Strasbourg, 4 May 2010

CDL-UD(2010)005
Engl. Only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

in co-operation with

THE FACULTY OF LAW AND THE CLUSTER OF EXCELLENCE "FORMATION OF NORMATIVE ORDERS" OF GOETHE UNIVERSITY, FRANKFURT AM MAIN, GERMANY

and with

THE CENTRE OF EXCELLENCE IN FOUNDATIONS OF EUROPEAN LAW AND POLITY RESEARCH HELSINKI UNIVERSITY, FINLAND

UNIDEM SEMINAR

"DEFINITION AND DEVELOPMENT OF HUMAN RIGHTS AND POPULAR SOVEREIGNTY IN EUROPE"

Frankfurt am Main, Germany

15 – 16 May 2009

«"FROM ABOVE", OR "FROM THE BOTTOM UP"?

THE PROTECTION OF HUMAN RIGHTS BETWEEN DESCENDING AND ASCENDING INTERPRETATIONS"»

by

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The history of human rights is not the story of popular sovereignty. Rather, the idea that there are rights which every human being possesses for the very reason of being a human[1] arose only after the ancient forms of popular participation in the government of the polity fell into a deathly crisis. Furthermore, the conception that rights characterize eminently the status of the citizens as an effect of their belonging to the political community and as a precondition for their involvement in political life always stood as a menace to the universality of human rights. The rejection of an abstract understanding of rights as existing merely in an ethereal space situated above democratic participation – a rejection which is the implicit consequence of their foundation on popular sovereignty – provides otherwise precisely for that radication of rights in political processes "from the bottom up", which we miss in many forms of universalism.[2]

Watching at the question from the point of view of the history of ideas, the foundation of human rights is therefore situated between two poles. The first interpretation sees rights coming "from above", which guarantees that they are not depending on exclusive procedures of popular participation, but runs also the risk of entrusting them to opaque instances claiming to possess ethical truth. The second interpretation situates rights within social and political processes and presupposes therefore participation in order to specify form and content of the entitlements,[3] however at the cost of a limited inclusion. A sound conception of human rights needs both universal inclusion and democratic radication. However, it has to avoid the dangers contained therein as well: an abstract and sometimes even quasi-authoritarian definition of substantive rights on the one hand, and the tendency to particularism on the other. For that reason, an understanding of human rights able to cope with the challenges of the 21st century should overcome the mutual rejection of the two traditions and incorporate some elements deriving from both legacies, while avoiding their shortcomings. The challenge will thus consist in finding a theoretical solution capable to draw a picture of a system of rights containing at the same time universality und social radication in democratic processes, both within a multilevel model of social interaction.

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1 *Human rights* are here defined as those rights to which every human is entitled for the very reason of its belonging to the universal community of human beings. On contrast, *citizens rights* are those rights that belong only to the citizens of a specific polity. Turning from philosophical principles or general legal norms to constitutional norms binding the institutions of concrete polities, human rights take the form of *fundamental rights*. At this level they meet the citizens rights guaranteed by those concrete polities, causing sometimes confusion. To avoid misunderstandings, two elements are therefore always to be distinguished in the concept of fundamental rights: on the one hand the contents of universal human rights, on the other the exclusive entitlements of citizens.

2 Ingeborg Maus, *Menschenrechte als Ermächtigungsnormen internationaler Politik oder: der zerstörte Zusammenhang von Menschenrechten und Demokratie*, in: Hauke Brunkhorst, Wolfgang R. Köhler, Matthias Lutz-Bachmann (eds.), *Recht auf Menschenrechte*, Suhrkamp, Frankfurt/M. 1999, at 276; Maus, *Zur Aufklärung der Demokratietheorie*, Suhrkamp, Frankfurt/M. 1992; Maus, *Liberties and Popular Sovereignty: On Jürgen Habermas's Reconstruction of the System of Rights*, in: 17 Cardozo Law Review 825 (1995–1996).

3 Gret Haller, *Menschenrechte und Volkssouveränität: Mögliche Antworten auf eine 200 Jahre alte offene Frage*, in: Armin Bammer, Gerhart Holzinger, Mathias Vogl, Gregor Wenda (eds.), *Rechtsschutz gestern – heute – morgen*, NWV, Wien 2008, at 541.

The inquiry is articulated in three steps. The first paragraph will concentrate on the origin of the foundation of human rights "from above" beginning with the decline of ancient republicanism. While pointing out the novelty of the approach, also deficits will be outlined, such as the difficulty in determining the contents of entitlements without a direct involvement of the very bearers of rights, or the danger that arises from almost uncontrolled instances pretending to appoint themselves to "guardians" of an alleged ethical truth embedded in society (I.). Part II will start with a change of paradigm: collocating the individuals at the centre of society, Hobbes' political philosophy paved the way for a "bottom-up" conception of human rights, now put in the hands of their very bearers. In fact, in Hobbes' view individuals waive almost all their rights, alienating them to a monarch vested with absolute sovereignty. Nevertheless, the seed had been sown: in the following developments of the contract theory – in particular in the works of Locke and Rousseau – the centrality of individuals in the conception of political community is intertwined with a specific sensibility for the inalienability of their rights. Yet, even the "bottom-up" conception of human rights of modern philosophy is characterized by two significant problems: first, the exclusive concentration on the human rights protection within the borders of the single nation, reducing them to mere rights of citizens and missing therefore a supranational dimension; second, the danger of projecting individual rights into the sphere of an unrestrained popular sovereignty, namely into a *volonté générale*, which can easily degenerate into tyranny (II.). Kant indicated the way to overcome both problems, on the one hand by limiting the risks of popular sovereignty through an adequate division of powers, on the other by postulating a multilevel conception of public law including for the first time in the history of philosophical thought a cosmopolitan public law grounded on the premises of modern individualism. Nonetheless, Kant's proposal remained unclear, due to the ambiguity of his individualistic paradigm. Moving from his suggestions, but going beyond his paradigmatic horizon, Part III will propose a new approach, based on the communicative understanding of social interaction (III.).

I. The Descending Interpretation of Human Rights: The Foundation "From Above"

Following the understanding of classic antiquity the universality of human beings consisted only in their physical constitution and ethical dispositions. As social and political beings, on the contrary, they were members of communities of limited range. Neither Plato's concept of «justice» (δικαιοσύνη),[4] nor Aristotle's theory of the natural sociability of humans[5] were thought to surpass the border of the single *poleis*. At the same time the idea of «isonomy» (ἰσονομία), namely the «equality within the range of the law» on which the praxis of political freedom in ancient Greece was based,[6] was applied only to the free citizens of the polity, making clear that the notion of *nomos* had – first, at least – no universal scope. Thus, the accentuation of the equality of all humans under an all encompassing *nomos*, against the particularity of their belonging to a specific community, remained an absolute exception in ancient Greece as well as in the Roman republic, with no influence on the political praxis, nor on the philosophical thought.[7]

To conceive the idea of an unlimited belonging of all humans to a global community, the notion of a universal *nomos* was first needed. Only from the submission of the *nomoi* of the single polities to a higher law could arise the attribution of rights not merely to the citizens, but to all humans. This paradigmatic revolution was introduced by the Stoic philosophy after the end of

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4 Plato, *Republic*, Harvard University Press, Cambridge (Mass.) 1980, Book II, 367e et seq., Book IV, 432b et seq., Book V, 469b et seq.

