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Citizenship and Human Rights: From Exclusive and Universal to Global Rights

Dr. Christian H. Kälin

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Abstrakt

Tematem niniejszej rozprawy jest prawno-filozoficzna krytyka napięcia między rzekomo uniwersalnymi prawami człowieka a obywatelstwem oraz opracowanie nowych ram bardziej realistycznych globalnych praw człowieka. Bada ona, czy pojawienie się postnarodowych modeli obywatelstwa, które mają na celu oddzielenie praw człowieka od obywatelstwa, jest w stanie przezwyciężyć napięcia między tym, co uniwersalne, a tym, co partykularne. Pokazuje, że dopóki w dyskursie o prawach człowieka istnieje napięcie między człowieczeństwem a obywatelstwem, nie można mówić o uniwersalnych prawach człowieka, a obecny system podziału świata na suwerenne państwa, które wykorzystują obywatelstwo do ochrony i oddzielenia się od innych, jest sam w sobie niezgodny z pojęciem uniwersalnych praw człowieka. Zastosowano metodę analityczno-hermeneutyczną.

Słowa kluczowe

godność ludzka, człowieczeństwo, obywatelstwo, prawa człowieka, prawa powszechne, prawa wyłączne, citizenship, universal human rights, global human rights

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Introduction

This is a philosophical critique of the tension between the supposedly universal human rights, and citizenship, showing why a new framework of human rights is needed. It will also explore whether the emergence of postnational models of citizenship that aim to decouple human rights and citizenship manage to overcome the tensions between the *universal* (multiculturalism; universal human rights; postnational values) and the *particular, the local* (citizenship; borders; national values and diverse local, ethnic and cultural narratives). It will be shown that without respect for all nations and cultures, in political philosophy it is not normatively possible to talk about universal human rights, universal human dignity or universal social justice. The universality of human rights and dignity remains a reference point of moral philosophy only. What is possible and what will be developed here, is a new framework of global human rights, which are effective to co-exist with the exclusive rights of citizenship and the sovereignty of states.

According to Douzinas, "Liberals claim that human rights are given to people on account of their 'humanity' instead of membership of narrower categories such as state, nation or class. If that were the case, refugees, undocumented immigrants, the *Guantánamo* Bay prisoners who have no state or law to protect them should be prime beneficiaries of the consolations of humanity. They have very few. 'Bare' humanity offers no protection (…) Humanity has no fixed or universally acceptable meaning and cannot act as the source of moral or legal rules."[1]

In (Western) moral philosophy, the concept of universal humanity based on reason is the foundation of the idea of human rights. This is also emphasised in the *Universal Declaration of Human Rights*, which states: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[2] Yet the idea of humanity based on reason excludes a wide variety of individuals. Historically, it excluded slaves, women, workers, and African Americans; currently, it excludes undocumented migrants, as well as certain collective groupings of people, such as Palestinian citizens in Israel[3], indigenous peoples[4], certain prisoners, modern-day slaves, women in

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[1] Costas Douzinas, 'Human Rights and the Paradoxes of Liberalism' in Alejandro Abraham-Hamanoiel, Des Freedman, Gholam Khiabany, Kate Nash and Julian Petley (eds), *Neoliberal Times: Dimensions, Contradictions, Limits* (Goldsmiths Press 2017), 37

[2] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A(III) (UDHR) Art. 1

[3] Rhoda E. Howard-Hassmann, 'Introduction: The Human Right to Citizenship' in Rhoda E. Howard-Hassmann and Margaret Walton-Roberts (eds), *The Human Right to Citizenship: A Slippery Concept* (Penn Press 2015)

[4] Elisa Arcioni, 'Excluding Indigenous Australians from "The People": A Reconsideration of Sections 25 and 127 of the *Constitution'* (2012) 40(3) Federal Law Review, 287-315; Mylene Santiago and Abdeljalil Akkari, 'Citizenship, Social Exclusion and Education in Latin America: The Case of Brazil' in Abdeljali Akkari and Kathrine Maleq (eds), *Global Citizenship Education* (Springer 2020)

Afghanistan, and so on. Even individuals who are officially citizens don't necessarily have the same capacity to exercise their rights.[5]

The dichotomy between universal human rights and citizenship is still a matter of debate within cosmopolitanism.[6] "Negotiating and reconciling universality of human rights with particularity of local, cultural values is one example of a presumed dichotomy between universality and particularity."[7] This dichotomy reflects one of the paradoxes of globalisation, which involves conflicting paradigms: unification and fragmentation; prosperity and inequality, global capitalism and the rise of nationalism, universal humanity and exclusivist citizenship and so on. The large number of excluded individuals from the concept of humanity throughout history casts doubt on the possibility of considering the idea of a universal humanity based on reason as the basis of the idea of human rights. The ancient Greek understanding of humanity equates "man" (human being) with a citizen of the city-state (*polis*). The Christian idea of humanity is based on the idea of Christian brotherhood. The Enlightenment idea of humanity adheres to white, civilised men, excluding a certain number of individuals based on sex, race, color, and status. The ancient, Christian and Enlightenment definition of humanity has an exclusivist character. Therefore, the modern idea of universal human rights based on these understandings of humanity is paradoxical and abstract.[8]

This study aims to recognise the historical and philosophical traditions of the human rights discourse and the failure of these streams of thought to sustain the idea of universal human rights. In particular, the universalist aspirations of both Christianity and the philosophy of the Enlightenment will be examined. "The parallels between the Enlightenment project and the project of an evangelising Christianity are quite clear. Indeed, it is from Christianity that the universalist aspirations of the project are derived, and these may be observed in the philosophical anthropology of a 'generic humanity'; that all people everywhere are the same with respect to the essential matters of being human: to will autonomously."[9]

This study is not least a philosophical critique of human rights. Schopenhauer emphasises: "That expression, *dignity of man*, once uttered by Kant, afterward became the shibboleth of all the

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[5]Rhoda E. Howard-Hassmann, 'Introduction: The Human Right to Citizenship' in Rhoda E. Howard-Hassmann and Margaret Walton-Roberts (eds), *The Human Right to Citizenship: A Slippery Concept* (Penn Press 2015)

[6]Seyla Benhabib, *Another Cosmopoltianism* (Oxford University Press 2008); Rebecca Adami, 'Reconciling Universality and Particularity through a Cosmopolitan Outlook on Human Rights' (2012) 4(2) Cosmopolitan Civil Societies Journal*,* 22-37; John Charvet, 'The Possibility of a Cosmopolitan Ethical Order Based on the Idea of Universal Human Rights' (1998) 27(3) Millennium – Journal of International Studies, 523-41; Anthony J. Langlois, *The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory* (Cambridge University Press 2001); Martha C. Nussbaum, *Cultivating Humanity: A Classical Defense of Reform in Liberal Education* (Harvard University Press 1997)

[7] Rebecca Adami, 'Reconciling Universality and Particularity through a Cosmopolitan Outlook on Human Rights' (2012) 4(2) Cosmopolitan Civil Societies Journal*,* 22

[8] Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge-Cavendish 2007)

[9]Anthony J. Langlois, *The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory* (Cambridge University Press 2001), 82

perplexed and empty-headed moralists who concealed behind that imposing expression their lack of any real basis in morals."[10] Hannah Arendt argues that "the rights of man" proved to be an illusion in the case of stateless persons and refugees in Europe in the interwar period.[11] They were denied their rights, precisely, by the fact that they are only "human" and do not have citizenship.[12]

Many of the philosophical questions (regarding the nature of human rights) raised by Jeremy Bentham, Arthur Schopenhauer and Hannah Arendt have not yet been adequately addressed. This study will examine the philosophical roots and assumptions of the main concepts underlying the idea of human rights in order to examine whether the notion of human rights can be considered universal. It aims to show "that phrases such as 'men are born, and always continue, free and equal in respect of their rights' can only ever be true and self-evident if the philosophical frameworks which inform such conversations are uncritically accepted."[13] The human rights discourse represents a "particularistic doctrine with universalist claims."[14]

> "For as long as human rights is centered around a particular non-universal tradition – Western liberalism (in all its variety) – it cannot be universal; it fails on its own terms. For while espousing universality it is limited by a particularist rationality; while espousing egalitarianism it judges often ways of thought and practices as unequal; while espousing freedom it forces silence on non-liberal voices."[15]

The imposition of liberal ideals on which the idea of human rights is based contradicts the very idea of liberalism. That is why many authors discuss the necessity of a hermeneutic turn in the understanding of human rights.[16] This study employs the hermeneutic method to examine contemporary ideas of citizenship and universal human rights. "Legal concepts and 'lawmaking instruments' are dynamic and they can be perceived as hermeneutic categories."[17] For instance, the European Court of Human Rights emphasised that the *European Convention on Human Rights* (ECHR) was a "living instrument proceeding with [the] current situation"[18] in the Tyrer case[19] of

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[10] Arthur Schopenhauer, *On the Basis of Morality* (Hackett 1989), 100

[11] Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace Jovanovich 1973)

[12] Andrew Schaap, 'Enacting the Right to Have Rights: Jacques Rancière's Critique of Hannah Arendt' (2011) 10(1) European Journal of Political Theory, 23

[13] Anthony J. Langlois, *The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory* (Cambridge University Press 2001), 7

[14] Ibid., 74

[15] Ibid., 7

[16] Thomas Bridges, *The Culture of Citizenship: Inventing Postmodern Civic Culture* (State University of New York Press 1994); Charles Taylor, 'Conditions of an Unforced Consensus on Human Rights' (IILJ, 2016) <https://iilj.org/wp-content/uploads/2016/08/Taylor-Conditions-of-an-Unforced-Consensus-on-Human-Rights-1996.pdf> accessed 19 February 2021

[17] Sanja Ivic, *European Identity and Citizenship: Between Modernity and Postmodernity* (Palgrave Macmillan 2016), 9

[18] Zhu Xiaoqing, 'Principles of Equality and Non-Discrimination in *European Convention on Human Rights*' (*StudyLib*, 2004) <https://studylib.net/doc/7468714/principles-of-equality-and-non-discrimination-in> accessed 20 February 2021

[19] Tyrer v. the United Kingdom, Judgment of 25 April 1978. Publications ECHR, Series A vol. 26

1978.[20] The Loizidou case[21] makes the dynamic and interpretive approach to ECHR even more clear.[22] "[The] European court of human rights indicated in the case that articles of the *Convention* should not be followed by statically … but be explained dynamically by the treaty powers."[23] This viewpoint emphasises the hermeneutic dimension of law.[24] For this reason, the analytical approach should be enriched with a hermeneutic perspective.[25]

The hermeneutic analysis carried out in this study involves two steps. The first one consists of the analysis of different philosophical approaches to the notions of citizenship and human rights, on which the contemporary conceptions of citizenship and the contemporary idea of universal human rights are based. The second step is a *close reading* of human rights documents and philosophical works on citizenship and human rights. Close reading involves focusing on specific words, as well as the order in which ideas and sentences develop. Placing the text in its historical, social, political or philosophical context will enhance the method of close reading.Although some authors[26] argue that qualitative approaches tend to be theoretical rather than empirical, and that they are subjective, non-representative and incomparable, this study emphasises that a hermeneutic, contextual approach is needed because human rights and citizenship are dynamic, not static categories.[27] "They represent processes that are constantly reinvented and reinterpreted."[28]

Chapter 1 examines the philosophical roots of the concept of humanity on which the idea of human rights is based.[29] This chapter shows that the concept of humanity is exclusivist and that the concept of human rights actually constructs "who and how one becomes human."[30]The notion of humanity does not include *everyone* (as the *Universal Declaration of Human Rights* states[31]), but only a limited group of people. Therefore, the notion of humanity, which derives from the legacy

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[20] Sanja Ivic, *European Identity and Citizenship: Between Modernity and Postmodernity* (Palgrave Macmillan 2016), 9

[21] Loizidou v. Turkey, Judgment of 18 December 1996, European Human Rights Reports (EHRR), vol. 23

[22] Sanja Ivic, *European Identity and Citizenship: Between Modernity and Postmodernity* (Palgrave Macmillan 2016), 9

[23] Zhu Xiaoqing, 'Principles of Equality and Non-Discrimination in *European Convention on Human Rights*' (*StudyLib*, 2004) <https://studylib.net/doc/7468714/principles-of-equality-and-non-discrimination-in> accessed 20 February 2021

[24] Sanja Ivic, *European Identity and Citizenship: Between Modernity and Postmodernity* (Palgrave Macmillan 2016), 9

[25] Ibid.

[26] Douglas W. Vick, 'Interdisciplinarity and the Discipline of Law' (2004) 31(2) Journal of Law and Society, 163–93

[27] Sanja Ivic, *European Identity and Citizenship: Between Modernity and Postmodernity* (Palgrave Macmillan 2016), 10

[28] Ibid.

[29] Article 1 of the *Universal Declaration of Human Rights* states: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

[30] Costas Douzinas, 'Human Rights and the Paradoxes of Liberalism' in Alejandro Abraham-Hamanoiel, Des Freedman, Gholam Khiabany, Kate Nash and Julian Petley (eds), *Neoliberal Times: Dimensions, Contradictions, Limits* (Goldsmiths Press 2017), 37

[31] Article 2 of the *Universal Declaration of Human Rights* states: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

of classical philosophy, Christianity and the Enlightenment, needs to be re-examined. The concept of humanity has always excluded numerous individuals. "Historically, the barbarians for the Greeks and Romans, the heathen for the Christians, the 'uncivilized' for the imperialists, the 'irrational' racial and sexual minorities for the privileged, the 'illegal immigrants' for the citizens or the economically redundant for the affluent have been divisions of 'humanity'."[32]

In ancient Greece, the institution of slavery was justified by the belief in the absolute supremacy of the Greeks over the non-Greek peoples. Ancient Greek philosophers, including Socrates, Plato and Aristotle believe that culture has the task of creating an individual who can live in community with other people, and that the *polis* is the center of human life. Both Plato and Aristotle perceive the ideal *polis* as a hierarchical society. Their idea of a hierarchical society stems from their understanding of the human soul and human being. In Plato's ideal state, only a small group of people enjoys the right to human dignity. According to Plato, there are three classes of citizens: rulers, soldiers and producers.[33] Plato's idea of the just state is analogous to his idea of the soul. They are both hierarchical. Plato argues that "there are three parts in the soul corresponding to the three classes in the city – namely the rational part in the wisdom of the rulers, the spirited part, which is manifested in the courage of the soldiers, the appetitive part, which is manifested in the rest of the population, whose defining motivation is material gain."[34]

According to Aristotle, the essence of a human being is the capacity for an ethical life.[35] Aristotle claims that man is endowed with reason. He excludes women, children, slaves and foreigners from enjoying the category of full citizenship.[36] According to Aristotle, they are incapable of living a virtuous life in accordance with to reason. "Although the parts of the soul are present in all [i.e., slaves, women, and children], they are present in different ways. For the slave lacks the deliberative faculty (*bouleutikon*) entirely (*holôs*). The woman has it, but it is without authority (*akuron*). A child has it, but it is incomplete (*ateles*)."[37]

Christianity makes a sharp distinction between Christians and pagans—the universal and the particular, the heavenly and the earthly.[38] Christianity determined the position of man in the world in a new way, and gave new meaning to human existence. Christianity is based on a dualistic view of man consisting of two parts — the human soul, on the one hand, and the human body, on the other.

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[32] Costas Douzinas, 'Human Rights and the Paradoxes of Liberalism' in Alejandro Abraham-Hamanoiel, Des Freedman, Gholam Khiabany, Kate Nash and Julian Petley (eds), *Neoliberal Times: Dimensions, Contradictions, Limits* (Goldsmiths Press 2017), 37
[33]Plato, *The Republic* (Penguin Classics 2003)
[34] Dorothea Frede, 'Plato's Ethics: An Overview' (*Stanford Encyclopedia of Philosophy*, 16 September 2003) <https://plato.stanford.edu/entries/plato-ethics/> accessed 20 August 2021
[35] Aristotle, *Politics* (Benjamin Jowett tr, Clarendon Press 1916)
[36] Ibid.
[37] Ibid., 1.13 1260a10-14
[38] Darrin M. McMachon, 'Fear & Trembling, Strangers & Strange Lands' (2008) 137(3) Daedalus, 12

Enlightenment philosophy equates the subjectivity of the white male with a category of humanity excluding slaves, women, children, and foreigners. Human rights documents define humanity as an abstract, universal concept because they rely on the idea of the abstract citizen promoted by the Enlightenment project.[39] Enlightenment philosophers universalised the human being, ignoring cultural, religious, political and other differences. *The Declaration of the Rights of Man and of the Citizen* was influenced by the concept of man defined by the philosophers of the Enlightenment.[40] This declaration proclaims the "natural, unalienable, and sacred rights of man,"[41] which should be respected because "men are born and remain free and equal in rights."[42] The concept of man on which this declaration is based excludes a whole range of individuals: women, foreigners, children and slaves.

Chapter 1 also includes various philosophical approaches that explore the idea of humanity and its exclusivist nature. Marx, Nietzsche and Freud question the Enlightenment idea of subjectivity.[43] Hannah Arendt criticises the idea of humanity used in human rights documents.[44] Representatives of poststructural and postmodern thought aim to deconstruct the notions of humanity and political subjectivity on which the discourse of human rights is based.[45]

Chapter 2 examines philosophical and historical roots of the concept of human dignity and shows that dignity does not represent a universal moral value as it is emphasised by the *Universal Declaration of Human Rights* and other human rights documents. Some authors warn of the "deliberate and unconscious manipulative uses of dignity by specific doctrines that employ 'human dignity' to pass off parochial and controversial ideas as universal, self-evident, and uncontestable truths."[46] However, as Michael Rosen has pointed out, "the lack of philosophical interest in the

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[39] The Enlightenment is often identified with the works of René Descartes, Francis Bacon, Thomas Hobbes, John Locke, Montesquieu, Voltaire, Jean-Jacques Rousseau, Immanuel Kant and others. Nevertheless, there are still different interpretations of the complex project of the Enlightenment (James Q. Wilson, *The Moral Sense* (Free Press 1993)

[40] "The Enlightenment project promotes the idea of an abstract citizen who is defined as a rational, conscious, and autonomous subject, independent of the historical, ethnic, gender, age, professional, and other determinations and affiliations." (Sanja Ivic, *European Identity and Citizenship: Between Modernity and Postmodernity* (Palgrave Macmillan 2016), 70) The consequence of this point of view is the appearance of the idea of political atomism - the modernist understanding "of the concept of citizen as a political atom. Political atomism arose in the seventeenth century in the theories of Grotius, Pufendorf, Locke, and others." (Ibid., 33)

[41] National Assembly of France, 'Declaration of the Rights of Man and of the Citizen, 26 August 1789' (*RefWorld*, 2021) <https://www.refworld.org/docid/3ae6b52410.html> accessed 5 January 2021

[42] Ibid.

[43] Paul Ricoeur, 'Psychoanalysis and the Movement of Contemporary Culture' in Don Ihde (ed), *The Conflict of Interpretations: Essays in Hermeneutics* (Northwestern University Press 1974)

[44] Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace Jovanovich 1973)

[45] Jacques Derrida, *Of Grammatology* (John Hopkins University Press 1974); Jacques Derrida, 'Declarations of Independence' (1986) 7(1) New PoliticalScience, 7-15; Michel Foucault, *Discipline and Punish*: *The Birth of the Prison* (Penguin 1979); Michel Foucault, *The Hermeneutics of the Subject: Lectures at the College de France 1981-1982* (Frédéric Gros ed, Palgrave Macmillan 2001); JuliaKristeva, 'Cultural Strangeness and the Subject in Crisis' in Ross M. Guberman (ed), *Julia Kristeva Interviews* (Columbia University Press 1996), 35-60

[46] Yechiel Michael Barilan, *Human Dignity, Human Rights, and Responsibility: The New Language of Global Bioethics and Biolaw* (MIT Press 2012), 3

concept of dignity is striking."[47] Despite its widespread use, the meaning of the concept of human dignity is largely uncertain. The concept of human dignity does not originate from the legal discourse, but is introduced into human rights documents and various constitutions without clear definitions. Therefore, the interpretation and understanding of the concept of human dignity requires wider research. The concept of human dignity has a significant philosophical history, which must be taken into account when exploring the meaning of this concept. Thus, clarifying the concept of human dignity within legal and political discourse requires an analysis of this concept through the history of philosophy.

Chapter 2 explores the concept of human dignity through the ideas of ancient Greek philosophers, Cicero, Seneca, Christianity, medieval and Renaissance humanists, Kant, and contemporary philosophers. One of the main goals of this chapter is to understand how philosophy built the idea of a rational and autonomous human being, which is the foundation of the modern conception of human dignity. According to Costas Douzinas, dignity is a flawed or empty signifier.[48] Schopenhauer argues that the concept of human dignity is "without any genuine substance behind it."[49] This chapter examines whether the concept of human dignity has a philosophical meaning that is independent of certain doctrines. It will be examined whether different, particularistic conceptions of human dignity allow the establishment of "the transition from the particularity of comprehensive frameworks to universal validity".[50] Chapter 2 also investigates whether the philosophical idea of human dignity reflects tensions between the universal (humanity) and the particular (citizenship, culture, religion).[51]

Chapter 3 examines the idea of universality of human rights and the problem of decoupling universal human rights and citizenship. Supposedly universal human rights also face a hermeneutic challenge — they are interpreted and applied differently in different societies. For example, the right to freedom of expression is exercised differently in the USA, France and Islamic countries. "Human rights law blandly acknowledges that the right to freedom of expression may be limited by considerations of public order and morals. But a government trying to comply with the international human right to freedom of expression is given no specific guidance whatsoever."[52]Thus, "it does not seem possible to construct a substantive meta-narrative that is able to satisfy the demands of our various traditions and at the same time be applicable universally."[53] Chapter 3 shows that binary oppositions still exist in world politics, such as

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[47] Michael Rosen, *Dignity: Its History and Meaning* (Harvard University Press 2012), 4

[48]Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge-Cavendish 2007), 37

[49] Michael Rosen, *Dignity: Its History and Meaning* (Harvard University Press 2012), 1

[50] Kebadu Mekonnen Gebremariam, *Human Dignity and Moral Rights* (University of Zürich 2016), 22

[51] Leah Soroko, 'Uncertain Dignity: Judging Human Dignity as a Constitutional Value' (PhD thesis, University of Toronto 2014), 14

[52]Eric Posner, 'The Case Against Human Rights' (*The Guardian*, 4 December 2014) <https://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights> accessed 20 February 2021

[53]Anthony J. Langlois, *The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory* (Cambridge University Press 2001), 80

global/local, transnational/national, West/East, and so on. Universal human rights have never been fully realised in practice because of the contrast between international order and nation states, universal human rights and citizenship, and global and national/local. This is evident in the example of the human rights crisis in Afghanistan, the human rights crisis in Myanmar and China's challenge to international human rights which will be explored in Chapter 3.

Chapter 4 explores whether the emergence of postnational models of citizenship that aim to decouple universal human rights and citizenship succeed in overcoming tensions between the universal (global) and the exclusive, particular (local). It will be shown that the notion of political subjectivity on which these postnational conceptions of citizenship are based requires a postmodern idea of political identity to be effective. Postnational citizenship is based on the idea of multiple membership that includes complex systems of duties and rights, as well as a multilayered concept of identity that includes global, regional, national and local aspects. Postnational concepts of citizenship are based on personhood, not nationality.[54]Although postnational citizenship made a shift from emphasising common nationality to emphasising common humanity, it retained the modernist idea of identity, which defined both categories as monolithic. In this way, both categories, *humanity* and *citizenship*, are exclusivist."What this shift ignores is how appeals to humanity continue to reproduce the idea that people share something in common, such as is expressed in a nation conceptualised as a territorialised entity with (…) calculable boundaries demarcating inside from outside."[55]Therefore, the notion of identity on which postnational ideas of citizenship are based should be reinterpreted and reconceptualised in the direction of a postmodern[56] multilayered notion of identity.[57] This multilayered notion of identity can serve as the basis for a new civic culture that is not based on one universal grand narrative, but includes different narratives.

Chapter 5 develops a new theory of global human rights that overcomes the tensions between the global (universal human rights, humanity, etc.) and the local (citizenship, particularist identities and values). Chapter 5 describes a new conception of civic culture and a philosophical ethic rule on which to base all global human rights. This chapter aims to break the link between human rights discourse and an exclusivist, modernist idea of citizenship. Chapter 5 attempts to reinterpret the Western culture of citizenship and human rights and separate it from the universalistic

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[54] Yasemin Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago Press 1994)

[55]Aoileann Ní Mhurchú, *Ambiguous Citizenship in an Age of Global Migration* (Edinburgh University Press 2014), 40

[56]"According to poststructuralist and postmodernist thinkers, biological traits such as race or sex, which are considered as natural and essentialist by modernist theorists, are constructed by discourse. Consequently, a new postmodern form of contingent and dynamic identity is produced. This notion of identity offers new understanding of the concepts such as 'nation', 'citizenship', 'society', 'power' and so forth. Subsequently, these concepts are perceived as socially and historically constructed, and thus, constantly reinterpreted and reconstructed by different historical conditions as well as social movements and changes." (Sanja Ivic, *European Citizenship and Identity: Between Modernity and Postmodernity* (Palgrave Macmillan 2016), 35)

[57]Jacques Derrida, *Of Grammatology* (John Hopkins University Press 1974)

metaphysical worldview of the Enlightenment that created a dichotomy between humanity (universal human rights) and citizenship. David Held's idea of reconstructing democracy in the modern global order, reinforced by Martha Nussbaum's capabilities approach, is highlighted in Chapter 5 as having the potential to help rethink the concept of universal human rights.

In Chapter 5, John Rawls's conception of human rights is presented and forms part of a solution for reconstructing the idea of universal human rights. Unlike human rights documents, Rawls's idea of human rights recognises the dynamic and contextual nature of human rights. It is necessary to rely on a contextually oriented and hermeneutic approach to human rights in order to reconstruct the contemporary human rights discourse. With this, we can develop a new theory of global human rights based on many cultural perspectives and individual experiences, as well as to include different contexts, views and circumstances in the human rights discourse. Global human rights are shown to be what can be a globally acceptable standard that could be acceptable and thus enforceable and more compatible with the system of exclusive, state-based citizenship which remain the effective source of human rights.

