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ADDRESSING DIVERSITY IN POST-UNITARY THEORIES OF ORDER

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Addressing Diversity in Post-unitary Theories of Order

Sergio Dellavalle[*]

Abstract

The article focuses on one of the most significant conceptual reassessments that are necessary in order to adapt the idea of sovereignty to the demands of an open and democratic society in an ever more interconnected world. Indeed, if sovereigns have to reject their absolutistic claim, this implies that they will have to share power with other national as well as infra- and supranational or international instances. This means that the concept of sovereignty has to be relocated within a pluralistic – or better, post-unitary – legal system. Following this premise, the article analyses the epistemological presuppositions that stay behind the transition from the unitary conception of order to the view that also a multiplicity of orders should not be denounced as a pathology any longer, but accepted as a fact, on the one hand, and as a desirable perspective on the other. The first step of the analysis consists in introducing the fundamental elements of the unitary conception of order in both its variants: the particularistic and the holistic. In the further section, three approaches are sketched which overcome the unitary notion of order: systems theory, post-modernism, and discourse theory. Each of these epistemological approaches lays the ground for a specific notion of post-unitary legal order: the idea of the existence of a multiplicity of self-reliant, albeit not mutually indifferent, legal systems in the first case, legal pluralism in the second, and cosmopolitan constitutionalism in the third.

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A. Introduction: From Unitary to Post-unitary Understanding of Social, Political and Legal Order

The reshaping of sovereignty in order to meet the requirements of an open and democratic society in an ever more interconnected world needs at least three major conceptual reassessments. First, the legitimacy of sovereign power has to be conceived "bottom up", i.e. as an ascending process originating from the citizens. Second, the rationalities that sovereign powers display while acting, have to be scrutinized so as to find out which understanding of rationality is more suitable for making sovereigns aware of their responsibilities towards non-citizens.[1] Third, if sovereigns have to reject their absolutistic claim, this implies that they will have to share power with other national as well as infra- and supranational or international instances. Put differently, if we abandon "the conviction that one system of norms [constitutional or international] is superior to the other"[2] and plea for the "discordant parity" of a "robust constitutionalism" and a "robust internationalism",[3] the concept of sovereignty has to be relocated within a pluralistic – or better, post-unitary – legal system.

Yet, the transition from a unitary to a post-unitary understanding of the law is far from being an easy task. Indeed, since the beginning of Western thought, social, political and legal order has always been conceived of as depending on the unity, internal coherence, reliable hierarchy and often also homogeneity of the community taken into consideration as the basis for social interaction. Therefore, regardless of its extension – it could be as small as the Greek *polis*, or as huge as the Roman Empire, as exclusive as the nation state, or as inclusive as the cosmopolitan *civitas maxima* –, the community regarded as the foundation of well-ordered social relations had always to be characterized by a pyramidal structure of political institutions and legal norms. The simultaneous presence of

[1] I have presented both these conceptual reassessments in: Sergio Dellavalle, *On Sovereignty, Legitimacy, and Solidarity. Or: How Can a Solidaristic Idea of Legitimate Sovereignty Be Justified?* (2015), 11 Theoretical Inquiries in Law (forthcoming).
[2] Eyal Benvenisti and Alon Harel, *Embracing the Tension between National and International Human Rights Law: The Case for Parity*, GlobalTrust Working Paper 04/2015, http://globaltrust.tau.ac.il/publications, at 2.
[3] Id., at 4.

different normative and institutional orders within the same territory, thus, was not welcome as the establishment and recognition of diversity, but rather condemned as sheer *dis*-order. In the last decades, yet, a new approach to the understanding of legal and political order has been developed, in which the plurality of norms and institutions within the same territory and regulating the same matter is not denounced as a pathology any longer, but is accepted as a fact, on the one hand, and as a desirable perspective on the other.

In my contribution, I will not present this change of perspective as the result of a kind of incremental growth of the scope of social interactions, due to the collapse of former geo-political divisions and to the development of new communication and transport technologies. Nor will I interpret it only as the quasi-natural effect of the necessity to support the expanded range of social interaction with an adequate normative framework. Rather, I will describe the shift – quite unusually within the debate about the emergence of cosmopolitan constitutionalism and pluralism in legal doctrine – as the consequence of an *epistemological* revolution. The assumption is that our understanding of the phenomenon of social, political and legal order as well as our possibility to act according to the rules of the order recognized as valid is fundamentally based, like any other aspect of the use of theoretical and practical reason, on epistemological *paradigms*.[4] Paradigms are those conceptual preconditions of knowledge and action that characterize the use of theoretical and practical reason within a certain society and with regard to a specific field of human experience and behaviour. On such a kind of fundamental paradigms are grounded the theories that attempt to explain the world phenomena and to give us orientation for conduct – and insofar as the paradigms on which they are based are essentially different, also the theories of knowledge and action will contain divergent interpretations of the world and radically distinct normative references for praxis. In any case, we cannot reach results in knowledge or action which are outside the conceptual scope of the paradigm on which we build our use of reason: everything beyond this range is simply not conceivable for us – at least at this precise moment of the development of human capabilities. Only a

[4] T. Kuhn, The Structure of Scientific Revolutions (1963).

paradigmatic revolution, as a consequence of the adaptation of the theoretical and practical presuppositions to inputs coming from experience and praxis which cannot be successfully inserted into existing patterns, can make us aware of new perspectives.

Every discipline has its specific paradigms; so does also the discipline that we can call the "general theory of order".[5] Against this background, the contribution will portray the epistemological presuppositions that stay behind the transition from the unitary conception of order to the view that also a multiplicity of orders or a multilayer understanding of its structure within one and the same society – in this case: within the international community – can nevertheless be interpreted as a status of order, albeit of a quite different kind.

The first step of the analysis will consist, therefore, in introducing the fundamental elements of the unitary conception of order in both its variants: particularistic and universalistic (B.). In the further section (C.) I will sketch the three main ways of overcoming the unitary notion of order that have been developed in the last decades, opening a new horizon on how we think that a society is factually shaped or should be, for those authors who endorse a normative point of view, rightly organized: systems theory (C.I.), post-modernism (C.II.), and discourse theory (C.III.). Each of these epistemological modi operandi – which correspond to different forms of criticism against the understanding of rationality that dominated modern philosophy – is not only characterized by a specific approach to the practical and theoretical use of reason but also lays the ground for a particular notion of post-unitary legal order: the idea of the existence of a multiplicity of self-reliant, albeit not mutually indifferent, legal systems in the first case, legal pluralism in the second, and cosmopolitan constitutionalism in the third.

