recently explained:

> If a person considers that his or her rights have been infringed by a provision of a legislative act, he or she may request a review of the constitutionality of the provision, in particular in the case in which the provision is to be applied (§15(1)2 PS). The constitutionality of a restriction

on access to the courts may be challenged by the person in court proceedings, in which the disputed provision should be applied.

Thus, the Riigikohus considers the right to concrete norm control as the primary right to constitutional review and the arguments regarding the alleged unconstitutionality of a legislative act must be presented before the ordinary courts. In another case, the Riigikohus has recently stated: "Pursuant to §15 and §152 PS, every court must, in deciding a case, assess the constitutionality of the applicable law." This is an expression of the diffuseness of the system – not only the Riigikohus, but, according to the Riigikohus, all courts are competent to perform judicial review. While this in itself can be considered somewhat ineffective, it is not necessarily constitutionally problematic as long as the Riigikohus fulfils its function as a constitutional court. However, one would expect that courts or – as the court of last instance – the Riigikohus at least has the obligation to respond to the arguments put forward in the complaint regarding the constitutionality of the piece of legislation in its decision. Instead, however, the Riigikohus has repeated several times: "The mere fact that the Riigikohus does not state reasons in its ruling as to the constitutionality of the contested provisions does not mean that courts failed to assess all the pleas in law raised in the complaint." This fiction applies regardless of whether a court has even explicitly considered the constitutionality of the legislative act in question. And this is where it becomes problematic.

In light of this, the claim to an effective legal remedy with regard to the review of constitutionality is reduced to a mere fiction and an irrefutable presumption that at least some judge in the court system has given some thought to the constitutional question. However, this does not fulfil the minimum constitutional requirements of a democratic constitutional state. Whether and how such an examination has been carried out must be evident and comprehensible. The complainant and the legal public must be informed of the reasons for rejecting the complaint. Moreover, the Riigikohus has the clear constitutional obligation to perform constitutional review, which means the duty to perform it explicitly. Not obeying this obligation comes close to the denial of justice.

As an interim conclusion, it should be noted that the diffuseness of the constitutional adjudication leads to a dispersion of responsibility. If several instances are simultaneously responsible for constitutional adjudication, it may end up that the question of constitutionality is passed on between the instances as a hot potato. Therefore, it ultimately comes down to the fact that it may happen that not one court really examines the most important question – the question of constitutionality. Historical experience teaches us that in case of a legal system that does not guarantee full legal protection of the constitutional rights, it is only a matter of time before the democratic system of government suffers serious damage.

4. The main institutional issues

a. Appointment procedure of judges

The different appointment proceedings for the Chief Justice and for the rest of the judges raises the problem of whether the Riigikohus is a fully-fledged collegial body. This has already been addressed elsewhere. A further problem lies in the modus of how the judges of the Riigikohus are appointed. Although the Parliament has the final decision-making competence, the recruitment of judges

is the constitutional responsibility of the Chief Justice, who may or may not involve all judges of the Riigikohus in his decision-making. Although the Parliament ultimately formalises the nomination, in reality the Chief Justice personally determines the composition of the Riigikohus.

The legitimisation procedure for judges of the Riigikohus corresponds to the indirect cooptation model. In his influential work on cooptation, Karl Loewenstein based his analysis on the preliminary understanding of cooptation as the filling of vacant positions in a collegial body by the votes of the existing members of the body, as opposed to an election by an outside constituency. If the actual election or nomination is not carried out by the body itself but just controlled by it, one could name it indirect cooptation. The function of cooptation is frequently, according to Loewenstein, as a means "to protect the existence and future of a group in its present form". Thus, in this model, it is more likely that the views of newly recruited members are in line with those of existing members, although the process can also be used to change the organisational profile. This means that the cooptation process also becomes a venue for power struggles between those who favour the change and those who would prefer to leave everything as it is. But there is another dimension causing the most concern. To describe the essence of the problem, the words of Karl Loewenstein express it best:

> It [i.e. the cooptation] may be superior to popular election in terms of expediency, but it offers no guarantee that only the most capable will actually reach the top positions. Patronage and nepotism can creep in with every appointment to office, but are easier to detect and, if necessary, correct with all other investiture techniques than with cooptation.

Karl Loewenstein's thorough analysis of cooptation thus points to its fundamental systemic risk.

It must be emphasised that the cooptation procedure for the composition of the Riigikohus was not entirely wrong, at least for the transition period, because it probably accelerated the reform of the court system and its necessary personal renewal, and with that the transformation of the whole legal system. The first composition of the Riigikohus selected by the first Chief Justice Rait Maruste turned many fundamental principles of the democratic constitutional state into constitutional reality. For this, they deserve sincere recognition.

However, the cooptation model might not appear equally successful in the long run. Even if cooptation might not have been a bad choice for a short period of time, over a longer period human imperfection, accumulating error rate and deficit of democracy may sooner or later lead to a creeping downfall. This insight could motivate a forward-thinking constitutional legislator to address this issue sooner rather than later. Historically, under the democratic Constitution of 1920, all judges of the Riigikohus were equally appointed (or elected) by the Parliament and this historical model could serve as the model for a possible future legitimisation procedure for judges of the court that carries out the constitutional review function. A qualified majority, e.g., a two-thirds majority of all members of Parliament, could be used as a possible amendment in order to minimise the risk of politicisation.

b. Lifelong term of office of the judges of the Riigikohus

The reason for the limited term of office is the need to find a reasonable balance between the democratic legitimacy of constitutional judges and their independence. The Government Commission for Legal Expertise of the

Constitution argued in its final report: "A fixed term of office and a periodic change of the membership will avoid the "petrification" of the Court and ensure the continuous renewal of its legitimacy." On the other hand, opponents of the time-limited term of office for constitutional judges insist on the absoluteness of the principle of lifelong tenure.

Currently, the judges of the Riigikohus are, equally to all other judges, appointed to office for life which means in practice that they will be released as a rule at 68 years of age, but their term of office can theoretically be prolonged by the Riigikohus *en banc* up to 72 years. Combined with the cooptation model, the lifelong tenure of judges of the Riigikohus reinforces both good and incorrect personnel decisions. If someone is appointed to the Riigikohus in his or her early 30s, as it has happened, the effective term of office may theoretically last even 40 years. In a democratic constitutional state, which derives its ongoing power from the change of personalities and their views at the top of the decision-making chain, this is simply too long.

The term of office of constitutional judges varies internationally. Other than in Estonia, the undetermined duration of the term of office of constitutional judges applies in the following member states of the European Union: Austria, Belgium, Cyprus, Denmark, Finland, Ireland, Malta and Sweden. However, the tendency seems to point towards a non-renewable term of 9 to 12 years, which would meet both requirements: the independence of the judges and the necessary change of personnel and views. In Latvia and Lithuania, as the closest neighbours, the not (directly) renewable term of office of constitutional judges is, respectively, 10 and 9 years. In other member states of the European Union, for example, a not (directly) renewable 9-year term of office applies for constitutional judges in Bulgaria, France, Italy, Poland, Portugal, Romania, Slovenia and Spain and a 12-year non-renewable term in Germany. Furthermore, a non-renewable 9-year term of office also applies for constitutional judges in Ukraine. Thus, Estonia is the only member state of the European Union which, in its relatively new Constitution, made the decision for a lifelong term of office of constitutional judges. Perhaps, in order to minimise the risk of negative effects on the democratic constitutional state, it could be advisable to consider limiting the term of office of constitutional judges *de lege ferenda* to a non-renewable term of office of between 9 and 12 years.

C. Secondary nature of the constitutional review

§149(3) of the Constitution reads: "The Riigikohus is the highest court of Estonia and reviews rulings of other courts pursuant to a quashing procedure. The Riigikohus is also the court of constitutional review." The systematicity of the two sentences of this paragraph forms the basis of the critique, mainly expressed by the first Chief Justice after the regaining of independence Rait Maruste, according to whose interpretation this constitutional provision means that the Riigikohus is in the first place the highest court of Estonia and only secondarily the court of constitutional review. Indeed, since the Riigikohus deals with administrative, civil, criminal and misdemeanour cases – apart from constitutional review cases – and above that with cases concerning court administration, it has to apply case by case a total of five different codes of procedure, plus rules for court administration matters. With such a complex structure of competences and procedures, it is crucial that the judges carrying out constitutional review tasks stay on track and do not lose sight of their main objective – to carry out an effective substantive

constitutional review. Constitutional guardianship, as Hans Kelsen has put it, in the style of Carl Schmitt, is a fundamental function of democratic constitutionalism, separate from ordinary jurisdiction, and deserves corresponding treatment by the Constitution. The cited constitutional article does not meet this requirement.

5. Reform efforts

There are numerous issues that could be raised. In the following, the article focuses on the two most important critical aspects: the lack of a separate constitutional court and the debate about the individual constitutional complaint.

a. Constitutional Court

It was only a matter of time before a debate would break out about the justification of the configuration of the institutional framework for constitutional review. There are four important issues of the present system that need to be addressed: incomplete access to constitutional adjudication for the protection of constitutional rights; the cooptation model of appointing the judges; the lifelong term of office of the constitutional judges; and the secondary nature of the constitutional review. All of these could be solved, or at least significantly mitigated, if a standalone constitutional court were established consisting of judges who are all appointed to office through an equal procedure for a non-renewable fixed term of reasonable duration.

The debate about a separate constitutional court started as early as in the *travaux preparatoires* of the Constitution, although none of the draft versions contained an explicit provision for this. Austrian expert Klaus Berchtold was – as far as can be seen – the first to propose a constitutional court for Estonia under the Constitution of 1992. He argued in his speech to the Constitutional Assembly:

> But you may consider establishing a constitutional court which is a specialised court and has the advantage of concentrating the competence concerning protection of human rights to one court for the whole of Estonia. I may say that our [i.e. Austrian] experiences has shown that such a concentration of competence in this field before a constitutional court has a lot of advantages. Especially the advantage that there is no differing jurisprudence between several courts.

The constitutional review questions were discussed in the Constitutional Assembly, but according to the transcript, either the idea was not properly discussed, or it was left aside for reasons not disclosed. Thus, the idea of a separate constitutional court was set aside without transparent reasoning and, instead, the present configuration was introduced.

The debate about establishing a separate constitutional court continued among the public in the second half of the nineties with the work and the final report of the Government Commission for Legal Expertise of the Constitution, which was established in 1996. First, foreign experts Robert Alexy and Sergio Bartole recommended a constitutional court for Estonia. Subsequently, in its final report, the commission presented a well elaborated proposal to amend the Constitution and to establish a constitutional court. The essential arguments presented by the commission were: (1) an individual constitutional complaint leads to the establishment of a separate specialised court; (2) the constitutional

court better ensures the development of constitutional law; (3) the constitutional court more effectively keeps state bodies within the limits of the powers assigned to them by the Constitution; (4) the constitutional court better ensures the protection of constitutional rights; and (5) the constitutional court helps to prevent Estonia being defeated in the European Court of Human Rights. The Minister of Justice at that time, Paul Varul, was of the opinion that the establishment of the constitutional court was, although not strictly necessary for the development of the state, important and recommendable. Subsequently, several authors – some of them involved in the work of the government commission themselves as staff of the commission – supported a constitutional reform and the establishment of a separate constitutional court.

In 2001, the departing President of the Republic Lennart Meri initiated constitutional amendment proceedings in order to establish a separate constitutional court. President Meri formulated reasons for the reform of the constitutional court in the explanatory memorandum to the draft and in his speech to the Parliament on 7 October 2001. The explanatory memorandum was essentially based on a critique of the present system. The further arguments raised by President Meri were: (1) Estonia needs a body that has the right to the final interpretation of the Constitution in order to be able to settle disputes between constitutional bodies; (2) such an institution would prevent the risk that some powerful prime minister, parliamentary leader or president will usurp the powers of the other institutions; (3) the constitutional court in this way would create the balance that the state needs to function. The proposed constitutional amendment did not find the necessary political majority and with the next election the draft dropped out of the proceedings of the Parliament. In the following period, several authors here and there supported the idea of establishing a separate constitutional court.

On the other hand, several authors have opposed the idea of the separate constitutional court. The most prominent opponents have been the former Presidents of the Riigikohus Märt Rask and Priit Pikamäe, judges or former judges of the Riigikohus Tõnu Anton, Jüri Põld, Indrek Koolmeister and Ivo Pilving, one of the leading authors of the draft of the Constitution of 1992 Jüri Adams, and Chancellor of Justice Ülle Madise. In summary, they have brought up the following main arguments: (1) there is no need for a separate constitutional court because there are no separate civil, criminal and administrative high courts that would cause the need for harmonising differing case laws but only a single integrated Riigikohus; (2) the cost factor would be too high and the anticipated workload would be too low in a small country like Estonia; (3) the position of the Riigikohus would be damaged and the role of the Chancellor of Justice would be marginalised; (4) since the appointment of the judges of a separate Riigikohus and their term of office would differ from the appointment procedure of other judges and their lifetime term of office, they would not be real judges and thus, the constitutional court would not be a real court; (5) as a consequence, a separate constitutional court would jeopardise the balance of powers and democracy; (6) last but not least, the present system guarantees a sufficient level of protection of constitutional rights and stability is a value in itself.

This debate reveals that any proposal for a reasonable constitutional reform cannot succeed without a broad political consensus, which is extremely difficult to reach. The recurring argument of too high costs has been brought up without any closer analysis and simply anticipating the high salaries of judges. However, if one included the advantages offered by a better protection of constitutional rights, which protection in certain respects does not currently meet the constitutional

standard (see above), and the increase of legal certainty, the calculation might not be so simple. These wins could be translated into a better economic climate and increased foreign investments and thus into real money. Furthermore, the institutional arguments illustrate the general reluctance of institutions towards reforms, with the institutions concerned tending to protect their powers and to ignore the broader picture. Therefore, it is now extremely difficult to correct institutional shortcomings created during the drafting of the Constitution, more than 30 years later.

b. Individual constitutional complaint

The main shortcoming of the constitutional review proceedings is the lack of a procedure for an individual constitutional complaint or, to be more precise, the lack of sufficiently clear and predictable criteria for the admissibility of an individual constitutional complaint. In Estonian constitutional law theory, the dispute is still ongoing as to whether the Constitution establishes a right to an individual constitutional complaint to the Riigikohus or if all courts have a direct constitutional obligation to enforce constitutional rights and to perform constitutional review. The author of this paper is of the opinion that there are far better arguments that support the necessity of the individual constitutional complaint. It is indispensable in order to meet the requirements of the constitutional guarantee of access to justice. Without the right of individual complaint, the constitutional review system cannot be considered to be exhaustive and the bearers of constitutional rights would still lack the ultimate remedy to enforce such rights.

