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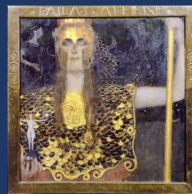
CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION



SOVEREIGNTY, INTERNATIONAL LAW, DEMOCRACY AND GLOBAL CONSTITUTIONALISM

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Foreword

Within the framework of a controversial and reciprocal process of constitutionalization of international legal order and internationalization of constitutional law (Bryde 2008), one can easily see that two opposed phenomena are in progress: the erosion of sovereignty and the rising of different forms of nationalism.

Since long time and namely with reference to the international field, sovereignty has irretrievably developed from an exclusive monopoly of the State to a broadly shared practice, exercised by a plurality of actors in different places, not only at national but also at sub-national and trans-national level. If State is now considered as a "Global State" (Ricciardi 2013), it has even ceased to be conceptualized and represented as the entitled subject of the sovereignty (here referred as the power of the State to enact law and exercise security and protection on its own territory), but has been developed into a valuable and "measurable" entity in relation to its own capacity and resources (as for the case of the economic development) and also in relation to risks it can produce and for which an immunization must be done (Duffield 2002, Simpson 2004).

Aside of the different attempts to give again to sovereignty a central role in International legal order (for example, the rising of different forms of nationalism), two aspects are highlighted in this reconceptualization of sovereignty: the *humanitarian turn* of the International Community and the *rising and legitimacy of new actors* in the International legal order.

As the result of a long, dramatic and discussed journey, international politics have now reached the *humanitarian turn*, which has reconceptualised sovereignty as a form of responsibility for the State, and has turned into the broadly accepted concept of "Responsibility to Protect," posing also problems with the notion of "humanitarian intervention." Indeed, this new concept allows to keep together the ambiguous dilemmas

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and effects stressing the exercise of the global governance; at the same time, a necessary containment of the sovereignty is derived and accepted.

Aside of this form of erosion of sovereignty, International legal order is assisting to the *advancement of other actors*, namely non-state actors and indigenous people. As with respect of non-state actors, they are increasingly involved into international decision-making processes, since they are considered as bearers of different public interests to be taken into account and developed into rules by international institutions (Higgins 1994). Although this participation is highly considered at the international level as a new form of "supranational" or "shareholder democracy" (Singer and Ron 2018), non-state actors are only formally accepted, but substantially are taken out of the deciding phase. As a consequence, there are forms of proposing participation in International legal order, as well as forms of theoretical deconstruction and rebuilding of international decision-making processes, in order to ensure the full participation.

As a matter of discussion, the two sides of erosion of sovereignty (the humanitarian turn and the advancement of new actors) are putting the international legal order under new lights, i.e. those of the modern thought of Global Constitutionalism. On one side, the traditional pillar of sovereignty is facing a new conceptualization of its limits, both on legal and political sides, and is leaving room to the progressive construction of a Global Community supported by fundamental values, considered as the pillars of a new form of Rule of Law. On the other side, there is an increasing demand for a new conceptualization of international politics, involving both more consideration of the principle of human dignity (Cançado Trindade 2013) and more participation in decision-making processes, for the purposes of commonly constitutionalizing the International Community.

These points can be considered the starting ones for discussing on this process of constitutionalization of International law. The following contributions are the final products of different study research by the

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authors, by which different scholarly perspectives are exposed and put genuinely together:

Andrea Morrone analyzes the foundations and the role of political sovereignty and discusses the possibility of it being replaced, through technology, by economical or bios sovereignty;

Damiano Canale investigates the nature of border walls as compared to traditional state borders;

Tomi Tuominen discusses Neil Walker's contribution to constitutional pluralism and global constitutionalism in the light of philosophy, sociology and critical theory;

Susanna Cafaro highlights the role of democracy at the supranational level and analyzes the ways in which it can be conceived and implemented;

Yadh Ben Achour analyses the democratic form of government considering the five principles, which it is based on: dignity, freedom, equality, participation and rule of law;

Massimo Fichera contributes to the debate on transnational constitutionalism by focusing on its transformative character;

Gustavo Gozzi reinterprets the history of the rights of man, and of human rights thereafter then (starting from 1948), from a non-Eurocentric perspective.

References

Bryde B-O. (2008). Constitutional Law in "old" and "new" Law and Development, in *Law and Politics in Africa, Asia and Latin America,* n. 1.

Cançado Trindade A.A. (2013), *International Law for Humankind. Towards a new Jus Gentium* (Martinus Nijhoff).

Duffield M. (2002). Social Reconstruction and the Radicalization of Development: Aid as a Relation of Global Liberal Governance, in *Development and Change*, n. 5.

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https://doi.org/10.6092/issn.2724-6299/12469

Higgins R. (1994). *Problems and Process. International law and How we Use it* (Oxford University Press).

Ricciardi M. (2013). From Modern to Global State. History and Transformation of a Concept, in *Scienza & Politica*, n. 48.

Simpson K. (2004). "Doing development": the Gap Year, Volunteer-tourists and a Popular Practice of Development, in *Journal of International Development*, n. 5.

Singer A., and Ron A. (2018). Models of Shareholder Democracy: A Transnational Approach, in *Global Constitutionalism*, n. 3.

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CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

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 sovereignity, economical sovereignity, 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

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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

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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 untangle itself without misunderstanding and confusion. As in the image of Ernst Kantorovicz'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.

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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

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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

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> *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."

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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 Soveraigne 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).

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> 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

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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

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3 Hobbes (1688, 132-133): "In civitate constituta, legum naturae interpretatio non a doctoribus et scriptoribus moralis philosophiae dependent, sed ab authoritate civitatis. Doctrinae quidem verae esse possunt; sed authoritas, 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.

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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 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 it 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.

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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

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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

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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

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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 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.).

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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).

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There is no shortage of efforts to "confer an order on Babel" (Amato 2014, 14). The most fruitful results can 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-jurisdictional 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

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> 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*?

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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 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.).

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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

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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 it 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.

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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.).

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"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*

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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

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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.

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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,

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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

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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

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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*

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"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, how ever, 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.

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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).

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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

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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.

References

Amato G. (2014). Il costituzionalismo oltre i confini dello Stato, in A. Morrone (ed.), *Costituzionalismo e globalizzazione: Annuario 2012 dell'Associazione Italiana dei Costituzionalisti* (Jovene).

Amendola A. (2003), *I confini del diritto: La crisi della sovranità e l'autonomia del giuridico* (Edizioni Scientifiche Italiane).

Anders G. (2007). *Die Antiquiertheit des Menschen. I: Über die Seele im Zeitalter der zweiten industriellen Revolution* (Beck).

Badie B. (2000). *Il mondo senza sovranità: Gli stati tra astuzia e responsabilità* (Asterios).

Baldassarre A. (2002). *Globalizzazione contro democrazia* (Laterza).

Barbera A. (2015). Costituzione della Repubblica italiana, in *Enciclopedia del diritto – Annali*, vol. VIII (Giuffré).

Battini S. (2003). *Amministrazioni senza stato: Profili di diritto amministrativo internazionale* (Giuffré).

Beber M. (1996). *L'interdipendenza: Produzione integrata e sovranità nel sistema internazionale* (Jaca Book).

Bodin J. (1903). *The Six Books of the Commonwealth* (1576) (University of London - presented by The Worshipful of the Goldsmiths).

Bodin J. (2010). *On Sovereignty: Four Chapters from* The Six Books of the Commonwealth (Cambridge University Press).

Borsellino P. (2009). *Bioetica tra "morali" e diritto* (Raffaello Cortina).

Brunkhorst H. (2008). "There Will Be Blood." Costituzione senza democrazia?, in *Iride: Filosofia e Discussione Pubblica*, n. 3.

Burckhardt J. (1961). *The Civilization of the Renaissance in Italy* (Mentor Book).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/12472

Cacciari M. (2013). *Il potere che frena: Saggio di teologia politica* (Adelphi).

Canestrari S. (2016). *Principi di biodiritto penale* (il Mulino).

Carrino A. (2014). *Il problema della sovranità nell'età della globalizzazione: da Kelsen allo Stato-mercato* (Rubbettino).

Casonato C. (2012). *Introduzione al biodiritto* (Giappichelli).

Cassese S. (2005). Il diritto amministrativo globale: una introduzione, in *Rivista trimestrale di diritto pubblico*, n. 2.

Cassese S. (2009a). *I tribunali di Babele: i giudici alla ricerca di un nuovo ordine globale* (Einaudi).

Cassese S. (2009b). *Il diritto globale: giustizia e diritto oltre lo Stato* (Einaudi).

Cassese S. (2010). C'è un ordine nello spazio giuridico globale?, in *Politica del diritto*, n. 1.

Cassese S. (2012). *The Global Polity: Global Dimensions of Democracy and the Rule of Law* (Global Law Press).

Cassese S. (2016). Stato in trasformazione, in *Rivista trimestrale di diritto pubblico*, n. 2.

Cassirer E. (1946). *The Myth of the State* (Yale University Press).

Catania A. (1996). *Lo stato moderno: sovranità e giuridicità* (Giappichelli).

D'Aloia A. (2012). Biodiritto, in U. Pomarici (ed.), *Atlante di filosofia del diritto* (Giappichelli).

De Giovanni B. (2015). *Elogio della sovranità* (Edizioni Scientifiche).

Dezalay Y. (1997). *I mercanti del diritto: le multinazionali del diritto e la ristrutturazione dell'ordine giuridico internazionale* (Giuffrè).

Esposito C. (1954). Commento all'art. 1., in *La Costituzione italiana: Saggi* (CEDAM).

Galgano F. (2001). *Lex mercatoria* (il Mulino).

Galgano F. (2006). *La globalizzazione nello specchio del diritto* (il Mulino).

Heidegger M. (1977). *The Question Concerning Technology and Other Essays* (Garland Publishing).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/12472

Hobbes T. (1688). *Leviathan, sive, De materia, forma & potestate civitatisecclesiasticae et civilis*, https://archive.org/details/leviathansivedem00hobb/mode/2up

Hobbes T. (1987). *De Cive: The English Version* (1642, 1651) (Clarendon).

Hobbes T. (1998). *Leviathan* (1651) (Oxford University Press).

Irti N. (2009). Tramonto della sovranità e diffusione del potere, in *Diritto e società*, n. 3/4.

Kantorowicz E.H. (1957). *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton University Press).

Kelsen H. (1920). *Das Problem der Souveränität und die Theorie des Völkerrechts: Beitrag zu einer Reinen Rechtslehre* (Möhr).

Locke J. (2016). *Second Treatise of Government* (1689) and *A Letter Concerning Toleration* (1690) (Oxford University Press).

Luciani M. (1996). L'antisovrano e la crisi delle costituzioni, in *Rivista di diritto costituzionale*, vol. I.

Morrone A. (2012). Teologia economica v. teologia politica? Appunti su sovranità dello Stato e "diritto costituzionale globale", in *Quaderni Costituzionali*, n. 4.

Munari F. (2016). Sui limiti internazionali all'applicazione extraterritoriale del diritto europeo della concorrenza, in *Rivista di diritto internazionale*, n. 1.

O'Rourke K.H., and Williamson J.G. (1999). *Globalization and History: The Evolution of a Nineteenth-Century Atlantic Economy* (The MIT Press).

Palombella G. (2012). *È possibile una legalità globale? Il* rule of law *e la* governance *del mondo* (il Mulino).

Penasa S. (2015). Il dato scientifico nella giurisprudenza della Corte costituzionale: la ragionevolezza scientifica come sintesi tra dimensione scientifica e dimensione assiologica, in *Politica del diritto*, n. 2.

Quaglioni D. (2004). *La sovranità* (Laterza).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/12472

Rodotà S. (2010). Il nuovo *habeas corpus*: La persona costituzionalizzata e la sua autodeterminazione, in S. Rodotà and P. Zatti (eds.), *Trattato di biodiritto*, Vol. I, *Ambito e fonti del biodiritto* (Giuffrè).

Rodotà S. (2013). *Il diritto ad avere diritti* (Laterza).

Romano S. (1946). *L'ordinamento giuridico: Studi sul concetto, le fonti e i caratteri del diritto*, 2nd ed. (Sansoni).

Rousseau J.-J. (2002). *The Social Contract and The First and Second Discourses* (Yale University Press).

Ruggeri A. (2013), Salvaguardia dei diritti fondamentali ed equilibri istituzionali in un ordinamento "intercostituzionale", in *Rivista AIC*, n. 4.

Ruggeri A. (2016). Il principio personalista e le sue proiezioni, in *Scritti in onore di Gaetano Silvestri*, vol. III (Giappichelli).

Schmitt C. (2006). *The* Nomos *of the Earth in the International Law of the* Jus Publicum Europaeum (1950) (Telos Press).

Schmitt C. (2007). The Age of Neutralizations and Depoliticizations (1929), in *The Concept of the Political* (The University of Chicago Press).

Severino E. (2002). *Téchne: Le radici della violenza* (Rizzoli).

Severino E. (2009). *Il destino della tecnica* (Rizzoli).

Silvestri G. (1996). La parabola della sovranità: Ascesa, declino e trasfigurazione di un concetto, in *Rivista di diritto costituzionale*, n.1.

Stella G. (2013). *Sovranità e diritti* (Giappichelli).

Weber M. (2010). The Profession and Vocation of Politics, in *Political Writings* (Cambridge University Press).

Zagrebelsky G. (2006). Discorso per i Cinquant'anni della Corte costituzionale,http://www.astridonline.it/static/upload/protected/Zagr/Zagrebelsky_Repubblica_22apr2006.pdf

Zagrebelsky G. (2016). Dignità e orrore, in *Scritti in onore di Gaetano Silvestri*, vol. III (Giappichelli).

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ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

Walled Borders, Territoriality and Sovereignty: A Tipology

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ABSTRACT

Legal scholarship has so far paid little attention to the concept of border, which is one of the reasons for the lack of clarity regarding the characteristics of public borders at the present time. This paper aims to contribute to fill this gap by looking at an apparently eccentric phenomenon regarding the contemporary transformation of state borders: the so-called border walls. At a first sight, border walls seem to reiterate the traditional functions of state borders. But their rising up as physical uncrossable barriers signifies a strong change in their function and institutional nature. In the light of this, a question arises: Does the proliferation of border walls simply indicate a revival of the territorial sovereignty of the states, or is it a phenomenon with quite different characteristics? To answer this question the paper proceeds by first considering the distinctive features of modern public borders from a historical and theoretical point of view, and then distinguishing different types of border walls on the basis of their functional characteristics. This will help clarify whether border walls are an eccentric phenomenon compared to traditional state borders, and whether the analysis of their features leads us to reframe the traditional concept of state border.

Keywords: state border, fences, migrations, state territory, state sovereignty, international law, philosophy of law

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1. Introduction

Territoriality has traditionally been a neglected aspect of state sovereignty. Although sovereignty is unanimously defined as the supreme authority within a territory, political and legal philosophy have mainly focused their attention on the first two components of this definition. Under what conditions do state institutions exert legitimate authority, i.e., "have the right to command and correlatively the right to be obeyed" (Wolff 1990, 20)? [1] And what limitations, if any, are placed on the state's superiority over citizens and other political institutions? If these questions continue to stimulate a number of debates and scholarly reflections, the same cannot be said with regard to territoriality, which actually specifies a salient condition for being a subject of the supreme authority of the state: the spatial location within a set of boundaries.

Indeed, territoriality is a privileged point of view for those who are interested in exploring the transformations of sovereignty in the current political scenario, and their impact on social and political relations. To show this, in this paper I will draw attention on an apparently eccentric phenomenon related to the way in which states exert their authority over a certain territory. I refer to the so-called border walls, i.e. the construction of physical barriers between the United States and Mexico, Israel and Palestine, India and Pakistan, Saudi Arabia and Yemen, Botswana and Zimbabwe, Uzbekistan and Kyrgyzstan, Spain and Morocco, as well as the new walls being built in the Sinai desert, in the south of Thailand, just beyond the borders between the Arab Emirates and Oman, between Kuwait and Iraq, in the tribal territories of Afghanistan, between Greece and Turkey, etc. At a first sight, border walls seem to reiterate the traditional functions of state borders. They simply set the spatial extension of the right to create and enforce state law. Furthermore, their progressive diffusion go

[1] For a discussion of this definition see also Raz (2009, 11 ff).

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on a par with the increasing sovereignty claims over state territory that characterises contemporary international relations, fed by migration pressure, global terrorism, or by the protectionist implications of economic crisis.

Border walls, however, have peculiar characteristics. Very often, they do not correspond to state borders but rather are built inside a state territory or on the edges of the territory of several states. Moreover, they have an immediate physical consistency which tends to determine a break away from the institutional character of modern public borders, which were conceived as imaginary lines delimiting the territory of the state. Obviously, also in the past fortified borders represented an instrument widely used to defend territory, but this did not influence their institutional characteristics in any way, as we will see later. Nowadays, it is the exterior aspect of border walls, their rising up as physical uncrossable barriers, that apparently signifies a change in their function and institutional nature. In the light of all this, a question arises quite spontaneously: Does the proliferation of border walls simply indicate a revival of the traditional sovereignty claims over state territory, or is it a phenomenon with quite different characteristics?

To answer this question the paper proceeds as follows: I will first consider the distinctive features of modern public borders from a historical and theoretical point of view. This will help clarify whether border walls are an eccentric phenomenon compared to traditional state borders, and whether the analysis of their features leads us to reframe the traditional concept of state border. To do this, I will distinguish different types of border walls on the basis of their functional characteristics.

2. The Traditional Function of State Borders

From a conceptual point of view, state borders have a complex and troubled history. Their origins can be traced back to Roman law provisions governing ownership and possession, but the concept of border has been

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strongly reinterpreted in modern legal and political thought. The theoretical reflection on state borders reaches a high level of elaboration the 19th century, with the affirmation of state law as an autonomous branch of legal knowledge. Then the interest for the institutional nature of state borders declined sharply after the First World War, a decline that has continued right up to today.[2] According to the traditional view in state law, state borders are totally different from the boundaries of private property. The boundaries of private property are used to subdivide the land into units of ownership, and thereby to assign things to persons, to confer control over physical objects and to exclude others to their use. On the contrary, public borders establish the spatial extension of the exclusive authority of the state over human individuals and relations (Preuss 2010, 26, Miller and Sohai 2001, 4).[3] Thanks to public borders, the state exercises control over the access to or the departure from its territory, over the use of the resources available there, and over the individual conducts and social interactions that take place in that area. More precisely, state borders identify the territory of the state on the basis of three distinct assumptions: as an area under sovereign powers, as an area ruled by the law of the state, as a place where a people, a race, a nation has its roots (cf., respectively, Jellinek 1921, 489, Kelsen 1945, 210, Schmitt 1974, 18). Which of these three assumptions was the most important in identifying state borders depended on the historical and geopolitical contexts (Howland and White 2009, 1, Taylor 1994). This paper is not going to trace the history of the concept of state border, but will concentrate more on a particular function of state borders which remains constant throughout modern history: the neutralization of personal differences both inside and outside the territory of the state.

To understand this function it is worth considering the institutional nature

[2] A historical reconstruction of the functions and conceptualizations of borders is provided by Kratochwil (1986).

[3] According to the Lockean theory of state borders, the boundaries of the state are coextensive with the boundaries of property of the individual property holders. As to the implication of this standpoint with regard to the justification of public borders, see Simmons (2001).

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of borders in public law and international law. Tracing a public border in the modern age means establishing a relationship between two spaces of land, the territory of the state and its "exterior," i.e. what lies outside it (Smith 1995, 475, Smith and Varzi 2000). On the one hand, by establishing state borders a territory is determined as a state: it becomes a territorial legal institution in its own right. On the other hand, the drawing of state boundaries affects the legal status of the "exterior," i.e. the territory that does not belong to the state. Whatever lies beyond the state border becomes, in time, *res nullius* to occupy, enemy territory to conquer, another state to recognize, an ally to collaborate with, in short: a case of international law whose institutional basis is the creation of the border itself.

It must be made clear that this function of state borders is independent from their physical substrate. That a border is designed by nature, as Joseph Calmette points out when referring to the Pyrenees (Calmette 1947, 27), or corresponds to a line randomly placed on a map, as in the case of the American North-West Ordinance States drawn by Thomas Jefferson, is of little concern. Just as it is of no importance that a border is indicated either by signs, barbed wires, walls or any other kind of barrier. Modern public borders are *de dicto* entities, not *de re* entities: they are an institutional reality which result from a conventional agreement among legal authorities. Considering, therefore, the conventional nature of modern public borders, how can the two spatial areas separated by them be characterised from a conceptual point of view? Let us examine this in more detail.

2.1. Border Inside

As far as the territory of the state is concerned, the border marks off the area within which the state exercises its sovereign powers and claims exclusive control of the means of coercion.[4] This implies that individuals are *formally* equal in the territory of the state since they are equally subject to the rules

[4] As Max Weber famously argued, the modern state is the only human association which successfully claims the monopoly of the use of force within a defined territory. Cf. Weber (1964, 1043).

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enacted by who exercises sovereign powers over that territory. This does not mean that the members of the states necessarily have the same liberties and rights, but simply that whatever individual right and obligation results from what the sovereign provides, irrespective of the fact that sovereignty powers are exercised by a democratically elected representative body, an enlightened king, or a despotic dictator. In this way, modern public borders realise the first relevant form of neutralisation: any personal status which differentiates human individuals on the basis of their ethnical, religious, linguistic, social, economic or cultural characteristics, is made irrelevant with regard to the validity and authority of law. If these differences were *themselves* sources of rights and obligations, the attribution of these rights and obligations would not be based on sovereignty powers but on the contingent characteristics of flesh and blood human beings. Such characteristics can certainly justify, from a political point of view, the unequal treatment of the people living *in* the state, but only as a result of a deliberation of the sovereign. In the same way, in the prospective of international law, the status of refugee or migrant is a title to claim rights only in so far as it is ascribed to individuals by the law. Merely existing as a human being is not sufficient to justify the enforcement of personal rights within the state or any other institutional entity. In this sense, the neutralisation of personal differences within state territory is a precondition of the supremacy of state authority, that characterizes the concept of sovereignty in the modern age.

Observations such as these should be a warning to anyone who is quick to associate the inclusive character of modern public borders with the notion of national state, in relation to which the border assume an identitary connotation that depends on those personal statuses which state borders tend to neutralise. If considered in an identitary sense, public borders do not simply separate what lies inside the state territory from what lies outside it; they also warrant the unity of the nation and its constitutive connection with

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a certain geographical area.[5] In reality, as Georg Jellinek (1921, 489) reminded us, state border give spatial extension to sovereignty and not to the nation. They are formal tools whose purpose is to establish the area where state law is enforceable; they are not thought of as a means to protect the ethnical, religious, linguistic, cultural identity of social groups. The relationship between state borders and national borders has a contingent character. This is shown, firstly, by the fact that individuals of several different national identities can live together within the territory of the same state. As Benedict Anderson (2006, 6) has correctly pointed out, nation states are "imagined communities,"[6] which aim at producing a political and social identity rather than reflecting it. Furthermore, it must not be forgotten how attempts to define the concept of public border on the basis of national or nationalistic claims contributed, at the beginning of the 20th century, to determine the crisis of state institutions in Europe and the inadequacy of the post-Westphalia international law.

2.2. Border Outside

Also as far as the space which extends beyond the territory of the state is concerned, drawing a public border implies, from a conceptual point of view, the neutralisation of "personal" differences; differences which, in this case, concern not human beings in flesh and blood but rather the actors of international law: the legal persons of the states. As the individuals of the internal territory are formally equal, so are the individuals acting in the external space. Anything outside the state border is an actor of international law only if it is recognised as a state by other states. Contrarily to what we are tempted to believe, the modern state knows no "outside" but only multiple "insides": when a human being crosses a border he simply moves from one state to another (Crawford 2005, 47, Sack 1986, 31, Lindahl 2013, 43). Recalling Leibniz's metaphor of the pond and the fish, it could be said

[5] On the nationalist conceptions of territorial rights, see Miller (1995, 2012).
[6] On the use of communitarian identities for the political control of populations, see Schiff and Berman (2012, 61).

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that in the global territory there are certainly some big states and small states, some strong states and weak states, some warlike and some pacific; what is important is that there are states everywhere (Leibniz 2009, 21).

The peculiar connotation that a state border attributes to external space land provides an interesting solution to one of the dilemmas which have always troubled border theorists. Just like any entity that occupies space or time, also the territory of the state is characterised by the geometry of the continuous. There are no two adjacent territorial states in the strict sense of the word; either two territories coincide or they are separated by other territories. According to Bolzano's classic theory, it follows that when two regions are adjacent to one another, one of them is "closed" and the border is contained within it, while the other is "open" and it is not possible to determine how far it extends (Bolzano 1851, par. 66). In the institutional logic of international law, such a problem is resolved by reducing the open space to a group of closed spaces with the same functional characteristics, which are positioned in such a way that they tend to occupy the whole spherical surface of the earth (Rosenzweig 1984, 331). In this way, the modern *ius gentium* acquires a two-dimensional geometry which does not allow overlapping or vertical layers. This brings about, among other things, a drastic reduction in the various meanings that the term *"gens"* had in the legal language in the early modern age. As far back as the start of the 17th century, for example, this term was still used by German speaking jurists to refer to peoples, intended as races, clans, tribes, nations as well as to autonomous towns, sovereign states, religious authorities and their dominions, empires, etc. (see, e.g., Knipschild 1740, 192). The new institutional geometry established by public borders marks the end of this multiform and multi-layered *ius inter gentes,* in favour of a common and homogeneous *ius gentium*.

This explains why modern public borders are not simply boundary lines establishing the territorial scope of state jurisdictions, but also a place of *transit*. In fact, in the external space the states mutually recognise

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international and supranational law and this favours relations between them under the rule of law. In this sense, the role of modern public borders is not necessarily to prevent or limit the transit of the foreigner on the basis of, for example, their personal status, but rather to *regulate* and *guarantee* his safety. The crossing of a border does in fact generate reciprocal obligations on the part of the states, obligations based on mutual agreement. Obviously, this is not to say that in the modern age state borders did not take sometimes the form of physical barriers which impeded the transit of people and goods, nor I want to argue that modern state borders do not generate forms of social exclusion. The point I want to make here is that physical consistency and insuperability were not *necessary* features of state borders but contingent characteristics of them, depending on the political function that state borders were to carry out.

Even though the characteristics of public borders mentioned above are usually considered pretty obvious, it is worth emphasizing that the very idea of public border was first set out by modern legal thought as a re-elaboration of the legacy of Roman law. Previous to the modern age the concept of public border, as outlined so far, did not exist at all (Scattola 1997, 37). We only have to think of how borders were thought of in the ancient world, evidence of which can be found in the sources of Roman law. Roman law knew no public border in terms of territorial boundaries, recognised by two or more states (*civitates*), which set up mutual agreements on the basis of a common *ius gentium*. In classic Roman law, crossing an external border lead to nowhere. In fact, only internal private boundaries, functional to each individual's *proprium*, were conceivable and legally relevant.[7] It could be argued here, however, that already at the beginning of the third century Ulpiano distinguished private borders (*fines privati*) from public borders (*fines publici*), a distinction which still holds true today. Nevertheless, with the expression "fines publici," Ulpiano was referring to borders which

[7] Inst. 4,17,6; D. 17,1,5 (Paulus); D. 20,1,24 (Modestinus); Cod. 8,44,45,10. On this see Scattola (2003, 9).

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separated public property from private property, and not state borders.[8] In the same way, when describing the content of the *ius gentium* Hermogenianus did not attribute to territorial borders any role in the formation of a people or the foundation of a kingdom.[9] Also in this case, territorial borders assume a privatistic relevance, connected with the delimitation of land owned by citizens (*cives*). This is confirmed by the fact that the ager *arcifinius*, i.e. the piece of land disputed by two belligerent peoples, is considered borderless as long as there is hostility with the enemy. As Siculo Flacco points out, once hostilities end and the occupation of the land is completed, the occupied land becomes public property and a boundary is drawn up not to mark it off from the "outside" but to prevent further occupation.[10] Beyond the *limes* of *civitas*, there are no other *civitates*, whether friends or enemies, but only "non-communities," "non-citizens," the "non-men," in other words the negative, the undetermined, what is radically excluded from the domain of law.

3. A New Kind of State Borders?

In the light of these considerations, how should contemporary border walls be characterized? Are they public borders in the modern sense, or do they have different basic features?

The *historical* analysis proposed in the last paragraph can help us to answer these questions. It allows us to establish under what conditions a border wall is a new institutional entity whose characteristics set it apart from traditional state borders. The two conditions that we will examine here are individually necessary and jointly sufficient to identify a new kind of public border. Therefore, if an institutional entity satisfies one of these conditions but not the other, we are faced with a hybrid entity which points to significant changes in the function of state borders, even though it cannot

[8] D. 50,10,5,1 (Ulpianus).
[9] D. 1,1,5 (Hermogenianus).
[10] Siculo Flacco: Sic. Flacc. grom. p. 138.3-10 Lachmann = p. 2.12-14 Thulin. On the concept of "occupation" in Roman law and international law, see Lasaffer (2005, 38 ff).

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be conceived as a brand new institutional entity.

The two conditions can be outlined as follows. A border wall is a new kind of public border if:

(1) It does not neutralise the personal differences in the internal territory;

(2) It does not neutralise the personal differences in the external territory.

Let us examine the first condition in more detail, with particular reference to the current debate on globalisation. The diffusion of border walls seems to signal the re-emergence of the political and legal relevance of the ethnic, religious, linguistic and cultural differences which the modern state attempted to neutralise to allow the full exercise of sovereignty powers. Border walls can be used as a means of controlling migration, of preventing ethnic or religious conflicts, of fighting organised crime, of defeating terrorism, of limiting the spread of endemic diseases; in short, it acts as a means to govern populations. If it acquires this public function, a border wall does not mark off the territorial space in which sovereignty powers neutralise personal differences, but the space where these differences are set up and marked off. Border walls typically carry out this function in two different ways depending on the personal statuses involved.

The first way in which border walls are used to govern populations concerns those personal statuses which possess *ab origine* a territorial dislocation based on the ethnical, religious, linguistic or social characteristics of the involved human beings. In other words, these personal statutes depend on the fact that a certain population has shaped the territory that it occupies, and its identity and culture are mixed with the physical characteristics of the land (Miller 2007, 217 ff.). Here border walls are used to separate a population of this sort from the other people living in the same territory. The second use of border walls concerns those personal statuses which are not originally connected to a certain territory but are "territorialised" by the law. The human beings to whom such status is attributed are forcibly placed in an area surrounded by border walls. In this way border walls carry out two public functions: a status is ascribed to a

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determined group of individuals (those who are located or transferred to a certain area) and full control over these individuals is guaranteed. This is the case of border walls that mark off institutional entities such as detention camps, refugee camps, humanitarian camps, emergency temporary locations, etc.[11] Transfer into a camp signifies that an individual, on the one hand, is labelled with a status, that of migrant, clandestine, refugee, etc., which determines her rights and obligations. On the other hand, the wall prevents individuals from leaving the assigned territory and consequently the alleged pernicious effects that this is supposed to bring about. Under this profile, the fact that a border wall is a physical, uncrossable barrier assumes a *conceptual* relevance. Unlike traditional state borders, border walls cannot carry out their function independently from their *physical* characteristics. Their institutional nature, therefore, depends strictly on empirical properties: the fact that border walls cannot be physically overcome.

The second condition mentioned at the beginning of the paragraph, which goes back to the neutralisation of personal differences in the external space, is equally relevant. A border wall cannot be considered the same as a state border if it is not recognised, *de facto* or *de iure*, by international or supranational law. Without this, the two-dimensional geometry of space territory in international law, which is at the basis of modern *ius gentium*, is no longer in place. Furthermore, in the case they are not recognised as boundaries dividing two institutional entities of the same kind, border walls do not carry out one of the basic functions of modern public borders, i.e. the function of providing legal protection to the transit of people and goods from one jurisdiction to another based on the mutual obligations of the states. This occurs, for example, when the wall is built to prevent those individuals with a certain personal status from coming in or getting out of a certain territory. In this case, the function of the barrier is to confine certain individuals in a given space by suspending their movement rights. The

[11] On the notion of "camp" see Davidson (2003), Edkins and Pin-Fat (2004), Cornelisse (2010). In Agamben's terms, a camp is a "space that opens up when the state of exception starts to become the rule" (Agamben 2000, 39).

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possibility to cross the border wall becomes a residual circumstance, subject to strong limitations, and justified only by the temporary or definitive loss of the status which imposed confinement in the first place, both in an inclusive sense (no way in) and an excluding sense (no way out).

Even though we might be tempted to think otherwise, the fact that a border wall is built in correspondence with the borders of a state is not sufficient to determine its institutional character. A distinctive feature of the so-called legal globalisation, often referred to in the literature, is the gradual disassociation of the multiple institutional functions carried out by public borders, functions which can now be ascribed to a number of territorial borders which do not necessarily coincide (Sassen 2007, 190). There are cases, for example, where the border which regulates the flow of goods between states does not coincide geographically with the border that controls the flow of people, in the same way that the border controlling the passage of durable goods is different to that which regulates the passage of financial goods. In much the same way, a barrier built close to a state border does not necessarily carry out functions that are connected to those traditionally attributed to state borders. On the other hand, a border wall may carry out one or more functions linked to the prerogatives of a state even if it is situated inside the territory of the state or is located between two or more states. It can be said then that even if a border wall and a state border are situated in the same place, this says nothing about the institutional character of the first nor the function of the latter.

4. Border Walls: A Typology

So far, our analysis has led us to distinguish four kinds of border walls which are worth looking at briefly.

(a) *Walled Boundaries.* Firstly, we have walls or barriers which *do not* satisfy the two conditions mentioned previously: they do not aim at territorialising a personal status and are regulated in accordance with

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international law. In this case, we are not really looking at authentic "border walls" but rather "walled boundaries," i.e. physical barriers which allow the border of a state to carry out its traditional functions. An example of this are the artificial barriers which separate the United Arab Emirates and Oman, as well as South Africa, Mozambique and Zimbabwe. Walled boundaries are the result of agreements between neighbouring states to pursue a common goal (control of the movement of people, regulation of trade, the fight against organised crime, etc.). These barriers merely make state borders visible, tangibly demonstrating the intention of the state to control its territory. In this sense, it can be argued that "walled borders" contribute to the process of de-globalisation by limiting the free movement of people (Dowty 1989, 181). Yet, they do not constitute a new kind of institutional entity.

(b) *Internal Border Walls*. Of greater interest are the barriers which satisfy the first condition but not the second, in other words those border walls that allow the territorialisation of one or more personal statuses within the internal space territory but which relate to the external space in much the same way as traditional state borders. An example of these are the fences built to block the flow of immigrants from one state to another, to fight terrorism, to calm inter-ethnic conflicts. The most well-known examples are the walls and fences that separate the United States from Mexico, Macedonia from Greece, India from Bangladesh, Botswana from Zimbabwe, Saudi Arabia from Yemen, Uzbekistan from Afghanistan, Thailand from Malaysia, Spain from Morocco. These barriers are usually built on the basis of a unilateral initiative of one state and are situated inside the territory of this state or can even close off geographically a portion of it, in such a way that a "no go area" is created between the official state border and the wall. The basic function of these barriers is to govern populations by banning a certain group of people (migrants, terrorists, members of a given ethnic or religious group, etc.) from the territory of the state. Under this profile, the building of the barriers does not have the effect of neutralising

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the personal differences inside a determined territorial space as modern public borders do, but rather transforms these differences into a criterium for separation and territorial segregation.[12] Nonetheless, these institutional entities are built and administered on the basis of sovereign prerogatives recognized by other states. This kind of border walls reveals, therefore, a hybrid institutional nature which, on the one hand, highlights some relevant functional changes compared to traditional state borders while, on the other, remains strictly connected to the traditional forms of legitimization that characterize state law and international public law.

(c) *External Border Walls.* The considerations just proposed can be extended to those territorial barriers which, unlike internal border walls, satisfy the second condition but not the first one. Their function is to neutralise personal differences in the space territory that lies outside the border, but not in the internal space territory. An emblematic example of this kind of walls are the fortified barrier created by India in the Kashmir regions, that set up by Turkey on the island of Cyprus, and also the barriers that divide Hungary and Serbia, North Korea and South Korea, Uzbekistan and Kyrgyzstan. Even though the geopolitical situations of each of the examples just mentioned are different, border walls carry out the same function. Let us take the case of Kashmir (Kadain 1992, 128, Farrell, 2003). Pakistan has always considered the regions of Kashmir, annexed to India in 1947, as a disputed territory. Therefore, it does not recognise the line of control, set down in the 1972 Simla agreement, as a state border. On the contrary, India, on the basis of the principle of state secularism, continues to

[12] According to the US Congress, however, the border wall between the USA and Mexico is simply meant to enhance state border controls for security and humanitarian reasons. See, e.g., *Secure Fence Act* 2006 (Pub.L. 109-367), sec. 2; *Build the Wall, Enforce the Law Act* 2018 (H.R. 7059). In the Presidential Proclamation 9844 of February 15, 2019, the president of the US claimed that "The current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency." This disputed declaration has formally enabled the president to divert founds from the Department of Defence (and other agencies) to be used for the construction of the wall. Under this perspective, therefore, the wall between the USA and Mexico should be qualified as a Walled Border and not as a Internal Border Wall. See, however, Heyman and Ackleson (2006, 37), Hattery, Embrick and Smith (2008), Morales (2009, 23).

