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Political Sovereignty and Its Enemies

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ABSTRACT

The aim of the essay is to discuss the concept and the value of political sovereignty and those to describe its enemies. According to the theorists of the modern state, two concurring aspects identify political sovereignty: a process of institutionalization of political power; a popular decision to recognize political sovereign. A similar concept of political sovereignty is challenged by other forms of power, which the Author defines the “economical sovereignty” and the “sovereignty of the bios.” After analyzing the characteristics of these different forms of individual power, the Author reveals the common fate of economical sovereignty and the sovereignty of the bios. A community of individuals founded on the economical sovereignty and sovereignty of the bios erases political sovereignty and supports the dominion of *téchne* (techno-science) over politics (Technocracy).

Keywords: political sovereignty, economical sovereignty, sovereignty of the bios, *téchne* (techno-science)

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1. Introduction

No *secularized theological concept* is more ambiguous than political sovereignty. At its very foundation lies a reflection that involves the entire history of the *modern state* – but this is a story that has not yet come to its closing chapter, despite the many narratives speaking to its end. If we should want to assess its usefulness, a current investigation into the concept of political sovereignty can, in a more fruitful way, go in search of elements of *persistence*: in this way, a theory of political sovereignty could still be possible. In historical experience, this or that characteristic of sovereignty is underscored, but no common and distinguishing feature emerges that keeps its *foundations* and practical utility alive.

In this paper, I will try to look at the reality of political sovereignty from a certain distance: the chosen point of view is external to the referent of statehood, detached from the modern state, from the myth of the modern state (Cassirer 1946), from the consideration of the relationships between different domestic legal systems.

My goal is to arrive at an understanding of political sovereignty by comparison with other phenomena that exhibit alternative claims to power. Today we can appreciate the value of the theory of political sovereignty in relation to the *new* and *emerging* questions about sovereignty. Do these questions resolve themselves in qualitatively different forms of sovereignty? My thesis is that the concept of political sovereignty today intersects with phenomena that push towards its being superseded. Appearing to us on the horizon are symptoms of other forms which try to carry out the function so far performed by political sovereignty but are based on a different principle. Every epoch in history knows a struggle for sovereignty. Even today there is a conflict between sovereign claims. The current *enemies* of political sovereignty seem to be in particular so-called *economic sovereignty* and so-called *biological sovereignty*. In this paper I will try to outline the

characteristics of political sovereignty, relating them to globalized economy trends and to the doctrines that, according to the *Foucauldian* language, separate *bios* from the concept of political. The goal is not only to verify whether *other* forms of sovereign power are being created, capable of undermining the modern device of political sovereignty, but also to get to the bottom of the current trends, to discover what actually lies behind the veneer emerging from the phenomena that can be made to fall under the label of economic sovereignty and the sovereignty of *bios*.

2. Persistence of Political Sovereignty

To identify the persistence of the concept, we need to must wrest ourselves from the predominance of holistic conceptions, which bring out only one aspect but fail capture its full semantic significance. Let us start with some clarifications.

Political sovereignty does not only point to a specific *political power*: who is the ruler, the king, the parliament? Who are the judges, the institutions of globalization? History offers us evidence to support all the answers. In the theory of the modern state, the central point was the thematization of the *generative* moment of law as the essence of political sovereignty. It is *that* moment which sovereignty is concerned with, and this much we have known since Jean Bodin admirably outlined the birth of the modern state essentially as the result of the struggle for the *production* of law (Bodin 2010, I, 8, 11ff.). The essence of the modern state relies on its immanence: in the modern sense, regulatory power is the expression of a creative human will. However, *uncovered* law and *created* law, law in nature and artificial law are useful but not decisive oppositions for our speech. In fact, for qualifying political sovereignty a reference only to legislation is not enough, even if political sovereignty refers to the power to create new law.

Political sovereignty is not *just* an attribute of political power: in this context, we can consider the theories which reflect on the concept of

supremacy and its corollaries (absoluteness, indivisibility, inalienability, etc.), but which cannot explain any deviation from the scheme except as a loss of meaning of the related notion. How to justify the division of power, the federal state, supranational integration, and international law without losing sight of the concept of political sovereignty?

Sovereignty is not only a criterion for *legitimizing* political power, which pertains to the question of its justification or foundation: this perspective captures an important, albeit partial, aspect because it tells us nothing about what sovereign political power is.

The question is not so much, Who is sovereign? as it is, more importantly, What is political sovereignty? For a long time, reflection was focused on the first aspect (sovereignty of the nation, the state, the people, etc.), neglecting the second trajectory, which is the one that makes it possible to go to the heart of the persistence of the concept. I try to get out of the mists and positively clarify a notion of political sovereignty.

Sovereignty is at the same time: (a) a *situation* (relating to a subject), that of the holder of the power of supremacy; (b) a *relationship of power*, or, better yet, a relationship between powers (occasionally between rulers and the governed, between the sphere of freedom and that of authority, between a politically appreciable action and a reaction).

Properly speaking, political sovereignty is the qualification of a device for creating and maintaining social order: *a political community's governing device*, a device of the “politician.” Therefore, sovereignty does not coincide with the sovereign “government” as a constitutive element of the state: traditional doctrine insists on this aspect but has remained entangled in this web and has not been able to untangle itself without misunderstanding and confusion. As in the image of Ernst Kantorowicz's corporation sole, sovereignty is not a *part* of the state – an organization of the *polis* – but *is* the state, exactly the “whole” (Kantorowicz 1957, 5).

This device was minted in order to found and explain the modern state: but the formula is valid for any political organization.

3. The two sides of political sovereignty

Our concept has two essential characteristics. In the first place, political sovereignty summarizes the modern process for the *institutionalization*, *stabilization*, and *ordering* of the political (synthesis of an organized political community). Clearly, this is not the *only* paradigm: there are different devices for securing social order (e.g., religion, morality, technology). *Political* sovereignty is *the* device, par excellence, for governing general interests – potentially all those related to a political community. Sovereignty not only refers to the source of political organization but also defines the content and purpose of political power, of a political community’s government.

Second, political sovereignty enables us to establish the *cause* of political obligation: the origin and purpose, the very essence of the political relationship between sovereign and subject, between rulers and the governed, between authority and freedom. The question was well set out in a page of Rousseau’s *contract social*: let us in fact ask ourselves, not why “a people is compelled to obey and does obey,” but “what can make [...] legitimate” the political power to command” (Rousseau 2002, 156). Let us explore both of these threads.

3.1 Institutionalisation of political sovereignty

The notion of political sovereignty entails a process of institutionalization of power, which power evolves from a mere fact to become law, or power under law. Sovereign power in this sense is *institutionalized power*: “sovereignty does not come *before* law but is organized *by* law” (Esposito 1954, 11, my translation). The modern state is an institutional association of rule (*Herrschaftsverband*) (Weber 2010, 316).