1. Foundation and development of the individual constitutional complaint

The right of individual complaint was discussed but rejected in the legislative process of the new PSJKS. However, it was recognised approximately a year later in the case law of the Riigikohus. In 2003 the Riigikohus heard an appeal brought by S.B. who had been sentenced to six years' imprisonment under the old Criminal Code, which had its roots in Soviet law. The new Penal Code, which entered into force on 1 September 2002, laid down a maximum term of imprisonment of five years for Brusilov's sentence for criminalised acts. After having completed five years, Brusilov brought an appeal before the Riigikohus for the correction of judicial errors and requested that he be exempted from continuing to serve his sentence. The Riigikohus *en banc* upheld the appeal and declared the Implementation Act of the Penal Code unconstitutional in so far as it did not provide for any reduction of the sentence of imprisonment imposed pursuant to the Criminal Code up to the maximum limit on deprivation of liberty laid down in the corresponding paragraph of the Penal Code. The main argument for the admissibility of these proceedings was the requirement under §15(1) PS that the protection of constitutional rights must be free from gaps.

The Riigikohus has stressed several times subsequently that: "The aim of the constitutional right enshrined in the first sentence of §15 PS is to effectively ensure access to courts without any gaps through appropriate court procedure." A gap arises, in particular, when there is no procedural possibility of enforcing a substantive claim. This interpretation must be upheld, since the cited provision, taken in isolation and in conjunction with certain other constitutional provisions, implies the existence of the right to an individual constitutional complaint.

In the subsequent period, the Riigikohus further developed its reasoning, implicitly recognising the individual constitutional complaint and stressing repeatedly:

> The Constitutional Review Court Procedure Act does not contain an *expressis verbis* provision enabling the filing of individual complaints for review of the constitutionality of legislation of general application. At the same time, the Riigikohus *en banc* has repeatedly pointed out, on the basis of §13, §14 and §15 PS and the application practice of the European Convention for the Protection of Human Rights and Fundamental Freedoms, that the Riigikohus may refuse to hear a complaint of a person on its merits only if the person has other effective possibilities for exercising the right of recourse to the courts, guaranteed by §15 PS.

Moreover, the Riigikohus has explicitly recognised the right of every person if direct recourse to the Riigikohus: "If a person is of the opinion that he has no other effective possibility to exercise the right of judicial protection, guaranteed by §15 PS, the person himself can have recourse to the Riigikohus." Simultaneously, the Riigikohus has always highlighted the subsidiary nature of the individual complaint: where there is another effective remedy, an individual complaint is inadmissible.

On the other hand, the Riigikohus has partly limited the possibility of filing an individual complaint in a way that would make it practically impossible:

> Even if a person has no other effective means of exercising the right to access to courts guaranteed by §15 of the Constitution, he or she can only appeal directly to the Riigikohus in defence of his or her constitutional rights if his or her rights have been violated by the application of certain provisions to him or her. The question of the constitutionality of these norms must arise from their specific application to the person, not from their unspecified application in the past or their possible application in the future. There must be a genuine dispute as to whether constitutional rights and freedoms have been infringed.

This extremely restrictive view cannot be accepted. The function of an individual complaint is to fill a gap in legal protection in cases where, for factual or legal reasons, a person cannot be required to await the specific application of the rule or cannot reasonably be expected to be subject to the rule in advance. Since an infringement of a constitutional right may also consist of a failure on the part of the legislature to act, it is legally impossible, at least in those cases, to require the prior specific application of a rule. A similar structure existed, for example, in the Brusilov case, in which the person had no procedural opportunity to challenge the non-reduction of his sentence and the infringement consisted quite simply in the absence of the necessary rule. However, even if there is a rule, it may be impossible to have to wait for the specific application of the rule. For example, in the case of challenging an international treaty or a rule of an international treaty that modifies the rights or duties of persons, the requirement of a specific application of the rule would render the legal remedy practically meaningless, since it is very difficult for a state to get rid of an unconstitutional treaty in force and the treaty cannot logically be applied before it is enforced. Moreover, the function of the individual complaint is to help secure rights where a person may not even be aware that a norm has been applied to him. This is the case, for example, with provision of surveillance measures. If a person does not know, it is impossible to require him or her to wait for the specific application of the rule. It is also doubtful whether a person can reasonably be expected to wait for the sanction to apply. If the legislature were to reintroduce, for example, the

death penalty, a person could not reasonably be expected to wait until the sanction norm would apply to him. The same is obviously true for sanctions that would constitute torture, cruel or degrading treatment. Where exactly the line is drawn is a matter of interpretation. So, the Riigikohus later retracted this extremely restrictive view:

> A person may file a complaint to the Riigikohus for review of constitutionality against a legislative act prohibiting certain conduct in order to protect his or her fundamental rights even before the imposition of the sentence or the alleged violation of subjective rights, if the person refers to the possibility of an actual violation of his or her rights. Such an individual complaint is admissible if the violation of the person's rights is probable, serious and irreversible and the person has no other effective means of exercising the right to judicial protection guaranteed by §15 of the Constitution.

It is to be hoped that the extremely restrictive view on the admissibility is merely an unfortunate isolated case.

2. Possibility of a constitutional complaint against a court decision (judicial constitutional complaint)

The aforementioned, however, only concerns the norm control complaint. Interestingly, in the period subsequent to the Brusilov judgment, the Riigikohus also initially appeared to be willing to recognise the judicial constitutional complaint, i.e., the constitutional complaint against the decision of the court of the last instance. This has been vaguely pointed out in particular in two judgments delivered by the Riigikohus *en banc*.

In a so-called special appeal brought by Ronald Tsoi, the Riigikohus *en banc* heard an administrative case. The two main issues in the case were, first, whether the law which precluded the revocation of withdrawal of the right to drive imposed before the entry into force of the new Penal Code, even though the new law did not know the corresponding additional punishment was constitutional and, secondly, whether the failure to waive the penalty had to be challenged before the administrative or ordinary courts. In the first place, the Riigikohus allocated the jurisdiction of the administrative court because it was a public-law dispute for which no special regime had been provided for. Secondly, the Riigikohus found that the law at issue was in line with the Constitution. This was a constitutional dispute which arose in the context of a dispute concerning the jurisdiction of a court.

In another so-called special appeal, brought by Peeter Ludvig, the Riigikohus *en banc* also examined a case transferred to it by the Administrative Chamber. The main issue in this case was, like the previous case, the question of the jurisdiction, i.e., whether the administrative court or the ordinary court had jurisdiction to hear an appeal against a decision establishing the intoxication status of a person who had been brought to a health care institution. The Riigikohus held that the jurisdiction in this case belonged to the ordinary courts.

The link between the two cases was that the Riigikohus gave a broad interpretation to the right of individuals to bring a so-called special appeal before the Riigikohus in order to ensure that the general constitutional right to address a court was not unprotected. These decisions have been interpreted as a step towards the recognition of judicial constitutional complaint.

In the following period, however, the Riigikohus expressly ruled out the judicial constitutional complaint in the case of Murat Kilic. A Turkish sea captain for long-distance ferries was married to an Estonian national and held a long-term

residence permit for Estonia. He applied for Estonian citizenship. This was refused on the grounds that the applicant had not stayed in Estonia for at least 183 days per year in the last five years. The administrative courts dismissed the appeals and did not initiate constitutional review proceedings, despite repeated explicit requests. The applicant lodged an individual complaint against the judgment of the Administrative Chamber of the Riigikohus before the Riigikohus, which was dismissed by the Constitutional Review Chamber. The latter stated succinctly: "Pursuant to the Constitutional Review Court Procedure Act, the Constitutional Review Chamber is not a higher court than the other chambers of the Riigikohus, to which appeals can be lodged against decisions of the Administrative, Civil or Criminal Chamber."

This precedent has been followed by a number of unsuccessful attempts to directly or indirectly challenge a Riigikohus's decision before the Riigikohus with a constitutional reasoning. As a consequence, according to the unequivocal case law of the Riigikohus, there is *de lege lata* no judicial constitutional complaint in Estonia. Such a solution may not sufficiently guarantee the constitutional right to loophole-free access to justice.

3. Amendment attempt

The fundamental importance of the individual complaint for legal protection and the legal uncertainty described above prompted the Minister of Justice in 2017 to present a plan to add provisions on individual constitutional complaint to the PSJKS. The subsequent debate about this plan was mainly conducted in the press.

The plan was endorsed by the Chief Justice of the Riigikohus at the time, Priit Pikamäe, and by some of the judges, who found that the problem of introducing an individual complaint in the PSJKS was appropriate and that regardless of the specific solution, the issue must be dealt with through legislation. Eerik Kergandberg also expressed cautious support for the institution of the individual complaint in the literature. In the press, Rait Maruste and, slightly more cautiously, Uno Lõhmus also expressed clear support for the idea of introducing individual complaints in the PSJKS.

However, on the other side, the plan triggered exceptionally harsh critique. In particular, the draft was attacked as dangerous for democracy, as an act of deception and as an attempt to silence the Chancellor of Justice. Even the majority of the Riigikohus did not support the draft law "as proposed". Furthermore, judge Ivo Pilving publicly criticised the plan. Other prominent opponents were the Chancellor of Justice Ülle Madise and former Minister of Justice and former Chief Justice of the Supreme Court Märt Rask. The main argument of the opponents was the assumption that there is no gap in the judicial protection, the assertion that the introduction of individual complaints would lead to an unnecessary increase in the workload of the Riigikohus, that it would create a risk of politicisation of the Riigikohus and the apprehension that it would undermine the competences of the Chancellor of Justice.

The strong negative reaction was somewhat surprising and regrettable. The Riigikohus, in its case law, has already accepted the right of individual complaint. Despite this, no excessive increase of the workload or politicisation of the Riigikohus has so far been observed. However, if the individual constitutional complaint were removed from the legal order, there would appear an unconstitutional gap in the right to access to courts.

In the following, the Minister of Justice withdrew his plan and the individual constitutional complaint continues its shadowy existence based on the case law of the Riigikohus, which itself did not have a majority in support of the idea.

6. A case study on the case law of the Supreme Court

One of the most famous cases of the Riigikohus, the Brusilov case, has already been touched upon above. Another judgement that is undoubtedly one of the landmark judgements of the Riigikohus is called "Operative technical measures I". The Parliament adopted the Police Act of the Republic of Estonia Amendment Act, which provided, among other things, for the following:

> To establish that until the adoption of an act laying down operative surveillance activity, the security police officers may temporarily use operative technical measures to perform their duties only at the written consent of a member of the Riigikohus appointed by the Chief Justice of the Riigikohus.

The Chancellor of Justice challenged this article in the Riigikohus. The Riigikohus repealed the article in question as of the entry into force of the judgment.

The reasoning of this early judgement was rather brief and simply structured. The following parts are of importance:

> The law establishes the possibility to employ special operative surveillance measures, and the general grounds for the restriction of fundamental rights and freedoms. […] Nevertheless, the Court is of the opinion that the valid normative framework for the implementation of special operative surveillance measures is insufficient from the aspect of universal protection of fundamental rights and freedoms, and hides in itself the danger of arbitrariness, distortions and unconstitutional restrictions of the exercise of fundamental rights and freedoms. It has not been provided what exactly is to be understood under these special operative surveillance measures. […] The circle of subjects entitled to apply special operative measures, the cases, conditions, procedures, guarantees, control and supervision, and responsibility pertaining to the use of special measures have not been specified. […] Thus, upon passing […] the Police Act Amendment Act, the Riigikogu has ignored §3 of the Constitution, according to which the powers of state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith, and has violated §14, which obliges the executive to guarantee the rights and freedoms of every person. […] The Riigikogu itself ought to have established the concrete cases and a detailed procedure for the use of special operative surveillance measures, as well as possible restrictions of rights related to the use of such measures, instead of delegating all this to the officers of the Security Police and a judge of the Riigikohus. What the legislator is justified or obliged to do under the Constitution cannot be delegated to the executive, not even temporarily and under the condition of court supervision. Thus, […] the Police Act Amendment Act is also in conflict with §13(2) of the Constitution, as insufficient regulation upon establishing restrictions on fundamental rights and freedoms does not protect everyone from the arbitrary treatment of state power.

The significance of this judgment arises from three aspects: first, the Riigikohus recognises the general principle of the reservation of the law; second, it introduces the general right to organisation and procedure, and third, it accepts that the legislature can not only violate the Constitution by going too far but also by doing not enough, i.e. by omission. Only the first aspect, which is the most

important one, is of a closer interest here. The general principle of the reservation of the law has its roots in the Enlightenment and in the idea that, since everyone is equally entitled to human rights, everyone must also be entitled to have a say, at least indirectly through a vote in elections, in the limitation of these rights. The Riigikohus has repeated the idea of the general principle of the reservation of the law several times after its first recognition, in a different wording but always in a very clear manner, e.g.: "The Parliament may not delegate to the Government of the Republic the resolution of a matter which, according to the Constitution, must be resolved by legislation."

The principle of general reservation of the law has two elements: first, the requirement of a legal base or legislative authorisation for every infringement of rights which specifically concerns constitutional rights, and second, a slightly broader materiality principle or parliamentary reservation which requires that material, or most important, questions must be decided by the Parliament itself and cannot be delegated to the executive power. The most prominent formulation of the first principle by the Riigikohus is the following:

> The delegation of a matter that falls within the competence of the legislature to the executive and the interference of the executive in constitutional rights is permitted only on the basis of an authority-delegating provision that is provided for by legislation and in accordance with the Constitution.

The materiality principle has been repeated in a similar wording several times by the Riigikohus:

> The requirement of parliamentary reservation derives from the principles of the rule of law and democracy, and it means that in regard to issues concerning constitutional rights all material decisions from the point of view of exercise of constitutional rights must be taken by the legislator.

The following requirement is a particularly important addition to this principle:

> The executive may only specify the restrictions on constitutional rights and freedoms laid down by legislation, but is not allowed to impose additional restrictions to those provided for by legislation.

When it comes to infringements of constitutional rights, both requirements, i.e. the requirement of a legal base or legislative authorisation and the materiality principle or parliamentary reservation must be met.

