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Universalism Renewed: Habermas' Theory of International Order in Light of Competing Paradigms

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A. Introduction

Social order is the *telos* of law and politics.[1] This study will present Jürgen Habermas' thought on this topic as one of the most important of the last forty years. By collocating it within the broader discussion on social order, we will highlight the potential, but also some problems of his universalistic proposal in light of challenges at the outset of the 21st century. This article argues that Habermas' communicative paradigm provides a conceptual framework for a universal public law protecting peace and human rights in an effective and legitimate way. It can be understood as a regulative idea, guiding transformative work of scholars, politicians and lawyers, rather than as a theoretical instrument that conceptualises international law in its current institutional setting.

The first part of the analysis consists in developing paradigms for mapping the discussion on social order in which Habermas' proposal will later be embedded (B.). It comprehends a brief consideration of the most important "paradigms of order" that have developed during the centuries as well as of the "paradigmatic revolutions" which have led, from time to time, to renewal in the field. This outline will end on the paradigm of universalistic individualism as it was developed by Immanuel Kant, the classic author to whose legacy Habermas is most bound.

The tensions within Kant's conception of order reveal the difficulties common to many conceptions of order. Part C. will start dealing with these difficulties and with the attempts in Western thought to overcome them. Systems theory and postmodernism as the perhaps most significant ways of thinking order beyond the Kantian paradigm of universalistic individualism are characterised, however, by a certain scepticism towards universal institutions. In contrast, Habermas asserts the viability of universalism on the basis of a new conceptual structure. His "communicative paradigm" aims at conserving and even

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[1] For a corresponding history of ideas, *see* ANDREAS ANTER, DIE MACHT DER ORDNUNG (2004).

developing central tenets of the universalistic conception of order by passing from a theory in which the rational individual is at the centre of knowledge and action to an inter-subjective notion of a multilevel structure of interaction. This structure comprehends, at its most inclusive and general level, global interaction between humans on which a theory of global institutions and universal public law can be built that avoids shortcomings of other universalist theories.

Habermas' mainly philosophical proposal has been already transposed, at least partially, into the fields of political science and law. After briefly presenting these first transpositions of Habermas' theory in the analysis of the concrete phenomena of politics and law, part D. will concentrate on the question of how the communicative paradigm can be seen as the conceptual foundation of a more general theory of public law in what is often called a global multilevel setting.

B. Paradigms of Order

A core assumption of any theory of order is that society is not possible without a set of rules governing the interactions among individuals. To establish order, these rules have to guarantee peaceful and, to a certain extent, cooperative social relations. Furthermore, they have to be effective, i.e. they need to be observed by the addressees. Lastly, so as to increase the stability of the social context, they have to be recognised as legitimate by most addressees. The task of a theory of order is to outline the defining elements characterizing such a set of rules.

We propose to conceive the various theories and understandings of order developed during the centuries in light of a few "paradigms of order". As a "paradigm" we understand a set of fundamental concepts on which a specific interpretation of the world as well as a specific understanding of the best way for acting in it can be based.[2] To be a paradigm of order, a set of fundamental concepts shaping the understanding of human interaction has to be centred on two assertions to be found in most theories of order. These concern, respectively, the possible extension of rules, i.e. of order, and secondly the ontological entity which has to be considered as the basic unit of the structure and extension of order.

Paradigms of order always contain an assertion concerning the possible reach (first of all, but not only, in a territorial sense) of a well-ordered community of human beings. This dimension finds its expression in the question of whether order is always particular, or can also be, at least potentially, universal. Proponents of the first conception suggest that order can only be realised within limited and relatively homogeneous communities, with the consequence that each community has its distinct order while disorder (or its fragile and temporary limitation) reigns between these systems. Or, following the alternate

[2] On the concept of "paradigm" in epistemology, *see* THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1963).

conception, order can, in principle, be extended to the whole of humankind. The second assertion contained in every paradigm regards the ontological entity from which order is to be conceived. According to one strand of theoretical approaches, order is to be understood in light of collective subjects, like the nation, in a particularistic view of the concept, or the whole of humankind in a universalistic one. By contrast, the second strand of theoretical approaches, in particular contractualism, construes social order on the free will of individuals.[3]

I. Holistic Particularism as the First Paradigm of Order

In the history of the theories of order different paradigms have developed. The most ancient one asserts, with reference to the extension of a rule-based community, that this is necessarily limited to the boundaries of single polities: it cannot extend to humankind as a whole. As regards the foundation of order, this first paradigm asserts that the basic unit is a whole of humans, be it a demos, a nation or a state, but not the individual as such. The theories which elaborate this paradigm tend towards firmly defending the polity's interests. Being only a "particular" view of order, and based as it is on a "holistic" understanding of society (the whole – the *holon* –, and in particular the good consisting in its homogeneity, is always more than its parts), this paradigm can be called *holistic particularism*.

The paradigm of holistic particularism has found expression in differing theories in the last two-and-a-half thousand years by which it has responded to the evolving theoretical discourse and the social transformations. The oldest expression of the paradigm, having already been developed in its main concept in ancient Greece, is the theory of politics usually defined as *realism*. Reduced to a simple formula, its central assertion is that all politics is nothing but a struggle for power. After having been elaborated with laconic mastery by the Greek historian Thucydides (460 – 400 b. Chr.) in his report on the Peloponnesian War,[4] the "realistic" view of politics was re-proposed, substantially unchanged, by Machiavelli in the early modern era.[5] Although extremely successful within the history of ideas, "classic" realism was affected from the outset by a severe flaw. Indeed, neither Thucydides nor Machiavelli, nor their numerous successors or *epigones*, managed to explain the evident difference between internal and external policies.

[3] For a reconstruction of contemporary international law in light of these paradigms, *see* Armin von Bogdandy and Sergio Dellavalle, *Universalism and Particularism as Paradigms of International Law*, IILJ Working Paper 2008/3, available at: http://www.iilj.org/publications/2008-3Bogdandy-Dellavalle.asp.

[4] *See* THUCYDIDES, THE PELOPONNESIAN WAR (1959).

[5] *See* NICCOLÒ MACHIAVELLI, IL PRINCIPE (1513); NICCOLÒ MACHIAVELLI, DISCORSI SOPRA LA PRIMA DECA DI TITO LIVIO (1513-1519).

Whereas there is some evidence that the rule of law is not always a top priority for foreign policy, a general claim of lawlessness cannot convince if it was applied to the political struggle within a polity. The latter is manifestly ruled by laws, which mostly succeed in establishing a certain degree of responsibility of the rulers towards the fellow-members of the polity. This deficit may be one reason, if not the most significant of all, for classic realism to make way, roughly half a century ago, to the so-called "structural realism" or "neo-realism" of the new discipline of international relations: only through its limitation to the realm of the external relations of the polities, the basic assertion of realism can gather sufficient evidence for being a meaningful proposition.[6]

Trying to explain why there is rule of law in domestic politics, realists have sometimes resorted to the concept of the *nation* as the consolidating factor within the polity.[7] They thereby turned - while abandoning the conceptual frame of "classic" realism - to the central theoretical tool of the second variant of the particularistic-holistic paradigm, namely to the idea of the *nation* as a *community* with a *particular* history, *particular* destiny, *particular* culture or *particular* ethnos.[8] Nationalism as a theory asserts that the individual's belonging to a national community is the most relevant factor for the polity's internal cohesion. This idea also explains and justifies the quest for solidarity and inclusion inside as well as collision and exclusion outside. Although less ancient than realism, nationalism also has a quite long history. Its most determinate elaborations date from the time of political Romanticism, when conservative political writers, especially in Germany, borrowed the nationconcept from the progressive lexicon of the French Revolution and adapted it to the needs of a re-founded social and political conservatism.[9] Founding the cohesion of the polity on the nation, a powerful idea was created: nationalism.