In general, the discussion stops at the first dimension (*de facto* power), leaving out the second dimension (*de facto* power that becomes power under law). In fact, political sovereignty refers to a social order organized by law. The concept emerges in the history of legal thought when we finally pass from an ancient conception, which traces *ius* back to declared law (because it is a

matter of reflecting or reproducing a natural or divine order), to the modern conception, which instead resolves ius into positive law or that is created *ex novo*. In Bodin, as anticipated, the creative decision is sovereign, constitutive of law: “persons who are sovereign must not be subject in any way to the commands of someone else and must be able to give the law to subjects” (Bodin 2010, I, 8, 11). The modern state is the *legislative* state (in a sense that does not imply a specific subject: it is the bourgeoisie that wants to hand over legislative power to the parliament alongside or in place of the monarch), which occupies the place of the medieval *judicial* state, in which the judge is sovereign precisely by virtue of *declaring* a pre-existing right (divine law or natural law) (Quaglioni 2004).

In the second place, the modern state, according to the theory of sovereignty, is underpinned by the *rule of law*: the state creates (new) law (on the basis of the social contract), and in so doing limits itself by means of the law itself. Let us return to the sources: in his *Second Treatise of Government. An Essay Concerning the True Original, Extent, and End of Civil Government*, John Locke speaks openly about a sovereign state as a *legal* and *legitimate* state. Let us read a passage from it:

the Power of the Society, or *Legislative* constituted by them, *can never be suppos'd to extend farther than the common good*; but is obliged to secure every ones Property, by providing against those three defects above-mentioned, that made the State of Nature so unsafe and uneasie. And so whoever has the Legislative or supream Power of any Commonwealth, is bound to govern by establish'd *standing Laws*, promulgated and known to the People, and not by Extemporary Decrees; by *indifferent* and upright *Judges*, who are to decide Controversies by those Laws; And to imploy the force of the Community at home, *only in the Execution of such Laws*, or abroad to prevent or redress Foreign Injuries, and secure the Community from Inroads and Invasion. And all this to be directed to no other

End, but the Peace, Safety, and publick good of the People (Locke 2016, IX, 131, 65).

The idea of a sovereignty decoupled not so much from legitimacy but, above all, from legality, from the rule of law, is completely alien to the main theorist of political sovereignty in the liberal state.¹

But *quid est a social order?* Not a simple natural association (and so a mere accretion of individual interests or wills) but a *political* order, a political unity. To give an example: Florence, the city par excellence in the Renaissance, “deserves the name of the first modern State in the world,” because “a whole community was involved with what in the despotic cities was the affair of a single family” (Burckhardt 1961, 62). This conception is not fully evident in Jean Bodin, who in fact saw the state as still a kind of natural association, a *city of houses*, a state of classes or families (Bodin 1903, I, chap. 5).

In the state there is a principle of unity that orders a pluralism. We are drawn to this point by Hobbes’s concepts of a single will, of unity of the representer, of the state as a *representative person*. Let us revisit some passages from *Leviathan*:

A Multitude of men, are made One Person, when they are by one man, or one Person, Represented; so that it be done with the consent of every one of that Multitude in particular. For it is the Unity of the Representer, not the Unity of the Represented, that maketh the Person One. And it is the Representer that beareth the Person, and but one Person: And Unity, cannot otherwise be understood in Multitude (Hobbes 1998, 109).

¹ This is an idea that has most influenced the constitutionalism the basis of our democracies. And even if there is no lack of footholds for this idea in the theories of Bodin and Thomas Hobbes himself, some would cast both, and Hobbes in particular, as theorists of a *legibus solutus* sovereignty: cf. Bodin (2010, I, 8, 31); on *salus populi* as a limit on the state, see Hobbes (1998, 222); see also Hobbes (1987, 157): “all the duties of Rulers are contained in this one sentence, *The safety of the people is the supreme Law* [...] *is it their duty* in all things, as much as possibly they can, to yeeld obedience unto right reason, which is the naturall, morall, and divine Law.”

This “unity of the representer” is a

reall Unitie of them all, in one and the same Person, made by Covenant of every man with every man, in such manner, as if every man should say to every man, “I Authorise and give up my Right of Governing my selfe, to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his Actions in like manner.” This done, the Multitude so united in one Person, is called a COMMONWEALTH, in latine CIVITAS. This is the Generation of that great LEVIATHAN, or rather (to speake more reverently) of that Mortall God, to which wee owe under the Immortall God, our peace and defence (*ibidem*, 114).

The state (Common-wealth) is accordingly defined as

One Person, of whose Acts a great Multitude, by mutuall Covenants one with another, have made themselves every one the Author, to the end he may use the strength and means of them all, as he shall think expedient, for their Peace and Common Defence. And he that carryeth this Person, as called SOVERAIGNE, and said to have Sovereaign Power; and every one besides, his SUBJECT (*ibidem*).

When it comes to clarifying the characteristics of the political sovereignty of the state “by Institution” (as opposed to the state “by natural force”),² the point is made, especially in *Leviathan*, that the act of instituting the state is properly a voluntary constituent decision made by a majority vote taken by an assembly in which the people are united: this creates the sovereign authority as a *Person representative* (*ibidem*, 123):

A Common-wealth is said to be Instituted, when a Multitude of men do Agree, and Covenant, Every One With Every One, that to whatsoever Man, or Assembly Of Men, shall be given by the major

² State by natural force: “as when a man maketh his children, to submit themselves, and their children to his government, as being able to destroy them if they refuse, or by Warre subdueth his enemies to his will, giving them their lives on that condition” (Hobbes 1998, 114).

part, the Right to Present the Person of them all, (that is to say, to be their Representative;) every one, as well he that Voted For It, as he that Voted Against It, shall Authorise all the Actions and Judgements, of that Man, or Assembly of men, in the same manner, as if they were his own, to the end, to live peaceably amongst themselves, and be protected against other men (*ibidem*, 115).

The political order is the state understood as an *artificial man* or purely as an *artifice*. It is a product of *art*, a creation of man and not of God, because it is man who imitates man; but the sovereign state surpasses the concrete man: it is a *machina machinarum*. If there is a force that sovereignty expresses (and many are of the view that this *all* that sovereignty resolves itself into), that force is transformed into organization, into the most perfect of human organizations, with its rules, its mechanisms, its forms, which continuously shape the social order, and which are continuously redefined by that order.