Chapter 1: Philosophical Roots of the Concept of Humanity

1. Ancient Greek Ideas Regarding Humanity and Citizenship

The notion of "humanity" as representing the whole of the human community (perhaps the most common contemporary interpretation of the concept) is delicate when speaking of Ancient Greek thought, at least until the advent of Stoicism – which posited the idea of a universal community of (rational) human beings as a morally and politically relevant notion. What we find instead in most pre-Stoic Ancient Philosophy (namely, in Plato and Aristotle) is an attempt to answer the question "what does it mean to be a man?" or "what is the specific difference that separates man from other animals?" – which, in a sense, is also an inquiry into the essence of humanity, though with the latter being understood in a slightly different fashion than what we normally would today.

Joseph Margolis, for instance, criticizes the Ancient Greek concept of humanity by positing that'the Greeks were literally unable to construct an adequate account of what it is to be a human being—beyond, say, the rather comic biology Plato offers in the *Statesman* or, more earnestly though by the same sort of fumbling, in the quasi-divine biology of Plato's *psyche* and Aristotle's *nous*.'[58]This was largely due to the fact that they lacked the conceptual apparatus necessary to analyze what it means to be human with any real depth and consequence. This sort of "defect" of classical philosophy, although understandable in light of the subsequent evolution of anthropological reflection from which Ancient Greek philosophers had no way of benefiting, nevertheless led to the fact that

> for the Greeks, *faute de mieux*, human nature must embody a changeless (or necessary) structure of its own that could account, in principle, for the intelligent grasp and application in thought and act and productive labor of the changing world. The Greek solution is no more than a deus ex machina that falls back to its compromise with Parmenides. It misperceives the sui generis nature of the human, which is fluxive and artifactual or hybrid.[59]

The disconnect between our contemporary understanding of "humanity" as a substantive concept and the Ancient Greeks usage of terms such as "Man" or "human being" is, therefore, something that we must keep everpresent throughout the duration of the present chapter, in order to prevent significant misunderstandings in both the scope and the intent of what is being argued. Indeed, as Margolis warns, when reading the Greeks today we almost naturally tend to"instantly translate

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[58] Joseph Margolis, *The Arts and the Definition of the Human* (Stanford University Press 2009), 4
[59] Ibid.

into our own idiom what they actually say, so we often fail to see the enormous difference between our respective views."[60]

1.1. The Sophists

A major milestone in the history of Ancient Greek ideas concerning humanity was the emergence and preponderance, in the fifth century BCE, of the democratic city-state of Athens. This provoked a "fundamental shift in politics [that] was accompanied by a shift in thought, leading to new philosophical schools"[61]. One such school was that of the Sophists, who are largely credited with having brought about the change in philosophical paradigm between the pre-Socratic philosophers (who were chiefly cosmologists and physicists [i.e., students of *physis*, or *nature*]), and post-Socratic philosophers, who took an anthropocentric turn in their philosophical endeavors.

This shift represents a significant turn not only on the ensuing focus of philosophical and political reflection, but also – and more comprehensively – in terms of the prism through which reality itself came to be viewed in ontological terms. In the words of Gernot Böhme,

> [a]s a philosophical term, nature - in Greek, *physis* - was originally, and that means among the pre-Socratics, a designation for being *in toto*. Not until Socrates' time, that is, with the Sophists, does a concept of nature emerge that develops contours through its contrast to social and handicraft doing or making by the human being, that is, in contrast to *nomos* and *techne*, and thereby becomes a designation for a part of being[62]

Surviving Sophist writings on human nature are rare, but some fragments have reached us and bear certain relevant considerations. Beginning with an analysis of the *Anonymus Iamblichi* (a fragment of unknown author from the late fifth or early fourth century BCE), Barny notes that

> [t]he *Anon. Iamb*. argues that human beings are by nature less than self-sufficient, and we cannot live together without law: 'because of all these constraints law and justice are made king […] among human beings, and will never be displaced; for their strength is ingrained by nature (*phusei*)' (6.1). So, paradoxically, nothing is more natural to us than the moral conventions which make possible civil society[63]

This seemingly familiar and almost jusnaturalistic argument regarding the natural origins of human society is equally present – albeit in an often implicit fashion – in the "Great Speech" by Protagoras, contained in the homonymous Platonic dialogue. Largely relying on myth to provide

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[60] Ibid., 5

[61] Paula A. Erickson and Liam D. Murphy, *A History of Anthropological Theory* (5th edn, University of Toronto Press 2017), 23

[62] Gernot Böhme, 'On Human Nature' in Armin Grunwald, Matthias Gutmann and Eva Neumann-Held (eds), *On Human Nature* (Springer 2002), 3

[63] Rachel Barny, 'The Sophistic Movement' in Mary Louise Gill and Pierce Pellegrin (eds), *A Companion to Ancient Philosophy* (Blackwell 2006), 86

a genealogical view of human nature and society, Protagoras claims that, in the beginning, 'humans "wronged each other, because they did not possess the craft of politics (*politike techne*)" (322b7– 8), and so were unable to form sustainable societies. So Zeus and Hermes bestowed justice and shame upon mankind.'[64]Delving deeper into this foundational Sophist doctrine, we realize that, according to the latter,

> human beings were originally endowed with technical skill, which along with fire enabled them to make practical discoveries (shelter, clothing, nourishment from the earth) and so survive. When a need to protect themselves against wild beasts led them to live together, however, they found that their lack of political skill (*politike techne*, the ability to live in a polis) made this impracticable. Scattered once more, they were in danger of extinction, until Zeus told Hermes to give each human being a share of *aidos* (a sense of shame and respect for others) and *dike* (a sense of what is right). So equipped, people are capable of living together in communities, but still they require teaching. Teaching is done in part by laws.[65]

In light of this, there appears to be an inescapable confrontation between laws (*nomoi*) and nature (*physis*) in the writings of (or attributed to) Sophists whenever the twofold issue of human nature and community presents itself. This confrontation, in turn, seemingly lead to a somewhat bicephallic conception of human nature, such that, for instance, while 'Antiphon observes that although all human beings are alike in important respects determined by nature, *nomos* (apparently) causes Greeks to distinguish between themselves and foreigners'.[66] The apparent dissonance in this regard is such that, in fact, authors such as Rachel Barry posit that we should perhaps divide Sophists into two main categories, pending on their specific positioning: the "subversives" and the "reaffirmers"; according to the first (which include Antiphon, the Sisyphus, and Callicles), 'our norms and institutions conflict with our pleonectic human nature, and so cannot withstand transparency. For the reaffirmer, conventions are legitimately authoritative and even natural to us.'[67] In any case,

> this sophistic debate raises a puzzle about where authentic human nature is to be observed. Look, says the subversive, to behavior *freed from constraint*: study animals, tyrants or empires, or imagine an agent endowed with superpowers […], and you will see us as we really are. The reaffirmer turns instead to what is distinctive about human beings. For Aristotle, the reaffirmer par excellence, that will turn out to be rationality itself […]; for the rhetorician Isocrates, it is the discursive capacity which makes persuasion and with it civil society possible […]; for Protagoras, it seems to be sociability and the rule of law itself.[68]

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[64] Ibid.

[65] John Gibert, 'The Sophists' in Christopher Shields, *The Blackwell Guide to Ancient Philosophy*, (3rd edn, Blackwell 2006), 36

[66] Ibid., 38

[67] Rachel Barny, 'The Sophistic Movement' in Mary Louise Gill and Pierce Pellegrin (eds), *A Companion to Ancient Philosophy*(Blackwell 2006), 87

[68] Ibid.

Naturally, though, no discussion of the Sophists views on human nature would be complete without an examination of what is perhaps the most famous and oft-quoted argument made by a sophist regading the matter at hand: Protagoras'notoriously anthropocentric claim according to which '[o]f all things the measure is a human being, both of the things that are that they are, and of the things that are not that they are not.'[69] The relative celebrity of such a claim within philosophical circles notwithstanding, something should be said regarding the proper – or, at least, the most likely – interpretation of the former:

> [i]t is generally accepted that *anthropos*, "a human being," means an individual humanbeing, not "humankind." It is possible to ask interesting questions about how Protagoras believed human communities ought to arrive at value judgments, but these should enter the picture only at a later stage. […] whatit means for a person to be a measure of a thing is that, according to Protagoras, that thing truly is as it seems to the person in question.[70]

Therefore, what we are dealing with in Protagoras' claim is not so much a call for the submission of nature in the face of humanity; instead, what it appears to be is a somewhat incipient phenomenological argument, according to which our understanding of reality is not necessarily of reality *itself*, but of reality *as it appears* to us (and is perceived by us). Regardless of the true nature and intention of Protagoras' claim, however, it remains undeniable that the latter seems to have inaugurated – or perhaps merely reflected – a substantial turn towards a growing valuation of human perspective and experience in different areas. In this regard, it is interesting to note the coincidence between this anthropocentric turn, motivated by the rise of Athenian democracy and the Sophists,and the historiographic work of Herodotus (c. 484–c. 425):

> [i]n his travels beyond the limited world of ancient Greece, Herodotus observed diversity in race, language, and culture. He explained this diversity in a relatively objective, or non-ethnocentric, way by correlating it with geography, climate, and other features of the natural world. Herodotus was also humanistic because he stressed how human differences were caused by human, not divine, acts. This combination of science and humanism, as opposed to religion, makes his writing a kind of ancient precursor of ethnography.[71]

By thus introducing the matter of human lived experience in his examination of the design of countries, empires, and civilizations, Herodotus further contributed to a broadening of the understanding that there is a specificity to human nature that not only distinguishes it from "nature" as a whole (*physis*), but also allows each human being to understand how a difference in circumstances may lead to different outcomes for human communities. As such, we may argue that 'in his narratives, far removed as they are from our present world, we recognize a problem

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[69] John Gibert, 'The Sophists' in Christopher Shields, *The Blackwell Guide to Ancient Philosophy*, (3rd edn, Blackwell 2006), 40

[70] Ibid., 40-1

[71] Paula A. Erickson and Liam D. Murphy, *A History of Anthropological Theory* (5th edn, University of Toronto Press 2017), 23

that has followed anthropology, in various guises, up to this very day: how should we relate to "the others"? Are they basically like ourselves, or are they basically different?'[72]

This key anthropological question, which occupied the minds of some of the most brilliant Greek thinkers, unfurls a philosophical and political paradox in what pertains to our relationship with "the others": the dichotomy between universalism and relativism. And although a question that would see many attempted answers throughout the history of Ancient Greek thought, the Sophists' answer to the former was as indicative of their overarching views regarding human nature as it was instrumentally useful for the practicing sophist:'[l]ike Herodotus, the author of *Dissoi Logoi* lines up examples of customs that differ from place to place, including from one Greek polis to the next (2.9–28). This kind of observation was used by some to justify rejecting customs they found oppressive or inconvenient.'[73] In doing so, the Sophists gave weight to the accusations of intellectual and political opportunism that would be levied against them by philosophers such Plato and Aristotle, whose views came to eventually solidify the Sophists' less than stellar reputation in the history of the debate of crucial philosophical ideas. Whether that is a fair assessment should, however – and in light of what has been expounded here – perhaps be reconsidered.

1.2. Socrates, Plato and Aristotle

No serious examination of Ancient Greeks' views on human nature could ever be deemed comprehensive if it failed to consider the three luminary philosophers whose names have become almost synonymous with Greek philosophy: Socrates, Plato and Aristotle. Although decidedly – and intentionally – holding their own intellectual endeavours at odds with those of the Sophists, the reflections of these philosophers concerning human nature can, nevertheless, be regarded as part of a relative continuum of interest in human beings' place and role in the cosmos which the same Sophists can be said to integrate.

Following not only a chronological but also a philosophically reasonable order, we shall begin by briefly examining Socrates and Plato's views concerning the matter at hand, before moving on to a more substantial exploration of Aristotle's. In truth, although Socrates and Plato provide many interesting insights into the Greek views on human nature, Aristotle's own contribution appears to hold a greater appeal and consequence in political terms.

It is important to begin by highlighting some key considerations made by Plato in this regard – that is, the interface between human nature and the reality of human political communities; generally speaking, Plato believes that 'justice in the ideal city has to do with the behavior of the citizens of that city towards each other. Members in each of its classes are to play their own role

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[72] Thomas Hylland Eriksen and Finn Sivert Nielsen, *A History of Anthropology* (Pluto Press 2001), 2
[73] John Gibert, 'The Sophists' in Christopher Shields, *The Blackwell Guide to Ancient Philosophy*, (3rd edn, Blackwell 2006), 40

and not interfere with others playing their own role'[74] (to be sure, a rather polemic perspective in light of contemporary concerns with social justice). If one moves to a yet broader scale of analysis, one comes to realize that Plato holds human beings to be constituted much in the same manner as the universe (*kosmos*): 'they possess a soul, whose rational part displays the same two circles that constitute the world soul; these circles have the same mathematical proportions as the world soul'. Thus, it would stand to reason that we could deem human beings as a sort of microcosm.[75]

In essence, Plato's and Socrates' conception of human nature invariably comes to be integrated into his conception of an ideal polis – which, considering that the latter should be designed to maximize the potential entailed by the former, should come as little surprise. Hence, to describe the process succinctly,

> [t]he construction of [a] completely good city proceeds by putting together the abstract and formal theory of function and virtue and empirical assumptions about the human situation and human nature; for example, the empirical propositions that human beings have to labor to satisfy their basic needs; that no individual is self-sufficient with regard to such needs; that human beings come together and cooperate to better satisfy their needs; that human beings are born with different abilities and talents for the various functions required for satisfying human needs; and that in view of all this, division of social labor by inborn abilities and talents and subsequent appropriate educations is the best way to achieve the well functioning of city-states.[76]

Anothermarkedly noteworthy feature of Plato's anthropologic-political perspective is his view on the *political* equality of men and women within the ideal *polis* – a rarity within the prevailing political perspectives of the time. Indeed, in his political works – the *Republic* first and foremost – 'day-care centers, abortion, and the desacralization of marriage are only a few of the easily recognizable elements of this revolution in favor of synthesizing the opposites man/woman into the unity, human being.'[77]

And yet, when taken as a whole, Plato's work in the *Republic* is much more focused on the parallel issues of defining justice as it pertains to human relations and the polis, rather than advancing a workable conception of what it means to be human (beyond his considerations regarding the tripartite nature of the human soul and how the organisation of the ideal city should reflect the latter). As such, from the standpoint of ascertaining the Ancient Greek views on humanity and citizenship, Plato's work is much less useful than, say, Aristotle's subsequent efforts.

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[74] Terry Penner, 'Plato's Ethics: Early and Middle Dialogues' in Mary Louise Gill and Pierce Pellegrin (eds), *A Companion to Ancient Philosophy* (Blackwell 2006), 162
[75] Luc Brisson, 'Plato's Natural Philosophy and Metaphysics' in Mary Louise Gill and Pierce Pellegrin (eds), *A Companion to Ancient Philosophy* (Blackwell 2006), 226
[76] Gerasimos Santas, 'Plato: Ethics' in Christopher Shields (ed), *The Blackwell Guide to Ancient Philosophy*, (3rd edn, Blackwell 2006), 125
[77] Allan Bloom, 'Preface' in Allan Bloom (ed), *The Republic of Plato* (2nd edn, Basic Books 1991), ix

Not posited only by philosophers, but also acknowledged by contemporary anthropologists, Aristotle's reflections regarding human nature are particularly sophisticated and thought-provoking. As Eriksen & Nielsen summarize,

> [i]n his philosophical anthropology he discusses the differences between humans in general and animals, and concludes that although humans have several needs in common with animals, only man possesses reason, wisdom and morality. He also argued that humans are fundamentally social by nature. In anthropology and elsewhere, such a universalistic style of thought, which seeks to establish similarities rather than differences between groups of people, plays a prominent role to this day.[78]

Equally significant is the emphasis placed by Aristotle's on ascertaining the specific – and special – essence of human nature, which could then be employed to better understand human beings' place and role within the myriad spheres of human existence:

> [f]rom classical antiquity up to the present, the self-interpretation of the human being has been articulated through the contrast between nature and technology, nature and social composition, later then between nature and culture, nature and civilization. … In the tradition going back to classical antiquity, that which is natural in the human being is contrasted with the capacity for language, with sociality, rationality, reason, and, in the broadest sense, the human soul. The human being is that living being which has language and reason (*zoonlogonechon*), a political animal [*zoonpolitikon*] - these being Aristotle's specifications.[79]

As far as Aristotle is concerned, human beings' essence – i.e. what makes them human beings in the first place – is inextricably connected with the question regarding man's function (*ergon*). In a famous passage in the *Nicomachean Ethics* (I 7 1097b22–1098a20), Aristotle defines man's *ergon* as a rational activity performed well – that is, in accordance to virtue (*arete*). This conception of man's function ties in perfectly with Aristotle's definition of man, in the *Nic. Ethics* as well as other works, as *zoon logon echon* – a living being capable of [using] reason.

In the *Politics*, however, Aristotle presents a different definition of man as *zoon politikon* – political living being (or animal) – that provides further evidence of exactly how he envisioned the true essence of man's humanity: a being which requires an existence within the polis in order to fulfill the true potential of its primary function (*ergon*).It is useful, in this regard, to recover the distinction drawn by Hannah Arendt's *The Human Condition* between Aristotle's original concept of *zoon politikon* and Cicero's translation of the latter as *animal socialis*. As Arendt begins by pointing out:

> [t]he *vita activa*, human life in so far as it is actively engaged in doing something, is always rooted in a world of men and of man made things which it never leaves or altogether transcends.… No human life, not even the life of the hermit in nature's wilderness, is possible without a world which directly or indirectly testifies to the presence of other human beings. All human activities are conditioned by the

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[78] Thomas Hylland Eriksen and Finn Sivert Nielsen, *A History of Anthropology* (Pluto Press 2001), 3

[79] Gernot Böhme, 'On Human Nature' in Armin Grunwald, Matthias Gutmann and Eva Neumann-Held (eds), *On Human Nature* (Springer 2002), 4

fact that men live together, but it is only action that cannot even be imagined outside the society of men.[80]

To these considerations, she further adds that

[t]his special relationship between action and being together seems fully to justify the early translation of Aristotle's *zoon politikon* by *animal socialis*, already found in Seneca, which then became the standard translation through Thomas Aquinas: *homo est naturaliter politicus, id est, socialis* ('man is by nature political, that is, social').[…] More than any elaborate theory, this unconscious substitution of the social for the political betrays the extent to which the original Greek understanding of politics had been lost[81]

Breaking down the depth and significance of the confusion, Arendt begins expounding: 'the Latin usage of the word *societas* also originally had a clear, though limited, political meaning. […] It is only with the laterconcept of a *societas generis humani*, a "society of man-kind," that the term 'social' begins to acquire the general meaning of a fundamental human condition.'[82]

Crucially, the issue is not that Aristotle dismissed human beings' gregarious instinct, that leads them to seek each other's company, but rather that such an instinct could not be considered *specifically and essentially* human – inasmuch as it is shared by a variety of other animals. The capacity for political organization, on the other hand, was – according to Greek thought – not only different but 'in direct opposition to that natural association whose center is the home (*oikiri*) and the family'[83]. In fact, with their active participation in the political life of the city-state, human beings could be said to engage in a different sort of life – their *bios politikos*. The latter was underpinned by what Aristotle deemed to be the specifically political human activities, which in turn form the basis of all significant human relations: action (*praxis*) and speech (*lexis*).

It is this latter element – *lexis* – that should lead us to the realization that

Aristotle's definition of man as *zoon politikon* was not only unrelated and even opposed to the natural association experienced in household life; it can be fully understood only if one adds his second famous definition of man as a *zoon logon ekhon* ("a living being capable of speech"). The Latin translation of this term into *animal rationale* rests on no less fundamental a misunderstanding than the term "social animal".[84]

From this we can conclude that Aristotle's conception of the essence of what we might term "humanity" is deeply connected with the notion of citizenship. Although, taken at face value, his definition of man as *zoon logon echon* seems to stand on its own, independent from any political considerations, a careful analysis of Aristotle's stance regarding the function (*ergon*) of human

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[80] Hannah Arendt, *The Human Condition* (2nd edn, University of Chicago Press 1998), 22
[81] Ibid., 23
[82] Ibid., 23-4
[83] Ibid.
[84] Ibid., 27

beings leaves little doubt that that function can only be fulfilled within the context of an active and full exercise of citizenship – as *zoon politikon*.

This is perhaps best – and most controversially – exemplified by the problematic anthropological and political status that Aristotle confers to slaves in his analysis of the phenomenon of slavery in the *Politics*. Commenting of this matter, Fortenbaugh notes that

> [a] slave has speech, can form propositions and so make judgments and assessments. He meets the minimum standard required by the scientific psychology of any creature that is to be classified as a man. (See 1253a9–18.) Nevertheless, the cognitive abilities of a slave have very definite limits. He lacks altogether the ability to deliberate (1260a12). Here the moral psychology is in play. Like every man a slave has emotions—that is, he makes assessments upon which he acts (*to alogon*). But unlike other men he cannot deliberate (*to logon echon*) and so is well advised to remain in the service of a more gifted master who can plan ahead and determine an effective course of action (1252a30–34).[85]

Here we have what appears to be two different measures for establishing the standard for acknowledging another's humanity: the mere ability to use reason and speech, we might say, constitutes a necessary *but not sufficient* condition for one to be considered "fully" human; to the contrary, ascertaining *the extent to which* one is able to employ that very reason and speech in one's everyday life is, for Aristotle, absolutely indispensable in that exercise. Once again, if the necessary political conditions are not met – i.e. if one is not a *de jure* and *de facto* citizen of a polis that ultimately allows one to fully participate in the political and deliberative process – then it would hardly be possible to consider someone to be wholly human, to the fullest extent of the word.

In fact, Aristotle can be seen as taking the matter one step further in his moral justification of slavery, by implying that not only the external political constraints might preclude one to be considered fully human, but also that some people may even be inherently more predisposed to being *sub-human* on account of their very nature and consequential *ergon*: '[p]eople whose function, that is to say, the best thing to come from them, is to use their bodies . . . are natural slaves' (Pol. I 6 1254b17–19).Speaking on this complex and troublesome issue, Fortenbaugh writes:

> Aristotle's remarks on slavery are admittedly difficult and controversial. He seems not only to be on the wrong side of a *nomos-phusis* (convention vs. nature) controversy … but also to express himself in a way that threatens the very humanity of slaves. He emphasizes their capacity for bodily labor …, compares their utility to that of tame animals … and says that slaves differ from masters to the same extent that bodies differ from souls and beasts from men …. Such remarks closely relate slaves to animals, so that it is at least understandable why difficulties have been felt as to whether Aristotle regards slaves as human beings.[86]

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[85] William W. Fortenbaugh, *Aristotle's Practical Side* (Brill 2006), 128
[86] Ibid., 242

Rehabilitating the validity of Aristotle's anthropological conception following this seemingly inescapable indictment of the latter, when viewed through a contemporary lens, is not an easy task – but nor is it an unsurmountable one. In truth, and despite the clear influence of his particular political and cultural circumstances in the development of the views exposed above, one should still note that

> Aristotle is quite explicit in classifying slaves as men (1254b16, 1259b27–28) and if we understand that Aristotle's idea of the natural slave is based upon his newly developed political and ethical psychology, we can see quite easily how slaves qualify as human beings. Aristotle denies slaves the capacity to deliberate (1260a12), but he never denies them the capacity of emotional response.[87]

This latter aspect – the slave's retention of the capacity for emotional response – may appear trivial within the relevant context, but is in fact particularly significant when read in light of the importance afforded to such a capacity in Aristotle's psychology. As such, and although this is a decidedly complex issue whose comprehensive exploration would fall outside the scope of our present endeavour, we may still legitimately posit that, '[i]n denying slaves the capacity to deliberate (1260a12), Aristotle is not robbing them of their humanity'[88]

Polemic as it undoubtedly is, an interesting issue that arises out of Aristotle's views regarding the alleged "naturally mandated" servile role of certain individuals concerns his perspective on women and their anthropological/political standing:

> [i]n discussing women, Aristotle leaves no doubt about their subordinate and domestic role. He states clearly that men are better suited to command than women (1259b2), and that the role of women is not the bodily service characteristic of slaves but rather the preservation of goods procured by men (1252a33-b5, 3.4 1277b4–5). Moreover, since Aristotle relates virtue to function (1260a16–17), he demands of women a virtue that reflects their domestic role.[89]

Much like what happens regarding his stance on slavery, Aristotle's claims pertaining to the naturally servile character of women may be somewhat attenuated when read in light of his particular psychology. Regarding the latter, Fortenbaugh states, Aristotle's account of the women's social and political role

> relates women to the distinction between the logical and alogical halves of the soul (1260a6–7) and contrasts the psychic capacities of women with those of both slaves and children. Slaves are said to possess the deliberative faculty not at all; women are said to possess it, but without authority (*akuron*); and children are said to possess it imperfectly (1260a12–14).[90]

Now, Fortenbaugh is admittedly an Aristotelian and, as such, he consistently holds apologetic views of even the most controversial of Aristotle's claims – the ones above being very much

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[87] Ibid.
[88] Ibid.
[89] Ibid., 244
[90] Ibid.

included in that group. While we could agree that the latter follow consequently and logically from Aristotle's psychological and political conceptions, we could also say that it is perhaps overly benevolent of us not to assume that his assertions regarding slaves and women do not entail, if not their outright *dehumanisation*, at least the concession of a less-than-human status to individuals within those groups – the degree of which is perhaps open for debate.

In any case, one thing appears to be unequivocally true – and undeniably important, given our present purpose: within Aristotelian philosophy, one cannot be fully human without being a full citizen of the polis, and one cannot be a full citizen of the polis without being fully human; it is a sort of ouroboros, a closed logical circuit where A can only be true if B is true, and vice-versa. And given the particular political and social composition of the Ancient Greek world, it is a theme which, *mutatis mutandi*, unavoidably recurs in much of Ancient Greek though on the matter.