5 Aristotle, *Politics*, Harvard University Press, Cambridge (Mass.) 1967, I, 2, 1252a et seq.

6 Hannah Arendt, *On Revolution*, Viking, New York 1963, at 23.

7 Otfried Höffe, *Demokratie im Zeitalter der Globalisierung*, Beck, München 2002 (1st ed. 1999), at 234. In fact, the only significant exception can be found in a sentence of Heraclitus: Hermann Diels, Walther Kranz (eds.), *Die Fragmente der Vorsokratiker*, Rowohlt, Hamburg 1957, at 22 B 14. See also Ernst-Wolfgang Böckenförde, *Geschichte der Rechts- und Staatsphilosophie. Antike und Mittelalter*, Mohr Siebeck, Tübingen 2002, at 40.

classic isonomy and the transition to broader cosmopolitan polities characterized by a strong centralized authority and a structural inequality in front of the law, such as Alexander's Macedonian or the Roman Empire. In the Stoic view not merely the physical, but also the social world is ruled by only one fundamental functional principle, the *logos*.[8] From this principle a general law is derived, the *nomos*, which in its universality was considered to build the benchmark of validity for all positive laws of concrete societies. On the basis of the Stoic understanding of metaphysics and ethics evolved the idea of a *natural reason* common to all rational beings – and to all humans in particular – and eventually the theory of *natural law*, as it was expressed by Cicero:

> There is a true law, a right reason, conformable to nature, universal, unchangeable, eternal, whose commands urge us to duty, and whose prohibitions restrain us from evil. Whether it enjoins or forbids, the good respect its injunctions, and the wicked treat them with indifference. This law cannot be contradicted by any other law, and is not liable either to derogation or abrogation. Neither the senate nor the people can give us any dispensation for not obeying this universal law of justice.[9]

According to the concept of natural law, the validity criterion of positive law does not consist – as it was in the ancient republics – in the correct application of the rules of political participation, but is rather situated at a suprapositive level. In other words, the legitimacy of legal norms does not "ascend" from popular sovereignty, but "descend" from purely rational abstract principles. A first condition for the establishment of a human rights theory – namely the overcoming of the restraining identification of the *nomos* with the law in force within single and limited communities – was thus fulfilled. The horizon of social and legal rules had been amplified and made able to sustain universality and, therefore, to encompass all humans. In order to claim that the "descending" principles of natural law can actually serve as a convincing foundation of human rights, however, two further elements were required: first, natural law had to be centred on the ideal of human dignity; second, a *jus* had to be conceived as a description not only of an "objective" law or of a set of legal rules, but also – and rather – as the definition of an entitlement (or a number of entitlements) possessed by all humans.

None of both elements was central to the Stoic vision, which was a *Weltanschauung* moving from the interest in discovering the essence of world order, more than from the articulation of the existential condition of humans. Yet, some of the most relevant components of the Stoic philosophy – among these the conception of natural law – were transfused into Christendom. In Christian thought, significantly more than before, the idea of human dignity came to the fore. This happened particularly by describing man as *imago Dei*:[10] being «images of God», humans could be seen as bearers of those rights immediately deriving from the contents of natural law. A second step in establishing a human rights theory had been therefore undertaken. In the most sophisticated presentation of the Christian Catholic understanding of the legal system, namely in Suarez' *De legibus*,[11] laws are structured at four levels, from the highest – the *lex divina* or *lex aeterna* – to the lowest one – the *lex civilis* –, passing through the *lex naturalis* and the *jus gentium*. Though maintaining its specificity, each level from the second downward is derived from the level above, in the sense that its content, if it has to be accepted as "law", cannot be in contrast with the substance of the higher law. Rather, it has to be seen as the partial application of the contents of the superior level to a different ontological context. So, the

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8 Johannes von Arnim, *Stoicorum veterum fragmenta* (1905).

9 Marcus Tullius Cicero, *The Treatise on the Republic*, in: Cicero, *The Political Works*, Spettigue, London 1841, at 123.

10 Aquinas, *Summa theologica*, W. Benton-Encyclopedia Britannica, Chicago 1980, I, XXXV.

11 Francisco Suarez, *De legibus, ac Deo legislatore* (1612), in: Francisco Suarez, *Selections from three Works*, Clarendon Press, Oxford 1944, at 1.

lex naturalis is that dimension of the *lex aeterna* which is accessible to any rational being;[12] the *jus gentium* is that part of *lex naturalis* which, laid down by humans in customs or treaties, gives order to their general interaction beyond the laws of the single polities;[13] and the civil law (*lex civilis*), finally, is that law which, according to the general principles of the *jus gentium*, organizes the social and political life within the specific contexts of single polities.[14] As a consequence of the deductive structure of the legal system,[15] no civil law, if it claims to be respected, can contradict the eternal law. Furthermore, since the latter is characterized by the paramount importance of human dignity, civil law has to be considered as legitimate only if it respects the fundamental conditions of human dignity, therefore human rights.

If the condition of the centrality of human dignity in natural law, albeit through the hardly convincing metaphysical assumption of the direct primacy of divine law, can be seen as accomplished already at this early stage of development of the "descending" conception of human rights, substantially insufficient is here the fulfilment of the further condition mentioned above. In fact, the idea of a *jus* conceived not only as an "objective" law, but rather as an entitlement ascribed to all humans remains, in the most favourable interpretation, a marginal product of the Christian tradition, although some anticipation can be found in the works of the School of Salamanca.[16] This result is hardly surprising in a conceptual legacy in which not the individuals, but the community conceived as a *holon* is at the centre of the philosophical understanding of society, politics and law. During the following centuries, as a consequence of the contamination with modern individualism, the "descending" theory of human rights amended this deficit giving more prominence to the individual character of entitlements.[17] To the contrary, further shortcomings of the "descending" understanding, which already emerged at the early time of its formulation, can still be found in the later developments, giving therefore good reasons to assume that they were inherent from the outset to the foundation of human rights "from above".

The first deficit that can be traced back to the very essence of the foundation of human rights "from above" is related to the postulation of the divine law as the origin of natural law and, therefore, of human rights. This postulation has characterized the Christian Catholic doctrine of human rights from its very beginning up to the present. Yet, if the message of salvation, according to the Christian belief, builds the basis of the content of human rights as well as of their relevance, the problem arises of what will happen to those who do not believe in that message. In principle, the Christian Gospel is addressed to all human beings; however, as a matter of fact, peoples who do not belong to the Christian tradition and, as a consequence of the postulation of rights "from above" or even "from Heaven's grace", are not involved in any deliberative formulation of their content, tend to be harshly disadvantaged. Hence, the metaphysical assertion that the *lex divina* is the source of human rights involves a high risk of *discrimination* embedded in philosophical and legal thought. Even the most cautious and

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12 *Id.*, II, V et seq., at 178 et seq.

13 *Id.*, II, XVII et seq., at 325 et seq.

14 *Id.*, III, at 361 et seq.

15 *Id.*, II, IV, at 171.

16 Francisco de Vitoria, *Comentarios a la Secunda secundae de Santo Tomás*, ed. por Vicente Beltrán de Heredia, Salamanca 1932 et seq., II–II, qu. 62, art. 1, no. 5; Suarez, *De legibus*, *supra* note 11, I, II, 5, at 30; Ernst-Wolfgang Böckenförde, *Geschichte der Rechts- und Staatsphilosophie,*, *supra* note 7, at 326 et seq.

17 Nonetheless, the ontological priority of individual entitlements in the discourse on human rights is still largely missing in one of the most significant and influential strands of the "descending" conception, namely in the doctrine of the Catholic Church. The most advanced position expressed by the Catholic Church on this issue can be found in the encyclical *Pacem in terris*, promulgated by Joannes XXIII in 1963. Later documents seem to retrieve, however, from the more far-reaching assumptions, contained in that encyclical, on the link between human rights, individual entitlements and natural reason; see: *Redemptoris Missio*, promulgated by Joannes Paulus II in 1990, and *Dominus Jesus*, written by Joseph Ratzinger and Tarcisio Bertone in 2000.

original thinkers who shaped the early Christian Catholic discourse on international law and human rights could hardly escape the trap of double-dealing.[18]

If discrimination, in the "descending conception", is primarily rooted in the postulated origin of human rights from the doctrine and dogmas of one specific religion, the first step on the way to the solution of the problem consists in dissociating the ontological basis of human rights from religious beliefs. This step was undertaken very early in the history of the discourse on human rights, namely as legal philosophers influenced by the Reformation between the end of the 16th and the beginning of the 17th century proposed to decouple the *lex naturalis* from the *lex aeterna*. According to the Protestant theology, the law of God is only – partially – accessible through the faith and completely inscrutable for the natural reason.[19] Thus the natural law, being prevented from relying upon the divine law, had to search for a new, purely secular foundation. Resorting once again to an element of the Stoic philosophy, international lawyers inspired by the Protestant approach collocated the ontological basis of what they saw as the essential principles of the universal interaction among humans in an ontological postulation on human nature, in particular on an alleged natural and universal disposition of human beings to sociability.[20] As a consequence of this attitude, human rights could be understood as the universal rules governing interactions within the global human society. The ontological assumption of a universal sociability of man was however, in its essence, not less discriminatory than the derivation of the universal rules of interaction from the law of the Christian God. The substance of the entitlements resulting from that sociability was understood, indeed, not as the effect of inclusive processes of deliberation, but as the outcome of the Western legal and philosophical legacy leading to a postulation about the ontology of human society. Regardless of its supposed purely rational nature, this postulation was – coming itself "from above" and being this "above" nothing else but Western culture – structurally biased.[21]

The assumption of a universal community of humankind, on which human rights as the fundamental rules of general interaction had to be based, not only runs the risk of being characterized by Western prejudice. It is also afflicted – and we come herewith to the second shortcoming of the "descending" understanding – with a severe *epistemological deficit*. Indeed, the existence of a universal community of humankind from which the contents of human rights are to be deduced, here presented as a *factum brutum*,[22] can hardly be proved. Rather, it could

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[18] See, in particular: Francisco de Vitoria, *Relectio prior de Indis recenter inventis* (1538–1539), in: Francisco de Vitoria, *De Indis recenter inventis et de jure belli Hispanorum in Barbaros*, ed. by Walter Schätzel, Mohr Siebeck, Tübingen 1952, at 1.