B. Particularism and Universalism in the Unitary Theories of Order

[5] A. von Bogdandy/S. Dellavalle, Universalism Renewed. Habermas' Theory of International Order in Light of Competing Paradigms, 10/1 German Law Journal 5 (2009); S. Dellavalle, Dalla comunità particolare all'ordine universale. Vol. I: I paradigmi storici (2011).

The assumption that political and legal order should always be unitary, hierarchical and self-coherent does not say anything, yet, on the question concerning the extension of the well-ordered society. In principle, two opposite answers are possible. The first one asserts that order – that means: a system of social interactions that prevents the disruptive effects of conflicts by neutralizing them through the procedural application of social and legal rules – is always limited to the internal context of every specific society and thus *particular*. On contrast, in the external dimension, i.e. between different societies, just a precarious and temporary control of disorder can be achieved. Thus, according to the *particularistic* conception, every society has its own social and legal order, but no supra-state or cosmopolitan order is possible. As a result, a plurality of national orders is supposed to exist, but no legal pluralism – in the sense of the co-existence of legal norms applicable to the same matter, but derived from different sources, which are not hierarchically related to each other – is regarded as possible or desirable. A "pluriversum" is here, thus, conceivable and admitted, but one that is made of non-pluralist orders (B.I).

The second answer to the question of the extension of social order maintains, to the contrary, that the well-ordered society can comprehend, at least in principle, the whole humankind, assuming therefore a *universalistic* scope. The apotheosis of this conception can be located in Hans Kelsen's monistic theory of the legal system. Beyond any parochialism, the unitary vision of the legal system – and therefore the rejection of legal pluralism – is here expanded in cosmopolitan perspective. The consequence is that pluralism is excluded – even more radically than in the particularistic understanding – also from international law, which is thus transformed into a rigid structure of hierarchically disposed norms. Drawing from its high intellectual ambitions, Kelsen's legal philosophy is an outstanding example of how the condemnation of the disorder of plurality is derived from assumptions – not always perfectly transparent for lawyers without philosophical background – concerning the necessary fundaments of true knowledge as well as of right action (B.II.).

I. A Pluriversum of Non-pluralist Orders

Generally, the core element of the particularistic conception of the unitary legal order – according to which rules of peaceful interaction, and therefore of a well-ordered society, can be reliably applied, provided for the due differences, only within each political community but not to the relations between polities – consists in the concept of the essential sovereignty of the individual political community. However, the contents of this concept can be quite diverging. Specifically, two variants can be distinguished.

1. The first strand of the particularistic understanding of the unitary theories of legal order is centred on the idea of national identity. According to this approach, developed in particular by prestigious German constitutionalists like Josef Isensee, Paul Kirchhof and Dieter Grimm, only the unity of the legal system, grounded on the primacy of the national constitution, can guarantee the rule of law and a high standard of legitimacy, both of which would be lost in the context of a cosmopolitan turn of constitutionalism.[6] More concretely, the unity of the law[7] is based on the unity of public power[8] – and this, for its part, can only be the result of the national unity of the people (*Volk*).[9] Interesting are here, above all, the reasons of the unity of the people: Isensee identifies them with "geographic and geopolitical situation, historic origin and experience, cultural specificity, economic necessities of the people, natural and political conditions."[10] None of these elements can be regarded as the consequence of free decisions taken by the members of the political community. To the contrary, all of them are expressions of a pre-political state of facts, of a quasi-natural condition of the *Volk*, on which political and legal institutions are built. They constitute the *Volk*, thus, as a

[6] D. Grimm, The Constitution in the Process of Denationalization, 12 Constellations 447 (2005).
[7] J. Isensee, Staat und Verfassung, in: J. Isensee and Paul Kirchhof (eds.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, Band I: Grundlagen von Staat und Verfassung, 591, at 619 (1987).
[8] Id., at 620.
[9] Id., at 634.
[10] Id.

"community of destiny",[11] before and beyond any individual decision or preference.[12] Furthermore, since the existential conditions of the *Volk* are unitary, the legal system that guarantees a peaceful interaction among the members of the *Volk* will be unitary as well.

Whereas in Isensee's and Kirchhof's interpretation the unity of the *Volk* has a generally ethnic character, where ethnic identity is understood as comprehending a large number of mostly pre-communicative elements, Dieter Grimm locates it rather in the common language spoken by all members of the people.[13] Only the existence of a shared language – following Grimm – enables the members of the political community to legitimate the institutions of public power as well as their decisions.[14] Here lies the key to a better understanding of the concept of rationality generally adopted by the supporters of the nation-based strand of legal theory. Correctly, law is identified as fundamentally linked to linguistic communication.[15] Linguistic communication, however, is not defined on principles of transcendental pragmatics,[16] but on the specific identity of national languages. For that reason, language can never be universal; rather, we have – according to this approach – a "pluriversum" of languages, each of them specific for a particular cultural community, i.e. for a nation. Moreover, if the rationality is necessarily embedded in language, and the language is no less necessarily the language of a nation, rationality itself will be deeply linked to the "spirit" of a nation. In other words, if we do not admit any universal language on which rationality is grounded, we will not have any universal rationality either. The plurality of languages and national identities justifies the plurality of legal systems as well, but each of these systems of norms builds a coherent and hierarchical unity in itself, clearly separated from any other legal system – like any national identity is inevitably separated from all other national identities. Here the

[11] Id.
[12] P. Kirchhof, Der deutsche Staat im Prozess der europäischen Integration, in: Isensee/Kirchhof (note 7), at 869.
[13] D. Grimm, Braucht Europa eine Verfasssung?, 50 JuristenZeitung 581 (1995).
[14] Id., at 588.
[15] For an analysis of the relationship between law and language, see: S. Dellavalle, Das Recht als positiv formalisierte Sprache des gesellschaftlich verbindlichen Sollens, in: C. Bäcker, M. Klatt and S. Zucca-Soest (eds.), Sprache – Recht – Gesellschaft, at 93 (2012).
[16] K.-O. Apel, Transformation der Philosophie (1973).

ascertainment of the irreducible presence of plurality does not lead, anyway, to the recognition of legal pluralism as the condition in which different systems of norms dialogically coexist with reference to the same matter and within the same context.