The nationalist variant of the holistic particularism has found a contender within the paradigm due to its difficulties in responding to the challenges of the ongoing transition towards a more interlinked world. An idea mainly concentrated on the flowering and protection of a self-sufficient nation does not provide the best conceptual framework for developing responses to a world where states are closely intertwined and hardly self-sufficient. Since a universal perspective with a truly public international order is beyond the particularistic-holistic paradigm, the quest for order beyond the borders of the nation found its answer in the turn to *hegemonism* as the third variant of the paradigm. Through the hegemonic variant the particularistic-holistic paradigm incorporates a global perspective without going universal, i.e. confirming the belief in the non-universality of

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[6] Anne-Marie Slaughter, *International Law and International Relations*, *in* 285 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9, 30 (2000).

[7] *See* HANS J. MORGENTHAU, POLITICS AMONG NATIONS. THE STRUGGLE FOR POWER AND PEACE (1954).

[8] Jerry Z. Muller, *Kampf der Völker. Die ungebrochene Kraft des ethnischen Nationalismus*, 62 MERKUR 461 (2008).

[9] *See* ADAM H. MÜLLER, DIE ELEMENTE DER STAATSKUNST (1809).

order. An important elaboration was given by Carl Schmitt with his theory of *Großraumordnung* (large-range-order).[10] Moving from the diagnosis that the traditional concept of the European nation state would be inadequate to manage the challenges of a new era,[11] he proposed a *Großraumordnung* as an idea of global (yet not universal) order based on a few great powers. The hegemonic powers should guarantee the order within their respective spheres of influence, which would be in the hand of an ethnically and ideologically homogeneous group organised by a nation state as the heart of the *Großraum*. Between the spheres of influence the principle of non-intervention should rule, and the international law between these powers should maintain its "classical" form. For some decades Schmitt's theory of *Großraumordnung* enjoyed little interest and even less appreciation, before reappearing in new-fashioned form in Huntington's influential idea of the "clash of civilizations."[12]

In the last few years, hegemonism has found a new shape in neo-conservative thought.[13] Denying, at least in principle, any geo-political restraint, neo-conservatism has developed to become the most radical expression of hegemonic approach, attuned to the globalised world of today.[14] The neo-conservative proposal remains particularistic insofar as it formulates the political agenda in close connection with the interests of the super-power. Yet, it overcomes one of the most central tenets of holistic particularism by pretending to address not primarily the advantages of a single political community but rather to safeguard universal human rights. The long history of this most ancient of all paradigms of order ends so far in a paradox. Exponents of neo-conservative hegemonism admit, on the one hand, that the problems of the contemporary world need global solutions, but promote, on the other hand, the reaffirmation of the unilaterally defined answers to such problems. A well-balanced approach to safeguarding peace and human rights and to tackling global regulatory problems in an increasingly interconnected world has to go beyond the mere globalisation of unilaterally defined interests.

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[10] *See* CARL SCHMITT, VÖLKERRECHTLICHE GROßRAUMORDNUNG MIT INTERVENTIONSVERBOT FÜR RAUMFREMDE MÄCHTE (1939). The concept has later been redefined; yet, in substance the theory has been restated, in CARL SCHMITT, DER NOMOS DER ERDE IM VÖLKERRECHT DES JUS PUBLICUM EUROPEUM (1950).

[11] Carl Schmitt, *Das Zeitalter der Neutralisierung und Entpolitisierung*, in: DER BEGRIFF DES POLITISCHEN. TEXT VON 1932 MIT EINEM VORWORT UND DREI COROLLARIEN 87 (Carl Schmitt, 1963).

[12] *See* SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (1996).

[13] *See* JEREMY A. RABKIN, WHY SOVEREIGNTY MATTERS (1998); DEEPAK LAL, IN DEFENSE OF EMPIRES (2004); DEEPAK LAL, IN PRAISE OF EMPIRES: GLOBALIZATION AND ORDER (2004); ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER (2003); Robert Kagan, *America's Crisis of Legitimacy*, 83 FOREIGN AFFAIRS 65 (2004). For a critique, *see* Jean L. Cohen, *Whose Sovereignty? Empire Versus International Law*, 18 ETHICS & INTERNATIONAL AFFAIRS 1 (2004); Nico Krisch, *Imperial International Law* (2004) (Global Law Working Papers 01/04).

[14] Sergio Dellavalle, *The Necessity of International Law Against the A-normativity of Neo-Conservative Thought*, *in* PROGRESS IN INTERNATIONAL LAW 95 (Russell A. Miller and Rebecca Bratspies eds., 2008).

II. The First Paradigmatic Revolution: From Particularism to Universalism

It took a long time before humans, although already living in complex societies, began to conceive of themselves as part of a common humanity. The idea of the universal authority of a general law for human society appeared for the first time at a mature stadium of antiquity. It was the merit of Stoicism to develop a radically new idea in Western philosophy: in the Stoic view the whole world – the physical as well as the social – is ruled by only one fundamental law, the *logos*.[15] Such a perspective had two consequences: first, the social world was also thought now to be ruled by a law valid, in its essence, for all humans and in principle applicable to all societies. This was a kind of "universal *nomos*" directly derived from the supremely ruling *logos*. Second, the *nomoi* of the different polities, if they aimed at normative validity, had to be in accordance with the "universal *nomos*" which had been placed above them.

> Therefore, Stoicism marked a first "revolution" in the way social order was conceived.[16] This revolution concentrated on the question of its extension, characterizing the transition from a particularistic to a universalistic view, while the understanding of its ontological basis remained homologous to the preceding paradigm. In fact, universalism in its original expression as a paradigm was founded – as the first paradigm – on the individual's belonging to a predetermined community; such a community was now extended to comprehend the whole humankind. Since the *holon* was still in this first version of universalism in a paramount position compared with the individuals, we suggest to call this idea of order *holistic universalism*.

The Stoic universalistic vision remained largely speculative with little impact on politics. The task of concretely creating universality within the complex context of political diversity was hence taken over by Christendom. Many elements of the Stoic philosophy became part of the Christian doctrine. Among these were the ideas of a universal *logos* and of community encompassing all humans. However, while Stoicism never attained the status of an "official state philosophy," maintaining herewith the possibility to avoid the prosaic

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[15] *See* JOHANNES VON ARNIM, STOICORUM VETERUM FRAGMENTA (1905).

[16] This does not mean, however, that holistic particularism disappeared. Unlike their homologous in natural sciences the paradigms of social sciences survive much easier the emergence of a conceptual successor. In the most cases they only need to modify some aspects of their conceptual equipment. The consequence is that in social sciences we have often the contemporary presence of a plurality of paradigmatic sets within the same matter, although oftentimes one paradigm plays a preeminent role.

dimension of concrete politics, Christendom achieved in a few centuries such a prominent political position that the question of how to transfer the commandment of universality into a realistic political and legal program could not be passed over. At the edge between antiquity and the Middle Ages, the Western world had become a Christian world. The principle of universality was enclosed into the doctrine of Christianity and thus a Christian world had to show the signs of universalism also within the realms of law and politics.[17]

At first, the Christian scholars tried to make this vision concrete by suggesting the idea of a "universal monarchy."[18] Yet, since this project proved impossible to realise, Christian political philosophy responded to political diversity by elaborating the conception of a "jus inter gentes", i.e. an international law conceived as set of rules governing the interactions between peoples on the basis of shared principles.[19] These principles were still to be derived from the core commandments of the Christian religion, but the political frame in which they had to be realised changed significantly by passing from the unrealistic vision of a universal monarchy to the concrete program of an unprecedented international law. This is the moment of the foundation in the Western world of what later became the modern law of nations. The outstanding point of its conception – as we see with paramount clarity in the works of Francisco Suarez – consisted in accepting the plurality of polities, each of them governed by specific rules, however within an all encompassing legal framework to guarantee minimal standards of interaction.[20] Therefore, we interpret the vision grounding the first formulations of modern Western international law as an anticipation of a multilevel legal system going beyond the idea of a global state as well as beyond the inter-state lawlessness of particularism.

Despite its significant contribution to the groundbreaking foundation of a modern idea of order, the Christian vision has always been affected by a corruptive bias. Although the message of love in Christianity claimed to potentially reach every human on earth, it has always been linked to the belonging to a specific religion. And belonging to a religious group or faith is such an intimate question that global homogeneity and an all-encompassing unity can neither be reached nor demanded. As a consequence of the link to a peculiar religious community, only Christians were allowed to be full members of the order of peace, security and cooperation based on the commandments of the divine law.