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refuse Pakistan's proposal to re-establish the frontiers of the region on an ethno-religious basis. In order to transform *de facto* the line of control into a border line, the Indian government organised in 2001 the building of a fence with the aim of neutralising, from a political and legal point of view, the ethno-religious differences present in the area, also at the cost of serious violations of human rights (Kaul and Teng 1992, 175, Wirsing 1998, 128, Gopalan 2007). However, the process of "statalisation" of the territory that lies inside the wall is not the result of a mutual recognition between neighbouring state entities. The Kashmir wall forbids the crossing of goods and people while, towards the exterior, functions as an exclusion mechanism on an ethno-religious basis. In all these cases, therefore, we find ourselves before a hybrid form of public border. External Border Walls maintain the traditional characteristics of state borders as far as the internal space territory is concerned, since they identify the space in which all individuals are subject to the same territorial jurisdiction. However, the way in which these border walls relate the external space territory seems to evoke the pre-modern dimension of radical exclusion and non-recognition which is at odds with International Law.

(d) *Full-fledged Border Walls.* The final kind of walls to be considered is that which satisfies both conditions enunciated above and could therefore be defined as border walls in a full sense. Like in the case of the physical barriers which mark off refugee camps and detention camps, here we find public borders whose function is to localise personal statuses both on the inside and the outside, so that these statues can be ascribed to individuals on the basis of their exclusion or inclusion in a bordered territory. These walls appear, to all effects, as a new kind of public border which, conceptually speaking, cannot be traced back to the modern tradition of state law and international law. As far the internal space is concerned, they are physical barriers which act as emergency administrative instruments independent of democratic deliberation and constitutional control. They are erected by government agencies to pursue a political goal which often cannot be

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submitted to deep judicial scrutiny. The government need only show that this administrative measure is rationally related to serving a legitimate state interest. With regard to the external space, moreover, full-fledged border walls are not the result of an agreement between international law actors with legal personality and mutual obligations. They are built on the basis of an unilateral decision of the government although they can affect some prerogatives of other international law actors. Finally, this kind of walls tend to remove any fruitful relationship between individuals and institutions, because they bring about the territorial isolation of different groups of people.[13] In this sense, border walls highlight the inability of political institutions to find a way of mediating between the interests at stake in global conflicts.

It goes without saying that the classification above should not be considered too rigidly. In fact, there are cases in which it is difficult to determine whether a border wall has the distinctive characteristics of one or other of those looked at. A clear example of this is given by the wall between Israeli and Palestinian West Bank, whose declared purpose is not to strengthen the border between two states but rather to defend Israeli citizens from terroristic attacks. According to some commentators, this would be a case of Full-fledged Border Wall that was built in breach of international law in order to put the population of the Palestinian occupied territories under control (cf., e.g., Gross 2006, Bekker 2005). However, others outline the wall in question as a case of Internal Border Wall which aims at protecting conflicting interests and values. On this view, the construction of the Israeli wall is not in breach of international law and is justified by a proportionality test between national security and human rights protection.[14]

[13] "Contemporary [border] walls, especially those around democracies, often undo or invert the contrasts they are meant to inscribe. Officially aimed at protecting putatively free, open, lawful, and secular societies from trespass, exploitation, or attack, the walls are built of suspended law and inadvertently produce a collective ethos and subjectivity that is defensive, parochial, nationalistic, and militarized" (Brown 2010, 40).
[14] Cf. *Beit Sourik Village Council v. The Government of Israel and Commander of the IDF Forces* (HCJ 2056/04). See also Barack (2006, 287); Kattan (2007).

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In this paper it is not possible to address controversial issues like this. The conceptual framework outlined here may simply serve as a guide to understanding the phenomenon of border walls and to explaining its different manifestations. As a matter of fact, border walls signal a significant change in contemporary legal reality which cannot be easily reconciled with the traditional categories of state law and international law. At the same time, border walls may carry out different functions and have different characteristics. Distinguishing these features, therefore, is the first step to a better understanding of this phenomenon and a reasoned evaluation of it.

References

Agamben G. (2000). *Means without Ends: Notes on Politics* (University of Minnesota Press).

Anderson B. (2006). *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso Books).

Barack A. (2006). *The Judge in a Democracy* (Princeton University Press).

Bekker P.H.F. (2005). The World Court's Ruling Regarding Israel's West Bank Barrier and the Primacy of International Law: An Insider's Perspective, in *Cornell International Law Journal*, n. 2.

Bolzano B. (1851). *Paradoxien des Unendlichen* (C.H. Reclam).

Brown W. (2010). *Walled States, Waning Sovereignty* (Zone Books).

Calmette J. (1947). *La question de Pyrénées at la Marche d'Espagne au moyen age* (J.B. Janin).

Cornelisse G. (2010). Immigration, Detention and the Territoriality of Universal Rights, in N. De Genova, and N. Peutz (eds.), *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement* (Duke University Press).

Crawford J. (2005). *The Creation of States in International Law* (Oxford University Press).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/12473

Davidson R.A. (2003). Spaces of Immigration “Prevention”: Interdiction and the Nonplace, in *Diacritics*, n. 3/4.

Dowty A. (1989). *Closed Borders. The Contemporary Assault on Freedom of Movement* (Yale University Press).

Edkins J., and Pin-Fat V. (2004). Introduction: Life, Power, Resistance, in V. Pin-Fat and M.J. Shapiro (eds.), *Sovereign Lives: Power in Global Politics* (Taylor & Francis).

Farrell B.R. (2003). The Role of International Law in the Kashmir Conflict, in *Penn State International Law Review*, vol. 21.

Gopalan S. (2007). From Darfur to Sinai to Kashmir: Ethno-religious Conflicts and Legalization, in *Buffalo Law Review*, n. 2.

Gross A.M. (2006). The Enforcement and Limits of Humanitarian Law and the Structure of Occupation, in *Leiden Journal of International Law*, n. 3.

Hattery A., Embrick D.G., and Smith E., eds. (2008). *Globalization and America: Race, Human Rights, and Inequality* (Rowman & Littlefield).

Heyman, J. McC., and Ackleson, J. (2006). United States Border Security after 9/11, in J. Winterdyk, and K, Sundberg (eds.), *Border Security in the Al-Quaeda Era* (CRC Press).

Howland D., and White L., eds. (2009). *The State of Sovereignty. Territories, Laws, Populations* (Indiana University Press).

Jellinek G. (1921). *Allgemeine Staatslehre. Dritte Auflage* (Springer).

Kadain R. (1992). *The Kashmir Tangle: Issues and Options* (Routledge).

Kanhia K., and Kanhia T.M.K. (1992). Human Rights Violations of Kashmiri Hindus, in T.G.C. Raju (ed.), *Perspectives on Kashmir: The Roots of Conflict in South Asia* (Routledge).

Kattan V. (2007). The Legality of the West Bank Wall: Israel’s High Court of Justice v. The International Court of Justice, in *Vanderbilt Journal of Transnational Law*, vol. 40.

Kelsen H. (1945). *General Theory of Law and State* (Harvard University Press).

Knipschild P. (1740). *Tractatus Politico-Historico-Juridicus de juribus et*

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/12473

privilegiscivitatum imperialium, vol. I (J. Beck).

Kratochwil F. (1986). Of Systems, Boundaries, and Territoriality: An Inquiry into the Formation of the State System, in *World Politics*, n. 1.

Lasaffer R. (2005). Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription, in *European Journal of International Law*, n. 1.

Leibniz G.W. (2009). Leibniz to Antoine Arnauld. Hannover, 28. November/8. Dezember 1686, in *Sämtliche Schriften und Briefe* , sec. II, vol. II (De Gruyter).

Lindahl H. (2013). *Fault Lines of Globalization: Legal Order and Politics of A-Legality* (Oxford University Press).

Miller D.L. (1995). *On Nationality* (Oxford University Press).

Miller D.L. (2007). *National Responsibility and Global Justice* (Oxford University Press).

Miller D.L. (2012). Territorial Rights: Concept and Justification, in *Political Studies*, n. 2.

Miller D.L., and Sohail H.H., eds. (2001). *Boundaries and Justice: Diverse Ethical Perspectives* (Princeton University Press).

Morales D.I. (2009). In Democracy's Shadows. Fences, Raids and the Production of Migrant Illegality, in *Stanford Journal of Civil Rights & Civil Liberties*, vol. 5.

Preuss U.K. (2010). Disconnecting Constitutions from Statehood. Is Global Constitutionalism a Viable Concept?, in P. Dobner, and M. Loughlin (eds.), *The Twilight of Constitutionalism?* (Oxford University Press).

Raz J. (2009). *The Authority of Law. Essays on Law and Morality* (Oxford University Press).

Rosenzweig F. (1984). *Globus. Studien zur weltgeschichtlichen Raumlehre* (1917), in *Gesammelte Schriften*, vol. III (Springer).

Sack R.D. (1986). *Human Territoriality: Its Theory and History* (Cambridge University Press).

Sassen S. (2007). *A Sociology of Globalization* (Norton & Co.).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/12473

Scattola M. (1997). Die Grenze der Neuzeit. Ihr Begriff in der juristischen und politischen Literatur der Antike und Frühmoderne, in M. Bauer, and T. Rahn (eds.), *Die Grenze. Begriff und Inszenierung* (De Gruyter).

Scattola M. (2003). *De finibus imperii Germanici*. Die frühneuzeitliche Diskussion über die Grenzen des Heiligen Römischen Reiches, in *Mitteilunge. Institut für Europäische Kulturgeschichte der Universität Augsburg*, n. 11.

Schmitt C. (1974). *Das Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Duncker & Humblot).

Simmons J.A. (2001). On the Territorial Rights of States, in *Philosophical Issues*, n. 1.

Smith B. (1995). On Drawing Lines on a Map, in A.U. Frank, and W. Kuhn (eds.), *Spatial Information Theory. Proceedings of the Third International Conference* (Springer).

Smith B., and Varzi A. (2000). Fiat and Bona Fide Boundaries, in *Philosophy and Phenomenological Research*, n. 2.

Taylor P.J. (1994). The State as Container: Territoriality in the Modern World-system, in *Progress in Human Geography*, n. 2.

Weber M. (1964). *Wirtschaft und Gesellschaft: Studienausgabe. Zwei Halbbände* (Kiepenheuer & Witsch).

Wirsing R.G. (1998). *India, Pakistan and the Kashmir Dispute: On Regional Conflict and Its Resolution* (Palgrave Macmillan).

Wolff R.P. (1990). *The Conflict Between Authority and Autonomy* (Blackwell).

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ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

From Constitutional Pluralism to Global Law: Reading Neil Walker's Postmodern Constitutionalism

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ABSTRACT

Neil Walker, one of the foremost constitutional theorists of our time, is perhaps best known for his work on constitutional pluralism and global constitutionalism. Having first pioneered the study of constitutional pluralism in the context of the European Union, and developed epistemic constitutional pluralism, Walker has since extrapolated these ideas onto the global plane. What are the key arguments Walker has made regarding constitutional pluralism and global constitutionalism, and how are we to understand this body of work? This article attempts to answer this question by way of reading Walker's work in light of philosophy, sociology and critical theory. Parallels are drawn especially with the ideas of functional differentiation and governmentality, but also other ideas prevalent in postmodern scholarship. This article concludes by highlighting the similarities between Walker's constitutional pluralism and Michel Foucault's governmentality, and by proposing to combine these two in the study of European constitutionalism.

Keywords: constitutional pluralism, global constitutionalism, epistemology, postmodernism, critical theory, sociology

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1. Introduction

What better place than a new journal dedicated to sovereignty, international law, democracy and global constitutionalism to publish an article on the writings of Neil Walker. Walker, who holds the Regius Chair of Public Law and the Law of Nature and Nations at the University of Edinburgh, is undoubtedly one of the leading constitutionalists of our time. Walker has contributed to several central themes in constitutional law and political theory, but he is perhaps most well-known for his work that relates to sovereignty and global constitutionalism.

With regards to sovereignty, Walker is renowned for his pioneering work on constitutional pluralism. He first presented his conceptualisations on this theme in the article *The Idea of Constitutional Pluralism* (Walker 2002). which sought to map out the causes and consequences of the waning of Westphalian[1] state-based sovereignty and the subsequent change that is best captured by the term constitutional pluralism. At the same time Walker also edited the compilation *Sovereignty in Transition* (Walker 2003a). which brought together most of the then pre-eminent scholars in European constitutionalism to reflect upon this change in our constitutional landscape.

Although *The Idea of Constitutional Pluralism* discussed the issue in general terms and the European Union was just the primary example (see Walker 2002, 336-339). Walker's work has been closely associated with the European constitutional experience (see, e.g., Walker 2003b; 2016). However, Walker has since broadened his approach from the European to the global. Considering global constitutionalism, his main publication is certainly the monograph *Intimations of Global Law* (Walker 2015). This book sought to describe the emergence of global law, something that goes beyond

[1] The current concept of state sovereignty in international law was established with the Peace of Westphalia treaties in 1648. This is the basis for the distinction between state-based constitutional law and international law. When international law or other forms of non-state law start acquiring constitutional features, Westphalian constitutionalism changes into post-Westphalian constitutionalism.

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international law or transnational law, and to explain how this emerging legal phenomenon questions our understanding of law and legal authority.

Epistemological questions have been central in both strands of Walker's work. The paradigmatic *sui generis* theory of European constitutionalism meant that a theoretical assessment of the European Union's constitutional credentials was not possible on the basis of the old, state-based constitutional language. The most well-known example of this is perhaps what has been called the "problem of translation" (Weiler 1999, 270) and the underlying "invisible touch of stateness" (Shaw and Wiener 1999, 2). This means that our conventional understanding of constitutional law and everything that relates to it is based on the idea that only nation-states can have constitutions. To tackle this, a new constitutional language, and along with that, a new constitutional way of thinking became necessary (see Walker 2003c). Simply put, to talk of sovereignty in any other context than the nation-state is not possible unless and until we adopt a new epistemological starting point regarding sovereignty, and whilst doing so, also a new language with which to conceptualise this new version of sovereignty. A truly *constitutional* pluralism is only possible if we assume a pluralist epistemology. The same goes for global law, which in its still emergent form can only be "intimated"[2] but not yet grasped in practice. Thus, regarding global law we are also required to refine our epistemological starting point in order to comprehend it.

Such epistemological questions have deeper roots than just what terminology we should use when describing the constitutional status of the European Union or the nature of global law. As Marxists historical materialism tells us:

> a change in thinking is a change in the social totality and thus has an impact on other social processes; a change in the social totality will provoke change in the process of thought. Hence, the process of

[2] Intimation (noun): the action of making something known, especially in an indirect way.

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> thinking is part of a ceaseless dialectic of social being (Gill 2008, 22).

A similar point is made by Foucauldian critical theory which informs us how:

> systems of thought and knowledge (epistemes or discursive formations, in Foucault's terminology) are governed by rules, beyond those of grammar and logic, that operate beneath the consciousness of individual subjects and define a system of conceptual possibilities that determines the boundaries of thought in a given domain and period (Gutting and Oksala 2019).

This epistemological point servers as an inroad into the main point of this article, namely the perspective through which I will be reading Walker's writings. Such epistemic issues are central in various strands of philosophy, sociology and critical studies, all of which can be grouped under the general heading of postmodern scholarship. My aim is to present a short reading of Walker's writings through the lens of such postmodern scholarship. Whilst doing so, I will also try to argue that Walker's project on epistemic constitutional pluralism is rooted in such postmodern thinking, or at least a product of such thinking to a certain extent.

I am not using the label postmodern in a pejorative sense – as is currently often done in political debates and which has also been done in academic circles (see, e.g., Sokal and Bricmont 1999) – but rather in a descriptive and explanatory sense. This is because at least for me, understanding Walker's work in this way has made a lot of sense. Furthermore, postmodernism is perhaps, for lack of a better word, the best umbrella-term to bring together the various issues through which I try to read Walker's work.

I argue that Walker's constitutional pluralism, and subsequently his global constitutionalism, is best understood through two basic sociological and philosophical concepts or ideas: functional differentiation (present in sociology since Emile Durkheim) and governmentality (present in critical

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theory since Michel Foucault). In addition to these ideas, Walker seems to constantly use analogously also other ideas taken from postmodern scholarship whilst developing his constitutionalism. I will also try to highlight this in my reading of his work.

Functional differentiation refers to the idea that society consists of independent yet interdependent systems. Luhmannian systems theory is a continuation from this tradition (see Stichweh 2013), and perhaps the most well-known example for legal scholars. In recent legal scholarship, especially two works representing this approach stand out. Kaarlo Tuori (2015) has conceptualised the European Union's constitutional development through the functional constitutions of the political, juridical, economic, social and security realms. Gunther Teubner (2012), for his part, has discussed the changes brought about by globalization in reference to the systems of technology, education, media and health. What is common to such legal approaches to functional differentiation is that they usually study specific societal systems and the legal rules regulating them, and their interaction between various systems and the norms associated with each system. This way they usually aim at some sort of a comprehensive account of the role of law in the regulation of the various societal systems.[3]

Governmentality, in contrast, is a term made famous by Michel Foucault as it played a central role in his theory on biopolitics (see Foucault 2008). Governmentality refers to the techniques of power used in the modern world, whereas government is more a synonym for power: the church is an expression of government as it uses power over its followers; it deploys this power through various techniques, such as for example the confession (Gutting and Oksala 2019). Legal scholars have utilised Foucault's ideas on governmentality in a variety of ways. In the context of the European Union, Foucault's ideas have been especially suitable for analysing the actions of the

[3] See e.g. Tuori (2015, 7): "My ultimate purpose is to contribute to a *general theory of the European constitution*, rather than to participate in dimension-specific debates which are an object for my reconstructive enterprise."

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European Central Bank and the role of the markets, but they have also provided a fruitful basis for an analysis on union citizenship (see Hurri 2014).

As Mitchell Dean, a leading Foucault scholar pioneering the study of governmentality has explained, our thinking about "government" is conditioned by our understanding of "the state": we somehow assume that governing is something done by states and only by states. Moreover, that such a state is sovereign. Thus, when we are searching for the sources of power, we naturally look at states, and whether the power utilised by states is legitimate or not. Language often has a central role in our analysis of government because language "is constructed as ideology, as a language that arises from and reflects a dominant set of power relations." While governmentality continues on this path of theoretical assumptions, it does not accept the exercise of power and its sources as self-evident. Furthermore, governmentality signals a "break with many of the characteristic assumptions of theories of the state, such as problems of legitimacy, the notion of ideology, and the questions of the possession and source of power" (Dean 2009, 16).

We can thus observe a clear parallel between Walker's constitution pluralism and Foucauldian governmentality: in the legal realm we talk about the waning of sovereignty, which is replaced by constitutional pluralism; in the realm of governmentality, we talk about sovereignty being recast by governmentality. In both strands of scholarship epistemological questions play a key role. The idea of functional differentiation, then, is linked to Walker's ideas in that sovereign power is dispersed from the nation-state to other constitutional actors, be they national, international, or global. Legal authority that has a constitutional nature is often used by functionally limited polities, for example the European Union.

This article is structured as follows. The second section discusses Walker's earlier work on European constitutional and attempts to sketch the epistemic turn in his work, that is, how he discarded other avenues of constitutional conceptualisation and decided to focus on constitutional pluralism. In the third section attention is shifted specifically to Walker's ideas about

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constitutional pluralism. *The Idea of Constitutional Pluralism* and several other articles are discussed here with the purpose of explaining what Walker's epistemic constitutional pluralism is about and from where it has perhaps drawn inspiration from. The fourth section focuses on *Intimations of Global Law* and tries to explain how this book is a continuation of Walker's earlier ideas about epistemic constitutional pluralism. Here, too, parallels between Walker's constitutionalism and certain ideas in postmodern scholarship are highlighted. The fifth section concludes by highlighting the similarities between Walker's constitutional pluralism and Michel Foucault's governmentality, and by proposing to combine these two in order to further deepen the study of European constitutionalism.

The reading I am offering of Walker's work in this article is very simplistic, in at least two senses. First, it is simplistic in that it is mainly descriptive. My aim is not to directly engage with Walker's ideas or to try to further develop them here. Rather, my purpose is to offer a popular reading of his work so as to perhaps raise interest in it amongst people who have not yet studied it. Second, the comparative aspect of my reading is simplistic, perhaps even naïve, in that I rather eclectically explain some of Walker's ideas through comparison with postmodern scholarship. The purpose of this article is not to construct an argument through combining Walker's ideas and those presented by philosophers and social scientists. Much like with the first point, my purpose is to just briefly highlight what types of ideas are present behind Walker's work and thereby perhaps to entice legal scholars to read more broadly into philosophy and the social sciences. At least on a personal level, my understanding and appreciation of Walker's work has grown considerably after I started reading philosophy and sociology.

2. The Epistemic Turn in European Constitutionalism

The postmodern flare was present already in Walker's earliest writings on European constitutionalism. In an article on the unification of Germany,

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Walker's (1994) inroad into the issue were constitutional discourses and identity politics. Specifically, the article was about how identity politics – as opposed to framing issues in light of the traditional left–right political spectrum – and constitutional politics mix, that is, how identity politics are articulated through a constitutional framework. This sounds like an issue that is even more topical today as it was then. Such an approach is distinct from the traditional doctrinal account, which focuses on constitutional texts and adjudication. Since law's, and thus the doctrinal method's capacity to explain our society is rather limited, one is naturally inclined to adopt a social scientific approach when discussing the role of constitutional law in a polity. This is also the note on which Walker ends his article (see Walker 1994, 159-160).

The fact that Walker's early approach was not that of doctrinal exegesis but rather a focus on broader political questions can be seen in his definition and role of constitutionalism, offered in an article on European constitutionalism:

> By focusing upon attitudes towards and ideologies concerning the constitutional order, whether supportive or otherwise, constitutionalism promises to provide an explanatory nexus between constitutional doctrine and institutions on the one hand, and the broader socio-political dynamics of European Union on the other (Walker 1996, 267).

For according to Walker, constitutionalism must register both at the sociological and the normative level (*ibidem*, 267-268). What this means is that the constituents of democracy and the constitutional actors have to also regard something as constitutional in order for it to be constitutional. In this article, too, the question of identity is central. One aspect through which Walker discusses the possibilities of European constitutionalism is the question of how could a constitutional identity for the European Union be

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established. Furthermore, he sees constitutional discourses as central in this development (*ibidem*, 283-289).

What is interesting to note, however, is how in this early article Walker still thought that whilst developing a constitutional identity for the European Union's novel political order, "an older vocabulary of design concepts could be drawn upon, including notions such as consociationalism, condominium, federalism, [and] confederalism" (*ibidem*, 289). Yet, these concepts were discarded rather soon when he adopted the idea of constitutional pluralism as the key to this polity-building.

The idea of differentiation comes into play first through the practical legal issue of differentiated integration.[4] Differentiated integration means, according to Walker, that a new set of analytical tools is required. These tools need to be such that they take into consideration that we have moved away from a two-dimensional Europe (Member States-European Union). A new theoretical language is needed to make sense of this constitutional setting (Walker 1998, 356). This leads Walker to the inadequacy of the traditional, state-based concept of sovereignty. According to Walker, not only does the Member State-European Union relationship question this traditional conceptualisation of sovereignty, but it is also put under pressure by the multi-dimensional Europe of differentiated integration. Walker does not, however, conclude that the concept of sovereignty should be discarded; on the contrary, he sees great potential in it, assuming that it be remodelled to our current context (*ibidem*, 356-360).

This seems to be the starting point for Walker's work on constitutional pluralism and epistemic constitutionalism. In this article Walker characterised sovereignty:

[4] Schimmelfennig (2019): "Differentiated integration has become a core feature of the European Union. Whereas in uniform integration, all member states (and only member states) equally participate in all integrated policies, in differentiated integration, member and non-member states participate in EU policies selectively. At its core, differentiated integration is formally codified in EU treaties and legislation."

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> as a plausible claim to ultimate legal authority identifying and grounding a particular legal order, the articulation of which claim takes the form of fundamental practices, propositions or assumptions, which, inter alia, may allocate constituent legal authority to a particular agency or between particular agencies (*ibidem*, 360).

Such an understanding of sovereignty allows "to develop the idea that there may be a plurality of claims to legal sovereignty, and that these claims refer to a plurality of legal orders, each with their own architecture and fundamental 'sovereign' agencies" (*ibidem*, 361). This makes it possible to move beyond the traditional discussion on sovereignty in the European Union, in which sovereignty is attributed either to the Member States or to the European Union. Instead, "the claims of the Member States and the claims of the EU to ultimate authority within the European legal order are equally plausible in their own terms and from their own perspective" (*ibidem*, 362). Here, it is important to emphasise the last word – perspective.

3. Constitutional Pluralism

In descriptive terms, constitutional pluralism refers to the situation where two or more "constitutional" systems are in force in a given geographical area at the same time. The European Union is the pinnacle example of this since the Member States all undoubtedly have their own constitutions while according to the prevailing narrative the European Union too possesses constitutional credentials if not a written constitution (see Avbelj 2008). This state of affairs results in constitutional clashes between the national constitutions and the European Union's constitutional order. The most recent and dire example being the German Federal Constitutional Court's ruling in *Weiss*, whereby it deemed the European Court of Justice's preliminary ruling in the issue as ultra vires and ordered the German Central Bank not to participate in the European

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Central Bank's PSPP-program.[5] The existence of constitutional pluralism leads to a problem, since traditionally constitutional authority is understood as ultimate and exclusive, so therefore one system must be hierarchically on top of the others for there to be a "constitution" in any meaningful sense; anything else would be an oxymoron when it comes to constitutionalism (see Loughlin 2014). But as each constitutional system has its own *Grundnorm*, "there is no neutral perspective from which their distinct representational claims can be reconciled" (Walker 2002, 338-339).

Walker's epistemic constitutional pluralism is an attempt to overcome this stalemate. Epistemic constitutional pluralism is primarily about how to understand and conceptualise this unprecedented constitutional situation. Such epistemic constitutional pluralism can then also contribute towards the more normative aspects of pluralism (*ibidem*, 317), although Walker has personally focused more on the epistemic aspects.

The Idea of Constitutional Pluralism (*ibidem*) can be a daunting read for someone who is mainly familiar with just legal scholarship and not yet versed in philosophical and sociological language. Its 43 pages and 149 footnotes discuss several issues and draw on an extraordinarily broad scope of literature. Yet, the reader should not be shunned away by this since the basic point of the article is fairly simple.

In the article Walker offered a three-fold typology of descriptive, normative and epistemic constitutional pluralism. The descriptive element is fairly simple, and was already explained above: as we can observer the competing claims to sovereignty, we can conclude that descriptively speaking there exists *plurality*. Normative constitutional pluralism, then, is the appraisal of such plurality, which results in true *pluralism*. In other words, normative constitutional pluralism accepts and even embraces the somewhat incomplete constitutional nature of the European Union, which results in constitutional clashes between national constitutional courts and the

[5] BVerfG, Judgment of the Second Senate of 05 May 2020 - 2 BvR 859/15 -, paras. 1-237, http://www.bverfg.de/e/rs20200505_2bvr085915en.html, accessed 1 July 2020.

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European Court of Justice. There are varying accounts of normative pluralism, which are beyond the scope of this article, but simply put most of them see that such clashes result in the continued refinement of constitutional doctrine and therefore induce legitimacy into the European Union's constitutional order (see, e.g., Avbelj and Komárek 2012). The alternative for normative constitutional pluralism would be to settle such issues through political means, but as amending the EU Treaties in a way that would settle all open questions on the competence of the European Union (by turning it into a true federation) seems unlikely, giving the highest courts the responsibility to settle such issues seems like an attractive solution.

Taking normative constitutional pluralism seriously necessitates the adoption of epistemic constitutional pluralism. Epistemic constitutional pluralism simply means, that in order for us to truly acknowledge the constitutional nature of the competing claims by the national courts and the European Court of Justice requires for us to adopt a separate epistemic starting point to each of them.[6] As sovereignty implies ultimate authority and the exclusion of competing claims to power, to acknowledge the constitutional nature of the competing sovereignty claims means that all of them need to be treated individually. If we think about this in terms of traditional state-based sovereignty, this does not seem logical. Thus, epistemic constitutional pluralism calls for a new constitutional language that could tell us what such constitutional pluralism is.[7]

The aim of *The Idea of Constitutional Pluralism* was to rehabilitate the "language of constitutionalism" in order for it to be able to retain its relevance and to respond to the challenges posed by the new post-state constitutional entities, such as the European Union (Walker 2002, 317). By language, Walker is not referring to any linguistic philosophy, but mainly to the

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[6] This idea is similar to epistemic universalism, which is an often-used starting point in comparative law. According to Husa (2015, 20-22) comparative law scholars must abandon the nationally oriented, epistemically internal perspective if they are to truly understand the various legal orders or cultures they wish to study.
[7] Walker probably used the terms normative pluralism and epistemological pluralism for the first time already in an article from 2001: see Walker (2001, 560-570).

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epistemology and ontology of constitutionalism. The answer to problems posed to constitutionalism by the new post-state entities is constitutional pluralism (*ibidem*, 319).

The article begins by an outline of five critiques of modern constitutionalism, as an answer to which Walker then proposes constitutional pluralism. These criticisms are: state-centredness, constitutional fetishism, normative bias, ideological exploitation, and the debased conceptual currency of constitutionalism. Instead of describing them here, let me just draw attention to how Walker is often inspired by postmodern scholarship in his constitutional analysis and the way he analogously uses terms taken from postmodern scholarship.

Fetishism, for example, is a term Karl Marx used when he talked about the effects of commodification and the capitalist system of production. According to Marx, in a capitalist system the production and selling of commodities functions so that people become alienated from social relations since they only perceive these social relations through the objects that they produce and sell to other people. In more general terms, this means that things that are actually socially constructed are thought of as naturally existing. As one can appreciate, this has severe consequences on our ability to conceptualise the society – and thus to change it. (Packer 2010, 277-279).

By constitutional fetishism Walker refers to how:

> an undue concentration upon – even enchantment with – constitutionalism and constitutional structures overstates the explanatory and transformative potential of constitutional discourse and frustrates, obstructs or at least diverts attention from other mechanisms through which power and influence are effectively wielded and political community is formed and which should instead provide the central, or at least a more significant, focus of our regulatory efforts and public imagination (Walker 2002, 319).

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Simply put, how we are accustomed to talking about constitutional structures – like parliaments, governments and courts – and by doing so fail to pay attention to the other ways in which power is used within our society. Or, if we revert back to Marxists vocabulary, how our constitutional tradition (our constitutional fetishism) has alienated us from the fact that how power is used in our society is largely based on socially constructed phenomenon, and how this state of affairs is not "natural" and thus unchangeable.

As an answer to the five critiques of modern constitutionalism, Walker proposes a revised concept of constitutionalism that would take into consideration the following six criteria (*ibidem*, 334-336). Spatially, constitutionalism should acknowledge the continued relevance of the state despite the current post-state paradigm, yet relevant constitutional discourses take place at non-state sites due to the emerging post-Westphalian paradigm. Temporally, we should secure historical continuity between this new constitutionalism and the old state-based constitutionalism, while at the same time securing discursive continuity between the old and the new when it comes to core ideas of constitutionalism. Normatively, then, we should strive to secure both inclusive normative coherence and external normative coherence. The first refers to how our definition of constitutionalism should be inclusive of other views, but there should nevertheless be a minimum requirement with regards to its content so that we can actually speak of constitutionalism; this entails a commitment to a reflexive understanding of democracy which can i) reconcile the different understandings of democracy within a *demos* and ii) be reflective towards itself as a *demos*. The second refers to how constitutionalism must not only convince the constitutionalists, but it must also offer something for those who are sceptical towards constitutionalism's capacity to offer something in the form of regulation of power in the post-Westphalian word; "constitutionalism must be capable of generating forms of explanatory knowledge and normative guidance which are relevant to other discourses of regulation and political imagination" (*ibidem*, 336).

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Next comes Walker's core idea on constitutional pluralism, which he proposes as the solution that would take all of these six criteria into consideration:

> Constitutional monism merely grants a label to the defining assumption of constitutionalism in the Westphalian age which we discussed earlier, namely the idea that the sole centres or units of constitutional authorities are states. Constitutional pluralism, by contrast, recognises that the European order inaugurated by the Treaty of Rome has developed beyond the traditional confines of inter-*national* law and now makes its own independent constitutional claims, and that these claims exist alongside the continuing claims of states. The relationship between the orders, that is to say, is now horizontal rather than vertical – heterarchical rather than hierarchical (*ibidem*, 337).

Such constitutional pluralism would entail an explanatory, normative and epistemic claim, which were already explained in the beginning of this section.

Whilst developing his constitutional pluralism, Walker asks: "does the idea of sovereignty, of fundamental authority, have anything to contribute to our understanding of post-state constitutional polities, or, indeed, even to state polities in a configuration where their authority begins to be rivaled by these post-state polities?" (*ibidem*, 345). He answers this question in the affirmative. The reason being that:

> in the emerging post-Westphalian order, it becomes possible to conceive of autonomy without exclusivity – to imagine ultimate authority, or sovereignty, in non-exclusive terms. This is because of the emergence of polities whose posited boundaries are not (or not merely) territorial, but also sectoral or functional (*ibidem*, 346).

Thus, we now have not just territorially limited claims to authority, but also functionally limited claims. Such territorially, sectorally and functionally

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limited claims can "overlap without subsumption" (*ibidem*, 346). The point with regards to constitutional pluralism (heterarchy as opposed to hierarchy) is that "the advent of sectorally or functionally limited polities means that the assertion of authority around a disputed boundary does not necessarily impugn the integrity of the other polity *qua* polity" (*ibidem*). That is to say, that autonomy – as opposed to territorial exclusivity – has become the defining feature of sovereignty. Accordingly, under this view, constitutional regimes enjoying a degree of autonomy (authority) in a functionally separated area are sovereign. In practice, the European Union as the regulator of the internal market, for example, can be seen as a sovereign as it enjoys relative autonomy in this, functionally separated area or commerce.

That constitutional authority is not vested in nation-states but in functionally limited polities leads to the fact that the internal logic and relational perspective of such new sites and processes of constitutional authority are "metaconstitutional." First, in that such "metaconstitutional discourse at post-state sites, however transformed in purpose and content, always can trace its historical and discursive origins in the actions and ideas of constitutional states" (*ibidem*, 356). Second, in that such new sites of constitutional authority usually engage in constitutional discourses with the intention of thus seeking "meta-authorisation – a deeper set of normative arguments for their position than would be required if, as in the one-dimensional state world, their constitutional constituency and mandate was purely self-contained" (*ibidem*). This means that when we think about the justification of constitutional pluralism – the plurality of unities – the role of metaconstitutionalism is to offer the required deeper normative justification that every polity and authority necessarily requires. A metaconstitutional justification is one which takes into consideration the competing authority claims, but does not compose a "*metaconstitution*" (*ibidem*, 356-357).

Again, to use the European Union as an example: the European Union's possibility to make constitutional claims stems from the fact that the Member States (as constitutional states) have transferred it such competences. The

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European Court of Justice then tries to seek normative justification for the European Union's constitutional system from the highest national courts when it engages in a dialogue with them through the preliminary reference procedure. According to Walker, this dialogue is an agonistic negotiation, rich with possibilities for mutual learning (*ibidem*, 359). A good recent example of such a dialogue are the Italian Constitutional Court's two references and the Court of Justice's answers to them in the so-called *Taricco saga* (see Piccirilli 2018).

The idea of functional differentiation is further developed by Walker in the article *Late Sovereignty in the European Union* (Walker 2003b). Specifically, this is done through the idea of functionally differentiated sovereignty. The purpose of the article is to further develop the concept of sovereignty within the framework of constitutional pluralism (Walker *ibidem*, 5). Walker starts his account by explaining how the concept of sovereignty has changed when we have moved from the Westphalian era to the post-Westphalian era. Previously, sovereignty was part of the meta-language of political science and law in that it provided a key reference point in the object-languages of political science and law (e.g. that politicians and courts referred to the concept, and that it was part of the social actors' self-understanding). Now, the concept of sovereignty is still used in the object-language but only rarely deployed in the meta-language because it has lost some of its explanatory and imaginatory potential (*ibidem*, 10).

Walker then argues that sovereignty is still a useful concept also at the level of meta-language due to what Anthony Giddens has called double hermeneutics, which he presented as part of his theory of structuration (see Giddens 1984). The social constructivist nature of Walker's constitutionalism becomes apparent here. As Walker explains, the point of Giddens's double hermeneutics is to make seen the fact that scientific interpretations of society are actually interpretations of interpretations: the social scientist interprets what the social actor is doing, who is on their part already interpreting the world (Walker 2003b, 16-17). To give a legal example: when a constitutional

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law scholar is studying the actions of constitutional courts, the constitutional courts' actions are already interpretations of constitutions, and thus the meta-language used by the scholars cannot drift to far from the object-language used by the courts (see Tuori 2015, 5). This is what Tuori (2002, 285-293) has called the dual citizenship of legal scholarship: how legal science is also part of legal practice and thus participates in the reproduction of the legal order. A good example of a disconnection between the two languages is how the European Court of Justice only uses the English language term primacy, yet in the literature instead of primacy often the term supremacy is used although these two terms have a different meaning (see Tuominen 2020).