[19] Böckenförde, *Geschichte der Rechts- und Staatsphilosophie*, *supra* note 7, at 385 et seq. Martin Luther's condemnation of the reason as the "Devil's greatest whore" is well known (Luther, *Werke. Kritische Gesamtausgabe*, Boehlaus, Weimar 1914, Vol. 51:126, Line 7ff.). But also in the Calvinist tradition, which was in general less adverse or even well-disposed to rationalism, God is approachable exclusively through grace and faith. See Jean Calvin, 1559, *Institutio christianae religionis*, Genevae 1559. Being excluded from the religious context, reason could otherwise be amended from the control by the Church and improve with less restraint in its application to secular matters.

[20] Alberico Gentili, *De jure belli libri tres* (1612), Clarendon Press, Oxford 1933, I, I, at 10, and I, XV, at 107; Hugo Grotius, *De Jure Belli ac Pacis* (1646), William S. Hein & Co., Buffalo (New York) 1995, "Prolegomina", No. 6, 16, and 17.

[21] On the bias structurally embedded from the outset in international law see Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press 2005. The Western prejudice has been emphasized particularly within the so-called Third World Approach to International Law; see: Ram Prakash Anand, *Studies in International Law and History*, Nijhoff, Leiden 2004; B. S. Chimni, *Third World Approaches to International Law*, 8 (2006) International Community Law Review 3–27.

[22] The assumption of a universal community of humankind has characterized the approach to international law usually known as "theory of the international community". For an overview on its history, see Andreas L. Paulus, *Die internationale Gemeinschaft im Völkerrecht. Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung*, Beck, München 2001. The contents of the theory in its contemporary version are presented in: Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, "Collected Courses of The Hague Academy of International Law", Vol. 281, Nijhoff, The Hague 1999.

be seen as a perspective that can be constructed by dialogue – but this is precisely what the foundation of human rights "from above" does not mean: the basis for human rights pretends here to be a given fact in its very substance, not a mere transcendental principle for a dialogic approach. For that reason, the supporters of the "descending" approach to human rights always had difficulties when it came to a specification of which entitlements ought to be universally guaranteed, or to the justification why precisely these had to be included while others were excluded from the universal safeguard. Being the epistemological basement rather shaky, they are forced to resort sometimes to a kind of hypostatized *opinio gentium*,[23] sometimes to metaphysics,[24] and sometimes even to divine authority.[25] This way, the "descending" conception eventually returns, in a cyclic process, to the main deficiency of its origins within the Scholastic tradition. However, while this deficiency was then embedded in a general context of courageous innovation, it seems to be now rather a back-looking attitude.

The third and last structural weakness of the "descending" conception of human rights can be shortly described with a question: who can actually safeguard the entitlements of individuals if these are excluded from the process of their formulation, in other words if the individuals are merely the addressees of rights and not also their authors? The danger of abuse by the powers in force is evident. If we follow the principle that only *volenti non fit iniuria*, no solution can be really satisfying. In the history of the "descending" theory we find many attempts to settle the problem; none is free from the risk of manipulation. In the Christian tradition of the Middle Ages and then in its Catholic continuation the custodian of the highest law of God is the Church, in particular the Pope as Christ's representative on earth.[26] So asserted Vitoria that a civil law can be cancelled by the Pope if it is against the divine law.[27] Similarly, Suarez stated that the Pope has the «jurisdiction for the correction of kings» and thus also the power of deposing them. The intervention of the Pope is justified both when the faults of the monarchs concern spiritual matters, as well as when their severe errors or tyrannical actions, albeit regarding secular

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[23] So Hugo Grotius in his seminal work *De jure belli ac pacis* gave actually up the deductive way to found the contents of international law, due to the insuperable difficulties of this kind of argumentation, and switched over to a descriptive presentation of the shared principles of legal and philosophical thought. See: Grotius, *De Jure Belli ac Pacis*, *supra* note 20, I, I, XII, and I, I, XIV.

[24] See, for example, the argumentative strategy of Alfred Verdross, who, searching for a not only formal, but substantial and therefore – in his eyes – more consistent content for the Kelsenian concept of the *Grundnorm*, seek remedy in Plato's and Hegel's metaphysics: Verdross, *Die Verfassung der Völkerrechtsgemeinschaft*, Springer, Wien/Berlin 1926, I, I, § 1, I, at 2 et seq.; I, II, § 7 et seq., at 22 et seq.; I, II, § 9, at 32.

[25] We find such a recourse already in Grotius' work (see Grotius, *supra* note 20, "Prolegomena", at no. 20), as well as in the Grisez School, one of the most recent attempts to revitalize the doctrine of natural law; see: John Finnis, *Natural Law and Natural Rights*, Clarendon Press, London 1980, at 376, 386 et seq.; Germain Grisez, Joseph Boyle, John Finnis, *Practical Principles, Moral Truth, and Ultimate Ends* (1987), in Finnis (ed.), *Natural Law*, Dartmouth, Aldershot 1991, Vol. I, 237–289, at 279.

[26] The most radical version of the theory which asserts that the Pope is the holder of all sovereignty, spiritual as well as secular, has been formulated by Henry Hostiensis (*Summa Aurea*, 1250–1261, Servanius, Lugduni 1556). The theory, however, was surely not conceived, at the time of its formulation, with the aim of improving universal rights, but rather of extending the range of political power of Christendom by challenging the legitimacy of non-Christian rulers or even the right to exist of non-Christian communities. Following a more moderate interpretation, a merely spiritual, but nonetheless universal power was attributed to the Pope by Hostiensis' antagonist, Sinibaldo Fieschi (1243–1254, *Apparatus super quinque lib[ris] decr[etalium] et super decretalibus*, 1st ed. 1477, Lugduni 1535). Fieschi's relatively temperate understanding of the power of the Church, further limited to the only spiritual authority over Christians, reappeared centuries later in the works of the School of Salamanca. On the limitation of the spiritual power of the Pope only to Christians, see Vitoria, *De Indis recenter inventis*, *supra* note 18, at II, 3. In the School of Salamanca the theory was actually connected with an attempt to address the question of the safeguard of universal rights, although these were yet defined – as mentioned above (see *supra* note 21) – from an inacceptable unilateralist perspective.