2. The idea that the unity of the law derives from the unity of public power, centred on sovereignty, is shared also by the second strand of the particularistic understanding of the unitary theories of legal order.[17] Common as well is the conviction that public law should maintain an incontestable primacy over all other domains of the law in order to guarantee the hierarchical coherence of the whole legal system. Different is, however, the ontological and epistemological foundation of the centrality of public law, in general, and of constitutional law in particular. According to this second interpretation – and specifically to Martin Loughlin as one of its most prominent advocates within the contemporary legal theory – the centrality of public law is not due primarily to the fact that it would translate into legal terms the quasi-natural, pre-political identity of the "nation", but is drawn from the persuasion that public law expresses, quite to the contrary, the highly political will of an autonomous entity that constitutes itself precisely through this act.[18] In other words, the public sphere – organized by the system of norms of public law – has its origin in the apodictic assertion of will made by a sovereign social actor, firmly rooted in the factual terrain of power.[19] No precondition such as the cultural or ethnic identity of the nation is here required to the political act of will, and this can be accomplished by as different social and ideological subjects as Bodin's monarch,[20] Carl Schmitt's *Volk*,[21] or Sieyès' *pouvoir constituant*.[22] The only indispensable requisite is that the act of will has to be free, i.e. independent from any other source of power.[23]

[17] M. Loughlin, Foundations of Public Law (2010), at 50.
[18] Id. , at 208, 221, 228 and 231.
[19] Id., at 216.
[20] For Loughlin's analysis of Bodin's political philosophy, see: id., at 185.
[21] Id., at 209.
[22] Id., at 221.
[23] Id., at 209.

According to this second, rather power-related understanding of the unity of the legal system, the rationality of public law consists in the simple affirmative assertion made by the individual entity. Rationality develops through apodictic propositions centred on the first-person pronoun, implies the effectiveness of decisions by relying on sufficient power resources, and lastly excludes internal diversity since the act of will, in this conception, has always to be self-coherent and to avoid contradictions. In this sense, if the public power takes the decision A, the possibility of non-A has always to be kept out from the domain on which this individual public power exercises sovereignty and in which the decision A is accepted as legally valid. Nonetheless, public power founded on a particularistic act of will does not rule out the existence of other sovereign public powers: simply, the domains in which they exercise authority should not overlap.

II. Hans Kelsen's Monism, or the Rejection of Legal Pluralism as the Apotheosis of the Legal Theory of Modern Subjectivism

Whereas the unitary conception of the legal system finds its limits, within the particularistic approach, at the boundaries of the individual political communities, in universalistic perspective no limitation is set. As a result, the whole cosmopolitan human society can and should be ruled on the basis of a self-coherent and hierarchical pyramid of norms. The extension of the well-ordered community is acquired, however, at the cost of an even more radical removal of diversity: even that pluralism[24] which, in the pluriversum of non-pluralist orders, was possible at least with regard to the many different national legal systems, is here dismissed on a cosmopolitan scale. No other author has championed this position better and with higher theoretical ambition than Hans Kelsen.

[24] I understand "diversity" as the presence, within the same context and regardless of how large this may be, of different systems of norms. "Pluralism" is here used as the concept that describes the acceptance and recognition of the positive value of diversity. Open remains the question as to whether pluralism can and should be achieved on the basis of an overarching rationality made able to include diversity – like in the communicative paradigm of social order (see *infra*, C.III.) – or by rejecting any attempt to establish a universally valid rationality – like in systems theory (see *infra* C.I.) and postmodern thought (see *infra* C.II.).

Kelsen's reasons for his rejection of legal pluralism[25] can be drawn from his analysis of the contraposition between dualism and monism.[26] His starting point is what he maintains to be a paradox: paradoxical indeed is the claim put forward by the supporters of nationalism, according to which a nation state pretends to be sovereign though acknowledging the validity of international law. In fact – Kelsen argues – the condition of sovereignty is realized when no power needs to be recognized, factually and normatively, as situated above oneself, so that the own capability of acting is not limited by any heterarchic instance.[27] Yet, international law – if taken seriously – imposes precisely such a limitation.[28] For that reason, either the nation state is not sovereign, or international law has little, if any, normative quality.

Kelsen detects three possible ways for resolving the paradox – the first one basing on a dualistic interpretation of the legal system, the second and third ones on a monistic view. The dualistic solution assumes that two different legal systems – the national and the international – coexist, the first one providing rules for the domestic realm, the second for the relations between states. According to this perspective, each system has its own basis of legitimacy and is unchallenged in its area of competence.[29] The problem, following Kelsen, is that in this case we would possibly have two diverging norms, derived from two different legal systems, both effective and legitimate, which simultaneously apply to the same matter. Kelsen refuses this possibility and points out unambiguously that the simultaneous validity of two diverging norms leads to a contradiction which would jeopardize the normative quality of the entire legal system.[30] Therefore, in his view the existence of a plurality of norms – that means: the presence of more

[25] It must be underlined, here, that the pluralism rejected by Kelsen is not the ethical, religious, ideological, political or philosophical pluralism, but only – which is nevertheless central for the present analysis – the legal and institutional pluralism, that means the recognition that the presence, within the same territory, of a plurality of non-hierarchically organized institutions vested with political authority may be seen, under certain circumstances, as an added value.
[26] H. Kelsen, Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik (1934), at 140.
[27] H. Kelsen, Das Problem der Souveränität und die Theorie des Völkerrechts (1981; 1st ed. 1928), at 12.
[28] Id., at 40.
[29] Id., at 102.
[30] H. Kelsen, General Theory of Law and State (1949; 1st ed. 1945), at 363.

than one rule applicable at the same time to the same legal field – is completely inacceptable: a pathology of disorder that should be avoided, or, if already present, healed as soon as possible.