According to Walker, constitutional pluralism is an attempt to retain the necessary connection between the meta-language and object-language of constitutionalism. In order to do this, constitutional pluralism must take seriously both "the resilience of unitarianism in the object-language of sovereignty" and "the persuasiveness of pluralism in the meta-language of explanation and normative commitment" (Walker 2003b, 18). Such unitarianism is most clearly observed in the argumentation of the German Federal Constitutional Court, for example in its recent judgment in *Weiss*.[8] The type of constitutional pluralism Walker is here advocating for should therefore take seriously the claims made by the German court, yet balance them out against other claims, both national and European.[9]

Walker then proceeds to outline the four characteristics sovereignty that would accommodate for such constitutional pluralism, which he calls late sovereignty: continuity, distinctiveness, irreversibility and transformative potential (*ibidem*, 19-25). Here, I will only briefly discuss two of these, again to highlight how Walker draws from postmodern scholarship in developing his constitutionalism.

[8] See BVerfG, Judgment of the Second Senate of 05 May 2020 - 2 BvR 859/15 -, paras. 1-237, http://www.bverfg.de/e/rs20200505_2bvr085915en.html.
[9] The argument developed for example by Massimo Fichera seems to take this point seriously. See Fichera 2019, Fichera and Pollicino 2019.

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By continuity Walker means that the new late sovereignty should be a continuation rather than a discontinuation of the old concept of sovereignty. When describing continuity, Walker refers explicitly to Michel Foucault's ideas on sovereignty.[10] Walker's point here is to try to square the circle between law and politics when it comes to the nature of sovereignty: how can sovereignty express "both the power that enacts law and the law that restrains power?" (*ibidem*, 19). That is to say, what is the relationship between the terms *pouvoir constituant* and *pouvoir constitué*, or those of constituted power and constituent power (see, e.g., Loughlin 2013). Although Walker uses Foucault's problematization as an inroad into this issue, he does not explicitly engage with Foucault's ideas on governmentality.[11] Walker's point is that by adopting a discursive understanding of sovereignty, the impasse between *pouvoir constituant* and *pouvoir constitué* can be overcome. This would also secure continuity, which is required when a new polity, such as the European Union, emerges (Walker 2003b, 19-21).

By distinctiveness Walker means that despite continuity, there are distinctive phases in the conceptual development of sovereignty. When talking about distinctiveness (*ibidem*, 21-24), he brings up the issue of functionally differentiated polities, and thus functionally differentiated sovereignty. While previously sovereignty was associated with territorial boundaries (i.e. states), now sovereignty can be associated with functional boundaries. In practice, "the political *societies* which non-state polities claim to constitute are no longer just territorial communities but also functional communities" (*ibidem*, 22). Through the emergence of such "functionally-limited" polities "it becomes possible to conceive of autonomy without territorial exclusivity – to imagine ultimate authority, or sovereignty, in non-exclusive terms" (*ibidem*, 23). Here we have the basic idea of functional differentiation adopted into a constitutional framework of sovereignty. In a

[10] Walker cites Foucault 1991.
[11] On governmentality see Rose, O'Malley, and Valverde (2006), who also explain how Foucault's ideas about governmentality have affected other fields of scholarship.

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sense, this is a description of the constitutionalisation of the various functionally separated systems that the society consists of.

In a later article, already anticipating his work on global constitutionalism, whilst describing the outcome of constitutional pluralism and what is in for us in the future, Walker wrote:

> The future of the global legal configuration is likely to involve more of the same. It is likely we will not witness the reestablishment of a new dominant order of orders but, instead, will depend on the terms of accommodation reached among these competing models and among the actors – popular, judicial, and symbolic –who are influential in developing them (Walker 2008, 373).

In reference to the previous point, this is actually closer to what Foucauldian governmentality is about. This is a description of how Westphalian sovereignty is deconstructed by governmentality: constitutional authority is not used by the states through traditional juridical mechanisms but rather power is dispersed to a wider range of actors, perhaps sometimes even to the subjects of constitutional authority themselves through juridical subjectivation (see, e.g., Hurri 2014, 87-93).

4. Global Constitutionalism

Walker's monograph *Intimations of Global Law* carries forward the work that he begun already in the article *The Idea of Constitutional Pluralism*. Both try to conceptualise the role of constitutional law in the post-state era and both take epistemic pluralism as their perspective. According to Walker's own words, this book is about "how we might fruitfully think about global law" (Walker 2015, 1). Thus, the starting point of the book is descriptive rather than normative (see *ibidem*, 27, 31); it aims "to be diagnostic rather than prescriptive" (*ibidem*, 178).

What does Walker (*ibidem*, 15-24) mean by "global law"? The Westphalian distinction between national and international law is fairly

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simple. Thus, "transnational law" is law that operates between states, while yet remaining in this binary conceptualisation of national-international. Whilst global law does not neglect the relevance of state-based national law, it moves beyond the confines of such a statist legacy. As Walker explains, "what qualifies laws as global law, and what all forms of global law have in common, *is a practical endorsement of or commitment to the universal or otherwise global-in-general warrant of some laws or some dimensions of law*" (*ibidem*, 18).

The argument of the book comprises of three layers: rhetorical, structural and epistemic. All of these levels are linked to the claim that we should take the idea of global law seriously. Rhetorically, because the idea of global law has gained considerable weight in practice. Structurally, because we can observe changes in the way law operates at a global level. Epistemically, because such a change equally echoes and inspires a shift in the way we think about law and develop law (*ibidem*, 10). All in all, then, global law "speaks to a shift in how we think about and seek to develop and present law's basic credentials *as* law" (*ibidem*, 26). Global law questions the state-centric and jurisdiction-centric features of law, both of which stem from the state-based Westphalian paradigm (*ibidem*, 26). In this sense, much like Walker's earlier argument on constitutional pluralism, to fully understand global law requires for us to adopt a different epistemic starting point than what we have traditionally been accustomed to. The "intimated" character of global refers to this. I will return to it later.

In this book Walker explicitly explains the link between his ideas and those presented in postmodern scholarship, specifically in international relations theory. Previously, international relations scholarship discussed the waning role of the state-sovereigntist world-view, the move away from the Westphalian model of state authority, and simultaneously a statist legacy of law. Nowadays, this scholarship engages with the idea of global governance. According to Walker, his vision of global law can be understood as an analogy to the global governance scholarship (*ibidem*, 12-15).

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The core descriptive argument of the book is a threefold typology of global law: convergent approaches, divergent approaches and historical-discursive approaches to global law (*ibidem*, 55-130). Again, the idea of functional differentiation is present in Walker's description of global law. One category of divergent approaches to global are functionally specific approaches. Such functionally specific approaches provide "a basis for highlighting what is distinctive and diverse and also what is consequential and derivative about the legal form of different policy sectors" (*ibidem*, 119). According to Walker, the role of law in global policy development is to serve policy functions as opposed to framing and generating such functional development (*ibidem*, 119).

As with most of Walker's work, this book too is rich with sociological language, sometimes used in an analogous manner. Take for example Walker's description of the "double normativity of global law" (*ibidem*, 132-135). Here, Walker again perhaps draws on Giddens's idea on the double hermeneutics of social sciences. Walker's typology of convergent and divergent approaches to global law functions in a similar manner. Both approaches aim to recognise the various strands of transnational law through more law and by containing them within law. The dual sides of global law are those of the global and the local (national):

> Each and every species of global law responds to the diversity of other forms of law by acting upon some of these diverse other forms of law. Each and every species of global law, therefore, is predicated on the existence of these diverse other forms of law, and would lack both orientation and traction in their absence (*ibidem*, 132-133)

Let us then turn to the epistemic aspect of Walker's argument on global law, and the point which clearly connects the thoughts presented in this book with those he presented earlier in *The Idea of Constitutional Pluralism*. Here, we come to the name of the book, *Intimations of Global Law*. What does Walker mean with this? Why do we only receive intimations of global law

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and not the actual thing? Instead of being directly visible and easily identifiable, global law can only be grasped from various smaller instances. In some sense, we can infer its existence from other factors, but we cannot fully envision it as such. Global law is not based on direct norm creation, such as national law or international law. Global law is, therefore, to be intimated. This, then, requires a certain epistemic approach (*ibidem*, 148-151).

There is also a clear substantive link between Walker's vision of global law and his earlier point on constitutional pluralism. As Walker informs us:

> the intimated quality of global law connects closely with the particular kind of claim to authority that global law entails. Global law flows out of the decentring of a sovereigntist framework and the resulting challenge to conventional state-centred understandings of modern legal authority (*ibidem*, 148).

More importantly, in this passage there are not only parallels to constitutional pluralism, through the challenge to state-centredness, but also to Foucauldian governmentality and the deconstruction of sovereignty as power is no longer concentrated in a single state that is sovereign but dispersed to various actors, which might not even be "sovereign" or "constitutional." Walker continues:

> Yet the form and process of global law's emergence reveal various special features of its own uncertain relationship to authority, a full appreciation of which requires a close examination of the role of all those who are involved in the endeavours to fashion and to authorize global law (*ibidem*, 148).

The intimated quality of global law, and especially to role that the academia has in realising global law, brings us back to its double normativity, already mentioned above. According to Walker, since global law is not a rigid system such as national law, this has resulted in academic writing amassing a greater role in "jurisgenerative activity." But the causality behind global law

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works in both ways, which is part of its double hermeneutic qualities: the intimated structure of global law on its part invites academics from a broad spectrum to participate into its crafting (*ibidem*, 170-173). Again, let us remind ourselves of what Tuori has called the dual citizenship of legal scholarship, discussed earlier above, and the double hermeneutics of all social sciences.

5. Concluding Remarks

Let us still return to governmentality, and through it to the contribution that Walker has made to European constitutionalism.

By definition, governmentality deals with how we think about governing and the different rationalities of government (Dean 2009, 24). In a Foucauldian framework sovereign power and governmentality are different forms of power yet interrelated. Sovereign power is operated through mechanisms such as constitutions, laws and parliaments. It comprises of the juridical and executive arm of the state. Governmentality, then, is the bureaucratisation of all aspects of life. Central in this is are ideologies and knowledge. Take for example the economy: to govern the economy requires specific economic knowledge and simultaneously the economy becomes the guiding principle of our society, almost like an ideology. Modern governmentality does not replace sovereignty, but just recasts it (*ibidem*, 24-30). While traditional theories of government often ask "who rules?," governmentality is more interested in "how do we govern?" (*ibidem*, 39).

Coming back to Walker's constitutional pluralism, we can recall how sovereignty is no longer located in nation-states but rather functionally differentiated into various competing and overlapping sites of authority. Furthermore, how this does not negate the relevance of sovereignty as a conceptual tool but rather requires for us to imagine a new constitutional vocabulary that is suitable for the post-Westphalian constitutional order. Constitutional pluralism, then, much like governmentality, is a recasting of

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sovereignty. In a pluralist setting, the question of "who rules?" becomes irrelevant, since true constitutional pluralism is based on heterarchy as opposed to hierarchy. That is to say, that there is no "*über*sovereign" to rule us all (see Walker 2005, 592). Thus, we should become more interested in the question of "how do we govern?". From this perspective, constitutional discourses and constitutional identities become central. Indeed, this calls for mutual accommodation and learning by the competing constitutional authorities. In practice judicial dialogues between courts and other relevant institutions is one way to materialise this, whilst the activities of legal scholars are another.

To compliment the more doctrinal accounts on judicial dialogues – or, in a sense to fully utilise the apparent similarities between the study of constitutional pluralism and governmentality – a further step should be taken; a step, which would in an interdisciplinary manner combine both the legal study of constitutionalism and that of Foucauldian governmentality, or other similar postmodern approaches. There is of course already plenty of this type of scholarship (see, e.g., Tzanakopoulou 2018), but what would perhaps generate even more interest on such issues would be if the apparent links between such legal theoretical ideas and the broader philosophical ideas from which they draw from would be made more explicit.

Overall, it seems that although the postmodern flare has been present in Walker's work from since the late 1990s, he has only more recently started to interact with this literature more explicitly. Being an expert in sociological prose and having the competence to contribute to philosophical and sociological discussions as well, this is welcomed. Methodologically European Union legal studies has a long history of learning from political scientific approaches to the study of European integration (see, e.g., Neergaard and Wind 2012). Perhaps something similar could be welcomed when it comes to postmodern scholarship, and especially critical theory. Critical theory – being a method of analysis basing on nonpositivist epistemology and employing the method of immanent critique (see Antonio

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1981), much like constitutional pluralism – would be well-suited for analysing European constitutionalism and its pluralist characteristics.

References

Antonio R.J. (1981). Immanent Critique as the Core of Critical Theory: Its Origins and Developments in Hegel, Marx and Contemporary Thought, in *The British Journal of Sociology*, n. 3.

Avbelj M. (2008). Questioning EU Constitutionalism, in *German Law Journal*, n. 1.

Avbelj M., and Komárek J., eds. (2012). *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing).

Dean M. (2009). *Governmentality: Power and Rule in Modern Society* (SAGE Publications).

Fichera M. (2019). Securing the European Project: From Self-Referentiality to Heterarchy, in *Cambridge Yearbook of European Legal Studies*, vol. 21.

Fichera M., and Pollicino O. (2019). The Dialectics Between Constitutional Identity and Common Constitutional Traditions: Which Language for Cooperative Constitutionalism in Europe?, in *German Law Journal*, n. 8.

Foucault M. (1991). Governmentality, in G. Burchell, C. Gordon, and P. Miller (eds.), *The Foucault Effect: Studies in Governmentality* (The University of Chicago Press).

Foucault M. (2008). *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979* (Palgrave Macmillan).

Giddens A. (1984). *The Constitution of Society: Outline of the Theory of Structuration* (Polity Press)

Gill S. (2008). *Power and Resistance in the New World Order* (Palgrave Macmillan).

Gutting G., and Oksala J. (2019). Michel Foucault, in E.N. Zalta (ed.). *The Stanford Encyclopedia of Philosophy*, https://plato.stanford.edu/archives/spr2019/entries/foucault/.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/12474

Hurri S. (2014). *Birth of the European Individual: Law, Security, Economy* (Routledge).

Husa J. (2015). *A New Introduction to Comparative Law* (Hart).

Loughlin M. (2013). The Concept of Constituent Power, in *European Journal of Political Theory*, n. 3.

Loughlin M. (2014). Constitutional Pluralism: An Oxymoron?, in *Global Constitutionalism*, n. 1.

Neergaard U., and Wind M. (2012). Studying the EU in Legal and Political Sciences Scholarship, in U. Neergaard, and R. Nielsen (eds), *European Legal Method – in a Multi-Level EU Legal Order* (DJOF Publishing).

Packer M. (2010). *The Science of Qualitative Research* (Cambridge University Press).

Piccirilli G. (2018). The 'Taricco Saga': The Italian Constitutional Court Continues its European Journey, in *European Constitutional Law Review*, n. 4.

Rose N., O'Malley P., and Valverde M. (2006). Governmentality, in *Annual Review of Law and Social Science*, vol. 2.

Schimmelfennig F. (2019). Differentiated Integration and European Union, in *Oxford Research Encyclopedia of Politics*, https://doi.org/10.1093/acrefore/ 9780190228637.013.1142.

Shaw J., and Wiener A. (1999). The Paradox of the European Polity, in *Harvard Jean Monnet Working Paper*, n. 10.

Sokal A., and Bricmont J. (1999). *Fashionable Nonsense: Postmodern Intellectuals' Abuse of Science* (Picador).

Stichweh R. (2013). The History and Systematics of Functional Differentiation in Sociology in M. Albert, B. Buzan, and M. Zürn (eds.), *Bringing Sociology to International Relations: World Politics as Differentiation Theory* (Cambridge University Press).

Teubner G. (2012). *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press).

Tuori K. (2002). *Critical Legal Positivism* (Ashgate).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/12474

Tuori K. (2015). *European Constitutionalism* (Cambridge University Press).

Tzanakopoulou M. (2018). *Reclaiming Constitutionalism: Democracy, Power and the State* (Hart).

Walker N. (1994). The Frontiers of Constitutional Law: Identity Politics in Reunified Germany, in *German Politics*, n. 3.

Walker N. (1996). European Constitutionalism and European Integration, in *Public Law*, n. 2.

Walker N. (1998). Sovereignty and Differentiated Integration in the European Union, in *European Law Journal*, n. 4.

Walker N. (2001). All Dressed Up, in *Oxford Journal of Legal Studies*, n. 3.

Walker N. (2002). The Idea of Constitutional Pluralism, in *The Modern Law Review*, n. 3.

Walker N. (2003a), ed. *Sovereignty in Transition* (Hart).

Walker N. (2003b). Late Sovereignty in the European Union, in N. Walker (ed.), *Sovereignty in Transition* (Hart).

Walker N. (2003c). Postnational Constitutionalism and the Problem of Translation, in J.H.H. Weiler, and M. Wind (eds.), *European Constitutionalism Beyond the State* (Cambridge University Press).

Walker N. (2005). Legal Theory and the European Union: A 25th Anniversary Essay, in *Oxford Journal of Legal Studies*, n. 4.

Walker N. (2008). Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders, in *International Journal of Constitutional Law*, n. 3-4.

Walker N. (2015). *Intimations of Global Law* (Cambridge University Press).

Walker N. (2016). Constitutional Pluralism Revisited, in *European Law Journal*, n. 3.

Weiler J.H.H. (1999). *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration* (Cambridge University Press).

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ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

Postnational Democracy: A Cultural Paradigm Shift in the Global Legal Order?

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ABSTRACT

Many global issues – from climate change to financial crises, from migration waves to management of pandemics, to name a few – have at their root a series of structural imbalances in our economic and cultural models. To move beyond the management of the emergency, the roots of the problems need to be addressed. A double paradigm shift is required: a paradigm shift in cultural models and awareness and a second one concerning global rules and institutions. As for the first one, there is a need to move from a state-centric cultural and educational model to the awareness of our belonging to mankind and our shared interest in the well-being of Planet Earth. The legal and implications of such a new narrative would push humanity to manage their common heritage as global citizens through new democratic supranational and transnational models.

Keywords: humanity, global citizenship, post-national, supranational, democracy

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> *"We can not solve our problems with the same level of thinking that created them"*
> A. Einstein

1. Global Governance: Why It Matters, Why It Scares

Most people usually react with suspicion and mistrust when they hear the two words *global governance* and even worse when they hear about *global laws* or *global constitutionalism*. They associate these concepts with the idea of dominant power, or a global directory, such as the G7, or the G20. Somebody even imagines a meeting of big corporates' CEOs influencing whatever this global authority will be.

It is not difficult to understand the fear of losing sovereignty, self-determination, even – in the worst scenario – the fear of losing cultural identity inside a global cultural soup where minorities would just dissolve. Global governance evokes centralization, management of the few, technocracy. It looks far and disconnected from citizens. Legitimacy and accountability are doubtful, to say the least.[1]

Paradoxically, this is what happens with globalization in the absence of a global rule of law, what happens right now, when the forces of market and the pressure to competitiveness are left alone to govern processes and outcomes.

[1] As R.S. Deese, (2019), summarizes, this fear "goes as follows: Global democracy is a form of Global government. Any form of global government is bound to become a soul-crushing dystopia." The Author mentions many examples of this perspective from fiction authors (from Adolf Huxley on), to political leaders to thinkers, al of them had a great cultural influence. We add to the list, in the nowadays social media culture, the fear for the so-called New World Order which plays a leading rôle in many conspiracy theories.

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Yet, people immediately understand that the most compelling issues are nowadays global: climate change, migration waves, rising inequalities, pollution of the oceans (to name a few).

How may it be possible that we understand the size and magnitude of problems and we are so reluctant to act accordingly? Why do we resist the idea that we need global solutions to global problems?

If understanding the resistance and the fears behind it is the first step, the second one is addressing it.

From the legal perspective, introducing democracy in the discourse about global governance would help. From the cultural perspective, addressing the emotional load connected to words and imagine new terminologies that do not carry the weight of the past is a must do. As we imagine new ways and tools for citizens to be connected to the governance of global commons and the management of global issues, for local communities to have their identity preserved and their role recognized, we need new words.

Earth governance cannot but be decentralized and – if we do not want it to be a step backwards in our legal and political culture, it must be democratic, with citizens and communities being building blocks of democratic governance. The cultural shift is maybe a pre-condition for the political shift to occur. Participatory democracy models, together with some kind of representative democracy could provide bridges among citizens, communities, and global organizations.

The postnational approach to democracy here suggested is an attempt to offer a first, tentative answer to this brain teaser. It is grounded on a constructivist method: first democracy is deconstructed in three basic components: legitimacy, accountability, and inclusiveness. Each of them is in turn analyzed in detail from the perspective of their possible strengthening at a global level. This model may be defined as supranational when we focus on the development of relationships between individuals and global organizations, which would provide them with legitimacy which is not derived by the states' conferral of powers as well as accountability which is not just

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towards national governments, often proved inadequate. It is, instead, transnational, if we focus on the relationships among individuals and among communities beyond national borders.

The first step in the exploration of this new approach towards global democracy is the acknowledgment of the long road already traveled by scholars and philosophers, the awareness of the issues to be faced, and of the transformation underway in our society.

We live in interesting times, when scholars may give themselves permissions to think out of the box, to suggest new models to respond to the crisis of the old ones. There is no truth to offer, but the pleasure of participating in a creative effort. To do so, we will touch upon different topics and subjects which would deserve books and even libraries. Going deep into each of them is out of the scope of the present contribution which is, instead, drawing the big picture: a mosaic of many different tiles combining in new and original ways. For this same reason, citations will be limited to a few authors and contributions which fit the aim of this analysis, without any pretension to being exhaustive.

2. The Long Quest for a Global Order

Philosophers have long been speculating on the ideal structure of the global society, one that could allow all human beings to overcome war and division, which also means borders.

There is not a shared concept of democracy beyond the state and it is difficult to apply on the global scale models and principles conceived in the eighteenth century for the state. We also wonder if it is desirable as that model itself, at the national level, is being questioned, as we will see.

The idea of democratic global governance, based on a federal structure, made its appearance in the book “Perpetual Peace” by Immanuel Kant

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(1903)[2] and resurfaced several times during the nineteenth century in the history of thought.[3] The same idea inspired activists and movements: the World Federalist Movement was established in 1947, but a "Campaign for World Government" had already been conducted between the two world wars. The idea of a global authority in charge of peace and security inspired the League of Nations after WWI, the United Nations after WWII and more recently the International Criminal Court. The two proposals by the ONG *Democracy without Borders* – an elected Parliamentary Assembly for the UN (UNPA) and the World Citizens' Initiative[4] – are inspired by the same vision.[5]

Several schools of thought in the field of philosophy and political science have proposed the paradigm of cosmopolitanism (Archibugi 2012) or that of transnational democracy (Scholte 2014), to emphasize the existence of social bonds and collective actors which overcome the limits and borders of the nation-states. Yet, in the classical international law approach, only states and some international organizations (IOs) are subjects of international law: legal subjectivity of non-state actors is still much controversial. A similar perspective is widespread in the field of international relations: the international community is usually defined as state-centric. Even if few democratic elements are part of the picture, they are not so relevant in the legal doctrine, where the only focus to define the legitimacy of an international organization (IO) is the respect of the rule of law (von Bogdandy 2012)[6].

[2] And, even before, in the essay *Idea for a Universal History with a Cosmopolitan Purpose* (Kant 1824) and specifically in the fifth thesis entitled "The greatest problem for the human race, to the solution of which Nature drives man, is the achievement of a universal civic society which administers law among men."
[3] We could also mention philosophers such as Karl-Heinz Krause and Bertrand Russell, disruptive thinkers such as Albert Einstein, political leaders such as Winston Churchill and Mahatma Gandhi.
[4] See: Campaign for a UN Parliamentary Assembly, http:/democracywithoutborders.org/ unpa-campaign/; Campaign for a UN World Citizens' Initiative, http:/democracywithout borders.org/unwci-campaign/
[5] For a beautiful history of the evolution of world federalism and globalism all along the Twentieth century, see Deese 2019.
[6] An International Organization (IO) respects the rule of law if it respects international law (external legitimacy) and its founding treaty and procedural rules (internal legitimacy).

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Their transparency, answerability, effectiveness – more popular in the field of international relations – are not codified as standards nor there is a shared appraisal about them.

The European Union, since its embryonic form as a European Coal and Steal Community (ECSC), is considered the most ancient form of supranational government, thanks to the presence of the European Parliament (which has fully become a legislative body only in this century), of the majority principle in the Council of the Union, of the Court of Justice and thanks to the production of rules and regulations binding and directly applicable – or with direct effect – for both states and citizens. Other examples are the European Court of Human Rights – since the Fifties like the ECSC – or more recently the dispute settlement mechanism in the WTO (Oates 2020).

3. The Outdated Model of International Organizations

The limited institutionalization inside the field of international relations consists of IOs whose range of action is defined by geographical borders and/or sectoral competences. The key elements of this model are: (i) limitations – to a minimum extent – of the exclusive sovereignty of States when a common interest is assumed to have higher rank; (ii) to this aim – if deemed necessary – organized cooperation or even shared sovereignty through common rules and goals, agreed procedures and institutional frames. Examples of the first ones are the non-aggression principle in the Charter of the United Nations and the proliferation of international courts and pre-established procedures for conflict resolution. Examples of the second element are all the statutes, charters, or treaties establishing IOs.

So, IOs are the building blocks of an imperfect and incomplete frame of world governance. They are functionally responsible for the pursuit of specific goals, also perceived as global public goods, "issues that are broadly

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conceived as important to the international community."[7] To accomplish their mission, international organizations were equipped with some competences and few tools. They rely on their member states for the enforcement of what they decide. Faced with a rapid acceleration of the events, they evolve slowly as they are built on rigid founding treaties, which cannot be easily amended.

Beyond the rule of law, there is no condition or ascertainment of the democratic nature of an IO. Nor democracy is a pre-condition for member states to join it, with few exceptions (e.g. in the EU, see Article 49 of the Treaty establishing the European Union).

The rule of law, whose relevance is undeniable as an essential element inside a legal order, is, unfortunately, nothing more than a formal condition, in the absence (often) of jurisdictional control.

This model of formal, intergovernmental/international relations was inherited by the generation who experienced Second World War. Even if it testifies a huge leap forward compared to the previous state of the world, in the end, it was not so effective nor so structured as the founding fathers were willing to it to be. Chapter VII of the UN Charter never entered into force, the International Trade Organization (ITO), planned in 1944, was only realized in 1995 as the World Trade Organization (WTO). Yet, that model responded to the aim to prevent global conflicts. Of course, it was impossible, then, to foresee many involutions in international relations as the cold war and the local and regional conflicts – and among them some neverending ones, as the Arab Israeli war or the Kashmir conflict – nor to imagine the UN Security Council blocked by crossed vetoes, nor the raise of the Groups of States (the Gs) as political coordination for filling that gap.

Nonetheless, that international legal order paved the way for a more interconnected world, which showed up after the end of the bipolar world, also thanks to the advancements in technology.

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[7] Final Report of the International Task Force on Global Public Goods 2006. See Kaul, Grunberg, and Stern (1999, XII).

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- First of all, a major change has been the globalization itself, with all its implications: the lowering of customs duties and increase in trade, the use of the internet in peoples' daily life and the role acquired by the global social media, the easy and fast movement of capital flows through the borders, the low cost of traveling and increased circulation of people. This unprecedented interconnectedness of states, populations, markets, is increasingly contributing to generate global issues. The risk of contagion of financial crises, of diseases, but also social and political phenomena (as terrorism's apology or fake news) makes the world a global village.[8] Issues which fifty years ago would have been national become now easily global.

- Second, some global issues, as rising temperatures, water scarcity, deforestation, generate more issues, as extreme weather events, migrations, conflicts, extreme poverty. To respond to emergencies, the international community relies upon sectoral agencies and fora[9], yet there is a need to deal with the big picture as issues are often interconnected as well. There are a few coordination fora, such as the G20 or the UN (and namely the Assembly and the Economic and Social Committee)[10], yet the first lacks legitimacy being a group of self-selected states (just like all the Gs), the second lacks effectiveness. Even if the UN, has (some) legitimacy, it does not have legal tools for the enforcement of coordination.

- Third, there is an increasing demand for legitimacy and accountability.[11] We assist in a multiplication of participation tools in the global public sphere – petitions, transnational political movements, structured dialogues of international organizations with civil society. Debates about the im-

[8] The prophetic term was coined by M. McLuhan (1962, 1964) who – already in the 60s – identified many risks stemming from the media and technology advancement. Even if the term has been used by other authors and it is now in current, some intuitions by McLuhan remain true.
[9] See, UNDP (United Nations Development Program), WFP (World Food Program), UNHCR (United Nations High Commissioner for Refugees), UNCCC (United Nations Climate Change Conference), and the list may go on, and on.
[10] See articles 58 and 60 in the UN Charter, but also the possibility for ECOSOC (United Nations Economic and Social Council) to request regular reports from specialized institutes (art.64) and the competence of the Assembly to examine their financial statements to make recommendations (art.17.2).
[11] On this point, see Cafaro 2017.

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provement of international organizations or the creation of new ones cannot avoid taking in these democratic expectations to some extent.

Facing these issues, we easily realize that (i) international organizations were not created to manage the global village, but to coordinate states, i.e. compartmentalized national markets and national communities; (ii) they were created to manage sectoral issues; (iii) they rely on the national level of governance for political legitimacy and enforcement; (iv) they are technocratic, not responding (enough) to these recent expectations of democratic participation. The way forward could be the evolution towards more advanced forms of multilateralism, even “multi-stakeholderism.”[12]

4. Identity and Citizenship

As we move towards more advanced models of democracy beyond the state, with the specific goal to imagine democratic multinational organizations we need to look again into the fear in accepting postnational governance: the loss of identity

Identity is often associated with nationality and the latter – because of a syllogism of history – with citizenship. Citizenship is one of the basic elements democratic States ground their sovereignty and legitimacy on – citizenship or, more emphatically, the will of the people (intended as the community of citizens). This need to look for (and to find) legitimacy in citizenship, is a peculiar expression of the constitutional state model we live in since the Nineteenth century.

Citizenship is a political concept, the status of a person under the law of a sovereign state. As the world is divided into states, humanity is divided into communities of citizens. Yet, while territories belong to a state or another – and borders are guaranteed by a *status quo* principle – people move. They may lose or gain citizenship, have more than one, or even none. What is worst, citizenships are not equal, as some attribute a better status than oth-

[12] See the concept of *omnilateralism* as developed by Wolfgang Pape (2009, 289-299).

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ers, they may be a vehicle for inclusion as well as a stigma for exclusion[13]. Some citizenships – as in the case of refugees – do not operate, leaving so individuals in legal limbo, out of the play of citizenship. Citizenship or not, fundamental rights are supposed to be a minimum standard, yet for the majority of the population of the world, they are not. For the two thirds of them, even their state denies – with the political citizenship rights – the most basic fundamental rights, even more so if they belong to disadvantaged groups (women, children, minorities, LGBT).

Nationality, which often is confused with citizenship, is, instead, a cultural (and often geographical) belonging. Even if usually nationality is attached to citizenship, it may not be so (in case of naturalization). While nationality is an event outside people's control, citizenship may be a choice.

Nationality and cultural heritage are elements of identity, they cannot be denied or lost. When an organized power (a government, a majority, a terrorist organization) threatens the cultural identity of a community or even cuts the roots which connect a people to their cultural heritage, they perpetrate a crime, possibly to be qualified against humanity, for sure against civilization.

Citizenship without a state is possible, as European citizenship[14], as well as citizenship beyond the borders, as Estonian e-citizenship. A national identity without citizenship is possible as well. Identity without one or more nationalities, without personal history, is an empty shell.

Fundamental rights doctrine and the value at its core – human dignity – unveils the flaws of governance models and political systems whose legitimacy and accountability are grounded on citizenship. To overcome such a conundrum we could venture into the unexplored land of universal citizen-

[13] This is a key point in the provocative and very convincing book by Kochenov (2019). The point is further (and unequivocally) proved true by the *Kälin and Kochenov's Quality of Nationality Index* (QNI) that objectively ranks the quality of nationalities worldwide. See https://www.nationalityindex.com/.

[14] A first attempt to overcome this biunivocal correspondence citizens ↔ state is offered by the supranational model of the European Union, yet the bridge between the community of individuals and the common institutions and rules they share is still provided by national citizenships. This conceptual gap is yet to be overcome.

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ship – or any other label we choose to give a universal political status to humans – as a common heritage of every human being. It is a necessary step to imagine multinational postnational governance which would leave no one behind. How could we imagine a governance system legitimate by citizens, accountable towards citizens, and inclusive of all citizens if citizens don't have equal and full dignity, just as human beings?

So, it is maybe time to let go of the idea that identity can be defended and guaranteed only through the legal status of citizenship and move towards new ways to connect individuals to governance and sovereignty, respectful of human dignity and cultural identity as well as of an equality principle. Which best opportunity than the multilevel governance we are trying to configure beyond the state, which is intended to be in the interest of communities and of humanity and not of first, second or third-class citizens?

5. The Decline in Democracy

A second fear and assumption to dismantle is that democracy can be better guaranteed by national states and governments.

National democracy is in a deep crisis, in every region of the world, because of many reasons: the populist and nationalist leaders and groups threatening pluralism, minorities, and foreigners; the increasing number of authoritarian governments reducing democratic freedoms, and, what is even worse, a loss of attractiveness of the democratic model itself. [15]

Democracy is "in retreat" also according to the 2019 edition of the Democracy Index by The Economist Intelligence Unit (EIU)[16]. The global score is the lowest recorded since the index began in 2006. Only 22 countries classified are deemed "full democracies" by the EIU. More than a third of the world's population, meanwhile, still live under authoritarian

[15] See the 25 Anniversary Issue of the *Journal of Democracy* (Plattner 2015).
[16] The index rates, through an annual survey, the state of democracy across 167 countries, based on five indicators: electoral process and pluralism, the functioning of government, political participation, democratic political culture, and civil liberties. See https://www.eiu.com/topic/democracy-index

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rule. The COVID-19 crisis has accelerated this process offering a further alibi to limit freedoms and rights beyond the state of emergency.

In more general terms, this decline cannot be described simply in terms of regression to some form of totalitarianism, as it happened in some specific cases (Turkey, Hungary, Poland, several South American and Sub-Saharian Countries, Hong Kong). The disaffection of citizens towards active politics, the disconnect between individuals and institutions appear in the very countries regarded as bulwarks of democracy – Britain, France, US – the cradles of parliamentarism and the rule of law. The impressive rise of populism and nationalism, there too, is testing the democratic institutions as never before (Bergman 2020).

There are many different explanations – sociological, psychological, cultural – the solipsism and egotism of the modern liquid human society, the globalisation and rise of technology, the circulation of capitals, and the social dumping, but maybe this is just the background picture. One undeniable reason is in the dimension of the issues we face nowadays, as already pointed out. Many current issues cannot be faced by a country alone,[17] hardly by a group of countries acting through common institutions, like the European Union.

Citizens feel insecure, unsupported, and they expect answers from their political leaders, and their governments. After all, this is the reason why the modern state was created in the first place: to provide a sense of security. Unfortunately, no state can offer this anymore.

The promise of populist-nationalist politicians is the simplest one: shutting the world out of the door, raising walls, guarding borders, stopping people. The way out of such an impasse needs to be found in comprehensive global solutions, as, for instance, the creation of democratic structures or levels of governance whose dimension and competence match the magnitude of the issues to be faced. The vision of a league of democracies or of a supranational democracy as the most effective way to protect such an uni-

[17] See the analysis of the destructive global competition in Bunzle, and Duffel (2018).

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versal value spans the entire 20th century with different nuances (Huntley 1998, Davenport 2018).

6. The Growing Demand for Democracy beyond the State or How the Individuals Got in the Picture

The first ones to point out the inadequate democratic standards in international organizations have been the non-governmental organizations (NGOs) which animated mass demonstrations against the international financial institutions and the G7 in the Nineties. This demand for democracy became tangibly visible since the first World Social Forum in Porto Alegre (2001).

Some IOs reacted building bridges – maybe a little step, but real – to appear more legitimate, accountable and inclusive.[18] A few interesting success stories prove their effectiveness. This process is still, slowly, evolving towards more significant tools of accountability as well as of participatory democracy. Some IOs are – more than others – adjusting to this new climate.[19] The non-governmental organizations (NGOs) interacting with the UN Economic and Social Committee grew exponentially in the last decade both in number and participation: in 1946 member NGOs were 41; in 1992 more than 700, today more than 5,000.[20] Some international organizations grasped better than others the possibilities offered by this cooperation with NGOs and are now delegating to them the task of implementing their deci-

[18] See, for example, since 2008, the civil society policy forums that accompany the annual and spring meetings of the IMF (International Monetary Fund) and the World Bank or the Civil 20 which is, since 2010, the gathering organized as a side event during the G20, or the dialogue between the International Organization for Migration and civil society, since 2001.
[19] To meet these needs of interaction, in many IOs specific guidelines have been introduced to discipline the relationships with civil society. See the Guidelines adopted by WTO, WT/L/162 on July 23th 1996, or the IMF Guide for Staff Relations with Civil Society Organizations of 2003, http://www.imf.org/external/np/cso/eng/2003/101003.htm. In some international organizations, like UNDP, the role played by NGOs became even part of the institutional framework through ad hoc bodies and procedures: the UNDP Civil Society Advisory Committee was created in 2000 as a formal mechanism for dialogue between civil society representatives and UNDP's senior management on key issues of policy and strategy.
[20] This consultation mechanism dates back to art.71 of the UN Charter and is now regulated by Res. 1996/31 ECOSOC.