[27] Vitoria, *Relectio de potestate ecclesiae prior*, in Vitoria, *Political Writings*, ed. by Anthony Padgen and Jeremy Lawrance, Cambridge University Press 1991, at 45.

matters, «constitute sins» and therefore a violation of the highest law of nature.[28]

In Suarez' interpretation, however, we find also the elements for a second solution of the problem of who should safeguard fundamental rights. In his understanding, the political power is not given by God directly to the monarch, but to the community.[29] As a consequence, the community as the original bearer of the political power has also the right – in face of a severe abuse – to depose the tyrannical king, «acting as a whole, and in accordance with the public and general deliberations of its communities and leading men».[30] These are the fundaments of the idea of popular power. In Suarez' vision, yet, they are thwarted by the reference to the superior authority of Christ's representative on earth. This constraint had been overcome – already before Suarez' works were published – in the Calvinist political theology. According to the approach of the Monarchomachs, the community is vested with supreme power, unchallenged by any ecclesiastic authority, since «not the peoples are created for the magistrates, but, to the contrary, the magistrates for the peoples».[31] Supporting largely the same conception, Althusius stated, a few years later, that «the people, or the associated members of the realm, have the power (*potestas*) of establishing this right of the realm and of binding themselves to it».[32] This right «has as its purpose good order, proper discipline, and the supplying of provisions in the universal association».[33] The control over the respect of human rights seems thus to have been put in the hands of their addressees again. Yet, this is not completely true – at least not with regard to the political theology at the edge between the 16th and the 17th century. In the view of the Monarchomachs there is a social order which is *objectively just*, thought to derive its superiority from its inherent quality and therefore independently from the will of those who are subject to it.[34] Similarly, Althusius' defence of popular sovereignty is based on a *holistic* social philosophy, in which hierarchy is considered as one of the most essential laws of nature.[35] In this understanding, the consent by the people is always based on an idea of substantial truth. As a consequence, the autonomy of the citizens is significantly limited and their involvement in the government of the polity, albeit necessary, is not seen as a sufficient condition for legitimacy. Justification and contents of the fundamental rights are still coming "from above", namely "from Heaven's grace", and their custodians, insofar as they have to apply principles which are thought to be inherently true, cannot be considered as bound by deliberative procedures.

A third solution to the question concerning the identity of the guardians of rights has been developed in coincidence with the elaboration of the modern theory of sovereignty. In his *Six livres de la République* Jean Bodin asserted that «sovereignty is that absolute and perpetual power vested in a commonwealth».[36] Therefore, a sovereign prince is not bound by laws (*legibus solutus*), and the civil norms promulgated by him, «even when founded on truth and right reason, proceed simply from his own free will».[37] Bodin concedes that the power of the

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28 Francisco Suarez, *Defensio fidei catholicae et apostolicae adversus Anglicanae sectae errores* (1613), in: Suarez, *Selections*, *supra* note 11, VI, IV, 16.

29 Suarez, *De legibus*, *supra* note 11, III, I, 4; III, III, 2; III, III, 6; III, IV, 2.

30 Suarez, *Defensio fidei*, *supra* note 28, VI, IV, 15.

31 Théodore de Bèze, *Du droit des magistrats sur leur subjects* (1575), EDHIS, Paris 1977, at 13.

32 Johannes Althusius, *Politica methodice digesta* (1614), Harvard University Press 1932, IX.

33 *Id.*

34 de Bèze, *Du droit des magistrats*, *supra* note 31, at 3 et seq.

35 Althusius, *Politica*, *supra* note 32, I.

36 Jean Bodin, *Six livres de la république* (1576), Imprimerie de Jean de Tournes, Lyon 1579, I, VIII, at 85.

37 *Id.*, at 92.

sovereign may be limited by the Estates as well as by divine and natural law.[38] Nonetheless, both limitations are very modest: on the one hand because of the marginal competences and the strict hierarchical submission of the Estates;[39] on the other – which is more important for the question addressed in this contribution – because the sovereign prince, being the secular *imago* of the almighty God, has the right to interpret freely, i. e. without any secular or ecclesiastic control, the suprapositive norms. Furthermore, no effective remedy against violation is given. Put in the hands of a sovereign power, the protection of human rights is thus at the mercy of its arbitrary will.

The fourth and last solution has finally evolved from the processes which brought to a "domestication" of sovereignty. This happened on the one hand, in the domestic institutional architecture, through the division of powers, and on the other hand, at the international level, through the transfer of sovereign competences with a specific impact on universal rights to international organizations. With regard to the domestic dimension, the safeguard of fundamental rights was first attributed directly to the parliamentary assembly,[40] which paved the way to the institutional application of those principles of a "bottom-up" foundation of human rights that will be presented in the next paragraph. In order to avoid that fundamental rights could be at disposal of the "tyranny of the majority" a second answer was elaborated, consisting in the fixation of the fundamental elements of social order in a constitutional document, accompanied by the establishment of a specific constitutional jurisdiction. This solution had been anticipated, to a certain extent, in the Constitution of the United States and, with even more limitations, in Switzerland.[41] It came then to full application, after the end of World War II, with the establishment of constitutional courts in Germany, Italy, Austria,[42] France,[43] Spain and Portugal, as well as, following the fall of the iron curtain, in several other countries, many of them in Europe, but also outside of it.[44] As a matter of principle, the idea that the essential elements of social order need an increased and qualified protection does not pose any deep conceptual problems.[45] Difficulties arise, however, when it comes to a specification of what these elements should contain and mean as well as of what the competences of the constitutional courts are and how they are justified.[46] Hardly convincing is in particular the interpretation that with the concept of "essential elements of social order" should be meant more than the guarantee of the conditions of social and political participation,[47] namely a kind of

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38 *Id.*, at 91 et seq.

39 *Id.*, at 98 et seq.

40 This solution characterizes the English tradition from the *Bill of Rights* of 1689 up to the present.

41 The Federal Supreme Court has no competence to review acts of the Federal Parliament.

42 In Austria the Constitutional Court (*Verfassungsgerichtshof*) was re-established in 1946, resuming and extending the competences of the *Verfassungsgerichtshof* created in 1920.

43 The French *Conseil Constitutionnel* was established in 1958. Its organization and functions are, however, only partially comparable with constitutional courts *stricto sensu*.

44 Ernst-Wolfgang Böckenförde, *Verfassungsgerichtsbarkeit. Strukturfragen, Organisation, Legitimation*, 52 (1999) Neue Juristische Wochenschrift 9–17, at 9.

45 However, the guarantee of the fundamental elements of social order can also be achieved without any particular judicial protection, i. e. without a specific Constitutional Court, as for example in the United Kingdom, Denmark, Sweden and the Netherlands.

46 For a radical criticism of the principle of constitutional review, see: Richard Bellamy, *Political Constitutionalism*, Cambridge University Press 2007. For e defence: Alec Walen, *Judicial Review in Review: A Four-Part Defense of Legal Constitutionalism*, in: 7 International Journal of Constitutional Law 329–354 (2009).

47 Jürgen Habermas, *Faktizität und Geltung*, Suhrkamp, Frankfurt a. M. 1992, at 320.

substantial foundation of society, rooted in history[48] or in an incontrovertible ethical truth.[49] From this point of view, constitutional adjudication cannot limit itself to the safeguard of the framework of deliberation; rather, it has the task and responsibility «to protect the republican state»,[50] or to interpret the authentic will of the people as *pouvoir constituant*, which laid down the ethical fundaments of the community, even against the deliberations of its representatives.[51] Paternalistic outcomes from this attitude are more likely to occur in the state-centred and natural-law-influenced European continental tradition than in the mainly dialogic and citizenship-oriented American republicanism.[52] Nevertheless, in both cases constitutional courts may see themselves as guardian of a fundamental truth – an alleged truth, yet, which reminds us more of metaphysics than of democracy.

Similar, but even deeper going problems are also resulting from the "domestication" of sovereignty at the international level. In order to prevent the violation of human rights by single states, these have been bound progressively by international law. Thus fulfilling one of the essential constitutional tasks, international law has also been interpreted as a "constitution for mankind".[53] However, given the modest standards of legitimacy in international organization, every executive decision taken by supra-state institutions in order to maintain or enforce peace and the respect of human rights always runs the risk of being understood as – or even of being in reality – at the service of the most powerful actors in the international arena. Still the judiciary, although the role played by international courts in guaranteeing an acceptable benchmark for the safeguard of human rights can hardly be overestimated, cannot substitute a consistent legitimation-chain in defining what human rights are expected to be.

II. The Ascending Interpretation of Human Rights: The Foundation "From the Bottom Up"

According to the descending understanding of human rights the acknowledgement of individual rights was always conceived as a concession made within the scope of a social order, the ontological and ethical quality of which pretended to go far beyond the will, interests and reason of individuals. From this perspective, society was not seen as founded to protect the rights of the individuals, but rather to realize the ideal of an *objective*, i. e. supra-individual justice. In the descending interpretation of human rights the protection of certain individual entitlements was therefore an important and even inescapable element of the implementation of the objectively just social order, but it was never the centre of gravity of the conceptual construction of the society. Due to the holistic horizon of their conception, the first legal documents asserting individual rights – such as the *Magna Charta Libertatum* (1215), the *Agreement of the People*

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48 See, as an example, Frank Michelman, *Law's Republic*, 97 (1988), The Yale Law Journal 1493–1537.