The most interesting question in this context is what is material. Unfortunately, there is neither a simple nor an exhaustive answer to that question. In subsequent case law, the Riigikohus has ruled in particular that a detailed procedure for limitation of rights and the designation of the competent administrative body are material from the perspective of constitutional rights and thus objects of legislation. What is more, e.g., disciplinary sanctions against civil servants, the object and amount of a customs duty, interest duty on a tax payment in arrears, a participation fee of an auction for privatisation of land, fees for bailiffs and a limit on the reimbursement of the costs of a contractual representation fee must be provided for by legislation and are, thus, material. However, this list is not exhaustive and is therefore only indicative.

At this point, it is important to note that the judgment "Operative technical measures I" laid the foundation for a long chain of case law, some of which continues to this day. Unfortunately, in a more recent case law, the Riigikohus seems to have partially abandoned the materiality principle in declaring that "some material matters can be decided by the government". This statement has also found expression in some judgements.

The Riigikohus *en banc* had to assess the constitutionality of a set of provisions providing for the qualification requirements for construction engineers. The obligation to prove the existence of qualifications for a certain profession is an intense infringement of the constitutional freedom of choice of profession. Since without proof of qualification, a person cannot work in the chosen profession, this is a restriction on access to the profession. This, in turn, means that a person who does not have a professional certificate cannot freely earn a living in his chosen profession. As the Riigikohus pointed out: "The law precludes the exercise of certain activities without a certificate of professional qualification or competence."

The legislature had delegated the setting of those qualification requirements in their entirety to the regulatory power of the Minister for Enterprise and Information Technology, without any limitations or substantive requirements. The Riigikohus held, in breach of its earlier case law, that this legislation constitutes the authorisation "under which the minister will establish, among other things, as qualification requirements, the education and work experience requirements that a person must meet in order to qualify [as a construction engineer]". In short, the Riigikohus accepted in this case a mere allocation of competence as the basis for authorisation to issue the regulation establishing the qualification requirements. The Riigikohus did not examine whether, in accordance with the principle of materiality, at least the most important qualification requirements should not be laid down in the legislation itself. However, from the earlier case law of the Riigikohus, it can be clearly concluded that the legislator cannot, in the case of an intensive infringement of a constitutional right, expressly delegate the power to enact all important conditions to the executive.

A further problematic development has emerged in the assessment of the lawfulness of vaccination orders. The Commander of the Defence Forces imposed on all employees of the Defence Forces the obligation to undergo vaccination against coronavirus. The consequence of non-compliance to this order was dismissal from service. The Riigikohus was of the opinion that a general provision of the labour law was a sufficient legal basis for this order. According to this general provision, every employer shall have the right to impose on the undertaking stricter occupational health and safety requirements than those provided for by legislation. This provision has a double meaning. In so far as the employer is a private person and the relationship between the parties is governed by a labour contract, this power must be exercised in accordance with the principles of private law. However, when it is relied upon by the State itself or by a subordinate public legal person in relation to a private individual, the rule is subject to constitutional principles, including the principle of materiality. According to the principle of materiality, however, the important questions, i.e., in particular, the restrictions of constitutional rights, must be laid down in the legislation itself. This condition was clearly not met by the provision in question. It is therefore highly doubtful whether the provision in question can be applied at all in public law. However, the Riigikohus stated, without seeing any problem: "[The particular provision] expressly permits the imposition of stricter requirements than those provided for in the legislation, and neither the Military Service Act nor its implementing acts provide for an exception to the right to impose stricter requirements."

In a more recent similar case concerning the compulsory vaccination of police officers, which was imposed by a general order of the Director General of Police based on the same legal basis, the Riigikohus reaffirmed the latter position. Hereby, the Riigikohus simply stated that the general labour law basis was constitutional. In short, the Riigikohus suddenly allows, despite its earlier strict

case law, the imposition of further obligations by the executive on the basis of a legal basis devoid of any substance. This opens the floodgates to the arbitrariness of the executive.

It remains to be seen whether these decisions are going to be corrected in later case law or whether a larger and more serious problem has occurred for the rule of law and the basic democratic order.

7. Constitutional Review in Estonia – a Model for 30 Years?

Speaking of the overall trends, the rapid development of the Riigikohus' case law in the initial period seems to have been slowed down over time. In some cases, tendencies have appeared to roll back some of the central achievements of the democratic constitutional state already achieved in the early case law, and in some recent important cases the case law has not taken the best path from the perspective of the constitutional principles. Some key judgments bring out important points. However, the reasoning tends too often to be fragmentary or methodologically poorly comprehensible and at times the consistency of the case law is somewhat lacking. Nevertheless, the withdrawn control over the decision-making powers of the executive is a cause for concern from the point of view of constitutional rights because the rule of constitution is not always guaranteed by the case law of the Riigikohus in this respect. Furthermore, the difficult or in some cases even impossible access to justice in the matters of constitutional review causes serious concerns from the constitutional point of view.

The Estonian constitutional review system appears only at the first glance as simple. Although performed by a single court, in reality, it is quite complex and does not constitute a good model. The incompatible dichotomy of diffuse and concentrated elements of review and the misleading constitutional article which stipulates the secondary nature of constitutional review blur competences and accountabilities. Furthermore, the formation of the Constitutional Review Chamber also raises questions related to the rule of law. Insofar as the institutional aspect is concerned, an improvement is not in sight because it would require far-reaching institutional reforms for which there is no consensus, and which cannot be achieved in the foreseeable future by democratic means. In particular, the reluctance of Riigikohus itself for any change will block every reform effort of the Riigikohus. And to go against a powerful unified highest, and at the same time constitutional, court would be a tricky task in every democratic constitutional state, which no mainstream political party would agree to because of suspicion of undemocratic ulterior motives.

As regards the appointment procedure for judges, which corresponds to the indirect cooptation model, it seems that the solution that has proven to be successful in the transformation period might not be the best solution for a stable democratic society in the long run. The lifelong term of office is an amplifier of the consequences of a possible unlucky appointment and an accumulation of unsuccessful personnel decisions combined with poor substantive decisions can even, in an extreme case, jeopardise the existence of the democratic constitutional state. In an ideal world, a stand-alone constitutional court would indeed, if configured without major errors, very likely be a far better solution in the long term.

Gustav Radbruch's Notion of State

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1. *Radbruch, a critical legal philosopher*

Gustav Radbruch is commonly regarded by legal theorists and historians of philosophical thought as a legal positivist who, after witnessing the upheaval of Nazi violence, returned to the classical doctrine of natural law. This portrayal does not, in our opinion, account for either the complexity of Radbruch's philosophy during the Weimar years or for his post-1945 theoretical approach.

From the very beginning of his academic and biographical career, Radbruch was an unconventional legal positivist. Because of his originality, it would be more correct to describe him from the outset as a *critical* legal positivist. With deep adherence to this theoretical position, after the fall of Hitler's criminal regime, he did not become a traditional natural law jurist, anchored again to metaphysical principles. The new appeal to a non-positivistic concept of law is, in short, only a partial revolution of his theoretical perspective. There are elements that do not change and that, in their persistence, complicate the concept of law.

Moreover, the internal reworking that he gave himself was both a necessity and a moral duty; a moral duty that, for Radbruch, the German jurists of the past should also have taken upon themselves. They should have had the courage to condemn the perversion of law carried out by the Nazis, the inner strength and the deontological consistency to refuse their own collaboration, even their own complicity with the regime. They would have had the duty to confront themselves and their own theories with the twelve years of National Socialist totalitarian domination, drawing all the consequences, on a civil and theoretical level. Unfortunately, this was not the case, as Radbruch regretfully recognised.

In the draft of the postface conceived by Radbruch for a new edition of *Rechtsphilosophie* (draft found in the *Nachlaß*), we find a very eloquent passage on this matter:

> In the face of such documents, the Nuremberg judgement speaks of a 'cynical and open disregard for all law'. The word 'cynical' does not suffice; the National Socialist rulers did not just cynically, i.e., shamelessly, show vice in pure nakedness; what is worse, they transformed vice, e.g., fanaticism, brutality and harshness, into virtues. In the field of law, the perversion of vice into law is forever characterised by three names: Frank, Freisler and Thierack. The many individual judges who resisted such judicial dishonour must unfortunately remain unrecognised".

They were certainly a minority, but they were there: cowardice, cynicism and perversion of the profession were rampant; and Radbruch would like to give voice to the silence of the dissenters.

Whether or not there is continuity or a caesura in Radbruch's philosophical reflection concerning the concept of law is, indeed, still an open question, even for recent historiography. It is indisputable that after the Second World War he expressed the conviction that legal positivism could only remain the last word for a definition of law, and that his normative intention could not be resolved in a posthumous return to an outdated notion of natural law. However, it should be noted that in the last paragraph of *Vorschule der Rechtsphilosophie*, he concludes by stating that "[t]he collapse of the National Socialist state of injustice repeatedly poses questions for German jurisprudence that traditional positivism is unable to answer." In the face of this latter conviction, the philosophy of law takes on a new task, rediscovering its old vocation: a normative vocation that Radbruch had never denied:

> General legal theory, universal history and the sociology of law were therefore addressed as substitutes for philosophy or even as philosophy. In view of the shake-up of our value system, however, we are particularly inclined today to see philosophy as the science of values, as the science of 'ought'. As such, it teaches us how to think correctly in logic, how to act correctly in ethics and how to feel correctly in aesthetics. Correspondingly, the philosophy of law is the science of just law (Rudolf Stammler). It therefore deals with the values and goals of law, with the idea of law and ideal law, and finds its continuation in legal politics, which has the realisability of ideal law as its object.

The cultural nature and historical character inherent in law is thus confirmed.

In the historiographical debate on Radbruch's thought, there are scholars who, in spite of this evidence, downgrade the value and stability of the theoretical outcome of the so-called "second phase" of his reflection, relegating it to mere judicial praxis, to advice of prudence at the disposal of the judge. And there are interpreters who grasp its theoretical depth but contest its legitimacy, given the conditioning that this normative twist suffered in the face of the tragic events linked to Nazi-fascist domination in Europe.

In our view, the accusations levelled against Radbruch, according to which he is even guilty of betraying the legal positivist doctrine, as if the legal positivist doctrine were a faith to be dogmatically endorsed, are frankly inadmissible. It is not the case; first of all because Radbruch has always been a legal positivist *sui generis*. But above all, it is not about a betrayal, but about a change in his own view of law. He would have in the event—though in our opinion this did not happen—changed his own conviction, which would have attested, if there was any need, his complete distance from (here ideological) fanaticism (in tune with Amos Oz's lectures on fanaticism). He has been accused of internal incoherence of the theory, of excessive exposure to historical contingency of ideas that should—it is argued—exist in full abstraction.

All of these criticisms are burdened with prejudice and a kind of scientific-disciplinary moralism, as if criticism and the progress of knowledge did not also depend on the willingness to recognise errors and revise theoretical approaches that had hitherto been considered safe.

Furthermore, it should not be forgotten that Radbruchian legal positivism never resolved itself, and never presented itself, even in its germinal phase, as a purely formalistic and therefore legalistic positivism. Rather, it was always a

theory of positive law anchored to minimum standards of morality, including Kantian references to a deontological morality referable to respect for the law. The form of the law in its pure formality never represented, for Radbruch, the necessary and sufficient requirement to affirm the legal status of a provision or an order. This conviction found further confirmation and inevitably drew new strength in the post-World War II period, once the impotence of the law-form in resisting its fiercest instrumentalisation had been tragically revealed.

2. *What "natural law"?*

How then to interpret his explicit revival of natural law in the second half of the 1940s?

For Radbruch, at stake was a clear assumption of responsibility, which could not but refer back to the theoretical and epistemological status of the category of natural law. At that time and in that cultural context, natural law in some form represented for him the only source of universalistic normativity. It is therefore understandable and inevitable that, as a critical-normative instance, a reformulation of the ancient category of natural law resurfaced from the ashes.

As we have already pointed out, it is not a re-proposition of the identical—of a nostalgic or reactionary reiteration of natural law. That would be a gesture out of time, no longer justifiable metaphysically or rationalistically. On the contrary, in his inaugural address *Der Mensch im Recht* (1927), he had shown with unquestionable clarity his sense of history and historical change. In that lecture, read in front of colleagues at the University of Heidelberg, he had emphasised how indispensable it always was for him that a reflection on law and its concept should take into consideration the evolution of institutions over time, an evolution closely linked to changes in the idea of man that occur in various historical epochs. There are therefore many variables that necessarily make the ideal of justice changeable, which then corresponds, for Radbruch, to the ideal of fairness, of the universal principle of equality commensurate with the diversity among people, in their individuality:

> Justice contains within itself an insurmountable tension: equality is its essence, generality is therefore its form – and yet the endeavour to do justice to the individual case and the individual person in their uniqueness is inherent in it. This desired justice for the individual case and the individual human being is called *equity.*

3. *What idea of 'state', what relationship with law?*

Against this general backdrop, Gustav Radbruch's notion of the state must be reconstructed by taking into consideration his entire work.

This is what we shall attempt to do, starting therefore with his writings from the first decades of the 20th century, where a critical-normative concept of the state was already surfacing, up to his latest production, that of the post-World War II period, a phase that had an understandable and undeniable evolution. Yet precisely in light of these changes, the unitary study of his essays, handbooks and

contributions of a different nature (literary papers, parliamentary interventions, book reviews, etc.) allows us to confirm a reading of Radbruch's thought as a dynamic but ultimately cohesive whole.

Let us note at the outset that the question of the nature of the state – of what the state is – never attained a central position in Radbruch's thought. It is explicitly and specifically addressed both in *Rechtsphilosophie*, in paragraph 26 of the third edition of 1932 (a significantly expanded version of the two previous editions), and in *Vorschule der Rechtsphilosophie* (1948), specifically in paragraph 11 of the third chapter.

The answer to the question of the state must therefore be traced by referring both to texts from the Weimar era, in which the complexity of the Radbruchian version of legal positivism is evident, and to those at the origins of the quasi-naturalistic outlook of the post-World War II period, essentially represented by the three writings from 1945-1948: *Fünf Minuten der Rechtsphilosophie*, *Gesetzliches Unrecht und übergesetzliches Recht* and *Vorschule der Rechtsphilosophie*.