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sions in important areas such as cooperation to development (Karns and Mingst 2010, 219).

When internet access became the norm in many areas of the world – in the last decades – an increasing number of individuals started to feel global citizens and to experience the awareness of being part of a global community, as consumers, as economic players, as producers and users of services and information. Active global citizenship started being born bottom-up.

The Arab Spring (2010) and the global financial crisis (started in 2008 and followed in 2010 by the European debt crisis) emphasized in different ways this process. The first was a powerful example of cross-border contagion of grassroots movements, the second a litmus test for the erosion of state sovereignty in key areas of typical citizen-state relationships such as welfare systems or labor markets.

The relationship between international organizations and NGOs does not exhaust the relationship between the IOs and all those subjects to their policies: civil society cannot, in any way, be considered as a spokesman or as an interpreter of a global population or, more precisely a global "demos," whose very existence is extremely controversial in doctrine.

It is so because of a series of objective difficulties in the relationship between international organizations and individuals, both legal – as their dubious legal capacity in international law – and simply factual, as the distances and the deep cultural and linguistic gaps. However, an undeniable rapid evolution is taking place in the social fabric, which every year brings a growing number of citizens to get involved in global issues as global citizens. Thanks to the internet and social networks, we could hazard to affirm that there is an embryonic global demos in the making: discussing, seeking answers, and proposing solutions, drafting, and signing petitions.

Still, as some legal scholars believe – concerning the more limited context of the European Union – the consolidation of a collective dimension is a necessary step in the evolution towards forms of a mature democracy. There is a long-standing debate on the so-called "demos problem," in the Europe-

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an Union and – even more – in the much wider and diverse global dimension. We can summarize it as follows: is a demos a precondition (or an essential ingredient) for building a governance system or, instead, it is the result of it, some sort of byproduct? Which comes first: the people with its collective identity, or the governance system which encourages individuals to regard themselves as a community of destiny?[21] History does prove that both options may be equally true.

7. Ingredients for a Postnational Democracy

The elements proposed for the construction of a theory for supranational and/or transnational democratic organizations are the typical values of a democratic model: legitimacy, responsibility or accountability, and inclusiveness. However, these values should not just be ascertained as existent or non-existent, as democracy itself is not an absolute and final status, but more an evolutive goal.

The legitimacy of an institution stems from the fact that it has the right to exercise authority; its accountability is the duty to account for its activities and to take responsibility for them; its inclusiveness is its ability to encompass and involve the largest number of interests and stakeholders.

In the traditional approaches to international law and international relations, the relationships relevant to define the degree of legitimacy, accountability, and inclusiveness of an international organization are those between the member states and the organizations. But, if the visual angle assumed is the relationship between organizations and individuals, legitimacy, account-

[21] For a more complete analysis on this point, we invite to read Morini (2020, 76, my translation), even if referred specifically to European Union: "The *demos*, therefore, could rightly be posed not as a *preliminary condition* for speaking of democracy but, rather, as one of the *results of democracy itself*, from which the juridical order that emanates from it would then draw, in a virtuous circle, its legitimacy and its effectiveness. Indeed, it is precisely through democratic *governance* that it is possible to strengthen the role of the *media*, for example, by making them more dynamic, independent and plural, or to stimulate the participation of civil society and promote greater social cohesion."

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ability, and inclusiveness acquire a different meaning, which brings us much closer to our idea and experience of democracy.

This different perspective is in the postnational approach: as far as IOs' legitimacy and accountability do not derive from states, but from individuals: they become original features of the international organization itself, attributing an authority and a voice which can resonate even over (supra) the states: supranational. Or, it can resonate among (trans) authorities in a network, such as it happens more and more among cities[22], or supervision authorities[23] or non-governmental (private) organizations in charge of public functions, as the International Federation of Red Cross or the International Olympic Committee.

Undoubtedly, embryonic forms of legitimacy from and accountability towards individuals and inclusiveness of them already exist in sevral IOs, but each of these structural elements of democracy can be improved, dramatically or gradually, over time.

These three core values – legitimacy, accountability, and inclusiveness – are the very texture of democracy as they reflect, in different ways, the grundnorm of democracy which is the respect of human dignity and the equality of individuals. They may, in turn, be declined in different legal tools, institutions, and procedures.

7.1 Legitimacy

National legal orders are perceived as legitimate if they are the result of a democratic constituent process and if parliaments (and governments) are periodically renewed through free elections. Global and regional organizations – which are now mostly inter-national – are legitimate if there is a conferral

[22] At the moment there are 99 global cities networks, among these, 61% with a specific or very narrow focus and 39% with a broad agenda. See Foster (2020).
[23] As it is the case for the Financial Stability Board (FSB), a forum for cooperation among national authorities, standard-setting bodies and international financial institutions, established by the G20 in 2009. As the two examples show, transnational cooperation among national institutions can be established bottom-up – as for the cities – or top-down, as in the FSB case.

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of powers from an international treaty, so their legitimacy stems from member states.

The substantial legitimacy of an international organization, however, can be fully verified only through a prismatic factorization of the term in its multiple meanings. This analysis is a precondition if we imagine the possibility for them to evolve towards democratic models, be them supranational or transnational.

An international organization is legitimate, first, if it is respectful of its genetic rules laid down by international law: if there is a valid founding treaty and the member states have voluntarily chosen to join, and if the special law thus created establishes a sub-order respectful of statutes and internal rules. Besides this legitimacy descending from the respect of the rule of law, there is (or could be) another, values-based: an organization is perceived as legitimate if it pursues the objectives assigned to it and reflects the common values shared by its members. A paradigmatic example is the recurrent crisis of legitimacy of the EU when specific political choices do not reflect properly its stated values.[24]

The third element of legitimacy is representativeness: an organization is considered legitimate if its decisional bodies are perceived as representative of its members. The representation may be direct or indirect: it is direct if all of its members are represented, it is indirect, in case of a restricted body, for example as a consequence of an election. The decision-making bodies enjoy, moreover, a greater or lesser degree of representation depending on the way they reflect directly or indirectly the membership as mediated by the voting powers. In the case of weighted voting, possibly some states do not feel adequately reflected in the number of votes they express and ask for a

[24] See the management of the Greek financial crisis or the externalization to Turkey of the control of migration waves coming from Syria. See also the commitment to restore this value-based legitimacy launching the Conference on the Future of Europe, in the Political Guidelines presented by the European Commission's newly elected President Ursula von der Leyen, on July 16, 2019, where we find the aim of bringing "together citizens, including a significant role for young people, civil society, and European institutions as equal partners."

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different weighting. A recent example is the evolution in the IMF (International Monetary Fund) voting rights after an endless debate over "voice and representation," which produced the 2008 and 2010 revisions of quotas and to the 2010 amendments.

Of course, we refer to the representativeness of the Member States. A particular way of reasoning pertains to the fact that we are describing a community of states, not of individuals.

There is, first, the impossibility of applying the principle of equality, which is a cornerstone of democracy in the modern state. The states are sovereign and therefore formally all equal in the international community, but this principle can only be a fiction: states are far from equal. Too many elements mark the difference: size, population, gross domestic product (GDP), availability of natural resources, control of mass destruction weapons. As a result, it is accepted in most international organizations the principle that the Member States are represented differently as they reflect different realities.

If the principle of equality of human beings were applied, it would lead us to focus on the population criterion to differentiate participation of states in IOs: a solution which would reduce to zero the presence of many small and micro-states and would increase exponentially that of the bigger ones, like China. The equal representation of the states and the equal representation of their citizens, therefore, conflict, and find a discretionary balance through special majorities, weighted vote, restricted decisional bodies as the Security Council in the UN.

Representativeness would appear quite different if we consider not states but citizens, not only regarding the principle of equality but also on the selection/electoral procedures. In this case, it would be necessary to pay specific attention to the main form of legitimacy: parliamentarism.

The role played by the European Parliament in the debate on the democratic deficit in Europe is well known. Today, 24 parliamentary assemblies are institutionally part of an international organization, the oldest one being the Parliamentary Assembly of the Council of Europe, established in 1946.

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There is no doubt that representative democracy in Europe is democracy par excellence and the elections are its culminating point. The symbolic value of the electoral moment as a celebration of democracy is ambivalent, not only does it allow the selection of the sovereign body to which the highest political responsibility is conferred, but also the guarantee of control over and the replacement of the ruling class.

Even if this European model of international organization has been replicated by other regional organizations, it still applies to a minority of IOs and probably should not be considered as the only possible one, even if a campaign for a UN Parliament is running since 2007 with increasing success.

As far as IOs' legitimacy and accountability do not derive from states, but from individuals, they become original features of the international organization itself, attributing an authority and a voice which can resonate over the states.

Another perspective enlightens the legal phenomena belonging to the frame of transnational governance. They can vary in scale and distribution and involve in many ways, individuals, groups, communities, companies, national authorities; all of them establish networks across national borders. Already 15 years ago the most careful doctrine observed that "[o]rganizations, activities and individuals constantly span multiple levels, rendering obsolete older lines of demarcation" (Djelic and Sahlin-Andersson 2006).[25]

Both supranational and transnational phenomena may be more or less structured and institutionalized, and the two paradigms of legitimacy and accountability may more easily be detected when there are structured institutions to deal with. While international organizations may evolve towards

[25] As pointed out in the introduction (Djelic and Sahlin-Andersson 2006). They add "[t]ransnational governance suggests that territorial grounds and national autonomy or sovereignty cannot be taken for granted. It also implies, however, that governance activity is embedded in particular geopolitical structures and hence enveloped in multiple and interacting institutional webs."

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some kind of supranational governance, transnational networks and organizations – being them constructs among non-state actors – may complete and integrate their governance, as qualified interlocutors (advisors, enforcers) in specific areas.

A third strand for the development of legitimate processes, beyond the representation of states and the representation of individuals is in the so-called deliberative democracy, a model explored by Jürgen Habermas. At the core of this approach is political argumentation and justification before the decision making. Because these practices are inherently communicative ones, they require, space and time for stakeholders to listen to each other and be heard, pluralism and inclusion are features of such pragmatic political practice which in turn downsize the principle of authority. The theories developed by Habermas with reference to the state were then enlarged to integrate international and global relations. The model of global governance he suggests combines a *supranational* dimension with limited responsibilities (peace and human rights) with a *transnational* regime in which a global domestic policy would be negotiated and implemented. This multilayered system is not a blueprint for something entirely new as it is an upgrade of existing structures into a new global constitutional framework (Habermas 2012).

7.2 Accountability

A second key element of democracy intervenes once the choices are made, and can be inscribed in the notion of accountability. Accountability is the acknowledgment and assumption of responsibility for decisions and actions, answerability, blameworthiness, liability, and the expectation of account-giving. Technical and political bodies are held accountable for their choices when they assume full responsibility. Of course, the higher the degree of independence the more important it is to have well-defined ways of holding the organization accountable towards states and citizens.

The principle of accountability requires, first, the knowledge of “who does what.” A second dimension relates to the need to know how things are

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done, how the money is used, to which extent the goals have been achieved, and what expectations have been met. Finally, this also implies that those who mismanaged can be punished or removed.[26] Accountability is the opposite of the arbitrary decision which could be attributed even to a fully legitimate subject. Its goal is to avoid that after a democratic process (such as an election) whoever assumes a position of power could imprint an authoritarian turn and abuse it, a not so rare phenomenon that leads to downsizing the role of free elections as a sufficient democratic guarantee.

Accountability requires transparency; motivation of decisions; legal and political responsibility, reporting on the outcomes; audit by external, independent bodies; the possibility of claims, and even appeals to a judiciary authority.

An international organization is accountable if it puts those under its authority – States, but also citizens – in the position to comment and criticize. So, offices and bodies responsible for monitoring and evaluation should be able to receive claims and answer them.

Although we have seen many steps forward – ombudsmen, audit and evaluation offices, claiming procedures, and whistleblowing services being created[27] – progress can still be made in several ways. One is internal to the organization itself: in the event of mismanagement or failure of an action taken by the organizations' bodies how could these be held responsible? Or even removed? By whom?

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[26] See: ILA (International Law Association) Report on Accountability 2004, http://www.ila-hq.org/.2004; Peters (2011).

[27] We refer to the complaints mechanisms, monitoring bodies, opportunities for structured dialogue with civil society that are nowadays increasing in number and impact. In the World Bank for instance, the Inspection Panel was established in 1993, in the same year the Independent Evaluation Group started to release its assessments. In the United Nations in 1994, the General Assembly adopted the resolution 48/218B, establishing the Office of Internal Oversight Services, in 2002 the first Ombudsman's office was created and, since 2006, it serves UNDP, UNFPA (United Nations Population fund), UNOPS (United Nations Office for Project Services), and UNICEF; in 2008 the Independent Audit Advisory Committee (IAAC) was established to support the GA and the Secretary General. In the IMF an Independent Evaluation Office was established in 2001.

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A second reform could be making the organizations more accountable towards citizens affected by decisions introducing jurisdictions. Finally, in some cases, there could and indeed must be a legal liability.

The imperfect representation of citizens, that we assumed to be inevitable, might be partly compensated by fully-realized accountability which can be the result of innovative formulas and experimental legal tools. Of course, civil society could raise a point of accountability, but not be able to impeach the IO decisional bodies – as it would lack an autonomous political legitimacy to do so. Eventually, the knowledge of the circumstances and reasons which have led to a decision could allow them to activate their national representatives and/or to communicate directly with the internal control bodies of the organization to submit a complaint whether of a legal or political nature. There are therefore many potential accountability actors: states, stakeholders, citizens, other bodies of the IO, or even the organization as a whole.

The most advanced model of public administration is today the "open government" model: transparency, openness of data and information, and sharing through digital technology. It is suitable for application in international organizations as it would contribute to bridging the gap between the international apparatus and the individuals. An interesting evolution of it, in the direction of decentralization, could come from the blockchain technology, whose employment is well known in the mining and exchange of cryptocurrencies (by the way a previously public- and state-controlled- function), less it is, yet, in the field of deliberative processes, authentication of documents, and validation of contracts.

Closely related to the needs of legitimacy and accountability – but also necessary to inclusiveness – is the topic of transparency: transparency implies permeability, the ability to communicate to express needs or grievances. It regards the procedural patterns, the access to documents, and people in the organizational chart. Not surprisingly, civil society is at the forefront in this claim for transparency (Lombardi 2009).

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Undoubtedly, progress has been made over the last few decades and the contribution offered by the internet is of utmost value. It is not sufficient, however, making documents available on a website or a database if explanatory keys are not offered for finding and understanding them.

7.3 Inclusiveness

Transparency and accessibility acquire a special value and significance if they allow civil society to interact and be integrated into the debate, or even more when they permit a direct dialogue with citizens and stakeholders through dedicated channels.

Inclusiveness is the specific target to involve the greatest number of citizens through the activation of tools of participatory democracy or to help them access the accountability channels (Scholte 2011). The involvement of civil society beyond the obvious barriers that stem from cultural, linguistic, or digital gaps to reach minorities and disadvantaged groups is the ingredient that prevents that the processes described above remain mostly the privilege of a white, English-speaking elite, with high academic qualifications (Scholte 2005, 80). Nonetheless, important networks of NGOs are growing in the emerging and developing countries[28], with yet a very different representation of states according to the levels of national democracies, of internet literacy, of participation. The hope is to see in the medium/ long run a more diverse, multicultural civil society, really representative of world pluralism.

A substantial and not merely formal democracy requires specific tools for inclusiveness aimed at stimulating the widest possible participation, overcoming cultural (especially linguistic) as well as digital gaps. The digital divide is still a big obstacle both in cultural as well as in infrastructural terms.

The possibility – widely tested in the European Union – to conduct open consultations online – before the adoption of regulatory acts – paves the way for the growth of dialogue with civil society and with stakeholders in

[28] See, for instance, the CIVICUS network, https://www.civicus.org/.

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specific areas, encouraging the consolidation of thematic communities inside a global demos[29] (dealing with the environment, civil rights, health, and so on). The list of sustainable development goals (SDGs) was adopted after an online poll involving about 8 millions. It is a small number compared to the global population, yet a big one for a consultative process online. Major groups and stakeholders are invited to participate in an e-consultation on the follow-up and review of the UN 2030 Agenda implementation on a dedicated platform.[30]

Yet, these are little experiments in front of the big challenges ahead. We agree with Dahl that among the major challenges for the future of democracy are cultural diversity and education of citizens (Dahl 2000). In a global, diverse world, pluralism is a word which needs to be filled with meaning: it is not enough accepting or tolerating diversity, the future paradigm is about comprehension, compassion and solidarity.

7.4 From the Deconstruction to the Reconstruction

The democratic formula applicable to a specific international organization is the result of the way we choose to strengthen and combine the aforementioned basic elements in its founding treaty, and even before that, it is in the definition of democracy we chose, the one which works better in a given field and to the specific aims of the organization itself.

To realize the aim of building new kinds of postnational democratic legal orders, it is necessary that the international treaties establishing the IOs foresee a clear and accessible revision procedure and that they are not considered as written in stone. In this sense, the experience of the EU is exemplary, as it is the best example of "democracy in the making," a work in

[29] See the art.11 of the Treaty establishing the European Union: "1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action. 2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society. 3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent."
[30] See: https://sustainabledevelopment.un.org/hlpf/2019/econsultation

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progress that has attained higher levels of legitimacy, accountability, and inclusiveness over the years, one reform after the other.

Cultural and structural differences among the organizations prevent from finding solutions and formulas universally applicable. What is necessary is rather to find a method and agree on the values/objective to be pursued, which can be attained gradually, creatively, reflecting the differences in culture and context and depending on the stage of evolution. As it was the case with the process of European integration, then, other international organizations could experience institutional formulas that give rise to *sui generis* solutions[31], new kinds of legal orders, never seen before.

What is proposed here is a progressive evolution towards shared values. This approach allows us to read in a teleological frame a series of small changes already happening, and would give us a key for their interpretation.

The experience of the European Union has much to teach in this respect as it is an interesting hybridation of models: there is a supranational dimension legitimated by both representative of states (Council and European Council) and of individuals (European Parliament), open deliberative processes with online consutations, technocratic initiative and management (European Commission), independent jurisdiction.

We know that the European experience can hardly be transferred to regional integration organizations originated in different "cultural climates," as appears quite proven by the existence of similar, but not at all identical, regional organizations in Africa and South America, clearly inspired by the primeval model of the European Economic Community (the one before the Maastricht reform), but by far less supranational. It is even more difficult to

[31] The European Court of Justice, ruling as far back as 1963 in the *Van Gend en Loos* case (1963) defined – for the first time – the Community as "a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields and *the subjects of which comprise not only member states but also their nationals*" (emphasis added). In doing so it has done much more than underline the importance of citizens as recipients and beneficiaries of European standards, it actually included them in full right in the European formula for supranationality, which contributed itself to define.

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transfer it on the global scale as "global federalism," which would reconcile deep economic integration and democratic policy.

Yet, a model applicable on a larger scale than Europe (escaping the charge of Eurocentrism) must necessarily hybridize cultures and accept diverse inputs and visions to get to some "syncretism" of democratic values. Innovative formulas have been tested in this regard and certainly they do not exhaust the (infinite) range of creative possibilities: the Global Fund to Fight AIDS, Tuberculosis and Malaria, the Kimberley Process, the Internet Governance Forum, the Global environmental facility, the UN Environmental Assembly (UNEA), the Committee on World Food Security. They all involve in original ways states, individuals, and other stakeholders. Another interesting trend in governance at all levels points to the private-public partnership (or PPP, see Tancredi 2015).

An autonomous legitimacy of an international organization, of course, requires some degree of independence by its member states: they have to be represented and participate actively in the decisional chain, but cannot keep the decisional process hostage to their own will. If this happens, any balance of interest among majorities and minorities and values and interests at stake is reduced to a mere negotiation among the most influential capitals – and ultimately to calculus of power – so undermining the added value of supranationality and multilateralism and reducing to zero the role of individuals. Real independence can be guaranteed only by specific statutory provisions, legal and jurisdictional guarantees, and by an adequate autonomous budget.

7.5 The Essential Ingredient: Individuals

The gene of supranationality has been crucial in influencing European integration and in any system, it could provide some propulsive capacity. It makes its appearance whenever to individuals – as members of advisory or decisional bodies – is assigned a role, even a limited one, in a governance system as this gives the organization a will and legitimacy of its own, which is not the summing up of the wills and legitimacies of its member states.

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Even classically intergovernmental organizations may experience limited forms of supranationality whenever they establish a direct relationship with citizens, whether it is by creating advisory bodies of individuals as experts, or by opening up consultations of stakeholders or dialogue with civil society, or any channel that allows individuals directly concerned by decisions to submit complaints to the organization. The same driving force – individuals – even in the associated form of civil society and of local community, constitutes the essential ingredient of transnationality.

Yet, mot all global citizens will be interested in dialogue with all regional and global organizations in any given field, just as not all individuals are interested in casting their vote in political elections and to be active in the local communities. To engage the bigger number is a cultural challenge, individuals could interact through forms of differentiated participation according to their own interests and choices, respecting their free will.

Global participation rights are already evolving according to the model of the community. For example, a global community of individuals is committed to supporting policies to stop climate change (Stevenson and Dryzek 2013), it was visible, in 2015, during the COP21 negotiations and in the following interactions between civil society and the secretariat of the UN Climate Change Conference (UNCCC). In 2018, thanks to pressures from civil society and local governments, the Fiji Presidency of UNCCC launched the Talanoa Dialogue: Talanoa is a traditional word used in Fiji and the Pacific to reflect a process of inclusive, participatory and transparent dialogue; its purpose is to share stories and build empathy to make wise decisions for the collective good. The process involves the sharing of ideas, skills, and experience through storytelling. [32] It was a little step in the direction of legitimacy and inclusiveness and an interesting specific application of the Habermas' model of deliberative democracy mentioned above.

The "World We Want" web platform, co-hosted by civil society and the United Nations, is another significant example of this new community-

[32] See: https://talanoadialogue.com

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based approach, allowing civil society to take a stance for single sustainable development goals[33]. Multilateralism itself could be improved, as we see emerging actors such as companies having now a systemic impact on transnational public opinion and lifestyle, as the "Big Five" (Google, Amazon, Facebook, Apple, and Microsoft) or – even more – socially responsible companies and associations of companies[34]. So, multilateralism could now evolve towards multi-stakeholders' platforms, something we have already seen, for instance, in the internet governance, in some environmental bodies (as United Nations Environment Assembly – UNEA) or the Committee on World Food Security. Nothing would prevent to give a role to civil society. For instance, it could play an advisory role, by commenting and contributing to the first drafts of policy and strategy documents of IOs posted online. No big reforms are needed to spread many best practices already tested.

The multi-stakeholder model opens up even wider decisional platforms where all the actors can have a place in the negotiations, to contribute to win-win solutions working for all the stakeholders as well as for the collectivity.[35]

The multi-stakeholder approach could successfully combine with "minilateralism,"[36] the not-so-new idea of bringing to the table the minimum of States whose role is really significant in producing an impact – for instance, in the field of climate change, the dozen of main CO2 emitters – so privileging effectiveness over legitimacy, which could be possible if legitimacy had othere sources complementing that of states' participation.

Drawing legitimacy directly from individuals, also in their associated form, overcoming the limitations of citizenship, and even creating *ad hoc*

[33] See: http://www.worldwewant2030.org/
[34] See platforms like *Business fights poverty*, https://businessfightspoverty.org/, or *Purpose Driven Innovation Ecosystem*, https://pdiegroup.com/.
[35] See the studies on "omnilateralism" by Pape (2009). See also the multi-stakeholders International Negotiation Platform promoted by Jerome Bellion-Jourdan, https://theglobal.blog/2020/04/24/democratizing-international-negotiations-towards-a-virtual-and-inclusive-negotiation-for-the-world-after-covid-19/
[36] On the topic, see Stevenson, and Dryzek (2013) and authors mentioned (Victor 2009, Wright 2009, Nain 2009).

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ones (von Bogdandy 2012), the new global fora will be supranational *and* transnational. The national governance levels will interact in various levels with them, but won't be anymore the gate-keepers of legitimacy and enforcement. This would provide an answer to the insurmountable obstacle stemming from the participation in the organization of non-democratic states – and so their impossibility to be representative of their citizens, or from inadequate representation by democratic states. Global democracy is going to involve individuals or it is not democracy at all, as the concept of democracy itself is grounded, in its core, on civil and political rights.

A culture of accountability towards individuals is completely lacking at the level of global governance and so this is maybe the most urgent shift needed. National judges are on the frontline to make international law enforced also at the national and local levels, yet, IOs and governments appear often to be beyond any rule.

Inclusiveness needs to be cultivated through education, access to the internet, and easily usable tools for participation at all levels. The paradigm shift here sketched is – at a time – cultural and political. For treaties revisions and legal procedures to be written and enforced a bottom up-process is needed for what is not asked is not given. Awareness and claim by global citizens go hand in hand with desirable reforms.

The role of technologies in shaping the future of democracy cannot be stressed enough, as well as the importance of tools for prevention of the abuse of them, such as cyber-attacks and fake news.

8. The Lesson of COVID-19

As we stated in the opening, the unprecedented interconnectedness of states, populations, markets, is increasingly contributing to generate global crises. Most crises are, at a time, multifactorial, cross-sectoral, and interrelated among them.

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Even if several global issues have been there for decades – as global warming – they are still waiting for a solution. The exposure to financial crises and the management of migration waves (with due respect for fundamental rights) are still challenging many states. All these issues could grow bigger over time, as environmental conditions worsen and inequalities rise.

In such a gloomy landscape came the tragic COVID-19 lesson, a global pause for reflection.

In the perspective of the study of international organizations, it has been a spotlight on the World Health Organization (WHO), on its intergovernmental, bureaucratic structure and limited scope and competence. Moreover, as the health crisis became quickly an economic and social crisis we had once again the difficulty to manage the cross-sectoral implications, which rested on more or less equipped states. Differences in the wealth of states are projected immediately, as usual, on their citizens.

Hence, there are some bright spots to reflect upon, and not little ones: (i) during lockdowns we assisted to the miracle of regeneration of nature, much quicker than we believed it to be possible; (ii) we saw how a rapid change in people's habits is possible when facing a real threat; (iii) a real (almost global) shared experience made the people feel closer. Finally – even if this is still to be proved – a significant economic crisis seems to be an occasion for a faster transition towards a greener economy, something we see in the plans of European Union.

It is an occasion to build a more solid and shared sense of belonging to the human family, to increase awareness of the interconnectedness not only between human beings but also between them and the Mother Earth, which reacts quickly to our choices with its own capacity for regeneration. As the Covid-19 wave is not over, a step in the right direction seems to be the Coronavirus Global Response, promoted by the European Commission, following the Pledging Summit in June 2020 and culminated in the decision to

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participate in the COVAX Facility for equitable access to affordable vaccines for everyone.[37]

9. The Need to Manage Crises

At this point, we wonder whether every crisis should be a new challenge, a new departure for the goal of a shared response, or whether a permanent mechanism for emergency management could be created: a control room coordinating the efforts at all levels.

We suggested the revision of the existing system of IOs to increase legitimacy and accountability according to the proposed framework, to upgrade the political and democratic level of the existing bodies, and equip them with the necessary competences and tools. It is also necessary that they operate as an efficient network, where data collection and good practices already tested are shared in other organizations, with efficient transmission chains for information and coordination.

On this topic, many ideas have already been put forward. For instance, there is a long record of proposals to create a *UN Economic Security Council.* In this line, an interesting one – by Ocampo and Stiglitz – was, a few years ago, the proposal to establish a Global Economic Coordination Council (GECC) inside the UN.[38]

This proposal builds on the criticism about the existing top political fora (the Gs), lacking legitimacy and competence. Their fortune rests on the fact that eminently technocratic management of many IOs has proved often inadequate, when it gets necessary to move to politically sensitive decision-making so, the need for a political dimension in the global sphere appears

[37] See: https://global-response.europa.eu/index/en.

[38] Even if this body, inside the UN institutional system would not be focused on crisis management, yet it would complement and complete the organization flanking the Security Council. It would meet at leaders' level (Heads of States) and its representation would be based on the constituencies mechanism (a restricted yet elected body). The option for multilateralism is clear as well as for a more legitimate and representative system. The new body would be in charge of coordinating all branches of the UN that operate in the economic, social, and environmental fields, including the Bretton Woods institutions, so encompassing the ECOSOC competence. See Ocampo and Stiglitz (2011).

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evident. The two problems which need to be solved are the deficit of politics and the crisis of multilateralism (due also to its lack of effectiveness). Action can be taken on both fronts giving to a high-profile, adequately legitimized political body the competence to build strategies, inside a genuine, multilateral organization. For instance, as IMF and World Bank lack top political guidance (which is often provided by G7 or G20), it would be possible to entrust their (advisory) Ministerial Committees with a role of political guidance similar to the one currently played by the G20 and eventually foresee their possibility to meet (also) at head-of-state level.[39] There is no need to point out the significant difference between a self-referential group of leaders and an official body inside a multilateral organizations, where the few have to respond to the many, follow transparency rules and be held accountable.

Another possible solution is the creation of a dedicated new organization. The solution proposed by Bassan[40] builds on a set of organizing premises: (i) systemic crises are an opportunity for States to be seized in a situation of ruthless competition where market forces win over them; (ii) a balance is needed between minimizing the transfer of sovereignty and reduction of competition between legal systems and providing coordinated reaction to systemic crises. To do so, such IO should be equipped with tools for managing and early warning functions and with the role of coordination of States' efforts as well as that of existing IOs. The new organization would require a strong legitimacy, which brings us back to the reflections in para. 7.1. Another, already mentioned, long standing proposal is the creation of a League of Democracies: a new organization among democratic countries which, even if limited in participation, could enjoy significant support among its members, favouring their coordination in the most urgent and significant areas of intervention. Finally, the hypothess of a transnational network of national authorities responsible for civil protection, with purely operational

[39] The proposal, in detail, is in Cafaro (2013).
[40] See Catà-Backer, Bassan, and Cafaro (2020).

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characteristics and a specific mandate in emergency management, could be a proposal to be evaluated.

10. Concluding Remarks

This analysis may appear utopian or disconnected from reality, even imaginative.

There is maybe a temptation to dismiss the discourse about a democratic postnational governance as distant from the reality that we have before our eyes. And yet, the time factor is illusory since we are confronted with an acceleration of history.

We all suffer from this sort of myopia: we may have a very good close vision but it gets blurry when we look at distant objects. Partly, this is a fortune as the future is for us to envision and co-create, it cannot be well-defined right now. Partly, it is a curse, as we tend to live in denial of the problems whose solution we don't see yet. It may also happen that what is envisioned by the few does not scratch the wall of fears and anxieties of the many: nothing is as paralyzing as fear. So the temptation is to put another patch, to close another leak in the boat we are all on.

All the global issues already mentioned have at their root a series of well-known structural imbalances in our economic and cultural models. If the goal is to go beyond the management of the emergency – whose relevance we don't deny – we must attack the roots of the problems. Here are some of them: (i) the non-sustainable relationship between mankind and nature, based on exploitation; (ii) the rising inequalities, fostered by a destructive global competition among companies, states, and legal models (generating among other effects the unfair system of tax-avoidance by the biggest market actors and the collapse of welfare systems); (iii) the lack or inadequacy of policies implementing shared values, as the fundamental human rights or the SDGs.

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Yet, a double paradigm shift is required: a paradigm shift in cultural models and awareness and a second one concerning global rules and institutions. The interrelation between the two is clear: only looking at the world with new eyes humanity could rethink models which led to the current situation. The leap required is, in our opinion, well described by the famous Einstein's quote in the opening. New technologies may help, but just as tools serving clear purpose-driven goals.

The human species could be able to live as part of an ecosystem where all other species equally thrive, in harmony with nature and as part of nature. Education may encourage the development of creative and critical thinking, contributing to preparing global citizens to take full responsibility for the planet and empowering them. The economy may serve the collective good while serving entrepreneurs and workers. The international community could take the incredible opportunity generated by the pandemic and the consequent economic crisis to move towards more sustainable standards in the relation between human species and the environment and towards more cooperative and supportive global governance.

So, the only line of defense of sovereignty – understood as both collective democratic sovereignty and as individual sovereignty in one's own area of freedom – cannot ignore the awareness that neither the market with its invisible hand, nor the algorithms[41] constitute a valid alternative to designing democratic processes to compose and balance interests within that desirable brotherhood constituted by the human community.

Factors that promote change may be exogenous or endogenous. Economic crises, natural disasters, threats to peace may act as catalysts for reforms, just like the pandemic. Similarly, increasing awareness and activism can determine the political climate in which change emerges.

The post-national and post-territorial democracy is a promising ground for research, attracting scholars from many different areas. Their work is

[41] The danger of having algorithms taking over more and more of human discretion is well highlighted in Harari (2018). The author points out the need for global politics in the lesson 7.

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split in different strands. There are scholars who study the characteristics of a possible democratic global governance, those who deepen the well-known hypothesis of a league of democracies and those who imagine a more fluid, transnational society, in which local communities dialogue with each other and with supranational authorities. The ideas provided here collect suggestions from all of the above and (hopefully) could be useful for any path going to combine democratic elements with universal values in a global polity.

This work in progress allows a creative process to overcome the experience of the sovereign territorial state. National democracy is not going to fade in the short/medium term, nor will it be substituted by global democracy all of a sudden, but, as Schuman pointed out "par des réalisations concrètes."[42] This process is already in front of our eyes if we want to see it[43].

References

Archibugi D. (2012). Cosmopolitan Democracy: A Restatement, in *Cambridge Journal of Education*, n. 1.

Bunzle J., and Duffel N. (2018). *The Simpol Solution* (Prometheus).

Cafaro S. (2013). *Democratizing the Bretton Woods Institutions. Problems and Tentative Solutions* (Kindle Direct Publishing).

Cafaro S. (2017). Democracy in International Organizations. Arguments in Support of a Supranational Approach, in *The International Journal of Interdisciplinary Global Studies,* n. 1.

[42] "Europe will not be built all at once or as a whole. It will be achieved through concrete achievements, first of all creating de facto solidarity [L'Europe ne se fera pas d'un coup ni dans une construction d'ensemble. Elle se fera par des réalisations concrètes, créant d'abord une solidarité de fait]," so Robert Schumann in his famous speech on May 9, 1950.

[43] Deese (2019, 152): "The question that the human race faces nowadays is not whether we should or should not have global governance. The global governance that we already have insures the nearly frictionless flow of goods and services around the planet by maintaining and expanding a transport and communications infrastructure that dwarfs anything seen in all of human history. The real question is whether we can make the global governance that we already have fairer, more democratic, and more effective in protecting the lives and wellbeing of the living and the yet to be born."

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/12477

Catà-Backer L., Bassan F., and Cafaro S. (2020). International Organizations and Systemic Crisis, in *Astrid Rassegna*, n. 11.

Dahl R. (2000). *On Democracy* (Yale University Press).

Davenport J. (2018). *A League of Democracies: Cosmopolitanism, Consolidation Arguments, and Global Public Goods* (Routledge).

Deese R.S. (2019). *Climate Change and the Future of Democracy* (Springer).

Djelic M.L., and Sahlin-Andersson K., eds. (2006). *Transnational Governance – Institutional Dynamics of Regulation* (Cambridge University Press).

Foster S. (2020) Plenary Address: The New Era of Glocalism, in *International Conference on-line "How Democracy Survives,"* https://www.bu.edu/pardee/how-democracy-survives-the-crises-of-the-nation-state/

Habermas J. (2012). *The Crisis of European Union. A Response* (Polity Press).

Harari Y.N. (2019). *21 Lessons for the 21st Century* (Vintage).

Huntley J.R. (1998). *Pax Democratica: A Strategy for the 21st Century* (Palgrave Macmillan).

Kant I. (1824). Idea for a Universal History with a Cosmopolitan Purpose (1784), in *The London Magazine*.

Kant I. (1903), *Perpetual Peace. A Philosophical Essay* (1795) (George Allen & Unwin Ltd).

Karns M.P., and Mingst K.A. (2010). *International Organizations. The Politics and Processes of Global Governance* (Lynne Rienner Publishers).

Kaul I., Grunberg I., and Stern M.A., eds. (1999). *Global Public Goods. International Cooperation in the 21th Century* (Oxford University Press).

Kochenov D. (2019). *Citizenship* (MIT Press).

Lombardi D. (2009). *Report on the Civil Society. Consultations with the International Monetary Fund on Reform of IMF Governance (IV Pillar Report),* http://www.oxonia.org.