2. Stoic Ideas of Humanity

From the very onset, what differentiates Hellenistic philosophy in general – and Stoicism in particular – from earlier philosophical endeavours lies largely with the advent of Alexander the Great's conquest of the Persian Empire and his expedition into Asia. Up until then dominated by the distinction between Greek and barbarian, the spirit of Greek philosophy began opening up to the notion that the perceived superiority of the Greeks over all other was perhaps just that – perceived. The differences between Greeks and non-Greeks thus gradually begun being regarded not as defects of the latter, but as unavoidable results of disparate cultural and ethnical practices that were – in principle, at least – just as valid as those that had led the Greeks to their own customs and beliefs.

This opening of the Greek mind to a certain cultural and moral relativism had, as a sort of fortunate by-product, the consequence of leading philosophical currents such as Stoicism to advance the notion of "humanity" in the sort of broad, all-inclusive manner that it is used today. In the wake of the expansion of Hellenic consciousness underpinned by the expansion of Alexander's empire, the age-old distinction between "Greeks" and "barbarians" began to gradually efface, with an increasingly broader ethnographical and axiological awareness of the world replacing it.

Such a substantial shift in anthropological conceptions and prevailing world-view is, as one would expect, quite clearly reflected in Hellenistic philosophy:

> [t]his strong emphasis upon the individual and a "nature" which he shares with humanity at large is one of the characteristics of Hellenistic philosophy. It becomes most prominent among Stoics, at the time of Rome's expansion from the second century B.C. onwards; but the early Stoics, Sceptics and Epicureans were supremely confident that a man's inner resources, his rationality, can provide the only firm basis for a happy and tranquil life.[91]

Out of all the representatives of Hellenistic philosophy, however, particular attention must be paid to the Stoics, whose philosophical views bore significant political consequences, not only at the time of their original writings, but echoing through the ages until today. Though the allure of Stoicism can be said to depend on the fact that it is not merely a "philosophy", but also – and more concretely – a particular mode of understanding and engaging with life, the wide-reaching success of the Stoics is not due to the fact that they 'abandoned theory for practice, but because they offered a conception of the world and human nature which drew its support from empirical observations, reason and a recognition that all men have common needs.'[92]

There is, hence, an underlying current of broad-scope humanism which underpins the concerns of the Stoics, which allows stoicism to flourish under a variety of circumstantial and temporal constraints, while simultaneously furnishing it with a core conception of humanity's place in the

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[91] A. A. Long, *Hellenistic Philosophy* (2nd edn, University of California Press 1986), 4
[92] Ibid., 6

cosmos. Interestingly, we might note, it is a feature which Stoicism can be said to share with Epicurianism – an almost equally enduring system of thought. As Long puts it, the *humanist focus* of both philosophies is one of their most interesting characteristics, and one which 'leads to very different results in the two systems. In neither case is it narrowly moralistic because the ethical values of both philosophies are related to two fully developed, if divergent, conceptions of the universe.'[93]

2.1. The nature of human beings and their place in the Cosmos

Any relatively in-depth exploration of Stoicism's core philosophical and political concerns must necessarily answer two key questions: *what* are human beings, and *how* do they fit in the world they inhabit? These two questions are, in the eyes of the Stoics, unavoidably and complexly intertwined, to such a degree that one cannot be fully answered without considering an answer to the other. Thus, if we begin by attempting to provide the Stoic answer to the first question – what is a human being – we will begin by noting the Stoics' fundamental emphasis on rationality as the defining human feature, taking that conviction even further thansome of their most notable philosophical precursors:

> [i]n ethics the Stoics were perhaps at their most innovative and most conservative. The Socratic commitment to the role of rationality in determining the best human life is developed with an unswerving emphasis; they rejected completely the suggestion that human beings have in their souls an essentially irrational part. They were committed, like Plato, Aristotle, and even Epicurus, to the notion that happiness (*eudaimonia*) is the goal of human life and that it can be achieved by cultivation of our distinctively human attributes.[94]

This "distinctive human attribute", however, is not the fruit of a creation ex nihilo, but rather of a natural process in which human beings inevitably commune with nature as a whole; and thus the question of what is a human being almost immediately diverges into the question of how the latter fits into the broader cosmological context. As such, we might posit that the 'key idea of Stoic ethics is the injunction that as rational animals our job is to follow nature, that is, to live in accordance with the way nature is; this will assure our fulfillment and success in the world'. Indeed, the harmony between human nature and nature itself is, according to the Stoics, neither accidental nor forcefully imposed; rather, it is something that follows logically from the long-held Stoic belief that 'nature is rational and indeed structured by the same sort of rationality that we humans possess.'[95]

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[93] Ibid., 13
[94] Brad Inwood and Lloyd P. Gerson (eds), *Introduction toThe Stoics Reader* (Hackett 2008), xiv
[95] Ibid.

Stoic doctrine held that rationality is a sort of essential link between human beings and the cosmos which they inhabit, simultaneously shaping and being shaped by it through actions based on that same rationality. They were convinced that the universe can be explained rationally precisely because it is, in itself, a rationally organized structure, to the degree that the same logos which enables human beings to think and speak is embodied in the cosmos at a broader scale. As Long puts it, an 'individual human being at the essence of his nature shares a property which belongs to Nature in the cosmic sense. And because cosmic Nature embraces all that there is, the human individual is a part of the world in a precise and integral sense.'[96]

This almost umbilical connection, which John Sellars dubs a 'close kinship between particular human beings and the cosmos as a whole'[97], is a key feature of the Stoic system of thought, without which the latter cannot be genuinely or fully understood. But although it may appear to focus mainly on the rational bond between human beings and nature, it should be noted that Stoic philosophy still provides a 'cosmic orientation for personal identity which, far from neglecting human relationships, makes them implicit in life according to reason.

The harmony between human nature and nature as a whole is indeed a cornerstone of Stoic thought; this does not, however, mean that human beings should abandon specifically human pursuits and endeavours to return to a simpler, more "naturalistic" way of life – in fact, it is quite the opposite: according to the Stoics particular view of this relationship, a 'good human life is possible if we follow nature. Following nature means figuring it out, which means that the study of physics requires a mastery of logic, epistemology, and scientific method.'[98]As such, there is an intimate connection, in Stoicism, between the pursuit of knowledge in accordance within the possibilities provided by human reason and the level of happiness or fulfilment rightfully experienced our human existence. In the words of Miller and Taoka,

> the Stoics, too, link awareness with happiness (*eudaimonia*, which they hold as the ultimate goal of human life). Seneca's Letter 89 explains Stoic ethics in three steps: (1) assessing each thing's value, (2) adopting the proper internal attitude toward the thing, and (3) behaving in accordance with the internal attitude. The first of these three steps may be considered one type of Stoic awareness: reasoned assessment of what each thing is. Knowing thoroughly what something is allows us neither to overvalue nor to undervalue it. Such knowledge ensures happiness, the Stoics aver, because we are prone to overvaluing and becoming too attached; their demise leads to pain.[99]

This connection between *eudaimonia* and awareness (or knowledge) once again emphasises the importance of reason as the foremost human faculty, and the one which more decisively distinguishes us from non-human animals. Impulse, the primary driving force behind the behaviour of the latter, was thought by the Stoics as an important part of human behaviour at an early age as well, but one which is gradually modified and brought under rational control as a child develops.

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[96] A. A. Long, *Hellenistic Philosophy* (2nd edn, University of California Press 1986), 108
[97] John Sellars, *Stoicism* (Routledge 2006), 105
[98] Brad Inwood and Lloyd P. Gerson (eds), *Introduction toThe Stoics Reader* (Hackett 2008), xv
[99] Steven A. Miller and Yasuko Taoka, 'Towards a Practice of Stoic Pragmatism' (2015) 10(2) The Pluralist, 155

Ultimately, then, while human nature entails non-rational and instinctual impulses, these eventually come to be governed and – if necessary – restrained by human reason over the course of individual development.

Further stressing this argument, the Stoic philosopher Epictetus argued that rationality was precisely the feature of human existence which not only allowed human being to transcend their animality, but also to form a meaningful connection with the cosmos and the divine:

> [a]re these faculties found in us alone? Many in us alone – faculties which the rational creature had special need of – but many you will find that we share with irrational creatures. Do they also then understand events and things? No – for using is one thing, and understanding is another. God had need of them as creatures dealing with impressions, and of us as dealing with them and understanding them as well. That is why it is enough for them to eat and drink and rest and breed, and every function is theirs which each irrational creature fulfils; while we, to whom He gave also the power of understanding, cannot be satisfied with these functions. … He brought man into the world to take cognizance of Himself and His works, and not only to take cognizance but also to interpret them. Therefore it is beneath man's dignity to begin and to end where their rational creatures do; he must rather begin where they do and end where nature has ended in forming us.[100]

On the other hand, however, it should be noted that the Stoics were not staunch proponents of something like utter apathy as the path towards human happiness and fulfilment; indeed, they thought,

> not every affective movement is an irrational movement, for there are also such things as "well-reasoned elevation," "well-reasoned withdrawing," and "well- reasoned reaching," which are affective responses but not emotions. In each case, the supervening movement is, again, like the movement of the feet in the walking case: it is not definitive of the action, since there are multiple reasoning processes which may result in a movement of that type.[101]

With this realization one begins to understand that, instead of complete and reductive rationalism, what the Stoics posited was a somewhat complex and inevitable relation between reason and emotion (between *logos* and *pathos*) – following, to a degree, in the footsteps of Aristotle before them. Unlike Aristotle, however, when characterizing that relation, the Stoics placed a much heavier weight on the rational side of the scale. In describing the idiosyncratic manner in which Stoicism understands the reason-emotion connection, Phillip Mitsis argues that the Stoics

> offer a very powerful challenge to psychologies that view emotions as the result of a psychic conflict or as a product of free-standing irrational forces in our mental lives. Moreover, they believe that we are entirely responsible for our emotions, because emotions are merely mistaken beliefs that we are free to

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[100]Epictetus, *The Discourses and Manual* (Clarendon Press1916), 61
[101] Margaret R. Graver, *Stoicism and Emotion* (University of Chicago Press 2007), 33

acquire or rid ourselves of. They thus deny that there are any ingrained emotional patterns or behaviors that are not amenable to rational control and that might pose a threat to our happiness or virtue.[102]

Following this description, one may begin to realize that a genuine understanding of the Stoic concept of humanity requires one to adopt a more nuanced view of the Stoics' perspective on the relation between reason and emotion – which is precisely one of the cornerstones of such a concept. In pursuing this nuanced perspective, the first step to take should be to acknowledge the teleological nature of Stoic thinking. According to the latter, nature does not operate at random; on the contrary, the fact that a given being exhibits a salient structural or behavioural feature must be regarded as pointing to some kind of ultimate purpose in the natural generation of said being. As such, the very fact that human beings are able to experience emotions means that they are *intended* to experience emotions, and that experience must serve a notable goal in the achievement of their potential and teleological goal as natural beings. Thus, we are ultimately led to the realization that, as Margaret Graves puts it, 'the endowment of nature plays a role in Stoicism analogous to that played by the evolutionary endowment in our own science'.[103]

Now, despite whatever reservations we may harbor regarding the validity of this Stoic perspective on the rationality of human nature – and its ability (or lack thereof) to account for a majority of the prevalent psychological phenomena we customarily ascribe to the human experience, two facts should stand out: firstly, that the crucial importance afforded by the Stoics to the rational dimension of human beings cannot be overstated within their conception of human nature. Secondly, that the distinction between human and "universal" or "cosmic" nature is, to a significant degree, deprived of *raison d'être* within Stoic philosophy. As Sandbach puts it,

> [t]he distinction between human and universal nature can be reconciled. When what normally accords with human nature is in conflict with the dispositions of universa1l nature, a rational man sees that the latter have precedence, and so it is then natural for him, as the rational being that man properly is, to follow universal nature, abandoning his normal preferences. On the other hand, these normal human preferences are usually acceptable to reason, and in accord with universal nature. Hence an opposition between human nature and universal nature is illusory."[104]

This fact has significant bearing on the Stoic's political conception, as well as the manner in which the political dimension is harmoniously integrated by them in their broader understanding of the nature of human existence.

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[102] Phillip Mitsis, 'Stoicism', in Christopher Shields (ed), *The Blackwell Guide to Ancient Philosophy*, (3rd edn, Blackwell 2006), 264

[103] Margaret R. Graver, *Stoicism and Emotion* (University of Chicago Press 2007), 36

[104] F. H. Sandbach, *The Stoics* (2nd edn, Bristol Classical Press 1994), 54

2.2. The political consequence of Stoic ethics and ontology: *Oikeiosis*

When specifically addressing the political dimension of Stoic doctrine, the first thing to keep in mind is the fact that said dimension is, to a large extent, a reflection and direct consequence of much of what the Stoics believed regarding ethics and anthropology. Among the key political ideas that Stoicism derived from these two latter aspects are 'the theory of oikeiōsis, the priority of one's internal virtue over one's external circumstances and the idea that one should live in harmony with Nature.'[105]Indeed, the significance of these ideas in Stoic political thinking is made particularly evident by the fact that all play a pivotal role in the most famous and enduring political doctrine to arise out of the latter: *cosmopolitanism.*

The roots of cosmopolitanism are varied and multifaceted, spanning the work of several notable Stoic philosophers. In truth, however, they are believed to have been present at the very inception of Stoicism as a distinct school of thought, at the hands of its founder, Zeno of Citium. And although the most famous of his works – the *Republic* [*Πολιτεία*] – has sadly not survived, Plutarch's account of the latter still provides us with an enlightening window into its essence:

> the much-admired *Republic* of Zeno, the founder of the Stoic sect, may be summed up in this one main principle: that all the inhabitants of this world of ours should not live differentiated by their respective rules of justice into separate cities and communities, but that we should consider all men to be of one community and one polity, and that we should have a common life and an order common to us all, even as a herd that feeds together and shares the pasturage of a common field. This Zeno wrote, giving shape to a dream or, as it were, shadowy picture of a well-ordered and philosophic commonwealth (329a-b).[106]

This account of Plutarch evidences the extent to which what we came to know as cosmopolitanism was regarded as a notable feature of Stoic political philosophy, even as early as the time of Plutarch's writing. The basic idea of a political entity that encompasses all human beings forms the cornerstone of Stoic political beliefs and directly influences all subsequent political reflection: our focus, the Stoics state, 'should be not on individual States or cities but rather on a much wider community, embracing all of humankind. Rather than there being different groups of people following different sets of political laws we should all follow one shared way of life'[107]

At the heart of Stoicism's belief in the viability of a *cosmopolis* as both an attainable and a desirable political unit lies a crucial concept, which marries politics with anthropology, and without which the very notion of cosmopolitanism would lose traction: *oikeiosis*. This, in turn, begs the question: what is this *oikeiosis*, and how did it go from being a notion designed to explain humanity's place in the cosmos, to provide the Stoics with the fundamental basis for their cosmopolitan political ideals?

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[105] John Sellars, *Stoicism* (Routledge 2006), 129
[106]Plutarch, *Moralia – Volume IV* (Harvard University Press 1962), 397
[107] John Sellars, *Stoicism* (Routledge 2006), 130

As a first attempt at an answer, and succinctly put,

> *oikeiosis* describes a series of concentric circles, with the Stoic at its center: the first circle encompasses his body, the next his immediate family, the next his extended family, and so on. The last circle encompasses all of humanity. The work of *oikeiosis* is to draw these circles together, considering distant people as one's own (*oikeiosis* is derived from the term *oikos*, "home," so can be thought of as "homing").[108]

Despite its relative contemporary obscurity, this notion of *oikeiosis* is indispensable towards a genuine understanding of the stoic doctrine in general and the focus it places on cosmopolitanism. It can be translated as "appropriation", "identification" or "affiliation", even though none of these notions manages to fully convey the true sense of the original.

If we proceed via an etymological analysis, we will find in *oikeiosis* the Greek word *oikos* (house, home) – itself the root of the verb *oikein* (to inhabit) – alongside the postfix *–osis*, which, among its several possible uses, is commonly used to represent an ongoing process (as it happens with "metamorphosis", for instance). As such, one can legitimately conclude that *oikeios is* represents a process of inhabitation, that is – replacing philological interpretation with a philosophical one – a process through which an individual transcends the boundaries his most immediate "home" (his material body) towards the inhabitation of a more encompassing abstract one, such as those represented by the concepts of self-preservation or family, for instance.

It is in this sense that we can speak of *oikeiosis* as a process of appropriation or affiliation: the individual incorporates into his or her essence concepts that transcend him corporally or individually. They become part of himself, his "home", and his self-concern extends to them as meaningfully as it did to the physical boundaries of his finite being.

The Stoics believed that the first stage of *oikeiosis* was necessarily an affiliation to self-preservation, something common to all living beings without exception. And since they also believed that the foundation of ethics could only be found within the principles of Nature, the fact that the behaviour of newborn infants – free from any prior social conditioning – invariably points towards self-preservation was regarded as sufficient reason to conclude that *oikeiosis* and practical life are intimately connected. In order to explain the move from this manifest ethical egoism (centred on the preservation of the self) to an ethic of altruistic values – or even to an ethic of virtues – such as the one commonly professed by Stoicism, however, another notion had to be introduced by stoic thinkers: constitution.

Constitution, defined within stoic doctrine as the sum of the general and particular characteristics of a given individual, corresponds to the psychological "self" or "ego", and essentially represents an individual's identity. Now, given that – according to the stoics – an individual's constitution plays a key role in the process of *oikeiosis*, if the former were to remain static since birth this would

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[108] Steven A. Miller and Yasuko Taoka, 'Towards a Practice of Stoic Pragmatism' (2015) 10(2) The Pluralist, 156

indeed imply that the latter could never evolve past mere self-preservation. Stoicism, however, did not conceive of constitution as being static but rather as dynamic, ultimately able to evolve throughout an individual's life.

While this might appear to challenge the belief in the concept of an immutable individual essence, it is not necessarily so; after all, as the stoics themselves might argue, one commonly acknowledges that a given individual is different as a child and as an adult, distinguishing between two different stages of development without considering to be referring to two different persons. An individual's constitution was, according to stoic doctrine, intimately connected with his rational faculty. Rationality, construed as the most crucial difference between human beings and other animals, was in fact regarded as the key factor in defining an individual's constitution.

Now, if *oikeiosis* depends on constitution, and the latter depends on our rational faculty, one is quickly led to conclude on the existence of a deep causal connection between *oikeiosis* and rationality – and such was precisely the reasoning employed by the stoics. Consequently, as an incipient individual progresses towards a more complex and encompassing rationality through nature and nurture, maturing and learning, so does the process of affiliation itself gradually become more intrinsically rational – and thus becomes an exclusively human kind of *oikeiosis*.

The rational faculty of human beings is thus identified as what enables them to transcend their purely individual dimension and re-equate their identity, in order to incorporate it into concepts which will thence simultaneously reflect and surpass their narrow individuality – the communion with a universal rationality being set by the stoics as the culmination point of this broadening of *oikeiosis*. In this regard, a simplified way to explain the phenomenon from the stoic standpoint would be to consider that rationality, along with the ability for abstract thought, allows us to see our "self" reflected in what we appropriate through *oikeiosis*: our family, our country, our species, and – since human beings are essentially rational – the universal principles of a pure rationality which presides over Nature. We would thus be compelled to preserve also the "self" reflected in each of those things, eventually leading us to the foundation of the most altruistic and universal of virtues.

The subtlety inherent to the stoic perspective in this transition from self-preservation to a universal concern for Humanity can be perhaps best understood in light of what Aristotle had already sustained in his *Nicomachean Ethics* (1168b1): not only is there not a necessary contradiction between the so-called egoistic and altruistic virtues, but it is entirely possible that the latter are actually born out of the former.

The ethical and political virtues of the stoic sage – cosmopolitanism included – thus find themselves legitimised; inasmuch they are deduced from both human nature (via an extrapolation from the basic instinct of self-preservation) and a human reason which partakes from a universal rationality which constitutes its ultimate aspiration. In the process, the purpose of stoic cosmopolitanism is made equally clear: a life in accordance with the rational principles which rule

the Cosmos, which values human beings' humanity above everything else, and which is consequently of a higher kind than one determined by the accidental circumstances surrounding each of us.In the words of John Sellars,

> [t]his process of widening one's circle of concern should not stop once it encompasses all of human society, however. Eventually one's *oikeiōsis* should extend to include the entire cosmos, generating a concern for the preservation of all human beings and the natural world (although for some reason Chrysippus denied any human concern towards non-rational animals). When we reach this widest possible circle of concern we shall become cosmopolitans – citizens of the cosmos.'[109]

Interestingly, as Sellars adds, this fact renders Stoic doctrine 'broadly apolitical when it comes to conventional politics'[110]. That the Stoic sage may very well participate in national or state politics does not entail that – in a manner following Aristotle – one should conclude that life in a traditional geographically circumscribed *polis* is a requirement for *eudaimonia* – or happy life. While the Stoics do acknowledge the human need for sociability, along with the fact that politics represents the highest degree of the fulfilment of such a need, they ultimately believe that membership of a shared cosmopolitan community is enough to attain the latter. That being said, an important caveat must be made: the value placed by Stoicism on the creation of a cosmopolitan community does not culminate in scorn towards more localized political and social duties; on the contrary, the Stoics still devote a substantial amount of attention to outlining the proper ways in which one ought to conduct oneself within specific social settings and relationships. In fact, and as a clear example of this,

> sociability (*koinônia*) in the guise of justice, defined as working for the common good, is a central theme in Marcus Aurelius' writing… . He anchors human sociability in the connection between human and divine reason, resulting in the formulaic claim that for gods and human beings, to be rational is to be social. This perspective governs the first book of the Meditations, in which Marcus Aurelius describes all the social relations that made him who he is.[111]

The Stoic contribution towards the understanding of our humanity is one that simultaneously reinforces the rational dimension of human existence, and social/political aspects that unavoidably come to define it. The symbiosis between human reason and what we might term "cosmic" reason, or reason as an abstract phenomenon, is what allows the Stoics to draw a clear continuity between reason, politics, and human nature, thus giving rise to an idiosyncratic outlook on these matters that not decisively influenced Christian theology, but also the entirety of subsequent Western political thought.

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[109] John Sellars, *Stoicism* (Routledge 2006), 131
[110] Ibid., 133
[111] Gretchen Reydam-Schils, 'Stoicism in Rome' in John Sellars (ed), *The Routledge Handbook of the Stoic Tradition* (Routledge, 2016), 26

3. The Christian Idea of Humanity

As one of the world's main religions, and one whose philosophical and theological influence is arguably most felt in the Western world's key traditions of thought – from rationalist humanism to contemporary human rights – it should come as no surprise that Christianity's idea of what constitutes a human being will be found at the basis of many of our current core beliefs regarding (universal) human rights. As such, in order be better understand – and therefore critically discuss – those same beliefs, one must first delve into that Christian idea of humanity that fundamentally underpinned them, and examine the former in a philosophical fashion.

The purpose of this section will thus be to inquire as to the theological origins of that idea or conception of humanity, how the latter stands in terms of internal coherence, what are its implications, and to what extent it was ultimately expanded to include all of "God's children", when understood in more concrete historical, political and philosophical terms.

3.1. Human animal – or something else?

The inclination to search for the place of humans among a the broader continuum of living beings that populate the earth, weighing similarities and distinguishing features to arrive at a classification that allows one to understand the specificity of human beings, while simultaneously acknowledging their common nature regarding other living creatures, is one with a lengthy tradition. If one goes back to Ancient Greece, for instance, Plato's definition of human beings as "featherless bipeds" – made famous by the anecdote involving Diogenes – as well as Aristotle's definition of Man as *zoon politikon* (roughly, a "political living being") or even as a *rational animal* (not properly Aristotle's, but common in the Scholastic philosophy inspired by his work) could serve as accurate representations of this inclination.

It should be noted, nevertheless, that such inclination has almost invariably been accompanied by another, almost wholly antithetical current of thought: that which decides to emphasise the purported exceptionality of human beings in what pertains to the remaining plethora of living beings. The seemingly unavoidable coexistence between the two in the history of any consequent thoughts on the human condition gives rise to a sort of paradox – or perhaps even a form of cognitive dissonance: on the one hand, human beings are officially categorised as being part of the kingdom *animalia*; on the other, we often hold ourselves in such high regard concerning our specific gifts and advantages that we consider human beings to be virtually transcendent from its biological kingdom.

It is a dichotomy which, *mutatis mutandi*, is also present in the commonplace scriptural interpretation of the Christian doctrine on the nature of humanity: as Green puts it, '[g]iven the human propensity to regard with hyperbole our significance in the cosmos, this is an important

opening reminder. On the one hand, we have been reticent to acknowledge the continuity of humanity with all other animals and, indeed, the degree to which our lives are bound up with the world we indwell. On the other, we are slow to recognize our creatureliness in relation to God.'[112]

The question of humanity – of what it means to be human – is therefore met with a twofold approach in Christian scripture: not only should we be concerned with what constitutes our essence and identity as human beings, but also – and perhaps more decisively, we should seek to ascertain what is the *telos*, the ultimate goal of our human existence. Only by examining the Christian perspective on the issue at hand with these two dimensions in mind will we be able to fully grasp the roots and implications of the former.

3.2. *Imago Dei*, the image of God

Perhaps one of the most popular and oft-repeated ideas regarding Christian anthropology relates to the doctrine of *Imago Dei* – the image of God. And though the latter has been interpreted by many of the key theologians in the history of Christianity, it ultimately comes to rely on a core-belief of the Christian faith: that God created man "in His own image".