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[17] In the early centuries of Christianity, when Christendom was yet largely distant from political power or even persecuted, this necessity to formulate a concrete political program according to the Christian principles was not felt as strongly as later. This is the time of the distinction between the *civitas dei* and the *civitas diaboli*, whereas the second one – the City of the Devil – corresponds to the real political situation on earth, and the first – the City of God – is projected, along with its universalistic aim, into a purely spiritual dimension. *See* Aurelius Augustinus, *De civitate Dei*, in: THE CITY OF GOD, 413–426 (1957).

[18] Dante Alighieri, *De Monarchia*, *in* 2 OPERE MINORI 1310-1314 (Dante, 1986).

[19] Francisco Suarez, *De legibus, ac Deo legislatore*, *in* SELECTIONS FROM THREE WORKS 1 (Suarez, 1944), at 1.

[20] *Id.*

Other peoples were treated as enemies or, in the best case, as marginal components of the system of international law, curtailed in their rights and dignity.[21] Even a moderate author like Francisco Vitoria, who refrained from defending the most outrageous injustices towards non-Christians at the dawn of the era of colonization, construes the rights of European and non-European peoples in a way which reveals significant elements of discrimination.[22]

This original bias in Western international law led some authors to the conviction that it is characterised by structural discrimination.[23] Following this interpretation, Western international law's universalism would rather be a travesty than a fundamental principle. Considering the dark sides of Western history, such as colonialism or imperialism, this criticism has to be taken seriously. To overcome this discriminating bias, a first step consists in affranchising it from the Christian presuppositions. The conditions for undertaking this step were first laid down within a doctrinal dispute concerning the correct Christian interpretation of the relation between the law of humans and the law of God. In the theology of the Middle Ages and then in the Catholic doctrine the universality of the most general law of humans, i.e. of what today is international law, is deduced from the universality of the divine law of the Christian God. The Reformation introduced at the beginning of the modern era a new understanding of the relation between human and divine law which contained the basic elements of a secular philosophy of international law. Since the law of God is inscrutable from the Protestant point of view, international lawyers influenced by the theology of Reformation had to search for a new foundation independent from the direct reference to the Christian God if they did not want to forsake the universalistic claim of their newborn doctrinal system. This has been the task accomplished by the third founder, along with Vitoria and Suarez, of modern international law, Hugo Grotius.

Grotius located the new, secular foundation of international law's universalism in an ontological postulation of human nature, which he saw determined by both a natural and a universal disposition of human beings to sociability.[24] Insofar as humans naturally tend to build a society, and this tendency is not – as Aristotle thought[25] – limited to the boundaries of the polity but extends globally, international law can be seen as the common law of

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[21] *See* JÖRG FISCH, DIE EUROPÄISCHE EXPANSION UND DAS VÖLKERRECHT. DIE AUSEINANDERSETZUNGEN UM DEN STATUS DER ÜBERSEEISCHEN GEBIETE VOM 15. JAHRHUNDERT BIS ZUR GEGENWART (1984).

[22] Francisco de Vitoria, *Relectio prior de Indis recenter inventis*, in: DE INDIS RECENTER INVENTIS ET DE JURE BELLI HISPANORUM IN BARBAROS 1 (De Vitoria, 1952).

[23] *See* RAM PRAKASH ANAND, STUDIES IN INTERNATIONAL LAW AND HISTORY (2004); ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2005).

[24] *See* HUGO GROTIUS, DE JURE BELLI AC PACIS (1646).

[25] *See* ARISTOTLE, THE POLITICS.

humankind containing the general rules of universal sociability. This interpretation of Western universalism abstains from a founding reference to the Christian God and grounds the law of nations on a view of every human being's natural reason binding upon him regardless of his cultural or religious background. Certainly, the universal sociability is less "thick" than its counterpart within the borders of the single polities; nevertheless, it is strong enough to bear the responsibility for a set of general minimal or "thin" norms guaranteeing the orderly and essentially peaceful[26] interaction of peoples and individuals beyond the borders of their countries.

The idea of a naturally sociable humankind as the basis of a universal order informs a second strand of holistic universalism increasingly independent from the Christian tradition. Notwithstanding its paramount significance in shaping the universalistic perspective of international law,[27] this understanding of order also shows at least one unresolved shortfall. The founding assumption of the existence of a global community including all individuals and states and of common fundamental values is little substantiated within this strand of thinking. The assertion of universal values is not a self-evident axiom and raises significant epistemological problems which so far have not received fully convincing answers. What we can experience, in fact, is the capacity of all humans to interact with each other, but solidarity as well as deathly competition can grow from this matter of fact. Given these opposite possibilities of human interaction, the case for a worldwide community as an ontological *factum brutum* rests on an unverified assumption about the "true" nature of humankind. However, this assumption on the "natural" sociability of our fellow humans is hardly a solid foundation for a general theory of law and global institutions. Moreover, the postulation of universal values without indicating the processes of their creation and change is prone to national or cultural bias.

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[26] Grotius admits that war can be sometimes unavoidable and even normatively acceptable. Nevertheless it is tolerable from a normative point of view only if it satisfies the conditions to be defined as "just". On the Grotian tradition in international law as *defensor pacis*, *see* Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRITISH YEARBOOK OF INTERNATIONAL LAW 1 (1946).

[27] *See* ALFRED VERDROSS, DIE VERFASSUNG DER VÖLKERRECHTSGEMEINSCHAFT (1926); Christian Tomuschat, *Die international Gemeinschaft*, 33 ARCHIV DES VÖLKERRECHTS 1 (1995); Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, 281 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW (1999); ANDREAS L. PAULUS, DIE INTERNATIONALE GEMEINSCHAFT IM VÖLKERRECHT. EINE UNTERSUCHUNG ZUR ENTWICKLUNG DES VÖLKERRECHTS IM ZEITALTER DER GLOBALISIERUNG (2001).

III. The Second Paradigmatic Revolution: From Holism to Individualism

Be it a single political community or the entire humankind, the entity on which the two first paradigms of order are grounded is always a *holon*, i.e. a social totality, a whole that is conceived to be superior to its parts, the individuals. At the dawn of modernity, philosophy began to question how convincing the assumption of such a *holon* is and whether a legitimate social system can be built on it. Doubts arose with regard to the belonging of individuals to a predetermined community with a hierarchical structure. The axiom that individuals had to serve the community, not vice versa, began to cedeground. In a world of an eroding belief in a community shaped by natural, moral, intellectual and political authority, philosophers turned to the individual's cognitive faculties as the only guarantee of ethics and knowledge. In the philosophy of knowledge, this new approach was first expressed by Descartes.[28] In political thinking, individualism was powerfully theorised by Thomas Hobbes. His conception overturned for the first time in history the traditional hierarchy between individual and community. It posits individuals at the centre stage of political life to be the bearers of fundamental rights and regards them as the starting point of any legitimation of authority.[29] Like Copernicus had reversed the positions of earth and sun, the "Copernican revolution in political thought"[30] turned the order of society upside down. In Hobbes' view, the Commonwealth is not the original and axiologically highest entity in the ethical world anymore but rather a tool that humans give to themselves in order to guarantee a better safeguard of life, security, and property.

Following this understanding, political institutions are to be thought and construed as the product of a contract among individuals. Concerning the consequences for the theory of order – and, in particular, for the possibility of its global extension – the central question is how far society built on such institutions can reach. In other words: can this society only be a particular one, constructed to serve the interests of a limited, albeit large, number of individuals? Or can we imagine society as based on a contract that expands to comprehend all humans? For one and a half centuries after its first formulation, contract theory showed little interest in international law and, insofar as the question of international order was mentioned, the most important exponents of contractualism were rather sceptical about the possibility of guaranteeing a peaceful interaction on a global scale.[31] Yet, there was no

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[28] RENÉ DESCARTES, DISCOURS DE LA METHODE (1637); RENE DESCARTES, MEDITATIONES DE PRIMA PHILOSOPHIA (1642).