In order to define his idea of the state, in *Rechtsphilosophie* our Lübeckian philosopher initially advances from a fundamental distinction between the concept of the "real" state (*Wirklichkeitsbegriff*) and the concept of the "legal" state (*Rechtsbegriff*). Ronald Dworkin, more than a century later, would perhaps have called the former a "criterial" concept of the state and the latter an "interpretative" concept of the state, a cultural concept (*Kulturbegriff*), a concept that belongs to the sphere of "value-related concepts" (*wertbezogene Begriffe*)—as Radbruch would put it in Paragraph 11 of *Vorschule*—hence neither "value concepts" (*Wertbegriffe*) nor "being concepts" (*Seinsbegriffe*).

The difference between the two concepts (the real and the legal) is of primary importance and Radbruch attempts to explain their meaning and relevance by proposing a first analogy with the aesthetic world and a second analogy with the universe of science.

The difference between the "legal" and the "real" concept of the state corresponds to the difference expressed, for example, in the concept of "Kunst" (art): "both an ideal concept and a yardstick by which the inartistic is expelled from the realm of art, like a concept of reality that encompasses all artistic achievements of a time, both artistic and kitschy." It is useful to understand that the *ratio* of the distinction is the reference to the notion of "science" (*Wissenschaft*), which "on the one hand means the standard of truth of cognitive activity, by which one measures unsuccessful cognition as unscientific," therefore, a valuable concept to expunge superstition, pseudoscience, erroneous beliefs from the sphere of science, and "on the other hand, the historical concept of culture. The scientific truth and scientific error are value-neutral in themselves."

Or finally, the concept of "Kultur" is eloquent, which "itself can be understood both as an ideal for the historical-social cultural facts and as the essence of these cultural facts themselves."

Returning to our reflection on the idea of the state as a legal concept, the term "state" is valid as an authentic concept, corresponding to the legal institution as such, e.g. the German Reich as expressed in the Weimar Constitution. Or it may be valid as a legally relevant concept, i.e., factual, representative of the rights and duties of the state, established in the Weimar Constitution, a text in which the term frequently recurs.

This preliminary clarification is due to the semantic complexity of the concept of the state, which can be understood first and foremost—as we have seen—as a real concept and as a legal concept, and the latter in turn can be

interpreted in a dual meaning: as an "authentic" legal concept, whereby the content of the norm is also taken into consideration, or, more externally, in a socio-historical sense, as a "legally relevant" concept. Against this background, a further question arises, which is also valuable in providing an answer to the fundamental problem concerning the concept of the state: what relationship exists between the state (understood as an "echter" legal concept) and the law?

According to Radbruch, law and power, or rather, the idea of law and the idea of the state, do not identify with each other. The purpose of the state, *raison d'État*, can conflict with the principle of legal certainty and the idea of justice. This is what was unfortunately made blatantly obvious during the years of the Nazi regime. It was revealed in all its crude brutality by the violent and criminal denial of any possible notion of credible justice; the complete overturning of it and its transformation into its opposite: the upside-down world imagined by Orwell and affirmed in reality, with the help of a pervasive practice of political lies, a racist logic cloaked in pseudo-science, a deep-rooted authoritarian culture, and the unscrupulous exploitation of resentment, the need for community, and the identity crisis, which were widespread in German civil society.

The very foundations of law were thus destabilised: not only its justice, but its very correctness. Legal certainty is, after all, an essential part of the idea of justice although it does not exhaust it: it counteracts arbitrariness and privilege by providing for separation of powers, transparency and stability of legislative procedures.

In *Rechtsphilosophie*, Radbruch reformulates and correctly applies to the conception of the state, the traditional Hume's law, where he asserts that "'normativity of the factual' is a paradox; an ought can never arise from a being alone, a fact such as the view of a certain epoch can only become normative if a norm has assigned this normativity to it." And in *Vorschule*, Radbruch explicitly refers to Kantian philosophy precisely to reinforce the thesis of impossibility "deriving values from reality, basing an ought on facts of being, transforming natural laws into norms," and at the same time not disqualifying the realm of morality; rather, attributing to it an independent value and a nature justly not derivable from material existence in the world.

By this route, the doctrine of the "normativity of the factual" that Radbruch traces in Georg Jellinek's theory of law, but which, generalising, belongs to the widespread imperativist and decisionist legal positivist theses, takes on a paradoxical aspect in its own right. Radbruch emphasises the independence of the normative sphere, whose justification therefore cannot derive from factual reality or scientific evidence, but from the goodness of its own moral foundation. One is inevitably pushed beyond mere positive law and the mere effectivity of the actual occurrence of the state, because, "It is precisely state and legal positivism taken to its logical conclusion that presupposes a principle of natural law," Radbruch admits already in *Rechtsphilosophie*.

Confirming the clarity of the Radbruchian analysis, recent interpretations of the so-called "Hume's principle" come to mind on this point. For example, Ronald Dworkin and, before him, Hans Jonas, reject any reading that aims to disqualify the field of morality on account of its factual non-demonstrability. At the core lies a correct observation: from the descriptive sphere, the dimension of what is, one cannot deduce what should be, the sphere of prescriptiveness. But from this evidence it would not be correct to derive the unfoundedness of the normative or prescriptive dimension, but rather its independence from that of mere factuality. The prescriptive therefore emerges strengthened and not challenged. It is in this

way defended and not questioned, because its self-sufficiency is claimed from the realm of brute facts.

From this perspective, the step separating us from a certain interpretation of natural law and the associated interpretative concept of the state is very short.

4. *An interpretative concept of state*

In 1932 Radbruch wrote: "If there is a supreme ruler in a community, what he orders should be obeyed." The principle of legal certainty, which only political authority can guarantee and which explains this obedience, at the same time represents, on the other hand, a constraint, or rather, a limitation on the exercise of sovereign power. The intention behind the demand for recognition of the principle of legal certainty implies that the state must also be subject to the laws. "The same idea of legal certainty that calls upon the state to legislate also demands that it be bound by its own laws. The state is only called upon to legislate on the condition that it considers itself bound by its laws."

The concept of state implies a claim of correctness towards the law from which can be inferred that it can never be considered *legibus solutus*. Against Hobbes, the state in its essence is a rule-of-law state, a state subject to the constraint of law.

Legal positivism and the concept of state in Radbruch's thought presuppose in this specific procedural sense a principle of natural law. "The state is thus bound to its positive law by super-positive law, by natural law, by the same principle of natural law on which alone the validity of positive law itself can be founded."

There is also a further limitation that cannot be overlooked. It corresponds to the recognition of the principle of equality, also understood as the principle of impartiality; the same principle that between 1945 and 1946 Radbruch would have defined as the fundamental principle of every democratic ideal of justice. Impartiality as a general normative principle allows the total conceptual extraneousness between a constitutional state (*Rechtsstaat*) and an unconstitutional state (*Unrechtsstaat*) to emerge clearly. "A state order that wanted to apply to individual people and individual cases as such would not be law, but arbitrariness," writes Radbruch in paragraph 26 of *Rechtsphilosophie*. And he concludes that the interest of the ruling class does not emerge in its nakedness, but rather "in the guise of law" (*im Gewande des Rechts*)*;* and "the content of the law is whatever it wants, the legal form always serves the oppressed." The law has to be in favour of the dominated, the less advantaged and the weak, for whom it is always better to depend on the state and the law, rather than a coexistence without them, i.e., exposed to anomie.

With the coherence that would accompany him to the end of his days, following up on his ideas in his political and governmental activities, Radbruch tried for as long as possible, and as much as possible, to make fairer the constitutional legal system in force in Germany before the advent of Nazism.

He attempted to pursue this project of justice, in particular through personal civic and institutional commitment. And it is precisely in this context that we find a concise but limpid essay from the Weimar period entitled *Volk im Staat*, in which Radbruch succeeds in just a few pages in exhibiting the critical potential of his ideal conception of state and the centrality of the principle of equality as its criterion of legitimacy.

Particularly noteworthy are the harsh words of denunciation when he switches from the ideal plane to the desolate description of reality. The world of facts, the German society before him shows "[n]ot equality, but inequality of individuals, inequality of property, of education, in the best case still inequality of dispositions and, as a result, the difference between rulers and ruled, often rulers and dominated. Not individuals who choose and vote of their own free will and subsequently add up to majorities and minorities, but beings socialised to the core of their souls, social groups that impose certain decisions on their members externally or internally, with group-forming powers behind them: class consciousness and leader suggestion, public opinion: street and press, behind this possibly the power of money majorities are potentiated minorities!".

5. *Conclusions*

It seems clear that Radbruch was not only never a "traitor", never underwent a "conversion", but rather, in the face of devastating historical events, after witnessing the historical failure of an uncritical positive law, he had the honesty and courage to revise his ideas, to modify them, in search of a concept of law more suited to express his constitutive and basic demand for correctness.

In this sense, what gave strength to his determination was the same conviction that Arendt theorised a decade later, denying the Hitler regime, the Nazi law, and the power of the *Führer* the possibility of continuing to be called law and sovereign power. They originated on foundations of abuse and violence, of a "criminal legality", an oxymoron behind which lies a formalistic idea of law that Radbruch never fully accepted. As is well known, Arendt, in the epilogue to her *Eichmann in Jerusalem*, posed a question: "what sovereignty does a State like the Nazi State have? […] Can we apply the principles that apply to regimes in which crime and violence are exceptions and borderline cases to a regime in which crime is legal and indeed the rule?". The question becomes whether one can still speak of sovereignty, whether that form of domination can still be called a state, in a sense not only rhetorical, but conceptually relevant.

Thus, through this path, the question of the definition of the concept of state is transformed into the more radical issue of the distinction between an unjust state and a non-state. The semantic space of the concept of state, if properly understood, lies between the ideal of a well-ordered society (impartial and capable of honouring the value of equality) and a criminal regime. This middle position is not uniform, being capable of sustaining its own internal modulation: between a state not too far from acceptable standards of justice and an unjust state, the nuances are many, as are the possible variants of law, in its ranging from a law with a constitutional high-profile to an unjust law. The point is that even with such variability, even with a more or less intense rate of injustice, one can still speak in the former case of state and in the latter of law.

In the concluding remarks of paragraph 13 of *Rechtsphilosophie*, Radbruch observes: "that the law is in the midst of polar tensions in an unstable equilibrium that is always under threat and has to be constantly re-established." But it is above all in *Vorschule* that this idea fully blossoms.

When, then, is the state no longer a state?

In the third chapter, after reaffirming that law is constituted of positive laws and customs, that it does not record facts but regulates reality through the norms

of collective life, of living in society, he states that where the recognition of these norms is lacking, it is the state itself that disappears, and mere domination remains. The difference between the state (legally or conceptually understood) and domination lies in the presence or absence of certain essential characteristics. "Even expressions of the will of the state, if they lack one of these characteristics, are only pronouncements of power without the nature of law. Where, for example, the general nature of law is deliberately denied and justice is not even sought, the orders thus created can only be decrees of power, never legal principles."

Not every form of dominion can be called a state, not every centralised power can be called sovereign. Neither the state nor the sovereign are brute instances of force capable of obtaining obedience: both must fulfil the minimum requirements of lawfulness. "Thus the state that legalises only one party and excludes other associations of the same character, the 'one-party state', is not a legal entity; thus the law that denies human rights to certain people is not a legal principle. There is therefore a sharp boundary here between law and non-law."

Ultimately, a clear indication of what Radbruch's position is may already be obtained from the exergue chosen for paragraph 26 of *Rechtsphilosophie*, the one—as we have seen—entirely dedicated to the concept of the state as a constitutional state.

It is a passage by Friedrich Schiller, the poet and writer, and a fraternal friend of the late 18th century German democrat, Wilhelm von Humboldt. It reads: "Mistrust yourselves, noble lord, lest the benefit of the state appear to you as justice!"

Still a Cold Monster?

On the Dual Nature of the State

Massimo La Torre

1. *The Question of the State*

The question of the state is central for legal and political theory, since the state is the form that modern political communities and their legal order have assumed. It is also the central question for philosophical and pollical anarchism. This is so because the state is an entity that claims to have an overwhelming right to our obedience, a right that is mostly shaped as absolute. Its commands should be obeyed without exception, and with not too much delay. Thus, a state is the form of social organisation that most conflicts with anarchist values and ideas.

A state, as a structured and institutionalised organisation, is in tension with a form of life that projects itself as constantly changing and changeable. This is a basic tenet of anarchism, which is projected along at least two different lines of elaboration. In the first, a political community is the outcome of the mutual recognition of individuals and of agreement about a common scheme of cooperation. Subjective autonomy here is the bedrock of political order, so this is permanently exposed to autonomous arrangements of individuals to cope with evolving circumstances and revision of their needs and views. A different elaboration of this autonomy motive conceives institutions as only legitimate if not detached from their instituting moment, from their original, societal source. This is the seat of autonomy and can never be pre-empted by the established institution. In this way, what is institutional is constantly exposed to the emergence of the ”novel”, a new project and concept of a good life, the vicissitude of social imagination, that is collective autonomy.

Contrary to this second model, the state seems to embody a quite rigid form of institutionalisation that does not allow for adjustment and modifications according to the needs and will of individuals. It is based, it would seem, on domination, violence and hierarchy, such that freedom is permanently denied to its citizens. It claims a value in itself that is superior to the dignity and autonomy of the individual. Individuals’ basic goods, life, property, honour, respect, liberty, might all be sacrificed on the altar of the state. It is a ‘person’ in itself that is more than the association of its members and even of its officials or rulers. It can demand everything from its ‘subjects’, including their own death, be it in war or on a scaffold. As Nietzsche once characterised it, it is a ‘cold monster’.

However, the question of the state – of its legitimacy and form – is not just a concern for anarchism, but might be plausibly considered as nearly the whole business of political and legal philosophy. Our entire life is developed and experienced within the confines of the state. We are born and are immediately registered as members, nationals of a state. Our minute affairs and vicissitudes are determined by state rules and instructions. We live within state borders, we are brought up to sing a national anthem, or salute a national flag. We are under state supervision and control from birth to death. If we infringe the state’s rules and instructions, we are sent to state jails or we have to pay state fines. A

substantial part of our income is taken every year by the state in the form of taxes, which is spent in ways over which we have little or no control.

Many Europeans were possibly not aware that they lived under a state until 1914. But suddenly, in August of that fatal year, they were conscripted, sent first to barracks, given a uniform and a weapon, carried by trains to the front, and forced to kill others indiscriminately, without a clear understanding of the reasons. The militarised state – first and foremost a European form of political rule – was fundamentally based on four key institutions: the army, the post, the railway, and the police. In several European states, military training began in the school, a place where children and teenagers were confined and subjected to strict discipline and indoctrination. The schoolmaster anticipated the figure of the sergeant.