49 On the independence of the specification of human rights from deliberation, see Ernst-Wolfgang Böckenförde, *Ist Demokratie eine notwendige Forderung der Menschenrechte?*, in Stefan Gosepath, Georg Lohmann (eds.), *Philosophie der Menschenrechte*, Suhrkamp, Frankfurt a. M. 1998, at 233. On the metapolitic origins of the concept of "human dignity", see Böckenförde, *Menschenwürde und Lebensrecht am Anfang und Ende del Lebens*, Stimmen der Zeit (2008), 245–258. Furthermore: Böckenförde, *Staat, Verfassung, Demokratie*, Suhrkamp, Frankfurt a. M. 1991.

50 Michelman, *Law's Republic*, *supra* note 48, at 1532.

51 Böckenförde, *Verfassungsgerichtsbarkeit*, *supra* note 44, at 11 et seq.

52 On the tendency to judicialization of political processes in the United States and Germany – and on the dangers which can arise from it – see Russell A. Miller, *Lords of Democracy: The Judicialization of "Pure Politics" in the United States and Germany*, 61 (2004) Washington and Lee Law Review 587–662.

53 Stefan Kadelbach, Thomas Kleinlein, *International Law – A Constitution for Mankind?*, 50 (2008) German Yearbook of International Law 303–347. On the constitutional function of the Charter of the United Nations, see: James Crawford, *The Charter of the United Nations as a Constitution*, in: Hazel Fox (ed.), *The Changing Constitution of the United Nations*, British Institute of International and Comparative Law, London 1997, at 3; Bardo Fassbender, Bardo, *UN Security Council Reform and the Right of Veto. A Constitutional Perspective*, Kluwer, The Hague 1998.

(1647)[54] and the *Instrument of Government* (1653)[55] adopted by the *Commonwealth* of England, Scotland and Ireland, and the constitutional documents of the New England Colonies[56] – always understood subjective rights in the light of the superior interests of a society seen as a whole endowed with a higher ethical truth. Analogously, the earliest philosophical foundations of subjective rights in the late Middle Ages[57] and in the early modernity[58] never challenged the organic interpretation of social life.

The turnabout came as a consequence of the transition from the holistic to the individualistic paradigm of social order and was introduced by Thomas Hobbes in the middle of the 17th century.[59] Hobbes overturned for the first time in history the traditional hierarchy between individual and community, collocating the individuals, as the bearers of fundamental rights and the starting point of any legitimation of authority, at the centre stage of political life. The starting point of his political philosophy was, in fact, not the society as a *factum brutum*, based on the natural sociability of humans and organized in an organic hierarchical structure,[60] but the individuals endowed with their rights, interests and reason.[61] In this original state of nature – a fictional condition, presented by Hobbes in order to focus attention not on the historic beginning of society, but on the ontological foundation as well as on the conceptual preconditions of a just order – individuals are free and equal.[62] However, they are also constantly in danger of being assaulted and harmed by fellow humans in search – as every individual always is in the state of nature – of more resources in order to improve their life conditions.[63] Therefore, natural reason commands to leave the state of nature and build a society (*societas civilis*), in which life, security and property are safeguarded.[64] In Hobbes' view the Commonwealth is thus not the original and axiologically highest entity in the ethical world anymore, but rather a tool that humans give to themselves in order to achieve social stability.

Hobbes' understanding of a social order based on the free will of individuals endowed with essential entitlements lays down the conceptual fundaments for an *ascending* interpretation of human rights. These are not seen anymore as the expression of an organic community relying

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54 *Agreement of the People*, in: Samuel R. Gardiner, *The Constitutional Documents of the Puritan Revolution 1625–1660*, Clarendon, Oxford 1979 (1st ed. 1906), at 359.

55 *Instrument of Government*, in: Gardiner, *The Constitutional Documents*, *supra* note 54, at 405.

56 *Massachusetts Body of Liberties* (1641), in: William H. Whitmore (ed.), *The Colonial Laws of Massachusetts*, Rockwell & Churchill, Boston 1890; *Fundamental Orders of Connecticut* (1637), in: Adolf Rock (ed.), *Dokumente der amerikanischen Demokratie*, Limes, Wiesbaden 1947.

57 William of Ockham, *Dialogus* (1332 –1348), ed. by John Kilcullen, George Knysh, Volker Leppin, John Scott and Jan Ballweg, 3.2, Book 2, Chapt 25 et seq., http://www.britac.ac.uk/pubs/dialogus/ockdial.html.

58 See *supra* note 16. On the organic understanding, within the School of Salamanca, of social and political hierarchy as quasi-natural and given by God, see: Vitoria, *Relectio de potestate civili* (1528), Akademie Verlag, Berlin 1992, 8, at 58 et seq.; Suarez, *Defensio fidei*, *supra* note 28, VI, IV, 17, at 719.

59 A partial anticipation of the individualistic turn, albeit in a conceptual horizon yet deeply influenced by the philosophical and political approach of the scholasticism, can be found in the works of Bartolomé de Las Casas, in particular in his *De imperatoria seu regia potestate* (1571); see: *id.*, Consejo Superior de Investigationes Cientificas, Madrid 1984, at 17 et seq.

60 Thomas Hobbes, *De Cive* (1642), Royston, London 1651, I, I, II.

61 *Id.*, I, I, I.

62 *Id.*, I, I, III.

63 *Id.*, I, I, X et seq.; Thomas Hobbes, *Leviathan, ot the Matter, Form, and Power of a Commonwealth Ecclesiastical and Civil*, Crooke, London 1651, XIII.

64 Hobbes, *Leviathan*, *supra* note 63, XIV; Hobbes, *De Cive*, *supra* note 60, I, II, II.

on the laws of God or of nature. Rather they are entrusted to the concrete single subjects as their bearers and preservers. From this perspective, social and political institutions are established by the rights bearers in order to guarantee, on the basis of a legitimacy coming from the bottom up, an adequate protection of the subjective entitlements. Institutions are legitimate only if they safeguard fundamental rights and are founded on a freely and explicitly expressed people's consent – in the strand of political thought initiated by Hobbes, in particular, by means of a contract (*pactum unionis*).

Once outlined the pivotal importance of the individualistic turn in political philosophy for the formulation of a human rights theory centred on the concrete rights bearers, two problems remain nonetheless: the first concerns forms and extent of the transfer of rights to the institutions established through the *pactum unionis*; the second regards the question on whether the rights protection should involve only the citizens of the polity or, to the contrary, all human beings, in other words the question between particularism and universalism in the safeguard of rights. Starting with the first problem, the shortcoming of a fundamental rights theory relying on the individualistic paradigm founded by Hobbes seems to arise from his assumption that, by establishing a public power endowed with sufficient authority, the citizens have to renounce almost completely their original rights. The only entitlements maintained by them in Hobbes' Commonwealth are actually the right to life protection and – very partially – the right to negative liberty, i. e. to pursue economic activities in order to achieve "happiness", yet just insofar as this does not jeopardize the guarantee for social peace and order.[65]

Hobbes' radical solution as regards the renouncement of the most original rights by the individuals entering into the state of society is, however, rather the exception than the rule among the theorists of contractualism. In the most proposals made by other political philosophers the individuals, now become citizens after having given their assent to the *pactum unionis*, maintain far more entitlements than in Hobbes' Leviathan-like Commonwealth.[66] The more citizen-friendly approach of the contractualism that arose from Hobbes' seminal intuition, nevertheless, does not solve the question. This can be clearly seen in Jean-Jacques Rousseau's theory of the "social contract". The result of the contract is here in many senses precisely the opposite of Hobbes' idea of a quasi-absolutistic Leviathan: within the *état civil* the goal of the establishment of the political community consists in the realization of the positive freedom of the citizens as autonomy.[67] Yet, also the political freedom outlined in Rousseau's social contract is implemented by means of an alienation of rights – an alienation which is, at least at a first glance, even more intransigent than in Hobbes' view. Rousseau's social contract provides namely for an alienation of *all* natural rights, without any exception.[68] The difference, which characterizes the more citizen-friendly attitude of the French philosopher, is made by the fact that, while in Hobbes' construction citizens alienate their rights to a monarch, turning their status to that of subjects again, in Rousseau the citizens alienate their rights to themselves, now constituted as a sovereign political community, as a *volonté générale*.[69] Nonetheless, since the body politic created by Rousseau's social contract is a collective entity – itself an individual, says Rousseau –[70] characterized by a high domestic unity and insufficient internal institutional

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65 Hobbes, *Leviathan*, *supra* note 63, XVII; Hobbes, *De Cive*, *supra* note 60, II, XIII, II et seq.