McLuhan M. (1962). *The Gutenberg Galaxy: The Making of Typographic Man* (University of Toronto Press).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/12477

McLuhan M. (1964). *Understanding Media* (Signet Books).

Morini C. (2020). *Dialogo e partecipazione nella governance dell'Unione europea* (Cacucci).

Naim M. (2009). Minilateralism, in *Foreign Policy*, n. 1.

Oates J.G. (2020). *Constituent Power and the Legitimacy of International Organizations. The Constitution of Supranationalism* (Routledge)

Ocampo A., and Stiglitz J. (2011). From the G-20 to a Global Economic Coordination Council, in *Journal of Globalization and Development*, n. 2, https://www8.gsb.columbia.edu/faculty/jstiglitz/sites/jstiglitz/files/2012_G20_ Glob_Econ_Coord.pdf.

Pape W. (2009). Learning from Each Other towards Omnilateralism, in G. Széll, W. Kamppeter, and W. Moon, *European Social Integration – A Model for East Asia?* (Peter Lang).

Peters A. (2011). The Constitutionalization of International Organizations, in N. Walker, J. Shaw, and S. Tierney (eds.), *Europe's Constitutional Mosaic* (Hart).

Plattner M.F. (2015). Is Democracy in Decline?, in *Journal of Democracy*, n. 1, https://journalofdemocracy.org/ issue/january-2015/

Scholte I.A. (2005). *Globalization. A Critical Introduction* (Palgrave McMillan).

Scholte I.A., ed. (2011). *Building Global Democracy? Civil Society and Accountable Global Governance* (Cambridge University Press).

Scholte I.A. (2014). Reinventing Global Democracy (2012), in *European Journal of International Relations*, n. 1.

Stevenson H., and Dryzek J.S. (2013). *Democratizing Global Climate Governance* (Cambridge University Press).

Tancredi A. (2015). L'ibridazione pubblico privato di alcune organizzazioni internazionali, in *Il futuro delle Organizzazioni internazionali. Prospettive giuridiche* (Editoriale Scientifica).

Victor D.G. 2009. Plan B for Copenhagen, in *Nature*, vol. 46.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/12477

von Bogdandy A. (2012). The European Lesson for International Democracy: The Significance of Articles 9–12 EU Treaty for International Organizations, in *European Journal of International Law,* n. 2.
Wright T. (2009). Toward Effective Multilateralism: Why Bigger May Not Be Better, in *Washington Quarterly*, n. 3.

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ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

What is a Democratic Revolution?

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ABSTRACT

Can we demonstrate that nothing in the world is more beautiful than democracy? This is the crucial question addressed in this study, which argues that, yes, we can indeed demonstrate such a thing. But to this end, it needs to be shown that democracy is based on a universal philosophical principle, one that rises above each nation's particular democratic experiences and political regimes. This higher principle, I submit, is that of "nonsuffering," standing as a universal humanist foundation for the democratic norm, beyond all empirical experiences of democracy, but capable of encompassing all of them. The universality of this principle of nonsuffering is yet to be demonstrated, to be sure, but it can be understood as the origin from which come the five principles of the democratic norm: dignity, freedom, equality, participation in public affairs, and the rule of law. In history, democratic revolutions invoke these five principles globally. Which means that, in seeking to effect political, economic, and social change, revolutions give us proof that their core impetus is moral—their ultimate aim being to give effect to the principle of nonsuffering.

Keywords: democracy, foundations of democracy, democratic revolution, right to non-suffering, islam, rule of law, dignity, freedom, participation

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1. Introduction

Nothing in the world is more beautiful than democracy. Democracy represents the best possible social way. There is no better way. This is what I would like to show in my contribution.

Obviously, if we consider democracy through its historical experiences, we will soon sink into disillusionment. Indeed, some experiences do not fully embody the democratic norm in its entirety. This means that we should avoid examining this great question through the deceitful lens of social phenomena. Sociologism and economism and the material conception of history in general will not be our chosen guides. Democracy is a norm, a human ideal, a moral imperative.

2. The Democratic Norm and Its Legitimacy

If democracy is to be defended against relativism, which is unfortunately accepted by modern human sciences and by Western political theorists of democracy itself,[1] there is no other way to proceed than by ensuring a

[1] Danilo Zolo (1992) stressed that the complexity of modern society was a challenge to European democratic tradition and its values. This stems from a contradiction between theoretical logic of democracy and the limits of democratic electoral promises. Examining the inner structure of democratic government founded on human rights, Marcel Gauchet (2017) concludes that these rights, raising the individual above the collectivity, are of a nature that weakens the common life. Guy Hermet (2007) thinks that Western democracy lies on the level of its principles, because it has achieved the limits of state providence. As electoral contests show, populism is tolling the bell. Yaascha Mounk (2018) examines the resurgence of populism, which apparently takes advantage of democratic legitimacy but whose practical result turns out to be fundamentally undemocratic, insofar as it turns out to be hostile to freedom, in the name of legitimacy. While Cas Mudde and Cristóbal Rovira Kaltwasser (2018) believe that populism can, depending on circumstances, either have a corrective effect or a negative effect on the democratic regime, Jan-Werner Müller (2016) maintains that populism is by nature not just antiliberal but also antidemocratic, to the extent that it threatens or destroys pluralism and freedoms. Ilvo Diamanti and Marc Lazar (2019) analyse it as a challenge to liberal representative democracy for the benefit of a direct democracy without mediation, anti-elitist and anti-Islamic that bets on populism. The criticism of this liberal democracy was recently taken up, on a larger scale, by Michael Albertus and Victor Menaldo (2018), who on the basis of the experiences of regimes that have experienced what is called a democratic transition, like Spain, South Africa, Indonesia, Ghana, Turkey, Colombia, Chile, and Tunisia, have shown that the elites under

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universal philosophical foundation for democracy itself beforehand, and grasping this foundation, in its most abstract and understanding concept, as a norm. I agree with Western critics of democracy, but I would like to reiterate that the democratic standard is not a particular political regime, but a human ideal. For our purposes, this is a false debate, insofar as none of these regimes represent a strict application of the democratic standard. These plans cannot be used as a criterion of judgment. It is on the basis of the norm that we must judge their greater or lesser proximity to the democratic ideal, and not the other way around.

Although the norm at its origin is inspired by the phenomena of real life, it is nonetheless the most general idea that one can have of the thing or the phenomenon which constitutes its living realization. We could compare it to the idea that inspires a great artist in his search for an aesthetic model. The standard is what makes it possible to construct a model. If Milo's *Venus* or Michelangelo's *David* are the models of a certain aesthetic, which almost nothing in life really resembles, the standard is what allowed the artist to build a model, by abstracting from reality, by which it was nevertheless initially conditioned. This is more or less the case with the democratic norm. If we can reveal both its universality and its superiority as a norm, then it becomes possible to assert that the political regimes that come closest to it are the best, despite the fact that no regime in the world will fully accomplish it. This is the most convincing way of responding to all the attacks on democracy. But this is also how we can show that democracy belongs to the world, not to *a* world. It has its roots in man, above cultural and historical geographies.

We should now take up David Hume's well-known objection that no ought (nothing normative) can be derived from an is (from a fact). Let us state the question briefly and simply. The pigeon flies. That is a fact. Are we therefore duty-bound to recognize this bird as having a right to fly? Can the

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the old dictatorial regimes have continued to retain all of their undue privileges after democracy was reinstated in their countries.

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pigeon claim this right? No, great minds tell us: the bird flies "because it is winged," a simple fact out of which no rights arise (Harari 2015). No rights exist in nature. Although Hume is not perfectly clear on this question, his principle, as understood by modern philosophy, and notably by Kant, is that from the observation that something "is," one cannot deduce that it "must be." Before we can pass from beingness as such to our being bound by duty, from experience to action, we need to have a standard of measurement, an evaluative standard that will constitute the necessary stopover between being and duty-boundness. But do excuse my stubbornness! Why, then, does this fact of being winged as a condition for the ability to naturally fly not give the pigeon morally the right, and therefore the duty, to be flying? Should not clipping off her wings be forbidden? It should. Why? Because, as we know with certainty, that would cause the bird to suffer intolerably, owing precisely to our negating the bird's nature, and doing so violently. Suffering is also a fact, as is the flight from suffering. However, it can be used as a criterion by which to prohibit an action or recognize a right. Nonsuffering does not need any stopover to become a norm: it is a "direct" ethical principle – Hume's principle notwithstanding.

3. A Democratic Revolution Is Likewise an Ethical Question

We cannot deny that modern democratic revolutions are explained historically by special economic and social conditions – the destruction of the feudal system, and of the European nobility; demographic growth; the rise of peoples; industrialization; urbanization; the globalization of trade, first in England, then in France – and at the same time we cannot deny that these revolutions, notably that of 1789, ushered in a new system of thought and a new language, that of human rights, as expressed in the great English, American, and French declarations. It was both agrarian capitalism and the industrial revolution, with its scientific and technological underpinnings, that would have produced this new thought and this new language. This is

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what is explained to us by Eric J. Hobsbawm (1996, 20), who thinks that this economic revolution forged Enlightenment thought, predicated on freedom and individualism. The latter consists in liberating the individual from the ignorant traditionalism of the Middle Ages, from the superstition of the churches, from the irrationality which divided men into a hierarchy of conditions, from lowly to elevated. The fact that modern democratic revolutions are characterized by particular economic and social conditions of emergence does not, however, prevent us from recognizing that the history of revolutions in the world is that of a recurrent, reiterated reaction against injustice, bondage, and tyranny.

The history of revolutions is an immemorial quest for equality and freedom, whether it takes the form of a bourgeois revolution, a proletarian revolution, independence, or a social, religious, peaceful, or armed revolution. This objective of revolutions marks not only modern democratic revolutions but the entire history of revolutions. Democratic revolution should not be reduced to a simple class struggle, as the Marxist perspective would have it, or to a triumphant struggle of the patriotic democrats against the aristocrats, as R. R. Palmer would have it, or "to the organization of peaceful competition for the exercise of power," as Raymond Aron (1997, 36) suggests. It encompasses all of these historical experiences to the extent that it more or less directly relates them to the achievement of the standard. But it goes far beyond them and will never be confused with any democratic experience in the world. From the point of view expounded here, a democratic tribe completely ignorant of the mechanisms of the parliamentary democracy practiced in Western nations has no less merit than the latter by the standard. Our question is a matter not of history, or of sociology, or of political anthropology, but of moral philosophy.

The question of democratic revolution is a deeply ethical question which transcends theories concerned with sovereignty, contract, the general will, procedures and institutions, the functioning of political parties, constitutions and laws, as well as specific freedoms. All these categories are only crystals

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used in the composition of democratic rock. Let us not reduce the rock to its crystals. If we did – if, for example, we judged democracy in these European developments by the pluralist functioning of political parties or the electoral procedure – we would inevitably end up with a reductive and antagonistic perspective on democracy and revolution. However, from the point of view I am here presenting, the two concepts of revolution and democracy are complementary. A democratic revolution is a materialization *by* and *in* the history of the five principles of the democratic standard.

4. The Five Principles of the Democratic Norm

Not all revolutions are democratic. Far from it. The substance of the democratic standard boils down to five basic principles: dignity, freedom, equality, participation, and the rule of law. At the heart of democratic theory, in other words, is the philosophy of human rights. Let us therefore take up its principles in turn.

4.1 Human Dignity

For Giovanni Pico della Mirandola, one of the theorists of human dignity, the concept comes from the fact that man defines his nature by his reason: "But you, constrained by no limits, may determine your nature for yourself, according to your own free will, in whose hands We have placed you" (Pico della Mirandola 2012, 117, l. 20). As Pico says in the opening of his book, this is something he read "in the ancient texts of the Arabians" (*ibidem*, 109, l. 1). Human dignity comes from an ontological superiority of the human being, that of his moral being, over other creatures. Without going so far as to say that dignity is a privilege accorded only to the human creature, we can concede, with Paul Ricoeur (1988, 235), that dignity means that something is due to man simply because he is human, a moral person.

Dignity is a quality recognized for man, and by man: that of not suffering. At this stage in the evolution of the world, this quality is limited to man and remains incomplete. We are at an as yet unfinished stage of

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moral progress. But a true philosophy of nonsuffering should not stop here. It should gain access to this fundamental inspiration from the philosophies of nonviolence, notably Jainism, which today haltingly finds expression in anti-speciesist philosophy. The Jainist principle reads as follows:

> One may not kill, nor ill use, nor insult, nor torment, nor persecute any kind of living being, any kind of creature, any kind of thing having a soul, any kind of beings. That is the pure, eternal, enduring commandment of religion which has been proclaimed by the sages who comprehend the world (Schweitzer 1936, 82, quoting Winternitz 1930, ii, 569; see also Nakos 2010, quoting from Schweitzer 1962, 65).

In other words, it's called respect. Future generations will be likely to judge us as we judge cannibals today.

Respect for the human person basically implies, in the first place, that we recognize human value and merit (when such recognition is due) and, in the second place, that we do not inflict suffering on other humans under any circumstances (any such infliction would be unjustified). Nonsuffering is a fundamental element of dignity. The dignity of man has been recognized by all cultures, religions, and philosophies of the world. The Koran, for example, based on this monotheistic idea of man's ontological superiority, recognizes dignity as a gift from God:

> We have privileged man in dignity, [...] we have given him precedence over a number of "other creatures" (Koran, *'Al Isra'*, 17:70). The Shi'a tradition expresses the idea in a more philosophical way by affirming: "Be yourself the balance of your relationship with others."[2]

Al Alâma al Majlissi reports a saying of Ali Ibn Abi Taleb to his son Hasan in these terms:

[2] Words spoken by Ali Ibn Abî Tâlib to his son Hasan. Source: Al Alâma al Majlissi, Bihâr al Anwâr, T. 72.

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> O my son, be yourself the balance of your bond with others. Love for others what you love for yourself and hate for others what you hate for yourself. Do not be unfair, as you do not want to be the victim of injustice yourself. [...] Consider that what is bad for you is bad for others and accept what is acceptable to them from others.

All cultures and civilizations in the world have formulated the principles of the democratic standard. We can find these principles in the theological, philosophical, and literary teachings contained in their founding texts or oral traditions: if we examine the Ren of Confucian Conversations and its golden rule, "Do not do to others what you do not want done to yourself"; or the biblical commandments; or the Second Fatiha (Ben Achour 2008); or the Manden Charter,[3] proclaimed in the 13th century in Kurugan Fuga in the Mali Empire under the reign of the Mandingo Emperor Sunyata Keita (Niane 1960; Chauvancy 2015), we will find that they constitute as many particular expressions of the democratic ideal (Randall and Hottelier 2015).

In the Western philosophical tradition, we have the famous Kantian formulation: "[So] *act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means*" (Kant 1998, 38). On these foundations the entire philosophy of human rights is built. The major human rights conventions systematically invoke this principle of nonsuffering. The attack on dignity can take many forms. It can affect both the body and the moral being, and the idea of torture as formulated by these conventions does not stop at the physical aspect, but obviously extends to all forms of moral suffering. The principle of nonsuffering can almost be described as *jus cogens*, not only in law, but also in philosophy. Indeed, a legal body like the French Council of State has framed this principle of dignity in both legal and philosophical

[3] CELHTO 2008. For a critical analysis of this charter, see Jolly (2010, 912).

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terms. Here is how, in a judgment of October 27, 1995, the Council of State condemned the practice of throwing dwarfs:

> Whereas the attraction of "dwarf throwing," consisting in having a dwarf thrown by spectators, is tantamount to a practice in which a person suffering from a physical handicap is used as a projectile and is presented as such; that, by its very object, this practice undermines the dignity of the human person [...], even when protective measures are taken to ensure the safety of the person concerned and this person has lent himself freely to this exhibition for pay.[4]

What comes into view here is the idea that "dwarf throwing" is inherently unethical and is so for what it does to dignity. The ethics of dignity can, however, fit into controversial perspectives, such as that of assisted dying. In General Comment 36, on the right to life, the Human Rights Committee made this assertion: "The right to life is a right which should not be interpreted narrowly. It covers [...] the right to live in dignity."[5] For some members of the Human Rights Committee (on which I serve), this right includes the right to end one's own life when it becomes a life of suffering, or, in other words, when an individual claims the right to die in dignity in order to no longer suffer a suffering life, that is, in order to no longer live in "unworthiness."

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[4] Conseil d'État, decision of 27 October 1995, no. 136727, ECLI:FR:CEASS: 1995:136727.19951027. In the French original: "Considérant que l'attraction de lancer de nain consistant à faire lancer un nain par des spectateurs conduit à utiliser comme un projectile une personne affectée d'un handicap physique et présentée comme telle; que, par son objet même, une telle attraction porte atteinte à la dignité de la personne humaine; [...] que des mesures de protection avaient été prises pour assurer la sécurité de la personne en cause et que celle-ci se prêtait librement à cette exhibition, contre rémunération; [...]." See: https://www.conseil-etat.fr/fr/arianeweb/CE/decision/1995-10-27/136727.

[5] UNHCR, General Comment 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, Adopted by the Committee at its 124th session (8 October to 2 November 2018), CCPR/C/GC/36, par. 3.

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4.2 Freedom

This is an extremely complex problem. Freedom is a difficult concept to grasp because it multiplies through metaphysics, social philosophy, law, and politics. In its most comprehensive dimension, freedom arises at the level of the relationship between man and his final destiny, as well as at the level of the knowledge of his own nature and of that which surrounds him. Is there a final destiny? Who governs it? What does it consist in? What are the limits of what man can hope and must do within the limits of his own nature and his particular environment?

Democratic freedom relates only to social and political life. This is what is called civil liberty. However, democratic freedom is not unrelated to metaphysics, insofar as in the background we always find representations of man that have a direct impact on civil liberty. When political freedom is viewed within the framework of a celestial beyond and of a creative god, it cannot have the same coherence as political freedom without God.

Noting the contradictory positions of the Koran on the question of freedom, Averroes chooses the midpoint between the Asharite philosophy, which denies freedom, and the Mutazilite philosophy, which recognizes free will. He argues that freedom, for man, consists in the possibility of choosing between opposites by exercising his deliberative capacity within the limits imposed by external causes that do not depend on his will (Al Jâbri 1998). Freedom is therefore dependent on the human condition itself. In this way, Averroes foreshadows Spinoza's philosophy, as well as that of Schopenhauer. Modern freedom will follow the path of individualism by defining itself as "the power of man" to do as he wills. Hence the definition that Hobbes offers of freedom in general: "And according to this proper, and generally received meaning of the word, A FREE-MAN, *is he, that in those things, which by his strength and wit he is able to do, is not hindred to doe what he has a will to*" (Hobbes 1909, pt. II, chap. XXI, 161; italics in the original). This is unfortunately called "negative" freedom. It is this so-called "negative" freedom that acts as the foundation of pluralism in a democratic

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society. But it is with Immanuel Kant that modern freedom will receive its ultimate expression. Kant defines freedom by our being self-determined, meaning our ability to escape the law of natural causation by reason and will. As such freedom constitutes the foundation of the moral law.

Let us simplify to conclude. From the thought of these great philosophers who have examined the question of freedom, we can extract the idea that freedom lies in this capacity of man to wrest himself from the negative face of his natural freedom – a deliberative capacity through which man's moral and rational nature can triumph over his instinctive, domineering, aggressive, and violent nature. All this leads us to democratic freedom.

More concretely, in terms of politics as activity, we can take up the four sides of freedom highlighted by Raymond Aron (1997, 64). "To be free politically is to participate in the formation or the exercise of power" (my translation). Second, "to be free would be to be protected from the arbitrariness of those in power" (*ibidem*). Third, freedom is the opportunity to flourish and "realize oneself in social life" (*ibidem*). And, finally, freedom is individual autonomy, that is, the ability of each individual "to not be completely absorbed in any group, including the national group as a whole" (*ibidem*, 65). The first aspect merges with participation, which we will examine later. The other three aspects, on the other hand, can form a statement of what freedom is in politics as activity. Oppressive governments, dictatorships, tyrannies, despotisms – all are forms of totalitarianism that affect all aspects of freedom.

4.3 Equality

Like dignity, equality between human beings, is nowhere to be found in nature, biology, or history. But precisely in this area – that of the factual – we have to go against this physical nature and build a universal concept deriving its unity from its moral nature. The moral dimension is part of human nature. Without this postulate, no domination, no violence, can be stopped. Even if the Greek political and social system was based on slavery, some Greek philosophers, like the Stoic Zeno or some Cynics like

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Antiphon, conceived both the unity and the equality of humans. To be sure, ancient Greece, with its Aristotelian slavery, practiced a lame democracy and a freedom that were blind to universality, but in the mists of a problematic social reality, it nevertheless confusedly attempted to chart its way towards a democracy without slaves. Georges Vlastos (1941, 289) argued that, while slavery is legitimized in the Aristotelian way in Plato's *Laws* and is omnipresent in the *Phaedo*, it does not as such exist in *The Republic*. But Plato was far from being an abolitionist (Hyde 2009, 11). After the tyranny of the Thirty Tyrants, the leader of the Democrats, Thrasybulus, proposed that citizenship be granted to all the combatants who had participated in the Battle of Piraeus, regardless of their status, including metics and even slaves (Ismard 2019, 230). This astonishing idea is contained in Xenophon's *Hellenica*, where it is expressed through the deeds of Theramenes. In reasoning about these facts Paulin Ismard concludes as follows: "Thus there would have existed a radical conception of democracy involving the lifting of all exclusions," and democracy would contain the potential for a radical extension of the privilege of citizenship" (*ibidem*, 231). "Democracy" would therefore already be "the name of a promise, that of the abolition of all relations of domination," "a founding gesture of the democratic regime" (*ibidem*). Thus, even if Greece was living in the mode of the natural law of domination, it was already looking for a superior way towards another natural law – a law of reason, universal, within whose purview comes the human species in its entirety, on which it is based. This new rational natural law would find one of its best expressions in the work of the sublime Roman Emperor Marcus Aurelius (Marcus Aurelius Antoninus Augustus): "Ever consider and think upon the world as being but one living substance, and having but one soul" (Marcus Aurelius 1906, bk. IV, § XXXIII, p. 37). His *Thoughts* end with words in which he urges us not to forget "how nearly all men are allied one to another by a kindred not of blood, nor of seed, but of the same mind" (*ibidem*, bk. XII, § XIX, p. 154). This is what would be reaffirmed by revolutionary movements in the history

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of Islam, particularly with the Kharéjites, who, claiming to be of the first Islam, would stand up against racial discrimination, class inequality, the despotism of the Eastern potentate, and the exclusion of the disadvantaged.

4.4 Participation

On this important question, that of participation, the enrichment of the democratic norm has taken place thanks to modern revolutions, certainly inspired by Athenian democracy. The idea of participation appears in particular in the French Constitution of June 24, 1793, with the principles of the sovereignty of the people, equal access to public employment, the right of the people to reform their constitution, participation in the formation of the law, the right to petition the government, the right to resist oppression, and finally to the right to insurrection. Worthy of note in this 1793 constitution is that it recognizes the right to revolution, with its famous Article 35: "When the government violates the rights of the people, the insurrection is, for the people and for each portion of the people, the most sacred of rights and the most essential of duties."

Democratic participation means that a political regime can only be established on the basis of the provisional and conditional acceptance of leaders, the participation of citizens in drafting the law, the appointment of their representatives, and free and equal access to public employment and representative functions. This implies that leaders must periodically renew the title they claim to legitimacy. This right to participate in public life is at the heart of citizenship. It is recognized today by international law, notably through the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Civil and Political Rights. It is this right of participation, in conjunction with the other human rights, which explains why human rights are at the heart of democratic state policy. It is this point that that forms the basis for distinguishing between the democratic model and other models of government, such as the imperial or monarchical regime or the regime of the Islamic Caliphate theorized by Muslim publicists. As Claude Lefort (2011/12, 25) has pointed out, in a democratic

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regime, power belongs to nobody and politics becomes an "empty place." But while democratic government is "emptied" of space, precisely because it does not belong to anyone, is far from being emptied of ideas, and in particular, as Georges Burdeau (1939) put it, the "idea of law." This brings us to the fifth principle of the democratic standard.

4.5 The Rule of Law

The democratic standard leads to the rule of law. This means that in the rule of law, not to be confused with the law itself, lies the essence of democratic rule. The rule of law obviously presupposes the existence of the law, but beyond that, it points to a certain way of making law, according to specific methods of drafting and enactment, in accordance with the other principles of the democratic standard.

Respect for the right to life; protection against suffering; equality before the law; equality of public fees and taxes; nonretroactivity of criminal law; the guarantee of the fundamental rights of the person as bearer of the right to think, express, and believe; and effective participation in public life – these are the basic principles constituting the rule of law, which principles are binding on any state that styles itself as democratic.

The question that needs to be resolved now is: In the name of what are we to prefer democracy over dictatorship, aristocracy, oligarchy, divine right monarchy, or theocratic regimes? How, philosophically, are we to legitimize the democratic norm and regard it as superior to other models of political organization. The answer to this fundamental question derives, in my opinion, from the principle of nonsuffering, as I will explain in what follows.

5. The Principle of Nonsuffering as the Basis for the Legitimacy of the Democratic Norm

Our starting point is that the principle of nonsuffering governs the whole of human life from start to end. This is an observation that, without exception,

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is imposed on us by the experience of life itself. It is also a primal, instinctual, natural fact that imposes itself on us before we make any discernment or any use of intelligence. Later, during the development of the social being, the principle of nonsuffering becomes the object of an intellectual, political, institutional construction that aims to put all the resources and the capacity of the social being to work to prevent it from falling under the grip of suffering. To this end, the state plans, draws up budgets and economic policies, and constantly seeks human and institutional resources to mobilize society with a view to preventing the people, as far as possible, from falling under the yoke of suffering. In his letter to Menoeceus, Epicurus stated:

> The right understanding of these facts enables us to refer all choice and avoidance to the health of the body and (the soul's) freedom from disturbance [ἀταραξία], since this is the aim of the life of blessedness. For it is to obtain this end that we always act, namely, to avoid pain and fear. And when this is once secured for us, all the tempest of the soul is dispersed, since the living creature has not to wander as though in search of something that is missing, and to look for some other thing by which he can fulfil the good of the soul and the good of the body. For it is then that we have need of pleasure, when we feel pain owing to the absence of pleasure; (but when we do not feel pain), we no longer need pleasure (Epicurus 1926, 87, par. 128).

The democratic norm, in its essence and its historical development, is entirely erected with a view to relieving, limiting, or abolishing the reign of suffering. This concerns the three dimensions of man: the material and bodily dimension; the moral dimension of the human being, as a thinking, speaking, and discerning being; and, finally, the social dimension of the human being as a member of a given human community. For this reason, the democratic norm forbids harming the life or the physical integrity of the

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human, because it is forbidden to make the human being suffer in life or limb. It is also forbidden to undermine this capacity of the thinking man, to invent, create, form concepts, adhere to ideologies, and express and share them with fellow humans, because it is forbidden to make human beings suffer in their moral dimension. Finally, the norm obliges us to refrain from undermining our living together, which constitutes the very foundation of the social human, being by nature civic. Respect for the principle of nonsuffering therefore entails freedom. It becomes universal by identifying each of us with this same commonality that brings us all together. It is this identification that leads to the duty-to-be of friendship or brotherhood among all who share this same commonality. Tolstoy wrote these admirable lines: "Our consciousness of unity among men manifests itself in our love for fellow beings, because life without love is only suffering [...]" (quoted in Deliège 2008, 150, my translation). It is through this mediation that the democratic norm, grounded in the principle of nonsuffering, is universalized to all. The principle of nonsuffering, the foundation of the democratic norm, opens not only the doors of freedom and fraternity but also that of law more, and more precisely of democratic law. The latter is expressed in different branches of law, such as international constitutional law and international human rights law. This right belongs to everyone and not to any specific culture. It belongs to humans as such. The human being is neither from the East nor from the West.

6. The Principle of Nonsuffering in Legal Systems

The principle of nonsuffering is universally recognized by legal systems. Admittedly, a large part of the legal system is devoted to regulating, arbitrating, or correcting the interplay of interests and rights between natural persons or other legal entities. Family law (marriage, parentage, inheritance) and civil law broadly (e.g., contract, property, commercial, and public law)

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are concerned with regulating interests, rights, and duties. The problem of suffering is not their object and concerns them only exceptionally.

On the other hand, in all legal systems, a good many of the rules are confronted daily with suffering and have the objective of preventing, correcting, or redressing it. It is true that, as a punitive measure, the rule of law also seeks to impose suffering through a kind of mechanism of social revenge against criminals and delinquents. But this reactive infliction of suffering only demonstrates the truth of the principle of nonsuffering, since its point is precisely to remind violators of the principle's existence.

What interests us more specifically in legal systems is that, in large part, their rules consist in repairing, mitigating, or preventing acts or situations of suffering. A court assesses the degree of suffering and orders to *réparer le dommage souffert*, repair the damage suffered, *reparar el daño sufrido*, *riparare il danno subito*. This is the case in criminal law, in its restitutive aspect; in the law of civil liability for fault or for fraud; and in domestic and international human rights litigation, but also in the other previously branches of law that are not primarily intended to address the problem of suffering.

The acts and situations of suffering are variously qualified by jurists, theorists, and practitioners. The Latin equivalents of suffering are *malum*, *injuriam*, and *damnum*. French uses the terms *prejudice*, *dommage*, or *tort*. All legal systems have their legal words to designate moral or physical suffering. English has *harm*, *prejudice*, *injury*, and *damage*; Arabic, *dharar*, *mukâbada*, and *mu'ânât*; Spanish, *lesión* and *daño*; Italian, *danno*.

The law covers either collective situations of suffering or individual acts through which suffering is inflicted. The collective situations are legion: the global deprivation of freedom of thought in a political regime, slavery, human trafficking, ethnic and religious discrimination, inequality between men and women, forced begging, genocide, exclusion of linguistic minorities, exclusion on the basis of gender or sexual orientation, blanket criminalization of voluntary abortions (without recognising any exceptions).

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The criminalization of these situations of suffering obviously evolves with a society's mores and with the social and historical environment. These situations of suffering can be the result of deviant practices, or they can unfortunately result from the law itself, as is the case with the criminalization of voluntary abortions or certain sexual orientations that in certain societies are considered deviant.

Individual acts of infliction of suffering are incalculable: attacks on people's lives or well-being by murder, torture, cruel or degrading treatment, kidnapping, extra-judicial execution, forced sterilization, rape (collective or individual), expulsion or refoulement of refugees, defamation, insult, war crimes, enforced disappearance, denial of freedom of thought or expression. Some cases, such as war crimes, genocide, and crimes against humanity, can relate both to collective situations of suffering and to individual acts done to inflict suffering.

7. A Democratic Revolution is the Manifestation of the Principle of Nonsuffering in History

After these developments, we are now ready to answer the question, what is a democratic revolution? (DeFronzo 2006).

A democratic revolution corresponds to the work accomplished by man to discover and develop the moral foundation of his human nature. If, as Jack A. Goldstone (2014, 4) puts it, "[a] revolution is the forced overthrow of a government [...], in the name of social justice, with a view to creating new political institutions," then a democratic revolution becomes the expression of the right to social justice, in which freedom must obviously be included. Generally speaking, we can affirm that it is through the effect of political revolutions, but also of philosophical, religious, and scientific ones, that humans, little by little, have managed to lift the blanket of lead which trapped their minds and kept them prisoners of social alienation. Through discovery, a scientific revolution leads to a better state of knowledge,

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making it possible to analyse natural phenomena in their largest dimension, that of universality. A philosophical revolution sharpens our critical sense. An artistic or literary revolution enriches creativity and expands aesthetic sensibility. In short, any revolution, whatever its nature, marks an advance towards a humanity delivered from ignorance, naivety, or suffering. This last point is particularly pertinent here with regard to political or social revolutions.

All political or social revolutions attempt to answer this nagging question in human history: How to eradicate injustice, remove suffering from the social condition? How to solve the problem of poverty and inequality? This is the main problem these revolutions propose to solve or provide a conceptual answer to. As Albert Camus (1951, 30) said, it all starts with a revolt. Revolt expresses an awareness of evil and suffering. Above all, it expresses its rejection, which leads to revolution. Wrote Tocqueville (2000, 287):

> Almost all the revolutions that have changed the face of peoples have been made in order to consecrate or destroy inequality. Put aside the secondary causes which produced great human upheavals, and you will almost always end up with inequality."[6]

Obviously, inequality is permanently incorporated into the history of all societies and human groupings, except in certain modern societies which have managed to resolve it, thanks to economic and social development, the industrial revolution, and the technological revolution, but above all thanks to policies for redistributing wealth, through taxes and other means of narrowing the wealth gap and providing aid or entitlements to those in society who are most disadvantaged. This, of course, does not solve the problem of inequality in any absolute way, but it does reduce that problem

[6] In the French original: "Presque toutes les révolutions qui ont changé la face des peuples ont été faites pour consacrer ou pour détruire l'inégalité. Écartez les causes secondaires qui ont produit les grandes agitations des hommes, vous en arriverez presque toujours à l'inégalité" (Tocqueville 2012, 561).

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enough so that it will not be likely to trigger revolts or revolutions. Countries like Norway, Sweden, and Denmark have reached such a level of development and control of distributive justice that revolts and revolutions lose their causes. This gives us proof that poverty is not part of the essence of society. This is what people have always believed, since they have always rebelled and will continue to do so until the problem of justice is properly resolved. This idea is aptly stated in the preamble to the Swiss Constitution, providing "that the strength of the community is measured by the well-being of the weakest of its members." Most of the revolts and revolutions in the Muslim world have been reactions either to a problem of ethnic inequality or to intolerable social discrimination.

8. Ancient World Revolution and Modern World Revolution

Obviously, in the ancient world, these revolts and revolutions took a religious form. We can see this, for example, with the Kharéjite revolts, which have bloodied the history of Islam, both in the East and in the Maghreb. It was in the name of the egalitarianism advocated by the first Islam that the great Berber Kharéjite revolt took place in the Maghreb in AD 734, towards the end of the Umayyad dynasty. It was by rejecting ethnic inequality between Persia and the Arabs that the Khurâmiyya revolt began under Babek's leadership between 816 and 837, before his defeat to Ashfîn. This revolt adopted a theology inspired by Mazdekism, based on metempsychosis and a communist ideology which recognized the community of land ownership, and even the community of women. We can add the examples of the *qarmate* revolution or that of the Zanjs.
Modern revolutions have neither the same language nor the same philosophical conceptions. On this last point, as we will see shortly, even as these modern revolutions adopted convictions of belief, even as they drew inspiration from religious beliefs, they nevertheless crafted philosophies completely devoid of the religious substratum. In these revolutions, God has

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the right to exist. But modern revolutionaries publicly state that their rights must be declared and written into law by a human legislator. We have here a new conception of human affairs, law, the state, politics, culture, and religion. The American Declaration of Independence of 1776, the English Bill of Rights of 1688, the French Declaration of the Rights of Man and of the Citizen of 1789, or that of 1793, and the Tunisian Constitution of 2014 all symbolize the emergence of a new world.

A liberal democratic revolution is content to assert the principle of equality before the law and of equal access to public offices. It abolishes unequal estates and statutes in the law. This is what the French Revolution of 1789 did. But a revolution may want to go further in its democratic ambition and tackle the more concrete problem of distributive justice and the possession of goods, in particular access to land ownership. In other words, it seeks to implant the principles of law in the field of economic and social reality. This question was approached by Victor Considerant in his work *Principles of Socialism*. As he writes on this subject:

> [...] despite the philosophical liberalism of democratic rights,[7] the legal destruction of former aristocratic rights, the constitutional equality of citizens before the law and in official capacities, and the abolition of royal franchises, the current social Order remains an aristocratic Order, no longer, it is true, *in theory and law*, but *in fact* (Considerant 2006, 50).[8]

We must therefore set out to "accomplish progressively the emancipation of the weak, the suffering, and the oppressed" (*ibidem*, pt. 2, II, § V). Also in the 19th century, Marxism devised a theoretical and practical framework for solving the wretched situation of the proletariat and the deep injustices

[7] The liberalism stemming from the 1789 revolution.
[8] In the French original: "[...] malgré le libéralisme métaphysique du droit nouveau, malgré la destruction légale du droit ancien, du droit aristocratique; malgré l'égalité constitutionnelle des citoyens devant la loi et les fonctions publiques malgré l'abolition des privilèges légaux dans le domaine industriel l'Ordre social actuel n'est encore qu'un Ordre aristocratique, non plus, il est vrai, *de principe et de droit*, mais *de fait*" (Considérant 1847, 5).

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of capitalist society. If we make a revolution speak through the voice of its theorists or doctrinaires, it will claim to open doors not only to a new world but also to a better one. This is what all revolutions tell us, before the concept is even revealed. That is the case, for example, with the revolutions of those in servitude.