This story is well narrated by Erich Remarque's pacifist novel *All Quiet on the Western Front* (1929), or by Józef Wittlin, in his *Salt of the Earth* (1935). The latter novel is especially suggestive in understanding how the state in the twentieth century was experienced by ordinary people. A Polish peasant is mobilised, stripped of his social attachments, forcefully put into a train wagon, and sent to military training in Austrian army barracks. Here he is confronted by a new world, where his individuality counts for nothing. He is one naked body among many, dressed in a uniform, but this does not really cover his nakedness: his social world, his relationships, all that gives him an identity and dignity, has been reduced to nothing. This nothingness is already visible during the medical examination, when his body is inspected to ascertain whether he is fit to serve as a soldier and fight. Recruits appear naked before the army doctors – they are simple, sheer bodies, filled with shame, and their prevailing experience is one of destitution.

National identity was a product of the exigency of states. A state was a gigantic enterprise for constructing a homogeneous national identity out of plural communities and local affiliations. Until late in the twentieth century, for instance, Italian peasants could not generally understand each other, since they did not share a common national language. They spoke their respective dialects: Sicilian peasants could barely grasp what a working-class girl from Piedmont had to say. We cannot but agree with Michael Oakeshott's observations:

> Each of the states which emerged in early modern Europe was composed of a variety of ancient communities with undying memories of other allegiances, of independence, or of mutual hostility, or made up of fragments of such communities severed by a frontier from their fellows, without a common language, law, or coinage, divided from one another ethnically, in custom, and often in religious beliefs.

Those plural and diverse communities shared only the same experience of being subject to an overwhelming force that intended to shape their lives in a uniform way. The state thus forcibly simplified the internal structures of political orders, while at the same time bringing about a new dimension of plurality, and indeed paradoxically producing "anarchy," within the international domain. In Europe, the birthplace of the modern state, "to the degree that state formation progressed, the universal Christian world order made room—as noted by Dieter Grimm, a former German federal constitutional judge—for particularistic states existing side by side." The state, that is, marks the decline and fall of the idea of

an Empire that, based on Christianity, was able to rule the entire Christian world. A state should sadly give up the universal ambition of global rule and only establish itself within the space of well entrenched, and specific borders. The state thus implicitly accepts the validity of other states, something an Empire would never possibly acknowledge. This is particularly relevant to the political configuration of Europe, where once the form "state" was introduced, it would be confronted with a plurality of equal, sovereign formations.

2. *The Nature of the State*

What is the state? What is its nature? How could we define it? There are at least two traditional definitions. There is one focusing on the exercise of violence within a distinct territory; the state would essentially be qualified by a monopoly of violence. This is the definition we find in one the most famous papers by Max Weber, the great German sociologist, *Politik als Beruf* (1922), where we read that the State is "that human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory." This does not mean that violence is the ordinary means for the state to act and exist; however, adds Weber, it is what gives the state its specificity, what ultimately defines it in the last instance; it is what defines its nature. Max Weber's idea is further developed by Carl Schmitt, according to whom a state is rather the monopoly of decision, meaning by this an exception to the 'normality' of the rule of law. This monopoly of decision refers to the sovereign's capacity to violate the law, a capacity that would potentially imply an exceptional use of force. The state, then, is that institution that is allowed to infringe, by force, its own law.

How should we understand this notion of a monopoly of force? We could think of it as a device to minimise violence. Indeed, there is a line of interpretation that sees the state as the engine of a process of civilisation within societies, whereby people have to learn to relate the one to the other without violence. Feuds and vendettas are no longer tolerated, as the state assumes the sole authority to decide disputes through legal means. The state rules out the private use of force; the violence or potential violence of the sovereign thus enforces a peaceful social order.

On the other hand, the monopoly of violence might be interpreted in a different way. What the State in this second approach can undertake is a superior use of violence such as to alter the use of violence elsewhere in the society. In its first version a monopoly of violence means a general prohibition of the use of force for citizens, and somehow for state agencies, too. In this second version, the monopoly is not an attempt to reduce the use of force in the society, but to make it possibly so radical that attempts at individual use of force would immediately be reciprocated with a disproportionate application of violence. There is no pacificatory ideal involved here. In a sense, the state, by asserting its own supremacy and sovereignty, means it is able to be the most violent possible actor within the society. In order to do that, means should be used that are the strongest and the most effective for deploying force. Force is concentrated not so much to deactivate it, but rather to make possible an extreme use of it. This logic is then duplicated in the arena of international relations, where a search for equilibrium

of powers among states is constantly disrupted by each state striving to have military supremacy over its rivals. According to this picture, states do not seem to be instrumental in civilising social and political relations; on the contrary, it may seem that they render the social world increasingly dependent on, and exposed to, extreme violence—indeed, after the development of weapons of mass destruction, to total annihilation.

But the question remains: What is a state? Legal philosophy and legal theory have usually given two main answers to this question, once again testifying to the dual nature of the state, and the ambiguity of its grip on our society and imagination. The key to the understanding of the state here is seen in its connection to law. What is law for the state, or vice versa: what is the state for the law? Here, two opposing visions are confronted. First, we have an approach according to which the state is an extra-legal entity, a body able to act collectively, which is hierarchically structured with a commander-in-chief at its highest rank. A state, according to this account, is either a sovereign power that can impose obedience on others, a 'political superior' in John Austin's words, or else a kind of community, a historical society that is an expression of a specific national, cultural, or temporal context, an embodiment of an 'objective mind'. This is the account of Hegel and German Historicism. In both cases, the state is prior to the law; it is the 'source' of law, and the efficacy of law is indeed limited in shaping the essentials of the state. The state operates legally by an act of self-limitation—this is an influential idea by George Jellinek, one of the founding fathers of European continental public law. This conception has relevant implications in the way we should then understand constitutionalism and the nature of a constitutional state. In this essentialist approach, the State is not the product of a constitution: the latter can only give some form to it; it offers formalisms of various kinds to its operation, but such formalisms, however, can be dismissed when necessary. There is a continuity of the state that constitutions cannot alter – such is also the public view of international law. The basic nature of what a state is remains the same whichever constitution is then adopted. Fundamental rights do not have a constitutive validity, but serve rather as a kind of regulative rule. Fundamental rights here can never be rooted in original natural freedoms of citizens or in their basic moral dignity. This is explicitly thematised, for instance, by Georg Jellinek, who understands public rights as being founded upon an individual's position of absolute subjection to authority, *status passivus.* Fundamental rights are then negative rights, entitlements against state intervention. They operate vertically between authority and autonomy. In this view, however, a constitution could hardly claim *Drittwirkung*, "efficacy towards third parties;" it could not claim validity in impinging upon private relationships and transactions. Private law is of the same essence as the state; that is, endowed with a stronger ontological dignity than constitutionalism. Law here is instrumental to the state, not the other way around.

However, there is an alternative doctrine. This is explicitly vindicated by Immanuel Kant: the state is a collective entity that is structured through legal rules ("Ein Staat […] ist die Vereinigung einer Menge von Menschen unter Rechtsgesetzen"): "A state is (…) an association of a mas of people through rules of law." Kant's view is then radicalised by Hans Kelsen: a state, he claims, cannot be understood, nor can it act, without referring to rules. And within the state, rules are equivalent to legal rules. There is no possibility of conceiving of a state from any other perspective, once we assume the internal point of view of its agents.

This is the legal point of view. The consequence of such an approach is that every state is seen as a *Rechtsstaat*, a rule of law: "Er muss zu der Erkenntnis führen, daß *jeder Staat Rechtsstaat ist,*" which should lead to the conclusion that every state is a legal state, that every rule is a rule of law. The authority of the law and the authority of the state are one and the same thing. This thesis, however, does not have *prima facie* strong legal philosophical or political implications. Kelsen is not justifying or recommending a dictatorship as the rule of law: a state here seems to be considered as a kind of a mask, behind which one might perceive the disquieting presence of the Gorgon of naked power. The ontology of the state is based on force, not really on law. This is somehow a sort of device to make sense of the juristic operations that are, however, instrumental to state functions. This is why there is a possible interpretation of Kelsen's doctrine as a sort of political realism. Nonetheless, the substantive emptiness, the radical formalism, of this approach contrasts with any attempt to offer an essentialist or naturalist picture of the State. This explains why Kelsen's picture of the state was so strongly opposed by nationalists and communitarians, both of the right and the left.

On the other hand, the Austrian scholar's approach allows for the idea that sovereignty is simply another name for a valid legal order, and that law can be perfectly impersonated through supranational institutions. In the end, Kelsen's message is that law is independent of the state as a specific sociological formation, or alternatively that a state is just another name for any valid legal order. Here the duality of the state—on the one hand, a historical community, a special sort of society, and on the other a formal, hierarchical structure defined by rules and procedures—is solved, as noted by Gustav Radbruch, the German legal philosopher, by simply denying that this is a problem. There is no solution to the dilemma of the dual nature of the state, only a denial of the problem, which is seen as arising from an unclear or mistaken epistemological strategy. The only cognitive point of view concerning a state is the internal, legal perspective. Beyond this, or without this, there is confusion and inappropriate essentialism or even mysticism, as happens, for instance, whenever the state is interpreted with reference to an impersonal soul or a collective destiny, and is filtered through a demanding philosophy of history or a too thick social ontology.

But is Kelsen's thesis sufficient for understanding what a state really is? We have reason to doubt it. The Austrian scholar does not ignore the coercive side of the state practice, and, indeed, according to him, a legal order is a coercive system, and legal norms are ultimately about sanction and coercion. But the nature of the law cannot be reduced to coercion, nor can it explain the state and its operations and validity. Otherwise, a bandits' order, a rule by desperados or gangsters or mafia, would be indistinguishable from law. Or we could envisage Auschwitz as an institution of law. Incidentally, according to Kelsen, validity, *Geltung*, is the specific form of the existence of both law and the state. The state is more than just a monopoly of violence; there is a drive to order and structured processing of conducts. The state is thus a *legal* monopoly of violence, where the legal attribute is what gives the state its specific nature and ontological justification.

However, is this reference to legality a sufficient guarantee to constrain the violence of state sovereignty? This is debatable. In the end here, the factual prevails; this is somehow explicit in Kelsen's admission that the basic ground rule of the legal order is the principle of efficacy, one that is recurrent in public

international law. Such admission tells us to consider as a state—that is, a legitimate legal subject of international law, one that deserves recognition by the international community—all those powers that are under fully effective control within a specific territory. In this way, we are driven back to Georg Jellinek's idea of the 'normative force of the factual', *normative Kraft des Faktischen,* so that the fact of authority is a sufficient condition for the claim to produce law. This idea, we might remember, is quite close to Pascal's recommendation that, since we cannot make justice powerful, we should aim to make the powerful just: "Ne pouvant fortifier la justice, on a justifié la force." Violence that is effective and monopolised by a powerful subject can legitimately raise a claim to legality. Is this consistent with the notion of the state as a civilising actor in society? Is the state a gentle civiliser of nations, once it is shaped according to the facticity of an irresistible power?

This is not the view of the great legal historian Hermann Kantorowicz. According to the German scholar, to presuppose the state as prior to law would not necessarily allow us to give legal character, for instance, to the rules of international law or customary law. Constitutional law would also be impaired by such priority given to the state as the primordial source of law. As Kantorowicz says:

> We must not, as many do, consider the law a creation of the state – a theory which would be incompatible with the existence of customary law, of canon law, and of international law. On the contrary, the state presupposes the law – international or national law – and this idea is borne out by the history of jurisprudence, which shows that no concept of the state has ever been formed that did not imply some legal elements."

This also seems to be the view developed by Gustav Radbruch, a good friend and a colleague of Kantorowicz at the University of Kiel.

3. *A Self-Limited Power?*

Radbruch was a legal positivist, and a strong legalist. He used Georg Jellinek's doctrine of the self-limitation of the state as starting point: law is the outcome of a self-limiting act, but the efficacy of the law is conditional on its application of being universally undertaken. Self-limitation by law means that the law is applicable to the state itself. Of course, from this perspective, there is a state before the law. But the state's claim to make law – and this is a necessary evolutionary move for the state to develop its grip on society – is only possible on condition that the law is generally applicable; that is, applied to the state itself. The law does not provide an exception for the state. A state without a law is illegal and thus illegitimate, but this opens the possibility of a full deployment of the dual nature of the state, in so far as the law's sense is envisaged in its pretension to justice. A legal state, a *Rechtsstaat*, is, according to Radbruch, a state that lays claim to justice. However, the question is intricate, and the legal positivism maintained as a general doctrine of law makes things less clear and promising. Radbruch maintains the idea of a sovereign power that imposes its rules, possibly by coercion, and its justification is essentially its capability of being a supreme authority, understood in factual terms as violence and the monopoly of force.

Legal positivism – the doctrine according to which the law's validity is not necessarily connected with justice, or morality – is a theory especially designed to justify the rise of the modern state. As a matter of fact, in the philosophy of law, legal positivism has been identified in three distinct forms. We have first a doctrine that claims the state to be the only source of the law. This is sometimes also called the "source thesis;" the law is to be known just by looking at what an authority, actually a state, says the law is. This thesis, that of legal positivism as a doctrine of the state as the only producer of law, is made plausible through the adoption of two more basic versions of positivism. The first is the so-called "methodological positivism:" it is possible—according to this version—to know what valid law is in a descriptive, purely cognitive mood. This is a kind of epistemological rehearsing of the "source theory": "there is somewhere a source of law. I approach it, I see it, I record it, and this all I need to know what law is. I do not need to assume a normative attitude. I can be—I should be—neutral. I should only repeat the law."

An Italian positivist legal philosopher used to say that legal rules are a reiteration of the sovereign's prescriptions. A lawyer should only learn them, possibly by heart, indeed to "sing" them ("cantar", as is required, for instance, in Spain to pass the exam for judges), and repeat such rules time and again. But why should the law be experienced in this way? In a society, there is a permanent conflict over what the rules of society should be. Such conflict cannot be resolved from the point of view of a substantive morality. This is so, especially, because the right and the wrong are relative and cannot be cognitively approached; there is no right answer in an absolute moral sense. What is "right," then, cannot but be the outcome of a decisionist action, undertaken by a figure that has the authority, the force, that can use the necessary violence, to impose the one solution that ends the controversy. And we need this authority if we want to live in peace and coordinate our conduct effectively.