66 For a comparison of the different proposals see: Norberto Bobbio, *Il modello giusnaturalistico*, in N. Bobbio, Michelangelo Bovero, *Società e stato nella filosofia politica moderna*, Il Saggiatore, Milano 1979, at 68.

67 Jean-Jacques Rousseau, *Du contract social, ou principes du droit politique* (1762), Garnier-Flammarion, Paris 1966, I, 8, at 55.

68 *Id.*, I, 6, at 51.

69 *Id.*

70 *Id.*, I, 7, at 53.

articulation,[71] and the sovereign power is not obliged to give any guarantee to its «subjects», who may even be «forced to be free»,[72] the protection of fundamental rights by the *volonté générale* results to stand on a ground which can hardly be seen as less shaky than in the case of Hobbes' Leviathan.

The second question which – as mentioned above – remains unresolved in the ascending understanding of human rights based on the individualistic paradigm consists in the limitation of the rights protection to the single polities. The political philosophy of contractualism was conceived as a theoretical way to re-found legitimacy within the scope of the single body politic. For that reason contract theory, for one and a half centuries after its first formulation, showed little interest in the question of order beyond national borders and, insofar as the problem was addressed, the most important exponents of contractualism were rather skeptical about the possibility of guaranteeing a peaceful interaction on a global scale through a cosmopolitan legal order.[73] Yet, without some kind of cosmopolitan legal order no safeguard of human rights on a global level is possible. Thus, for a long time the individualistic approach to social and political philosophy seemed to be able to substantiate only an *ascending theory of citizens rights*, established on the basis of people's legitimacy of public power, but not a *universalistic theory of human rights at a cosmopolitan level*. Yet, no conceptual reason stood against the possibility of applying contractualism to a system of global protection of rights. Indeed, supporters of the individualistic paradigm of political philosophy and of the ascending interpretation of rights asserted from the very outset that the centre of gravity of any social order has to be found in the single individuals, all of them endowed with essential rights and faculties, in particular with the capacity to act reasonably. Therefore, no insurmountable obstacle, at least not at the theoretical level, would stand on the way to the construction of a cosmopolitan legal order aiming to safeguard those essential rights which belong to *all* human beings and to guarantee that they interact peacefully with each other. In order to achieve this goal, however, deep-going conceptual adjustments were needed.

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71 *Id.*, I, 6, at 52.

72 *Id.*, I, 7, at 54.

73 Hobbes, *Leviathan*, *supra* note 63, at XXX; Baruch de Spinoza, *Tractatus politicus* (1677), in: Spinoza, *Opera*, Winters, Heidelberg 1924, Vol. 3, III; Spinoza, *Tractatus theologico-politicus* (1670), in: Spinoza, *Opera*, Vol. 3, XVI; John Locke, *Two Treatises of Government* (1690), Awnsham-Churchill, London 1698, II, 2, § 14; II, 12, § 145; II, 16, § 183.

III. Perspectives for a Theoretical Foundation of the Protection of Human Rights "From the Bottom Up" within a Multilevel Legal System

The individualistic paradigm of political philosophy put for the first time in history human rights in the hands of their very bearers, namely the concrete individuals, laying down the conditions for a direct rights protection by the rights beneficiaries themselves, without any appeal to supra-individual instances allegedly entrusted with higher ethical truth. Nevertheless, the solution proposed by the founders of the individualistic understanding of rights was yet burdened with relevant shortcomings, which made difficult in particular its application to a universal theory of human rights. In order to overcome the deficits, two corrections had to be introduced:

a) the individuals should remain the rights holders, in the sense that their enter into civil society does not imply an alienation of rights and a consequent loss of control as regards their application. Insofar as the individuals transfer the rights to a public power, this is entrusted with the primary task to protect and improve them. The limitation of a right is only acceptable if it can be proved as indispensable for a better protection of another right and exclusively to the extend that is needed to this purpose. In order to guarantee that public authorities do not abuse their power for the realization of selfish goals, they need to be adequately controlled by parliamentary assemblies, proper institutional safeguards for social, political, religious and ethnic minorities, and a sound system of checks and balances.

b) Fundamental rights have to be understood not only as citizens rights, but also – insofar as their contents apply to the scope of a guarantee of a peaceful and just universal interaction between humans – in their dimension of human rights in a cosmopolitan sense.

The way to these two corrections was paved already in the works of Immanuel Kant.[74] Considering the first adjustment, Kant maintains Rousseau's ideal of autonomy as the aim of moral[75] and political life.[76] Yet, he prevents the dangers for liberty implied by Rousseau's ontological hypostasis of the *volonté générale* by postulating the necessity of a constitution (*Verfassung*) as the warranty of the rule of law for all citizens,[77] by introducing a rigorous division of powers,[78] and by assigning central competences to the representative assembly as the unchallenged holder of the legislative power.[79] The solutions proposed by Kant can be considered up to the present as the fundamental pillars of a domestic institutional architecture properly respecting the rights of the individuals.

More problems are posed by the proposals made by Kant as regards the second shortcoming of the original individualistic theory of rights, namely the restriction of the entitlements only – or

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[74] As regards the first "correction", we find an anticipation even before, namely in the political philosophy of John Locke, in particular in his limitation of the rights alienation as well as in the competences attributed to the parliamentary assembly. See John Locke, 1690, *Two Treatises of Government*, *supra* note 73, II, 7, § 90; II, 11, § 134; II, 12, § 143 ; II, 13, § 150.

[75] Immanuel Kant, *Grundlegung zur Metaphysik der Sitten* (1785), in: Kant, *Werkausgabe*, ed. by Wilhelm Weischedel, Suhrkamp, Frankfurt/M 1977, Vol. VII, at 65.

[76] Immanuel Kant, *Zum ewigen Frieden. Ein philosophischer Entwurf* (1795), in: Kant, *Werkausgabe*, *supra* note 75, Vol. XI, at 204; Kant, *Der Streit der Fakultäten* (1798), in: Kant, *Werkausgabe*, *supra* note 75, Vol. XI, at 364.

[77] Immanuel Kant, *Die Metaphysik der Sitten* (1797), in: Kant, *Werkausgabe*, *supra* note 75, Vol. VIII, § 43, at 429; Kant, *Zum ewigen Frieden*, *supra* note 76, at 204.

[78] Kant, *Die Metaphysik der Sitten*, *supra* note 77, § 45, at 431; Kant, *Zum ewigen Frieden*, *supra* note 76, at 206.

[79] Kant, *Die Metaphysik der Sitten*, *supra* note 77, § 46, at 432; Kant, 1793, *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis* (1793), in: Kant, *Werkausgabe*, *supra* note 75, Vol. XI, II, at 150.

at least primarily – to the domestic realm.[80] Doubtlessly, Kant has the merit of introducing for the first time a three-level construction of public law – domestic, international and cosmopolitan law –[81] which explicitly comprehends, at its third level, a *corpus juris* addressed to the specification of rights belonging to all human beings beyond their affiliation as citizens and regardless of it. In other words, while the domestic public law defines the rules of interaction within the single polity and the international law gives order to the relations between states, the cosmopolitan law – which has to be, in Kant's view, *positive* and not only *natural* law – specifies entitlements of every human being vis-à-vis any state of which he is not citizen, or vis-à-vis any other human who is not citizen of the same polity. The problem arises when it comes to the questions of what contents this cosmopolitan law should have, and of which institutional shape the concrete implementation of the cosmopolitan law has to take.

In fact, it is surprising, at least at a first glance, and somehow disturbing to notice how "thin" are the rights that should be guaranteed by the cosmopolitan law. They comprehend, in Kant's proposal, only the «conditions of universal hospitality», namely «the rights of a stranger not to be treated as an enemy when he arrives in the land of another».[82] Kant's cosmopolitan law anticipates thus merely in its very concept the idea of a universal human rights law regulating the global interactions among humans, but is – if we focus on the concrete provisions contained in it – hardly comparable with a universal catalogue of human rights in our common understanding.