For all the divergence in the historians' interpretations of slave revolts, these revolts can objectively have no other aim than to end the legal status of the slave, deemed as property, and to end the injustice, misery, and servitude to which slaves are subjected, whether the action takes the contours of a class revolt, an ethnic revolt, or a religious revolt. This is confirmed by the servile revolts under the Roman republic. The first servile "revolution" in Sicily, that of Eunus the Syrian, in 139 BC, was triggered by the deplorable living conditions of the Roman latifundial system in Sicily and the cruelty of certain slave masters, such as Damophilus and his wife, Megallis (Pittia 2011, 200). After defeating the Roman armies, Eunus founded a kingdom which was finally besieged and defeated by the Roman armies in 132 BC. A few years later, still in Sicily, the Second Servile War broke out, that of Tryphon, who also founded an ephemeral kingdom that was reconquered by the Roman republic in 100 BC. The Third Servile Revolt, that of Spartacus, was for Rome the most important and serious.

From 868 to 883 the Abbasid dynasty faced the Zanj Rebellion,[9] led by Mohamed Ibn Ali. The sources are scarce, making it difficult for historians to agree on whether this rebellion was essentially racial, religious, social, or servile. In fact, it contained all these elements at once: although it attracted to its cause the participation of white men – like the Bedouins of Bahrain, as well as peasants from Lower Mesopotamia – most of those who took part in it were slaves; although nonblack populations took part, it included blacks; although it was not a distinctly religious rebellion, it co-opted the religious and egalitarian theses of the Kharéjites (Al-Samir 1954; Talhami 1977, 443–61; Furlonge 1999, 7–14). But, however one might want to interpret this

[9] On the importance of the Zanj, see Talhami (1977, 451).

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rebellion, there is little argument about what triggered it: at root was the rebels' extremely precarious social condition.

The idea of suffering is expressed by the American Declaration of Independence: "Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States." The experience of suffering begets freedom, and when men go through great trials of suffering, they end up yearning for more freedom. Did not the 1945 Charter of the United Nations open with the intention to "save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to humankind"? As for the 1948 Universal Declaration of Human Rights, it says in its preamble that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and that the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people." Likewise, the 1987 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment affords protection against "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" (Article 1). So, too, nonsuffering is at the heart of the system of international criminal law and the Rome Statute (adopted in 1998, entered into force in 2002), which in its preamble states "that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity." The same principle is also at the centre of the case law of all judicial or para-judicial bodies for the protection of human rights.

Concretely, at the end of the journey, a democratic revolution can be seen to be the historic event through which a political regime is changed with a view to applying the five cardinal principles of the democratic norm.

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A revolution constitutes an over-activation of politics as a vector of social change and progress – a program, a call to action, a message – with a view to building a political model deemed to be better, ensuring greater freedom, dignity, and respect for man and the citizen. This message is a reminder of almost the same universal principles of dignity, justice, and freedom. A revolution hopes to end the dispossession of individuals, races, classes, or peoples subjugated by other individuals, races, classes, or peoples. This condition reveals the uncontestably moral and voluntarist scope of any revolution and the development of the spirit of justice. This moral significance is not unique to modern revolutions. The latter stand out for their particular philosophy on the relation between the state and society, between the law and the individual. They are also characterized by their particular uses of the language. But the fundamental principles deriving from the democratic norm can be found almost in any revolution. The revolts and revolutions of all kinds that have punctuated the history of the Roman Empire or Islam respond to a demand for justice, for race equality, for an end to discrimination. They have sometimes taken the form of egalitarian or clearly communist ideologies.

The core ideas of a revolution can alarmingly be distilled down to a string of clichés: "Dignity, Freedom, Justice"; "Liberty, Equality, Fraternity"; "Bread and Work"; "Down with the government!" "Down with autocracy!" "Down with the pharaohs!" "A land for peasants," "Death rather than humiliation." In most cases, popular uprisings such as revolts, riots, general strikes, and collective acts of civil disobedience that do not necessarily lead to revolutions generally express a demand for social justice or for political freedom or both. A democratic revolution is the highest expression of humanism.

9. Conclusion: The Future of Democratic Revolutions

In that message of humanism lies the teaching we can extract from some of the most recent revolutions around the world, in Tunisia, Algeria, Lebanon,

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Iraq, Iran, Chile, Hong Kong, Colombia, Bolivia, Equator, Sudan. The popular democratic project – not an elitist one – charts a path against political closure, corruption, the confessional state, and authoritarianism. Neither Donald Trump's shocking populism nor the COVID-19 pandemic can stop it. The history of democracy is a struggle that always starts over. And the value of democracy imposes itself every time we lose sight of it.

With all the dead and wounded, the 1964 Sudanese revolution; the Algerian revolution of 1988; the Kifaya movement of 2005 in Egypt; the hunger strike that took place in Tunisia the same year; the peaceful uprising that in December 19, 2018, was staged in Sudan against the government of Omar Al Béchir, who had been in power since 1989; the peaceful Algerian movement of 2019, directed against a government that had turned into a political caricature and represented an outrage for the dignity of the Algerian people; the onset of the secularisation of politics in Lebanon; and the youth uprisings in both Iraq and Algeria – all these events and developments represent as many stages of the democratic claim.

Not even the COVID-19 emergency succeeded in stemming the movement, and the population took to the streets again in early May 2020 to denounce political practices and the corruption in Lebanon.

But we have to remember that what was just said also applies to Syria, Morocco, Yemen, and Libya. Just one example can refresh our memory, that of Yemen. In September 2013, the Yemen we are currently seeing ravaged by war was about to undertake a truly revolutionary initiative through the Conference on the National Global Dialogue. Out of the conference came a charter that was to foreshadow the future Yemenite constitution, marking an advance that at the time of the Yemenite revolution was celebrated as a success and was considered a model. Some of the innovations, which might seem incredible, lie in the charter's pronouncements on religion, the civil and democratic state, the Universal Declaration of Human Rights, and the Covenant on Civil and Political Rights.

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However, the case of Yemen is not the only one. A similar experience is that of Libya's General National Congress, elected on July 7, 2012, which was the realization of a democratic claim. The failure of the Syrian, Libyan, and Yemenite experiences cannot be explained only by pointing to the resistance of dictators or their backers, but needs to also take into account the forced confessionalisation of internal conflicts, the militia's violence, the conflicts for supremacy and – what is worse – the great powers' interests and external interventions.

For this reason, the Algerian pacifist slogan *silmiyya* is a strategy of wisdom. The nonviolence of revolutions is a new idea: we owe it to Mahatma Gandhi that violence cannot be taken as a necessary principle of revolutions.

Even so, it is likewise certain that this strategy of nonviolence does not guarantee civil peace. Evidence of this is fierce crackdown we saw unfolding in Iraq (in November and December 2019), with its hundreds of dead and thousands injured. And we all know how easy it is for the opponents of a revolution to provoke civil violence and risk war just to hold on to power.

The revolutionary breath smothered by repression is not the swan song. Let us not rush to declare the final failure of democratic revolutions. While it may be true that the age of revolutions has run its course in Europe, as Marcel Gauchet (2017) claims, for us who are not Europeans, that age is beginning. Contrary to appearances, the democratic project is still in its infancy: it is not experiencing the ailments of old age. Its history is in front of it, yet to unfold. Its future is open and the real New World is at its side.

References

Albertus M., and Menaldo V. (2018). *Authoritarianism and the Elite Origins of Democracy* (Cambridge University Press).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/12478

Al Jâbri M. A. (1998). *Ibn Rushd, Al Kashf ‘An Manâhij al Adillah Fî ‘Aqâ’id al Millah* (Markaz Dirâsât Al Wihda al-‘Arabiyya).

Al-Samir F. (1954). *Thawrat al-Zanj* (The Zanj Rebellion) (Dar al-Qari’).

Aron R. (1997). *Introduction à la philosophie politique: Démocratie et révolution* (Fallois).

Ben Achour Y. (2008). *La Deuxième Fatiha: L’islam et la pensée des droits de l’homme* (PUF/ Coll. Proche Orient).

Burdeau G. (1939). Essai sur l’évolution de la notion de loi en droit français, in *Archives du Philosophie du Droit* , n. 1–2.

Camus A. (1951). *L’homme révolté* (Gallimard).

CELHTO (Centre d’Études Linguistiques et Historiques par Tradition Orale) (2008). *La Charte de Kurukan Fuga: Aux sources d’une pensée politique en Afrique* (L’Harmattan).

Chauvancy R. (2005). *Soundiata Keïta: Le lion du Manden* (L’Harmattan).

Considérant V. (1847). *Principes du socialisme: Manifeste de la démocratie au XIXe siècle* (Paris).

Considérant V. (2006). *Principles of Socialism: Manifesto of 19th Century Democracy* (Maisonneuve Press).

DeFronzo J.V., ed. (2006). *Revolutionary Movements in World History, from 1750 to the Present* (ABC Clio).

Deliège R. (2008). *Gandhi, sa vie et sa pensée: Un modèle pour le XXIe siècle* (Presses Universitaires du Septentrion).

Diamanti I., and Lazar M. (2019). *Peuplecratie: La métamorphose de nos démocraties* (Gallimard).

Epicurus (1926). Epicurus to Menoeceus, in *Epicurus: The Extant Remains* (Clarendon Press).

Furlonge N. D. (1999). Revisiting the Zanj and Re-Visioning Revolt: Complexities of the Zanj Conflict—868–883 AD, in *Negro History Bulletin*, n. 4.

Gauchet M. (2017). *L’avènement de la démocratie*. IV, *Le Nouveau Monde* (Gallimard).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/12478

Goldstone J.A. (2014). *Revolutions: A Very Short Introduction* (Oxford University Press).

Harari Y.N. (2015). *Sapiens: A Brief History of Humankind* (Harper).

Hermet G. (2007). *L'hiver de la démocratie, ou le nouveau régime* (Armand Colin).

Hertig Randall M., and Hottelier M. (2015). *Introduction aux droits de l'homme* (Université de Genève).

Hobbes, T. (1909). *Hobbes's Leviathan* (1651) (Clarendon).

Hobsbawm E.J. (1996). *The Age of Revolution: 1789–1848* (1962) (Vintage).

Hyde T. (2009). Reasonably Free: The Question of Slavery in Plato's Kallipolis Revisited, in *The Society for Ancient Greek Philosophy Newsletter* 2008–2009.

Ismard P. (2019). *La cité et ses esclaves: Institutions, fictions, expériences* (Seuil).

Jolly É. (2010). L'épopée en contexte. Variantes et usages politiques de deux récits épiques (Mali/Guinée), in *Annales Histoire, Sciences Sociales*, n. 4.

Kant I. (1998). *Groundwork of the Metaphysics of Morals* (1785) (Cambridge University Press).

Lefort C. (2011). À l'épreuve du politique: Dialogue entre Claude Lefort et Pierre Rosanvallon, in *Esprit*, n. 12.

Marcus Aurelius (1906). *The Meditations of Marcus Aurelius*. (J.M. Dent & E.P. Dutton).

Mounk Y. (2018). *The People vs. Democracy: Why Our Freedom Is in Danger and How to Save It* (Harvard University Press).

Mudde C., and Rovira Kaltwasser C. (2018). *Brève introduction au populisme* (Éditions de l'Aube).

Müller, J.-W. (2016). *What Is Populism?* (University of Pennsylvania Press).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/12478

Nakos J. (2010). Le Jaïnisme et les animaux, in *Cahiers Antispécistes*, n. 32., https://www.cahiers-antispecistes.org/le-jainisme-et-les-animaux/

Niane D. T. (1960). *Soundjata, ou l'épopée mandingue* (Présence Africaine).

Pico della Mirandola (2012). *Oration on the Dignity of Man: A New Translation and Commentary* (Cambridge University Press).

Pittia S. (2011). Diodore et l'histoire de la Sicile républicaine, in *Dialogues d'histoire ancienne*, Supplément n. 6.

Ricoeur. P. (1988). Pour l'être humain du seul fait qu'il est humain, in J.-F. de Raymond (ed.), *Les enjeux des droits de l'homme* (Larousse).

Schweitzer A. (1936). *Indian Thought and Its Development* (Beacon Press).

Schweitzer A. (1962). *Les grands penseurs de l'Inde* (Petite Bibliothèque Payot).

Talhami G.H. (1977). The Zanj Rebellion Reconsidered, in *The International Journal of African Historical Studies*, n. 3.

Tocqueville A. de (2012). *De la démocratie en Amérique*, https://www.institutcoppet.org/wp-content/uploads/2012/01/De-la-d%C3%A9mocratie-en-Am%C3%A9rique.pdf

Tocqueville A. de (2000). *Democracy in America* (Hackett).

Vlastos G. (1941) Slavery in Plato's Thought, in *The Philosophical Review*, n. 3.

Winternitz M. (1930). *Der Mahāyāna-Buddhismus* (Siebert und Mohr).

Zolo D. (1992). *Democracy and Complexity: A Realist Approach* (Polity Press).

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ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

The Relevance of the Notion of Time for Constitutionalism Beyond the State: Towards Communal Constitutionalism?

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ABSTRACT

The overproduction of material hinting at or announcing the emergence of a form of constitutional law beyond the State (sometimes defined as transnational constitutional law) has caused sceptic reactions increased in recent years. Many scholars have either been wary of employing the constitutional vocabulary too easily or as a form of crystallization of power structures, or have attempted to elaborate new concepts while emphasizing the descriptive and normative appeal of pluralism, or resorting to the less ambitious vocabulary of administrative law. While it is not the purpose of this essay to do justice to the complexity of the debate on constitutionalism beyond the State, its aim is to single out one distinctive element of this project: its *transformative* nature. In particular, it argues, against H. L. A. Hart's idea that international law is a static legal order, that the notion of constitutional time is crucial for the purposes of framing the contours of the debate on constitutionalism in general and on its applicability beyond the confines of the traditional State.

Keywords: constitutionalism, transnational constitutional law, international law, constitutional time, kinds of constitutionalism, domestic law

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1. Introduction: A Short Overview of the Debate on Constitutionalism beyond the State

A growing circle of legal scholars has for years inquired upon not only the existence of a form of constitutional law beyond the State (sometimes defined as transnational constitutional law), but also how to describe it, which features should be identified as permanent, and whether the development of a so-called constitutionalism beyond the State should be seen as legitimate or even desirable.[1]

Inevitably, the overproduction of material hinting at or announcing the emergence of a new form of constitutionalism has caused sceptic reactions (see, e.g., Somek 2008; Grimm 2016). Yet, although the latter have increased in recent years – partly as a result of the considerable political backlash that globalising trends have suffered across the world, the rise of populist leaders and movements and the erosion of rule of law standards in many rich countries, where economic prosperity seemed, at least on the face of it, often associated with liberal democracy – it must be admitted that many scholars have always refrained from depicting idealistic scenarios. They have either been wary of employing the constitutional vocabulary too easily or as a form of crystallisation of power structures (Koskenniemi 2006; Koskenniemi 2007), or have attempted to elaborate new concepts that could operate in a post-Westphalian environment while emphasising the descriptive and normative appeal of pluralism (Walker 2002; Walker 2014), or resorting to the less ambitious vocabulary of administrative law (Kingsbury, Krisch, and Stewart 2005).

While it is not the purpose of this essay to do justice to the complexity of the debate on constitutionalism beyond the State, its aim is to single out one distinctive element of this project: its *transformative* nature. Whether it merely describes an emerging phenomenon, or it also points towards a more

[1] For an inquiry into the appropriate methodology and the configuration of a "transnational legal theory" more generally, see Dickson (2015, 565), Roughan (2013).

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desirable state of affairs, or it forcefully adopts a critical stance towards the legal and political implications of global and/or transnational law, reflecting on these recent developments *is already altering* the terms of the debate and some of the fundamental premises that were traditionally associated with legal systems. This sort of "observer effect" (a term borrowed from physics), i.e. a modification of the nature of the object of study through reflection and interpretation, takes place in addition to the activities of law production or application that characterise law itself. This is particularly true as regards the curious phenomenon called "law beyond the State." In this sense, this is one important reason why H.L.A. Hart's idea that international law is a static legal order, because it lacks rules of change, is incorrect (Hart 1994, 92-93), not only because "international law" as a label is nowadays competing against other relevant labels – such as "transnational law," "global law" or "supranational law" – which describe similar but not identical phenomena or projects (Fichera 2016a). This article's claim is that, regardless of the position one may have in relation to constitutionalism's desirability, importance, or appropriateness, the notion of constitutional time is crucial for the purposes of framing the contours of the debate on constitutionalism in general and on its applicability beyond the confines of the traditional State. The premise of this work is that an overview of constitutionalism beyond the State cannot separate radically international from domestic legal orders, in the sense that we are witnessing a growing interpenetration between them. The diffusion of norms and practices across legal orders implies that, even when the intention is either to criticise the use of the constitutional vocabulary, or to supersede traditional categories anchored to State-centred conceptions, it is not possible to ignore the role of domestic legal orders.[2] In light of this, the first argument developed in the article is that constitutional time as a concept is much more important than it seems in order to understand the functioning of a legal system (section 2).

[2] One consequence of this is that comparative constitutional methodologies must also be taken into account. See, e.g., Husa (2021).

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The second argument is that the transformative nature of constitutionalist discourses can be traced in six ideal-types: legal, political, identitarian, societal, transformative and democratic constitutionalism (section 3). Each of these ideal types has developed within the State but may be employed in the more general debate on constitutionalism beyond the State, too. They are broad models, which are able to encompass different examples of constitutional frameworks. They are useful for our purposes, because they provide a rather accurate account of the directions taken by current constitutional reflections. Moreover, each of them presents a different understanding of constitutional time: their various articulations of the nature of commitment and of the relationship between constitutionalism and democracy may help us understand better the extent to which they are applicable beyond the State. Roughly, I define constitutionalism as the idea that government action should be at the same time enabled and limited by law (thus corresponding to the idea of the rule of law), and should protect individual rights.[3] Democracy can be – equally roughly – identified with a set of mechanisms ensuring that the voice of the people is heard and that their decisions on fundamental issues are taken into account (Sunstein 2001; Michelman 1999; Palombella 1997) – although both people and public sphere are the outcome of constructions that tend to be subject to power dynamics.[4] The need to strengthen both elements, without emphasising one to the detriment of the other, leads to suggesting, towards the end of the article, a seventh form of constitutionalism, i.e. communal constitutionalism, as a possible way forward in the debate (section 4).

2. Constitutional Time

The purpose of this section is to examine the nature of self-government for a complex transnational polity and its commitment to the future. In this light, it employs the notion of constitutional time, understood as a crucial notion

[3] See e.g. McIlwain (1940); Wheeler (1975).
[4] As regards the European Union (EU), see Fichera (2018).

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for every legal system,[5] because it encompasses not only the time of foundation, characterized by a variously formulated binding commitment to a long-term project, but also the time of self-amendment and adjustment. The reason why temporality is bound up with normativity (Christodoulidis 2003, 416) is that engagement with a project over time presupposes a special kind of commitment, conceived as a "normative embrace of the future" (Rubenfeld 2001, 128). In essence, constitutionalism can only live up to its promise of regulating society according to rule of law standards if it incorporates the dimension of the future.[6] To be sure, modern constitutionalism is characterized by the attempt to rise above time and exercise control over an extended period, thereby reducing uncertainty and limiting contingency. Norms protecting the core values of a community may be laid down (such as in the case of the so-called "eternity clauses"). Nevertheless, constitutionalism's effort to limit contingency is pointless if the possibility of renegotiation and revision of fundamental norms is not allowed, at least to some extent. As a result, the "self of 'self-government'" of a constitutional arrangement is not pre-determined once and for all. It is not true that the past exercises a strict control of the possibilities of norm-changing (Christodoulidis 2003, 419), because the past is a construction made in the present: constitutionalism can only be reconciled with democracy if the past is not fixed, but re-presented over and over again, and therefore never identical with itself but always already projected towards the future. In a sense, the continuous re-presentation and re-interpretation of this past and its extension into the future – which we may call "cyclical time" – enables the democratic component of a legal system. As observed by Rubenfeld, constitutionalism as commitment produces "democracy over

[5] There is an extensive literature on the relationship between (constitutional) law and time. See e.g. Bjarup and Blegvad (1995); Barshack (2009); Linden-Retek (2015); Postema (2018).

[6] See e.g. US *Hurtado v. California* 110 U.S. 516, 530-531 (1884) (Matthews, J., Opinion of the Court): "The Constitution of the United States […] was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues."

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time" because it permits self-government: it is only in this sense that constitutionalism – typically expressed by the rule of law – and democracy can be synchronized. However, constitutionalism as commitment can only be *persuasive* if it is expressed through a democratic procedure of collective re-negotiation of its values. Instead, "present-tense temporality," as upheld by constitutionalists and political thinkers across a line of thought that begins with Rousseau and Jefferson, by viewing democracy as a promise to live in the present, places (written) constitutionalism and democracy directly in opposition to each other (Rubenfeld 2001, 46). The reason is that a written text is viewed as constraining the voice of the people in the present and should be therefore entirely replaceable. Yet, as Rubenfeld notes, "A people must have law from the past, and it must project law into the future, to be self-governing. We can achieve liberty only by engaging ourselves in a project of self-government that spans time" (*ibidem*, 177).

Having this in mind, two points need to be raised. First, while the possibility to question the existing constitutional settlement and envision alternative settlements should be preserved within a polity at any moment in its evolution, there should always exist at the heart of a liberal-democratic legal order an epistemic core, which ought to be left untouched.[7] Second, methodological openness and the related inclusiveness of as many social actors as possible are one of the factors that allow a constitutional settlement to endure over time (Elkins, Ginsburg, and Melton 2009).[8] In order to consider the above statements more carefully, I set out to explore in the next pages the nature and meaning of a commitment extended over time.

[7] Instead, Christodoulidis seems to suggest (against the idea of "cyclical time" proposed here) that "the suspension of the foundation over and above political time, the dictate to return and to repeat overwhelms the possibilities of becoming" (Christodoulidis 2003, 407). On a similar wavelength was Thomas Jefferson, who believed that, because no generation has the right to bind another, no society can have a perpetual constitution and ultimately every constitution ought to expire at the end of 19 years. See Jefferson (1958, 392). Jefferson (2013) expressed a slightly more moderate view in his "Letter to Samuel Kercheval" of 1816.

[8] Note also Williams (2010, 11): "The weight of past practices repeated over and again and past decisions affirmed across time lies heavily on the behaviour of those who come within its domain."

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One of the main paradoxes stemming from the relationship between constitutionalism and democracy is the following. On the one hand, constitutionalism's illusory – at times overweening – ambition to control the future through a binding commitment placed at the beginning of constitutional time is liable to compromise the consensus that is assumed to underpin a liberal democracy.[9] On the other hand, excessive emphasis on the democratic component – for example, by evoking an allegedly pure, unlimited "sovereignty of the people" on each and every issue that enters the public domain – may undermine that very commitment. It is precisely this long-term extension, stretching towards an undefined future, which lends a constitutional project its credibility and authority[10] – yet, this is also one of the main sources of contradictions for constitutionalism. Given the added layer of complexity associated with constitutional time,[11] it is thus remarkable that contemporary political liberalism, epitomized by Rawlsian "justice as fairness" (Rawls 1971), has often been characterized by a degree of ambiguity in its consideration of the future. One of the main weaknesses of the most popular versions of liberalism – exposed by the recent economic and financial crisis – has been that, despite showing some degree of concern for the future, they have always relied on the overly optimistic assumption of continuous growth and the persistence of postwar consensus: in other words, liberalism has been too "presentist," thus bracketing the "problem of

[9] "Why would a democratic society tolerate what might appear to be a dictatorship of the past over the present?" (Elster 1988, 1).

[10] See e.g., as regards the European Union, Articles 53 TEU and 356 TFEU, as well as Article 3 Final Provisions of the Treaty of Lisbon: "The Treaty is concluded for an unlimited period." The notion of "unlimited duration" is also contained famously in ECJ Case 6/64 *Costa v. ENEL* ECLI:EU:C:1964:66 para 3. See also Article 240 Treaty on the European Economic Community, Article 312 Treaty on the European Community, Article 51 Treaty on the European Union (Maastricht). Clauses on unlimited duration are not uncommon under international law. However, voluntary and unilateral withdrawal is always possible: see Article 50 TEU. The same mind frame can be seen in ECJ C-184/99 *Grzelczyk* ECLI:EU:C:2001:458: "Union citizenship *is destined to be* the fundamental status of nationals of the Member States" (emphasis mine).

[11] As well known, Hart already observed that two key features of most legal systems are the continuity of the authority to make law possessed by a succession of different legislators and the persistence of laws long after the disappearance both of the law-maker and of those who are characterised by their "habit of obedience." He even criticised Austin for neglecting the importance of this aspect of persistence over time. See Hart (1997, 51).

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the future," or circumscribing its value for the present (Forrester 2019, 172-203). In a sense, contemporary forms of populism and Euroscepticism may be seen as a response to the "lack of future" of the European project. By way of contrast, historically, as observed by Ernst Kantorowicz, "the most significant feature of the personified collective and corporate bodies was that they projected into past and future, that they preserved their identity despite changes, and that therefore they were legally immortal" (Kantorowicz 1957, 311). It follows that "the relegation of sovereignty to ancestors and offspring and the different representations of corporate perpetuity, such as […] the constitution, open up the present to the horizons of the past and the future" (Barshack 2005, 562). In other words, one of the main flaws of contemporary liberalism, rather than openness to the horizons of time, has been that of flattening constitutional time, reducing it to a fragmented form of "linear time," i.e. a sequence of present moments without any reconnection either to the past or to the future.[12] If liberalism has had an idea of self-government in mind, the "self" it has promoted has always been identified with the individual, rather than the people (Rubenfeld 2001, 69). If the individual conceived by liberalism is liberated in any meaningful sense, he/she is always liberated – at least allegedly – from the shackles of constitutional time. However, this does not tell us anything about the authorship of a collective commitment.

Hence the importance of complementing "linear time" with "cyclical time," not only in terms of self-representation and self-interpretation, but also with a view to strengthening authority and credibility through a process of *collective* will-formation and deliberation. In other words, "cyclical time" is the image of a legal system as a set of normative values that are the object of interpretation over time by the actors of that system by looking

[12] The same can be said of modernity, which aims "to forbid the past to bear on the present […] to abolish time in any other form but of a loose assembly, or an arbitrary sequence, of present moments; to flatten the flow of time into a *continuous present*" (Bauman 1997, 89). Linear time can also be seen in positivist theories, which trace back the authority of legal norms sequentially to an ever-higher norm, up until an originating source: see Walters (2016, 33).

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retrospectively at past interpretations and selecting the best possible meanings for the future. Yet, "to understand the law in the present and thereby its guidance for future action requires more than projecting into an open and unscripted future a rule based on inferences from the past" – as noted by Postema – in the sense that "it is a matter of fitting the present proposition and its guidance for present action into a future that can and must be anticipated," essentially because "law, and its mode of reasoning, is concurrently retrospective and prospective, a matter of appreciating the past and anticipating the future" (Postema 2018, 166). It is true that a certain degree of legal indeterminacy and openness suggest that normativity, especially as regards constitutional projects, always has a "weaker hold on the future" (Christodoulidis 2003, 416). However, this does not necessarily point towards irreconcilability between constitutionalism and democracy, because constitutional authorship is transtemporal. In other words, it is possible to conceive of the development of a common project in which all participants hold a strictly forward-looking perspective, capable of including also later generations (Kuo 2009, 706-707).

In fact, according to Rubenfeld, the legitimacy of a constitutional arrangement cannot be secured through the will of a single founding moment, because a commitment can only be *owned* by a people if the fundamental law is re-written and re-examined when necessary (Rubenfeld 2001, 14). At the same time, "the voice of the governed – the will of the governed, here and now – *cannot* be supreme. It must itself be governed by a text, whether written or unwritten, established in the past, providing rules for its own speaking" (*ibidem*, 79). A people can thus come into being independently from its own will, but can only become the author of its own foundational commitment over time.[13]

As a result, for a constitutional arrangement to be both initiated and upheld, several critical constitutional moments are necessary in order to put

[13] *Ibidem*, 83. Moreover, "a constitution can never be founded in a sublime moment from a revolutionary past. It can find its foundations only – in its own future" (*ibidem*, 86).

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the tenability of the original commitment as a collective act of self-binding to the test. Yet, what if this test can never exhaustively define the nature of a polity's commitment? In reality, approaches that deny the existence of demos-legitimating factors respond to standard accounts of rational action, which, even when admitting the possibility that constitutionalizing features may emerge at some undefined point in the future, tie rationality to the agent's preferences at the time of action (Rubenfeld 2001, 119). In so doing, they overlook the relevance that an *ongoing* process of self-amending and self-interpreting constitutionalisation, characterized by an open-ended commitment, may have.[14] Present-oriented rationality characterises also those approaches that claim that a proper democratic process of deliberation – for example in the European Union (EU) – can only take place by conferring decision-making power on national executive and legislative powers, which are supposed to better reflect the needs of the electorate.[15] Although executive and legislative organs play a fundamental role in the performance of action in the present, the undeniably programmatic nature of their policies needs to be integrated by the activity of the judiciary precisely in order to verify to what extent a long-term commitment can be upheld and, if necessary, re-elaborated by a political community through self-interpretation. In fact, especially national courts can be very effective in counteracting the activity of the other organs, thus performing judicial review in order to contain and reformulate the public's immediate preferences in light of the polity's long-term commitment (Bassok and Dotan 2013). This confirms, first of all, that the nature of such commitment, unlike that of a *pre*-commitment, is never fixed once and for all, but always under negotiation, because "through a commitment, the self imposes on itself a normative obligation that provides a reason for, and not merely a cause of, its own future action" (Rubenfeld 2001, 125).[16] Secondly, the

[14] In this vein, I employ the concept of "discursive constituent power" in Fichera (2018, 39-63).
[15] Mostly, this claim is put forward by political constitutionalists: see, e.g., Bellamy (2019).
[16] On the nature of pre-commitment, see, e.g., Issacharoff (2003).

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normative force of this commitment derives not merely from the fact that its object is worthwhile, but also from the circumstance that the author of the commitment views it as his/her own. It follows that this obligation can be discarded at any time, when it is no longer recognized as one's own. Because constitutional commitments are generated at times of "high political feeling," and not merely of "sober rationality," they cease to exist once the feeling vanishes (Rubenfeld 2001, 129). They can also be amended, if they no longer correspond to popular will.

3. Six Forms of Constitutionalism

In light of the analysis of the nature of a constitutional commitment over time provided in the previous section, in this section I will distinguish between six ideal-types of constitutionalism and illustrate how constitutional time is conceived differently in each of them. These ideal types are: legal constitutionalism, political constitutionalism, identitarian constitutionalism, societal constitutionalism, transformative constitutionalism and democratic constitutionalism. In a sense, as will be seen later, they may also be classified according to the different weigh that is conferred upon the conceptual couple rule of law-democracy.

Legal constitutionalism may be considered as *par excellence* the conception that emphasizes the need to protect the rule of law. As a result, it advocates and relies upon some degree of neutrality of those institutions that are supposed to guarantee the "fair play" in a governmental architecture.[17] When these institutions correspond to supreme or constitutional courts, they are endowed with particular strength, which is usually expressed by the exercise of rights-based judicial review. From this particular perspective, a constitution is thus viewed as a norm, which must be interpreted and applied by the courts. In order for courts to perform their tasks, some of the fundamental principles of a constitution are removed from the ordinary

[17] These institutions can be typically courts – in particular constitutional or supreme courts- or other organs with analogous functions, such as the Head of State.

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political process of deliberation and are object of a special form of entrenchment (e.g. through eternity clauses).

Because the constitution as a norm entails a more or less rigid framework, in the sense that it assumes the existence of a core that is difficult to amend, normally a substantive configuration of constitutionalism is advocated: contemporary societies express a commitment to certain fundamental values and, correspondingly, constitutions enumerate the basic rights that are placed at the heart of a polity.[18] Judicial review is supposed to protect fundamental rights against the tyranny of the majority; at least some of these fundamental rights are coterminous with democracy; in hard cases, judges can deduce from these rights the principles that enable them to decide in line with the core values of the society (Dworkin 1996).

The image of law reflected by legal constitutionalism is thus closely associated with the sphere of morality. In other words, the significance of a constitution lies in its ability to define the political morality of a community, thus drawing on the principle of equal respect of all citizens. Given a strong emphasis on the rationality and entrenched nature of a legal system, politics is subject to law. The main function of a constitution is thus to limit government by law.

In many respects, political constitutionalism is the antagonist of legal constitutionalism, because it is characterized by a shift towards the democracy component rather than the rule of law component of a polity. Rather than looking at the constitution as a norm, political constitutionalism focuses on the process that enables both the fulfilment of the ideal of self-government and the representation of collective interests (Griffith 1979, Bellamy 1996, 2019). In order to ensure large participation and inclusion of people, this conception thus supports parliamentarism (in particular,

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[18] The relationship of legal constitutionalism with Hans Kelsen is ambiguous: see for a general treatment Vinx (2007). Kelsen was sceptical about the use of open-ended concepts and human rights provisions in the constitution, because they would inevitably acquire a supra-positive status. He was also against increasing the role of constitutional courts, because this would undermine their legitimacy and their claim to relative political neutrality.

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unicameral parliamentary systems). As a result, from a political constitutionalist perspective there are no questions or issues – including those having moral, ethical or religious implications – which can be legitimately excluded from the political debate. In addition, because the articulation of the common good is always the outcome of deliberation, courts are not the most appropriate organs acting as guardians of the constitution. Citizens, instead, ought to be viewed as the suitable guardians: in fact, the principle of parliamentary sovereignty protects their freedom from domination. In particular, the relationship between citizens and the government is very much based on a direct relationship of trust.

Because the constitution is viewed here in more dynamic terms, political constitutionalism is normally proceduralist, in the sense that it considers procedural democracy as the true source of legitimacy for political action.[19] A constitution is thus supposed to incorporate a detailed description of the legal and political system, especially of the powers and functions of the levels of government.

The image of law that can be extrapolated from this mind frame is intertwined with political action. As the constitution is never able to settle the fundamental disagreements that lie at the heart of a society, the democratic process tends to be preferred over the judicial process. For example, US-style strong judicial review and the use of a written constitution are regarded with suspicion, because they constrain democracy. Given a strong emphasis on political equality, party competition and majority rule, the law is subject to politics. The main function of a constitution is to enable government (Griffith 1979) or make it accountable (Tomkins 2002) and secure the stability of the polity.

While legal and political constitutionalism, at least in their ideal-typical configurations, appear as classic contenders – with the result of spurring endless debates about the quality and suitability of one or the other model –

[19] However, some versions of political constitutionalism may be considered more substantivist. See, e.g., Khaitan (2019).

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there exist two other forms of constitutionalism, which are even more controversial as regards both their configurability and implications. They are societal constitutionalism and identitarian constitutionalism.

The former conception pledges to deprive the notion of constitutionalism of its statist bias. A broader constellation is thus suggested, in order to encompass non-State actors, including not only corporations, but also social movements, professional bodies and other autonomous sectors of society, e.g. within health and sport (Teubner 2004, 5). Traditional versions of constitutionalism beyond the State are blamed for limiting their analysis to the WTO, the EU and other supranational bodies with a public institutional character. Yet, the version offered as a more comprehensive alternative – predicated on the need to ensure social differentiation as a strategy of resistance to top-down institutional pressures – is by no means univocal. While some accounts clearly turn their eye on market-oriented sectors, which are supposed to emerge and self-regulate spontaneously (*ibidem*, 27-28), others focus on and overtly advocate forms of equally spontaneous popular resistance and "constitutionalism from below" – for example through social movements (Anderson 2013) – which may sometimes antagonize not only the statist institutional apparatus, but also other more established public entities beyond the State.

Societal constitutionalism paints a more complex image of law, as encompassing both external intervention – in the form of both social pressure and political-legal regulation – and self-restriction.[20] As a result, societal constitutionalism's relationship with the political is ambiguous, in the sense that the latter is either ignored or downplayed,[21] or reasserted in a different shape (Anderson 2013, 898). In other words, constituent power is

[20] This is often defined as "hybrid constitutionalization." Constitutions emerge as a result of a double reflexivity: the reflexivity of the self-constituting social system (economy, science etc.) and the reflexivity of the associated legal system. Constitutionalization (i.e. the juridification of social spheres) is achieved when a meta-code (constitutional/unconstitutional) is developed, thus subjecting decisions that have already been verified through the code legal/illegal to a further independent code.
[21] See the *critique* in Christodoulidis (2013).

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not denied, but reconfigured beyond formal politics, i.e. dispersed in the various sectors and sub-sectors of society (e.g. economics, health) and transcending institutional power structures. In this existential and decisionist mind frame, constitutional moments are not limited to politics, but are characterized by the mobilization of societal forces pushing for radical change in circumstances of near catastrophe.[22] This is because, in what is considered a functionally differentiated environment, mechanisms of self-correction are normally ignored and only operate in extreme situations, when the will to change and the awareness of the imminent collapse are sharp enough and the self-destructive tendencies of a system can be potentially remedied by the last-minute decision of self-limitation. Hence, "inner constitutionalization" is a more valuable alternative to State intervention, which is viewed with suspicion after the episodes of political totalitarianism in the XX century. Unsurprisingly, whereas legal constitutionalism focuses on constitutional courts and political constitutionalism emphasizes the role of parliaments and the electorate, societal constitutionalism (especially in its market-oriented version) regards both constitutional courts and central banks as "guardians of the (economic) constitution."[23]

At the other end of the spectrum lies a very familiar form of constitutionalism – one which encompasses a number of variously nuanced versions, including "authoritarian constitutionalism," "competitive authoritarianism" or "abusive constitutionalism" (Tushnet 2015; Landau 2013; Levitsky and Way 2010) or, alternatively, "populist constitutionalism" (Blokker 2019). These formulae convey a number of

[22] Teubner (2011, 11-12): "This is not the moment when the self-destructive dynamic causes the abstract danger of a collapse to appear: that is the normal state of things. Instead, it is the moment when the collapse is directly imminent" and "the constitutional moment is the direct experience of the crisis."
[23] Teubner (2011, 40-41). As the author notes, "the politicisation of the economy is high in the agenda of societal constitutionalism (…). And just as constitutional assemblies and constitutional courts are the guardians of the political constitution, so the central banks and the constitutional courts are the guardian of the economic constitution. And their constitutional politics requires a high degree of autonomy."