The modern sovereign state is a *corporation sole*: a twin person (*gemina persona*), a *political unity of individuals* (whether it be persons or groups). The *covenant* is a metaphor for the foundation of the corporation as unification, and hence as a unity of distinct parts (*ex pluribus unum*). As *The King's Two Bodies* teaches, two realities are coessential to the *corporation* in which political sovereignty is expressed: a *physical body*, consisting of the plurality of individuals, and a *political body*, consisting of the unity of the *polis*, the *commonwealth* (Kantorowicz 1957, 7–9), the state as an institution made up of institutions, the “*social Ego*” that Santi Romano discusses in *Ordinamento giuridico* (Romano 1946, 18, 19, 25–27, 35ff.). The medieval concept of sovereign *dignitas*, from which our notion derives by secularization, implies uniqueness and individuality, but unity transcends individuals.

The device of political sovereignty is moreover characterized by an essential aspect: it affirms and demands autonomy for *the political* and for *the law* of the *polis*, with respect to any other device designed for the social order (religion, morals, the economy, science, technology, etc.). What, after all, was

meant by the dictum *Authoritas non veritas facit legem?* (Hobbes 1688, 133).³ The crucial question, otherwise stated, is *Quis iudicabit?* That is, what is the fundamental criterion for determining what is of value in a political community? The answer is the device of political sovereignty, and no other device apart from it.

Let us consider a practical example: What is the human person? What is human dignity? Observed through the lens of political sovereignty, it is the result of a political decision (either a made decision or one that is in the making) that defines those concepts (with the corollaries that have been affirmed historically: slavery, the death penalty, the right to bear arms, the right to life, etc.). The fact that the Constitution is a pluralist one and that pluralism is an unrenounceable value depends on a sovereign decision by a *concrete* political community: in the Italian case, it is the consequence of the defeat of Fascism. We are willing to do anything to defend pluralism, no holds barred; it is “we,” the “social Ego,” who establish the content of political sovereignty and of a constitution. Christ said, “He who is not with me is against me.” Pluralism, then, is not universalism; the human person is not humanity: in either case, there is always a decision that establishes the *quid*, or what; there is always a decision by a sovereign political community (be it a made decision or one that is in the making). Political sovereignty (and the state as its envelopment) is the highest device for mediating between freedom and power.⁴

What, after all, is the connection between political sovereignty and the constitution? Is the relationship between the whole and a part of a political community. The constitution identifies the fundamental principles of the

³ Hobbes (1688, 132-133): “In civitate constituta, legum naturae interpretatio non a doctoribus et scriptoribus moralis philosophiae dependet, sed ab auctoritate civitatis. Doctrinae quidem verae esse possunt; sed auctoritas, non veritas, facit legem.” The more long-winded statement of that dictum in chap. 26 of the English edition: “The interpretation of the laws of nature, in a commonwealth, dependeth not on the books of moral philosophy. The authority of writers, without the authority of the commonwealth, maketh not their opinions law, be they never so true” (Hobbes 1998, 183).

⁴ De Giovanni (2015, 96), who on this point is reinterpreting Hegel’s pages.

political community, what makes it possible to form a people, the content of political unity. But the constitution as a set of fundamental principles is a concept that cannot disregard its own relationship to a sovereign political community. Theories that dissolve and neutralize political sovereignty in the supremacy of the constitution (or, which amounts the same, in a *theology of rights*)⁵ amputate an essential part of our concept. The separation of constitutional principles from the political community that embodies them in a living way may be done for the purpose of domesticating political power, to be sure, but it nonetheless leads to a paradoxical outcome: the substitution of one form of power (political power), the only one that justifies and characterizes sovereignty, with other forms of power (by its subjective power, like that of judges, or objective power, like that of religion, science, technology). The consequence is that the appeal made to principles becomes only a ruse: powers that are not political use constitutional principles only as a means and not as an end.

3.2 Recognition of Political Sovereignty

This second characteristic of the concept of sovereignty has often remained on the sidelines. Yet, after the cultural revolution of the European Renaissance, the *legitimacy* of a sovereign command no longer depends on a natural or supernatural order but on an act of recognition by the subjects, or *cives*. It was Rousseau who first identified and offered to solve this problem. The *social contract* announces a discovery:

Man was born free, and everywhere he is in chains. Many a one believes himself the master of others, and yet he is a greater slave than they. How has this change come about? I do not know. What can make it legitimate? I believe I can settle this question (Rousseau 2002, 156).

⁵ For criticism, see *ibidem*, 215.

Rousseau's answer is given by juxtaposition with that of Emperor Caligula (whom he considers as representing Hobbes or Spinoza): while Caligula took the axiom that, just as the shepherd has a nature superior to that of the flock, so the shepherd of men (that is, their ruler) has a nature superior to that of the people, and on this basis asserted "that kings are gods, or that men are animals" (*ibidem*, 157), Rousseau recognizes that "the social order is a sacred right that serves as a foundation for all others. This right, however, does not come from nature. It is therefore based on conventions" (*ibidem*, 156).

This conquest of modern thought lies at the heart of political sovereignty and enables us to establish and justify all the characteristics we have so far examined. We can dissect this problem in a series of statements. At its root is an individual decision essential to any sovereign political consortium: to renounce being *iudex in rem propriam*, to renounce the right to have a right to everything (the right to have rights, often revived today), to renounce the Hobbesian *permanent* war or the *inevitable* Lockean war, to renounce pure violence to solve the social conflicts. The Law that political sovereignty creates, and on which basis social conflicts are worked out, is *legal* (and legitimate) violence: its strength lies in an act of recognition by the *polis*.

As an "element intrinsic to the very concept of sovereignty," an "authentic and decisive moment" (Catania 1996, 27, my translation), it is only the recognition by citizens that makes it possible to deem sovereign power as a *legitimate* power to lay down mandatory commands for all. It is not enough to admit a *recognition* of any kind whatsoever. The social contract is a *metaphor* for this act of recognition: from that moment on, the members of the *polis* renounce private justice and accept a common system of government having a monopoly over the legitimate and legal use of force. According to Alfonso Catania, from the act of recognition the fundamental distinction take shape between the *internal* forum and *external* forum, the former devoid of public significance, the latter instead necessary to fill political and legal obligation with content: "everyone and every social group can have their own internal truth, their own substantive internal order of justice, but to the extent

that social peace must be ensured within a given territory, they need to renounce expressing their own internal religious, moral, or conscientious order or showing it to be in the public arena” (Catania 1996, 20, my translation).

An important decision such as renouncing the sovereignty of the ego is not without purpose: it presupposes a recognition of *another sovereign* to whom all powers are conferred. So it is that from individual sovereignty we move over to the sovereignty of the polis through its organs (through representation or identification). This renunciation contains a decision to favour the *primacy of the general interest*, or the public interest, over individual interests. The public interest identifies the dimension of conflict, the level of political decision-making, the response that is recognized for solving conflicts through the mediation of particular interests, for preserving the polis, that is, for ensuring the continuous existence of a community from generation to generation.