What does it mean, exactly, to be "created as God's image"? Moving beyond the more obvious and literal interpretations of such claim, we will find that it entails an idea with complex ramification, which is able to somewhat bridge the gap between human beings' "creatureliness" mentioned above and our purportedly divine (and assuredly spiritual) dimension. As Green eloquently puts it:

> Humans are unlike other creatures in that only humanity is created after God's own likeness, in God's own image (*imago Dei*). Only to humanity does God speak directly. Humanity alone receives from God this divine vocation. The *imago Dei* tradition has been the focus of diverse interpretations among Jews and Christians – ranging widely from some physical characteristic of humans (such as standing upright) to a way of knowing (especially the human capacity to know God), and so on. What is obvious is that humanity is thus defined in relation to God in terms of both similarity and difference: humanity is in some sense "like" God, but is itself not divine. Humanity thus stands in an ambivalent position – living in solidarity with the rest of the created order and yet distinct from it on account of humankind's unique role as the bearer of the divine image, called to a particular and crucial relationship with Yahweh and yet not divine.[113]

Reinforcing this idea further, John Sachs explains how human beings' "likeness" with God (perhaps the most oft used term to express *imago Dei* in the English language translations of the Bible) should be properly interpreted, in what concerns both its meaning and implications:

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[112] Joel B. Green, *Body, Soul and Human Life: The Nature of Humanity in the Bible* (Baker Academic 2008), 27
[113] Ibid., 75

[t]he term likeness refers more specifically to an internal relationship and similarity. Human beings are radically different from God but uniquely and intimately related to God, capable of personal relationship with God. According to the Priestly tradition, the human creature is defined primarily in relationship to God, not in terms of its relationship to the other types of creatures, the way we might place a particular animal in a specific phylum, genus and species. The human being is not merely *primus inter pares*, nor merely the highest among the animals. […] It is this relationship with God which 'defines' human nature and makes us different from all other creatures. It is also the foundation of the inviolable dignity of human life.[114]

When examined in its origin, *Imago Dei* is a doctrine (or core-belief) that essentially echoes a number of passages in the Bible, namely Genesis 1:26-27, where we are told that: "Then God said, "Let us make humankind in our image, according to our likeness; and let them have dominion over the fish of the sea, and over the birds of the air, and over the cattle, and overall the wild animals of the earth, and over every creeping thing that creeps upon the earth. 'So God created humankind in his image, in the image of God he created them; male and female he created them."

This idea is further reinforced by Genesis 5:1-2 ('This is the list of the descendants of Adam. When God created humankind, he made them in the likeness of God. Male and female he created them, and he blessed them and named them "Humankind" when they were created.'), as well as by Genesis 9:6, which – in a passage that can be seen as particularly pregnant from the standpoint of a universalistic ethics and universal human rights – informs us that 'Whoever sheds the blood of a human, by a human shall that person's blood be shed; for in his own image God made humankind.'

The prevalence of the belief in Imago Dei is therefore a hallmark of the Old Testament from its very inception, and a crucial step in understanding both Christian anthropogeny and anthropology. The New Testament, however, is not devoid of references to the same idea, even if it of course tends to frame it through the figure of Christ. Thus, in 2 Corinthians 4:4, Paul tells us that '[i]n their case the god of this world has blinded the minds of the unbelievers, to keep them from seeing the light of the gospel of the glory of Christ, who is the image of God.'

A similar logic is inherent to Hebrews 1:3, where we are told that 'He [God's son] is the reflection of God's glory and the exact imprint of God's very being, and he sustains all things by his powerful word.', while a closer interpretation to the Old Testament's *Imago Dei* may be found in James 3:9: 'With it [the tongue] we bless the Lord and Father, and with it we curse those [human beings] who are made in the likeness of God.'

Following this brief exploration of the doctrine of *Imago Dei* as it is presented in the Bible itself, it is worth mentioning that – as stated above – the former and its ultimate theo-philosophical meaning have been interpreted in markedly different fashion across epochs and thinkers. That being said, the most influential manners of interpreting *Imago Dei* can be grouped and categorised

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[114] John R. Sachs, *The Christian Vision of Humanity. Basic Christian Anthropology* (The Liturgical Press 1991), 16

under three headings: *substantive*, *functional* and *relational*. A succinct and simplified explanation of each is provided by Don Thorsen:

> [t]hroughout church history, various attempts have been made to understand the image of God. Some have thought that there is a substantive explanation. For example, people are thought to reflect God's image because of their rationality, spirituality, or some other substantive aspect of who they are, such as a soul. Others have thought that there is functional explanation. For example, God commanded people to be moral, and they reflect the image of God to the degree that they act morally; or God commanded people to have dominion over the world, and they reflect the image of God to the degree that they have dominion. Still others have thought that there is a relational explanation. For example, people reflect God's image to the degree that they are in a right relationship with God, themselves, or others.[115]

Without delving deep into each possible interpretation of *Imago Dei*, or expressing particular favor towards a particular one, it should nonetheless be noted that "[t]he Christian concept of humankind as made in the image of God has proved to be a rich source for reflection on morality and the legitimation of human freedom", while that same "promise that human beings are created in the image of God ensures the nonnegotiable conferment of dignity and human rights on every person."[116]In that sense, the doctrine of *Imago Dei* is arguably at the heart of many facets of what is commonly believed to be at the heart of the human experience, according to the prevailing tradition of thought in the Western world.

3.3. Free will, divine providence and human autonomy

Perhaps one of the most salient features of Christianity when viewed as a system of theo-philosophical and anthropological beliefs has to do with the frequently problematic role played by the notion of human freedom (and free will) within it – so much so that one of the livelier and more enduring debates in Christian theology was precisely to do with the problem of how to reconcile the simultaneous belief in *human free will* and *divine providence*.

This debate, in which the reality of human freedom was often cast between extremes of absolute libertarianism and utter determinism, engaged the attention of some of the foremost intellects in the history of Christian theology. Augustine, for instance, battled arduously to solve that sometimes seemingly impossible conundrum, the difficulty of the task at hand best encapsulated by his assertion that 'there are some people who defend the grace of god in such a way that they

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[115] Don Thorsen, *What is True About Christianity? An Introduction to Christian Faith and Practice* (Clermont 2020), 70

[116]Ng Kam Weng, 'The Image of God, Human Dignity and Vocation' in Michael Ipgrave and David Marshall (eds), *Humanity: Texts and Contexts* (Georgetown University Press 2011), 11

deny human free choice, or who hold that free choice is denied when grace is defended'.[117] For him as well as other important Christian theologians, it was plain to realise the place that the issue of free will had within the Christian conception of humanity.

In differentiating it from analogous concepts that precede it (such as the ones employed by ancient Greek philosophers, for instance) the Christian concept of free will entails a markedly different context – and, with it, significant implications. In the words of Albrecht Dihle,

> [the Christian] concept of Free Will results from a completely different view. The world as experienced in human life owes its existence to a creator who is free to interfere, at any given time, with what is going on in his creation. It is only due to his benevolence that he also has given some regularity to the cosmic process. So man is to experience, first of all, the will of the creator. He becomes conscious of his own intention through continuous acts of obedience or disobedience that is to say through acts of will by which he freely reacts to the utterances of the divine will.[118]

Within Christian tradition, human free will, as it were, seems therefore to be constrained by two critical aspects: the will of God (which precedes and arguably frames alternative courses of action within a particular calculus of moral worth) and divine providence – wherein the notion of divine omniscience seems to be at odds with human beings' ability to genuinely exercise free will, a conundrum that can be expressed in a fairly simple manner: if God already knows what I will chose to do in the future, how can that choice be free (and not predetermined)?

In other words,

> [a]t first glance, there appears to be a conflict between the Christian belief that the history of the world is the working out of the divine purposes and the human experience of freedom: either God controls history, in which case humans are mere pawns in God's game, or humans have free will, in which case history cannot be the unfolding of the divine purposes but is contingent on human free-will decisions.[119]

It is within the landscape laid forth by these problems that theologians such as Augustine and Thomas Aquinas will attempt to find a satisfactory answer to the problem of human free will. If we begin by focusing briefly on Augustine, we will find that his answer to the problem – despite a complex development – arrives at a fairly straightforward conclusion. Human will, he posits, has been corrupted by the fall of Man from Eden, and only God can rehabilitate it. According to this view, it is only the *grace of God* that can 'renew the human will and restore its original freedom of choice' since 'God has to change the present nature of man, before he can even want to act according to virtue and God's commandment, as he knows he is supposed to do, and, eventually, to pass the final judgement and be saved'[120].

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[117]Augustine of Hippo, 'A Treatise on Grace and Free Will' (*The Reformed Reader*, 1999) <http://www.onthewing.org/user/Augustine%20-%20Grace%20and%20Free%20Will.pdf>accessed 20 February 2021

[118]Albrecht Dihle, *The Theory of Will in Classical Antiquity* (University of California Press 1982), 72

[119]Alexander S. Jensen, *Divine Providence and Human Agency* (Ashgate 2014), 67

[120]Albrecht Dihle, *The Theory of Will in Classical Antiquity* (University of California Press 1982), 131

Following Augustine's reflection of the subject, thus, there seems to be an (ideal) overlapping between human and divine will: 'the free will always do what is in accordance with God's will, while the will that is turned away from God is not free at all'. Consequently, 'there cannot be a competition between human free will and divine will and providence, because the free will is a gift from God and therefore always directed towards God. Human free will and divine providence belong intrinsically together'[121]

Now, despite the undeniable influence of Augustine not only in Christian theology but also in Western philosophy as a whole, the impact of his contribution cannot be understated. But that is not to say that his answer fully exhausts the problem – quite the contrary, in fact. If we move now to Thomas Aquinas' view on the latter, we will find a markedly different answer, and one which is not any less influential.

In the *Summa Theologica*, question 83 is devoted precisely to the matter of free will (*libero arbitrio*). Article 1 of said question poses the problem in no uncertain terms: 'Do human beings have free will?' Here, Aquinas begins by citing a number of objections to an eventual affirmative answer to the query, most of them supported by a particular passage on the Bible, such as (for instance) objection 4, which tells us that 'Whoever has free decision is in control of his acts. But a human being is not in control of his acts. For as Jeremiah 10.23 says, *a person's way is not up to him, nor does it belong to a man to direct his steps*. Therefore human beings do not have free decision.'[122]

Following these objections, whoever, Aquinas begins unveiling his own position on the subject with a brief argument to the contrary (*sed contra*), which he grounds in Ecclesiaticus 15.14: '*God established human beings from the start, and left them in the hands of their own counsel* – i. e. (according to the Gloss) with free decision'[123]. He then posits his unequivocal reply: 'Human beings have free decision. Otherwise counsel and encourgement, commands and prohibitions, reward and punishment would all be pointless.' And this is because, he straightforwardly tells us, 'human beings necessarily have free decision, from the very fact that they are rational.'[124]

But how to conflate this rationally grounded free will with divine providence? Aquinas answer comes in the form of a reply to one of the objections he had presented earlier:

> [f]ree decision is the cause of its motion, because through free decision a human being moves himself to act. But freedom does notnecessarily require that what is free be the *first* cause of itself, just as one thing's being the cause of another does not require that it be the first cause of that other. God, then, is the first cause, moving both natural and voluntary causes. And just as his moving natural causes does not take away from their acts being natural, so his moving voluntary causes does not take away from

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[121] Alexander S. Jensen, *Divine Providence and Human Agency* (Ashgate 2014), 76
[122] Thomas Aquinas, *The Treatise on Human Nature: Summa Theologiae 1a 75-89* (Hackett 2002), 126
[123] Ibid., 127
[124] Ibid.

their actions being voluntary. Instead, he makes this be so for them, because he works within each thing in accord with its own character.[125]

Aquinas Aristotelian heritage hence allows him to solve the dilemma in a largely conciliatory and holistic manner: human autonomy and divine providence can indeed coexist, if one understands that both powers function at a different level of causality, affecting different dimensions of our reality. Aquinas theology of double causality, as it is sometimes termed, hence rescues human autonomy from what seemed to be an otherwise likely dissolution in the far larger pool of God's will.

Augustine's and Aquinas' positions on the issue are certainly not the final word on the matter. Reformers such as Erasmus and Martin Luther, for instance, were notoriously involved in a debate on the matter that led the former to a defense of autonomous human free will and the latter to an outright refusal of that same free will, in face of divine providence and prescience[126].

The fact remains, however, that a deep concern with the nature of free will (or *autonomy*) as a specifically human phenomenon is one of the foremost contribution of Christian philosophy towards our understanding of the human condition. If one couples that acknowledgement of human autonomy with the logical secularised correlate of the doctrine of *imago Dei* – the idea that "human beings have an inherent"[127] and inalienable worth (or dignity) – one will find oneself in possession of two of the most critical aspects that have underpinned the development of human rights in any shape or form familiar to us today. It is a contribution stemming from the Christian conception of humanity.

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[125] Ibid., 127-8
[126] Alexander S. Jensen, *Divine Providence and Human Agency* (Ashgate 2014), 85-91
[127] James David Ernest Watson, 'A Universal Human Dignity: Its Nature, Ground and Limits' (PhD thesis, University of Exeter 2016), 78

4. The Enlightenment, Abstract Humanity and Universalism

The impact of the Enlightenment on Western culture as a whole is one that, much like Christianity, can hardly be overstated. And if this is true in general philosophical and political terms, it is perhaps nowhere as obvious as in the particular struggle for the acknowledgement of "natural" (or "human" rights. Indeed, as Jonathan Israel puts it, the 'effectof […] the increasingly fraught question of universal human rights has been to push the Enlightenment increasingly to the fore as the single most important topic, internationally, in modern historical studies, and one of crucial significance also in our politics, cultural studies, and philosophy.'[128]

But what is at the core of the Enlightenment? In terms of the more common-place answer to the question, one might claim that the latter should be defined as a somewhat international socio-cultural phenomenon chiefly animated by 'the notion of bettering humanity in this world through a fundamental, revolutionary transformation discarding the ideas, habits, and traditions of the past either wholly or partially'[129]

Yet, despite this fact, our understanding of the "true" nature of the Enlightenment as a politico-philosophical movement – as well as its ultimate consequences – has long been a matter of lively debate. While mostly acknowledged as a necessary shift away from an overly faith- or tradition-driven theological view of human beings and their reality towards a more rational and objective perspective on the latter, the Enlightenment's project of what we might term "*abstract humanity*" – reliant on the conviction that human reason is capable of shaping both our comprehension of the human condition and its concrete unfolding – is not without its critics.

Postmodernist thinkers, for instance, have posited that the "abstract universalism" of the Enlightenment

> was ultimately destructive, that the relentless rationalism, concern with perfecting humanity, and universalism of what they often disparagingly called "the Enlightenment project" was responsible for the organized mass violence of the later French Revolution and the still greater horrors perpetrated by imperialism, Communism, Fascism, and Nazism in the late nineteenth and twentieth centuries[130]

Thus, and in spite of its renown as "the age of Reason", one could examine the wealth of critical analyses on the subject and conclude that

> [c]ritics of the Enlightenment seem unable to resist adopting and inverting the period's own preeminent metaphor: Enlightenment implies, necessitates even, obscurity and darkness. If the Enlightenment can be celebrated as fostering ideals of rationalism, universalism, and human perfectibility, it can equally

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[128] Jonathan I. Israel, *Democratic Enlightenment – Philosophy, Revolution and Human Rights* (Oxford University Press 2011), 1
[129] Ibid., 7
[130] Ibid., 1

be reprehended as causing modernity's greatest evils. Its naïve confidence in reason and in the malleability and perfectibility of human nature authorized totalitarianism.[131]

At the same time, however, the legacy of the Enlightenment is certainly not without its staunch defenders, even today. And while many may hold similar views to the ones illustrated above, in general terms it would perhaps be fair to state that 'exceedingly few believe that the Enlightenment amounted to nothing more than a dogmatic embrace of moral and political universalism, a blind faith in abstract reason, and a reductive and isolating focus on the individual.'[132]

In light of all this, therefore, what should concern us here is a twofold question: a) what is the Enlightenment's overarching comprehension of human nature and experience? b) what are its political implications concerning political and human rights?

4.1. Reason as salvation

When describing the cultural and philosophical zeitgeist that gave both birth and purpose to the Enlightenment, Ernst Cassirer once stated that

> [t]he eighteenth century is imbued with a belief in the unity and immutability of reason. Reason is the same for all thinking subjects, all nations, all epochs, and all cultures. From the changeability of religious creeds, of moral maxims and convictions, of theoretical opinions and judgments, a firm and lasting element can be extracted which is permanent in itself, and which in this identity and permanence expresses the real essence of reason.[133]

To say that the Enlightenment's project of abstract humanity relied heavily on a generous – some would say, excessive – estimation of the powers of human reason, is perhaps a truism at this point. The true extent of that generosity, as well as the politico-philosophical consequences ultimately drawn from it, on the other hand, is a matter perhaps best left to the examination of its most notorious proponent – Immanuel Kant – in the subsequent section of this chapter. Constrained by this caveat, this exploration of the Enlightenment's adoption of the concept of Reason as animus of the movement will briefly focus not on an exhaustive analysis of that concept, but on the instrumental role played by it when viewed alongside the Christian tradition of thought that prevailed in the Western world at the time.

In this regard, and despite the fact that the Enlightenment rather expressly intended to break with both Christian theology and anthropology, its efforts in that regard cannot be genuinely understood without being read in light of the tension caused by such an intention. The very inception of the

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[131] Henry Martyn Lloyd, 'What is it to Rethink the Enlightenment' in Geoff Boucher and Henrt Martyn Lloyd (eds), *Rethinking the Enlightenment* (Lexington Books 2018), 3
[132] Dennis C. Rasmunssen, 'Contemporary Political Theory as an Anti-Enlightenment Project'in Geoff Boucher and Henrt Martyn Lloyd (eds), *Rethinking the Enlightenment* (Lexington Books 2018), 40
[133] Ernst Cassirer, *The Philosophy of the Enlightenment* (Princeton University Press 1951), 6

Enlightenment as a philosophical movement, one might say, is indebted to the internal revolutions in the Christian faith that had been witness one or two centuries prior to it. In the words of Anthony Pagden,

> [i]n the genealogy of "Enlightenment"—*le siècle des lumières*—which D'Alembert provided at the beginning of his *Essai sur les éléments de philosophie* it was Calvin and Luther who, for all their dogmatism, by destroying the authority of the Catholic Church, prepared the way for the rationalization of the seventeenth century, exemplified by Descartes.[134]

The process leading up to the rationalisation mentioned by Pagden, however, was much less an abandonment and substitution of the theological paradigm inherited from the Christian tradition, and more of an *adaptation* of the latter's model in service of a new conceptual content. That is to say, the true status of the Enlightenment's concept of Reason – the motive behind the very capitalisation of the word – is something that can only be grasped in its fullest extent when viewed through the lens of the religious paradigm it purportedly aimed to replace.

Regarding this aspect, there is no shortage of instances – and of thinkers – that lay bare the extent to which the Enlightenment's faith on Reason mirrors the preexisting religious fidelity that it built upon; referring to Lessing's *The Education of the Human Race*, for example, Israel has no hesitation in diagnosing its ultimate purpose as to 'boldly […] transform men's notion of revelation from a glorious divine intervention into the progressive unfolding of collective human reason.'[135]

A similar assessment of the Enlightenment's project "rational theology", as it were, can be found as close to the source of said project as any literary endeavor can claim to be: Diderot and d'Alembert's *Encyclopédie*. On the entry pertaining to the nature of a "Philosopher", penned by César Chesneau Du Marsais, we are told that 'Reason is to the philosopher what grace is to the Christian. Grace determines the action of the Christian; reason determines that of the philosopher. […] For him, civil society is, as it were, a divinity on earth.'[136]

Now, it is true that certain credible historical analyses of the phenomenon exhort us to be mindful of the fact that, '[f]ar from being overlyoptimistic as their twentieth-century critics have frequently charged, or treating human beings as "quasi-divine", radical thinkers and mostly also the Enlightenment'smoderate thinkers frequently tended, in fact, to be rather pessimistic.'[137] But it is equally true that the inverse attitude was – even if only for its rhetorical or political efficacy – the

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[134] Anthony Pagden, 'Orientalism and Occidentalism in the Enlightenment' in Larry Wolff and Marco Cipolloni (eds), *The Anthropology of the Enlightenment* (Stanford University Press 2007), 63-4

[135] Jonathan I. Israel, *Democratic Enlightenment – Philosophy, Revolution and Human Rights* (Oxford University Press 2011), 325

[136] César Chesneau Du Marsais, 'Philosopher' in *The Encyclopedia of Diderot & d'Alembert Collaborative Translation Project* (Michigan Publishing 2002)

[137] Jonathan I. Israel, *Democratic Enlightenment – Philosophy, Revolution and Human Rights* (Oxford University Press 2011), 34

one notably promulgated by the key figures of the time that came to shape our current understanding of it.

Thus, one might conclude, when viewed from this prism the Enlightenment's project ultimately sought to replace God with Man at the seat of creation, with Reason as both architect and driving force of that creation – a creation that aimed not only at the socio-political reality of the time, but also (and crucially) at the very concept of human being that is expected to inhabit it. And in a final parallel with the theological paradigm that this movement seemingly adapts to its purpose, it cannot do without a substantial degree of *faith* in the powers of that [human] Reason – a proposition that holds promise, but not without a degree of peril:

> the Enlightenment's commitment to reason ultimately rested on faith—faith that revelation is untrue and that there is no such God. The dangers inherent in an unquestioning faith in reason are, according to Strauss, evidenced by the great increase in human power that has accompanied progress in science and technology, which, combined with the rise of moral relativism, has turned modern man into "a blind giant."[138]

This commitment to reason, born out of a concern with universality, hence appears ironically capable to undermine the Enlightenment's intentions on the grounds of its contrary: relativism.

4.2. Human nature and action

For all the reasons expounded above, the Enlightenment's overarching conception of what constitutes the core of human nature is often criticised as overly rationalistic and, consequently, excessively reductionist and abstract. Indeed, the very possibility of arriving at a practically useful understanding of the human experience by means of a purely rational analysis was denounced by David Hume as an "absurd" proposition, 'implying an infinite capacity of the mind': '[t]he abstract idea of a man represents men of all sizes and all qualities; which it is concluded it cannot do, but either by representing at once all possible sizes and all possible qualities, or by, representing no particular one at all.'[139]

There is something to be said regarding the Enlightenment's claims in what pertains to the concept of human nature; for even if the latter 'was sometimes introduced into Enlightened discourse more as a casual, unexamined assumption than as an operative force—[…] in any case, it was very much apart of the accepted verbal currency of the age.'[140] This seeming inconsistency is perhaps made

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[138] Dennis C. Rasmunssen, 'Contemporary Political Theory as an Anti-Enlightenment Project'in Geoff Boucher and Henrt Martyn Lloyd (eds), *Rethinking the Enlightenment* (Lexington Books 2018), 42
[139] David Hume, *A Treatise of Human Nature* (The Floating Press 2009), 41
[140] Henry Vyberg, *Human Nature, Cultural Diversity and the French Enlightenment* (Oxford University Press 1989), 20

more interesting – and understandable – by the fact that the concept of "nature" on its own also suffered from the same combination of exalted valuation and superficial exploration.

In myriad fields of research, nature was invoked as either guide or final arbiter: talk of "human nature", the "state of nature", "natural rights" and so on, all made use of an idealised concept of nature that allowed moral and political philosophers to legitimise their views on the critical questions raised during the Enlightenment; when examined in more concrete terms, however, the latter's understanding of nature was often found to be lacking – a fact made all the more significant due to the aforementioned moral or political weight afforded to the concept. As Vyberg puts it, '[n]ature became a central and commonplace concept, rivaled only by reason, in the realm of general intellectual discourse—and again […] it might be eithera descriptive or a normative concept.'[141]

In any case, and with that limitation present, it is entirely possible to draft a general picture of the prevailing views (and points of interest) concerning human nature espoused by thinkers of the Enlightenment; as a whole, they 'tended to focus upon only a very few basic principles of human nature—its essential goodness or badness; the centrality of reason, the feelings, or empiricism; the eternal quest for happiness; the opposition or cooperation of urges toward self-love and sociability; and the role of human choice.'[142]

If all of the above aspects are perhaps easily recognisable features of the Enlightenment as we know it, there is another that – particularly when viewed alongside Kant's apology of the *public use of Reason* – is of the outmost political consequence: the core belief in human beings' natural inclination towards an active political life. In this regard, and in order to give latitude to Kant's own views on the matter, we shall focus on the work of Scottish philosopher Adam Ferguson.

Albeit a somewhat more obscure figure when viewed from a "continental" lens, Ferguson's importance in the Scottish Enlightenment cannot be overstated. His work stands out as one of the clearest examples of the movement's commitment with an active political stance, borne out of human nature itself. As Fania Oz-Salzberger summarises it,

> "[t]hat man is not made for repose" is a major conclusion of Adam Ferguson's analysis of human nature and of human history. Men act or languish; nations are at best "forward, enterprising, inventive, and industrious", at times suffer "periods of remissness", and at worst decline and die. The need and the desire for action are common to men and beasts, but they are interwoven into human history in ways unique to the species.[143]

The notion of activity as standing at the core of human nature was consistently emphasised in Ferguson's writings, who '[m]ore than any other Scottish writer of his day,[…] equated "mankind"

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[141] Ibid., 22

[142] Ibid., 28

[143] Fania Oz-Salzberger, 'Ferguson's Politics of Action' in Eugene Heath and Vincenzo Merolle (eds), *Adam Ferguson: History, Progress and Human Nature* (Pickering & Chatto 2008), 147

with a vigorous notion of "men", and "society" with active civic life.'[144] According to him, this was no mere accident of upbringing or cultural mores; although is not oblivious to the power of those influences, his analysis of this aspect runs deeper, seeing in it a trait that is deeply embued in the intrinsic nature of human beings, without which a genuine understanding of the latter cannot be achieved:

> The "disposition to action", the love of adversity, is what "every boy knows at his play". In "rude" societies man is the hunter, gamester, warrior; in the ancient polities he was the soldier and statesman; in modern states he ought to maintain an all-rounded civic personality, a non-specialized political skill and military prowess. Perennial human psychology, inborn masculine traits, primitive tribal codes, and the history of ancient and modern societies – all provided Ferguson with a linear or concentric model for substantiating a general truth: men are prone to action.[145]

Regarding Ferguson's belief in the foundational role of activity in human nature, Craig Smith concurs:

> [f]or Ferguson humans are "formed to act" and "fitted to act" – activity is something integral to our make-up. Human nature, he notes in the *Institutes*, is actually "in motion", while in the *Principles* he asserts that all living creatures carry "a principle of active exertion in themselves". [...]However, it is crucial to Ferguson's understanding of humanity's place in the system of nature that they alone possess higher intelligence and as a result are "more active than any other nature."[146]

Now, it is significant to note that Ferguson is not concerned with describing a feature of human nature, but rather to draw concrete conclusions regarding how individuals and societies *ought* to be understood, as well as designed – to move from the descriptive to the normative, as it were. As Smith puts it, '[a]ction lies at the heart of his social thought. His very understanding of human nature is couched in terms of his recognition of its active nature and the interactive nature of the societies in which mankind assembles.'[147]

Following this commitment with employing human nature's active inclination to effect social and political change, it is certainly not surprising that 'Ferguson's argument moves decidedly from the descriptive and sociological to the evaluative and prescriptive as he seeks to distinguish types of activity that produce greater degrees of happiness.'[148] In this regard, however, he is careful to point out that our pursuit of an active existence, if unharnessed by more noble pursuits such as politics or business, will undoubtedly lead us to wasteful "pastimes" – which are painted by Ferguson will similar strokes as Pascal's *divertissement*. For though pastimes are an expectable consequence of our natural pursuit of action, they are also (and essentially) 'a form of activity undertaken to divert

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[144] Ibid., 148

[145] Ibid.