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features, which do not necessarily coexist simultaneously, such as: the use of constitutional forms to achieve un- or anti-constitutional objectives (more specifically, the use by some political leaders of large majorities and constitutional procedures to progressively amend the constitution and increase or consolidate their power: the so-called unconstitutional constitutional amendments); limited pluralism and a higher than average control of the media and other *super partes* organs by the dominant party; a degree of responsiveness to public opinion and resulting flexibility of the party's political choices, coupled with a diminished degree of accountability; weak-form review and strong connection between courts and the dominant party; the use of elections as the only or predominant test to detect and crystallise popular will once and for all. However, two observations are necessary. First, as already mentioned, not all these features are present at the same time and some of them are not compatible with each other. For example, at least according to Tushnet, authoritarian constitutionalism displays a higher degree of commitment to legally restraining arbitrary power than abusive constitutionalism (Tushnet 2015, 438). Second, I believe the same features, in different shades of intensity, may characterize many constitutions, which are not commonly labelled as authoritarian or abusive. As a result, in my view a different, broader notion, which I call identitarian constitutionalism, expresses more usefully a certain way of organizing power, which does not necessarily go – either explicitly or implicitly – against the fundamental principles of a modern constitution.

Identitarian constitutionalism does not place emphasis either on the nominal, procedural elements of a constitution (as political constitutionalism does), or on the social forces that shape legal and constitutional frameworks (as societal constitutionalism does). Similarly to legal constitutionalism, there emerges a substantive commitment to an entrenched set of principles or values. Yet, unlike legal constitutionalism, the privileged site where such commitment is made explicit is not the supreme/constitutional courts, but a reified notion of the people, who, if "genuine," adhere to these values,

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especially when they are anchored to an ethno-nationalist narrative. Values are not posited by the legislator, but reflect the historical and cultural basis of a constitutional order, which ought to be respected across the years. Consequently, key concepts for this form of constitutionalism are constitutional and national identity – often undistinguishable from each other.

The image of law that is associated with identitarian constitutionalism is one that goes against the traditional, rationalistic liberal account of a legal order. The rule of law is conceived as self-government and the general will facilitates the tendential identification between the governor and the governed.[24] Identitarian constitutionalism, with its voluntarist undertones, thus relies upon one empty container, which can be filled variously, depending on how popular will is manufactured: trust, as the relationship of immediacy between people and the government. Similarly to legal constitutionalism, some questions are placed outside the ordinary political debate – although they are decided in identitarian terms; analogously to political constitutionalism, less judicial oversight over the activities of government is advocated. Finally, in contrast to societal constitutionalism, the vocabulary associated with the constitutionalization of non-state entities, including civil society or corporations, is regarded with suspicion, unless it is brought under the aegis of the executive.

As opposed to legal, political and identitarian, as well as, in some sense, societal constitutionalism, which have been analysed thoroughly in recent years, transformative constitutionalism is a relative under-theorised phenomenon. It has been developed essentially by judicial bodies in the Global South, especially in India, in Latin American and African Countries and stands in stark contrast with classic counter-majoritarian arguments and related diffidence towards juristocracy and the "*gouvernment des juges*,"

[24] Rousseau (1968, 81): "When the people as a whole makes rules for the people as a whole, it is dealing only with itself; and if any relationship emerges, it is between the entire body seen from one perspective and the same entire body seen from another, without any division whatever."

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which are rather popular not only in the United States, but also in many European countries, starting from France. The main project behind transformative constitutionalism is to promote social and economic rights and, more in general, State action towards a more just society (Klare 1998; Vilhena Vieira, Baxi and Viljoen 2013; von Bogdandy *et al*. 2017). Interestingly, this form of constitutionalism has given birth to many strands, sometimes quite different from each other, depending on whether they are inspired by Dworkinian or vaguely deliberative conceptions, or critical legal studies (Cornell and Friedman 2010). Despite its geographically delimited origin, it has spread across the Northern hemisphere too, and has been embraced, for example, by a section of German scholarship (von Bogdandy, Ferrer Mac-Gregor, Morales Antoniazzi, Piovesan, and Soley, 2017). Although transformative constitutionalism shares with classic legal constitutionalism an emphasis on the role of courts in the preservation and promotion of society's core values, it pursues a more explicitly social and political agenda, supporting positive rights, State interventionism and accountability of private actors with respect to constitutional rights (Hailbronner 2017, 540). Change must not simply be promoted, but also preserved in the future: in other words, as explicitly made clear in countries which have only recently adopted a democratic constitution, the intention is "to heal the wounds of the past" and provide guidance for a better future, while envisioning a society that is constantly open to contestation and change (Langa 2006).

One additional form of constitutionalism is represented by what I would like to call democratic constitutionalism. This latter form includes two strands: one, relatively old, which has been coined "participatory constitutionalism" (Valastro, 2016; Polletta, 2014; Pateman, 2012), and another, fairly recent, which has developed out of general theories on deliberative democracy and is known as "deliberative constitutionalism" (Levi, Kong, Orr, and King 2018; Worley 2009). Both aim to enhance direct participation of citizens in the democratic process, thus emphasizing the

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values of transparency, participation and accountability. From their perspective, the constitutional and democratic components of a contemporary liberal democracy ought to be conceived on an equal basis. While they support various degrees of popular sovereignty, protection and promotion of social and political rights and the related autonomy of parliaments, they distinguish themselves from political constitutionalism, because majority rule is not seen as the main legitimating factor in the liberal-democratic game. In other words, the foundational nature of modern constitutions is not dismissed completely: however, the idea of a "final act of closure" – which, in the eyes of legal constitutionalists, would be typically performed by a court – is alien to these conceptions. Rather, their background assumption is that a liberal democratic society is neither fully accomplished, nor triumphally progressing towards an enlightened form of government. Because institutional arrangements are always historically situated, they are necessarily characterized by openness and flexibility, hence subject to constant criticism and renewal (Gerstenberg 2019). This happens, because popular sovereignty is proceduralised in such a way that the weigh conferred upon the public sphere is higher than any temptation to appeal to the people as such – thus avoiding to confer upon the elections a decisive significance (Chambers 2019).

Relatedly, there is a clear distinction between deliberative constitutionalism and populist constitutionalism, on the one hand, and participatory constitutionalism, on the other. On the one hand, differently from populist constitutionalism, deliberative constitutionalism prioritizes the public sphere over the elections as a mechanism of democracy and legitimacy (*ibidem*; see also Levy, Kong, Orr, and King 2018). On the other hand, although emphasis is placed, in both the deliberative and participatory form, on citizens' participation in the political decision-making, especially at the micro level – for example citizens' juries or assemblies, deliberative polls or participatory budgeting – it has been observed that deliberation has an added value compared to participation, as it focuses on the quality of the

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deliberation and on the active involvement of citizens in the framing and discussion of the relevant issues on the agenda (Suteu and Tierney 2018, 282).

Each of the forms of constitutionalism sketched very briefly above deals with the notion of constitutional time in a different way. As the premise of legal constitutionalism is that a number of fundamental principles must be preserved from political contestation, although they are still subject to interpretation, the predominant conception of time is cyclical. Prevalence of the features of rationality and entrenchment point towards placing emphasis on the role of the judiciary as the emblem of cyclicality and as a guardian of the rule of law. However, this does not imply a removal of linear time, which is mainly expressed by executive decision-making and legislative activity.

Linear time is instead strongly present in the case of political constitutionalism, because democracy emerges as a daily business, constructed through a direct relationship between social and political actors. Although participation and involvement of local levels of decision-making are encouraged, the main focus of political constitutionalism are the central Parliament and government. As political activity is viewed as an expression of the contemporary will of the citizens, this approach is essentially presentist.[25] Cyclical time is not excluded, but – whether in the form of regular elections, or in the form of judicial review – it is subordinated to linear time and viewed instrumentally for the purposes of the achievement of governmental goals.

By way of contrast, identitarian constitutionalism, by reconfiguring a return to the nation State – or at least to a reinvigoration of national sovereignty through which transnationalisation of law is not denied radically, but refashioned and adapted to sovereigntist eyes – evokes in fact a return to a legitimating past. This source of both authority and legal pedigree is a fixed moment or period, which, while supposedly situated far

[25] See the reflections on the implications of presentism in section 2 above.

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back in time, is constantly present in the narrative proposed. As a result, while some features, like entrenchment and attachment to some more or less traditional values might recall elements traceable in legal constitutionalism, the presentist vision of identitarian constitutionalism locates this conception somehow nearer to political constitutionalism. However, its representation of time is circular, because it lacks the ability to allow ongoing negotiation and reinterpretation of the founding values that are identified as binding for the polity. In addition, this is a strong version of presentism, because the identified leader possesses a relatively high discretionary power to alter the binding commitment of the polity or replace the previous interpretation of the alleged traditional values with another interpretation.

Yet, perhaps the most radical version of presentism is provided by societal constitutionalism, which offers a much more complex representation of constitutional time. As noted by Prandini, globalization and high-speed society threaten law as a source of legitimacy and stability, as well as the very nature of constitutions as basic law: "law is law (and nothing else), and it must change" (Prandini 2013, 748). In other words, according to Prandini globalization disconnects the rule of law, as a system of general, stable and predictable norms, from societal processes, as new forms of law, much more flexible, dynamic – such as in the case of soft law – emerge: as a result, judicial activity becomes more creative and less focused on legal precedents (*ibidem*, 750-752). New self-constituting entities thus do not find legitimacy in their past, but project themselves into the future, thus replacing the identification of a clear origin with the establishment of a field of networked actors that decide at one point to regulate their activity – in compliance with already existing rules – with constitutive meta-rules (*ibidem*, 766). Examples can be made in the context of the so-called transnational law, such as in the case of *lex sportiva*, *lex digitalis* or *lex mercatoria* (Fichera 2016a). As contingency is seen as the prevailing factor in the technology of law-making, societal constitutionalism

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configures time as fragmented into “now-times,”[26] which can be regulated by some piece of legislation only in the short term, only to be replaced by another piece of legislation.

Differently from societal constitutionalism, the notion of constitutional time proposed by transformative constitutionalism is not a rupture between past and future, but some degree of continuity. Although the future holds a promise to remedy the mistakes of the past, the latter must not be removed completely. Moreover, not only the core values of a society, but any change in those values is supposed to be preserved in the long term, at least to some extent. The representation of time that is put forward by transformative constitutionalism is thus something in between the arrow of linear time and the undulation of cyclical time.

For analogous reasons, democratic constitutionalism considers pre-commitment not as a set of substantive limitations on the choices of a majority, but rather as a collection of procedural and structural values that ensure the protection of those rights of participation that allow a democracy to survive (Issacharoff 2003, 1994-1995). Conceived in this fashion, pre-commitment is not understood as a negative constraint to change, but rather as an enabler or facilitator of democratic governance. Constitutional time can be imagined therefore as a spiral moving upwards, from bottom-level to top-level decision-making.

Obviously, these ideal-types do not correspond exactly to real-life models and often many of their features are overlapping. However, they provide a useful overview of how different degrees of the combination between constitutionalism and democracy can operate, with legal constitutionalism located more towards the rule of law side, and the others, progressively from political to transformative, identitarian, societal and democratic towards the democratic side.

[26] I borrow the notion of “now-time” from Heidegger (although with a different meaning): see Heidegger (1962, 474-475).

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4. Communal Constitutionalism

The argument in this work is that none of the ideal-types illustrated in the previous section contemplates an alternative scenario, one in which at least an attempt could be made to re-imagine constituent power – i.e. the power to establish a constitution, which is normally exercised by the people – in a new setting. Such a form of constituent power is no longer configured simply within the comfortable borders of the nation-State. Yet, one should avoid depicting idealistic representations or reifications of some sort of transnational people, possessing a collective identity and a transnational consciousness. Nor should one cling to the old, perhaps in some sense reassuring, framework of nation-States as the only relevant actors in the field. Especially when the focus in on complex processes of integration beyond the State, such as in the case of the EU, but also in other similar processes across the globe, especially in Latin America, the role played by the local dimension should be emphasized and promoted much more than it currently is. Inevitably, however, one of the main shortcomings of participatory and deliberative practices is that they operate only on the surface, without turning into *actual* involvement of the citizens.

I would like to use for these purposes the notion of communal constitutionalism. Communal constitutionalism implies the co-existence of a plurality of normative orders, sites of decision-making, social practices and mechanisms of allocation of resources, which are not necessarily associated with State actors, but may also include non-State actors (including private actors acting in the public interest), especially at the sub-national, local level. As argued elsewhere, this means that, while a constructive relationship with national and transnational levels of decision-making is maintained, grass-root movements, transnational party formation and citizen participation should be encouraged in both institutionalized and non-institutionalized settings (Fichera 2016b). This notion is thus an enriched form of legal pluralism "from below," capable of embracing not only, for

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example, the idea of "Europe of regions," which was developed in the European context in the early 2000s, but also forms of participatory budgeting that have become particularly popular in Latin America and have been spreading across the globe, including Asia and Europe. It is not by chance that the notion of communal constitutionalism has had some resonance among Latin American political scientists (Rivera Lugo 2019, 162). However, in this frame of mind national courts, too, have an important role to play. They may not only check compliance with standards of accountability of local governors, but also ensure that the interpretation and application of EU or transnational law is in conformity with fundamental constitutional provisions. Communal constitutionalism thus does not accord excessive leeway to the executive, contrary to what may happen in the case of participatory budgeting (de Sousa Santos 2005, 310). It may be considered a derivation of deliberative constitutionalism, but, while emphasizing the democratic component of contemporary constitutional arrangements, it confers an equal importance to the rule of law component, primarily through the activity of the judiciary. The protection of the rule of law and other fundamental values of the multi-level polity by each of its members is considered of the utmost importance.

To some extent, there is an overlap between communal constitutionalism and sub-national constitutionalism (Ginsburg and Posner 2010; Marshfield 2011; Delledonne and Martinico 2011). First, just like subnational units' constitutional frameworks, communal constitutions define and preserve a certain degree of independence and self-determination for their local authorities, and at the same time limit and reorganize their power. Second, both versions admit the establishment of minimum standards of protection of fundamental rights, while allowing the local level to set up higher standards. However, subnational constitutionalism, while institutionally distinct from federalism – as the latter is concerned with the distribution of power between different levels of government – is a second-level form of constitutionalism, because it still depends on and is constrained by the

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allocation of powers decided by a federal set of rules. By way of contrast, communal constitutionalism can operate in non-federal contexts, where there exists a complex multi-level structure of government, as in the case of the EU. While subnational constitutionalism may prohibit subnational units from setting up their own judiciary, no limitation of this sort exists for communal constitutionalism, neither as regards the judiciary nor for any other institution.

Ultimately, communal constitutionalism is a form of practical arrangement that seeks to remedy the flaws and combine the virtues of the models illustrated earlier. For example, it admits that and certain values in a legal system should be preserved according to a political morality, but at the same time negotiation and re-discussion of these values should be permitted. Importantly, communal constitutionalism relies upon a two-level system of constitutional change. Generally speaking, the overarching legal framework in federal systems tends to resist to change much more than its sub-national units (Dinan 2008). The same cannot necessarily be said as far as communal constitutionalism is concerned. Looking at the most emblematic example where it can operate – the EU – it is worth noting that several significant changes in the structure of its legal and political order have taken place during its history, in different ways, much more than in the structure of the domestic constitutional systems that compose it. This has occurred first through classic treaty amendment and ratification. Second, change has been shaped by atypical activity, such as the practice of adopting Treaties outside the EU legal framework, as with the adoption of the European Stability Mechanism.[27] Third, constitutional changes have traditionally occurred by way of interpretation by the EU judiciary, in particular in the form of

[27] On that occasion, while agreeing on the amendment of Article 136 of the Treaty on the Functioning of the European Union – authorising the establishment of the European Stability Mechanism (ESM) under EU law – a separate Treaty, i.e. the Treaty Establishing the European Stability Mechanism (ESM), Brussels, 1 February 2012, was concluded only by the Member States belonging to the Eurozone. It replaced two earlier funding programmes, the European Financial Stability Facility (EFSF) and the European Financial Stabilisation Mechanism (EFSM). Interestingly, the ESM acts as an intergovernmental organisation, whose seat is in Luxembourg and follows rules of public international law.

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important – sometimes even landmark – rulings by the Court of Justice of the EU and the interaction between courts belonging to different levels (Arnull, 2012). As will be further illustrated below, the configuration of a different type of change in the relationship between the EU and the national level, as opposed to the relationship between the federal and sub-national level, is a factor that is seriously taken into account by communal constitutionalism. Moreover, one fundamental premise of communal constitutionalism is that, when it comes to complex mechanisms of transnational integration, the economic dimension cannot be separated from the social dimension.[28]

Ultimately, the representation of time associated with this form of constitutionalism is, perhaps counterintuitively, that of a fractal, given that one of the properties of these geometric figures is that of exhibiting similar patterns at increasingly small scales. Structures, techniques and symbols that normally operate on a large scale, such as, for example, a council of representatives, an expert committee, a social movement, an executive board, can function effectively also at the micro-level of regions or cities, especially those having a bigger size (Hirschl 2020).

Having said that, communal constitutionalism addresses a daunting dilemma. Its objective is to ensure, through deliberative practices, self-government at the micro-level, while at the same time relying upon a core set of shared values, which ought to be promoted within contemporary, stratified legal orders, despite the fact that societal demands are increasingly complex and tensions rising. It is a project that attempts to answer some of the problems identified by populist movements, without losing sight of the bigger picture. After all, the contradictions between constitutionalism and democracy are reproduced at the micro-level, too. In this regard, once again the EU represents a significant example. As noted briefly above, constitutional change in the history of the EU has often occurred at a rather

[28] See, e.g., Young (2012, 354), who emphasizes the role of social movements in channelling demands for social and economic rights, and Hervey and Kenner (2003).

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fast pace and in formal and informal, as well as typical and atypical, ways. This means that the democratic underpinnings of such changes may not be solid enough or may be at least questionable. From this perspective, communal constitutionalism presents several points of contact with deliberative constitutionalism. It believes that the possibility to revise both the substantive principles that found a political community and the deliberative criteria themselves should be preserved (Worley 2009, 469). Constitutionalism and democracy are thus reconciled by allowing amendment even of entrenched institutions and fundamental rights, as long as modification takes place through particularly strict, exceptional procedures[29] that are able to involve as many stakeholders as possible.

However, especially as far as decisions affecting the allocation of budgetary resources are concerned, appropriate decision-making at the local (both national and sub-national) level should be ensured and taken into account in a more structured way, for example through institutionalised and non-institutionalised channels of communication with social and political movements that are not associated with traditional parties. First, in order for deliberation to proceed as an ongoing practice – which is not confined to constitutional moments and exceptional situations, but operates as a constant process of self-learning and self-correction – it is necessary that concern for local sensibilities is not only brought to the fore, but also addressed explicitly. Second, national and sub-national courts are supposed to give voice to those local sensibilities, including not only the respect of constitutional principles and values that are deemed essential for their societies, but also cultural and social demands that otherwise risk to be neglected or superseded. In the case of the EU, this set of practices and discourses takes the name of *discursive constituent power*, through which a

[29] Worley (2009, 473-474). As the author notes, “Constitutionalism insulates individual rights from ‘the vicissitudes of political controversy,’ but it does not require their being entirely immune to revision. Conversely, deliberative democracy treats individual rights as morally and politically provisional, but it does not require that every principle of rights or justice be subjected to endless reconsideration and alteration.”

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peculiar idea of people has been constructed in the process of European integration (Fichera 2018, 39-63). A pre-condition for this, however, is that a minimum degree of shared values is not only agreed upon, but also complied with and enforced within the transnational polity.

5. Conclusions

These are hard times for constitutionalism. The Enlightenment spirit that was still strong at the end of the 20th century seemed to herald a new era, characterised by the expansion of rights, the consolidation of new methods of governance, the rise of free movement. None of this has occurred, or, if occurred, it has had a negative impact on standards of democracy and rule of law that were believed to be unquestionable. Not only has the development of constitutionalism beyond the State both as an idea and as a technique of government reached a standstill. It has also raised concerns about its viability and effectiveness. In this article, six ideal-types of constitutionalism have been analysed: legal constitutionalism, political constitutionalism, identitarian constitutionalism, societal constitutionalism, deliberative constitutionalism, transformative constitutionalism. The question is whether these models, developed within the State, may at least in part apply beyond the State. It has been suggested that it may be useful to adopt a reflexive approach that examines them through the notion of constitutional time. The prism of time allows considering the nature of commitment in a polity. From this perspective, with a view to reconciling constitutionalism and democracy or at least preventing their demise, communal constitutionalism aims to focus on the needs of the local, both national and sub-national level of decision-making. For this to happen, not only institutionalized, but also non-institutionalized mechanisms of cooperation and articulation of social and cultural interests should be encouraged.

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References

Anderson G. (2013). Societal Constitutionalism, Social Movements, and Constitutionalism from Below, in *Indiana Journal of Global Legal Studies*, n. 2.

Arnull A. (2012). Judicial Dialogue in the European Union, in J. Dickson, and P. Eleftheriadis (eds.), *Philosophical Foundations of European Union Law* (Oxford University Press).

Barshack L. (2009). Time and the Constitution, in *International Journal of Constitutional Law*, n. 4.

Bassok O., and Dotan Y. (2013). Solving the Countermajoritarian Difficulty?, in *International Journal of Constitutional Law*, n. 1.

Bauman Z. (1997). *Postmodernity and its Discontents* (New York University Press).

Bellamy R. (1996). The Political Form of the Constitution: the Separation of Powers, Rights and Representative Democracy, in *Political Studies*, vol. XLIV.

Bellamy R. (2019). *A Republican Europe of States – Cosmopolitanism, Intergovernmentalism and Democracy in the EU* (Cambridge University Press).

Bjarup J., and Blegvad M., eds. (1995), *Time, Law and Society* (Franz Steiner Verlag).

Blokker P. (2019). Populism as a Constitutional Project, *International Journal of Constitutional Law*, n. 2.

Chambers S, (2019). Democracy and constitutional reform: Deliberative versus populist constitutionalism, in *Philosophy and Social Criticism*, n. 9-10.

Christodoulidis E. (2003). Constitutional Irresolution: Law and the Framing of Civil Society, *European Law Journal*, n. 4.

Christodoulidis E. (2013). On the Politics of Societal Constitutionalism, in *Indiana Journal of Global Legal Studies,* n. 2.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/12479

Cornell D., and Friedman N. (2010). The Significance of Dworkin's Non-positivist Jurisprudence for Law in the Post-Colony, in *Malawi Law Journal*, n. 1.

Delledonne G., and Martinico G. (2011). Legal Conflicts and Subnational Constitutionalism, in *Rutgers Law Journal*, n. 4.

de Sousa Santos B. (2005). Two Democracies, two Legalities: Participatory Budgeting in Porto Alegre, Brazil, in *Law and Globalization from Below-Towards a Cosmopolitan Legality* (Cambridge University Press).

Dickson J. (2015). Who's Afraid of Transnational Legal Theory? Dangers and Desiderata, in *Transnational Legal Theory*, n. 3-4.

Dinan J. (2008). Patterns of Subnational Constitutionalism in Federal Countries, in *Rutgers Law Journal*, vol. 39.

Dworkin R. (1996). *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press).

Elkins Z., Ginsburg T., and Melton J. (2009). *The Endurance of National Constitutions* (Cambridge University Press).

Elster J. (1988). Introduction, in J. Elster, and R. Slagstad (eds.), *Constitutionalism and Democracy* (Cambridge University Press).

Fichera M. (2016a). Law, Community and Ultima Ratio in Transnational Law, in M. Fichera, S. Hänninen, and K. Tuori (eds.), *Polity and Crisis-Reflections on the European Odyssey* (Routledge).

Fichera M. (2016b). The Paradox of Liberal Constitutionalism: A Call for Communal Constitutionalism, *VerfBlog*, https://verfassungsblog.de/the-paradox-of-liberal-constitutionalism-a-call-for-communalconstitutionalism/.

Fichera M. (2018). *The Foundations of the EU as a Polity* (Elgar).

Forrester K. (2019). *In the Shadow of Justice – Postwar Liberalism and the Remaking of Political Philosoph*y (Princeton University Press).

Gerstenberg O. (2019). *Euroconstitutionalism and its Discontents* (Oxford University Press).

Ginsburg T., and Posner E.A. (2010). Subconstitutionalism, in *Stanford Law Review,* vol. 62.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/12479

Griffith J. (1979). The Political Constitution, in *The Modern Law Review,* n. 1.

Grimm D. (2016). *Constitutionalism: Past, Present and Future* (Cambridge University Press).

Hailbronner M. (2017). Transformative Constitutionalism: Not Only in the Global South, in *American Journal of Comparative Law*, n. 3.

Hart H.L.A. (1994). *The Concept of Law* (Oxford University Press).

Heidegger M. (1962). *Being and Time* (Blackwell).

Hervey T.K., and Kenner J. (2003). *Economic and Social Rights Under the EU Charter of Fundamental Rights – A Legal Perspective* (Hart).

Hirschl R. (2020). *City, State-Constitutionalism and the Mega City* (Oxford University Press).

Husa J. (2021), Comparative Methodology and Constitutional Change, in X. Contiades, and A. Fotiadou (eds.), *Routledge Handbook of Comparative Constitutional Change* (Routledge).

Issacharoff S. (2003). The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Elections, in *Texas Law Review,* vol. 81.

Jefferson T. (1958). Letter to James Madison, 6 September 1789, in *The Jefferson Papers Vol. 15: 27 March 1789 to 30 November 1789* (Princeton University Press).

Jefferson T. (2013), Letter to Samuel Kercheval (1816), in H. Gillman, M.A. Graber, and K.E. Whittington (eds), *American Constitutionalism, vol. I: Structures of Government* (Oxford University Press).

Kantorowicz E.H. (1957). *The King's Two Bodies* (Princeton University Press).

Khaitan T. (2019). Constitutional Directives: Morally-Committed Political Constitutionalism, in *The Modern Law Review,* n. 4.

Kingsbury B., Krisch N., and Stewart R. (2005). The Emergence of Global Administrative Law, in *Law and Contemporary Problems,* vol. 68.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/12479

Klare K.E. (1998). Legal Culture and Transformative Constitutionalism, in *South African Journal of Human Rights,* n. 1.

Koskenniemi M. (2006). *From Apology to Utopia – The Structure of International Legal Argument* (Cambridge University Press).

Koskenniemi M. (2007). Constitutionalism as Mindset: Reflection on Kantian Themes About International Law and Globalization, in *Theoretical Inquiries in Law,* n. 1.

Kuo M-S. (2009). Cutting the Gordian Knot of Legitimacy Theory? An Anatomy of Frank Michelman's Presentist Critique of Constitutional Authorship, in *International Journal of Constitutional Law,* n. 4.

Landau D. (2013). Abusive Constitutionalism, in *University of California Davis Law Review,* vol. 47.

Langa P. (2006). Transformative Constitutionalism, in *Stellenbosch Law Review,* vol. 17.

Levitsky S., and Way L.A. (2010). *Competitive Authoritarianism* (Cambridge University Press).

Levy R., Kong H., Orr G., and King J., eds. (2018), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press).

Linden-Retek P. (2015). Cosmopolitan Law and Time: Toward a Theory of Constitutionalism and Solidarity in Transition, in *Global Constitutionalism*, n. 2.

Marshfield J.L. (2011). Models of Subnational Constitutionalism, in *Penn State Law Review,* n. 4.

McIlwain C.H. (1940). *Constitutionalism: Ancient and Modern* (Cornell University Press).

Michelman F. (1999). *Brennan and Democracy* (Princeton University Press).

Palombella G. (1997). *Costituzione e Sovranità – Il senso della democrazia costituzionale* (Dedalo).

Pateman C. (2012). Participatory Democracy Revisited, in *Perspectives in Politics*, n 1.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/12479

Polletta F. (2014). Participatory Democracy's Moment, in *Journal of International Affairs*, n. 1.

Postema G. (2018). Time in Law's Domain, in *Ratio Juris,* n. 2.

Prandini R. (2013). The Future of Societal Constitutionalism in the Age of Acceleration, in *Indiana Journal of Global Legal Studies*, n. 2.

Rawls J. (1971). *A Theory of Justice* (Harvard University Press).

Rivera Lugo C. (2019), Marxist Perspectives on Law and the State in Latin America, in R. Sieder, K. Ansolabehere, and T. Alfonso (eds.), *Routledge Handbook of Law and Society in Latin America* (Routledge).

Roughan N. (2013). *Authorities: Conflicts, Cooperation and Transnational Legal Theory* (Oxford University Press).

Rousseau J-J. (1968). *The Social Contract* (Penguin).

Rubenfeld J. (2011). *Freedom and Time: A Theory of Constitutional Self-Government* (Yale University Press).

Somek A. (2008). *Individualism: An Essay on the Authority of the European Union* (Oxford University Press).

Sunstein C. (2001). *Designing Democracy: What Constitutions Do* (Oxford University Press).

Suteu S., and Tierney S. (2018). Squaring the Circle? Bringing Deliberation and Participation Together in Processes of Constitution-Making, in R. Levy, H. Kong, G. Orr, and J. King (eds.), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press).

Teubner G. (2011). A Constitutional Moment? The Logics of "Hitting the Bottom," in P. Kjaer, G. Teubner, and A. Febbrajo (eds.), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Hart).

Teubner G. (2004), Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?, in C. Joerges, I-J. Sand, G. Teubner (eds.), *Transnational Governance and Constitutionalism* (Hart).

Tomkins A. (2002). In Defence of the Political Constitution, in *Oxford Journal of Legal Studies,* n. 1.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/12479

Tushnet M. (2015). Authoritarian Constitutionalism, in *Cornell Law Review*, n. 2.

Valastro A., ed. (2016), *Le regole locali della democrazia partecipativa. Tendenze e prospettive dei regolamenti comunali* (Jovene).

Vilhena Vieira O., Baxi U., and Viljoen F. (2013). *Transformative Constitutionalism: Comparing the Apex Courts in Brasil, India and South Africa* (Pretoria University Law Press).

Vinx L. (2007). *Hans Kelsen's Pure Theory of Law* (Oxford University Press).

von Bogdandy A., Ferrer Mac-Gregor E., Morales Antoniazzi M., Piovesan F., and Soley X., eds. (2017). *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (Oxford University Press).

Walker N. (2002). The Idea of Constitutional Pluralism, in *Modern Law Review,* n. 3.

Walker N. (2014). *Intimations of Global Law* (Cambridge University Press).

Walters M.D. (2016), The Unwritten Constitution as a Legal Concept, in D. Dyzenhaus and M. Thorburn (eds.), *Philosophical Foundations of Constitutional Law* (Oxford University Press).

Wheeler H. (1975). The Foundations of Constitutionalism, in *Loyola L. A. Law Review,* vol. 8.

Williams A. (2010). *The Ethos of Europe – Values, Law and Justice in the EU* (Cambridge University Press).

Worley J.J. (2009). Deliberative Constitutionalism, in *Brigham Young University Law Review*, n. 2.

Young K.C. (2012). *Constituting Economic and Social Rights* (Oxford University Press).

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ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

Rights' Global History. The Making and Unmaking of the History of the Rights of Man according to a Non-Eurocentric Perspective

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ABSTRACT

This paper expresses the effort to reinterpret the history of the rights of man, and of human rights thereafter then (starting from 1948), from a non-Eurocentric perspective. This is a very specific project that naturally is not meant to retrace the phases of the Western history of rights, but neither is the point to compare the Western conception with those of other legal traditions, such as the Islamic one. In short, the attempt is not to read the history of the rights of man as a progression involving the recognition of increasingly large spheres of freedom carved out of the sovereignty of Western states (as Georg Jellinek saw it), nor is it to read that history as a slow and belated delimitation of national sovereignty in international relations since the end of World War II. To introduce a non-European perspective is instead to analyze the role of the Western conception in leading to the ascendancy of the West over other civilizations and cultures on the ground of the anthropological representation of a non-Western otherness.

Keywords: man's rights, western civilisation, humanitarian intervention, muslim psychiatry, human rights, islamic concept of human rights, third world and human rights, psychical universality and cultural diversity

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1. A Western History of Rights

Let us consider first of all the history of man's rights according to a Eurocentric perspective.

We can specify the following periods:

- The concept of people's rights in the first half of the sixteenth century.
- The religious origin of the rights of man from the second half of sixteenth century to the first half of the seventeenth century.
- The process of *secularization* in the seventeenth century.
- The concept of the rights of man as grounded in natural law from the seventeenth century to the end of the eighteenth century, that is until the age of the American and French Revolutions.
- The concept of the rights of man as grounded in the law in the nineteenth century, that is during the age of the rule of law.
- And finally the age of constitutional democracy and the concept of fundamental rights as grounded in the constitutions from the twentieth century to now.
- We have to also consider the perspective of so-called international constitutionalism, that is, the concept of human rights as grounded in international covenants, declarations, and conventions.

It is very important to consider that we are only dealing with the *Western history of rights,* which is quite different from other conceptions of rights in different civilizations and cultures, and this consideration implies that we have to accept the perspective of *relativism* in considering the question of the rights of man. In fact the idea of the rights of man in the Western civilization is quite different from what it is for instance in the Islamic civilization.

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2. The Roots of Colonialism

But let us now analyze the discrimination that followed as a result of grounding the Western concept of the rights of man in the representation of a non-Western otherness.

The beginning of our reconstruction goes back to the first half of the sixteenth century, to the important school of Salamanca, and in particular to the ideas of Francisco de Vitoria, who had to answer to the questions posed by the discovery of the "New World."

At the basis of his concept of man there was the Stoic philosophy that all men have the same material and spiritual nature.

On this basis he could declare in his important work, *On the American Indians* (Vitoria 1991a), that the Indians, too, had rights as a people and in particular property rights to their lands.

Vitoria claimed that the Indians had natural rights as Christian peoples, including rights to property and lordship. By virtue of their natural rights to the so called *dominium*, "before the arrival of the Spaniards these barbarians possessed true dominion, both in public and private affairs" (Vitoria 1991a, 251).

Moreover, Vitoria said that: "they could not be robbed of their property, either as private citizens or as princes, on the ground that they were not true masters (*ueri domini*)" (*ibidem*).

But there was a problem: If they had the same material and spiritual nature as Christian peoples, why were their habits and customs so different?

The answer was that there is a difference, from an Aristotelian perspective, between the term *potentially* and the term *in the act*. So the Indians are *potentially* rational as Christian peoples, but *in the act* they have not yet reached the same level or degree of civilization as Christian peoples: "the potential (*potentia*) which is incapable of being realized in the act (*actus*) is in vain (*frustra*)" (*ibidem*, 250).

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On this basis it was permitted the Spaniards would be justified in governing them in order to let them advance towards the so-called civilization.

In these considerations we can see the beginning of the Western idea of colonization, because there is clearly the idea that there is only one way to civilization, the Western one. There is no idea of the possibility of roads to a civilization different from the Western one.

Further, at the foundation of the international community conceived as a *communitas orbis*, Francisco de Vitoria placed a *ius communicationis ac societatis*, along with all the branches of law which acted as corollaries – the *ius commercii*, the *ius migrandi*, and so on –
and which also served to legitimize the Spanish conquest. Indeed, if the Indios had prevented the Spanish from establishing across the land and in perpetuity a law the Spanish themselves accordingly proclaimed to be universal (such that no harm would follow from that establishment), the Spanish would have been justified in waging war against the Indios. This breach of a system of law that Western doctrine had proclaimed to be universal would serve as cause to launch a "just war" against the Indios.

As Onuma Yasuaki (1993) has pointed out, this doctrine was held up against "barbarians" and against the *perpetui hostes* of Christianity, namely, the Turks and the Jews.

This conception went so far as to deny freedom of religion to the *infidels*. In the *Relectio de jure belli*, in the first part of the fourth question, Vitoria discusses "what, and how much, may be done in the just war." Taking up the first doubt, he asks "whether it is enough for the just war that the prince should believe that his cause is just." Vitoria resolutely answers no, for if a prince's opinion that he is in the right is enough to make a war just, "it would otherwise follow that most wars would be just on both sides" (Vitoria 1991b*,* 306). So it would happen that "even the wars of Turks and Saracens against Christians would be justified, since these peoples believe that they are serving God by waging them" (*ibidem*).