The *content* of this act of recognition depends, of course, on history: it may be *necessity* (following Hobbes), *freedom* (that of each individual, for Locke; that of the people, for Rousseau), *equality* (Marx), and so on.

4. Political Sovereignty and Its Enemies

This idea of political sovereignty has been in crisis for a long time now. Today, two emerging factors are destabilizing the order underpinning the concept of political sovereignty. These are (1) economic sovereignty (globalization) and (2) sovereignty of *bios*. Both are processes *separating* and *freeing* individual interests from the concept of political or from a political community: one of these processes is driven by economic activity (economical *without* political), the other by power of the human being as mere *bios* (biological *without* political). Both of these forces converge toward the same consequence, namely, the crisis of political sovereignty as a *corporation sole*, a union of physical body and political body, the crisis of the political

process for mediating or resolving conflicts between individual interests and the general interest in keeping with the forms recognized by a political community.

The economical and the biological express two new forms of *social theology*: are they therefore in due course meant to replace *political theology*?

5. The Economic Sovereignty

The historical function of political sovereignty, namely, to harness civil society and the forces operating in the market (Carrino 2014, 33, n. 47), has not prevented either one or the other from gaining positions of hegemony. In the case of economic forces, this has happened especially in the global space. Globalization is an elusive and ambiguous concept. We can distinguish two relevant areas: the economic one and the legal-institutional one. Globalization is tied to processes through which people, goods, and capital are exchanged. These historical processes are not linear, alternating between phases of globalization and phases of deglobalisation. Looking at the dynamics of the Western world of the last century and a half, three moments have followed one another: “the late-nineteenth-century *belle époque*, the dark middle ages between 1914 and 1950, and the late-twentieth-century renaissance.” The first and the last are characterised by these very processes of globalisation; the intermediate phase, on the contrary, marks an important transition toward deglobalisation (O’Rourke and Williamson 1999, *passim*, 167ff.).

Globalisation not only leads to convergence and economic interdependence among states, but also changes the relationship between legal systems. From this point of view, the trends are less linear. The increasingly close intertwinement of constitutional law, international law, and transactional law also depends on the globalisation of the economy and finance (as has been recently borne out by the Great Recession of 2008). Bertrand Badie has clarified that in globalisation (economic and legal), political sovereignty does not disappear but changes form; that category (and

its most important subjective referent, the state) has shown a marked capacity to adapt to a changing reality. Sovereignty is a permanent “patching up” process (Badie 2000, 19, 78). The space conquered by international law has not prevented states from exercising their sovereignty, even over the international order.⁶

The boundaries of the globalised market go beyond those of a state’s political sovereignty. With economic and legal globalisation, we have a breakdown of the essential trait of *ius publicum europaeum*: the unity between order and location (Schmitt, 2006). On a global level, subjects and institutions (public and private) emerge, exercising regulatory powers that affect legal situations normally entrusted to the states’ lawmaking. International trade values the contract (and not the law) as a “source of *new law*” capable of composing a “universal,” “freestanding” normative system whose “sources are customary” and whose legitimacy depends on the “*opinio iuris* of those who, whatever their nationality, act in international markets.” What we have here is the “*new lex mercatoria*” (Galgano 2001; 2006, 9 and 93, my translation). Legislation, in this field, is in the hands of powerful international law firms, the “merchants of law,” who give voice to a “spontaneous uniform law” (Dezalay 1997). There is a widespread practice of law and forum shopping (enabling the parties to a contract to choose their applicable law and competent venue irrespective of where the transaction takes place or of the parties’ nationality), and this requires states to find solutions by which to prevent economic operators from escaping the reach of national law.

Public law has not remained immune from these trends, which mainly concern private law. I am thinking of the so-called institutions of globalization (the WTO, WHO, IMF, World Bank, etc.): all these subjects (of dubious legal nature) operate on the basis of rules contained in acts of all kinds, to whose production states or individuals have contributed, and on that

⁶ A clear example is the undisputed legitimacy of the exercise of state jurisdiction in extraterritorial areas: see Munari (2016, 32ff.).

basis they have gained regulatory powers in areas of human activity (trade, currency, health, the environment, cultural goods, work, etc.) that add to and overlap with the legal rules of national, European, and international government institutions.

The bearing these institutional forms have on political sovereignty is typically underscored by qualifying them under the rubric of “stateless statehood” (Brunkhorst 2008, 577) or as “stateless administrations” (Battini 2003).

Scholars have had different reactions to these new phenomena. The critical positions come mainly from the constitutionalists, while less controversial, and indeed reconstructive, reconstructions have been undertaken by administrative law scholars. And that is no coincidence: the former look at these phenomena from the standpoint of constitutional principles, while the latter look above all at structure and activity at work.

In the globalised economy, we are witnessing, in process, the creation of a natural or spontaneous legal order, “an institutional order that grows increasingly sophisticated and complex with the increasing complexity of its production processes” (Beber 1996, 14, my translation), an order that displays many of the traits of sovereignty (autonomy, independence, exclusivity, unconditionality, etc.). Along with a constitutional order’s sovereignty there emerge new *potestates directae*, new sovereign claims that, being linked to the economic globalization process, can be brought within the conceptual framework of *economic sovereignty*. Ultimately, as has been claimed by the most critical commentators, globalization would have sounded the death knell on constitutionalism (Baldassarre 2002), giving rise to a new order made up of islands with different “styles of law” (Monateri 2013) in which an “antisovereign” seeks to govern “an indistinct plurality, or rather the totality of social groups (all the peoples of the world, or at least all the peoples in the part of the world it considers worthy of interest)” (Luciani 1996, 165ff., my translation).

There is no shortage of efforts to “confer an order on Babel” (Amato 2014, 14). The most fruitful results can be found in that foundry that is forging a global administrative law (GAL), referring to “global regulatory systems,” which are meant to provide a “global legal order,” devoid of unity, process-driven (in the sense that it develops gradually), spontaneous, governed not by a separation of powers but by one of functions – a “saprophytic” order, which recognizes the citizens of states as having rights of participation and defence (especially where there are bodies invested with arbitration or para-judisdictional functions) (Cassese 2005, 331ff.; 2006; 2009; 2012). There is talk of a “global Law” having traits that are now clear: it is fragmented; it is a source of “elasticity,” for it “combines different regimes, enabling otherwise inconceivable alliances”; it “makes it possible to activate mechanisms from the bottom,” on a voluntary and individual basis, but with effects that can also be general; compliance is not enforced but is rather prodded by way of incentive and disincentive mechanisms; it encompasses multiple regulatory regimes that can be used to resolve disputes; and, finally, it is “made up of self-feeding mechanisms that can grow on their own ground,” engendering phenomena whereby rules and principles are applied by “imitation” and “cooperation.”