A further deficit concerns the specification of the institution entrusted with the implementation of the cosmopolitan dimension of order, in particular with the safeguard of peace. Indeed, we find in Kant's work two different solutions for the institution accomplishing world order: in some passages he suggests a «world republic» (*Weltrepublik*) as a kind of global super-state;[83] in some others he proposes, in contrast, the rather unpretentious idea of a «league of nations» (*Völkerbund*).[84] The *Weltrepublik* is presented as the best perspective in principle since it would be the only structure capable to guarantee equal rights and binding rules for all actors concerned in international organization.[85] However, Kant admits that the solution favoured in principle is actually unfeasible, while underlining nonetheless that the practicable hypothesis of a «league of nations» cannot really accomplish the task of establishing a worldwide binding system of peace, security and protection of human rights.

Searching for conceptual reasons of the shortcomings contained in Kant's proposal, i. e. going beyond their mere collocation into the cultural climate of his time, it may be useful to address the question of whether both deficits – the "thin" contents of cosmopolitan law as well as the indeterminacy in specifying the institutional framework – can be traced back to the very "heart" of Kant's political philosophy, namely to the paradigm on which he founded his analysis and proposals. As mentioned above, Kant based his idea of social and political order – and therefore also his conception of cosmopolitan law – on the individualistic paradigm of modernity. Accordingly to this understanding, knowledge and society are conceived as founded on a unitary conception of subjectivity: only the assumption of the uniformity and internal coherence of the mental processes performed by each individual can guarantee, from the point of view of modern Western thinking, that the use of theoretical reason leads to truth, the

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80 For a reconstruction of the cosmopolitan approach in the philosophy of Enlightenment, see: Francis Cheneval, *Philosophie in weltbürgerlicher Absicht. Über die Entstehung und die philosophischen Grundlagen des supranationalen und kosmopolitischen Denkens der Moderne*, Schwabe, Basel 2002.

81 Kant, *Zum ewigen Frieden*, *supra* note 76, at 203.

82 *Id.*, at 213; Kant, *Die Metaphysik der Sitten*, *supra* note 77, § 62, at 475.

83 Kant, *Zum ewigen Frieden*, *supra* note 76, at 212.

84 *Id.*, at 213; Kant, *Die Metaphysik der Sitten*, *supra* note 77, § 54, at 467, § 61, at 475.

85 Kant, *Zum ewigen Frieden*, *supra* note 76, at 212.

implementation of practical reason to justice, and finally that the social, political and legal world is well ordered.

Western modernity, however, achieved these important results at high costs. The first problem consisted in the solipsistic understanding of the individuals, due to the claim that the theoretical and practical processes could be performed by each individual for himself, independently from any social contextualisation. The second problem is the rigidity of the system: like the individuals can be seen as well-shaped personalities only if their theoretical assertions and practical behaviours are coherent, that means non-contradictory, so can knowledge, ethics, society and law be considered as true, just, well-organised or normatively solid only if they are structured in a unitary and pyramidal way. One of the most negative consequences of the modern Western idea of knowledge and action, as well as of society and law, is thus the lack of flexibility. Insofar as theory and praxis are based on the monologic integrity of a subjectivity conceived as a coherent and hierarchically constructed monad, no place can be given to horizontal plurality. Like the single subjectivity is understood as unitary in itself, so are to be conceived as unitary the political institutions established by an agreement among individuals as well. As a consequence, sovereignty cannot be shared,[86] so that states are seen as impermeable "billiard-balls" and the organization responsible for global order has to be shaped, in order to be effective, as a kind of "world state" endowed with sovereignty. The political and legal structure created in order to implement social order and to guarantee the respect of fundamental rights cannot be, following Kant's individualistic approach, but a sovereign unity: either the single state, which may be able to guarantee fundamental rights at the domestic level but with the consequence that a *Völkerbund* of sovereign states can scarcely implement an effective universal protection of human rights; or the rather unrealizable and somehow threatening *Weltrepublik*.

To the contrary, only a multilevel legal and political system, which overcomes the traditional idea of unshared sovereignty, can create the conditions for a legitimate and feasible protection of fundamental rights both at the domestic level, as citizens rights, as well as within the global arena. The domestic level guarantees the procedures of popular participation so as to specify via deliberation the contents of fundamental rights, which would be difficult to realize on global scale. On the other hand, the cosmopolitan level defines universal rights establishing adequate institutions entrusted with their protection. To substantiate conceptually this construction a new paradigm of social order is needed which, going beyond the shortcomings of modern individualism, articulates the idea of subjects characterized by plural belongings, being part at the same time of a single polity and of the global community and holding rights which derive from either social situation. This task can be accomplished by the *communicative* paradigm, as developed by Karl-Otto Apel[87] and Jürgen Habermas.[88]

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86 Habermas, *Eine politische Verfassung für die pluralistische Weltgesellschaft?*, 38 Kritische Justiz 222 (2005), at 224.

87 Karl-Otto Apel, *Transformation der Philosophie*, Suhrkamp, Frankfurt/M. 1973; Apel, *Diskurs und Verantwortung. Das Problem des Übergangs zur postkonventionellen Moral*, Suhrkamp, Frankfurt/M. 1990; Apel, *Das Anliegen des anglo-amerikanischen "Kommunitarismus" in der Sicht der Diskursethik. Worin liegen die "kommunitären" Bedingungen der Möglichkeit einer post-konventionellen Identität der Vernunftperson?*, in: Micha Brumlik, Hauke Brunkhorst (eds.), *Gemeinschaft und Gerechtigkeit*, Fischer, Frankfurt/M. 1993, at 149; Apel, *Discourse Ethics, Democracy, and International Law. Toward a Globalization of Practical Reason*, 66 American Journal of Economics and Sociology 49 (2007).

88 Jürgen Habermas, *Theorie des kommunikativen Handelns*, Suhrkamp, Frankfurt/M. 1981; Habermas, *Moralbewußtsein und kommunikatives Handeln*, Suhrkamp, Frankfurt/M. 1983; Habermas, *Der philosophische Diskurs der Moderne*, Suhrkamp, Frankfurt/M. 1985; Habermas, *Faktizität und Geltung*, *supra* note 47; Habermas, *Die Einbeziehung des Anderen. Studien zur politischen Theorie*, Suhrkamp, Frankfurt/M. 1996; Habermas, *Die postnationale Konstellation*, Suhrkamp, Frankfurt/M. 1998; Habermas, *Der gespaltene Westen*, Suhrkamp, Frankfurt/M. 2004; Habermas, *Eine politische Verfassung für die pluralistische Weltgesellschaft?*, *supra* note 86.

The architects of the communicative paradigm[89] cope with the problems of modern subjectivity (in singular) not by de-structuring and cutting it "into little pieces" – as postmodern thinkers do – but, so-to-say, by multiplying it into a plurality of subjectivities (in plural). The preservation of an encompassing idea of theoretical and practical reason is achieved by conceiving several kinds of logics of interaction, each of them distinguished by a specific context of implementation. The dialectic is guaranteed by the common substrate of communicative reason, shared by any interaction. From the idea of a single but universally valid subjectivity, the legacy of Western modernity is thus moving to a plurality of individuals, acting with each other and constituting, this way, a new and more flexible fundament for the theoretical and practical reason. Amplifying subjectivity into a plurality of concrete individuals communicating among each other, knowledge[90] and ethics can avoid formalism by maintaining the claim for truth and universality, personal and social responsibility as well as the reference to the individuals as the instances setting standards of legitimacy.

According to the communicative paradigm, individuals are at the same time citizens of a single polity as well as human beings involved in interactions affecting them in their sheer and essential dimension as humans, regardless of their belonging to a political community and often within a scope going beyond this sphere.[91] Incidentally, it has to be pointed out that this double-belonging – to a political community and to the global community of humans –, the awareness of which is to date rather week, should be addressed in an adequate pedagogic effort carried out both by governments and international organizations. Both kinds of interaction – within the single polity as well as in the context of a potentially worldwide interaction of humans – need rules in order to work properly: if expressed in legal forms, these rules correspond, in the first case, to what we define as "citizens rights", in the second to more general and universally valid human rights.