A somehow oblique version of this normative positivism is offered by the "service conception" of authority, whereby authority is justified in so far as it is of service to individuals' preferences and plans of life. Here, the argument is presented as a logical or an ontological one. Since the law is something that claims authority, it does presuppose such authority; that is, a coercive power capable of imposing its prescriptions. This is the nature of law. It is a kind of ontological proof of the authoritarian nature of law. It reminds us of the medieval ontological proof of the existence of God: since God is claimed to hold all properties, He should also have the property of existence. "Existence" is considered an adjectival quality, like "goodness". Now, in the same way as we assume that God is good, we should then also acknowledge that He owns "existence," once we start from the basic idea that God possesses all possible positive qualities. The authoritarian nature of law is deduced in a similar way. Behind such ontological proof of authority as the nature of law, there is a theory of the reason we have for action. In this case, the argument runs more or less as follows: authority, issuing pre-emptive, second-order reasons for action, is able to give first-order reasons for action, individual preferences, and basic interests, greater satisfaction or more effective realisation. First-order reasons are more capable of realisation if they are assisted by second-order reasons.

But—and this is the gist of the argument—such assistance is equivalent to replacement. Assisting individual preferences means, for authority, replacing them through the authority's prescriptions. Second-order reasons replace first-order

reasons, and it is good that this is so. To do that, however, there should be an authority issuing those second order reasons; that is, an intervention that pre-empts first-order reasons, individual substantive desires and preferences, and make them irrelevant in citizens' practical reasoning. This, in a sense, is what also constitutes the state as such—its primordial *Coup d'État*; that is, the State's "official" reasons supplanting citizens' "private" reasons. Authority—which is, moreover, the basic justification for such an operation—makes people better off, and this is only possible if, in following authority's rules, people forget the relevance and even the content of their first-order reasons; that is, their interests, needs and preferences. When presented with rules as second-order reasons—that is, as authority commands—we are asked to remember the underlying good these reasons, such commands, are supposed to assist and better realise.

That a contemporary natural lawyer shares an analogous view of authority is evidence of the deep influence enjoyed by positivism over the whole of legal culture. Indeed, such a view seems more radical than the thesis defending natural law as being based on sheer force. According to the natural law thinker, legal validity at the end of the day is built upon the "perhaps too stark principle" (the natural lawyer's words) of effective force. Once again, normativity is related here to the supreme capacity of a fact, *normative Kraft des Faktischen*. The state is a rule that is opaque to people's desires and motives. This core thesis of positivism is also reflected and re-elaborated from different intellectual perspectives. Such is the case, for instance, of system theory, which thematises legal norms as expectations that are not open to disappointment. A state legal rule would therefore be valid, even if it were not repeatedly followed. The rule not being assisted and applied with reference to people's wishes, and its being actually opposed to people's desires, breach the conditions for such a rule to be given the dignity of law.

Not surprisingly, Gustav Radbruch, being a legal positivist, defends something of a similar tenor. His first move is the recognition that legal positivism bases itself on a natural law assumption: "Wenn in einer Gemeinschaft ein Höchster Gewalthaber vorhanden ist, soll, was er anordnet, befolgt werden," ("If in a state there is a supreme holder of force, whatever this prescribes ought to be followed.") But why? The answer here is given through an appeal to the highest value of legal security. It is only by obeying the supreme holder of violence and force that we can reach certainty about a common rule for society to follow. However, the same legal security principles oblige the state, the supreme force holder, to abide by that same law it has issued. "Der selbe Gedanke der Rechtsicherheit, der den Staat zur Gesetzgebung beruft, verlangt auch seine Bindung an die Gesetze:" the same intuition that connects legal certainty and State legislation, leads to the idea of the rule of law binding the state. Should the supreme legislator not be bound to its own commands and rules, its power would cease to be legitimate and it would not be able to claim obedience. The use of force and law is inextricably considered connected to the claim to be legitimate and binding on citizens. But law here is not just a general rule; law is more than just a rule or statute or command, and a rule can only be a law if it can claim to be just: "Denn Recht ist nur, was den Sinn hat, Gerechtigkeit zu sein:" "Law is only that whose meaning is justice." Justice, on the other hand, implies equality and a strong connection to the common good, to the *res publica*. A state is legitimate, and indeed a proper public institution, only if it can be considered a guarantor of the public good.

4. *The State as Caring for the Common Good: An Alternative View*

Legal positivism tends to obscure the dual nature of law and the state. From this perspective, authority is the core of the law and the state, and behind authority lurks the experience of the monopoly of violence, meant as the greatest possible deployable force. However, Gustav Radbruch—as we have seen—proposes a richer concept of law and legality, connected as this is to justice. He makes positivist reductionism less plausible, and opens up an alternative theory. This alternative, surprisingly enough, has been openly thematised by the anarchist thinker, Pierre-Joseph Proudhon.

We are used to believing that anarchism is a doctrine that radically opposes the state. Indeed, for most anarchist thinkers, the state is irremediably considered as a form of violence and domination. This is also so in the work of contemporary anarchists, such as David Graeber. In his work on the history of debt, Graeber refers to the state not as a specific political form related to modernity, but rather as a notion to explain and name all forms of centralised power and authority in human history. This approach is later confirmed in his general political anthropology of human societies, *The Dawn of Everything.* In this perspective, there were states in Ancient Mesopotamia and Egypt, as well as in the Inca and Aztec societies in pre-Columbian America. The Roman city is here held to be a State, and so on. The qualifying character of a state is assumed to be its use of violence and the reduction of people, in principle, to slaves—to subjects that are fully disposable by power holders. This is also the anarchist Kropotkin's view, whose book on *The State* centres around the hypothesis of this political form as an outcome of sheer violence and oppression.

Kropotkin's view is that the roots of the state are to be found in war, and in the surrender and humiliation of the vanquished and conquered. Max Stirner declared that whoever has the power, he will also have the right: "Wer die Gewalt hat, der hat das Recht:" "Law is thus an accessory, a tool, of the state for enforcing its power." Karl Marx, though dismissive of 'Saint Max', would agree: "Einfache Herrschaft von Säbel"—"the simple rule of the sword," the German communist says, "is the state's oldest way."

More recently, Michel Foucault, the French post-structuralist philosopher, has presented us a picture that is not too different from the stark view held by Kropotkin or Stirner. In most of his work, the state is a force of domination, violence and codified warfare; law is stained with the blood of the oppressed. From such a perspective, no alternative vision of the state would seem to be possible: nor might a state with dual nature be even conceivable. This is still Nietzsche's 'cold monster': "Staat heisst das kälteste aller kalten Ungeheuer." Nietzsche also later adds that the state is a sort of 'hypocritical dog', *Heuchelhunde*; that is, while its speech is given through the shouting of orders and the smoke of firing, it would have us believe that those words it speaks imperatively would express the nature of things. It offers us a philosophy whose real essence is violence. In short, the state is an ideological machine that disciplines not only our conducts, but also and above all our thought and imagination. It claims to be 'the most important animal

on this earth', and more often than not it bravely succeeds in convincing us that it is so.

However, there is an anarchist thinker who has a more nuanced and sophisticated understanding of the state. Pierre-Joseph Proudhon considers the state from two alternative perspectives. We can see the state simply in terms of the monopoly of violence, where any claim to justice is nearly null, or if it exists, it plays the role of mere ideological fiction. Here, force and violence are the definitional properties of a state. However, there is another sense of the state which is both less formal and less sheerly empirical, and that is a state as the dimension of public affairs, of common good, "res publica":

> Il existe en toute société, par cela seul qu'il y a société, une chose positive, réelle, qu'il est permis de nommer *l'État*. Elle consiste, cette chose : 1. Dans une certaine force essentielle au groupe, et que nous appellerons force de collectivité ; 2. dans la solidarité que cette force crée entre les membres du corps social ; dans les propriétés et d'autres avantages communs qui la représentent et qui en résultent.

The common good is another name for the justice of political life, of the public morality of collective institutions. In this sense, a State is a sphere where individuals are no longer considered isolated subjects, stripped of their social context, of their intersubjective attachments, of the reciprocity of commitments that makes their identity. In this area, the public is equivalent to reciprocity and solidarity. The State's *locus* is public morality, or the common good; in Hegel's jargon: "Der Staat an und für sich ist das sittliche Ganze."

Michael Oakeshott seems to follow Proudhon's suggestion when he proposes two possible delineations of the idea of State: one that he calls *societas*, and another labelled *universitas*. The main character of *Universitas* is its purposiveness, its instrumental strategic determination, whenever associates are driven by a uniform external target. *Societas* is rather a mode of internal discursive recognition and conversation. Oakeshott then adds that modern states are a conjunction of both models: they are mixed up, but such mixing is never fully achieved; the two basic ideas cannot fully converge in a coherent, frictionless scheme.

We could nonetheless hope that one model, and the more civilised one, that of the state as public sphere and discourse, might eventually prevail. The state is reshaped in terms of an institution of social solidarity and civil conversation, if—as Proudhon claims—by state we should mean the public sphere and the institutionalised common good through citizens' participation: "si par l'État on entend la chose publique, la force collective, à la production et au benefice de la quelle participent tous les citoyens." Here, justice moreover assumes a strong redistributive turn by at the same time referring it to the citizen's sovereignty. As Proudhon says: "The peculiar feature of the concept of justice—as John Rawls says—is that it treats each person as an equal sovereign." In this second view of the state, as an institution of public discourse and solidarity, there are no commands and subjection as original positions, and they do not have a definitional character; what is essential in such a case is engaging with commitments and agreements. Authority is here prompted by citizenship and participation. First-order reasons take the upper hand over the second-order state precepts. Law is

given back to considerations of justice, and this to the collective solidarity of people that acknowledge each other's basic needs, rights, and virtues.

Now, what is the conception of the state that is most conducive to democracy and to social justice? It is obvious that we are in need of a richer notion of the state that might keep open and operative the question of its possible dual nature and the meeting of requirements that such duality mobilises. The Covid-19 pandemic has shown us how much the common good is a question of care, and how effective care can only be provided by a public institution. We might thus refer to the State as *the public institution of care*. We would then expect a concept of law, accompanying this civilised form of the state, that does not forcefully and starkly pre-empt citizens' first-order reasons, and will be permanently accountable to them.

In this way, eventually, we get a state that anarchists could claim as their own. This is the dimension of the common good, a public sphere that is instrumental for individuals to make effective their personal projects of good life and where they act in concert to experience the pleasure of participation in a common scheme and project. The good life would remain the business of each person. There is no other way to have a good life if not from the internal perspective of the person whose good life is in question. No one except him or her can know what is really good for a person beyond a certain threshold that guarantees that conditions are offered for developing one's own plan of life. A good life is a life in which one has the capacity and the means to project and conduct oneself. Pursuing a good life also means that one is ethically responsible for it. A public sphere cannot pre-empt this basic reference to the individual plans of life. However, it should protect and make it possible in a dignified way. In this sense a state could be reshaped as such a guarantee and eventually be considered as an institution that anarchism could reasonably and legitimately claim without denying its normative core. This is maintained by the refusal of hierarchy, inequality and domination. An anarchist state would thus be a public sphere comprising persons endowed with equal dignity, each given the capacity to pursue their project of life, without submitting to any other rule than the one commonly and freely agreed.

5. *Sovereignty Civilised*

A general criticism and rejection of the state, indeed, seems to be the core of the anarchist theory of politics. This—as we have tried to argue—might be doubted. However, Proudhon's political philosophy attempts a more nuanced analysis of the state whereby its monopoly of violence and its obsession with coercion are disconnected from its more basic public functions and its role for the maintenance of a public sphere and a collective good.

In his lectures on the birth of biopolitics and neoliberal governance at the end of the 1970s, Michel Foucault astutely outlined how unsatisfactory was a general criticism of the state. This, he intelligently remarked, was based on several argumentative fallacies. One of these was arguing by generalising an assumed historical state capacity for evil and expanding it to the whole scope of state action: since there was Auschwitz, and a state was responsible for Auschwitz,

whatever a state performs keeps as its inner logic the potential for Auschwitz. However, a national health system is also a state performance, but it cannot be equated with a practice of domination or with one of sheer coercion: this would only be possible if one had to approach states with a poor analytical methodology. Institutions are complex collective entities which obey distinct functional motives. In order to understand them, we should be able to differentiate distinct institutional functions and modes of action. A general, unnuanced criticism of the state would not give us the best key for such an understanding. It would also oversimplify the anti-authoritarian sense and good reason of the traditional anarchist rejection of the state. Now, Proudhon's more nuanced care approach is indeed what could, on the one hand, maintain the anarchist criticism against dominion and self-defining institutions, and at the same time satisfy the need not to scarify the collective good and the public functions that are instrumental to the flourishing of the public good to a preconceived, and not thoroughly reflexively self-examined ideological position.

But here, a more fundamental question is implied. Anarchism traditionally does not seem capable of avoiding a paradigm of politics rooted in the notion of sovereignty. What anarchism does is to radically universalise such a paradigm, both in its intensity and in its extension. The sovereign is not only one person or a few people, but all. Sovereignty is here linked to equal concern, a universal notion of individual dignity. Dignity requires autonomy, and thus sovereignty, or at least a fragment of it. On the other hand, sovereignty is here permanently exercised: there is no end to its use and movement. Rules are given by all and then by all they can be changed—in fact, they ought to be changed, if institutions are not to be fully crystallised in a socially unreflective and coercive form. Rejection of coercion means a permanent activation of sovereignty, but this has a cost, and this, among others, is a recurrent claim of individual merits and rights, a growing focus on the self, to the detriment of the respect and attention due to others. This attitude can only be controlled from a different existential perspective. Self-reflexivity would here only increase the self-centred world of an egocentric self, obsessed in the end with his own will to power. To counteract this likely outcome of a radicalised individualism, we need to give others a voice, and the chance to stop the self-righteous activation of autonomy. This is exactly what care intends to do. Sovereignty in this way is, so to speak, tamed and reshaped in a more humble way by attention to the needs and the words of the other person. The voluntarist romanticism inherent in the self-empowering individual and collective self (people driven in this way imagine themselves to be a pre-political homogeneous entity) is corrected by a different form of romantic culture; one that is rooted in respect for the small, poor and humble. It is not strength here that is the defining virtue, but just its opposite, vulnerability.