[29] THOMAS HOBBES, DE CIVE (1642); THOMAS HOBBES, LEVIATHAN, OF THE MATTER, FORM, AND POWER OF A COMMONWEALTH ECCLESIASTICAL AND CIVIL (1651).

[30] NORBERTO BOBBIO, L'ETÀ DEI DIRITTI (1990).

[31] *See* Hobbes, *supra* note 29; Baruch de Spinoza, *Tractatus politicus*, in: 3 SPINOZA OPERA, III (1924); Baruch de Spinoza, *Tractatus theologico-politicus* (1670), *in* 3 SPINOZA OPERA XVI (1924); JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1690). Samuel Pufendorf may be a partial exception however, his theory should be better understood as a kind of half-way solution between contractualism and the traditional sociability conception,

conceptual reason against the possibility of applying contractualism to a system of global peace and security. If the central moment of any society are the single individuals and if it is also admitted that all individuals are endowed with essential rights and faculties, in particular with the capacity to act reasonably, then no insurmountable obstacle stands between the present condition and the construction of a world order based on a general agreement among fellow humans.

This expansion of contractualism was developed by Immanuel Kant.[32] Two main novelties were introduced by his political philosophy. First, the passage from the estate of nature to the civic condition is not only, like in Hobbes, the practical output of a reasoning based on expediency but the fulfillment of a higher moral duty. The fact that, in Kant's view, only the civilised human is morally accomplished, implies that the bare consideration of the personal payoffs as the sole criterion of action is to be abandoned to the benefit of a more complex, non-utilitaristic and transcendental approach to rationality. Second, insofar as the perfect accomplishment of human rationality can be exclusively reached when every interaction is civilised, the establishment of an international order has to be seen as the highest objective of law and politics as well as the noblest duty an individual has to fulfill. Giving to the modern individualistic view of society for the first time in history a universal reach and re-founding universalism on an individual act of will, i.e. on the capacity of generalisation and the capacity to orient oneself on maxims, Kant accomplished a second paradigmatic revolution in the theories of order, formulating what we call a *universalistic individualism*.

From a theoretical perspective, Kant resumes some of the most relevant aspects of holistic universalism, namely an understanding of rationality going beyond egoistic interests as well as the aim to establish a universal order. Yet, he has the merit of putting them on a more solid fundament: not the personal faith, nor the uncertain reference to a community of humankind or a set of values, but the ineludible evidence of our thinking and acting subjectivity, namely the capacities to generalise and to follow maxims. Problems emerge, however, when it comes to the realisation of the philosophical project. Indeed, we find in Kant's work two different solutions for the institution to accomplish world order. In some passages he suggests a *Weltrepublik* (world republic) as a kind of global superstate;[33] in some others he proposes, in contrast, the rather unpretentious idea of a *Völkerbund* (league of nations) .[34] The *Weltrepublik* is the only structure capable of effectively

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where the second prevails in the interpretation of international law, *see* SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO (1672).

[32] *See* Immanuel Kant, *Zum ewigen Frieden. Ein philosophischer Entwurf*, *in* XI WERKAUSGABE 191; Immanuel Kant, *Die Metaphysik der Sitten*, *in* VIII *Werkausgabe* 309.

[33] Kant, *Zum ewigen Frieden*, *supra* note 32, at 212.

[34] *Id.* at 213; Kant, *Die Metaphysik der Sitten*, *supra* note 32, § 54, at 467, § 61, at 475.

guaranteeing equal rights and binding rules for all actors globally.[35] However, it would run the risk of oppressing diversity, turning into a kind of "universal tyranny."[36] Therefore, two arguments speak for the less ambitious *Völkerbund*. First, the peoples have to be protected in their identity;[37] second, the states are not disposed to transfer their sovereignty.[38] In short, Kant seems to say that the most effective solution is politically rather unfeasible and, moreover, theoretically burdened with deficits. At the same time, the practicable hypothesis cannot really accomplish the task of establishing a worldwide binding system of peace, security and protection of human rights.

A large debate has developed over the reasons for what appears to be an incongruity in Kant's idea of order.[39] Regardless of the contextual factors that may have played a role in determining Kant's position, we suggest that his vacillation arises directly from the paradigm of order on which his theory is based.[40] As we have argued, Kant develops his idea of order on the individualist paradigm. Accordingly, knowledge and society are conceived as founded on a unitary conception of subjectivity: the uniformity and internal coherence of the mental processes performed by each individual are the bases for theoretical and for practical reason. A first problem consists in social disembedding of individuals, as reason is conceived independently from the social context. A second problem is the rigidity of the system. As the individuals are full personalities only if they are coherent in thought and action, so knowledge, ethics, society and law are considered as true, just, well-organised or normatively solid only if they are structured in a unitary way. A striking consequence in the Kantian theory of knowledge and action, of society and law, is thus a lack of flexibility. Insofar as theory and praxis are based on the monologic integrity of subjectivity that is conceived as a coherently and unitarily constructed monad, there is no place for plurality and, as a result, for the idea of a overarching, but pluralistic order. Legal and political order is understood, just as the single subjectivity, as unitary. From here stems Kant's trouble, as his theory leads to the impossibility of shared sovereignty.[41] As

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[35] Kant, *Zum ewigen Frieden*, *supra* note 32, at 212.

[36] *Id.* at 225.

[37] *Id.* at 209.

[38] *Id.* at 212.

[39] Among the most influential analysis, *see* GIULIANO MARINI, TRE STUDI SUL COSMOPOLITISMO KANTIANO (1998); OTFRIED HÖFFE, KÖNIGLICHE VÖLKER. ZU KANTS KOSMOPOLITISCHER RECHTS- UND FRIEDENSTHEORIE (2001); VOLKER GERHARDT, IMMANUEL KANTS ENTWURF ZUM EWIGEN FRIEDEN. EINE THEORIE DER POLITIK (1995). On Habermas' interpretation of Kant's theory of international order, *see* Jürgen Habermas, *Kants Idee des ewigen Friedens*, 28 KRITISCHE JUSTIZ 293 (1995), also published in DIE EINBEZIEHUNG DES ANDEREN (1996); JÜRGEN HABERMAS, DER GESPALTENE WESTEN (2004); Jürgen Habermas, *Eine politische Verfassung für die pluralistische Weltgesellschaft?*, 38 KRITISCHE JUSTIZ 222 (2005).

[40] Sergio Dellavalle, *Kant, l'ordine internazionale e l'integrazione europea*, 20 FILOSOFIA POLITICA 245 (2006).

[41] Habermas, *Eine politische Verfassung für die pluralistische Weltgesellschaft?*, *supra* at note 39, at 224. The conception of divided sovereignty was present in the discussions of the 19th century due to the Federalist Papers,

states are seen as impermeable "billiard-balls", the organisation responsible for a global order can only be conceived, if to be effective, as a "world state" endowed with unitary sovereignty.[42] Obviously, such construction is hardly compatible with diversity in world society. Thus, the need for a transition from a vertically to a more horizontally structured society, from a pyramid-like to a cluster- and network-like legal and political system. This evolution, however, comes with a crisis of the whole understanding of order that had characterised Western thought from the antiquity to the first half of the 20th century.

C. The Crisis of the Unitary Theories of Order and Habermas' Communicative Paradigm

Be it the *polis* or the nation-state, a federal world republic or a universal community comprehending all fellow humans, the social entity on which order is based was conceived – from the very beginning of the thought on order to the middle of the 20th century – as a homogeneous unity. The social entity responsible for order has been characterised by encompassing all subjects capable of peaceful and cooperative relations as well as by constructing a unitary political and legal system. Given these premises, universalistic individualism can be seen as the most ambitious expression of *unitary theories of order.* It allows, contrary to holistic particularism, to comprehend all humans into one system of order which, in contrast to holistic universalism, however, is construed in light of the individual. As the unitary theories of order began to show their inadequacy in the face of more recent challenges, the search for a new paradigm took the form of a critique of the paradigm of modernity as the most powerful among the former conceptions.