[146] Craig Smith, 'Ferguson and the Active Genius of Mankind' in Eugene Heath and Vincenzo Merolle (eds), *Adam Ferguson: History, Progress and Human Nature* (Pickering & Chatto 2008), 159-60

[147] Ibid., 157

[148] Ibid., 162

us from the languor induced by repose'. Thus, '[f]or Ferguson pastimes represent a "disease" and are worthless compared to "business" or "real affairs".'[149]

In truth, Ferguson's unequivocal valuation of activity as an essential feature of human nature, and one which is specifically tailored to our involvement in matters of politics and business – "real affairs", as he puts it – is just as idiosyncratic of the Scottish thinker as it is symptomatic of his time. The drive towards an active political live, informed and animated by the dictum of Reason, is indeed a key feature of the Enlightenment's political anthropology – one which is crucial towards the inception of the revolutionary processes that it initiated, as well as of the acknowledgement of *inherent natural rights* that resulted from them.

4.3. Human history and race

One final aspect which is significant regarding the Enlightenment's anthropological perspective – though often overshadowed by more salient (and perhaps more palatable) one such as the focus on human reason and autonomy – lies in the movement's overall perception of human history and race. Alongside these issues comes a third, to which they are related, and which pertains to a teleological vision of human development. Indeed, imbued with the sense of being at the forefront of a "human" revolution, which promised political and social progress via the transcendence of antiquated traditional values or customs, most thinkers of the Enlightenment came to regard their endeavors as a crucial step towards the fulfillment of some noble *telos*, which one could deduce from the very nature of human beings and their history thus up to that point.

Now, it should be noted that this teleological view of human history and nature was not necessarily borne out of a rigorous scientific study of either history or nature; in fact, more often than not the very concept of natural history 'was more a diversion or an occasionaltool than a constant preoccupation: relatively few writers of the Enlightenment, after all, were scientists by temperament or inclination'[150] The movement produced a plethora of substantial assertions regarding the past, present, and even future course of human development – which, in turn, led to a quite generous assessment of modern European culture, coupled with often scathing views on alternatives to the latter.

Adam Smith, for instance,

> first formulated his later famous concept of "human development" in 1762, […] as a process evolving through four stages, his "four-stage theory". Through each of these—first, the age of hunters; second, the age of shepherds; third, the age of settled agriculture; and fourth, the age of commerce—human

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[149] Ibid.

[150] Henry Vyberg, *Human Nature, Cultural Diversity and the French Enlightenment* (Oxford University Press 1989), 21

society, following nature's law, grows more "opulent" and closer to civility while developing a complex hierarchy of ranks[151]

But Smith, as one might imagine, was not alone in his belief concerning the natural and rightful end-point of human history. Once again calling upon the Scottish enlightenment, we will find that

> [a]mong the Scots, indeed among all enlighteners, Henry Home, Lord Kames (1696–1782), was one of the first to analyse and explore the stages of history, to view human development as a complex process and attempt through studying history and society to widen our understanding of what humanity is. An assiduous and original intellect in many ways, he was a classic exemplar of Enlightenment in his central preoccupation with—and very broad conception of—human improvement.[152]

Kames and his peers thus sought to not only trace human history up to the present moment, but also to answer several critical *forward-thinking* questions: '[w]hat is human betterment? What is society? And what is the meaning and the direction of the progress […] in human history? At every point his naturalism was blended with elements of natural theology and especially a concern with providence and final ends.'[153] Yet, his research into this matter could not avoid the aforementioned Eurocentric bias, which led to another key question that would define the Enlightenment's answers concerning these matters: 'the question of racial differentiation and whether humanity forms a single entity.'[154]

Regarding this issue, one can find a multitude of arguments – and advocates – in two separate camps. Carl Becker's *Heavenly City of the Eighteenth-Century Philosophers*, for one, 'offers a classic statement of the uniformitarian thesis. The philosophers, wrote Becker, were looking for "man in general," who could "be found only by abstracting from all men in all times and all placesthose qualities which all men shared."'[155]

In the other camp – the one that is perhaps less comfortably acknowledged – we find a substantial amount of more ethnographical perspectives, whose proponents 'played a major role in the ethnicization process as they rationalised and organised identities according to the hierarchies of the time' – which made it so that the 'characteristics of race and of each ethnic group therefore appeared indispensable to this rationalization, and the resulting identities were neatly bordered.'[156]

This ethnicisation process was a substantial, if often willingly neglected, feature of the Enlightenment's conception of humanity as a whole, one that would unavoidably echo in the sort of "universal" human rights that we are commonly led to believe arouse out of the movement –

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[151] Jonathan I. Israel, *Democratic Enlightenment – Philosophy, Revolution and Human Rights* (Oxford University Press 2011), 237
[152] Ibid., 248
[153] Ibid., 250
[154] Ibid.
[155] Henry Vyberg, *Human Nature, Cultural Diversity and the French Enlightenment* (Oxford University Press 1989), 35
[156] Jean-Philippe Belleau, 'Ethnographic Voices in Eighteenth-Century Haiti' in Larry Wolff and Marco Cipolloni (eds), *The Anthropology of the Enlightenment* (Stanford University Press 2007), 225

perhaps best exemplified by the acknowledgment (or lack thereof) of the human rights of African slaves in the post-Revolution United States of America. In more theoretical terms, the problematic character of this particular aspect of Enlightenment anthropology can be made exceedingly clear by the efforts of Johann Gottfried von Herder in adding substantial nuance and fairness to it.

Compared with the sort of views presented above, Herder's work bore crucial differences. First and foremost, 'while Herder accepts the idea that history is advancing towards a goal, for him the "aim" (*Zweck*) of this providential history includes the various forms along the way, and as ends in themselves, not merely as means towards the production of a later stage.'[157]In addition to this, and consequently,

> he also refuses a straightforwardly progressivist view of history, and especially when coupled with the idea that his enlightened Europe is the end and *summum bonum* of the process. In the *Ideas*, he describes as absurdly arrogant the presumption "that, in order to live happily, the inhabitants of all parts of the world must be Europeans" (Ideas, 327), affirming that all people everywhere are, and have been, ends in themselves[158]

Now, his employment of seemingly Kantian modes of analysis to the problem should not confound his essential disagreement with Kant's own views on the matter. That disagreement was evidenced, at once, in Herder's appraisal of the way of life of "simple peoples", which were viewed less than favorably according to Kant's standards of rational elevation: '[t]he goodness of people cannot, in Herder's view, be measured entirely through their capacity for "reason," as Kant understood it, nor is their happiness ever like that of sheep or pigs.'[159]

Following this, it should come as no surprise that the ethnographical and racialist perspectives adopted by some of his contemporaries is something that Herder takes issue with, his criticism once again especially directed at Kant, 'whose "On the Different Races of Man" (*Von den verschiedenen Rassen der Menschen*), appearing in 1775, had divided the human species into four fixed and sharply distinct races'[160]Though Herder's criticism regarding those perspectives may today be sadly and unjustly muddled by the Nazi party's attempts to weaponise the notion of Volk that was dear to him – but which had an entirely different nature than the one imprinted on the term by Nazi ideologues – the truth is that Herder's remarks on the concept of race assuredly entailed

> a practical, as well as an epistemological, intent. The debate about race has significant ethical and political implications, and Herder's position within this debate is meant to support his admonition, directed towards his fellow Europeans, that, unlike the higher apes, "the American and the Negro" are

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[157] Sonia Sikka, *Herder on Humanity and Cultural Difference* (Cambridge University Press 2011), 84
[158] Ibid.
[159] Ibid.
[160] Ibid.,126

your brothers, and that "therefore, you must not oppress or kill or rob them: for they are human beings, as you are" (*Ideas*, 255).[161]

In this respect, therefore, his work allows to simultaneously envision the best and the worst that the Enlightenment's project of abstract humanity has to offer, as well as the challenges that project left regarding the pursuit of *genuinely* universal human rights.

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[161] Ibid.

5. Kant's Conception of Humanity

Immanuel Kant's cultural, philosophical and, ultimately, *political* significance is such that it warrants his thoughts in this regard to be examined in a separate section. Kant's work must be viewed from the paradoxical position of being, simultaneously, a product of the Enlightenment, and the driving force behind much of the latter's reflections on ethics, politics, and human nature.

To be sure, it is not that such reflections (and their conclusions) were perfectly consensual even at the time of Kant's writing; but their impact on the broader movement was undeniable, both in producing intellectual offspring intent on continuing the lineage, and in spurring to action those that would denounce Kant's views, along with the worthiness of their substantial influence – Arthur Schopenhauer certainly springs to mind concerning this latter aspect.

In any case, Kant's postulation that humanity should be regarded as an "end in itself", consequence of the fact of human rationality, is one that 'exercises a powerful influence on modern moral thinking not only in philosophy but even in ordinary life and in moral common sense'[162] – and, as such must be examined in what follows. Other aspects, however, such as Kant's views on race, culture and gender, may come as more of a surprise, but must also be considered if we are to accurately ascertain Kant's *real* and *intentional* impact in the development of universal human rights.

5.1. Human reason and human nature

When thinking of Kant's account of human nature, one is often drawn, first and foremost, to his valuation of reason as the *prima inter pares* feature of the former, the one which lifts human beings from the remainder of creation into a status of their own. Indeed, when it comes to the tension between the generalities and particularities of humanity in regards to nature as a whole, 'we see that although he holds humans and other animals to have much in common owing to their shared animal nature, he also insists that humans are absolutely unique within the field of animal life.'[163]

The fact that reason is able to have such an effect, however, is not solely to do with the human possession of reason as such, but also – and primarily – with the possibilities that the latter affords human beings. As Baumeister notes, referencing the 'Mrongovius anthropology lecture from 1784/1785, where Kant identifies adaptability as a distinguishing human feature', reason 'allows humans to flexibly and broadly make use of any product of nature for the purpose of survival.

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[162] Allen W. Wood, *Kantian Ethics* (Cambridge University Press 2007), 88
[163] David Baumeister, *Kant on the Human Animal* (Northwestern University Press 2022), 17

Without this endowment, humans would ostensibly be limited to one region of the planet, unable to venture elsewhere.'[164]

In this regard, Allen W. Wood concurs that human reason 'introduces a practical gulf between humans and other animals that extends beyond the physiological', a gulf that gives way to the specifically human 'dimensions of "rationality" and "personality" that, as Kant demarcates them in *Religion within the Boundaries of Mere Reason* (1793), are categorically distinct from "animality."'[165] Thus, we arrive at Kant's distinction between the three fundamental predispositions (*Anlagen*) of human nature: animality, humanity, and personality. As Wood puts it,

> [a]nimality contains our instinctual capacities for the survival of the individual and the species: "mechanical" (prerational) self-love (selfpreservation), sexuality (preservation of the species), and the social drive–our instinctual need to be in community with other human beings. Humanity contains our rational capacity to set ends and devise means to them, and our rational self-love, giving us grounds for forming a conception of our happiness and pursuing it. Personality is our rational capacity to legislate for ourselves the moral law and obey it.[166]

It is important to note that, despite the above characterisation of personality, Kant's intention is not to portray human reason as a substitute of divine reason; indeed, 'as opposed to what a divine understanding might be, human minds are, like all other animal minds, also passively impinged upon by a reality that is independent of them, which they have not created'[167]. They are, nevertheless, capable of such a level of reflection and representation of the reality around them that new forms of relating with that reality – such as *moral reasoning* – become possible.

Man as a spiritual possessor of himself realizes himself only as the pinnacle of diversity. The Kantian transcendental unity cannot become an object of cognition because it is not capable of reflecting on itself; therefore, it remains a defining moment that cannot be defined. The absolute appears to be a thing in itself.[168]

At this point, having arrived at moral reasoning as the key feature arising out of human rationality that sets humanity apart from the remainder of creation, it is important to note that the capacity for moral reasoning is, nevertheless, not presented by Kant as a given. In fact, 'on his view, morality is a much more precarious achievement for human beings, one that is always in danger of slipping away and concerning which we are constantly in danger of fooling ourselves.'[169]

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[164] Ibid., 18
[165] Allen W. Wood, *Kantian Ethics* (Cambridge University Press 2007), 88
[166] Ibid.
[167] Béatrice Longuenesse, *Kant on the Human Standpoint* (Cambridge University Press 2005), 3
[168] Marek Urban, *In search of the whole. Between thinking and eschatology, in: Beyond Secular Faith: Philosophy, Economics, Politics, and Literature, Edited by Mátyás Szalay*, Wipf and Stock Publishers, Eugene 2023, p. 193
[169] Robert B. Louden, *Kant's Human Being* (Oxford University Press 2011), 24

Part of the motive for this has to do with the imperfect nature of human will – a point often made by Kant, positing that a "perfect" will would not necessitate any moral law such as the Categorical Imperative to behave righteously – and part of it has to do with the consequences of the former aspect to the reality of evil. As Robert Hanna states, '[r]adical evil for Kant is actually universal in rational human beings, yetstill contingent, and thus neither partially nor wholly constitutive of ourrational human nature. We constitutively and necessarily desire the good,and are contingently although universally tempted by the bad.'[170]

These considerations about human beings' relation with evil, in turn, allow us to reach yet another foundational aspect of human nature, and one that precisely bridges the gap between the key concepts of reason and will: *autonomy*. As Hanna once again puts it, 'autonomy is rational freedom of the higher-order faculty of volition, or the "will" (*Wille*)'.[171] Thus, within the broad scope of human existence, 'to exercise rational freedom of the will is to realize the rationalpractical aspect of human nature, and, to that extent, transcend the intrinsicconstraints on ordinary human volition.'[172] Given this fact, it should perhaps come as no surprise that Kant understands 'both education and history as a developmental process involving the gradual realization of inherent human powers and capacities, the growth of freedom through rational control of instinct and desire.'[173]

Ultimately, when it comes to the form, the content, and the importance of human nature, one may conclude that Kant posits something like a *primacy of human nature* – a view that contrasts most starkly with the sort of scientific naturalism that prevailed at the time of his writings, and that would further rise in popularity with the advent of the widespread acceptance of Darwin's work. And yet, the validity and significance of the latter notwithstanding, we may still conclude that

> the ultimate pay-off of Kant's thesis of the primacy of human nature is that it provides a serious philosophical alternative to scientific naturalism. Kant does this however not by rejecting the claims of exact science, nor by reducing them to phenomenal-language statements about subjective mere appearances, but instead by developing a humanistic, liberal naturalistic, and empirically realistic conception of the exact sciences that also preserves their core meaning and core truth.[174]

According to this Kantian conception, despite the objective validity of the exact sciences, the latter must nevertheless exhibit an ultimately practical concern. Thus, nothing that arises of the work undertaken by those sciences can fundamentally contradict of human beings' potential capacity for autonomy.

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[170] Robert Hanna, *Kant, Science, and Human Nature* (Oxford University Press, 2006), 24
[171]Ibid., 27
[172] Ibid., 27
[173] Robert B. Louden, *Kant's Human Being* (Oxford University Press 2011), 141
[174] Robert Hanna, *Kant, Science, and Human Nature* (Oxford University Press, 2006), 33-4

5.2. Humanity or human reason as an end in itself

It is both necessary and useful to recover some of the things that have already been alluded to regarding Kant's account of human reason. Firstly, it is important to note that Kant distinguishes three essential tasks of human reason: '[t]he first task, preservation, concerns the art of survival. […] Reason's second task is education. […]Third, in virtue of their capacity for reason, humans also have the task of governing themselves "as a systematic whole (arranged according to principles of reason)" (Anth 7: 322).'[175]

It is in this final task that we might arguably find the crux of the matter when it comes to acknowledging humanity as an end in itself. This, as one might surmise, is no meager feat – indeed, as some scholars have noted, at the very foundation of the impressive edifice of Kantian ethics lies 'the worth of rational nature: inhumanity as an end in itself, and in the dignity of autonomous personality as universally legislative'[176]. But what exactly does it mean to acknowledge humanity as an end in itself, and what logically warrants that we do so? Let us perhaps begin by examining Kant's preliminary answer to such questions:

> [n]ow I say that the human being, and in general every rational being, *exists* as end in itself, *not merely as means* to the discretionary use of this or that will, but in all its actions, those directed toward itself as well as those directed toward other rational beings, it must always *at the same time* be considered as an *end*. … Thus the worth of all objects *to be acquired* through our action is always conditioned. The beings whose existence rests not on our will but on nature nevertheless have, if they are beings without reason, only a relative worth as means, and are called *things*; rational beings,by contrast, are called *persons*, because their nature already marks them out as ends in themselves, i.e., as something that may not be used merely as means, hence to that extent limits all arbitrary choice (and is an object of respect). These are not merely subjective ends whose existence as effect ofour action has a worth *for us*; but rather *objective ends*, i.e., things whose existence in itself is an end, and specifically an end such that no other end can be set in place of it, to which it should do service *merely* as means, because without this nothing at all of *absolute worth* would be encountered anywhere.[177]

Kant's typically dense writing style notwithstanding, is should be relatively easy to parse from this excerpt of the *Groundwork* that the notion of *worth* plays a key role in the differentiation between beings that should be regarded as ends in themselves and beings that should not; the former –

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[175] Robert B. Louden, *Kant's Human Being* (Oxford University Press 2011), xxv
[176] Allen W. Wood, *Kantian Ethics* (Cambridge University Press 2007), 40
[177] Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Yale University Press 2002), 45-6

which Kant equates with human beings, the only unequivocally known rational beings in existence – enjoy what he terms *absolute worth*, and are hence to be regarded as "objective ends", i.e. things "whose existence in itself is an end."[178] Thus, and in essence, 'Kant identifies two classes of extant beings, the one rational, the other nonrational, each having a different sort of worth. The first class, persons, have absolute worth, while the latter, things, have only relative worth.'[179]

Kant's belief in the absolute worth of human beings as ends in themselves – a key feature of his ethics following the humanity formula of the Categorical Imperative – has unsurprisingly been the subject of enthusiastic acceptance on the part of well-meaning philosophers and varied philanthropists, particularly those intent on demonstrating the necessity and legitimacy of a universal understanding of human rights grounded upon Kantian precepts. This latter intent, however, betrays the acknowledgement of a significant lack of clarity in Kant's own reasoning regarding these matters. As Richard Dean rightfully puts it, 'despite its intuitive appeal and the scholarly attention it has received, it is far from clear precisely what the humanity formulation demands. Even the two most basic elements of the principle—what humanity is, and what is involved in treating it as an end in itself—require further explanation.'[180]

How can we then seek to explain those aspects, moving beyond Kant's own analysis? Beginning with the only seemingly simple question of what it means to treat something (or someone) as an end in itself, Robert Audi provides us with a wonderfully straightforward explanation:

> [t]o see what constitutes treating things (including persons) as ends, consider how some people treat a painting as an end rather than, say, as an investment. There must simply be something suitably connected with the end that one pursues for its own sake, say viewing the painting. We may also refer to other substances and to such things as a beautiful garden as our ends; but this notion of an end ("in itself") should be understood in terms of bringing about some state of affairs, event, or action, in which the thing in question figures. If my end is a beautiful garden, I will tend to seek means to producing one. Talk of treating persons as ends—at least in ethical contexts—is explicable in terms of action in which persons figure in intrinsically motivated (end-regarding) action.[181]

If what it means to treat humanity as an end in itself is made clearer by the above explanation, another key question yet remains: how is "humanity" to be understood in this context? In order to clarify this issue, we have already the beginning of answer – after all, as we have said above, the salient feature in Kant's understanding of humanity is the latter's specific rationality. Robert Dean, however, argues that this understanding is still too limited to account for the real nature of what Kant means when he employs the term:

> [h]umanity, in the sense of the humanity formulation, is indeed equivalent to some feature possessed by rational beings, but not by all minimally rational beings. Instead, "humanity" is Kant's name for the

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[178]Ibid.

[179] David Baumeister, *Kant on the Human Animal* (Northwestern University Press 2022), 21

[180] Richard Dean, *The Value of Humanity in Kant's Moral Theory* (Oxford University Press 2006), 4

[181] Robert Audi, *Means, Ends and Persons – The Meaning and Psychological Dimensions of Kant's Humanity Formula* (Oxford University Press 2016), 17

more fully rational nature that is only possessed by a being who actually accepts moral principles as providing sufficient reasons for action. The humanity that should be treated as an end in itself is a properly ordered will, which gives priority to moral considerations over self-interest.[182]

Furthermore, he notes:

[i]n the argument for the humanity formulation, Kant maintains that humanity is the only thing that is an end in itself (G 427–8). And in the opening paragraph of *Groundwork*, he states that a good will is the only thing good without qualification. [An analysis of these aspects] will lead to the conclusion that humanity must be the same thing as a good will.[183]

Now, it should be noted that Dean's analysis, while grounded on a sound knowledge of Kantian philosophy is hardly the only – or even the prevailing – interpretation of the meaning of humanity for Kant. His equating of the latter with "a good will" is particularly debatable, as there would be equally if not more valid grounds, to interpret humanity as being defined by that specific kind of human rationality that we have mentioned above. Indeed, Dean's thesis in this regard has been disputed by researchers such as Jonathan Glasgow, who claim that, generally speaking,

it seems that the rational capacity interpretation captures Kant's texts better than the good will interpretation does. Passages that seem to support the good will reading are, at best, ambiguous. Indeed, those passages seem to be more naturally read as countenancing the view that one's autonomy and concomitant moral subjectivity are the grounds of being an end in oneself.[184]

Allen W. Wood essentially agrees with Glasgow's position regarding this particular point, and goes on to argue that the "fundamental value" on which humanity's status as an end in itself rests has to do with the latter's rational nature, as well as the 'capacity to set ends according to reason.'[185].

Yet, Wood claims, one very important caveat must be made when attempting to set (or, rather, to find) Kantian philosophy as the sole cornerstone of the modern project of universal dignity and human rights:

From the fact that humanity or rational nature has dignity, or fundamental and unconditional value, it by no means follows that the value of human life is basic or unconditional. At times people are in terrible situations where living up to the dignity of their rational nature even requires them to sacrifice their continued existence. There may also be situations in which moral rules grounded on the worth of rational nature as end in itself require that human beings be killed, or even entail that the continuation of a human life should no longer be set as an end at all. … For better or worse, Kantian principles (rightly understood) justify attaching great importance to preserving human life, at least most of the

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[182] Richard Dean, *The Value of Humanity in Kant's Moral Theory* (Oxford University Press 2006), 6
[183] Ibid., 36
[184] Joshua Glasgow, 'Kant's Conception of Humanity' (2007) 45(2) Journal of the History of Philosophy, 307
[185] Allen W. Wood, *Kantian Ethics* (Cambridge University Press 2007), 55

time, but they provide no support for the idea that, as some people like to put it, "all human life is sacred."[186]

This significant caveat opens the door to the understanding that perhaps Kant's ethical and political reflections have been (contemporarily) made to carry more weight in the field of *universal* human rights than what his anthropological beliefs actually will allow them to support. Part of the problem – and, arguably, the most easily solved – is derived from Kant's evident belief that '[t]he human being is a particular sort of rational creature who needs to be educated into morality and who requires the aid of fellow species members to fully develop his capacities.'[187] But the other, more troublesome part of the same problem has to do with the fact that, as we shall see in what follows, Kant does not necessarily believe that *all* human beings possess that kind of "absolute worth" which lies at the heart of one's recognition as an *end in oneself*.

5.3. Race, gender and culture

One of the foremost difficulties that one will encounter when seeking to portray Kantian philosophy as the theoretical foundation for the eighteenth century's – and, indeed, the contemporary – struggle for the acknowledgement of universal natural or human rights has to do, precisely, with his polemical views regarding race, culture and the different *hierarchies of humanity* that either could or should be established on the basis of such notions.

As Pauline Kleingeld points out, in 1788 – the same year in which the *Critique of Practical Reason* saw the light of day – Kant published an essay (*On the Use of Teleological Principles in Philosophy*) in which 'he claimed that people from Africa and India lack a "drive to activity", and hence lack the mental capacities to be self-motivated and successful in northern climates, never becoming anything more than drifters.'[188] That such contrasting thoughts with Kant's famed ethical and political universalism were penned by the philosopher himself at the height of his intellectual production may strike some as deeply unexpected, but are actually in accordance with his broader views on the subjects of race and culture.