Beyond *Staatswissenschaft*: The Conception of the State and Rights in Kelsen and Weber

Peter Langford

Introduction

The tradition of *Staatswissenschaft*—a general theory of the character and organisation of the state—is a distinctive phenomenon, both in its concern with a method of theory construction which founds itself on its scientificity (the assertion of a comparable degree of objectivity in its theoretical framework to that of the natural sciences), and in its emergence as an almost exclusive concern within German-speaking lands. Its emergence and formal recognition as an academic discipline within the Universities of German-speaking lands, in the nineteenth century, is to be understood as a theoretical response to the enduringly negative conception of the French Revolution and to the particular trajectory of state formation or transformation. The process of German Unification, undertaken by Prussia, during the later nineteenth century, eventually resulted in the constitutional monarchy of the German Reich (1871). The Austro-Hungarian Empire, defeated as part of this process of German Unification, had, in the earlier 1860s, transformed itself into a constitutional monarchy.

The theoretical framework of *Staatswissenschaft* is one predominantly orientated to integrating a monarch, within a juridical and parliamentary legislative framework, in a manner in which the monarch remains the principal source and origin of sovereign power and authority. The monarch, while no longer a source of absolute, unconditioned sovereignty or authority, is related to non-monarchical institutions by according them a lesser position.

Within this tradition, the specific conceptualisation of law—*Staatsrechtlehre* or *Staatsrechtswissenschaft*—is exemplified in the work of Paul Laband (1838-1918) and Georg Jellinek (1851-1911). A central difference between Laband and Jellinek, beyond their distinct, initial intellectual formation, is that Jellinek develops his theoretical position through the theoretical difficulties arising from within Laband's theoretical framework. This process is also contributed to by an academic career trajectory commencing in Vienna and concluding in Heidelberg, and the accompanying movement (Vienna-Basel-Heidelberg) away from the Austro-Hungarian Empire to the comparatively freer intellectual environment of Heidelberg.

The differing position of Jellinek is evident from the development in his thought of the origin and character of rights in relation to the state. This is exemplified through a comparison of Jellinek's works of 1892 and 1895 (the latter republished in 2016), in which public rights are initially thematised and then, their historical origin is traced, prior to their reintegration within the conceptual framework of the *Staatsrechtlehre*. This process of reintegration is then subsumed within Jellinek's later conceptual framework of the *Allgemeine Staatslehre*.

The importance of Jellinek's short work of 1895, as the preliminary preparation for the subsequent reintegration, is, as explicitly recognised in the critical exchange between Boutmy and Jellinek on this text, to adopt a juridical approach to the text of the *Declaration of the Rights of Man and the Citizen* 1789, and to seek the origin of the *Declaration* in a detailed textual examination of its historical precursors. In this manner, Jellinek seeks to effect a double displacement: to displace the origin of the *Declaration* and to then re-centre that origin upon a particular fundamental freedom. The origin is displaced from Rousseau's *Social Contract*—the purportedly contemporaneous French origin—by situating it as the further development of an origin in the American *Declaration*. From this historical origin, the development is held to reside in the freedom of religion, and, from the perspective of this trajectory, the *Declaration of the Rights of Man and the Citizen* ceases to have a distinct, exceptional position.

This internal development, by Jellinek, within the *Staatsrechtslehre* tradition, indicates an increased recognition of rights, whilst continuing to conceive them from the perspective of a state-centred positivism: the self-limitation of the state.

A subterranean critique of the *Staatslehre* tradition is formulated from the initially privately printed first part of Nietzsche's *Thus Spoke Zarathustra* in 1883. In 'The New Idol' section, Zarathustra inveighs against the state—the "coldest of cold monsters" (Nietzsche, 2006, p. 34)—which has substituted itself for the people, and in this mendacious substitution is the historical origin of the phenomenon of the state's generalised lying and stealing. Zarathustra's emphatic rejection of the state—an idol which creates its worshipers (Nietzsche, 2006, p. 35)—is the prelude to the conclusion of the section, in which the "end of the state" (Nietzsche, 2006, p. 36), namely, that place or position beyond the state, prefigures or gestures towards a different image of the political.

The condensed Nietzschean critique, delivered through the figure of Zarathustra, within the distinctive textual form of *Thus Spoke Zarathustra*, is articulated outside the methodological concerns and parameters of the *Staatslehre* and the *Staatsrechtslehre*. The place or position of the "end of the state" is, however, reached in a different manner, with the defeat of Germany and the Austro-Hungarian Empire in World War I, and the installation of the Weimar Republic and the First Austrian Republic with their respective democratic constitutional states. This defeat is also the end of the nineteenth-century tradition of the *Staatsrechtlehre* and, in its later nineteenth-century formulation, the end of a theory of the state as a constitutional monarchy.

Hans Kelsen and Max Weber, who, however, died in 1920, were directly situated in this transition, contributing, respectively to the elaboration of the Constitution of the First Austrian Republic and the Constitution of the Weimar Republic. The transition, which is also a methodological critique of the preceding tradition of both the *Staatswissenschaft* and the *Staatsrechtlehre*, is then the attempt to combine the state and the people within a democratic constitution. Kelsen and Weber are, however, distinguished by the manner in which this critique is developed and articulated in what will become the contrast between a Kelsenian legal science of positive law and theory of democracy and a Weberian sociology and sociological theory of law.

Hans Kelsen: State and Rights in a Legal Science of Positive Law

State

For Kelsen, the legal science of positive law is developed from a direct critique of this preceding tradition. It centres upon displacing the primacy of the state with the primacy of law, and, in this displacement to juridify the notion of the state. In this displacement, the notion of the state, is transformed from one which designates a substantive entity to one which, as a juridical notion, designates a formal entity. The initial critique is elaborated in Kelsen's *Hauptprobleme Der Staatsrechtslehre* 1911 (Kelsen, 2008), which provides a comprehensive critique of the methodological presuppositions and approach of the *Staatsrechtslehre* tradition. This is the preparatory or preliminary methodological critique which is then further modified and extended during the interwar years, concluding with the first pure theory of law (*Reine Rechtslehre*) in 1934.

The methodological purpose of juridification is to be understood as the methodological dissolution of any continued adherence to a conception of the state as an entity which exists prior to law. Juridification is the counterpart of the demonstration that all attempts to situate the origin of the state prior to law or to accord primacy to the state in relation to law are characteristic of a hypostatisation: the presentation of a category of thought—the state—as a distinct substance or physical entity. The methodological dissolution retains the notion of the state, but as one which is now entirely juridical in character and, therefore, part of, rather than prior to, the hierarchical normative order of positive law. Positive law is itself understood as a normative order of coercion—*Zwangsordnung*—which exists autonomously and externally to the individuals whose behaviour is guided or shaped by it.

The dualism of state and law is, thereby, overcome, and the notion of the state is conferred with an entirely heuristic purpose of designating a certain level within the hierarchical normative order of positive law. It is from this position that Kelsen then considers that the further dualism between national and international law is to be dissolved in an analogous manner with a theory of legal monism: the state, as a legal category designating a level within the hierarchical normative order of positive law, is an *internal* component of a normative hierarchy in which international law is situated above the level encompassed by the state.

The methodological effect of the development of the Kelsenian legal science of positive law extends to the notion of a *Rechtstaat*. The dissolution of the dualism of state and law results in the generalisation of the notion of a *Rechtstaat*: it becomes, in itself, an entirely descriptive, rather than, prescriptive or evaluative notion. This is initially expounded in the final section of the first part of the *Allgemeine Staatslehre* (1925) (Kelsen, 2019, pp. 230-31), and finds its most concise and radical formulation in the Pure Theory (*Reine Rechtslehre*) of 1934:

> The attempt to legitimise the state as a *Rechtstaat* is exposed as completely inappropriate, since every state must be a *Rechtstaat*—if one understands by '*Rechtstaat*' a state which 'has' a legal system. There can be no state that does not have, or does not yet have, a legal system, since every state is only a legal system. (Kelsen, 1997, p.105).

This, in turn, introduces the distinction between the notion of a *Rechtstaat* as a legal *form* and the particular legal *content* of the specific legal system of a state. With the Pure Theory, the Kelsenian legal science of positive law has

confined itself to legal *form* in which the *Rechtstaat* has become merely a generic, descriptive term. For neither the state nor the law, as notions within a legal science of positive law which has dissolved the dualism of state and law, has the purpose of justification of the other. The methodological coherence of the Pure Theory which, as "objective cognition" (Kelsen, 1997, p. 106), relinquishes a position of justification, as one of subjective evaluation: "a matter of ethics and politics" (Kelsen, 1997, p. 106).

The methodological stringency of the Pure Theory is tempered by returning to Kelsen's work of the late 1920s, 'La garantie juridictionnelle de la Constitution (La justice constitutionnelle)', and early 1930s—the exchange between Carl Schmitt and Kelsen over the 'guardian of the constitution'. It is in these works of Kelsen, and, in particular, in the conception of a constitution, rather than that of a *Rechtstaat*, that a regulatory, rather than an entirely descriptive approach to positive law is articulated. The Kelsenian analysis situates the constitution and a constitutional court *within* the structure of the normative levels of a system of positive law. This, in turn, situates the question of regulation through the notion of an unconstitutional law—the possibility of the divergence between a statute and the constitution—and its institutional corollary, a constitutional court (an institution other than the state or a parliament) with the authority to declare a law unconstitutional.

The Kelsenian notion of 'constitutional justice', contained in the brackets of the title of the 1928 article, is, therefore, to be understood as *internal* to a hierarchical order of norms of positive law. However, as Kelsen emphasises, this is not necessarily confined to the mere determination of procedural conformity by establishing the process of formulation of the particular law:

> It also goes without saying that the control must cover both the procedure according to which the act was drawn up and its content, if the standards of the higher level contain provisions on this point as well. (Kelsen, 1928, p. 236)

The limits of Kelsenian constitutional justice are also determined by the overarching methodological framework of a legal science of positive law. The constitutional court, dependent upon its prior constitutional creation, as an institution of the juridified notion of the state, is potentially open to draw upon the general principles of international law in its regulatory function. However, this openness, or recognition, is entirely determined by the prior recognition of these principles of international law by the constitution at the level of the particular domestic legal system (Kelsen, 1928, pp. 238-239). These limits are accompanied by the insistence upon the maintenance of the exclusion of ""super positive"" norms insofar as these norms remain untranslated into norms of positive law (Kelsen, 1928, p. 239). Insofar as these norms are explicitly contained in, and referred to, in a constitution, Kelsen considers that these should not condition the determinations of the constitutional court. The conformity of the legislature, and, therefore, the statute, with the constitution should not be undertaken by recourse to these norms. The prohibition is corollary of the wider relationship, within a constitution, between a democratically elected Parliament, as the legislative body, and a constitutional court. The constitutional court, in relation to the content of the Parliamentary legislation, regulates, rather than substitutes, its position for that of provisions of the particular statute, through the prohibition of recourse to these norms. For Kelsen, in order prevent this potential institutional conflict, and

> [t]o avoid a similar shift of power – which it [the constitutional court] certainly does not want and which is politically completely contraindicated – from Parliament to an authority which is foreign to it and which can become the representative of political forces quite other than those who express themselves in Parliament, the Constitution must, especially if it creates a constitutional tribunal, refrain from this type of phraseology, and, if it wants to lay down principles relating to the content of the laws, to formulate them in a manner which is also as precise as possible. (Kelsen, 1928, pp. 241-242).

The delineation of the boundaries of the criteria for the determination of the compatibility of legislation with the constitution in a democratic republic is one in which regulation assumes a centrally important position. The boundaries which Kelsen determines for the constitutional court and which, thereby, determine its distinct judicial role, are also those which provide for the regulation of Parliamentary democracy.

The importance of 'constitutional justice', as the capacity for a constitutional court to annul an unconstitutional law, is, for Kelsen, demonstrated by considering a constitutional framework in which there exists no capacity for annulment. Here, for Kelsen, the reduction of the possibility of juridical regulation—the effective disappearance of constitutional justice—is evident from its restriction to, and the difficulties of attribution of individual responsibility to, the relevant government minister (Kelsen, 1928, pp. 250-252). It is in a constitution with a constitutional court, in a democratic republic, that the sense of constitutional justice becomes apparent. For the regulation of legislation by the constitution, through the constitutional court, becomes the procedural regulation of political parties within a representative democracy: "it is an effective means of protection of the minority against the encroachments of the majority" (Kelsen, 1928, p. 253).

For Kelsen, this protection relates primarily to legislation, as any proposed revision or amendment of the constitution itself will normally require a reinforced, rather than a simple majority, thereby necessitating that the proposed revision includes the support of the minority (Kelsen, 1928, p.253). Thus, the primary locus of constitutional justice arises from within the sphere of Parliamentary legislation, which remains determined by simple majority and, therefore, by the government resulting from the election of the largest political party. This, in turn, creates the continued potential for the largest political party to pass legislation which "encroaches upon the freedom of the minority in the sphere of its constitutionally guaranteed interests" (Kelsen, 1928, p.253).

Thus, for Kelsen, "[e]very minority—of class, nationality, religion—whose interests are protected in any manner by the Constitution has, therefore, an eminent interest in the constitutionality of laws." Constitutional justice is an institutional means of reinforcement of the character of representative democracy—"the constant compromise between groups represented in Parliament by the majority and the minority" (Kelsen, 1928, p.253). The interest of the minority is furnished with institutional support, which, as "the simple threat of recourse to the constitutional tribunal" becomes the "correct instrument to prevent the majority from violating unconstitutionally its juridically protected interests" (Kelsen, 1928, p.253). The particular interest of the minority is simultaneously the interest in the prevention of the "dictatorship of the majority, which is no less dangerous to social peace than that of the minority" (Kelsen, 1928, p.253).

The procedural guarantee of the constitutional conformity of legislation provided by the existence and operation of a constitutional court is also, for Kelsen, the procedural guarantee of the compromise essential to representative democracy.

Rights

The position accorded to rights in the Kelsenian legal science of positive law arises from the preceding juridification of the state and the critique of natural law of the later 1920s. In the critique of natural law, Kelsen seeks, through the comparison with a legal science of positive law, to demonstrate that natural law confronts an insoluble, internal contradiction in its movement from an absolute, invariant material foundation to "its application to the concrete conditions of social life" (Kelsen, 2006, p. 397).

This application indicates that "the norms of natural law, which are ideally independent of human action and volition, ultimately do require the mediation of human acts in order to fulfil their purpose" (Kelsen, 2006, p. 398). The application, through human action and volition is, therefore "dependent upon the knowledge and will of men by whose doing more abstract natural law is transmuted into a concrete legal relationship" (Kelsen, 2006, p. 398).