In order to understand better on which epistemological assumptions Kelsen's rejection of plurality is based, it is necessary to consider first the further solutions he proposes. Both are grounded on a monistic conception of the legal system, i. e. on the assumption that domestic and international law have one and the same foundation for validity and legitimacy. The difference is that in the first case domestic public law prevails on international law, whilst in the second international law is placed at the top of the pyramid of legal norms. Following the first definition of monism, international law is conceived of as a part of domestic public law, or, as it has been described, as "external state law".[31] Therefore, it is among the competences of the sovereign individual state to specify the scope of international legal norms. The curious – and according to Kelsen even quite absurd – consequence of this modus operandi is that, given the fact that we have a large number of individual states, if international law is depending for the specification of its normative range on sovereign decisions taken by each of those single states, we will also have as many different international law systems as we have sovereign states; that means, lastly, that no binding international law would exist. Not less absurd would be the circumstance that, since international law norms provide for the mutual recognition of states as equal actors on the international arena, exactly this mutual acknowledgment, which is fundamental for the very functioning of the international system, should rely upon the free and arbitrary will of each individual states. The result would be that the recognition of every state as equal actor of international law would lie in the hands of every other single state, as well as that each individual state would decide on the international recognition of all other states – a confusing condition, which is illogical on the one hand, and would not contribute to stability in international relations on the other.[32]

[31] Kelsen (note 26), at 140.
[32] Id., at 142.

The only solution of the problem would thus consist indeed, if we follow Kelsen and accept his conceptual presuppositions, in the preference for the monistic structure of the entire legal system, but turned upside down as against the former option, i. e. with international law at the apex of the pyramid and domestic public law as the executor of the fundamental principles and norms of international law within a limited territory, towards a specific group of individuals – the citizens of the state – and within the range of competences attributed to the state by international norms.[33] Kelsen admits explicitly that such a construction of the legal system would mark the end of any serious pretension of sovereignty by the single states.[34]

No doubt can be raised on intellectual courage and originality of Kelsen's conception: his turn from an international law conceived as subordinated to domestic law to the assertion of its pre-eminence, based on an outstandingly ambitious conceptual framework, is one of the most fascinating and pathbreaking moves ever made by legal thinking. Nevertheless, it is not free from problems. In particular, the strictly hierarchical and rigid structure of the system of the law as a whole favoured by Kelsen, along with his harsh refusal of legal pluralism, condemned as a source of confusion and disorder, appears to be ill-equipped to face properly the challenges with which the legal system is confronted at the beginning of the 21st century. In a context of increasingly complex and differentiated interactions, the multiple facets of law can hardly be correctly understood and further developed if forced to fit into a traditional pyramidal hierarchy of norms.

The question that we should pose now is why Kelsen so rigorously rejected the perspective of a non-monistic legal order, thus constraining legal norms into a limiting and lastly short-sighted ranked structure. Surely, he cannot be made responsible for not being aware of social, economic and legal developments which

[33] Id., at 149; H. Kelsen, Peace through Law (1944), at 35.
[34] Kelsen (note 26), at 142 and 153.

were, in his times, yet to come. Striking is, nevertheless, that his conception of the structure of the legal system does not need just an adjustment to be made fit for a useful application in our times; rather it is, in particular as regards its theoretical presuppositions and framework, completely inadequate for this purpose. We can detect the reason for this deep-rooted shortcoming of a nonetheless exceptional achievement in legal philosophy if we consider his theory of the hierarchy of legal norms as the apotheosis, within the field of legal philosophy, of the understanding of knowledge and action that dominated Western thought from the middle of the 17th until the beginning of the 20th century. According to the philosophy first outlined by Descartes[35] and then further developed by almost all greatest Western thinkers until Sigmund Freud[36] and the early Wittgenstein,[37] knowledge and action are not based on a natural or divine order, but on the cognitive capacities of the individual subject. In what has been called "modern subjectivism" the social and intersubjective rootedness of individuals plays no significant role, and the theoretical and practical use of reason is based exclusively on the correct use by every single individual of his/her mental capabilities, lastly regardless of any interaction with other human beings. For modern philosophy, knowledge is true and action is right if the individuals – each of them for her- or himself – perform the correct mental processes and insert the elements of experience into an internally coherent und unitary framework of categories. True knowledge and right action are thus grounded on the unity, internal coherence and hierarchy of the mental processes of the subject. Within the ranked order of modern subjectivism, categories organize empirical experience[38] and higher duties and values have to exercise control over physical impulses.[39] Analogously, in Kelsen's legal system higher norms exercise control over lower ones, and the whole structure is theoretically sound only if it is organized as a translation of the principles of modern philosophy into the language of the law, i. e. as a closed, pyramidal and internally coherent system of norms. However, if this is the

[35] R. Descartes, Discours de la Méthode (1637); R. Descartes, Meditationes de Prima Philosophia (1642); R. Descartes, Principia philosophiae (1644).
[36] S. Freud, Das Ich und das Es (1923); S. Freud, Das Unbehagen in der Kultur (1930).
[37] L. Wittgenstein, Tractatus logico-philosophicus (1921).
[38] I. Kant, Kritik der reinen Vernunft (1781).
[39] B. Spinoza, Ethica ordine geometrico demonstrata (1677).

condition for a legal system to be sound, no order of pluralism can be admitted, at least not in the legal and institutional setting, and no opening can be made – or even is, from the theoretical point of view, thinkable – towards a poliarchic understanding of legal rules. To reach this new field, a paradigmatic revolution was thus needed.

C. Towards a Paradigmatic Revolution: The Post-unitary Theories of Order

From an epistemological point of view, all unitary conceptions of legal order share what we could call an *exclusive* understanding of rationality, in the sense that the idea of rationality that they apply is fundamentally characterized by the *exclusion of diversity*. So expels the rationality grounded on national languages the principle of diversity insofar as this is located outside the borders of the culturally-based, self-subsistent community: if diversity exists, this is referred to the plurality of cultural identities, but is largely banished from the internal unity of each of them.

No less exclusive is the concept of rationality founded on power. In principle, the rationality expressed in the individual act of will is potentially universal – in contrast to the nation-based conception – insofar as the supporters of the power-based approach to legal theory generally assume that this kind of use of reason is shared by all social and political actors. Yet, the solipsistic assertion of will, even if we admit that it represents a common use of reason, is characterized nevertheless by indifference, if not by hostility, towards any other affirmation of individual will. The many individual sources of acts of will behave in a similar way and use the reason in an analogous manner, but they interact only strategically. Therefore, diversity is, in the best case, tolerated – or, somehow, even recognized – as something external, which should not interfere with the own will, and is never included in a dialogue searching for an overlapping basis for a more-than-strategic ethical, political and juridical discourse.