I. The Deconstruction of Unitary Thinking by Systems-Theory and Postmodern Thought

The universalistic understanding of order has been grounded on the idea of the unity of reason. Indeed, the well-ordered society can be conceived to extend worldwide – following the traditional conception of universalism – only if one assumes that its rules conform to a *ratio* that can be seen as governing all humans in all their cognitive faculties and practical activities. The critique of this assumption is the common denominator and point of departure of many recent attempts to formulate new paradigms of order. Systems theory, an important sparring partner for Habermas over the last 40 years for example, claims that different social systems perform specific activities following their own peculiar rationality

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but it remained marginal, at least in Europe; *see* Stefan Oeter, *Federalism and Democracy*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (Von Bogdandy & Jürgen Bast eds., 2006).

[42] The main tenets of the individualistic-universalistic paradigm has deeply influenced – in their visionary strength as well as in their weaknesses – also Hans Kelsen who did conceive the possibility and desirability of a global state. *See* HANS KELSEN, DAS PROBLEM DER SOUVERÄNITÄT UND DIE THEORIE DES VÖLKERRECHTS (1928); HANS KELSEN, REINE RECHTSLEHRE (1934); HANS KELSEN, LAW AND PEACE IN INTERNATIONAL RELATIONS (1942); HANS KELSEN, PEACE THROUGH LAW (1944); PAULUS, DIE INTERNATIONALE GEMEINSCHAFT IM VÖLKERRECHT, *supra* note 27. For a recent proposal explicitly defending the idea of a world state *see* OTFRIED HÖFFE, DEMOKRATIE IM ZEITALTER DER GLOBALISIERUNG (1999).

based on the function that the system fulfills.[43] Although all social systems consist of communication they cannot communicate with each other. Every system is based on a particular rationality and can perceive the activities performed by other systems following other rationalities only as an "irritation".[44] Every system is "autopoietic".[45] It reproduces itself on the basis of its own operations, no common language can overcome the boundaries of the single systems and no element of the one system can become part of the operation chain of another one, or influence directly the outcomes of its activities.

Social systems need rules in order to function correctly and thus require the support of law. Law is, in itself, an autopoietic system[46] but, given the necessity to stabilise normative expectations concerning the outcomes of the various social systems, it has developed into a plurality of legal subsystems, each of them referring to the necessary stabilisation of a specific social system.[47] Therefore, from the multiplicity of functional systems also arises a plurality within the legal system, not bound by a hierarchical structure. This plurality reflects in its principles and operations the rationality of the social operations the stability of which they have to guarantee.[48] The plurality of rationalities assumed by systems theory is different compared to that kind of differentiation that characterises the *nomoi* before the paradigmatic revolution which introduced universalism. Whereas the plurality identifying particularism distinguishes rationalities with reference to different communities and territories, the *paradigm of systemic plurality* identifies the multiplicity on a functional level, so that the various systems are conceived as – at least potentially – *global*.[49] Furthermore, since a fragmented legal system is not characterised anymore, as the unitary conception of law used to be, by the priority of common interests and values and hence of public law, systems theory lays down the theoretical foundations for a *lex mercatoria* thought as an autopoietic subsystem. For the first time in history, we can see the coherent

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[43] NIKLAS LUHMANN, SOZIALE SYSTEME. GRUNDRIß EINER ALLGEMEINEN THEORIE (1984); NIKLAS LUHMANN, DIE GESELLSCHAFT DER GESELLSCHAFT (1997).

[44] LUHMANN, DIE GESELLSCHAFT DER GESELLSCHAFT, *supra* note 43.

[45] *Id.*; NIKLAS LUHMANN, DAS RECHT DER GESELLSCHAFT (1993).

[46] LUHMANN, DAS RECHT DER GESELLSCHAFT, *supra* note 45; GUNTHER TEUBNER, RECHT ALS AUTOPOIETISCHES SYSTEM (1989).

[47] Andreas Fischer-Lescano & Gunther Teubner, *Fragmentierung des Weltrechts: Vernetzung globaler Regimes statt etatistischer Rechtseinheit*, *in* WELTSTAAT UND WELTSTAATLICHKEIT. BEOBACHTUNGEN GLOBALER POLITISCHER STRUKTURBILDUNG, 37 (Mathias Albert & Rudolf Stichweh eds., 2007).

[48] Gunther Teubner, *Des Königs viele Leiber: Die Selbstdekonstruktion der Hierarchie des Rechts*, *in* GLOBALISIERUNG UND DEMOKRATIE. WIRTSCHAFT, RECHT, MEDIEN 240 (Hauke Brunkhorst & Matthias Kettner eds., 2000).

[49] Fischer-Lescano & Teubner, *supra* note 47.

formulation of the idea that private actors create global legal structures and thereby *order* largely outside public institutions.[50]

A second attempt for a paradigmatic revolution beyond the unitary theories of order singles out modern subjectivity as the main target of its attack. Whereas for modern Western philosophy the integrity of subjectivity was the guarantee for true knowledge and a well-ordered society – in short, for progress in sciences, freedom and justice – postmodern criticism claims that a unitary subject is rather an abstraction which actually oppresses the concrete individualities.[51] For postmodern philosophy, subjectivity as unity is a theoretical fiction choking real individuals. Accordingly, for the *postmodern paradigm of order*, the idea of a unitary order is neither a correct representation of reality,[52] nor a desirable prospect.[53] From the postmodern point of view, universalism can degenerate into mere *Kitsch* disregarding the real pain of fellow humans,[54] and humanitarianism – insofar as it is based on universal principles – has a hidden "dark side".[55] If the perspective of a universal order is a chimera or, insofar as it has an effect, a backup for oppression, its abandonment to the benefit of developing pluralistically structured legal orders is not seen anymore as an essentially negative phenomenon. Rather, it is understood as having the potential to open new dimensions of freedom to real individuals, ranging from the personal commitment of professional lawyers within the framework of "legal formalism" and its effect on the protection of individual rights,[56] to very diverse proposals – sometimes only indirectly influenced by postmodern thought – of realizing individualities

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[50] GLOBAL LAW WITHOUT A STATE (Gunther Teubner ed., 1997); Gunther Teubner, *Privatregimes: Neo-Spontanes Recht und duale Sozialverfassungen in der Weltgesellschaft?*, *in* ZUR AUTONOMIE DES INDIVIDUUMS (Dieter Simon, Manfred Weiss eds., 2000).

[51] Michel Foucault displays this approach in his deep-going analysis of different social phenomena, such as language, scientific knowledge, and sexuality. *See* MICHEL FOUCAULT, LES MOTS ET LES CHOSES (1966); MICHEL FOUCAULT, L'ARCHEOLOGIE DU SAVOIR (1969); MICHEL FOUCAULT, L'ORDRE DU DISCOURS (1970); MICHEL FOUCAULT, HISTOIRE DE LA SEXUALITE, I : LA VOLONTE DE SAVOIR (1976); Michel Foucault, *The Subject and Power*, in: MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS, 208 (Hubert L. Dreyfus & Paul Rabinow eds., 1982).

[52] Martti Koskenniemi, *International Law in Europe between Tradition and Renewal*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 113 (2005).

[53] For a critique of "Empire" as the contemporary form of unitary order, *see* MICHAEL HARDT & ANTONIO NEGRI, EMPIRE (2001).

[54] Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 17 CAMBRIDGE REVIEW OF INTERNATIONAL AFFAIRS 197 (2004). For a critique of the universalistic and therefore utopian approach to international law *see e.g.* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989).

[55] DAVID KENNEDY, THE DARK SIDES OF VIRTUE. REASSESSING INTERNATIONAL HUMANITARIANISM (2004).

[56] MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATION: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960 (2001).

beyond the prospect of an all encompassing universality.[57] Against these challenges, Habermas' renewed universalism needs to be read.