In the communicative understanding, all kind of rights – i. e. not only citizens rights, but also human rights – being centred on the individuals, are seen as coming "from the bottom up", namely as the result of inclusive processes of deliberation. Different as regards normative density are, however, the legal forms in which the principles guaranteeing interaction are laid down at the distinct levels: on the one hand constitutions – or analogous documents of constitutional relevance – as the texts specifying the fundamental rules which protect interaction among citizens within the single polity; on the other those parts of international law claiming general relevance and universal validity as the nucleus of what can be interpreted as the «common law of mankind».[92] Different in structure and competences are also the jurisdictional institutions entrusted, respectively for the level of citizenry and for the cosmopolitan level, with the task of safeguarding fundamental rules as the essential conditions of interaction as well as of participation to social and political processes: constitutional courts within the national range; international courts of human rights beyond it.

Two main questions arise from this construction, in particular with regard to the cosmopolitan

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89 As regards the different approaches to the communicative paradigm, in particular the distinction between the rather transcendental interpretation by Apel and the politically and sociologically more substantiated understanding by Habermas, I will rely in the following primarily on the latter.

90 On the epistemological implications of the communicative paradigm, see: Habermas, *Vorstudien und Ergänzungen zur Theorie des kommunikativen Handelns*, Suhrkamp, Frankfurt/M. 1984; Habermas, *Wahrheit und Rechtfertigung*, Suhrkamp, Frankfurt/M. 1999.

91 «Citizens continue to have deep connections with their own governments and they also have relationships that transcend state borders. Increasingly, citizens are entitled to expect more from their governments than simply keeping order at home and managing threats beyond the border» (Helen M. Stacy, *Human Rights for the 21st Century: Sovereignty, Civil Society, Culture*, Stanford University Press 2009, at 31).

92 Johann Caspar Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten*, Beck, Nördlingen 1878, 56, No. 7; Christian Tomuschat, *Die internationale Gemeinschaft*, in: 33 Archiv des Völkerrechts 1 (1995); Tomuschat, *International Law: Ensuring the Survival of Mankind*, *supra* note 22.

human rights law: the first concerns the shape that institutions committed to protecting human rights at the cosmopolitan level should take; the second regards the ways of popular participation in the procedures determining global rules, i. e. in a context which seems to be, at least at a first glance, simply too distant from the individuals to make influence and control possible. Considering the institutional forms of human rights protection, supporters of the communicative paradigm generally reject the hypothesis that only a federal «world state», a *Weltrepublik* could successfully assume this task, as part of a broader commitment to world governance.[93] The renouncement of "hard" political solutions does not imply, however, a withdrawal of the communicative theory to an ivory tower grounded on the sterile – as regards practical consequences – equalisation between human rights norms and a merely moral "ought" (*Sollen*). An exit from the impasse can be sought by means of a "soft" institutional architecture combining political and jurisdictional elements.[94] Within this balance between political institutions and international courts, the political dimension, insofar as it can be characterized by higher democratic legitimacy achieved by inclusive deliberation procedures, remains yet the most important from the point of view of the communicative paradigm. The institutional "supra-state" architecture – i. e. the political dimension of a global institutional architecture – would take, basically, the form of a world organisation endowed with competences drawn from the transferral of sovereignty by the nation-states for the limited but effective accomplishment of two functions: the protection of peace and global security, and the safeguard of the fundamental human rights.[95] Fundamentally, it would consist in a UN with a substantially reformed Security Council.[96]

The idea of the normative inescapability and also of the concrete possibility of the participation of individuals – even at the cosmopolitan level – in the deliberative processes intended to specify the contents of their essential rights rely on the concept of a «universal community of communication».[97] Since political participation, nevertheless, can take place primarily – if not exclusively – within single political communities, democratic legitimacy has to arise, also as regards the specification of universal human rights, mainly from deliberative processes inside the states as the principal actors in the international arena.[98] Yet, this legitimacy source, albeit essential, is not sufficient. Provided that human rights, from a communicative perspective, have to be defined and protected in an "ascending" way, i. e. "from the bottom up", their formulation

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93 For a plea in favour of a *Weltrepublik* see: Otfried Höffe, *Demokratie im Zeitalter der Globalisierung*, *supra* note 7. For a discussion of Höffe's proposal see: Stefan Gosepath, Jean-Christophe Merle (eds.), *Weltrepublik. Globalisierung und Demokratie*, Beck, München 2002.

94 On the balance between the protection of human rights by political institutions and the role played by international courts, see: Stacy, *Human Rights for the 21st Century*, *supra* note 91.

95 Such a cosmopolitan world organization has to be so inclusive as possible, which – in a world in which democracies live together with autocratic states or even tyrannies – poses nevertheless significant problems. On the question, see the controversial *The Law of Peoples* by John Rawls (Cambridge University Press 1999). For a criticism: Apel, *Discourse Ethics, Democracy, and International Law*, *supra* note 87.

96 Habermas, *Der gespaltene Westen*, *supra* note 88, at 133; Habermas, *Eine politische Verfassung für die pluralistische Weltgesellschaft?*, *supra* note 86, at 228. For a discussion of Habermas' proposal, see: Peter Niesen, Benjamin Herborth (eds.), *Anarchie der kommunikativen Freiheit*, Suhrkamp, Frankfurt/M. 2007.

97 Apel, *Transformation der Philosophie*, *supra* note 87 (1976), vol. II, at 358; Apel, *Diskurs und Verantwortung*, *supra* note 87; Apel, *Discourse Ethics, Democracy, and International Law*, *supra* note 87, at 50. A way to spell out the concept within the theory of international relations can be found in the idea of a global «political community»; see: Andrew Linklater, *The Transformation of Political Community*, Polity, Cambridge 1998. See also: David Held, *Global Covenant*, Polity, Cambridge 2004. Elements of a "dialogic" understanding of international law and relations can be found, however, also in the work of authors who do not share the theoretical premises of the discourse theory; see, for example: Anthony Carty, *Philosophy of International Law*, Edinburgh University Press 2007; Andrew Hurrell, *On Global Order. Power, Values, and the Constitution of International Society*, Oxford University Press 2007.

98 Habermas, *Die postnationale Konstellation*, *supra* note 88, at 161; Habermas, *Der gespaltene Westen*, *supra* note 88, at 137; Habermas, *Eine politische Verfassung für die pluralistische Weltgesellschaft?*, *supra* note 86, at 229.

and protection, insofar as they claim validity and are applied beyond the state borders, must also involve a dimension which is collocated itself outside the borders of the single polities. In other words, if the supra-state level of public law – that means norms and institutions of public international law concerned with the protection of peace and human rights – has to be endowed with autonomous normative power,[99] then this level also needs, at least partially, its own legitimacy source. In a world of Kantian republics this normative requirement would not pose any problem: an uninterrupted chain would namely transfer legitimacy from the democratic processes within the single polities to the supra-state arena.[100] In such a world, even the perspective of a global parliamentary assembly of members of national parliaments would not be chimerical anymore.[101] But, alas, we do not live (yet, let me say) in a world of Kantian republics. So we have to settle, as a putative substitute to the global parliamentary assembly, for an adequate role to be attributed to a steady representation of non-governmental organizations at the UN, in order to give a voice – at least a feeble one – to the international civil society, namely to the society of world citizens.[102]

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[99] The endowment of the institutions of supra-state public law with autonomous power, or even with a higher normative competence, does not imply that they would possess, like in the case of the institutions of a world state, also a kind of federal sovereign authority.

[100] Mortimer N. S. Sellers, *Republican Principles in International Law. The Fundamental Requirements of a Just World Order*, Palgrave, New York 2006.

[101] Habermas, *Konstitutionalisierung des Völkerrechts und die Legitimationsprobleme einer verfassten Weltgesellschaft*, in: Winfried Brugger, Ulfrid Neumann, Stephan Kirste (eds.), *Rechtsphilosophie im 21. Jahrhundert*, Suhrkamp, Frankfurt/M. 2008, at 360. On global democracy, see also: David Held, *Democracy and the Global Order*, Stanford University Press 1995; Daniele Archibugi, *The Global Commonwealth of Citizens*, Princeton University Press 2008.

[102] Habermas, *Die postnationale Konstellation*, *supra* note 88, at 165; Habermas, *Der gespaltene Westen*, *supra* note 88, at 141; Habermas, *Eine politische Verfassung für die pluralistische Weltgesellschaft?*, *supra* note 86, at 228.