It follows that

the order resulting from the operation of the rules that have been set out is capable of not remaining static: it can move and grow, exploiting advantages and interests (especially those of civil society and national governments) and making them the engine of a cumulative process that, while satisfying these interests and responding to these advantages, also increases the density of global institutions and rules.

In short, it is

not a cosmopolitan government [...] that reigns over legal globalization but an “invisible hand,” regulating its growth and

correcting its defects. Compliance with the new order is not imposed by force but is ensured by mechanisms that work through the interests of private individuals, national governments, global bodies (Cassese 2010, 137ff., my translation).

I do not believe that this global (or, perhaps more appropriately, transnational) law is actually a constitutional order, or that, despite the rationalization undertaken by GAL, it can be considered an irenic solution, a seamless way of working out the relation between political-constitutional powers and economic-technocratic powers. On the other hand, I have elsewhere identified three levels of analysis – one juridical, one legal, and one constitutional – in order to highlight the compatibility of global law with constitutionalism: the point of major friction between the two orders exists on the third level (Morrone 2012, 829ff.).

In fact, I am not convinced by the idea that the global order amounts to a “substantive constitution” (Cassese 2006, 188), especially if the concept of a constitution is taken to designate not only a legal system but also a legitimate order. In political sovereignty, legitimacy and legality are consubstantial, necessary, and indissoluble characteristics. In global law, it is perhaps possible to identify a set of rules that can be traced back to the concept of the rule of law, that is, to a set of procedural guarantees for a legal and transparent exercise of powers by the institutions of globalization (Palombella 2012), but with all of these conditions met, I still cannot see how they can suffice as a substitute for a legitimate legality, one grounded in the addressees’ *recognition and consent* and in material purposes that can be traced back to the components of the *societas* to be organized.

However, postulating the existence of a global order (structured or not) is a fact against which to gauge the strength of the constitutional order, in the sense that its presence gives rise to new constitutional conflicts and new borderline cases, precisely those that call into question the decisions that count toward recognizing the existence of genuine political sovereignty. In these borderline cases we ask, *quis iudicabit?*

6. The Sovereignty of Bios

The other process of liberation from politics can be considered an outcome of the deconstruction that Michel Foucault carries out in his thinking on biopower and biopolitics. The main implications can be found in some popular doctrines that proceed from the need to separate and free *bios* from political sovereignty.

These doctrines share a sort of revival of subjectivism: even if they are grounded in values taken as objective (human dignity, body, life, personal identity, human rights), they address either human beings in their unconditional and ungeneralizable individuality or closed and impermeable social identity groups (as in certain expressions of multiculturalism). The common ground lies in the fortunate paradigm of the “constitutionalism of needs”: the jurist’s task would be to protect, as a fundamental subjective right, any claim, any psycho-physical and biological human need, be it individual or collective (Rodotà 2013). This idea can be developed in such a way as to argue that *bios* is a sovereign power, or, even more directly, that *bios* is *the* sovereign.

Among the most popular approaches is the one that postulates a sovereignty of human rights or sovereignty of values. The background for such conceptions, apart from Hans Kelsen’s neutralization of political sovereignty,⁷ is formed by the idea that the subjective should be eliminated and replaced by the objective embedded in the constitution: the universal instead of the relative, human rights above the rights of the citizen, *bios* instead of politics. The sovereignty of values would arise precisely where political sovereignty rears up its demonic face. The latter notion would conceal “two deadly weapons”: “the de facto establishment of a new order, legitimized by its own effectiveness,” and “the power of closure, the unappealable decision that someone will have to make” (Silvestri 1996, 54, my translation). Rigid constitutions, on the other hand, would have placed

⁷ Kelsen (1920), in the footsteps of Hugo Krabbe: see Stella (2013, 58ff.).

absolute limits on the constituent power by “substituting the foundation of value for the foundation of authority” (*ibidem*, 56–57). Human values, trampled on by totalitarianism, become *sovereign*: these values stand above all powers, including constitutional power; they are “meta-constitutional” (not supranational), giving rise to an “ideal sovereignty.” The principle of legitimacy grounded in values lies at the heart of power. “From this theoretical perspective,” then, “the effectiveness of values becomes the legal system’s Archimedean point, the ideal sovereignty of a theory of the state completely severed from the subjective principle of sovereignty” (*ibidem*, 58).

There is an “unlimited expansiveness” to these values, and their unavoidable tyranny can be averted by effecting a “synthesis of values,” that is, by way of balancing – a typical means of reconciling the pluralism of values and their horizontal arrangement. Relativism is dealt with by assuming that there exist objective values in an “ontologically given unity in the constitution” (*ibidem*, 59). Indeed, there is only one meta-value, human dignity: “the *supremitas* of human dignity is elevated to a criterion for balancing values, without itself being liable to reduction as a result of balancing” (*ibidem*, 63). This unity must not be too rigid or too mobile, but the result of choices made by the combined work of all political powers (Parliament, the Constitutional Court, judges, everyone involved in the process of implementing the constitution). The sovereignty of values – desubjectified, reobjectified, disconnected from power, except, perhaps, from a diffuse power – must stand on two “pillars,” one internal and one external: “the sovereignty of values can take hold and be maintained only through the concurrent action of national sovereignty intersecting with the superordinate power of international and supranational [legal] systems” (*ibidem*, 83f.).

Absent any global Leviathan in the offing, the Leviathan state is replaced by the mechanics of a system that opens and closes the constitutional order according to the criterion of the “best protection of rights”: in comes what best protects the fundamental rights, out goes what instead offers less

protection. On this conception, the sovereignty of values does not subvert political authority, or at least it does not appear to, but rather rests on such authority, both national and supranational, and entrusts to judges (all judges) the task of implementing the device of power underlying the sovereignty of values. The Italian Constitutional Court has partially subscribed to this doctrine: the unquestioning acceptance of the European Convention on Human Rights (ECHR) has been tempered with “sovereign” attitudes aimed at affirming the axiological supremacy of the Italian Constitution.⁸ A similar process is underway in relation to European Union law: the Charter of Fundamental Rights of the European Union (CFREU) is not self-executing and escapes direct judicial application, but is subject to *ex ante* judicial review by the Constitutional Court itself.⁹ By way of judicial dialogue, this jurisprudence fully develops what Antonio Ruggeri now calls the “inter-constitution” (Ruggeri 2013, 1ff.), a concept that gains its sense precisely in view of the prospect of recognizing human rights *regardless* of the state, the constitution, and political sovereignty.