Thus, the Kelsenian critique of natural law is an immanent critique of natural law: it must, to become law, posit itself in the form of legal norms of positive law, thereby creating a distinct, external form. This external from is, then, positive law detached from the 'origin' of natural law, and the process through which natural law posits itself as law is the process of the positivisation of natural law. In the process of positivisation, natural law has become positive law, and the transformation in form entails that it is to be defined as positive law. The transformation is also its insertion within a system of positive law which, from the perspective of a legal science of positive law, is *both* static and dynamic: legal norms of positive law exist as a system which is perpetually open to modification and change solely as the result of human action.

The methodological demonstration of the inherent, internal contradiction of natural law, then affects the position and character of natural rights which may be held to derived from natural law. Natural rights require an analogous process of positivisation—to be posited in the legal form of norms of positive law—and exist, prior to or beyond positive law, only as the subjective values of ethics and politics.

The Pure Theory of Law (1934) proceeds beyond the critique of the later 1920s to engage in an extended critique, within the system of positive law, of the dualism of subjective rights and objective law. For Kelsen, this dualism, which is the residue of natural law theory in later nineteenth-century positivism, presupposes that there exists an objective law, composed of legal norms, and a subjective right, composed of the individual's interest or will.

This dualism is one in which logical and temporal priority is accorded to subjective rights in relation to objective law; subjective rights are held to exist "prior to and independently of, the objective law, which emerges only later as a state system protecting, recognising, and guaranteeing subjective rights" (Kelsen, 1997, p. 38). The dualism is to be overcome not by a simple reversal of the

primacy between objective law and subjective law, but by demonstrating that subjective law is an integral part of objective law.

This requires, for Kelsen, that subjective right be "confronted [with] the concept of legal obligation", as the "sole essential function of the objective law" (Kelsen, 1997, p. 43). In this manner, subjective right and objective law become two aspects of the same law, for, "there is subjective right (*qua* legal right) only insofar as the objective law aims – with the consequence that it establishes an unlawful act—at a concrete subject" (Kelsen, 1997, p. 44). This reconceptualisation has the further consequence that it enables the expansion of legal rights, as subjective rights within an objective legal order, to proceed beyond the realm of civil law to encompass political rights: "granting participation in creating law" (Kelsen, 1997, p. 45).

From this, however, Kelsen then proceeds to reconfigure the understanding of the legal person as an entirely heuristic concept which indicates the "unity of a bundle of legal obligations and legal rights, that is, the unity of a complex of norms" (Kelsen, 1997, p. 47). The effect of this reconceptualisation is to reveal:

> legal connections between human beings, more precisely, between material facts of human behaviour, which are linked together by – that is, as the content of – the legal norm. The legal relation is the connection of two material facts, one of which consists in human behaviour established as a legal obligation, the other in human behaviour established as a legal right […]. In understanding so-called law in the subjective sense simply as a particular shaping or personification of the objective law, the Pure Theory renders ineffectual a subjectivist attitude toward the law, the attitude of so-called law in the subjective sense. (Kelsen, 1997, pp. 52-53)

Hence, the legal person is situated heuristically at a different level from the state *within* the hierarchical system of norms of positive law.

Max Weber: State and Rights in the development of Weberian Sociology

For Weber, the critique of the preceding tradition of *Staatswissenschaft* and *Staatsrechtlehre* develops more slowly, incrementally and indirectly as part of the development of a distinct Weberian sociology. The early period of Weber's work, prior to the *Protestant Ethic* (1904), involves the first stage of his academic formation and of his conceptualisation of law. It is concerned with delimited historical investigations of medieval commercial partnerships in Italy (1889) and Roman agrarian history within roman civil and public law (1891) (Weber, 1986; Weber, 2008). The principal orientation of Weber's work in this period is to the German historical school of law. The emergence of a general methodological approach to the analysis of law arises through Weber's critical engagement, in 1907, with the work of Rudolf Stammler (Weber, 2012a, 2012b). It is in this critique that Weber develops and distinguishes a set of concepts for the delineation of legal rules and the definition of legal norms. These concepts are drawn upon, and reinforced, in Weber's response, at the 1910 German Sociological Association General Meeting, to Hermann Kantorowicz's presentation on Legal Science and Sociology (Weber, 2012c). The Weberian conceptualisation of the state and of rights are comparatively later developments which find their most comprehensive articulation in the posthumously edited and published *Economy and Society* (*Wirtschaft und Gesellschaft*).

The State

The Weberian conceptualisation of the state—its sociological preconditions—commences from paragraph 17 of Part 1 (Basic Concepts of Sociology) in *Economy and Society*:

> A political institutional organisational enterprise (*Anstaltsbetrieb*) will be called a State to the extent that its administrative staff can exercise a monopoly of legitimate physical force in the execution of its orders. (Weber, 2013a, p. 54).

This condensed definition is also to be understood as shaped by a wider interpretative methodology which orientates Part 1: the concept of a State is attributed to the combined or collective effect of reciprocal individual social action.

The further precision and delimitation of the categories with which to grasp this Weberian concept of the State, leads to the distinction between an organisation (*Verband*), an association (*Verein*) and an *Anstalt*. Thus, paragraph 17 is, for Treiber (2015, p. 69) necessarily linked to paragraph 15, in which it is the *Anstalt*, an organisation distinguished by an administrative staff implementing a statutory order in which membership is compulsory, which, for Weber, represents the sociological preconditions for the formation of a State.

It is with this category of *Anstalt* that Weber appropriates a category of the preceding *Staatsrechtslehre* tradition, and strips it of its limitation to "the Prussian-German constitutional monarchy" (Treiber, 2015, p. 71), by reconfiguring it as the description of a collective orientation of reciprocal individual social action: an apparatus of compulsion which combines obedience—conformity of external action—with "legitimacy-compliance"—inner conformity of individual belief.

Thus, the *Anstalt*, as a Weberian category, expresses the socio-historical transformation in the use of force in which the combination of 'the monopoly of force and the capacity to enact statutes' (Treiber, 2015, p. 73) demarcates the modern State as "the use of legitimate force" (Treiber, 2015). It is also, and equally, the expression of a process of legal rationalisation, and, thus, paragraph 17 is necessarily linked to paragraph 2 of the Sociology of Law, in Volume II of *Economy and Society* (Weber, 2013b, p. 644; Treiber, 2015, p. 67).

It is rule, through law, in the particular Weberian sense of the enactment of maxims for the orientation of human action (predicated upon the combination of external obedience and internal compliance), underpinned by the capacity for their enforcement, that the extent of Weber's recognition of "a State based on the rule of law (*Rechtstaat*)"is contained (Treiber, 2015).

The Weberian conception of the state based on the rule of law is accompanied, in paragraph 13, by the explicit appropriation, and reinterpretation, of Ferdinand Lassalle's notion of a constitution (Weber, 2013a, p. 51). This appropriation is of a materialist theory of the constitution – the constitution is a form for the expression of the interests of social classes—which strips it of its Lassallean articulation within the emergent German workers movement—and generalises it, conferring on it a wider, non-legal form and sociologically descriptive purpose:

> The only relevant question for sociological purposes is when, and for what purposes, and *within what limits*, or possibly under what special conditions (such as the approval of gods or priests or the consent of electors), the members of the organisation will submit to the leadership. Furthermore, under what circumstances the administrative staff and the organised actions of the group will be at the leadership's disposal when it issues orders, in particular, new rules. (Weber, 2013a, 51)

The effect of this understanding is particularly evident in Weber's Reich President proposals which, if lacking full realisation in the final text of the Weimar Constitution, is indicated in his writings (Weber, 2002a, 2002b), the reintroduction of a figure or personification of authority who is directly elected – the plebiscitarian Reich President. The Reich President establishes a locus of authority which is distinct from the Parliament of representative democracy, and the party system; and is both directly elected and with distinct legal authority to dissolve parliament and to authorise referendums.

The Reich President, as an individual, is to embody the Weberian vocation for politics, and this embodiment becomes the basis, beyond direct election, for the combination of external obedience and internal compliance which is the sociological condition for the maintenance and continued existence of the state within the Weimar Republic.

Rights

The Weberian conceptualisation of the State is accompanied by a conceptualisation of rights which develops and maintains a distinct position in relation to Jellinek's work of 1895. This position, rather than seeking to adopt or repeat Jellinek's 'origin' of rights, in the right to religious freedom, and the consequent displacement of a historical origin from the French Revolution to the American Revolution, arises from a conception of rights which has already detached itself from a necessary inherence in a wider juridical or political theory of rights.

The Weberian position, which finds its expression, among other texts, in the analysis of the Russian Revolutions of 1905 and 1917 (Weber, 1995), and, within a broader framework, in Part 2 of Economy and Society, entitled 'Sociology of Law' (Weber, 2013b) is the reflection of a specifically Weberian 'liberalism'. This has relinquished a connection to the Enlightenment and seeks, instead, to comprehend rights within a socio-historical presentation of the distinction between state and economy.

This, in turn, arguably reflects a certain degree of continuity or affinity with Weber's initial formation in civil law, and his dissertation, 'The History of Commercial Partnerships in the Middle Ages' (*Zur Geschichte der Handelsgesellschaften im Mittelalter*), 1889 (Weber, 2008), in which an intertwining of 'rationality' and 'rationalisation' of law is given its first, preliminary articulation.

This Weberian approach is combined with a continued acknowledgement of a non-positivist source of rights and law as a socio-historical redescription of natural law. In the Sociology of Law section of Volume II of *Economy and Society*, (Weber, 2013b, pp. 865-880), Weber presents a particular description of the

emergence and disintegration of modern natural law, commencing from the French Civil Code of 1804. This is itself situated within a broader sociological analysis of the formal and substantive rationalisation of law and the discussion of modern natural law – its emergence and disintegration – is orientated by this overarching framework. The emergence and disintegration is, therefore, also a description of a process of 'positivisation' of natural law which, having "advanced irresistibly", entails that

> [t]he disappearance of old natural law conceptions has destroyed all possibility of providing the law with a metaphysical dignity by virtue of its immanent qualities. In the great majority of its most important provisions, it has been unmasked all to visibly, indeed, as the product or the technical means of a compromise between conflicting interests. (Weber, 2013b, p. 875).

This process of positivisation is also accompanied, for Weber, by the increased centrality of the legal profession and their "vocation" in regard to the orientation of the system of positive law (Ibid., 875-876); and, in relation to a system of modern, formal, positive law, the sociological analysis centres upon the further analysis of these formal qualities (Weber, 2013b, pp. 880-895).

Weber's 'sociological approach' retains the dualism of subjective rights and objective law but provides this with a sociological reinterpretation. This is particularly apparent in the Weberian responses to the Free Law Movement (Weber, 2012c, 2013b, pp. 886, 886 fn.20) in which Weber insists upon retaining the formalism of general legal norms of positive law. This is combined with the resistance to the expansion or alteration of these general legal norms to actively intervene in, and respond to, social and economic conditions. These, for Weber, indicate one of the anti-formal tendencies of modern law – the re-materialisation of formal law – which undermine its essential generality: re-materialisation is to render modern, positive law formally *irrational*.

Weber, by designating these directions as possibilities or tendencies, leaves open the question of how they will affect the "form of law and legal practice" (Weber, 2013b, p. 895). The openness with regard to these possibilities is combined with the attribution of inevitability or "fate" (Weber, 2013b) of other aspects of modern, formal, positive law. These inevitable or invariant aspects relate to the continued development of the technical elements of this modern law, reinforcing its specialised character and a domain of specialists (Weber, 2013b). From this, for Weber, "the notion must expand that the law is a rational technical apparatus which is continually transformable in the light of expediential considerations [i.e., not these anti-formal directions] and devoid of all sacredness of content" (Weber, 2013b).

As Treiber concludes, in *Reading Max Weber's Sociology of Law*, "it is possible to connect the trend towards re-materialisation with Weber's fundamental belief that modernisation and rationalisation also produce wholly negative side effects" (Treiber, 2020, p. 169).

Conclusion

Kelsen and Weber, in their critical engagement with, and transformation of, the preceding German language tradition of *Staatswissenschaft* and

Staatsrechtswissenschaft, recognise the problematic conceptualisation of the character of the state in this tradition. In place of the subterranean Nietzschean denunciation of *Thus Spoke Zarathustra*, there is a concerted attempt to undertake a methodological comprehension and regulation of the state's importance and power. This is accompanied by an equally explicit presentation, within their respective methodological positions, of the essential fragility of political organisation maintained by a legal framework composed of norms of positive law.

It is their distinctive combination of methodological regulation and fragility against which post-World War II juridico-political thought has sought to define itself. In particular, there has been a sustained reconsideration of the continued pertinence of the dualism between values (inherently subjective) and validity (a methodological operation to establish a position of objectivity beyond all value) from which both Kelsen and Weber commence, and which determines the parameters of their respective methodological frameworks.

This reconsideration has then led to the reopening of the question of the relationship between morality and law, the existence and justification of fundamental or basic human rights and freedoms, themselves now further delineated as civil rights, political rights and socio-economic rights, and the reconception of the character and purpose of a constitution and the notion of a *Rechtstaat* or the rule of law.

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Taming Sovereignty

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 and Immanuel Kant—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 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*, 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 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. 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. 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. 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.

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

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," which are all independent of individual decision or preference and are assumed to forge the members of the community into a "community of destiny". Others, like Dieter Grimm, rather point at linguistic unity as the glue that holds the community together and makes meaningful communication possible. 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.

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. 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", and Huntington goes so far as to say that the "other" has to be explicitly perceived as an "enemy". 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—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.

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. 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. 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, this can be led back to the paradigmatic revolution that 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 true* on the other. 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. 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 from God, its only original and supreme holder, to the mundane rulers. 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. 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. 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 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. 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, passing through Jean-Jacques Rousseau's passionate defence of democracy, to temporarily end with the deliberative theories of the late twentieth century—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 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". A couple of centuries later, the same turn towards universalism was taken in the Western world by the Stoic philosophy. 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," 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. 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. 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. 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. 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", 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 he unequivocally defined as "cosmopolitan law" (*jus cosmopoliticum*). 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. 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. 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. 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. 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 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. 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. 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.

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*. 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. 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 described in a former section—of any ethnic connotation. 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, but reinterpret it from an intersubjective perspective. 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 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. 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".

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, 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, 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 of the constitutionalisation of international law. 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).

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.

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 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.