In the same essay, for instance, Kant goes on to remark on the history and character of native American peoples, claiming

> that their natural disposition did not achieve a *perfect* suitability for any climate, can be seen from the circumstance that hardly another reason can be given for why this race, which is too weak for hard labor, too indifferent for industry and incapable of any culture – although there is enough of it as

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[186] Ibid., 87

[187] Robert B. Louden, *Kant's Impure Ethics – From Rational Beings to Human Beings* (Oxford University Press 2000), 54

[188] Pauline Kleingeld, 'Kant's Second Thoughts on Race' (2007) 57(229) The Philosophical Quarterly, 573-4

example and encouragement nearby – ranks still far below even the Negro, who stands on the lowest of all the other steps that we have named as differences of the races.[189]

Now, it should be evident in light of statements such as the ones above that 'Kant's race theory and its implications for global migration cast his cosmopolitanism in a disconcerting light.'[190] And when one considers the true impact of Kant's more "mainstream" political views on the development of what we might term contemporary *liberal internationalism*, as Mikkelsen puts it, 'it would be no exaggeration to suggest that what is at stake in these discussions [of Kant's race theory] is not simply Kant's views on specific topics but a complete reassessment of his contribution to the "the project of modernity"'[191]

What then is at the heart of Kant's thoughts on race? And what are some of the salient features of his overarching theory on the subject? First and foremost, in an essay entitled *On the Different Human Races*, Kant famously divides the entirety of the human species into four races (which, despite any possible miscegenation and subsequent permutations, remain as the essential anthropological divisions): 'They are: (1) the race of *whites*; (2) the *Negro race*; (3) the *Hunnish* race (Mongolish or Kalmuckish); and (4) the Hinduish, or *Hindustanish*, race.'[192]

As Oliver Eberl notes, however, Kant's conceptualisation of race did not remain static throughout his different reflections on the subject; succinctly put, that conceptualisation 'begins with the climate-theoretic categorization of extremes and a hierarchy of the origins of different races, moves on to a non-hierarchical concept of race, and ultimately arrives at a notion that identifies activity teleologically as a characteristic and uses it to confirm power relations and differences in the political world.'[193] This evolution in Kant's views, which sometimes led to an apparent softening of the racial and cultural prejudices that were blatant in his early writings on the subject, have motivated many well-meaning Kantian apologists to claim that the philosopher from Königsberg must have somehow have himself been the subject of an "enlightenment" regarding any racist views he originally held. It would be untenable, those apologists claim, to simultaneously hold such reprehensible views alongside Kant's famed ethical universalism, particularly in what pertains to the acknowledgement of the dignity and natural rights of *all* human beings. This sort of argument, well-intentioned though it may be, appears however to suffer from a sort of revisionist penchant. As Robert Bernasconi puts it,

> tempting though it is to imagine that Kant must eventually have seen the light and resolved this issue [his views on race] in favor of a radical egalitarianism, there is no explicit acknowledgment on his part that he saw the problem. Kleingeld concedes that Kant 'gives no indication of when or why he changed

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[189] Immanuel Kant, 'On the Use of Teleological Principles in Philosophy' in Günter Zöller and Robert B. Louden (eds), *Anthropology, History, and Education* (Cambridge University Press 2012), 211
[190] Pauline Kleingeld, 'Kant's Second Thoughts on Race' (2007) 57(229) The Philosophical Quarterly, 574
[191] Jon M. Mikkelsen (ed), *Kant and the Concept of Race – Late Eighteen-century Writings* (State University of New York Press 2013), 2
[192] Immanuel Kant, 'On the Different Human Races' [1777] in Jon M. Mikkelsen (ed), *Kant and the Concept of Race – Late Eighteen-century Writings* (State University of New York Press 2013), 62
[193] Oliver Eberl, 'Kant on Race and Barbarism' (2019) 24(3) Kantian Review, 407

his views' [on race], and she cannot do so because there is no evidence that he did renounce his views either about the scientific character of race as such or about the hierarchy of the races, although he did appear to modify his views on the slave trade.[194]

To be sure, ascertaining the reality of Kant's thoughts on race and culture can be an unpleasant and complicated endeavor. On the one hand, it does appear that, generally speaking, 'Kant does not seek to ground moral judgements in his writings on race.'[195] On the other, however, there are numerous examples[196] where Kant either explicitly or implicitly seems to subscribe to a definite racial and cultural hierarchy which sets the "white" race above all others – precisely the sort of views that his pupil Herder later criticised him for. But regardless of whether the racial and cultural prejudices Kant appeared to espouse were the result of deeply held reprehensible convictions, or merely the product of the socio-cultural environment in which Kant lived and worked, there seems to be a deeper sort of problem at play here – one that may prove just as pernicious, if not more, to Kant's fame as the "father" of universal human rights. In referring to that very problem, Robert Louden observantly notes: 'an unresolved tension exists between the core message of universality in his ethics and his frequent assertions that many different groups of people (who when taken together constitute a large majority of the human race) are in a pre-moral state of development.'[197]

In order to fully grasp the nature and implications of this assertion – i.e., that many different groups of human beings exist in a 'pre-moral state of development', it will be useful to broaden our focus beyond race and culture to include gender as well. Indeed, if some races are thought by Kant to exist in such a state almost irrevocably (native Americans, as we have seen above, are after all said to be 'incapable of any culture'), the same should not apply to members of the white race and European culture – and yet, it appears as if it does. In a telling passage in his *Anthropology from a Pragmatic Point of View*, Kant states that

> an understanding that is in itself sound (without mental deficiency) can still be accompanied by deficiencies with regard to its exercise, deficiencies that necessitate either a *postponement* until the growth to proper maturity, or even the *representation* of one's person through that of another in regard to matters of a civil nature. […] *Children* are naturally immature and their parents are their natural guardians. *Woman* regardless of age is declared to be immature in civil matters; her husband is her natural curator.[198]

Thus, while (male) children may be considered to exist in a pre-moral state merely provisionally – with proper upbringing and education able to lift them up above it – women seem to be doomed

[194] Robert Bernasconi, 'Kant's Third Thoughts on Race' in Stuart Elden and Eduardo Mendieta (eds), *Reading Kant'sGeography* (State University of New York Press 2011), 292

[195] Oliver Eberl, 'Kant on Race and Barbarism' (2019) 24(3) Kantian Review, 408

[196] The most notorious and oft-quoted of which being provided by Kant's *Physical Geography*, wherein he claims that "Humanity has its highest degree of perfection in the white race. The yellow Indians have a somewhat lesser talent. The Negroes are much lower, and lowest of all is part of the American races." (9:316)

[197] Robert B. Louden, *Kant's Impure Ethics – From Rational Beings to Human Beings* (Oxford University Press 2000), 15

[198] Immanuel Kant, *Anthropology from a Pragmatic Point of View* (Cambridge University Press 2006), 103

to remain in such a state. And it appears that not even proper education can have the same redeeming effect on women as it does on boys; as Kant later states concerning 'scholarly women', 'they use their *books* somewhat like their *watch*, that is, they carry one so that it will be seen that they have one; though it is usually not running or not set by the sun.'[199]

Now, a more beneficent view on Kant's overall remarks on women and their status would say that 'women on Kant's view are definitely included within the class of rational beings. But although he views them as members of the class of rational beings, he also holds that women do not yet exercise their rational capacities properly.'[200] Saying that women do not *yet* exercise their rational capacities properly, however, is massively different to saying that they do not exercise those capacities outright – and reading from Kant's own words, the latter interpretation does appear to more accurately portray his views on the matter.

But why is this so important, and why should it not be swiftly dismissed as a more or less insignificant feature of the sexism (or racism, for that matter) of the time? The answer should be clear to any who, as we did above, has examined Kant's account of human nature and the role played by human reason in defining humanity. As Robert Louden claims, regarding Kant's views on women (but equally valid concerning his views on race),

> [t]hough nothing specific is said here about the causes or sources of the alleged weak exercise of women's reason, it is clear that Kant believes that they do not think sufficiently for themselves. … However, since the ability to think for oneself is also a necessary part of Kant's own conception of moral character (see, e.g., Anth 7:292), the charge of weak exercise of reason appears to entail not only a lack of legal rights but of moral character as well"[201]

The full scope and impact of Kant's remarks on race, culture and gender therefore become exceedingly clear. When it comes to laying unshakable foundations for the project of universal human rights – a role that Kant's has often been summoned to play – those remarks introduce a level of instability that may very well threaten the solidity of the edifice as a whole. This, undoubtedly, should come as a troubling realisation to those who saw in Kant the precursor of contemporary human rights, and who hardly hesitate to return to his moral philosophy in search of support for the acknowledgement of universal human dignity that is so often at the heart of contemporary discussions regarding the international application of human rights. Kant's apologists have staunchly attempted to rescue Kant from accusations of excluding large parts of the population from fully enjoying the status of "humanity", arguing that his enduring sexism should not invalidate his apparent abandonment of racism in favor of pure egalitarianism. This, however, is not a convincing proposition. As Robert Bernasconi puts,

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[199] Ibid., 209
[200] Robert B. Louden, *Kant's Impure Ethics – From Rational Beings to Human Beings* (Oxford University Press 2000), 84
[201] Ibid., 85

it is, of course, perfectly possible to be sexist without being racist, and vice versa, but to the extent that Kleingeld allows the contradiction between the universal moral theory and the racism to provide the motivation for his alleged abandonment of his hierarchical conception of race this interpretation merely highlights the puzzle without resolving it.[202]

Recognising Kant's puzzling views on race, culture and gender should, obviously, not cause us to completely disregard his supremely valuable work on moral and political philosophy. But it should cause us to not uncritically accept that his philosophy provides all the necessary criteria required for the resolution of the wide scope of problems and challenges that contemporary globalised societies entail in terms of human rights and citizenship.

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[202] Robert Bernasconi, 'Kant's Third Thoughts on Race' in Stuart Elden and Eduardo Mendieta (eds), *Reading Kant'sGeography* (State University of New York Press 2011), 29

6.Marx, Nietzsche and Freud: Towards a New Idea of Humanity and Political Subjectivity?

Despite the differences that separate them, Marx, Nietzsche and Freud share one common and crucial accomplishment: all of them have forced us to regard the human experience in a different light, challenging our preconceptions regarding the latter, and ushering forth a novel comprehension of what it means to be "human". They are, as Paul Ricoeur calls them, the 'masters of suspicion' – thinkers whose work promote a radical questioning of crystallised assumptions, a 'tearing off of masks' that reveals the truth beneath, regardless of how unflattering[203].

It is worth to examine the manner in which each of them contributed – in his own fashion – to a *radical rethinking* of human nature and the truths that they believed to have uncovered as a result of it.

6.1. Marx: history, human nature and the "species-being"

In light of the far-reaching consequences of Marx's work in the political realm – both in terms of the passionate debate that it continues to motivate and the concrete influence it bore in ideological terms – it is perhaps understandable that Marx's conception of what it means to be human, significant as it is, has routinely been relegated to a place of almost insignificance. It remains 'remarkable that so many have discerned, with the emergence of the materialist conception of history, a dismissal by Marx of the idea of human nature'[204]. On the contrary, that idea – and Marx's idiosyncratic understanding of what nature entailed – was utterly foundational towards the edifice of Marxism.

Indeed, Marx's concern with human nature was, perhaps unsurprisingly, situated more at a societal level than an individual one – and it is precisely in that sense that the concept in question can be said to play a pivotal role in the broader theory put forth by him. As John G. Fox puts it, 'Marx treated [human] essence as located in the structures of our society rather than in its individual members, with those structures serving to organise, like a musical ensemble, a series of interactions between elements that were interdependent.'[205]Since Marx's theory of human nature begins by emphasising the corporal (or *material*) element's influence in human life, one should begin by noting the 'interdependence that follows from that influence, as famously considered by him in

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[203] Paul Ricoeur, *Freud and Philosophy – An Essay on Interpretation* (Yale University Press 1970), 30-2
[204] Norman Geras, *Marx and Human Nature – Refutations of a Legend* (Verso 2016), 44
[205] John G. Fox, *Marx, the Body, and Human Nature* (Palgrave Macmillan 2015), 13

terms of the "mode of production", and the depth to which that combination of material and social relationships affects individuals caught up in that system.'[206]

Marx's rejection of any form of abstraction or separation between human beings and the reality around them hence constitutes the first touchstone of his conception of humanity; what he would posit in its place – a focus on the interaction between human beings and the material world, and all the different objective relations that characterise it – would lead to a significant consequence: 'the material or corporeal could no longer be treated as distinguishable from a non-corporeal human essence and therefore discardable. Rather, with Marx's "objective being", it became central.'[207] Indeed, this sort of fundamental incorporation in human nature of the relations of production is made clear in *The German Ideology*:

> [t]his mode of production must not be considered simply as being the production of the physical existence of the individuals. Rather it is a definite form of activity of these individuals, a definite form of expressing their life, a definite mode of life on their part. As individuals express their life, so they are. What they are, therefore, coincides with their production, both with what they produce and with how they produce. The nature of individuals thus depends on the material conditions determining their production.[208]

Marx's approach in this regard follows a straightforward logic. Just as the mode of production is "said here to be the form in which individuals express their life", that form simultaneously constrains the very essence of those individuals; thus, that essence 'is declared […] to coincide with their mode of production.'[209]

Marx's attempts to substantially equate human nature with modes of production has, however, often been criticised on grounds of reductionism. Authors such as Peter Archibald, for instance, claim that Marx's understanding of human beings in this regard appears to rob them of any substantial psychological individuality, inasmuch as they 'lack any significant amount of psychic distinctiveness or autonomy to express or develop it'. From the standpoint of Marxism, then, it is

> precisely because individuals thought of themselves and acted as part of a collectivity rather than as self-interested individuals, any legitimate analysis must start with the nature of the community and the immersion or separation of its individual members from it. Members may indeed be individuated to the point where rational calculation of self-interest is a reasonable, partial explanation for their thoughts and actions, but this cannot simply be assumed to be universal[210]

A related error, pertaining to the genealogical relationship between individual and community, is pointed out by Mary Clark, who states that

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[206] Ibid., 9

[207] Ibid., 155

[208] Karl Marx and Friedrich Engels, *The German Ideology* (Progress Publishers 1968), 34

[209] Norman Geras, *Marx and Human Nature – Refutations of a Legend* (Verso 2016), 47

[210] W. Peter Archibald, *Marx and the Missing Link: 'Human Nature'* (Macmillan 1989), 15-6

a similar mistake regarding the search for utopia was made by Karl Marx and his followers when they left individual autonomy (the West calls it "freedom") out of their logistical calculations, assuming people could be physically coerced into forming meaningful, sharing and just communities. The dehumanizing brutality they imposed on their own peoples to conform to the "ideal" was, I believe, far more to blame for their abundant problems and ultimate collapse than their economic system per se. The people never had a real chance to 'own' the new society they were trying to create.[211]

The most notable and oft-quoted concept within the Marxist theory of human nature is the notion of *species-being*. Despite the fact that the notion in question arguably lies at the heart of Marx's anthropological conception, the question of how exactly might one define or explain the species-being is one that is largely left unanswered. As Cuschieri notes, '[a]lthough Marx uses the expression 'species-being' extensively, he never fully explains, in clear and unambiguous terms, what he meant by it. This is unfortunate because the "species-being" conception is of great strategical importance within his system.'[212]

That being said, there are several passages where Marx makes significant claims regarding the essence of what should be understood by species-being, and why it is important to consider the latter when attempting to drive at the core of human nature and what ha considers its most crucial dimension: our social existence. Fittingly, then, *On the Jewish Question* informs us that

> [o]nly when real, individual man resumes the abstract citizen into himself and as an individual man has become a *species-being* in his empirical life, his individual work and his individual relationships, only when man has recognized and organized his *forces propres* as *social forces* so that social force is no longer separated from him in the form of *political* force, only then will human emancipation be completed.[213]

The individual's self-acknowledgment of his own nature as species-being therefore appears to be, for Marx, sine qua non condition for his or her true (political) emancipation, This further emphasises the decisive character of the species-being within Marx's broader theory, but does precious little to clarify what that concept entails. And although, as mentioned above, it is near to impossible to find a satisfactorily comprehensive definition of the latter, an approximate one can be found in the *Economical and Philosophical Manuscripts* penned by a young Karl Marx:

> Man is a species-being, not only because he practically and theoretically makes the species – both his own and those of other things – his object, but also – and this is simply another way of saying the same thing – because he looks upon himself as the present, living species, because he looks upon himself as a *universal* and therefore free being.[214]

As justification for his belief in the factuality of human beings' nature as species-beings, Marx proceeds by arguing that that '[t]he practical creation of an *objective world*, the fashioning of

[211]Mary E. Clark, *In Search of Human Nature* (Routledge 2002), 382
[212]Anthony Cuschieri, 'Karl Marx on Human Nature' (1980) 2(3) Hyphen, 118
[213] Karl Marx,'On the Jewish Question' in *Early Writings* (Penguin Books 1992), 234
[214]Karl Marx,'Economic and Philosophical Manuscripts' in *Early Writings* (Penguin Books 1992), 327

inorganic nature, is proof that man is a conscious species-being, i.e. a being which treats the species as its own essential being or itself as a species-being'[215]. Furthermore, as Cuschieri insightfully notes, 'Marx's conception of man as a "species-being" is the perspective for a correct interpretation of his doctrine on alienation'; according to Marx ,humanity 'was "born" in alienation, is moving away from alienation, but this state of estrangement will persist until man's formal existence, the social milieu with which he identifies, in and through which he fulfils and realises himself becomes adequate.'[216]

In conclusion, Marx's conception of humanity ultimately breaks new ground in the acknowledgement of the material, social and political forces' importance in the shaping of human nature itself, rejecting the tradition of regarding the latter in a largely abstract, transcendent and often monolithic manner, in favour of a relational understanding which is largely grounded on individuals' socio-political existence. And while this may now appear to simply meet the expectations fostered by our current understanding of Marx's broader political and economic theory, the fact remains that his conception of humanity – cryptic as it sometimes appears – unequivocally subverted many of the prevailing anthropological paradigms at the time.

6.2. Nietzsche: religious morality, values, and the *Übermensch*

If Marx's challenge to traditional modes of understanding human nature is sometime obfuscated by the massively influential economical and political aspects of his philosophical critique, the same cannot be said about the work of Friedrich Nietzsche, where the latter's often incendiary views on philosophical and theological creeds concerning the essence of humanity are routinely brought to the forefront. Indeed, as Ronald Osborn puts it, any serious philosophical reader of Nietzsche should inevitably come to understand 'that there is nothing self-evident, automatic, or guaranteed about our ways of thinking about what it means to behuman.'[217]

Out of all the challenges laid forth by Nietzsche regarding our common understanding of humanity, his incisive criticism of the assumptions surrounding the moral dimension of human life are particularly deserving of attention. Nietzsche's anathemas against a "Judeo-Christian morality" which he saw as pervasive and profoundly pernicious is arguably the most notorious feature of his critique, but the latter runs decisively deeper than a mere distaste for any particular brand of religious morals. In truth, his concerns – as made clear from the title page of *On the Genealogy of Morals* – delved into the very origin and anthropological status of morality per se. And in this regard, he saw a clear insufficiency in all preceding attempts:

> [t]he problem with all previous explanations of the origins of morality, Nietzsche declared, was that they took morality itself as a given. Yet what society had come to perceive as evil was originally

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[215] Ibid., 328-9
[216] Anthony Cuschieri, 'Karl Marx on Human Nature' (1980) 2(3) Hyphen, 121-2
[217] Ronald E. Osborn, *Humanism and the Death of God* (Oxford University Press 2017), 20

acknowledged as good. What traditional ethics – corrupted by Judeo-Christian teachings – condemned as vice were merely untimely atavisms of older ideals. In the pre-moral period (vaguely associated in Nietzsche's mind with pre-Socratic Greece), the value of a deed was determined not by the actor's motives but by the action's consequences. Strength, cunning, and brutality held no moral stigma but were simply expressions of human vitality. "Strong wills" thus dominated "weak wills" as a means to their own glory or vitality, while all effective energy was "will to power."[218]

Nietzsche's perspective of the origin of morality, then, cannot be fully understood in the absence of another key Nietzschean concept: the *will to power*. This perceived driving force behind much of human activity and history is, for him, equally at the heart of the phenomenon of human morality – both as a positive productive force and as the spark for a negative and reactive impetus, on the part of those who come to resent it. This, in turn, leads us to Nietzsche's division of humanity into two basic types of individuals: the strong (who embrace the will to power as a key biological drive) and the weak (who reject and resent it). According to him, '[t]he strong were those who could endure suffering and were masters of self-overcoming. They could say "Yes and Amen" to the harshness of life. The weak, on the other hand, required subterfuge to make life tolerable.'[219]

This cleavage in psychological types, as it were, bears definite consequences in moral terms, the latter motivating Nietzsche to famously oppose what he views as "the emasculated slave morality of Christianity"; instead, he proposes 'anethic of the "free spirit" in which the noble elite engaged in their own projects of value creation and self-mastery' and who should exhibit 'the "hardness of the hammer," the rejection of unmanly and morbid pity for others'[220]. As is made clear by the above considerations, Nietzsche's conception of morality is imbued with a level of psychological subtlety that is often lacking in such endeavours; his perspective on the genealogy of morality holds that the latter 'is actually the story of some set of values trumping those of another', which – 'since all values presuppose evaluators'[221] – is a story best understood by delving into the psychological character of those same evaluators.

This is particularly evident in Nietzsche's analysis of the dynamics of resentment: according to his perspective, 'troubling emotions like frustration and defeat are themselves reflected upon. These reflections turn into brooding. Brooding leads to *resentiment* (resentment), and *resentiment* leads to a reinterpretation of defeat. Moreover, a reinterpretation of defeat sometimes leads to the creation of new values.'[222] This is precisely, according to Nietzsche's dismal diagnostic, the driving force behind the "slave morality" of the Judeo-Christian tradition. And yet, even beneath his venomous invectives against such a morality (and corresponding psychological type), we can

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[218] Ibid., 52

[219] Brian Lightbody, *Nietzsche's Will to Power Naturalized – Translating the Human into Nature and Nature into Human* (Lexington Books 2017), 81-2

[220] Ronald E. Osborn, *Humanism and the Death of God* (Oxford University Press 2017), 53

[221] Brian Lightbody, *Nietzsche's Will to Power Naturalized – Translating the Human into Nature and Nature into Human* (Lexington Books 2017), 174

[222] Ibid., 176-7

still glimpse the kind of subtlety that makes Nietzsche's anthropological conception worth considering:

> Nietzsche defines slave morality as a moral perspective on the past that does not know how to forget and, therefore, generates feelings of resentment, hatred, and revenge for the past. In contrast, noble morality exemplifies a perspective on the past that is defined by the power of forgetfulness. Those who know how to forget do not dwell on the past and, hence, do not 'disown [*verläugnen*]' the past.[223]

Now, if morality depends essentially of the character of the evaluators (those who decide what values should be most *valuable*), it should be noted that Nietzsche's conception unavoidably transcends his inflammatory criticism of a slave morality and goes on to open the door for a rather more optimistic take on individual anthropology – an optimism that, as one might guess, will culminate in the (in)famous Nietzschean concept of the *Übermensch*. The road to the latter is, in fact, a philosophically interesting one; it begins with the realisation that the "sovereign" individual (the one who embraces the biological drive towards a will to power)

> is "an autonomous, supra-ethical individual", who deserves "the privilege to make promises" because it "has freed itself from the morality of customs" (GM II: 2). The overcoming of the "morality of customs" depends on a return to animal forgetfulness as that force which allows the sovereign individual to twist free from and forget the moral and political norms of civilization (memory of the will) in the name of its "own standard of value" (GM II: 2).[224]

Nietzsche's almost naturalistic understanding of humanity, largely focused on biological impulses and inclinations, leads him to place a greater emphasis on the egoistic and self-interested basis of all human action. Though greatly inspired by Schopenhauer's work – as evidenced by the very concept of the will to power – Nietzsche's conception ultimately breaks with the Schopenhauer's, "who identified morality with nonegoistic action and the motive of compassion, [while] Nietzsche denies that there is any such thing as a nonegoistic action."[225]

In addition to this, there is something to be said of the usual picture of the Nietzschean *Übermensch*as someone who transcends both the "herd morality" and the very concepts of good and evil, a picture which normally comes across as irrevocably pernicious; in truth, however, Nietzsche

> is not opposing community to individual, but rather human excellence and achievement to basic material welfare, or the greatest happiness for the greatest number. This ethical opposition does not entail a trade-off between classes, that if we choose excellence for the few we must also choose unhappiness for the many. In fact, Nietzsche holds on the contrary that excellence can be achieved only

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[223] Vanessa Lemm, *Nietzsche's Animal Philosophy –Culture, Politics, and the Animality of the Human Being* (Fordham University Press 2009), 90
[224] Ibid., 37
[225] Paul Franco, *Rousseau, Nietzsche, and the Image of the Human* (Chicago University Press 2021), 77

if there is a national culture established, one in which the few and the many collaborate and check one another in the common pursuit of humanity.[226]

And thus we are able to reach the crux of Nietzsche's conception of humanity. For him, becoming human involves, first and foremost, a process of 'self-creation.'[227] Hence, it is only right that we, as human beings,

> devote our lives to humanity, to our own distinctive nature. By doing so, we achieve wholeness, in that our lives are no longer alienated to a will external to ourselves, but rather we find ourselves at home in the pursuit of our own humanity. We also perfect ourselves by perfecting our distinctive nature. Human beings are distinctive in our freedom, our capacity to transcend nature and create purposes for ourselves, our subjective ability to legislate value and then devote our lives to this ideal or value. For much of human history, human beings have projected value onto nature or created gods and devoted ourselves to them. By making ourselves our own end, by contrast, we project value onto our own nature. As such, we devote our lives to the realization of our own freedom, our own capacity to legislate value. We cease to be a means or vehicle or link in the chain of becoming for some further end external to ourselves. By making ourselves our own end, we become at once agent and final purpose, means and end.[228]

With both the originality and the merit of Nietzsche's anthropological conception attested by everything above, it should be noted – to bridge the gap to the following section – that 'Nietzsche's portrayal of human action as determined by unconscious drives and struggles between drives clearly undermines conventional notions of freedom of the will'; according to this perspective, one might conclude, '[w]hat we call "will" is merely a shallow interpretation of a complicated process that goes on beneath the level of consciousness."[229] How this *sub*conscious level can be said to operate, and what are its consequences towards the matter at hand, is precisely what Sigmund Freud sought to ascertain.

6.3. Freud: the subconscious, aggressiveness, and group psychology

If it is true that Nietzsche's ideas regarding human nature and human will were significantly influenced by an acknowledgment of the power exerted by unconscious forces upon the latter, the same should be said manyfold concerning his contemporary, Sigmund Freud. In truth, there is perhaps no other thinker – what we nowadays might term "public intellectual" who has so clearly contributed to the broad awareness of the substantial power that our subconscious can hold over our everyday lives, and over our very nature as human beings.

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[226] Jeffrey Church, *Nietzsche's Culture of Humanity – Beyond Aristocracy and Democracy in the Early Period* (Cambridge University Press 2015), 145
[227] Paul Franco, *Rousseau, Nietzsche, and the Image of the Human* (Chicago University Press 2021), 73
[228] Jeffrey Church, *Nietzsche's Culture of Humanity – Beyond Aristocracy and Democracy in the Early Period* (Cambridge University Press 2015), 60
[229] Paul Franco, *Rousseau, Nietzsche, and the Image of the Human* (Chicago University Press 2021), 80

And such was the impact of his work, in fact, that '[d]espite distorted understandings of Freud's views and despite periodic waves of Freud-bashing,…Freud's influence continues to be enormous and pervasive. In a crucial sense, we must concede that Freud 'gave us a new and powerful way to think about and investigate human thought, action, and interaction. He made sense of ranges of experience generally neglected or misunderstood.'[230] Thus, regardless of however much one questions or is intent on disproving his theories, the fact remains that they are *unavoidable* even today.