With the turn to cosmopolitanism in political philosophy and legal theory the inclusion of diversity seems to be, at first glance, inevitable: how could a *cosmos* comprehending the universal human society be conceived, if not as one accepting the plurality of legal orders in its scope? Yet, Kelsen's cosmopolitanism shows us that the idea of a universal legal order can go along with the refusal of diversity. This can happen if the rationality that is applied depicts universality just as a blowing up of the individual subjectivity. The solipsistic, non-dialogical use of reason that, in the particularistic understanding of the unitary idea of order, was embodied in the individuality of the nation or of the *pouvoir constituant* grows here to a global macro-anthropos aiming to shape a legal order for the whole humankind. This way, horizontal diversity degenerates into vertical differentiation, brought under control by a hierarchical concept of reason.

To conceive of the legal system as a pluralist order that acknowledges diversity as an added value, a new understanding of rationality had to be developed which had to overcome the modern identification of order, truth and right action with unity, hierarchy and internal consistency. Three major theoretical approaches which undertook this challenge have been elaborated since the last decades of the 20th century, the first centred on the plurality of functional rationalities, the second on the destructuration of the unitary character of modern subjectivism, and the third on a dialogical reinterpretation of reason.

I. Systems Theory, or the Plurality of Functional Rationalities

The theory of society elaborated by Niklas Luhmann eschews any reference to an overarching rationality that, starting from the transcendental capacities of the individuals, would pretend to encompass, like in modern philosophy, all forms of social interaction. No universal reason – subjective or intersubjective – is here envisaged, either at the descriptive or at the prescriptive level.[40] To the contrary, Luhmann maintains that many rationalities can be observed by the social scientist,

[40] N. Luhmann, Soziale Systeme. Grundriß einer allgemeinen Theorie (1984); N. Luhmann, Das Recht der Gesellschaft (1993); N. Luhmann, Die Gesellschaft der Gesellschaft (1997).

each of them characterizing the way of functioning of one specific social subsystem. In other words, while we do not detect – according to Luhmann's systems theory – any extra-systemic rational processes, we observe the implementation of different rational processes that, within the manifold functional subsystems of society, guarantee that these subsystems deliver the performances for which they have developed and that are necessary for the continuity and the further improvement – in the sense of higher efficiency – of the whole society.

Given these premises, also the legal system – as a social subsystem itself – will be characterized by its specific rationality. Authors inspired by Luhmann have gone, however, even further – in a direction which is very significant for the present inquiry. Indeed, since the function of the law consists in stabilizing the normative expectations of the actors of social interactions,[41] and since these social expectations derive from a large number of social subsystems in which functionally specified social interactions occur, the existence of a plurality of social subsystems will correspond to a fragmentation of the legal system on a global scale.[42] Put differently, insofar as the law has the function to guarantee the internal order of different social subsystems, the law itself loses its unity and develops distinct legal subsystems, each of them characterized by the rationality, expressed in legal terms, that underlies the implementation of the subsystemic functions.[43]

From the perspective of systems theory, the fragmentation of the law is not, therefore, the result of an irrational disorder, but expression of the manifold order of plural rationalities.[44] The problem comes out, here, when collisions emerge

[41] Luhmann, Das Recht der Gesellschaft (note 40), at 131.
[42] G. Teubner, "Global Bukowina": Legal Pluralism in the World Society, in: G. Teubner (ed.), Global Law Without a State, at 3 (1997).
[43] A. Fischer-Lescano/G. Teubner, Fragmentierung des Weltrechts: Vernetzung globaler Regimes statt etatistischer Rechtseinheit, in: M. Albert and R. Stichweh (eds.), Weltstaat und Weltstaatlichkeit. Beobachtungen globaler politischer Strukturbildung, at 37 (2007).
[44] G. Teubner, Constitutional Fragments: Societal Constitutionalism in Globalization (2012); G. Teubner, Privatregimes: Neo-spontanes Recht und duale Sozialverfassungen in der Weltgesellschaft?, in: D. Simon and M. Weiss (eds.), Zur Autonomie des Individuums, at 437 (2000); G. Teubner, Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie, 63 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 1 (2003).

between different legal regimes: because systems theory assumes that no generally recognized overarching system of law, nor a suprasystemic rationality exist to make interaction between actors of distinct legal subsystems possible as well as to allow the flow of information between them, the question is how those collisions can be dealt with so as to avoid disruptive consequences for the whole society.[45] One of the most central tenets of systems theory claims that social subsystems are self-reliant, that means that no actor of one subsystem can operate within another subsystem, nor communication generated within a social subsystem can directly flow into another subsystem, thus immediately influencing its operational chain.[46] As a consequence of this assumption, each subsystem reacts to the "irritations" coming from outside, i.e. from another subsystem, by relying on the own rationality and thus by adapting its operational chains to the new environmental situation.[47] Lastly, no common language can be built on systemically distinct rationalities.

Many questions arise from this approach. First, from the epistemological point of view, the restriction of rationality just to its functional dimension seems to impoverish significantly the range of its unfolding. Second, from the empirical standpoint, it is at least questionable whether the axiom of the "operative closedness" really describes how social communication works. Exactly as regards communication within the legal system – or, better, between distinct legal subsystems – it has been claimed, on the basis of case studies, that legal communication flows largely *between* the legal subsystems, and not only *within* them, as well as that legal actors, while performing their actions, follow rules which are drawn from disparate systemic logics, put together on the basis of their individual preferences and purposes.[48] Third, from the axiological perspective, the limitation of the use of reason to the research of the best functional response to the "irritations" coming from the environment makes actually any critical approach,

[45] A. Fischer-Lescano/G. Teubner, Regimekollisionen. Zur Fragmentierung des globalen Rechts (2006); A. Fischer-Lescano/G. Teubner, Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law, 25 Michigan Journal of International Law 999 (2004).
[46] Luhmann, Das Recht der Gesellschaft (note 40), at 42; Luhmann, Die Gesellschaft der Gesellschaft (note 40), at 92 and 100.
[47] Luhmann, Die Gesellschaft der Gesellschaft (note 40), at 106 and 118.
[48] N. Krisch, Beyond Constitutionalism (2010), at 232.

supported by reason, to the status quo of society lastly impossible and any hope for a better realization of freedom and justice by legal means obsolete.