II. Habermas' Communicative Paradigm as a Defence of Universalism

Centering social order on the principle of a universal rationality based on the homogeneous mental processes of the subject, Western philosophy assures the general validity of science and ethics, against the challenges of scepticism; herewith, it has also provided the conceptual foundations for a progressive improvement of the rights of individuals. As a consequence of this position of subjectivity as the guarantor for the universal validity of rational principles, public power could eventually be understood, at the end of a long and sometimes dramatic evolution, as legitimated only by the will of the individuals who are subject to it. Through a deconstruction of this subjectivity, systems theory and postmodern thought bring the descriptive shortcomings and the normative ambiguity of modern subjectivism to the fore. Yet, hereby they also shake what had been over the preceding 300 years the philosophical basis of the universal validity of knowledge as well as of the idea of a legitimate legal order, paving the way to a renaissance of scepticism in the theory of knowledge and to normative relativism with important consequences for the thought on legitimacy and normativity in law and politics. The communicative paradigm, as it was developed by Karl-Otto Apel[58] and Jürgen Habermas[59] in an original fusion of German idealism and Anglo-Saxon pragmatism is the attempt to preserve the legacy of modernity in light of those challenges, i.e. by responding to the shortcomings of monologic subjectivity and rationality.

The inventors of the communicative paradigm aim to overcome the hubris of the hypostatised subjectivity not by destructuring the idea of "subject" itself but by reconsidering it into an interactive, intersubjective framework. Reacting to systems theory, they accept the insufficiency of a monolithic understanding of rationality and largely recognise the diagnosis of functionally differentiated rationalities within different subsystems. Here, however, this diagnosis does not lead to the abandonment of an overarching idea of reason as counterpart to the functional rationalities. The preservation

[57] As examples of the different approaches that can be traced back, to some extent, to a postmodern background insofar as they reject the idea of a unitary order, see neo-Grotianism (Benedict W. Kingsbury, *The International Legal Order*, IILJ Working Paper 2003/1; Benedict W. Kingsbury, *The Problem of the Public in Public International Law*, New York University Public Law and Legal Theory Working Papers, 2005/6), network-theories (ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER, 2004) and the theory of supranational integration (JOSEPH H. H. WEILER, THE CONSTITUTION OF EUROPE, 1999).

[58] *See* KARL-OTTO APEL, TRANSFORMATION DER PHILOSOPHIE APEL (1973).

[59] *See* JÜRGEN HABERMAS, THEORIE DES KOMMUNIKATIVEN HANDELNS (1981); JÜRGEN HABERMAS, MORALBEWUßTSEIN UND KOMMUNIKATIVES HANDELN (1983); JÜRGEN HABERMAS, VORSTUDIEN UND ERGÄNZUNGEN ZUR THEORIE DES KOMMUNIKATIVEN HANDELNS (1984).

of an overarching idea of reason, linked with the acknowledgement of differentiation, is achieved by conceiving several logics of interaction, each distinguished by a specific context, but nevertheless open to the dialectic of mutual comprehension, influence and competition. This dialectic is made possible by the common substrate of communicative reason, present in any interaction. The described deficits of the solipsistic understanding of subjectivity in founding the universality of knowledge and the legitimacy of law only on the internal processes of mind, i.e. without any contextualisation in society, are tackled here by grounding them on the interaction between socially centered individuals, whereby Habermas strives to overcome (in a Hegelian way) the *querelle* between liberals and communitarians.[60] The idea of a single and universally valid subjectivity evolves to a plurality of individuals, interacting with each other. This shall provide a new fundament for theoretical and practical reason. Accordingly individuals remain the basic units for the standards of legitimacy.

In the broad context of the philosophy of intersubjectivity,[61] communicative theory holds as its core assertion that communication, to live up to its rational potential, presupposes that any participant in the interaction makes his assertions in the firm conviction that these can – or even should – be accepted by any other participant. This kind of linguistic re-interpretation of the theory of recognition essentially states that (a) order is more than the effect of strategic action, but the result of an interaction that lives up to certain normative principles, and (b) social interaction is basically characterised by linguistic pragmatics. Moreover, (c) this theory states as fundamental for communication that the speaker postulates to be expressing a true proposition, eventually in light of a just action, and that the interlocutor accepts this claim.[62]

On that basis, the communicative paradigm develops first a new comprehension of knowledge.[63] The supporters of the communicative paradigm share the critique of modern epistemology, but do not follow, however, the view that any universal knowledge is

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[60] As is shown by two famous examples – of contributions to, respectively, the liberal and the communitarian understanding of political philosophy: JOHN RAWLS, A THEORY OF JUSTICE (1972) AND CHARLES TAYLOR, SOURCES OF THE SELF. THE MAKING OF THE MODERN IDENTITY (1989).

[61] *See* JÜRGEN HABERMAS, DER PHILOSOPHISCHE DISKURS DER MODERNE (1985). With regard to the paramount relevance of Hegel's social philosophy for a theory of intersubjectivity *see* AXEL HONNETH, KAMPF UM ANERKENNUNG. ZUR MORALISCHEN GRAMMATIK SOZIALER KONFLIKTE (1992); SERGIO DELLAVALLE, FREIHEIT UND INTERSUBJEKTIVITÄT. ZUR HISTORISCHEN ENTWICKLUNG VON HEGELS GESCHICHTSPHILOSOPHISCHEN UND POLITISCHEN AUFFASSUNGEN (1998).

[62] *See* HABERMAS, VORSTUDIEN UND ERGÄNZUNGEN, *supra* note 59. The idea of a validity claim in propositions as a necessary condition of communication has raised much criticism. For an overview of the various positions *see* SYBILLE KRÄMER, SPRACHE, SPRECHAKT, KOMMUNIKATION (2001). Object of dispute remains – even between the authors of the present contribution – whether the validity claim as a precondition of communication is an indispensable requirement for a (normative) theory of social order.

[63] HABERMAS, VORSTUDIEN UND ERGÄNZUNGEN, *supra* note 59; JÜRGEN HABERMAS, WAHRHEIT UND RECHTFERTIGUNG (1999).

impossible, as postmodern thinkers do, nor do they resort to any kind of pre-critical ontology, of whatsoever nature and origin, in order to support the claim for truth and universality. Basing their understanding of truth on the universal principles and praxis of communication, they defend the possibility of knowledge in a post-metaphysical as well as non-sceptical way. Concretely, individuals involved in the discussion concerning the description of phenomena might agree with each other on the content of the assertions made, which means that they see it as a "truth", albeit not absolute, but fallible, not ontological, but transcendental and pragmatic. If part of the participants involved disagree on the contents of the assertions, "consensual truth" is possible as a final result of a discursive process. However, this result depends on the respect of a number of fundamental principles of communication, in particular its openness to every argument which does not curtail the condition of participation and, within this horizon, the acceptance of the best argument, that means of the most coherent, well-informed, compatible with the data and phenomena of experience and susceptible to universalisation.

The communicative paradigm proposes a specific understanding of practical reason. The use of practical reason is spelled out in different *modi*, each one characterised by the specific issue which forms the content of the interaction. The first step consists in distinguishing between the strategic use of reason and its use in order to achieve a consensus about a question by the individuals concerned.[64] The *strategic* use of reason aims to determine the most favourable instruments or the best way in order to achieve a goal established, independently from any kind of discursive agreement, by the individuals, each of them singularly and apart from the others. In contrast, the *communicative* use of reason is oriented at establishing consensus on a common concern. It requires an interaction in which the goal is not unilaterally defined but elaborated by the interchange of arguments, according to the mentioned principles of a non-sceptical theory of knowledge. Interactions based on the strategic use of reason tend to be output- and power-oriented insofar as the participants use communication means in order to exercise influence over the counterpart so as to achieve their goals. In contrast, interactions according to the communicative use of reason are process- and consensus-oriented whereby they live up in a more complete way to the normative potential contained in any kind of social interaction. The adequate display of the normative potential can be achieved exclusively in social processes characterised by the open exchange of arguments. Consequently, only the consensus-oriented use of reason can be defined as "truly communicative". Albeit always confronted, often overlapped and sometimes interweaved with strategic approaches to action, the argumentation-based communication functions not only as a kind of normative benchmark of practical reason, but is – in the view of the supporters of the communicative paradigm – already concretized in at least some social contexts of interaction.

[64] HABERMAS, VORSTUDIEN UND ERGÄNZUNGEN, *supra* note 59.