Bioethics and Law (“bio-law” in short) theorists make a huge leap forward by talking about a biolaw separated from political. Biolaw is based on bioethics, since they take the same object (Casonato 2012, 7), which spans from the protection of the environment to the protection of human life and health (the main focus). Bioethics is called into play whenever interventions on human and nonhuman life raise “ethical problems,” understood as “problems in which a choice needs to be made between alternative routes” on the basis of normative criteria, legal sources, or legal formants (Borsellino 2009, 1, my translation). What would these criteria and sources be? An argument has been made for “light” and “sober” law, extra-legal sources (ethics committees, codes of ethics, professional associations, etc.), and above all case law (*ibidem*, 76f.), whose activity can be distilled down to a concept

⁸ Constitutional Court, judgements n. 348 and n. 349 of 22 October 2007; Constitutional Court, judgement n. 49 of 14 January 2015.

⁹ Constitutional Court, judgement no. 269 of 7 November 2017.

of “bio-equity,” understood as a criterion of substantive justice (Casonato 2012, 161, 170), and which alone can avert the risk of legislating on the life sciences and the danger of the so-called “temptation of the majority way.”¹⁰

This doctrine, which marginalizes the role of legislative policy, identifies the material values that support biolaw. At its core is the self-determination of bios, configured not simply as a subjective right but as an absolute meta-value in light of which the system of possible relationships between all forms of life – not only man but also animals, nature, and the environment – can be revised. The starting point for human life is, once more, the concept of human dignity. Stefano Rodotà insisted on making the passage from the individual to the person: the latter is to be considered in the entirety of what a person is – both soma and psyche – rather than being reduced to DNA and data. The concept of a person, without constitutional links, is qualified by human dignity, considering that no person can be separated from their dignity. Human dignity turns political citizenship into a mere citizenship of identity, in distinction to universal citizenship as the common heritage of every human being. Given this constitutionalism of needs, the claim can be made that “private law has been saved by biology,” though it would be more accurate to say that it is law as a unitary phenomenon that draws value from this idea of the person transformed into dignity, the source of universal rights (Rodotà 2010, 170, my translation). Indeed, human dignity, understood as an innate and universal quality of the human (Zagrebelsky 2016, 2642), is still a concept of extreme vagueness, having the potential to bring everyone together, but in fact difficult to put into practice. Gustavo Zagrebelsky (2016, 2644) distinguishes two aspects of the integral idea of dignity: a social aspect – necessarily relative and so amenable to balancing – and an aspect I would define as “autistic” (the dignity we each recognize for ourselves), which by contrast is necessarily an absolute value. For Antonio Ruggeri (2016, 208, my translation), human dignity is “a fundamental meta-right” as well as a

¹⁰ Casonato (2012, 155). A more moderate stance can be found in D’Aloia (2012, 86ff.).

“fundamental duty”; it is also a “contextualized value” and a “value with a drive toward (or vocation for) the universal,” *humanitas*, meaning “what is proper to every human being as a human being.” Dignity would then have an “objective meaning” that would emerge by way of a “hermeneutical circle” exploring the concept. As can be gleaned from a comparative examination of other legal systems and experiences, dignity is an ambiguous concept, frustrating any attempt to find “some homogeneity” in it (Casonato 2012, 47, 60, my translation). Even so, dignity is useful for biolaw owing to the “plurality of functions it can serve in affording protections”: it would protect the person, freedom, and equality; it would act as a barrier against a return to authoritarian experiences; and, above all, it constitutes a decisive element in balancing. Human dignity is an absolute value (or right) (it is therefore not subject to balancing), and it entails both self-determination and self-government (*ibidem*, 81ff.).

This vision is rooted in various “*secularization* processes”: in the relationship between self-determination and health, in the evolution of the medical profession from the Hippocratic Oath to Nuremberg trials. What comes into being, in essence, is a “path of liberation” from external powers: this is achieved by recognizing a sphere of “autonomy *under guard*,” meaning an autonomy that is not just recognized – implying the absence of intervention (from politics or the medical establishment – but is safeguarded as well (Rodotà 2010, 197).

Are there any limits? The sovereignty of *bios* is a self-regarding sovereignty concerned with the individual: it is exercised over oneself, not over others. There is no longer any difference between man and machine today: the boundaries of the “human” are mobile; as Günther Anders said man is “outdated” (Anders 2007); *Pistorius* represents the path toward the bionic man. Even if the “function of the limit” (“is the bionic hybrid the person?”) is not denied, the conclusion is that, today, the real person and the virtual person are often confused, so the divide between biology and biography needs to be avoided, while objective risks are found in the dimension of *autonomic*

computing (self-governing *software* systems). We are experiencing a change in perspective: it is “the human who incorporates the machine,” and not vice versa, such that we cannot reduce the human being to a material entity, but should rather assert the primacy of the person over the machine and recognize a *continuum* between the two, understanding the person as an *integrality*—not just the physical person but also the psychic and social person, a particular version of the “machine man” (Rodotà 2010, 228ff.).

There are two possible interpretations of this complex phenomenon of emancipation of the *bios*. On the one hand, it may be considered a legitimate claim of autonomy from political sovereignty understood as biopower. On the other hand, it may be something qualitatively more ambitious: the substitution of the biopolitical device with a different mechanism of power, with another sovereign which coincides with *bios* itself (either directly or through specific concretization instruments). Although bioethicists and bio-rights theorists seem to stand by the first interpretation, the fertility of the concepts and methods used should incline us towards the second one. In fact, this second interpretation ushers in an idea of human dignity (and individual self-determination) as an *absolute value serving as a source of absolute power*. In this way a shift is effected that can be analogized to the one which has characterized the history of political sovereignty, considering that this human *dignitas*, like the political *auctoritas* that came before it, is destined to take the place of the ancient royal *dignitas*, but in such a way as to maintain its surplus value, the corresponding *plenitudo potestatis*, the ambiguous coexistence of the theological and the political. The problem is that there is no *corporation sole* here, since the *bioi* and the political body have definitively come apart.

In severing *bios* from political sovereignty, these conceptions do not seem to be able to either achieve the goal of genuine objectification or resolve certain conceptual and constitutional contradictions. In taking the place of the constitutional concept of a *concrete* human person (whose contours are drawn by the principles of a constitution), human dignity becomes a scheme so

universal that, as is openly conceded, it is *bon à tout faire*. The subject gives way to the object; the noun surpasses the qualifier; the concept itself prefigures an absolute insofar as it is entirely indeterminate. Who decides what is worthy? What is a “worthy life” or a “worthy death”?¹¹ Having discarded the political, biopower, is it individuals themselves who decide? Or is it a social group (not a political one), in view of its cultural identity? In the absence of political mediation, is an agreement on human dignity possible? Is the intervention of the judge-as-arbiter sufficient? How can the constitutional catalogue of rights be reconciled with the sovereign claims asserted by any individual existence, be it an individual subject or an identity-focused group?