II. The Postmodern Critique of Modern Subjectivism, or Legal Pluralism as the Framework for Dialogue between Incommensurable Identities

The way how systems theory understands the structure of rationality that unfolds within social subsystems still reminds us of modern subjectivism: albeit limited to its functional dimension, systemic rationality is, like the reason of modern subjectivity, monadically self-sufficient, self-reliant, coherent, and hierarchically structured. To find a more radical turning away from modern subjectivism, we have to move on to the second post-unitary conception of order, i.e. to postmodernism.

The explicit target of postmodern criticism is the modern concept of subjectivity, accused to be nothing less than an artificial construct imposed to constrain human experience and action capabilities into a forced and oppressive unity.[49] Actual human individualities have to realize themselves, therefore, beyond the boundaries of a unitary – and lastly tyrannical – idea of order, enforced by a diffuse power aiming at the full control over bodies and minds.[50] However, insofar as modern subjectivism was the epistemological guarantee of true knowledge and right action as well as of the unity of the systems built respectively on the theoretical and the practical use of reason, the overcoming of modern subjectivism through postmodern criticism runs also the risk of losing any shared criterion as regards the distinction between true and false, as well as between just and unjust. Indeed, legal philosophers influenced by postmodern thinking generally deny that legal propositions contain a universally recognisable

[49] M. Foucault, L'ordre du discours (1971; 1st ed. 1970), at 10 and 49; M. Foucault, Histoire de la folie à l'âge classique (1961); M. Foucault, Les mots et les choses (1966); M. Foucault, Surveiller et punir (1975); M. Foucault, Histoire de la sexualité, I : La volonté de savoir (1976); M. Foucault, The Subject and Power, in: H. L. Dreyfus and Paul Rabinow (eds.), Michel Foucault: Beyond Structuralism and Hermeneutics, at 208 (1982).
[50] M. Foucault, L'archéologie du savoir (1969).

epistemological and ethical content.[51] Following some interpretations, legal norms are simply instruments in the hands of lawyers who pursue their own priorities by means of legal arguments.[52] Complete arbitrariness is here prevented not by resorting to a universal rationality – which is thought to be only a chimera, or even a vehicle of oppression – but rather by appealing to non-rational attitudes largely shared by fellow humans, such as empathy.[53]

Favoured by the postmodern de-construction of the modern idea of unity as the best realization of a rational order, other authors have pointed out, on the contrary, the inherent plural quality of contemporary law.[54] Here lies the epistemological foundation of the theory of legal pluralism. In the eyes of the supporters of this approach, no legal regime can claim to embody the principles of a superior rationality. Rather, every legal system is the formal product of a narration that has its *raison d'être* – not less than any other narration – in the conditions of interaction of a specific society, cast into the form of legal discourse. From this perspective, diversity itself is a value, with the consequence that any attempt by allegedly supra-ordered legal norms to force hierarchy on the manifold plurality of legal systems is condemned as a suffocation of what is not only a matter of fact, but also a normatively desirable opportunity to unfold the freedom of individuals and social groups.

The novelty introduced by the approach of legal pluralism into legal theory is underlined by Nico Krisch. In his passionate and eloquent plea, pluralism is presented as a "break",[55] thus – in epistemological terms – as a paradigmatic revolution which overcomes the old-fashioned idea of the unity of the legal

[51] M. Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (1989).
[52] Id., at 495.
[53] R. Rorty, Contingency, Irony, and Solidarity (1989); M. Koskenniemi, International Law in Europe between Tradition and Renewal, 16 European Journal of International Law 113 (2005).
[54] P. S. Berman, Global Legal Pluralism (2012); M. Poiares Maduro, Three Claims of Constitutional Pluralism, available at <http://www.wzb.eu/sites/default/files/u32/miguel_maduro_three_claims_of_constitutional_pluralism_hu-coll_may_15_2012.pdf>; Krisch (note 48).
[55] Krisch (note 48), at 16, 23 and 68.

system,[56] paving the way to the acknowledgement of diversity.[57] National constitutionalism is criticized because it "not only fails to include but also fails to deliver."[58] As regards the first issue, "domestic constitutionalism, which places the national community at the centre of the legal and political universe […] cannot reflect [the] broader constituency" that "goes well beyond the national community": therefore, "on transboundary issues, it remains underinclusive."[59] And, referring to the second point, "domestic constitutionalism […] would require us to withdraw from, rather than extend, effective postnational decision-making structures in order to safeguard control by domestic political processes."[60] Yet, the criticism is broadened to comprehend cosmopolitan or postnational constitutionalism as well, insofar as it is accused "to provide continuity with the domestic constitutionalist tradition by construing an overarching legal framework that determines the relationships of the different levels of law and the distribution of power among their institutions."[61] On contrast, pluralism is adaptable and enables us to adopt a highly flexible system of checks and balances which can fit into the postnational legal system with its poliarchic character.[62] Last but not least, legal pluralism not only defines a theoretical instrument able to describe the present state of the art but also depicts what can be regarded as a normatively attractive perspective.[63]

The theory of legal pluralism seems to possess an evident advantage over unitary conceptions of legal order as well as, at least at first glance, over both other post-unitary understandings. Indeed, it simply acknowledges the multifaceted dimension of the legal phenomenon as it has developed in the contemporary world, without trying to impose on it an overarching system of rules, or a criterion

[56] Id., at 305.
[57] Id., at 303.
[58] Id., at 21.
[59] Id.
[60] Id.
[61] Id., at 23.
[62] Id., at 78.
[63] Id., at 103.

for the distinction between rational and non-rational.[64] Since from the point of view of postmodern legal pluralism no universal standard of rationality can be convincingly established, every social narration has to be considered as rational as any other, and the legal rules that give predictability to the interactions that unfold within the societal context of a narration should be recognized as being on an equal footing as any other system of law.

Not less evident are however, on the other hand, also the disadvantages that emerge from postmodern pluralism. First, whilst in the traditional understanding the normativity of a legal norm was clearly related to its position within the system of the law as a whole, in a context of plurality in which norms have disparate origins, partially incommensurable fields of application and largely different instruments of implementation, the normative quality of rules and principles is increasingly difficult to define and ascertain.[65] In front of a weaker normative content of the law, the *factum brutum* of power would become ever more central and decisive in social and political interaction.[66]

Second, the basis for legitimacy of the norms against the background of pluralism is not only itself plural but also often shaky and characterized by little transparency. This happens when the criteria for legitimacy are made independent from the main epistemic principle of democracy, according to which those who are bound by rules ought to have the chance to participate in the decision-making-

[64] In contrast to systems theory, legal pluralism abandons the strictly binary code in interpreting legal communication, in favor of a more nuanced attention to "graduation" (Krisch, note 48, at 305).