Of course, the fact that Freud's theories gained such widespread popularity during his time by no means entails that they were just as widely accepted; on the contrary, his psychoanalytical theories and methodologies were often met with scepticism and distrust, particularly within those areas of knowledge whose intellectual domain Freud ultimately infringed. As he diagnosticates, in his *Autobiographical Study*,

> [p]sycho-analysis regarded everything mental as being in the first place unconscious; the further quality of 'consciousness' might also be present, or again it might be absent. This of course provoked a denial from the philosophers, for whom "consciousness" and "mental" were identical, and who protested that they could not conceive of such an absurdity as the "unconscious mental."[231]

And while "diagnostician" is indeed one of the roles that Freud felt a calling towards, his work ultimately saw him delve into increasingly deeper levels of analysis. His efforts in finding the roots of mental illness hence soon 'led him to pursue the emotional basis of human behavior in general', engaging in observational studies of such varied topics as 'dreams (1900), everyday mistakes (1901), sexuality (1905b), character formation (1908, 1931), jokes (1905), and the origin of guilt (1913).'[232] Linking all of those topics was Freud's belief in the 'remarkable power of the uniquely moral emotions of shame and guilt …to infiltrate our nightly dreams, create everyday parapraxes, influence the development of sexuality, specify the emotional release in jokes, shape personality, and "create" human culture.[233]

The acknowledgement of the inextricable link between our emotions (either conscious or subconscious) and our behaviour – a link that therefore sat at the heart of what we call "human nature – famously led Freud to the conception of a new model of the human mind, intended to accurately portray its workings, and which consisted of three parts: id, ego, and super-ego. And though they are today concepts one might come across even in everyday parlance, what they truly represented within Freud's conception is, paradoxically, often ignored or misunderstood. Hence, as a brief but helpful summary of the latter, we might say that

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[230] Jerome Neu, 'Introduction' in Jerome Neu (ed), *The Cambridge Companion to Freud* (Cambridge University Press 1991), I

[231] Sigmund Freud, *An Autobiographical Study* (W.W. Norton & Company 1989), 33

[232] Helen Block Lewis, *Freud and Modern Psychology – Volume 2: The Emotional Basis of Human Behavior* (Plenum Press 1983), v

[233] Ibid.

[t]he id is defined as the oldest part of the mind from which the other structures are derived. The id is primitive, unorganized, and emotional: "the realm of the illogical". […]The ego is that part of the mind representing consciousness. It employs secondary process: that is, reason, common sense, and the power to delay immediate responses to external stimuli or to internal instinctive promptings. …Freud postulated an agency within the mind that devoted itself to self-observation: which watched the ego, and decided whether or not the ego was conforming to, or fell short of, the ego-ideal. This agency was what Freud later named the super-ego. … The super-ego can be regarded as the product of repeated conditioning by parental injunctions and criticism.[234]

When examining the picture of the human condition sketched by Freud's understanding of the mind, one may logically come to the conclusion that every individual – every ego – is 'uneasily poised between three agencies: the external world, the id, and the super-ego, each of which may be urging a different course.'[235] Thus, one would also have to conclude, it is really not all that 'surprising that human actions sometimes appear vacillating or indecisive'[236] – indeed, that appears to be a logical consequence of the manner in which the subconscious interplays with the conscious mind.

It is also interesting to note that, as a key feature (or, rather, as an *underlying guide*) of mental processes, Freud emphasises what he dubs the "pleasure principle". Regarding the latter, as he unabashedly explains in *Beyond the Pleasure Principle*,

> [i]n the theory of psycho-analysis we have no hesitation in assuming that the course taken by mental events is automatically regulated by the pleasure principle. We believe, that is to say, that the course of those events is invariably set in motion by an unpleasurable tension, and that it takes a direction such that its final outcome coincides with a lowering of that tension – that is, with an avoidance of unpleasure or a production of pleasure.[237]

Following Freud's description of the mechanism, a question that might almost immediately arise, however, is which of the two – the production of pleasure or the avoidance of its contrary – takes precedence in the hierarchy established by this powerful subconscious drive. The answer, which Anthony Storr deems 'characteristic of Freud's predominantly pessimistic view of human nature', is that the pleasure principle advanced by Freud, and 'upon which so much of his thought depends, is much more concerned with the avoidance of pain than with the pursuit of pleasure.'[238]

The assertion of Freud's anthropological pessimism, simultaneously stemming from and underpinning his pleasure principle, presents us with an ideal opportunity to deepen our analysis of his views on human nature, by focussing on a characteristic of the latter that Freud seems to regard as constitutive and, as such, absolutely inescapable: our *aggressiveness*. In what pertains to the latter, Freud is far from adopting any sort of apologetic view, such as the ones that would

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[234]Anthony Storr, *Freud – A Very Short Introduction* (Oxford University Press 2001), 60-3
[235] Ibid., 63-4
[236] Ibid., 63-4
[237] Sigmund Freud, *Beyond the Pleasure Principle* (W. W. Norton & Company 1961), 1
[238]Anthony Storr, *Freud – A Very Short Introduction* (Oxford University Press 2001), 61

explain aggressiveness away as mere consequence of a pernicious social arrangement, of repressed pathological feelings, or as the justifiable reaction to external stimuli. Instead, what Freud proposes is that aggressiveness is a crucial innate trait of human beings, without which the latter's nature and behaviour cannot be truly understood:

> Men are not gentle, friendly creatures wishing for love, who simply defend themselves if they are attacked, but that a powerful measure of desire for aggression has to be reckoned as part of their instinctual endowment. The result is that their neighbour is to them not only a possible helper or sexual object, but also a temptation to them to gratify their aggressiveness on him, to exploit his capacity for work without recompense, to use him sexually without his consent, to seize his possessions, to humiliate him, to cause him pain, to torture and to kill him. *Homo homini lupus.*[239]

As one may gather from Freud's remarks quoted above, the instinctual aggressiveness of human beings comes to condition and even shape the reality of social arrangements and interactions. It is such a defining and inextricable feature of human nature that its reality is ever-present in the political sphere – even when we assume it is not. Freud's recourse to the same dire verdict of *homo homini lupus* [Man is wolf to men] that was made famous in political philosophy by such anthropological pessimists as Machiavelli and Thomas Hobbes, leaves little to speculation as to the extent to which he believed that aggressiveness was an significant factor in our social life. As Freud himself adds later on in *Civilization and its Discontents*, the fact that we perceive ourselves and those around us as being ever-vulnerable to manifestations of this underlying aggressiveness 'is the factor that disturbs our relations with our neighbours and makes it necessary for culture to institute its high demands. Civilized society is perpetually menaced with disintegration through this primary hostility of men towards one another.'[240]

In this regard, Freud has no qualms in directing highly specific criticism to one particular political ideology – communism – which, according to his estimation, purported to be able to efface our inherent aggression in the political sphere – or, at the very least, to harness it in a positive manner. Freud, however, is left unimpressed by both the gleaming promises and the communist critique of the role of property in the development of human relations:

> [t]he Communists believe they have found a way of delivering us from this evil. … I have no concern with any economic criticisms of the communistic system; I cannot enquire into whether the abolition of private property is advantageous and expedient. But I am able to recognize that psychologically it is founded on an untenable illusion. By abolishing private property one deprives the human love of aggression of one of its instruments, a strong one undoubtedly, but assuredly not the strongest. …This instinct did not arise as the result of property; it reigned almost supreme in primitive times when possessions were still extremely scanty.[241]

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[239] Sigmund Freud, *Civilization and its Discontents* (Hogarth Press 1930), 85
[240] Ibid., 86
[241] Ibid., 87-9

In light of this apparent turn, on the part of Freud, from a psychoanalysis applied to individuals to one applied to *societies*, it is warranted that we conclude this section by considering some of his key remarks concerning *group psychology*. While much could be said regarding this topic, to which Freud devoted an entire book – *Group Psychology and the Analysis of the Ego* – we shall limit ourselves to the ideas expounded in the latter which most evidently bear significant consequences towards the broad picture of human nature that Freud is attempting to construct.

Before anything else, almost as if justifying the fact that the "founder of psychoanalysis" was devoting his attention to what appear to be essentially social phenomena – and, as such, mere epiphenomena of the individual psychology that should constitute the core of his analysis – Freud is quick to argue that '[t]he contrast between individual psychology and social or group psychology, which at first glance may seem full of significance, loses a great deal of its sharpness when it is examined more closely.'[242] Indeed, Freud goes on to argue from these preliminary remarks, '[i]ndividual psychology almost always regards the individual's relation with others'[243] – and, as such, the former cannot be truly understood without careful consideration of the latter.

Where does Freud's analysis of the forces and phenomena underpinning human beings' social existence ultimately lead him? In essence, it could be said that it leads him to a very similar place to the one reached by many of the most notable thinkers who pursued the same endeavor either before him or alongside him – thinkers such as Gustave Le Bon, Gabriel Tarde and Wilfred Trotter, to name but a few. The work of the latter was, to be sure, known and often quoted by Freud, but his own perspective on the matter at hand, one can clearly perceive, was still believed by him to allow for a deeper understanding of phenomena such as "herd mentality" and "group mind". It is with that conviction that Freud proposes, for example, that we 'venture, then, to correct Trotter's pronouncement that man is a herd animal and assert that he is rather a horde animal, an individual creature in a horde led by a chief.'[244]

The social unit represented by the "primal horde" is the sort of archetype that Freud sees at the basis of much of human sociability. As he goes on to state, human groups 'exhibit once again the familiar picture of an individual of superior strength among a troop of equal companions, a picture which is also contained in our idea of the primal horde. …Thus the group appears to us as a revival of the primal horde.'[245]

This sort of genealogical approach to group psychology, as it were, bears two significant consequences: the first can be encapsulated by the conclusion that 'the psychology of groups is the oldest human psychology; what we have isolated as individual psychology, by neglecting all traces of the group, has only since come into prominence out of the old group psychology'[246]; the

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[242]Sigmund Freud, *Group Psychology and the Analysis of the Ego* (Penguin 1991), 95
[243] Ibid.
[244] Ibid., 153
[245] Ibid., 154-5
[246] Ibid., 155

second, and equally as relevant for the understanding of human nature, if not more, is the realisation that the "horde" is always dependent upon the appearance of a *leader*, one who is able to rise above the rest to direct and employ the potential energy (and aggressiveness) of the group. This leader, according to Freud, will almost necessarily be regarded as a sort of patriarchal figure; indeed, in all likely social permutations (the church and the army being the examples provided by him) even in more complex and organised groups the 'illusion that the leader loves all of the individuals equally and justly' is simply an 'idealistic remodelling of the state of affairs in the primal horde, where all of the sons knew they were equally persecuted by the primal father, and feared him equally.'[247]

Freud's analysis of group dynamics according to the model provided by the "primal horde" leads him to the assertion that the primal leader enjoys such a singular position within the horde – a position whose privileges are legitimised by the group's own subconscious psychological needs – that, 'at the very beginning of the history of mankind, [that leader] was the 'superman' whom Nietzsche only expected from the future.'[248] In this regard, Freud's understanding of group psychology is able to provide remarkable clarity on the phenomena of fascism and totalitarian regimes centered on the perceived uniqueness of a single individual – the leader, or dictator. Thus, as Theodore Adorno remarks in his essay *Freudian Theory and the Pattern of Fascist Propaganda*, Freud, despite being 'hardly interested in the political phase of the problem, clearly foresaw the rise and nature of fascist mass movements in purely psychological categories.'[249] – a fact that, on its own, would already provide sufficient reason for Freud's work to be taken seriously in the context of humanity and human rights.

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[247] Ibid., 157
[248] Ibid., 156
[249] Theodore Adorno, *The Culture Industry: Selected Essays on Mass Culture* (Routledge 1991), 134

Chapter 2: Foundations of Dignity and Human Rights

1. Introduction

Beyond the reflection regarding the nature of human beings and of the relations that they to establish amongst themselves over the course of their concrete existence, the issue of human rights must look to its roots in certain specific concepts that arose out of that very reflection. One of the most important such concepts is human dignity.

That all human beings are endowed with dignity – a special and substantive importance that transcends and overrides particular circumstances – is today a sort of truism in the West. Where might we trace the origin of such an idea of human dignity, or even whether the latter's evidence is so universally acknowledged as we would like it to be, however, are related and crucial questions whose answer we often take for granted, or simply choose to ignore. In fact, these are not merely peripheral questions to the issue of human rights; they actually related to the sine qua non conditions for the success of any endeavour aiming at establishing them on a global scale.

As we move towards a greater understanding of the concrete reality of human rights and a clear perspective on the challenges that they have faced throughout history (and still face today), our analysis must not only delve into the roots of the idea of human rights, but also into the very ground within which such roots found sustenance. This latter goal can only be attained through careful examination of the gradual historical and philosophical progress towards the acknowledgement of a heightened importance or inherently superior value of human existence in the face of reality as a whole. Be it expressed in terms of the "human soul" or as "human dignity", it is this special intrinsic value of human life that ultimately led to the formulation of modern-day human rights.

2. The Human Soul in Greek Philosophy

An inescapable topic in ancient philosophy, what we might (following the etymology of the Ancient Greeks) term "psychology" (the study [*logia*] of the soul/mind [*psyche*]) occupied many of the most influential thinkers of the ancient world, with the work of Plato and Aristotle providing the most widely discussed and studied reflections of the subject.

The concept of "soul" [*psyche*] in Ancient Greek usage should not be viewed as perfectly reflecting the homonymous notion inherited from the Christian tradition in the West, but rather as a broader concept, that evolved from the meaning of "life force" or "breath of life" that Homer attributes to it in his epic poetry, to the philosophically nuanced and complex conceptions of both Plato's tripartite soul and Aristotle's own account.

2.1. Homer

It is worth setting Homer as a starting point for an analysis of Ancient Greek ideas on the human soul, for two key reasons: firstly, both the *Iliad* and the *Odyssey* were, and remain to this day, foundational texts in the western intellectual and spiritual traditions; secondly, his portrayal of (and implicit reflection on) the human condition foreshadows many of the conceptual subtleties that would arise in the subsequent philosophical and religious interpretations of the subject at hand.

The portrayal of the soul in Homeric poetry is at once fascinating and complex, since there is not one single word in the original Greek that we could identify with our contemporary conception of what a human soul ought to represent, but rather several words that are sometimes apparently used interchangeably, and other times seem to represent different facets of the essence that later Christian tradition would ascribe to the human soul.

As Bruno Snell puts it, 'Homer has no one word to characterize the mind or the soul. ψυχή (*psyche*), the word for soul in later Greek, has no original connection with the thinking and feeling soul. […] For the area of the "soul", the most important words are *psyche*, θυμός (*thymos*), and νόος (*noos*).'[250] As such, any exploration of the concept of soul in the works of Homer must take into account this triadic division of the former, examining each element as constitutive of the whole that ultimately emerges. With that in mind, we shall begin by considering the concept of *psyche*.

The first noteworthy aspect of *psyche* as a significant concept in this regard pertains to the fact that it, 'just like its Latin counterpart, *anima*, originally meant 'breath/breeze' or 'wind'. The notion that this breath should have a continued existence is already present in Homer, who reserves the

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[250] Bruno Snell, *The Discovery of the Mind* (Harvard University Press 1953), 8

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name of '*psychê*' for the souls of the dead.[251] This ephemeral nature of the psyche is made quite clear by several of Homer's characterizations of the phenomenon of death, whence the *psyche* "flutters" about in Hades; less clear, however, is what he believes to be the function of that *psyche* throughout our lifetime. As Snell argues, '[o]ne would do well to remember how little Homer says about the *psyche* of the living and of the dying man'[252]; although it appears to have been construed as something related to the vital function of human beings, inasmuch it is risked through battle, what we might call its positive meaning appears to have been left deliberately vague.

In any case, Snell posits, some important clues are left in Homeric writings regarding the nature of the psyche:

> The psyche leaves through the mouth, it is breathed forth; or again it leaves through a wound, and then flies off to Hades. There it leads a ghostlike existence, as the spectre (eidolon) of the deceased. The word psyche is akin to ψύχειν, 'to breathe', and denotes the breath of life which of course departs through the mouth; the escape from a wound evidently represents a secondary development.[…] It appears as if in Homeric times the term psyche chiefly evoked the notion of an eschatological soul[253]

The fact that neither of these do yet bring us any closer to a positive definition of what the psyche might be construed as, might lead us to conclude that '[t]he usage of *psychê* of something active in the living body is thus not at all inevitable according to traditional usage and would sound decidedly strange to contemporary readers.'[254] – and, hence, that the very notion of a positive definition of the concept, along the lines that we would deem satisfactory, would be equally foreign to ancient Greek minds.

If we shift our focus from the concept of *psyche* to that of *thymos* (or *thumos*), the latter may be better suited to advance our understanding of the Homeric concept of human soul. Interestingly, from an etymological standpoint, the *thymos* too can be said to have once been 'a primitive "breath-soul" or "life-soul"; but in Homer it is neither the soul nor (as in Plato) a "part of the soul." It may be defined, roughly and generally, as the organ of feeling. But it enjoys an independence which the word "organ" does not suggest to us'[255]. This significant connection between *thymos* and feelings (or emotions) is at once sufficient to make us regard the Homeric concept of soul in a broader manner; and more so yet when we add another missing key element to his portrayal of *thymos*:

> If we translate *thymos* as "organ of (e)motion", the matter becomes simple enough. Since this organ, prominently among its functions, determines physical motion, it is plausible enough to say that at the point of death the *thymos* leaves the bones and the μέλη, i.e. the limbs with their muscles. But this

[251] Dorothea Frede and Burkhard Reis (eds), *Body and Soul in Ancient Philosophy* (Walter de Gruyter 2009), 1
[252] Bruno Snell, *The Discovery of the Mind* (Harvard University Press 1953), 8
[253] Ibid., 9
[254] Carl Huffman, 'The Pythagorean Conception of the Soul from Pythagoras to Philolaus' in Dorothea Frede and Burkhard Reis (eds), *Body and Soul in Ancient Philosophy* (Walter de Gruyter 2009), 35
[255] Eric R. Dodds, *The Greeks and the Irrational* (2nd edn, University of California Press 1973), 16

hardly implies that the *thymos* continues to exist after death; it merely means: what provided motion for the bones and limbs is now gone.[256]

Examining the specific uses of *thymos* in the Homeric poems, one comes to find that the former can take on the meaning of such diverse modern concepts as "life force", "heart" (as in 'the locus of affection'), and "craving".[257] Its meaning, therefore, appears to have been either rather poorly defined by Homer, or intentionally multifaceted, as a way to convey the intricately complex phenomenon that is the human soul.

The matter will be made clearer by taking into account the missing element of the conceptual triad that appears to integrate the Homeric concept of human soul: *noos*. Regarding the latter and its relation with the former two elements mentioned above – *psyche* and *thymos* – it should be noted that

> [w]hereas the contrast between *thymos* and *psyche* is clear and emphatic, the line between *thymos* and *noos* cannot be drawn with the same precision. If …*thymos* is the mental organ which causes (e)motion, while *noos* is the recipient of images, then *noos* may be said generally to be in charge of intellectual matters, and *thymos* of things emotional. Yet they overlap in many respects."[258]

This interesting characterization of the possible relation between the parts allows us to acknowledge, as early as Homer, a nuanced view of the relationship between what we might term reason and emotion that would be, *mutatis mutandi*, subsequently echoed by thinkers such as Aristotle. Speaking on this matter, Furley's analysis adds yet a deeper layer of understanding:

> The proper use of '*noos'* and the verb '*noein'* in Homer is in describing a man 'seeing the point of a situation', 'summing up the situation', 'appreciating it' (in something like the military sense). If the situation is grim, his appreciation may make him afraid, but this is a coincidence. From the appreciation of particular situations, '*noos'* may be extended to describe an enduring manner of appreciating situations[259]

It should be noted, however, that the particular usage of *noos* in Homeric poems points not to a process of lengthy intellectual ponderation, but rather to a sort of 'instantaneous appraisal'[260] of the situation at hand, which would perhaps more closely link it to what we would contemporarily characterize as *intuition* – inasmuch as the latter also appears to capture an often surreptitious symbiosis between reason and emotion which plays a useful role in deliberation and decision making.

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[256] Bruno Snell, *The Discovery of the Mind* (Harvard University Press 1953), 9-10
[257] Maria Helena da Rocha Pereira, *Estudos de História da Cultura Clássica* [Studies on the History of Classical Culture] (9th edn, Fundação Calouste Gulbenkian 2003), 124
[258] Bruno Snell, *The Discovery of the Mind* (Harvard University Press 1953), 12
[259] D. J. Furley, 'The Early History of the Concept of Soul' (1956) 3(1) Bulletin of the Institute of Classical Studies, 6
[260] Ibid., 8

Ultimately, then, the conjunction of the three elements discussed thus far – i.e., *psyche*, *thymos*, and *noos* – leaves us with a relatively clear picture of how the human soul is presented in Homeric epics as it pertains to its function: it is simultaneously life-force, a source of motion, and it plays a key role as intermediary between our intellectual and emotional dimensions. And while decisively vague in its definition, the Homeric soul is therefore endowed with a complexity that renders it a rich philosophical concept, open to fruitful exploration by the brilliant minds that would arise out of the nascent ancient Greek civilization.

What, then, are some of the key philosophical contributions of the Homeric concept of human soul, and what are its limitations in that regard? Perhaps unsurprisingly, given the formative nature of Homeric epics on Greek character at the time, it appears to have been quite influential on the development of Plato and Aristotle's respective theories of the soul. Indeed, as Furley states, one cannot help 'noticing the traces it leaves on Plato's Theory of Forms – the *psyche* is said to be "akin" to the Forms – and even on Aristotle's psychological theory, in which the nous, mysteriously, is said to come from "outside"'[261]. There is, as researchers such as David Sedley concur, a sort of continuity between Homeric ideas on the soul (its survival after death, its eventual voyage to Hades and the possibility of its return in different incarnation) and Plato's own philosophy of the soul, to such an extent that 'Plato would see himself less as an innovator than as an interpreter and defender of these traditions.'[262]

This is not to say, however, that such continuity is a perfect one. There are, in fact, several aspects concerning which Homeric ideas seem to fall short of what was to be accomplished by ancient Greek philosophy. First and foremost, as Bruno Snell insightfully remarks, it 'should be noted that Homer does not know genuine personal decisions; even where a hero is shown pondering two alternatives the intervention of the gods plays the key role.'[263] This, of course, represents a significant limitation on the concepts of free will and human agency without which much of subsequent ethical and political thought would not be possible. In a sense, we might say that 'Homeric man has not yet awakened to the fact that he possesses in his own soul the source of his powers, but … he receives them as a natural and fitting donation from the gods.'[264]

Secondly, Homer's works still leave a gap that would needed to be filled, regarding the possible immortality of the human soul – a key feature in later significant philosophical and theological systems. In this regard, it is only with Pythagoras that

> a new general concept of a living being is created, *empsychon*: 'a *psyche* is within.' This *psyche* is obviously not the powerless, unconscious image of recollection in a gloomy Hades, as in Homer's *Nekyia*; it is not affected by death: the soul is immortal, *athanatos*. That the epithet which since Homer

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[261] D. J. Furley, 'The Early History of the Concept of Soul' (1956) 3(1) Bulletin of the Institute of Classical Studies, 16

[262] David Sedley, 'Three Kinds of Platonic Immortality' in Dorothea Frede and Burkhard Reis (eds), *Body and Soul in Ancient Philosophy* (Walter de Gruyter 2009), 146

[263] Bruno Snell, *The Discovery of the Mind* (Harvard University Press 1953), 20

[264] Ibid., 21

had characterized the gods in distinction from men now becomes the essential mark of the human person is indeed a revolution."[265]

This revolution was, however, not achieved *despite* Homer, but largely *because* of him. Even with all of its imprecisions and limitations, his concept of the human soul served to decisively inspire the luminous generations of thinkers that followed, not only within the scope of the ancient Greek world, but also beyond. In the words of Bruno Snell, '[h]owever primitive man's understanding of himself as presented in Homer's speech may appear to us, it also points far into the future: it is the first stage of European thinking.'[266]

2.2. Socrates and Plato

If making reference to Homer's ideas on the soul is warranted on the grounds of its influence on the ancient Greek spirit as a whole, to consider Socrates' and Plato's thoughts on the same matter should be viewed as positively unavoidable, such is his influence upon all subsequent reflection on the human psyche up until the time of this very writing.

Plato's examination of the human psyche – what we might call, to be brief, his psychology – must necessarily begin with the individual who was both inspiration and literary vehicle for Plato's ideas: Socrates. Thus, in works such as the *Apology* we will find Socrates declaring that his ultimate purpose in engaging in philosophical activity in the way that he does is none other than 'care of the soul'; '[p]roper care of the soul will lead to happiness (*eudaimonia*), the aim of each of us. We will be happy if and only if we are virtuous. Virtue, in turn, is a state of one's soul, namely knowledge of goods and evils."[267] Thus, in this regard (as well as others), Plato's conception appears to be, *mutatis mutandi*, a clear precursor to the one enshrined in Christian tradition; after all, Plato posits that, in doing philosophy, Socrates has not only been caring for his soul throughout his life, but actually 'practicing death', which is merely 'the separation of the soul from the body (Phaedo 63e–64c). Socrates is his soul and one's soul is immortal. Thus Socrates is not dead; he has merely departed this earthly existence.'[268]

Indeed, the matter of the immortality of the soul – which, as noted above, was also inspired by Pythagoric doctrine – is one of the most salient features of Plato's psychology. It is a key belief in whose centre

> stands his ethically pivotal conviction that the soul outlives its present incarnation, to be duly rewarded or punished. The realisation that the soul's progressions and regressions are most properly evaluated and understood over an indefinitely long time-span, and not just within the confines of a single life, in

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[265] Walter Burkert, *Greek Religion: Archaic and Classical* (Blackwell 1985), 300
[266] Bruno Snell, *The Discovery of the Mind* (Harvard University Press 1953), 22
[267] Allan Silverman, 'Plato: Psychology' in Christopher Shields (ed), *The Blackwell Guide to Ancient Philosophy*, (3rd edn, Blackwell 2006), 131
[268] Ibid.

his eyes both makes greater moral sense of the world and clarifies how we can best play our own part in it."[269]

Once again, then, one can easily recognize Plato's overall conception of the soul as remarkably close to what would come to be advanced by Christian theology. That being said, there are two noteworthy characteristics of the soul, pointed out by Plato in the *Phaedo*, which should be regarded with less familiarity by the Christian scholar:

> "a) The soul seems to take bodily traits. The poisoning of the soul (said to be drunk) seems to suggest that. This picture is substantially different from the one of a simple imprisonment of the soul inside a bodily shell. The latter case, in fact, would not imply any kind of contamination. b) The process of incarnation of the soul into the body does not appear to be the result of a passive entrapment of the soul by the body. On the contrary, what apparently is going on here is the soul moving towards the body and wanting to make use of it in order to know the world through the senses"[270]

The *Phaedo* thus serves as a sort of introductory study of the soul in Platonic philosophy, and the one which is likely the closest the views espoused by Plato's teacher, Socrates, on the matter. The former's psychology, however, is not exhausted here; rather, in some of his following works Plato would go on to delve significantly deeper into each of the parts that, he believed, make up the human soul.