Removing the political aspect does not neutralize social conflicts: it gives way to an inevitable ethical imperialism (Amendola 2003, *passim*, 67ff.). As Antonio D’Aloia (2012, 61) recalls, in matters of bio-rights, in addition to a juridical rule there is also an “elsewhere,” that is, a religious and ethical substratum “capable of expressing normativity.” The risks incident to such ethical imperialism become apparent when bio-rights are applied to criminal law. In this context, assuming the absolute primacy of human dignity “entails a danger of proliferation, the danger that protection may be extended to all the objects that can potentially be traced to the lexicon” associated with that value; the indeterminate nature of the concept, especially if it is considered to be a balancing meta-criterion, “lends itself to a political-legislative and jurisprudential management that refers to ‘comprehensive’ conceptions, i.e., to moral theories that translate particular conceptions of the good life and of the good” (Canestrari 2015, 33, my translation). Carlo Casonato speaks of a “borderline concept.” Gustavo Zagrebelsky (2006) believes that, like other legal principles, human dignity is a formula that refers to a civilization’s values that cannot be frozen in a text. But one has to wonder: how far do such conceptions fall from Schmitt’s idea of the “borderline case,” of the

¹¹ This is the unresolved dilemma of the Italian Constitutional Court’s order n. 207 of 24 October 2018, the so-called *Cappato* case.

exceptional, which calls for a decision and for a sovereign who will make that decision?

Augusto Barbera offered insightful remarks on the so-called *right* to individual self-determination. As he argues, not only is it doubtful that the Italian Constitution admits of readings (even textual ones) consistent with a recognition of that right, and not only would such a sovereignty of *bios* end up justifying the right to die, the right to mutilate oneself, to take drugs, to prostitute oneself, to dispose of one's body in any way, but it would also end up overturning the fundamental task of the Republic as set forth in Articles 2 and 3 of the Italian Constitution, since in this different framework the need to not only protect but also develop human personality and the rights of the person would paradoxically morph into a *duty* to help others carry out those extreme acts so as to satisfy *bios*. When constitutions set out a table of values "it is not possible for them to remain neutral to or agnostic about the various conceptions of the good present in society." In fact, liberties "do not amount to *liberation* from constraints – to liberating oneself from public and private power – but are rather amount to free *communication* and self-conquest [...]. The removal of constraints can be a means but not an end" (Barbera 2015, 331ff., my translation).

Moreover, biolaw entails an alliance of *bios* and science that imposes a principle of scientific truth over any form of political-democratic mediation. Reinforced by the evidence of science and the possibilities of technology, *bios* can take up all the space of public decision-making. The upshot (clearly) is *veritas non auctoritas facit legem*. This is the direction that constitutional jurisprudence itself takes when it embraces what has been termed "scientific reasonableness review" (Penasa 2015) – a true oxymoron, because while the legislator's take-up of scientific evidence and medical practices retains a space for the autonomy of politics (without recourse to the concept of sovereignty), science (here medical science) by contrast represents a real constitutional limit for the law, a limit that has become fully justiciable. So we have to ask: what is it that, from standpoint of constitutional law,

distinguishes scientific evidence from other “truths,” such as ethical, moral, or religious truths, in a world where science itself is based on conventions and not on certainties? Is it just a question of method, or is there a substantial difference?

It can be argued, however, that biolaw should be grounded in a new principle: *non veritas nec auctoritas, sed pluralitas facit legem*, pointing to

a constitution that – in an age of truth without consensus and authority in crisis – can base its legitimacy (more so than ever) on its ability to mediate in an effective and balanced way, in an effort that results in, and at the same time guarantees, open and plural procedures (Casonato 2012, 247, my translation).

But in this way the aim of biolaw is revealed: this pluralism is incompatible with any agreement, because it boils down to establishing a right for particular truths, a right resulting from a summation of rules on a case-by-case basis. Indeed, if on the principle of self-determination every existence must necessarily be claimed to be worthy of being realized (as its claimant believes it to be), that is, if every *bios* must necessarily be claimed to be a *borderline case* – an exception that becomes a rule in and of itself – then these rules correspond to each and every particular sovereign claim. That a biolaw based solely on *experience* and not on rationality (*logic*) is feasible, as it is claimed to be, is a thesis far from being demonstrated. A biolaw built on borderline cases does not produce legal rules (which imply a relationship between powers or situations, and a common decision): it only produces “true” answers, and true for a given *bios* – a *bios* that appoints itself as a new sovereign.

7. New Sovereigns? The Role of *Téchne* and the Fate of Technocracy

As much as the economic and biological approaches may have been wielded against political sovereignty, I do not think that either of them amount to new alternative forms of sovereignty capable of taking the place of political

sovereignty in ordering society. For this to happen, each of these two approaches needs to be able to produce a new separate mechanism, be constituted as a separate legal system, and be institutionalized in opposition to the mechanism of political sovereignty. Has either approach placed individuals in a position to liberate themselves from political institutions? The only way we could say yes is if these new claims to sovereignty had themselves become mechanisms or institutions, recognized as such by the majority of individuals.

Rather, and more realistically, we should recognize that we are in the heat of yet another struggle for sovereignty, one requiring more analytical efforts than the ones that have so far been made.

If we focus on the content of this process of liberation from the political sphere, we can see that economic sovereignty and biological sovereignty are exercised using two different tools: one is the judge-as-arbiter – national judge-made law is only the most visible manifestation of the process, not the only one: just think of the power of private arbitration and of law firms, for example – and the other is *téchne* (techno-science).

The economical and the biological domain both reject the “legislator” in the traditional sense, but they need and require a judge-as-arbiter, a third impartial party – and not part of any given constitutional order (Irti 2009, 465) – who can respond to their peculiar problems (hence the various proposals to cast law firms, tribunals of Babel, scientists, anthropologists, psychologists, etc., as judges). This is a judge who is selected not by operation of law but directly by the parties in dispute, and whose legitimacy is case-specific and grounded in technical expertise or specialized knowledge and empirical objectivity. In fact, in the economic and the biological domains, these are the only trustworthy values, the ones we look to instead of entrusting our fate to the subjectivism attendant on political and democratic procedures (which by comparison are therefore always arbitrary).