[65] This is what Nico Krisch describes as a weakening of the principle of the rule of law. See: Krisch (note 48), at 109. However, Krisch eventually dismisses criticism maintaining that "[t]he rule-of-law critique of pluralism in the postnational order is thus ultimately unconvincing. […] This does not make the rule of law meaningless in the postnational order: it continues to represent an important political ideal, only one that does not find an *international* home in the macro-structure of the legal order. It does not lead to an integrated legal order that defines which law rules when, but exerts its influence in a more context-dependent way" (id., at 285).

[66] Krisch rejects this criticism as well, claiming that "under certain conditions, pluralism has a greater potential than constitutionalism to stabilize cooperation in the postnational space. […] And it is also not as vulnerable to exploitation by the powerful as might appear at first sight: because it accommodates change and contestation more easily, it allows actors a voice who were excluded or sidelined in the formal processes of regime creation" (id., at 263). Yet, if the rules of participation in the decision-making process are still quite underdetermined, the voice of the powerless is doomed to be very feeble.

process that establishes the norms they have to follow.[67] As a result, legitimacy is based on more flexible – if not rather vague – standards.[68] However, if accountability, revisability and deliberation are not put into a setting of precise conditions for participation of all those involved, the door that seems to be open for inclusion can be easily closed down when it comes to what really matters, namely to decisions.

Third, within the unitary legal system the criteria for interpretation and further development of the *lex lata* were in general firmly established and derived from the basic assumptions – forming themselves a unitary whole – of the pyramid of the law. To the contrary, pluralist approaches substitute legal and rational *argumentation* as the linguistic tool for interpretation and improvement of the existing law – a concept which presupposes the existence of a shared standard for the evaluation of the descriptive and prescriptive quality of a legal proposition – with *contestation* – a concept which, instead, actually rejects the possibility that common criteria for the search for truth and justice can be found out.[69]

Yet, fourth, if no generally accepted criteria for rational communication can be determined – simply because no supra-contextual rationality is meant to exist – then the question arises on which language can be used to settle the conflicts that emerge between legal orders in a context of pluralism. The supporters of legal pluralism have intensively investigated the communicative processes that unfold between legal orders;[70] yet, probably because of a certain indifference to epistemological questions, they do not address the problem of how communication can work if we do not assume the existence of a shared rational basis as the dividing line that separates convincing from non-convincing arguments.

[67] Id., at 16.
[68] Id., at 268.
[69] Id., at 81.
[70] Fischer-Lescano/Teubner (note 45); Krisch (note 48), at 109.

III. The Communicative Paradigm, or the Attempt to Conciliate the Legacy of Modern Rationalism, the Principle of Legitimacy of Democratic Constitutionalism, and the Recognition of Plurality

The unitary conception of legal order, based on a philosophically well-elaborated and long-established epistemology, had the benefits of a clear definition of normativity, a firm basis for legitimacy and a robust criterion for the interpretation of the *lex lata* as well as for the definition of proposals *de lege ferenda*. On the other hand, it had also the deficit of being insensitive to the challenges of a multifaceted social world. To the contrary, systems theory and postmodern thinking deliver answers to the contemporary questions that affect the legal system, but at the cost of a problematic weakening of the normative quality of the law as well as of its legitimacy. As a solution, a new concept of rationality should be developed that overcomes the hierarchical rigidity of modern subjectivism, meeting this way the demands of a pluralist world of social interactions, but still maintains the tenets of a universal rationality. The communicative paradigm of order may be seen as a significant step forward in this direction.[71]

According to the fundamental assumption of the communicative paradigm, society is made of a plurality of interactions, each of them characterized by a specific aim that influences decisively the discursive contents of the interaction. Yet, although the aim of the social interaction is essential to determine the contents of the discourse, the rationality embodied in the communication – mainly at the linguistic level, but not only – is, from the perspective of the communicative paradigm, not exclusively and even not primarily functional. Rather, the communicative rationality – right from the understanding of communication here presupposed – has always a normative core.[72] Precisely this normative core, even

[71] Apel (note 16); K.-O. Apel, Diskurs und Verantwortung (1990); J. Habermas, Theorie des kommunikativen Handelns (1981); J. Habermas, Moralbewußtsein und kommunikatives Handeln (1983); J. Habermas, Vorstudien und Ergänzungen zur Theorie des kommunikativen Handelns (1984).

[72] The normative core of communicative rationality consists in the assumption that discursive communication can achieve its goal only if all those involved mutually presuppose that: a) from an *objective* perspective, the assertions are *true* (in the sense that the propositions are referred to real situations or facts); b) from a *subjective* perspective, the speakers act *truthfully* (in the sense that

more than the reference to the outer object, is what makes communicative rationality universal – and therefore different from the purely systemic rationalities.[73]

As regards the legal system, communicative rationality paves the way, from the epistemological standpoint, to a conception in which the manifold articulation of the legal system is recognized, but in a quite different way than in the approaches described before. Here plurality is embedded into an overarching structure, held together by the display of communicative reason as a counterpart of systemic rationality – a counterpart that is operating not only from outside the social subsystems but also inside each of them.[74] Two characteristics stick out. First, the communicative understanding of legal order overcomes the hierarchical notion of the legal system which was typical for the traditional conception of order, but maintains a normative ranking between the different levels of the system. The normative quality of the norm, however, is not justified here by the level of "hard power" of which the authority vested with the task to impose this norm over other rules can dispose, but rather by the more or less high inclusivity of the range of validity of the norm. In this sense, international law has the highest normative quality, albeit endowed with relatively little authoritative and compelling "hard power". Second, the recognition of legal differentiation and diversity as a matter of fact and as a desirable outlook does not correspond, from the standpoint of the communicative paradigm, to a value-free, horizontal pluralism like in the perspective of postmodern criticism. Instead, the fundamental values – conveyed through the communicative reason – pervade all subsystems and all levels of the legal system. As a result, the normative centre of the legal order is held by the

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they are committed to fair-minded purposes and are sincerely persuaded that their assertions meet the conditions for truth); c) from an *intersubjective* perspective, the speakers interact according to the principles of *rightness* (in the sense that they accept that their assertions have to meet the criteria for a general and mutual acknowledgement by all participants in the communication). See: J. Habermas, *Vorstudien und Ergänzungen zur Theorie des kommunikativen Handelns* (1984), at 598; J. Habermas, *Nachmetaphysisches Denken* (1988), at 73, 105 and 123; J. Habermas, *Wahrheit und Rechtfertigung* (2004), at 110.