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In this way, religion breaks into the scene in framing the relation between war and justice, for the problem is no longer how to redress a wrong but how to deal with a *different faith in God*.

Once more Vitoria's conception is put to the test, and in facing the complexity of the challenge at hand, he simply asserts the certainty of the truth of Christianity, by saying that the Turks and the Saracens *believe* they are obeying God, with the implication that their belief is erroneous.

Western reason and Christian doctrine set thus themselves out as a granitic monument that neither the reasons of the Indios nor the faith of the Muslims can chip away at.

3. Hugo Grotius: the Civilizing Mission

A century later, Grotius's doctrine asserted the *jus gentium* as the basis on which the East Indians' lands and resources could be expropriated. His approach reveals a deep ambiguity. For in *De iure predae* he claims that the peoples of the East Indies have rights that they can assert against the Portuguese. To claim that the infidels have no ownership of their goods is to commit heresy, Grotius argues, and to take what they own away from them is to commit thievery and plunder, no less than if the same was done to Christians (Grotius 1868, cap. XII, 209)[1]. In the great world community, the rights of peoples had to be guaranteed *regardless of any differences of faith*. That is an important *de jure* statement! We will have to ask whether that principle was also followed in practice.

Grotius added that Plutarch before him felt that the barbarians' civilization was only a cover for greed, or, stated otherwise, he thought that an undue desire for the property of others was disguised under the pretext of the need to bring civilization to barbaric areas (Grotius 1868, cap. XII, 209; see Plutarco 1958, 763). It is extraordinary to find in the classics of international law the same arguments that to this day "Western civilization"

[1] In the acknowledgment of the native populations' rights, R. Higgins (1992, 278), has read an anticipation of the self-determination's right of the peoples.

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deploys to extend its hegemony over other regions and civilizations on Earth!

In reality, this defense that Grotius mounts in support of the rights of the peoples of the East Indies was entirely instrumental to the purpose of preventing the Portuguese from achieving a commercial monopoly over those lands.

In fact, Grotius himself argued that their rights could be violated.

Indeed, in *De jure belli ac pacis* (1913), he provided arguments legitimizing the colonial expansion of the West. In Book III, chapter II.V, he stated that if in any foreign country a judgment was pronounced contrary to law, it would be legitimate to intervene so as to reinstate the breached law. Here Grotius was clearly appealing to a denied law (*jus denegatum*) in virtue of which it was legitimate for Europeans to intervene in the lands of Asia, America, or Africa so as to enforce the law of the European nations.[2] It is quite apparent that here he is setting a "just" Western law against the law of the native peoples.

Elsewhere Grotius sets out the principle of a right of humanitarian "intervention," but this only winds up legitimizing Western intervention in the internal affairs of non-European countries. This happens, according to Grotius' perspective, when foreign sovereigns are considered so brutish and outrageous in their conduct as to bring on an external intervention. Indeed, as Grotius argues, if subjects cannot legitimately take up arms even in extreme cases, it does not follow that others cannot take up arms on their behalf.[3] The obstacle that prevents subjects from resisting does not also hold back those who are not subjects. For this reason Grotius invokes Seneca, saying that it is permissible to start a war against those sovereigns who do not belong to our people but oppress their own people. He is referring in particular to a situation that is often the reason why innocent people need to

[2] Grotius (1913, 446), "[…] exteri autem jus habent cogenti […]": "foreigners have the right of compulsion." See. about it, Naoya (1993, 254).
[3] *Ibidem*, Lib. II, caput XXV, § VIII : "Non tamen inde sequetur non posse pro ipsis ab aliis arma sumi."

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be defended.[4] Some commentators have even seen in these remarks by Grotius the first statement of the principle of humanitarian intervention (Lauterpacht 1946, 46)[5]. Others, by contrast, have only seen in his thought no more than an attempt to legitimize European expansion and imperialism (Röling 1992)[6].

The same ambivalence also runs through Grotius's reflection on the relation between Christian and non-Christian peoples. Indeed, on the one hand, Grotius said that there are no grounds for imposing the Christian religion by force,[7] but on the other he thought it *was* legitimate to punish and wage war against those who "persecuted" Christians. Grotius does not inquire into the possible causes explaining why Christians might be persecuted. He merely confines himself to stating that there is nothing in Christian doctrine that can harm human society: indeed only good can come out of it.[8] Nor can the hostility be explained by pointing out that what is new can cause alarm, nor is there any justification for aggression against a group of honest men. In short, Grotius concludes, there is no question about the goodness of the Christian religion: it is reality itself that speaks [!], and foreigners are forced to recognize that fact.[9] The reasons that foreigner may have for their action are irrelevant. *The truth borne by the Western Christian*

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[4] *Ibidem*, Lib. II, caput XXV, § VIII, 414: "quae saepe cum defensione innocentium conjuncta est." Onuma Yasuaki (1993, 108), points out that Grotius knew very well that an intervention for the defence of innocents could be based on selfish reasons, however he thought that the instrumentalisation of a right wasn't a reason enough to declare that it ceased to exist.

[5] Lauterpacht (1946, 46), highlights that the principle set out by Grotius, that is that "the exclusiveness of domestic jurisdiction stops where outrage upon humanity begins," is at the ground of the humanitarian intervention.

[6] Röling (1992, 297), who was a judge at the International Military Tribunal in Tokyo, states: "In short the enormous popularity of Grotius' doctrine becomes comprehensible when we recognize that […] in practice it did not restrict in any way the endeavour to subjugate the non-European peoples to European authority."

[7] In this respect Grotius 1913, Lib.II, Caput XX, § XLVIII, 345, mentions the Council of Toledo: "Praecipit Sancta Synodus nemini deinceps ad credendum vim inferre [The holy synod ordains that no one should be constrained to believe by force]."

[8] *Ibidem*: "nihil enim est in disciplina christiana […] quod humanae societati noceat, imo nihil quod non prosit."

[9] *Ibidem*: "Res ipsa loquitur, & extranei coguntur agnoscere." Cfr. Cavallar (2002, 152 and 154), who however denies that Grotius privileges the Europeans, because he thinks that Grotius worked for peace instead of being based on Eurocentric prejudices.

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civilization is manifest, and those who fail to recognize it will be compelled to do so by force!

This conception that Grotius expounds, recognizing freedom of commerce and freedom of the seas, while subordinating the law of non-Christian peoples to those principles, reflects the effort to project the nascent system of European states beyond European borders. It is therefore to that conception we must now turn.

4. Liberalism's "Heart of Darkness"

The age of revolutions of the late eighteenth century proclaimed the universal natural rights of man. But in reality those rights were reserved for the people of Europe.

This can be appreciated by looking at European colonial thought and its representation of non-European peoples.

Alexis de Tocqueville is celebrated as a liberal thinker who has analyzed and extolled the principles of American democracy. But if we look at what he wrote on Algeria we will see an entirely different picture.

In the first place, it is clearly through Western categories that Tocqueville interprets the Muslim world. In the second *Lettre sur l'Algérie*, of 1837, Tocqueville underscores the difference between the French people, "puissant et civilisé," and the peoples that to his eyes wee "à peu près barbares," (Tocqueville 1962a, 148) and who accordingly had to be progressively brought into the Western fold until the two races could be merged into a single people. All that needed to be done to this end, in his view, was to establish enduring relations with these peoples, and they would be induced to incorporate themselves (*s'incorporer*) into French civilization. This transformation would have been accomplished by imposing the Western conception of the administrative state on the colonies.

This view was developed in Tocqueville's subsequent writings (1962b), especially in *Travail sur l'Algérie* (of October 1841), where he can be seen

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to espouse a philosophy of history that likens the condition of the colonies to that of the "petite enfance des sociétés," (Tocqueville 1962b, 276) which is not yet ready for the great political institutions of France. Indeed, he argues that these institutions can be introduced only when the "barbarian" populations of Algeria will reach a higher level of development. What clearly comes through in Tocqueville's thought, therefore, is the unilinear conception of the development of society, not admitting of any alternative to the path followed by Western civilization.

This colonial conceit, predicated on a relation of superior to inferior, can also be seen at work in Tocqueville's analysis of the war the French army waged against the Arab tribes united under the leadership of Abd el-Kader. The clash between Western and "barbarian" civilizations of Islam informs the view that the *jus in bello* is subject to exceptions, to the point where, in Tocqueville's judgment, it was permissible to destroy harvests and pillage and lay waste to the country (*ibidem*, 228). These violations of the *jus in bello* were necessitated by the kind of warfare that was being waged in Algeria – not between states, but between a state and a people.

No less illuminating are Tocqueville's considerations on the institutional makeup that French colonies had to assume. Political power, "qui donne la première impulsion aux affaires," was to be held by the French. The secondary powers of government were to be exercised by the country's native inhabitants. Furthermore, French power in Algeria was to rest on the preexisting influences exercised by the country's religious or military authority (Tocqueville 1962c, 320).

Lastly, this institutional framework was to also provide Algeria with the security guarantees and individual freedoms in place in the metropolitan territories, but only for French people in the colony and not for the local population! (Tocqueville 1962b, 263-264). In short, the rights the French Revolution proclaimed as universal rights grounded in natural law were, on the contrary, recognized only for Western humanity, and they could also be

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extended to a non-European otherness, but only after an extensive "civilizing" process governed by the Europeans.

(Moreover at the beginning of the XX century the so-called "Muslim psychiatry," introduced in the French colonies by A. Porot, wanted to demonstrate "scientifically" – as Porot declared – that the Muslim mind and the the Muslim brain too was underdeveloped in comparison to the European one).

There emerges here the paradox and "heart of darkness" of the West, which has developed a great civilization of law and of rights that, despite its being proclaimed as universal, was only reserved for the Western world.

5. An "Inferior" Humanity

In the nineteenth century, a non-Eurocentric reading of international law enables us to uncover a negation of rights, or at least a markedly restrictive or reductive conception of them, in relation to peoples who could not be counted among the "civilized" nations. A non-Eurocentric approach will indeed make it possible to see how the rights of man get deformed when applied to a humanity regarded as inferior.

Thus the Italian international lawyer Pasquale Fiore on the one hand asserted the right of peoples that had not yet been civilized, but on the other set out an extremely constraining conception of such rights.

Indeed, he declared that the rights of savage populations (*populations sauvages*) were grounded in a "respect for personality" (Fiore 1909, 478). Accordingly, he recognized the international rights of man, defining them as "those rights that belong everyone as a man, rather than as a citizen of any given state. These are the rights of human personality according to international law" (Fiore 1898, 88). Fiore also recognized the international rights of peoples and nations: "Every people has the right to enact and modify its own political constitution and establish the government it shall deem best suited to protect the rights of fellow citizens, and it may request

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that the government established by the people themselves relate to other governments on the basis of international law" (*ibidem*, 89).

International law was "entrusted with studying the complex problem of colonial expansion," and so recognizing these rights meant establishing the legal principles "that must govern the way the colonizing civilized states are to relate to indigenous and barbarian races" (Fiore 1909, 479). In short, it fell to the science of international law to identify the principles that would serve as the basis on which to regulate relations between civilized peoples, on the one hand, and indigenous races, on the other, so as to protect the latter from despoilment, as happens with every arbitrary form of conquest. These considerations made it possible to clearly set out the purpose of international law, which was tasked not only with establishing the rights of states in their relations to one another, but also with "identifying and formulating the regal rules on which basis to regulate relations among all the beings [*êtres*] that are part of the international community, whether they be states, individuals, or groups" (*ibidem*, 479)[10].

But in reality the rules that were meant to regulate relations between the Western civilization and the savage peoples were geared toward asserting the superiority of the West.

Thus, for example, the property rights of noncivilized peoples were founded on the principle of settlement or occupation, and it was held that these rights could not be invoked against the principle of the European states' "sovereignty" (Westlake 1894, 129-133)[11]. So it was the principle of sovereignty that distinguished European international law and thus framed relations among Western states, legitimizing their dominion over the lands that came within the reach of territorial expansion. The "savage" people's settlement or occupation of land counted for nothing against the power that backed the sovereignty of the civilized states.

[10] In this regard, see Koskenniemi (2001, 128).
[11] About it, see *Ibidem*, 114.

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There were a couple of specific consequences that followed as a result of coming into contact with "other" peoples.

(1) On the one hand, the scope of international law, as an expression of the Western states' scientific consciousness, was limited to this system of states and was differentiated from other bases on which to regulate relations among peoples. So, for example, international law was said to belong to the Christian nations and could not be extended and applied to Muslim nations (Wheaton 2002, 45)[12].

(2) On the other hand, even though European international law – Christian and Aryan, and centered on the idea of the sovereignty of the state – proclaimed itself to be superior, it did nonetheless concede the need for a "humane" treatment of "noncivilized" peoples, and it did recognize natives as having the rights of man. These are the same universal rights which Francisco de Vitoria had invoked to legitimize the Spanish conquerors' domination and commercial expansion into the New World, and which Grotius had instrumentally resorted to in order to secure freedom of navigation for the Dutch in their struggle against Portuguese design to monopolize trade routes across the high seas – *now these same rights are being reduced to a magnanimous Western treatment of an "inferior" humanity*.

6. The Legitimation of Humanitarian Intervention

Over the course of the nineteenth century, this paradigm of international law took other directions as well. Indeed, international law also developed the

[12] Mentioning sources of the history of international law – Grotius, Bynkershoek, Montesquieu – Wheaton, an American diplomat in Europe, declared that, according to these scholars, there was no universal, unchanging law of nations "which all mankind in all ages and countries, ancient and modern, savage and civilized, have recognized in theory or in practice," see Wheaton (2002, 44). Wheaton (*ibidem*, 44-45) continued: The jus gentium "is only a particular law, applicable to a distinct set or family of nations, varying at different times with the change in religion,manners, government, and other institutions, among every class of nations. Hence the international law of the civilized, Christian nations of Europe and America is one thing; and that which governs the intercourse of the Mohammedan nations of the East with each other, and with Christians, is another and a very different thing."

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concept of human rights / "human law" understood as the rights / law of a "human society," and as the basis on which to legitimize "humanitarian intervention" in states considered to be "barbarian," like the Ottoman empire, or "savage," like the institutional arrangements in place on the African continent.

These aspects of the paradigm of international law can be illustrated by looking at the debate on international law in the second half of the nineteenth century, focusing in particular on the theses advanced by A. Pillet, professor of international law at the university of Grenoble.

It was Pillet's view that the peoples of the world are organized on three levels: on the first level we have the national societies, where we find the sphere of relations among individuals within the same territory; on the second level we have the international society, the sphere of relations among states; and on the third level we have the human society, the sphere of relations among humans above and beyond the political entities they belong to. Corresponding to each form of society, according to Pillet, was a distinctive form of law: national law, international law, and human law, respectively (Pillet 1894, 13)[13]. Human law – the form of law specific to human society – consisted of "a set of obligatory principles applying to humans solely by virtue of their being human" (*ibidem*).

The French lawyer Rougier felt that this was still too vague a definition of human law and thus sought to bring it into sharper focus. That he did by explaining that this was the highest form of law, for it answered "the deepest and most abiding needs inherent in human nature." As such, human law had to "necessarily seep into and inform national and international law," its purpose being to attend to the human rights (*les droits humains*) (Rougier 1910, 492) of the national and international society.

[13] In Pillet's own words (1894, 13): "We thus reach the third and final level in our progression. To the most general of the three forms of society must correspond the most general of all duties; to the human community, human law." (my translation). The French original: "Nous arrivons ainsi au troisième et dernier échelon de notre progression. A la plus générale des trois formes de société doit correspondre le plus général des tous les doits; à la communauté humaine, un droit humain."

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To appreciate as much, one just had to look at the path of human law as evidenced, on a national level, in the establishment of political freedoms and, on an international level, in the protection of prisoners of war, the abolition of the slave trade, the institution of international arbitration, and other like developments. And so it was that in the 19th century a consensus emerged on the foundation of human law: it lay in the principle of solidarity. Rougier looked in particular to Léon Duguit (1901), who in social or human solidarity saw the basic principle of law, and no positive enactment that failed to embody that principle could claim legitimacy as law. In short: "Human law is none other than the expression of human solidarity" (Rougier 1910, 493). In a passage approvingly quoted by Koskenniemi, however, E.H. Carr observes that "pleas for international solidarity and world union come from those dominant nations which may hope to exercise control over a unified world" (Carr 1981, 86, quoted in Koskenniemi 2004, 201).

But what content did this human law need to take in order to serve as the foundation of positive law? Because human solidarity was understood to protect all activities essential to the human being, human law had to encompass the right to life and liberty, as well as the right to legality, that is, the right to a legal system under which these rights of the human being are recognized and protected.

In the Western debate of the 19th century human law and the rights it comprised were found to encapsulate the essential aim recognized by all "civil states." And thus was sealed the idea framing the paradigm for humanitarian intervention: this intervention was made to rest on this Western conceit of a community of states committed to the principle of human solidarity, a principle that in human law found its legal embodiment. It was thus a specifically Western construct that provided the criterion on which to judge other states and peoples as rough or nonhuman. This much can be appreciated by looking a Rougier's conclusions:

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When acts contrary to human solidarity are [...] the work of a barbaric state [*État barbare*] or one that is semicivilized [*demi-civilisé*] [...], the civil powers are compelled to resort to a more vigorous mode of control through which to *prevent* evil before it comes to the point where it needs to be repressed or redressed. Plain intervention is thus replaced by a permanent right of intervention: a right to protection. That is the right the Western powers have claimed for themselves against the Porte [meaning the Ottoman Empire] (Rougier 1910, 497).

It was deemed legitimate for the European states to exercise their right to protection even more robustly by setting up a protectorate, or they could assert against the "more backward" tribes of Africa what came to be known as the "right to civilize" (*droit de la civilisation*) (Bluntschli 1895). But this was of course a way to dissemble the true nature of the Western powers' interest, which was to annex territories (Rougier 1910, 497).

In short, Western human law, base on the idea of solidarity, became the foundation for breaching the rights of peoples.

7. The Islamic Concept of Human Rights

After World War II, when the crisis of colonialism could already be sensed, the debates on the different concepts of human rights made it evident that we were facing a "clash of civilizations."

In 1947 during the debates on the draft of the (so-called) Universal Declaration of Human Rights, deep conflicts arose around the different understandings the Western and the Muslim tradition had of human rights, particularly as concerned the right to marry regardless of race, nationality, or religion and freedom of thought, conscience, and religion. So, for example, the representative of the government of Saudi Arabia declared, in regard to the right to freely marry, that

> the authors of the draft declaration had, for the most part, taken into consideration only the standards recognized by the western

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> civilization and had ignored more ancient civilizations which were past the experimental stage, and the institutions of which, for example, marriage had proved their wisdom down through the centuries. *It was not for the Committee to proclaim the superiority of one civilization over all others or to establish uniform standards for all the countries of the world* (Third Committee, *Summary Records of Meetings* 1948, 370).

Article 16 of the draft (Article 18 of the Declaration) proclaims the freedom of thought, conscience, and religion, and here the representative of Saudi Arabia proposed to eliminate "the freedom to change his religion or belief," because this freedom was in contrast with Islam.

The amendment proposed by Saudi Arabia was rejected – a clear expression of a clash of civilizations.

The representative of Saudi Arabia also accused the colonial powers of imposing their point of view on the peoples under their government. He asked the French representative whether his government had consulted the Muslim peoples of North Africa and other French territories before accepting the text, or whether it intended to impose it on them arbitrarily. He also asked the other colonial Powers, notably the United Kingdom, Belgium, and the Netherlands, whether they were not concerned about denying the religious beliefs of their Muslim citizens by imposing that article on them.

On that occasion the conflict concerned the history of the controversial relations between the Western world – with its religious proselytism and colonial rule – and the Muslim world. Indeed, the Saudi representative declared that

> throughout history missionaries had often abused their rights by becoming the forerunners of a political intervention, and there were many instances where peoples had been drawn into murderous conflict by the missionaries' efforts to convert them.

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> So it was that bloody and unjustifiable crusades organized in the name of religion had had as their real economic and political purpose the acquisition of a place in the sun for the surplus populations of Europe. Religious wars between Catholics and Protestants had caused, in Europe, the death of millions of persons of both faiths which differed but little from each other (i*bidem*, 392). Once again he recalled the "clash of civilization," remembering how certain groups of people had claimed throughout history to be God's chosen people or to belong to a superior religion, merely because they were more powerful than their neighbours of a different faith (*ibidem*, 392).

The declaration of Western rights is here charged with having legitimized religious proselytism and colonial rule.

8. The Statement of American Anthropologists on Human Rights

But the criticism against the Western concept of rights was expressed not only by members of the Muslim world but also by important exponents of the Western world. Indeed, in 1947 the journal *American Anthropologist* published a "Statement on Human Rights" explicitly pointing out the ethnocentrism of the draft of the (so called) Universal Declaration of Human Rights.

The Statement proclaimed that the problem considered by the Commission on Human Rights of the UN had to be approached from two points of view: "The first [...] concerns the respect for the personality of the individual as such, and his rights to its fullest development. In a world order, however, respect for the cultures of differing human groups is equally important."

The Statement further acknowledged that the Declaration contained definitions of freedom and concepts of the nature of human rights that had

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been conceived in the tradition of Western Europe and America. But, as the statement also recognized,

> the consequences of this point of view have been disastrous for mankind. Doctrines of the "white man's burden" have been employed to implement economic exploitation and to deny the right to control their own affairs to millions of peoples over the world, where the expansion of Europe and America has not meant the literal extermination of whole populations [...] the history of the expansion of the Western world has been marked by the demoralization of human personality and disintegration of human rights among the peoples over whom hegemony has been established.

In its conclusion, the Statement said that the Declaration ought to contain another fundamental right: "Only when a statement of the right of men to live in terms of their own traditions is incorporated in the proposed Declaration, then can the next step of defining the rights and duties of human groups as regards each other be set upon firm foundation of the present-day scientific knowledge of Man" (Statement on Human Rights, *American Anthropologist*, n. 4, 1947, 543).

9. The Revolt against the West

Until World War II, the history of the rights of man had two faces: on the one hand, it marked a trend in which civil societies in Western countries increased their spheres of freedom vis-à-vis the sovereignty of Western states; on the other hand, that same process deprived non-Western peoples and individuals of their rights.

But starting from the 1950s, the history of human rights took on a different meaning with the so-called "revolt against the West."

In answer to the question whether the peoples of the Third World enacted this revolt invoking Western values or their own values, H. Bull said that

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they initially appropriated Western values, turning them against the West, in such a way that these values took on an authentically "universal" meaning, but they subsequently resorted to their own values.

Five phases can be identified in the revolt against the West.

First, there was the struggle for equal sovereignty. The inferior status of non-Western peoples was expressed by the extraterritorial jurisdiction of citizens of Western states within non-Western territories. This struggle was spearheaded by Japan, followed by Turkey, Egypt, and China (Bull 1989, 220).

Second, there was the anti-colonial revolution that began in the 1960s and 1970s with the struggles of Asian and African peoples.

Third, there was the struggle for racial equality – a struggle against the "privileged position of the white race" (*ibidem,* 221). In this regard it bears pointing out the Afro-Asian movement that was launched at Bandung in 1955 and the 1965 International Convention on the Elimination of All Forms of Racial Discrimination.

Fourth, there was the struggle for economic justice against all forms of economic exploitation. In December 1974, the UN General Assembly issued the resolution on the Charter of Economic Rights and Duties of the States, which proclaimed the rights and duties necessary to establish a New International Economic Order. Some articles of the Charter expressed the historical phase of decolonization. In Article 16.1 read: "It is the right and the duty of all States, individually and collectively, to eliminate colonialism, *apartheid*, racial discrimination, neo-colonialism [...]." Taking the same perspective, Article 16.2 reads: "No State has the right to promote or encourage investments that may constitute an obstacle to the liberation of a territory occupied by force." (General Assembly, Twenty-ninth Session, Resolutions adopted by the General Assembly, 3281, XXIX, *Charter of Economic Rights and Duties of the States*, 12 December 1974).

The rights and duties of states had to be the basis on which to establish the New International Economic Order that had been proclaimed by the UN

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General Assembly in the Sixth Special Session of April 9 to May 2, 1974.[14] Among the principles of the New Economic Order was the fundamental acknowledgment of "the right of every country to adopt the economic and social system that it deems the most appropriate for its own development and not to be subjected to discrimination of any kind as a result" (General Assembly – Sixth Special Session, 9 April – 2 May 1974, Resolutions adopted on the Report of the ad hoc Committee of the Sixth Special Session, *Declaration on the Establishment of a New International Economic Order*).

In December 1986, the UN General Assembly issued the Declaration on the Right to Development,[15] which was conceived as a human right.

Lastly, there was a *fifth phase*, namely, the struggle for cultural liberation, which is the struggle of "non-Western peoples to throw off the intellectual or cultural ascendancy of the Western world so as to assert their own identity and autonomy in matters of the spirit" (Bull 1989, 222).

At the beginning this struggle, Third World peoples adopted Western values (as can be appreciated by their embracing the right of nations to self-determination, the right of human beings to equal treatment, and so on), but afterward they turned to non-Western values (witness the 1990 Islamic Charter of Human Rights), and indigenous cultures can interpreted as a clear revolt against the Western concept of human rights.

In defending their own economic interests, Third World countries asserted their own traditions and cultural identities, as has can be

[14] On this, see the volume written by M. Bedjaoui under the auspices of Unesco. M. Bedjaoui served as Algeria's ambassador to France, as member of the UN Law Commission and as Associate of the International Law Institute. The book of Bedjaoui (1979) highlights the emergence of a "multipolar world" where states should have "an international right to participate" in the process of elaboration and application of the rules governing their own relations. Bedjaoui also emphasises that the establishment of a new economic and juridical order is the goal of Third-World countries for the protection of their recently obtained independence and of their sovereignty. But actually Western countries have produced a new paradigm, which expresses a postcolonial attitude, to contain and resist Third-World countries' claims and requests.

[15] Art. 1 of this Declaration reads: "the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."

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appreciated, for example, in the ongoing struggles of South American Indians. In this way there clearly emerges, on the one hand, the need to take a relativistic approach in analyzing the postwar declarations of the rights of individual and peoples and, on the other hand, an awareness that the movements of Third World peoples "have overturned the old structure of international law and organization that once served to sanctify their subject status" (*ibidem*, 227).

10. Psychical Universality and Cultural Diversity

This ambivalence of international law and of human rights shows that the unsurmountable opposition between human rights and the economic policies of the Western powers can in fact be bent in favor of economic policies. This reveals the continuity between the ideology of colonialism, which has been justified as grounded in the "civilization" of peoples, and the human rights ideology which has been espoused by the neocolonial powers, and which can be used to justify they free-market economic policies. According to U. Baxi, the principles enshrined in the Universal Declaration of Human Rights now risk being replaced by a human rights paradigm aligned with the market and functional to commerce (Baxi 1998, 163)[16].

The necessarily relativistic approach to the history of human rights makes it inevitable to reflect on the possible alternatives that open up once we come to appreciate that there is not just one history of rights. Two alternatives suggest themselves. The first alternative is that of the clash between different civilizations and rights. From this perspective, we can only suppose that a single conception asserts itself above all others, either defeating or subordinating them. The second alternative is instead that of a

[16] This paradigm states the principle according to which the human rights can have a future only on the ground of the economic development. In this perspective it is declared that the free market only can offer the best hopes for the human emancipation. On the contrary the result is the legitimation of the imposition of an extraordinary human suffering on the part of the global capital: see Baxi (1998, 168).

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multi-civilizational history of rights built on a foundation enabling the different histories to coexist. But what is this foundation?

An answer can perhaps be provided by drawing on different sources. One place we can look to in building a common foundation for an international law of human rights is the philosophy of law. In a book published a few years ago, Ronald Dworkin argued that two principles should guide the future of democracy in a multicultural world:

(1) The first principle states that every human life has its own distinctive objective value in virtue of its potential, and it is important for it to realize that potential.

(2) The second principle states that every person is or should be responsible for fulfilling his or her life. This responsibility means that we must each *judge and freely choose the kind of life we want to live in order to achieve such fulfillment*.

These two principles are the necessary conditions for respecting the *dignity* of each human being (Dworkin 2006, 9-11). The first principle corresponds to the ideal of equality; the second, to the ideal of freedom. The first one can be understood as the condition for satisfying the second. For if we recognize every human life as valuable in itself, quite apart from any ideological or cultural filters we might have, then we won't be prompted to discriminate on the basis of rights, such as *citizenship*, that have been granted to some but denied to others.

Such denials of rights are quite serious, for they result in conditions of legal inferiority that inevitably translate into judgments of anthropological inferiority, on the reasoning that "so-and-so has no rights because he or she is not like us." The recognition of each human life as inherently valuable is instead the condition that makes it possible to freely choose the kind of life we want to live, which means that we might even choose a life that is culturally different from the lives of those who belong to the majority.

Recognizing each human life as inherently valuable, thus protecting the dignity of each human life, means that each individual must be treated with

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equal concern and respect. The protection of dignity so understood rules out a merely formal concept of equality (equality as "equal treatment," while leaving inequalities as they are) and instead calls for a concept of substantive equality, on which equality means "being treated as equals," having the same concern and respect for different human beings in different conditions.

Proceeding from the substantive concept of equality just introduced, this conception seeks to set the conditions that would make it possible to overcome all forms of racism, discrimination, and marginalization.

But the organization of Western knowledge tends to impose and apply its own criteria. As Foucault has pointed out, each discipline has its own "discourse," that is, a paradigm that sets out a precise conception of disease, health, normality, and pathology.

This mentality – a carryover from the colonial era – has not been completely overcome. And so certain manifestations that appear pathological to us when judged according to our own criteria will look entirely physiological in other cultures. Indeed, a physician will generally view the patient's body through a strictly biological lens, without considering the culture in which that patient has been brought up (Quaranta and Ricca, 2012). Indeed, biomedical reductionism prevents us from appreciating how relevant the meaning is which patients give to their own experience of the disease they are suffering from (*ibidem*, 25).

Disease conjures up a thick web of words and conceptions of reality and images of the body. This underscores the need for a critical reflection on the concept of culture, which, as has been pointed out by the more insightful contributions in cultural and medical anthropology, needs to be interpreted not in any "essentialistic" way but in a process-oriented way, that is, by taking a relational approach that ties patients to their significant others and to health professionals.

This complex biological and cultural reality is something that should be taken into account in training physicians, psychologists, psychiatrists, social

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workers, and administrators, so that they may finally appreciate the normality of diversity. As difficult as that goal may be to reach, it is not an impossible undertaking.

This desideratum also brings to light the paradox of multiculturalism, in that the *relativism* it entails – the equal legitimacy it ascribes to different cultural approaches and behaviors – is founded on a *universal principle*, which is that *each human life needs to be recognized as having equal worth*.

The idea of dignity as an *objective* value ascribable to each human being's life can be the necessary foundation, imposed by the struggles of the non-Western peoples, on which to proceed in tracing out culturally differentiated histories of rights.

We can thus look for a shared foundation on which to reconstruct an international law of human rights, and to this end we can turn to a discipline that is far removed from law, namely, ethnopsychoanalysis, which sets up a *complementary* relation between the postulate of *psychical universality* and the plurality of *cultural production*.[17]

The father of this complemental ethnopsychoanalysis is G. Devereux, who accordingly argues that complementary relation holds between an individual's understanding and that of society: "The concept of human psychism and that of culture," he says, "are inextricably bound up both methodologically and functionally" (Devereux 1953, 300).

This view rests on a couple of tenets: first, "the psychical unity of humanity, which has an exceeding capacity for variation" (Devereux 1955, 92), and, second, the ability of different cultures to shape a wide range of cultural behaviors.

[17] M.R. Moro (2005,128, my italics), an outstanding exponent of this perspective, declares: "From a theoretical point of view it exists a postulate without which the ethno-psychoanalysis could not have been realized, that is the postulate of the *psychic universality* or, in other words, the fundamental unity of the human psychism (Devereux, 1970). From this postulate it derives the necessity of acknowledging the *same ethical and scientific statute* of all human beings, of their cultural and psychic productions, of their ways of living and thinking, however different and divergent they can be […] the universal is a point of view towards which tends every knowledge regarding the human sciences without the certainty of ever having reached it."

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In short, both psychoanalysis and ethnology are branches of anthropology, which in turn has been defined by Kant as "the science of that which in man is properly human" (Devereux 1953, 303). So by recognizing the universality of the psyche and the inherent value of each human life, while embracing its plural cultural forms, imposed by the struggles of non-Western peoples, we can construct a foundation on which to enable society to appreciate how important it is for diversities to coexist, as well as to appreciate the wealth that can come out of such coexistence.

On these premises we can represent the history of human rights as a plurality of cultural histories, while giving shape to an international law of human rights grounded in a mutual recognition of different cultural traditions.

References

Baxi U. (1998). Voices of Suffering and the Future of Human Rights, in *Transnational Law and Contemporary Problems*, n. 8.

Bedjaoui M. (1979). *Towards a New International Economic Order* (Holmes & Meier Publishers).

Bluntschli J.C. (1895). *Le droit international codifié* (1868) (Guillaumin).

Bull H. (1989). The Revolt against the West, in H. Bull, and A.Watson (eds.), *The Expansion of International Society* (Clarendon Press).

Carr E.H. (1981). *The Twenty Years' Crisis, 1919–1939: An Introduction to the Study of International Relations*. (Macmillan).

Cavallar G. (2002). *The Rights of Strangers: Theories of International Hospitality, the Global Community, and Political Justice since Vitoria* (Ashgate).

Devereux G. (1975). Cultura e inconscio (1955), in *Saggi di etnopsicoanalisi complementarista* (Bompiani).

Devereux G. (1978). I fattori culturali nella terapia psicoanalitica (1953), in *Saggi di etnopsichiatria generale* (Armando Armando).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/12480

Duguit L. (1901). *L'état, le droit objectif et la loi positive* (Fontemoing).

Dworkin, R. (2006). *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press).

Fiore P. (1898). *Il diritto internazionale codificato e la sua sanzione giuridica* (Unione Tipografico-Editrice).

Fiore P. (1909). La science du droit international. Horizons nouveaux, in *Révue générale de Droit International*, t. XVI.

Grotius H. (1868), *De Jure Praedae Commentarius: Ex Auctoris Codice Descripsit et Vulgavit* (1604) (Martinum Nijhoff).

Grotius H. (1913). *De Jure Belli ac Pacis Libri Tres, in quibus Jus Naturae & Gentium, item Juris Publici precipua explicantur* (1625, 1646) (Carnegie Institution of Washington).

Higgins R. (1992). Grotius and the Development of International Law in the United Nations Period, in H. Bull, B. Kingsbury, and A. Roberts (eds.), *Hugo Grotius and International Relations* (Clarendon Press).

Koskenniemi M. (2001). *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge University Press).

Koskenniemi M. (2004). International Law and Hegemony: A Reconfiguration, in *Cambridge Review of International Affairs*, n. 2.

Lauterpacht H. (1946). The Grotian Tradition in International Law, in *British Yearbook of International Law,* vol. XXIII.

Moro M.R. (2005). *Bambini di qui venuti da altrove* (Franco Angeli).

Naoya K. (1993). The Laws of War, in O. Yasuaki (ed.), *A Normative Approach to War* (Clarendon Press).

Pillet A. (1894). Le droit international public. Ses elements constitutifs, son domaine, son objet, in *Revue générale de droit international public,* t. I.

Plutarco (1958). Vita di Pompeo, 70, vol. I, in *Vite parallele* (Einaudi).

Quaranta I., and Ricca M. (2012). *Malati fuori luogo. Medicina interculturale* (Raffaello Cortina Editore).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/12480

Röling B.V.A. (1992). Are Grotius' Ideas Obsolete in an Expanded World?, in H. Bull, B. Kingsbury, and A. Roberts A (eds.), *Hugo Grotius and International Relations* (Clarendon Press).

Rougier A. (1910). La Theorie de l'Intervention d'Humanité, in *Revue générale de droit international public*, vol. XVII.

Tocqueville A. de (1962a). Seconde lettre sur l'Algérie (22 aout 1837), in *Oeuvres Complètes*, Tome III, 1, *Ecrits et Discours Politiques* (Gallimard).

Tocqueville A. de (1962b). Travail sur l'Algérie (octobre 1841), in *Oeuvres Complètes*, Tome III, 1, *Ecrits et Discours Politiques* (Gallimard).

Tocqueville A. de (1962c). Rapport sur l'Algérie. Sur le projet de loi relatif aux crédits extraordinaires demandés pour l'Algérie (1847), in *Oeuvres Complètes*, Tome III, 1, *Ecrits et Discours Politiques* (Gallimard).

Vitoria F. de (1991a). On the American Indians (1539), in A. Pagden, and J. Lawrance (eds.), *Political Writings* (Cambridge University Press).

Vitoria F. de (1991b). On the Law of War (1539), in A. Pagden, and J. Lawrance (1991, eds.), *Political Writings* (Cambridge University Press).

Westlake J. (1894). *Chapters in the Principles of International Law* (Cambridge University Press).

Wheaton H. (2002). *Elements of International Law: with a Sketch of the History of the Science* (1836) (The Lawbook Exchange).

Yasuaki O. (1993). War, in O. Yasuaki (ed.), *A Normative Approach to War* (Clarendon Press).

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