Within the realm of a "truly" communicative understanding of practical reason, Habermas distinguishes, in a normative perspective, different sorts of interaction centered on distinct social questions, operationalising separate understandings of reason: the ethical and the moral. Herewith, Habermas gives to these terms and their relationship a rather innovative meaning.[65] The ethical use of reason is displayed within interactions concerning individual as well as collective existential identity, or within interactions regarding political questions how to deal with common concerns. Habermas first identifies interactions regarding the *existential identity of the self and of the community*. Here, individuals communicate with the aim of clarifying the sense of their lives as individuals and as a culturally specific group. When the communication focuses on issues related to existential identity, the content of the discourse addresses "how do we want to live in order to have a meaningful existence?". According to Habermas, the best context of this kind of communication is the religious, *Weltanschauung*-based, ideological or cultural community, held together by shared values aiming at existential questions. Values characterised as ethical do not claim to be universal; rather they express principles on which individuals want to orientate their existence. They may be deeply convinced that these principles are the best solution in order to find a sense of life, but Habermas does not support to impose them on members of other cultural or religious groups, for example through compelling laws. Otherwise, a society ceases to be liberal.

Second, Habermas conceives a *political* dimension of the social discourse displaying an ethical use of reason when the members of a society are arguing about the best ways in order to address the shared issues of public concern. The question is "how do we want to organise our community in order to tackle together the common problems within a well-ordered society?" In this case, individuals are not searching for existential sense. Rather, the topic consists in elaborating through an inclusive discussion a social order which offers to all citizens the best chances to self-realisation and self-enhancement. Not personal faith is here the beacon for the action of the individuals, but rather the participation in deliberative procedures. Not surprisingly, the best order for a post-metaphysical society without a predetermined idea of a "good life" is, according to Habermas, simply the order that is procedurally legitimated by the citizens. In such a political discourse, values also arise from the pertinent communication. Nevertheless, these values are not mainly substantive as in the case of the existential-ethical use of reason. Rather, in a pluralist society political values are mostly *procedural*. The political values in a pluralist society are centered in Habermas' theory on the basic elements of political freedom, democracy and justice.[66]

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[65] JÜRGEN HABERMAS, ERLÄUTERUNGEN ZUR DISKURSETHIK (1991).

[66] JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG. BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHTSSTAATS (1992).

Both the existential-cultural and the political discourse are associated by what Habermas defines, in general, as an *ethical* use of reason, regarding the principles that should govern social live within a specific community.[67] On the contrary, if the content of the communication concentrates on the question about "what we ought to do", thus concerning the behaviour one should assume as a human being towards all other human beings directly or with respect to their present and future essential condition of existence, the modus of the use of practical reason is, according to Habermas, a *moral* one.[68] Its main characteristic is that the action eventually legitimated by the communication should be universally acceptable by every reasonable person. Concerning as a matter of principle all human beings, the moral discourse is universal. If consensus is hard to achieve within concrete and limited societies, normative, i.e. universal results are consequently even more difficult to bring about. Therefore, Habermas splits moral discourse in two spheres. The first one consists in the transcendental sphere of moral communication: the discourse produces rules that should govern the behaviour of every human being towards any other human being. These rules are fundamental to the existence and well-being of every fellow human and therefore ought to bind in principle everyone's conscience and behaviour everywhere in the world – irrespective of their normative status. Discourse ethics conceives the formulation of moral rules not as the result of a monologic procedure, as it was with Kant; rather their elaboration requires a dialogue. Nevertheless, since the rules are informal they do not need universal agreement.

Yet – and this is the other sphere in which moral discourse splits – some achievements of moral argumentation can be transposed into positive law. They are basic and rather "thin" if compared both with the laws governing individual political societies as well as with the transcendental principles of morals as they only protect the general preconditions of a peaceful and cooperative interaction among humans at the most wide-ranging level. Accordingly, the prohibition of the use of force and fundamental human rights form the core structure of a *universal legal order.*[69] Surely, the translation of such moral standards into effective law is at present at best partial, and maybe it will always be so. Yet, following Habermas and with him a great strand of philosophical thought, from Plato to Hegel and from Augustine to Kant, this tension is inherent to the human condition and the more formal and universal the principles are, the more striking can be the distance to their concrete realisation. From a normative point of view, however, the existence of such a gap does not make the principles invalid; rather it creates the setting for meaningful individual commitment.

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[67] HABERMAS, ERLÄUTERUNGEN ZUR DISKURSETHIK, *supra* note 59.

[68] *Id*.

[69] JÜRGEN HABERMAS, DIE POSTNATIONALE KONSTELLATION (1998).

Summing up, communicative rationality does not stop at the functional barriers of social systems. Rather, the communicative paradigm of order maintains the claim for a universal rationality, which has distinguished all universalist conceptions. And it preserves the promise to free individuals from the chains of pre-reflexive belongings, essential to the second paradigmatic revolution. Nonetheless, the exponents of the communicative paradigm have learned from post-modern theory and systems theory: their concept of rationality is not monolithic but differentiated, and it has overcome monologic thinking by building on intersubjectivity and historicity.

D. Habermas' Communicative Paradigm as a Conceptual Base for a Theory of Public International Law

From the epistemological bases of his communicative understanding of social order Habermas draws two main consequences for the architecture of contemporary public law (1 and 2). Furthermore, scholars have begun to apply Habermas' political-philosophical analysis in order to specify a universal dimension of public law and international order without resorting to holistic metaphysics or shaky assumptions on the "natural" sociability and solidarity of humankind (3 and 4). Altogether, these elements provide a viable regulative idea for a general theory of public law encompassing rules flowing from domestic, supranational and international sources (5).

1) Historically, theocratic states and, in a different way, also many nation-states are characterised by the overlapping of the existential-cultural discourse with the political one. Therefore, the state church or the institutions of the nation often address issues of personal and group identity and not only those concerning the organisation of the society. The consequence has often been a trend to exclusion of the "other". Independently from the normative problems of such exclusion, social integration by an existential-cultural discourse is becoming increasingly difficult within societies distinguished by a variety of ideas of "good life". Moreover, the assumed overlap of culture and politics makes it difficult to conceive a citizenry within supranational systems, such as the European Union. Distinguishing the existential-cultural level of interaction from the political dimension, Habermas develops a perspective for multi-ethnic societies without the bond of the nationhood or a common religion. A political discourse is conceived which might deliver the foundation for democratic legitimacy of a post-national public authority at the domestic, the supranational, and eventually perhaps also the global level.[70]

2) In his recent works on international order Habermas supports the idea of an international law which is more than interstate coordination based on a shared perception of utility. Peace and the rights of the individuals have to be safeguarded and, if necessary,

[70] HABERMAS, DIE EINBEZIEHUNG DES ANDEREN, *supra* note 39; SERGIO DELLAVALLE, UNA COSTITUZIONE SENZA POPOLO? LA COSTITUZIONE EUROPEA ALLA LUCE DELLE CONCEZIONI DEL POPOLO COME "POTERE COSTITUENTE" (2002).

enforced by international mechanisms. Moreover, the perception of common problems at a worldwide scale leads to the call for "world internal politics". The Habermasian answer to both challenges is a "constitutionalisation" of international law. However, this quest for "constitutionalisation" does not strive for a fundamental law of an unlikely "world republic" or for enshrining the values of an ontologically already existent worldwide society. In his view, the international law beyond interstate coordination is articulated in two dimensions.[71] First, there should be a *supranational* 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 fundamental human rights; fundamentally a UN with a substantially reformed Security Council. The second arena is called by Habermas *transnational*[72] and is distinguished by institutions for the formulation and implementation of rules regarding fields of shared common interest like energy, environment, trade, or financial transfers. The transnational dimension of international order differs insofar from the mere interstate praxis of the traditional international law as the rules laid down by such processes do not affect only the interests of the political communities involved but shape common concerns on a worldwide scale.