[73] The universal dimension of communicarive rationality is essentially embedded in its intersubjectivity, as outlined *supra*, note 72, c).

[74] J. Habermas, Faktizität und Geltung (1992); J. Habermas, Der gespaltene Westen (2004); J. Habermas, Eine politische Verfassung für die pluralistische Weltgesellschaft?, 38 Kritische Justiz 222 (2005).

principle of democratic legitimation and definition of common interests and values, whereby the democratically legitimated public order maintains a normative superiority over private law subsystems.

As a post-unitary, non-hierarchical and non-pyramidal whole, the legal system of the communicative paradigm takes the form of a constitutionalism beyond the borders of the nation state,[75] the cosmopolitan dimension of which, due to its acknowledgment of diversity, is quite different from the old ideas of the "world state" or of the *civitas maxima*. As underlined by Mattias Kumm, cosmopolitan constitutionalism overcomes the old-fashioned dichotomy between dualism and monism, being situated beyond both of them.[76] Acknowledging the intrinsic value of diversity, it makes the case for pluralism to its own – but in a way which is significantly different from the conception presented before. Indeed, cosmopolitan constitutionalism "is not monist and allows for the possibility of conflict not ultimately resolved by the law, but it insists that common constitutional principles provide a framework that allows for the constructive engagement of different sites of authority with one another."[77] Even more explicitly, "this results in a conception of legality that is not monist in that it allows for legal pluralism: potential for legally irresolvable conflict between national and international law remains. But it is not simply dualist either: the relationship between national and international law is reconceived in light of a common set of principles that play a central role in determining the relative authority of each in case of conflict."[78] One of the most important consequences for the legal praxis of an improved relationship between national and international law within the context of a cosmopolitan understanding of constitutionalism is the increasing cooperation between national and international courts, in particular in the field of human rights protection.[79]

[75] M. Kumm, On the Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State, in: J. L. Dunoff and J. P. Trachtman (eds.), Ruling the World? Constitutionalism, International Law, and Global Governance, 258, at 265 (2009).
[76] Id., at 274.
[77] Id., at 272.
[78] Id., at 279.
[79] Id., at 306.

Although not limited any longer by the boundaries of the nation state, cosmopolitan constitutionalism largely presupposes the same cognitive frame for legitimate authority that characterizes traditional, nation-state-bound constitutionalism.[80] That means that a specific understanding of the social world and of the relationship between individuals and political society lies at the core of both national and cosmopolitan constitutionalism, regardless of the significant differences and of the novelty of the latter outlined above. More explicitly, the constitutional cognitive frame comprehends four elements. First, it presupposes "a comprehensive framework for all relevant considerations relating to the establishment and exercise of legitimate authority that falls within its scope."[81] In other words, constitutionalism, even if not unitary and hierarchically organized, always maintains the ambition to construe an overarching normative framework which prevents the disruptive contents of diversity and makes the dialogue between different legal traditions possible by resorting to a cognitive dimension, to a conception of rationality that can be worked out as common to them all. Second, constitutionalism cannot be reduced to positive law. Third, a constitutional cognitive frame "must integrate and structure […] three core concerns": "the exercise of public authority *through law*"; the generation of "an account of legitimate procedures"; the "substantive constraints […] for the exercise of public authority, to be fleshed out in terms of human or constitutional rights."[82] Fourth – from my point of view the most important feature – the constitutional cognitive frame has always to be referred to "the *idea of free and equal persons*."[83]

The fourth element of the constitutional cognitive frame resumes quite clearly, in the terms of legal and political theory, the principle of the epistemic centrality of the active participation in the discursive interaction by all those involved that, from a philosophical and epistemological perspective, links the communicative understanding of rationality to the exercise of democracy at all level of the

[80] Id., at 321.
[81] Id., at 322.
[82] Id., at 323.
[83] Id., at 322.

realization of human society.[84] Nevertheless, the description of legitimacy that is given by Kumm – as one of the more committed supporters of cosmopolitan constitutionalism from the standpoint of legal theory – is by far less ambitious than the perspectives sketched by political philosophers. In particular, Kumm separates legitimacy from the praxis of democracy, i.e. from the direct or indirect but always explicit involvement of all those concerned, and regards legitimacy as guaranteed, in cosmopolitan perspective, if standards of "public reasonableness" are respected.[85] In general, active involvement by the citizens could be substituted, in order to attain legitimacy within the cosmopolitan horizon, by the safeguard of fundamental rights as the main content of public reasonableness.[86] Yet, it remains rather unclear how the centrality "of the free and equal" could be preserved in front of such a concession to that kind of technocratic paternalism that colonizes a large part of the debate on governance beyond the nation state – and evidently influences also those authors who, like Kumm, are in other respects quite sensitive to the normative dimension that links cosmopolitan constitutionalism to the tenets of the communicative rationality.[87] Furthermore, it is always difficult to ascertain who the legitimate holders and guardians of public reasonableness should be – if not those citizens or, in general, fellow humans who are affected by the consequences of the decision. As a result, it is not by chance that some philosophers and political scientists, when it comes to a coherent defence of the highest standards of legitimacy also within the international context, do not refrain from entering the difficult terrain of cosmopolitan democracy.[88]

As it becomes evident in the debate on legitimacy and democracy in cosmopolitan perspective, laying down the epistemological premises of a conception that recognizes diversity, but maintains the centrality of a universal understanding of rationality, is just the first step – albeit a crucial one – on a quite long journey. For

[84] Habermas (note 74).
[85] Kumm (note 75), at 269, 273, 290, 301 and 312.
[86] Id., at 303.
[87] Id., at 324.
[88] J. Habermas, Kommunikative Rationalität und grenzüberschreitende Politik: eine Replik, in: P. Niesen and B. Herborth (eds.), Anarchie der kommunikativen Freiheit, 406, at 448 (2007); D. Archibugi, The Global Commonwealth of Citizens: Toward Cosmopolitan Democracy (2008).

a convincing translation of these premises into an applicable and useful theory of the legal system much work has yet to be done.