On the other hand, whether directly or by means of the judge-as-arbiter, the economic domain and the biological domain both employ technology and

techno-science in order to advance their own (economic or biological) interests: on the one hand, profit through production, consumption, and capitalistic disruption; on the other, the machine-man as a substitute for the (now obsolete) human being, super-humans as substitutes for concrete and naturally finite people.

The fundamental aspect is that (at different degrees of intensity) the economic and the biological are two levels of the same (institutional) process, which does not necessarily lead to a distinct economic or biological sovereignty (as one might think) but instead leads to the single domination of *téchne*: the technology both levels employ is the function of a single technocracy. Economic globalization and the universalization of human dignity are symptoms, conceptual signals, of the affirmation of a new not political but technical mechanism. They themselves become instruments of technical power. *Téchne* drives a process of production and consumption of *things*, with a parallel process of production, modification, and extinction of *bioi*.

How so? What is *téchne*? I cannot dwell on this question in much detail here, so I will confine myself to a few observations that are pertinent to my purposes.

Martin Heidegger lifted the veil of illusion when we observed that *téchne* is not just a means directed at any of several ends – it is not just a human activity – because

the manufacture and utilization of equipment, tools, and machines, the manufactured and used things themselves, and the needs and ends that they serve, all belong to what technology is. The whole complex of these contrivances is technology. Technology itself is a contrivance, or, in Latin, an instrumentum (Heidegger 1977, 4-5).

Even as a means, however, *téchne* is also an end: the means implies the cause, the production, the unveiling of something (*alétheia* in Greek, *veritas* in Latin). Technology precisely “is a way of revealing” (*ibidem*, 12). *Téchne*

“reveals whatever does not bring itself forth and does not yet lie here before us, whatever can look and turn out now one way and now another” (*ibidem*, 13). This is a “challenging revealing,” which reveals reality as a background: unlike agriculture in the mechanized food industry, “the work of the peasant does not challenge the soil of the field” (*ibidem*, 15). “Unlocking, transforming, storing, distributing, and switching about are ways of revealing” (*ibidem*, 16); “man does not have control over the unconcealment itself” (*Unverborgenheit*), but is employed in the revealing (*ibidem*, 18):

Since man drives technology forward, he takes part in ordering as a way of revealing. But the unconcealment itself, within which ordering unfolds, is never a human handiwork, any more than is the realm through which man is already passing every time he as a subject relates to an object (*ibidem*, 18).

Technology (Gestell) is a revealing contrivance, is “Enframing”:

Enframing [Ge-stell] means that way of revealing which holds sway in the essence of modern technology and which is itself nothing technological. On the other hand, all those things that are so familiar to us and are standard parts of an assembly, such as rods, pistons, and chassis, belong to the technological. The assembly itself, however, together with the aforementioned stockparts, falls within the sphere of technological activity; and this activity always merely responds to the challenge of Enframing, but it never comprises Enframing itself or brings it about” (*ibidem*, 20-21).¹²

Technology is the destiny of revealing – it is a direction (not a fate, understood as an unchangeable process) – but this destiny is free and brings freedom: “All revealing comes out of the open, goes into the open, and brings into the open” (*ibidem*, 25). This is why it is dangerous: the dangerousness of

¹² Heidegger (1977, 20, 21) stresses that there is a difference between the constitutive parts of a machinery and the “challenging order” it is designed for.

technology lies in interpreting what is unconcealed in the wrong way, “The destining of revealing is in itself not just any danger, but danger as such” (*ibidem*, 26). But in danger there is also salvation: “As the essencing of technology, Enframing is that which endures” (*ibidem*, 31). “The essence of technology is in a lofty sense ambiguous” (*ibidem*): to employ and guard, revealing and concealing; what saves is meditation on technology through *poiēsis*.

Téchne is thus a means as well as an end: “the more effective the means is, the more it tends to become an end in itself” (Severino 1979, 224; 1988, 18ff., my translation); in order to achieve a selective goal it is necessary to perfect a technical means, but this means becomes the only nonselective goal; the servant becomes master, master of all things. The result of this is the technical domination of things, the “scientifically controlled ability to produce and destroy things.” The irresistible trust towards the miracles of technology is thus explained. Trust, faith, not seeing, not knowing replace philosophy, which implies enlightenment, making things clear, manifest, visible. (Philosophy is the negation of trust/faith: it is caring about truth; see Severino 1979, 69–70). Technology becomes the contrivance employed to solve all problems: it “serves everyone” and “remains culturally blind”; it is “intellectually meaningless”; “the spirit of technicity [...] is perhaps something gruesome, but not itself technical and mechanical”; it is “the belief in unlimited power (Schmitt 2007, 90–94). The technical ability to produce and destroy things is the ability to drive things from nothing into being and from being into nothing; that is the technical domination on things, men included: the end is nullification, nihilism.¹³

In the face of *téchne* – and this is the crucial aspect – there is nothing immutable (not even the economy, human-rights universalism, the ineffable human dignity): there is only a *nothinging*, not only of politics but also of economics and, above all, of *bios* (i.e., the value of humans and their rights),

¹³ From the supreme technical God to the supreme technical man (Severino 1979, 237).

which is nevertheless understood as the real content of the new claims to sovereignty.

Thus revealed, then, is the enemy of political sovereignty: *téchne* – employed by the judge-as-arbiter, and on which the economic and the biological feed – is where we find the future contrivance of sovereignty, the only real threat to political sovereignty in present times.

8. The Future of Constitutionalism

Technology is ambiguous (it is so by virtue of its consisting in both unveiling and hiding). In technology there is both danger and salvation (where there is danger, there is also salvation): according to Heidegger, as we saw, salvation lies in *poiēsis*, in the fine arts, which can make explicit what is otherwise hidden by technology.

Rational thinking, constitutional law, and legal science cannot be reduced to execution, technical activity, in the service of technology. We need to go back to the root of our discipline: the object of our study is political order and its underlying ideology, the essence of political sovereignty. Resorting to this category is a way of saying: it is not for technology to establish what the human being, the economy, the law are, for this needs to be established through a political process of sovereign decision-making, with the consent of a political community.

Political sovereignty is not (or no longer) the *katékon* (the power that holds back the advent of the Antichrist) (De Giovanni 2015, 76; Cacciari 2013), but it is, and continues to be, *the* contrivance by which to organize a social order as a political order. Political sovereignty bases on individual consent the relationship between freedom and domination. It is the device which presupposes and implies the primacy of politics and law over any “nonpolitical” contrivance. Political sovereignty is the least that can be demanded, and for which it is still worth fighting to counter the current trends, which manifest themselves in the claims of the globalized economy and of

the Bios, aimed at transforming *téchne* (technology) into a technical domination (technocracy) – unconditional and exclusive – over human existence, over the economy, politics, and the law.

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