3) Habermas' application of the communicative paradigm to the international level is not just a conceptual possibility; there is empirical evidence of truly communicative action in international relations. In analysing the forms of rationality in international relations some authors have applied elements of its communicative understanding. They succeeded in demonstrating that interaction among international actors is not just led by strategic purposes but can include the aim at achieving consensus by means of the exchange of arguments.[73] Pointing out that international agreements come about through the use of communication and that communication can build a dimension beyond mere strategic action, the supporters of the "arguing-theory" do not remove the strategic use of reason from the field of their research nor substitute it with a harmonistic view. Rather, they emphasise the potential of communication in international relations, the specificity of communicative rationality and the fact that the exchange of normative arguments builds a

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[71] HABERMAS, DER GESPALTENE WESTEN, *supra* note 39; HABERMAS, EINE POLITISCHE VERFASSUNG FÜR DIE PLURALISTISCHE WELTGESELLSCHAFT?, *supra* note 39.

[72] It has to be pointed out that Habermas' understanding of the concept of "transnational law" is significantly different from its interpretation by the theorists of the "transnational legal process" which give little importance to international institutions, *see* Harold Hangju Koh, *Transnational Legal Process*, 35 NEBRASKA LAW REVIEW 181 (1988); Felix Hanschmann, *Theorie transnationaler Rechtsprozesse*, in NEUE THEORIEN DES RECHTS, 347 (Sonja Buckel, Ralph Christensen, & Andreas Fischer-Lescano eds., 2006).

[73] Harald Müller, *Internationale Beziehungen als kommunikatives Handeln*, 1 ZEITSCHRIFT FÜR INTERNATIONALE BEZIEHUNGEN 15 (1994); Harald Müller, *Arguing, Bargaining and All That: Communicative Action, Rationalist Theory and the Logic of Appropriateness in International Relations*, 10 EUR. J. INT'L REL. 395 (2004); Thomas Risse, *"Let's Argue!": Communicative Action in World Politics*, 54 INT'L ORG. 1 (2000).

horizon of expectances which can influence, the behaviour of actors.[74] In a way, Habermas' paradigm provides the philosophical underpinning for many streams of peace research of the last decades.[75]

4) Based on communicative theory, discourse ethics has been adopted to substantiate *jus cogens*, one of the most difficult concepts in contemporary international law. *Jus cogens* refers to a set of superior norms in international law which binds international actors independent of their will.[76] Among the many problems connected with *jus cogens* is the need of a sound theoretical basis beyond natural law and positivism. Another persisting challenge of *jus cogens* results from the still outstanding establishment of a procedure to identify *jus cogens*. Recurring to discourse ethics[77] *jus cogens* is conceived as those principles that lead to norms which can be generally recognized. This concept of *jus cogens* can thus be linked to the assumption of a "universal community of communication".[78] This encompasses the totality of actors involved in international relations, including not only states but also individuals understood in a cosmopolitan way; it sets the core requirements for legitimate public action worldwide. The idea of a global "political community" is a way to spell out this concept within the theory of international relations.[79]

5) All these applications of Habermas' conceptuality highlight how his communicative paradigm provides a possible foundation for an interlinked system of public law consisting of elements from domestic, supranational and international legal orders. It appears promising to understand contemporary public law as a system of interlinked norms addressing the exercise of public authority by domestic, supranational and international institutions. Such a system of public law deploys a sum of original features which may help to meet successfully some important challenges which public law faces at the beginning of the 21st century.

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[74] For a survey on empirical studies on conditions and effectiveness of such an influence *see* Cornelia Ulbert & Thomas Risse, *Deliberately Changing the Discourse: What Does Make Arguing Effective?*, 40 ACTA POLITICA 351 (2005).

[75] ERNST-OTTO CZEMPIEL, SCHWERPUNKTE UND ZIELE DER FRIEDENSFORSCHUNG (1972); JOHAN GALTUNG, PEACE AND SOCIAL STRUCTURE (1978); Gert Krell (ed.), FRIEDEN UND KONFLIKT IN DEN INTERNATIONALEN BEZIEHUNGEN (1994).

[76] STEFAN KADELBACH, ZWINGENDES VÖLKERRECHT (1992); Stefan Kadelbach, *Jus Cogens, Obligations Erga Omnes and other Rules – The Identification of Fundamental Norms*, in: THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER, 21 (Christian Tomuschat & Jean Marc Thouvenin eds., 2006).

[77] At this point, it needs to be stressed that discourse ethics as well as deliberative democracy do not coincide *tout court* with the communicative paradigm. Rather they are two specific uses of reason among those covered by the paradigm.

[78] KARL-OTTO APEL, TRANSFORMATION DER PHILOSOPHIE (1976); KARL-OTTO APEL, DISKURS UND VERANTWORTUNG (1990).

[79] ANDREW LINKLATER, THE TRANSFORMATION OF POLITICAL COMMUNITY (1998).

a) The communicative paradigm informs an understanding of society as the sum of all social interactions. These need rules in order to be well-ordered, i.e. peaceful, cooperative, and effective. The domestic, supranational and international dimensions of public law are each characterised by specific discourses, its own finalities, distinctive procedures in order to produce norms, and particular mechanisms for legitimacy. Despite this specificity, the systems of norms are interlinked, not only legally, but also through the role played by the communicative rationality insofar as it impacts the functional subsystems and contributes to their normative horizon.

b) Though preserving the idea of a general link between norms and therefore between the different orders, the communicative understanding of public law stresses the plurality of legal orders. The communicative paradigm rejects the traditional conception that law should form a unitary and hierarchical normative system. The coordination between the orders is not guaranteed anymore, as it was in the historical paradigms of order, by the unity of a vertical authority chain, but by the performances of a communicative reason shared by all actors.

c) The conception of public law based on the communicative paradigm overcomes the emphatic idea of a constitution – as it was interpreted in the tradition of the nation-state – as the core precondition of public law in general. Cutting the link between cultural identity and constitutional law even at the national level, it paves the way to a more flexible application of the standards that make up public law also to non-national contexts.

d) Although the criteria of legitimacy are fundamentally the same for any legal order, their concretization and their interaction have to be established specifically for each order of public law. In doing so it has to be pointed out that the democratic legitimacy of international law remains, today and for the foreseeable future, bound to the democratic process within the single states.[80] Democratic procedures cannot be simply extended to supranational and in particular international organizations, which would imply the chimera of the construction of a world-state. Accordingly, there is a global interest to protect and develop the sources of political legitimization within the single polities. Although there is no theoretical argument that these sources are exclusive, there is still a need to explore further sources on a theoretical as well as practical level.[81] The question remains in particular how international political and legal processes relate to the demanding standard of legitimacy developed in "Between Norms and Facts", above all with respect to the

[80] A hybrid position is taken by supranational organisations such as the European Union, which have access both to strong own legitimacy resources as well as to legitimation coming from the procedures within the member states.

[81] For a taxonomy of relevant positions *see* Armin von Bogdandy, *Globalization and Europe: How to Square Democracy, Globalization, and International Law*, 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW 885 (2004). Habermas' position is expressed in: HABERMAS, DIE POSTNATIONALE KONSTELLATION, *supra* note 69; HABERMAS, EINE POLITISCHE VERFASSUNG FÜR DIE PLURALISTISCHE WELTGESELLSCHAFT?, *supra* note 39.

requirement of a socially embedded parliamentarism.[82] The standards and mechanisms of inclusive politics at the supranational and international level still need to be defined. Habermas has recently proposed an institutional sketch how to provide democratic legitimacy to such institutions with, for example, a global parliamentary assembly. Accordingly, he calls for a substantive transformation of the institutional bedrock of international law inspired by the example of the European Union.[83]

Habermas presents an innovative theoretical basis for a constitutionalist, universalist project of global order and provides elaborate reasons why a universalist project should be pursued. His constitutionalist project does not amount to a celebration of international law as it stands; in that respect it is very different to many contributions on the constitutionalization of international law in legal scholarship. Rather, it sets out a far reaching transformative agenda that might serve as a regulative idea, informing transformative work of scholars, politicians and lawyers, depending on what is conceived to be feasible at the international level in our times.

[82] HABERMAS, FAKTIZITÄT UND GELTUNG, *supra* note 66.

[83] Jürgen Habermas, *Konstitutionalisierung des Völkerrechts und die Legitimationsprobleme einer verfassten Weltgemeinschaft*, in RECHTSPHILOSOPHIE IM 21. JAHRHUNDERT, 360, 371-373 (Winfried Brugger, Ulfried Neumann, & Stephan Kirste eds., 2008).