We are referring here Plato's famous tripartite conception of the soul – the very incarnation of Plato's psychological theory that confers it the complexity and richness which have warranted continued consideration of the former up until today. In this regard, a somewhat close examination of Plato's writings as a whole should lead us to the realization that it is in works such as the *Republic*, *Phaedrus*, and *Symposium* that 'the powers of the soul are expanded. The crucial difference in the Republic and Phaedrus is the apparent division of the soul into three parts. Reason is only one part of soul, accompanied now by appetite and spirit'.[271]

Thus, Plato's later works not only introduce a division of the soul into different parts – each with a specific function and purpose – but also aim to sustain Plato's proposed hierarchy between those parts:

> two aspects of the *Republic* suggest that reason remains the fundamental power of the soul, or better, perhaps, what soul is in its own right. First, the rational capacity is capable of influencing and redirecting the drives of the other two parts in any individual.[…] The second, related, facet is Plato's emphasis that a human's goal is to become like God. Throughout these works, and equally in the

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[269] David Sedley, 'Three Kinds of Platonic Immortality' in Dorothea Frede and Burkhard Reis (eds), *Body and Soul in Ancient Philosophy* (Walter de Gruyter 2009), 145

[270] Gabriele Cornelli, 'Separation of the Body and Soul in Plato's Phaedo' in Luca Pitteloud and Evan Keeling (eds), *Psychology and Ontology in Plato* (Springer 2019), 28

[271] Allan Silverman, 'Plato: Psychology' in Christopher Shields (ed), *The Blackwell Guide to Ancient Philosophy*, (3rd edn, Blackwell 2006), 136-7

Philebus, *Timaeus*, and *Laws*, the divine is depicted as purely rational. Thus in achieving our best state, we humans try to become as rational as possible."[272]

Now, one of the most interesting consequences of Plato's proposed psychology is the fact that it necessarily and decisively influences other aspects of his philosophy. For one, looking at the above descriptions, it should not be difficult to surmise that it significantly impacts Plato's epistemology; indeed, if the desiderative and spiritive parts of the soul are irrational, only the intellective part remain rational, or capable of reason [273]. As such, the acquisition and processing of knowledge would appear to be a purely rational process, with no relation with the senses, for instance – which is an obviously problematic notion. It is because of this epistemological problem that,

> [i]n the view of many scholars, one of Plato's aims in the *Theaetetus* is to repair the *Republic's* epistemologically fragmented soul. In the concluding argument against *Theaetetus'* first definition that knowledge is perception (151d–e) […] Socrates appears to argue that the senses themselves make no judgments (184b–186e). Rather, the "reports" of the senses are delivered to the same soul that issues judgments about both the (special) objects of the senses, for example, "The cheese is green" (where green, a color, is special to sight), and everything else, for all judgments about anything require 'common' notions, for example, being, or same or different, unavailable to the senses. Plato thus anticipates the Kantian "unity of the perceiving consciousness" and relocates all rational, cognitive, and judgmental activities in one (part of the) soul. The appetitive and spiritive aspects remain "irrational."[274]

Plato's tripartite conception of the soul does not bear significant consequences only to his epistemology, but also to is political philosophy. Concerning this latter aspect, it is perhaps most interesting to note the sort of mirroring that exists between the political and the psychological dimensions in the *Republic*:

> [Plato]tells us that if justice in a city is a matter of the internal structural relations within the city, then justice in the individual is also a matter of internal structure – the internal structural relations within the individual's *psyche*. As the ideal city has three parts (the guardians who have knowledge and look to the good of the entire city; the military who defend the city from danger from outside as well as from within; and the worker class who do their own thing while going along with the commands of the guardians), so too, in parallel, does the individual *psyche* have three parts (Reason whose job is to have knowledge and look to the good of the entire person; the Spirited part which follows Reason's orders and protects the entire person against unthinking impulses of the Appetitive Part; and the Appetitive Part itself).[275]

The seeming "personification" of the political entity – which, in truth, is actually the fruit of a deliberate effort to ordain the ideal polis so as to achieve a perfect harmony with the most essential

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[272] Ibid., 137

[273] Ibid., 137-8

[274] Allan Silverman, 'Plato: Psychology' in Christopher Shields (ed), *The Blackwell Guide to Ancient Philosophy*, (3rd edn, Blackwell 2006), 138

[275] Terry Penner, 'Plato's Ethics: Early and Middle Dialogues' in Mary Louise Gill and Pierce Pellegrin (eds), *A Companion to Ancient Philosophy* (Blackwell 2006), 162

features of human essence – also ties in with Plato's concept of justice (both in the *polis* and regarding the individual):

> as justice in the ideal city is an internal structuring, in accordance with which each of its three parts (classes) fulfills its own function and does not interfere with other parts as they try to fulfill theirs, so too justice in the individual is the same internal structuring of the parts of the psyche, in which each of its three parts fulfills its own function and does not interfere with the functions of the other parts. Hence, instead of justice being, as we expected, a relation external to – between – the citizens of the just city, it is a relation internal to any individual – whatever city he or she be a citizen of. It is, as we have said, a kind of psychological well-adjustment – a certain well-adjustment of the three parts of the *psyche* to each other.[276]

Conversely, we might note, unlike what happens in the *ideal polis*, 'for every pathological polis there is a corresponding pathology of the psyche. … a pathological psyche is not, in fact, a psyche, but various psychic parts. So, for example, just as an oligarchy is not a polis, but two parts, a rich part and a poor part, so an 'oligarchical psyche' is in fact two psychic parts: a ruling part and a ruled.'[277]Hence, a well-ordered and properly functioning polis is essentially a perfect reflection of a soul within which all three parts function harmoniously, and following the predetermined hierarchy.

Plato's tripartite conception of the soul is a highly influential concept, whose echoes can be heard not only in the work of most subsequent philosophers of substance that addressed similar issues, but also in the work of contemporary neuroscientists who continually seek to prove or disprove Plato's ideas – whether knowingly or not. Decisively, however, Platonic psychology was highly impactful in the intellectual life of Plato's foremost pupil, whose own work on the subject was itself largely a critique of his master's theories.

2.3. Aristotle

The main source of Aristotle's ideas regarding the human soul lies undoubtedly in his treatise *Peri Psyche* (often referred to by its Latin translation, *De Anima*, and which is commonly translated to the English language as *On the Soul*).But although the importance of this treatise is regarded as unquestionable within the scope of Aristotle's writings, its exact nature is frequently open to debate: should we view its contents as an exercise in psychology, or in philosophy of mind? Concerning this question, it would seem that we are largely falling prey to a comfortable anachronism; for '[e]ven if… we agree with commentators who say that Aristotle's *De Anima*is

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[276] Jonathan Lear, 'Inside and Outside the *Republic*' in Ellen Wagner (ed), *Essays on Plato's Psychology* (Lexington Books 2001), 172

[277] Jonathan Lear, 'Inside and Outside the *Republic*' in Ellen Wagner (ed), *Essays on Plato's Psychology* (Lexington Books 2001), 172

also a treatise on the philosophy of mind, we need to be clear that Aristotle was quite innocent of the modern concept of mind, which owes so much to the philosophy of Descartes.'[278]

This fact, which is so often effaced by our attempt to interpret ancient philosophy in light of contemporary conceptual frameworks, bears significant consequences towards a genuine understanding of Aristotle's writing of the soul, and of the context in which they were produced. Indeed, since the modern concept of mind was non-existent at the time of Aristotle's writing, it was obviously not Descartes' ideas on the former that Aristotle disputed, but rather – as we mentioned before – Plato's tripartite division of the soul and, to an extent, the materialistic notions of ancient atomists such as Leucippus and Democritus. Similarly, what Aristotle posited was not inspired by contemporary accounts of the human mind, but rather echoed a notion that, as we have seen above, was largely made commonplace even as far back as Homer. Indeed, following the latter, Aristotle opens his treatise by telling us that the soul is at the basis of life itself: "[t]he *psyche*, Aristotle tells us at the very beginning of his *De Anima* is, as it were, 'the principle of living things' (*arche ton zoon*) (402a6–7). … In Aristotle's Greek, an *empschyon*, an ensouled entity, is a living thing. Thus it is, for Aristotle, a verbal truth that all living things have souls."[279]

Moving beyond this foundational idea, Aristotle goes on to argue that

> life functions are "nested" in such a way that the higher functions depend in some very important way on lower ones. Some organisms, he tells us, take nourishment, grow, and reproduce, but do not move themselves or perceive. These are plants; they have only a vegetative *psyche*. Other organisms, namely, the animals, move themselves and perceive as well as nourishing and reproducing themselves. Among mortal animals, the human ones, and only they, also think."[280]

Though the above quote does not specify all of them, we are here referring to Aristotle's three degrees (or levels) of the soul: the *nutritive* or *vegetativesoul* (growth, nutrition, reproduction), that is characteristic of plants; the *sensitive soul* (perception, sensation, locomotion), characteristic of animals; and the *rational soul* (thought), which is exclusive to human beings. The fact that these three functions or degrees of soul are "nested" essentially means that any living being that possesses a higher degree of soul should also possess the lower ones as well.

What actually distinguishes Aristotle's conception of the soul from Plato's is therefore not the number of parts in which each philosopher elected to divide it, but rather the *relationship* between them – and, ultimately, the relationship between body and soul:

> "One of the chief concerns of Aristotle's treatise *De Anima* is the relation of the soul to the body. […] he repeatedly returns to the question of whether there is any sense in which the soul can be said to be 'separable' (*choristos*). His own solution appeals to the central concepts of his metaphysics. He regards

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[278] Gareth Matthews, 'Aristotle: Psychology' in Christopher Shields (ed), *The Blackwell Guide to Ancient Philosophy*, (3rd edn, Blackwell 2006), 211
[279] Ibid., 212
[280] Ibid., 212-3

the body as the *matter* and the soul as the *form* of a living thing (De An. II.1, 412a15–b6) – hence, the description of his view as 'hylomorphism,' literally, 'matter-form-ism.'"[281]

To speak of "form" in this context is not the same as to speak of "shape". Instead, Aristotle defines form as *actuality*. This leads us to Aristotle's distinction between actuality (*energeia/entelecheia*) and potentiality (*dunamis*): matter, he argues, is essentially potentiality – inasmuch as it holds the *possibility* (the power, the capacity) to be or to become something. As the human body is comprised of matter, the body itself is potentiality. Actuality, on the other hand, represents the motion, change, or activity that fulfils a possibility – and thus one can say that *the human soul is, essentially, actuality* [*entelecheia*], i.e. it actualises the matter provided by the body into an actual human being.

In the absence of movement (*kinesis*), actuality (*energeia*) and potentiality (*dunamis*) are equivalent to, respectively, form (*morphe*) and matter (*hyle*) – thus forming a quadratic scheme according to which a living being is indeed *hylomorphic*, i.e. a *necessary* combination of both matter and form, potentiality and actuality. This particular novel conception advanced by Aristotle set him, once again, on a contrary course concerning his principal intellectual opponents in this matter. Thus, according to Aristotle, the soul 'is not itself a certain kind of body (as the Atomists think), but neither can it exist without a body (as the Platonists think). It is something that belongs to a body of a given sort and so inheres in it …Most, if not all, of what living things do or undergo will thus be the activity of body and soul together'[282].

As a consequence of this, hylomorphism 'is widely regarded as the sort of middle course for which Aristotle is famous, a nuanced solution that does justice to the intuitions on each side, without going to either extreme."[283]Ultimately, then, since the soul is the form of the body, psychological phenomena must have both a formal and a material cause. According to *De Anima*, anger, for example, entails both a *formal* cause (a desire for reprisal motivated by a perceived slight) and a *material* one (the boiling of the blood around one's heart), thus illustrating Aristotle psychosomatic and hylomorphic understanding of such phenomenon, which represented a rather decisive break with psychological conception at the time, and ensured the continued endurance of Aristotle's conception of the human soul.

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[281] Victor Caston, 'Aristotle's Psychology' in Mary Louise Gill and Pierce Pellegrin (eds), *A Companion to Ancient Philosophy* (Blackwell 2006), 317-8
[282] Ibid., 318
[283] Ibid.

3. Dignity in the Christian Tradition

The claim that human dignity, as both theoretical concept and practical concern, has been uniquely espoused and championed by the Christian tradition as a whole is somewhat commonplace among theologians and more generalist thinkers associated with the latter. The extent to which this claim holds true, however, is very much open for debate. On the one hand, there appears to be sufficient ground to ascribe a clear and explicit concern for human dignity as a universal concept to certain expressions of that tradition. On the other, valid questions may be raised as to the actual universality of the practical application of the concept (insofar as it may or may not extend to non-Christians, depending on the specific time period and offshoot of Christianity that one considers), as well as to the groundbreaking originality that Christian theologians often claim for the Christian valuation of human dignity.

Any serious approach to this matter must, therefore, be well aware of these tensions and do its best to examine them in earnest. As such, the true scope of the Christian concept of dignity and any of its eventual theoretical roots and offshoots outside the Christian tradition will constitute inescapable lines of inquiry here.

3.1. Christian concepts of Human Dignity

When addressing the origins and nature of the concepts of human dignity within the context of Christian philosophy and theology, the first aspect that one must necessarily consider is the doctrine know as *imago Dei* [image of God]. According to the latter, to put it succinctly, 'every single human being, male and female, is created in the image of God and therefore has responsibility before God' – thus establishing a sort of 'egalitarian nature of human dignity.'[284] But while this doctrine does indeed play a pivotal role in Christian theology, it should be noted that it is not exclusive to the latter, instead cross-sectioning a variety of theo-philosophical traditions:

> [f]rom Genesis to the Pauline epistles to the *hadiths* of Sahih al-Bukhari, the sacred texts of Judaism, Christianity, and Islam affirm that human beings were created in the image of God. Throughout these traditions' respective histories, prominent figures such as Maimonides, Thomas Aquinas, and Ibn Arabi have made the image of God central to questions of religious thought and life. More recent adherents continue to discuss the image of God and often treat it as interchangeable with another term that many take to be its secular analog—namely, human dignity"[285]

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[284] Ellen Davis, 'Human Dignity' in Michael Ipgrave and David Marshall (eds), *Humanity: Texts and Contexts* (Georgetown University Press 2011), 71-2

[285] Matthew Puffer, 'Human Dignity after Agustine's *Imago Dei*: On the Sources and Uses of Two Ethical Terms' (2017) 37(1) Journal of the Society of Christian Ethics, 65

As Matthew Puffer argues, this analogy or even interchangeability between the doctrine of *imago Dei* and the sacrosanct value of human dignity leads today to an effacement of the former notion, in favour of the latter. While debate surrounding human dignity is commonplace in contemporary political and legal discourse, very rarely does one hear of *imago Dei* being invoked in such discussions – even within more religious circles. That fact, however, should not be taken to mean that the doctrine of *imago Dei* has lost any sort of relevance, but rather that its role in the development of the very notion of human dignity has gradually – and unfortunately – become less explicitly acknowledged.[286]

The much needed consideration of the importance of *imago Dei* in the history of western thought is undoubtedly made harder by the fact that, even only within the scope of Christian theology, that seemingly straightforward doctrine has been interpreted in multiple ways by different thinkers at different times:

> Aquinas's account of the image of God corresponds to Augustine's later interpretation advanced in *De trinitate*. Aquinas argues that the image of God in the human is the rational soul's natural capacity for judgment, choice, and action in accordance with that choice. According to Thomist ethicist Jean Porter, this account explains why "torture is an assault on human dignity" and ought, for this reason, to be absolutely prohibited. […]Torture is thus a violation of human dignity because it attempts to undermine an agent's rational judgment, choice, and action, no matter the moral state of the accused—it assaults the very capacity that is the image of God."[287]

According to Martin Luther, on the other hand,

> the "image and likeness of God" of Genesis indexes the peculiar dignity of pre-Fallen human nature. Rejecting the later exposition in *De trinitate*, wherein Augustine argues that the image of God is never lost, Luther favors an interpretation consonant with *The Literal Meaning of Genesis*—the image of God was intrinsic to the human as created but was lost through sin. It is not difficult to see how this conception of the image of God corresponds to less stable notions of human dignity in which even basic rights might be forfeited or lost by an individual's sin or gross violations of justice. If human dignity grounds rights to life, liberty, freedom of religion, and the prohibition of torture, but a guilty verdict (e.g., in cases of first-degree murder, crimes against humanity, or treason) might forfeit or invalidate such rights, this corresponds to a view that human dignity might be intrinsic to those who possess it but does not inhere for those who violate some moral obligation. In this account, human dignity is not inalienable or absolute; like the image of God, it can be lost."[288]

The assessment of the extent to which the notion of *imago Dei* has directly contributed to the contemporary notion of human dignity will vary significantly depending on what perspective one lends credence to. When it comes to the prevalence of a concept of human dignity that, at the very least, *feels* like it may have been inherited from Christianity and the notion of *Imago Dei*, one must

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[286]Ibid.

[287] Ibid., 78

[288] Ibid., 77

necessarily consider the work of one of the key figures responsible for such contemporary endurance: the former pope Benedict XVI.

> "For Benedict [XVI], the basis of the dignity of the human person is the belief that the human being is created in the image of God, imago Dei. To be created in the image of God says something about what the human person is (1.1), what the human person is capable of (1.2), and what the human person's purpose is, the end or *telos* for which the human person is created and to which the human person should direct his or her actions (1.3). The latter can be achieved by taking the first two aspects properly into account, from which Benedict derives a normative morality (2)."[289]

In light of Benedict XVI's compelling argument in favour of a concept of human dignity boasting Christian roots, and immediately following the above reasoning, it is equally important to note that

> [t]he dignity of the human person is referred to in a way that suggests that it is a normative criterion. This is understandable when one realises that this is precisely how Benedict understands the dignity of the human person. For example, Benedict acknowledges the importance of human rights, but insists that they are founded on the dignity of the human person: 'a stable, not relative, not optional foundation.'"[290]

All things considered, there appear to be compelling reasons to regard the Christian doctrine of *imago Dei* as a fundamental source of that concept of human dignity which is so widely lauded and applied in contemporary discussion surrounding human rights. On the one hand, Christian philosophy and theology has decisively influenced the entirety of Western thought – including in matters of philosophy, politics, and law – from Christianity's rise to dominant religion until today; on the other hand, many of the features and internal logic of the doctrine of *imago Dei* seems to directly lead to the acknowledgement of an inherent and inalienable worth of human beings which must be rightfully regarded as the conceptual precursor to the very notion of human dignity and eventually (universal) human rights.

3.2. The critique of "Christian exceptionalism" regarding Human Dignity

Despite the arguments that have just been laid out, the view according to which the concept of human dignity was, in essence, a creation of Christian thought is not without its critics. Sulmasy, for example, grounds his particular critique on a linguistic analysis of the very scripture that is usually cited in support of the thesis concerning the Christian origin of human dignity:

> [w]hile it is often assumed that the idea of dignity is essentially religious, it is hard to make this case from the Jewish and Christian Scriptures. The Hebrew word translated as 'dignity', *gedula*, occurs rarely in the Hebrew Scriptures and means something more like nobility of character or personal standing in the community. The Greek σεμνοτης (*semnotes*) is sometimes rendered in English as

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[289] David Kirchhoffer, 'Benedict XVI, Human Dignity, and Absolute Moral Norms' (2010) 91(1035) New Blackfriars, 589
[290] Ibid., 588

"dignity". It occurs, however, only three times in the Christian Scriptures and is probably better translated as "seriousness". The word best translated today as 'dignity', αξιοπρε´πεια (*aksioprepeia*), is not used in the New Testament at all.[291]

Similarly, even if one broadens the scope of analysis to feature such prominent Christian scholars as Thomas Aquinas, the overall outcome does not appear to substantially change: 'Aquinas uses dignitas and its cognates 185 times in the *Summa Theologiae* and it tends to mean the value something has proper to its place in the great chain of being; for example, plants have more dignity than rocks; angels more dignity than human beings.'[292] As Chalmers and Ida concur, the concept of dignity does not appear to be 'unique to the Catholic nor other Christian faiths. The idea of human dignity is common to the other great world monotheistic religions of Judaism and Islam. The idea of human dignity appears to have been familiar in the development of Japanese society.'[293]

Thus, to conclude in a sentence the point being made by critics of what we might call a sort of *Christian exceptionalism* in matters pertaining to the origin of human dignity, 'while Christians may have always had some concept of human dignity, until very recently "it had not been developed into either a clearly defined literary form or an internally consistent set of ideas".'[294]

This latter assertion, however, begs the question of exactly how recent is "recently" in this regard? According to Rosalind Hursthouse, it is as recently as a papal encyclical dated from 1888, which posits that

> Liberty, the highest of natural endowments, being the portion only of intellectual or rational natures, confers on man this dignity—that he is 'in the hand of his counsel' and has power over his actions. But the manner in which such dignity is exercised is of the greatest moment, inasmuch as on the use that is made of liberty the highest good and the greatest evil alike depend.[295]

Apart from this specific encyclical, still according to Hursthouse's analysis, there is another significant one, dated from 1891, which addresses the conditions of labour in industrialised nations and the concern that the rich may be exploiting the poor – thus impinging upon 'that human dignity which God Himself treats with great reverence.'[296]

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[291] Daniel P. Sulmasy, 'Human Dignity and Human Worth' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity* (Springer 2007), 10
[292] Ibid., 11
[293] Don Chalmers and Ryuichi Ida, 'On the International Legal Aspects of Human Dignity' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity* (Springer 2007), 159
[294] Daniel P. Sulmasy, 'Human Dignity and Human Worth' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity* (Springer 2007), 11
[295] Rosalind Hursthouse, 'Human Dignity and Charity' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity* (Springer 2007), 63
[296] Ibid.

In addition to the surprisingly recent compromise with the safekeeping of human dignity by the Christian church, other critics point out the apparent contradictions in the Christian tradition's stance regarding the concrete application of the concept of human dignity:

> [the] specious interpretation of alterity as lack of humanity and hence with diminished or departed dignity has given rise to the most atrocious crimes against humanity. In the bicentenary year of the abolition of slavery it is important to recall that these atrocities have been condoned and condemned, sustained and eventually abolished by Christian action. The historic slave trade itself was justified by appeal to Scripture and eventually abolished by a similar appeal. Apartheid, a paradigmatic assault on human dignity, was validated by the Dutch Reformed Church with a Bible-based theology. At the same time it was strongly and actively opposed on theological grounds by Christian leaders such as Desmond Tutu, Alan Paton, and Trevor Huddleston.[297]

Equally noteworthy are the debates generated within Christendom surrounding practices that openly defy the established standards of human dignity, particularly in what refers to the wars against the "heretics" during the Crusades and against "uncivilized pagans" in the colonisation of the Americas.[298]In fact, the varying stance adopted by the Christian leaders in matters that directly depend on the acknowledgement of universal human dignity raises a point of criticism which is often levelled, as noted before, against Cicero's use of the concept of *dignitas*: whether the latter is inate or acquired (and, therefore, relinquishable). As St. John and Blackler put is,

> [the] muddied confusion of "human" with "human action" raises the question as to whether one's right to have dignity respected unconditionally can be forfeited by deliberate behaviour. The theological understanding referred to earlier would deny that this is possible—dignity is a given not a merit—the dignity within each person is the presence of the divine, no matter how perverted and distorted the behaviour of the individual. It is interesting to note, however, that the Christian actions which any champion of the notion of human dignity would reject, have been the outcome not of a definition of 'dignity' but of 'the human'. … This ambiguity is again the result of muddied and muddled thinking, of intelligence bewitched by words.[299]

Ultimately, the critics posit, the Christian engagement with the notion of human dignity simply does not run deep enough to overcome the ambiguity that the history of Christianity seems to evidence in matters pertaining to the dignity of all human beings. As such, any intention to establish a direct line between Christian philosophy and theology and the contemporary concept of human dignity (or human rights) cannot be regarded as fully legitimate.

Even if Christian theology cannot be rightfully regarded as the sole source from which the contemporary notion of human dignity springs, it should, nevertheless, be acknowledged as a key

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[297] Eilidth C. St. John and Stuart Blackler, 'Religion and Dignity: Assent and Dissent' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity* (Springer 2007), 130-1

[298] Cf. Lars K. Pharo, 'The Council of Valladolid (1550–1551): A European Disputation about the Human Dignity of Indigenous Peoples of the Americas' in Marcus Düwel et al. (eds), *The Cambridge Handbook of Human Dignity* (Cambridge University Press 2014), 95-100

[299] Eilidth C. St. John and Stuart Blackler, 'Religion and Dignity: Assent and Dissent' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity* (Springer 2007),131

step in the process of conceptual construction, being influenced by certain preceding perspectives, and affecting subsequent ones. In what pertains to the former, it is perhaps rather unsurprising to realize that ancient Greek philosophy provided a sort of seeding bed for many of the ideas leading up to the Christian conception of the specific dignity of human beings:

> Plato and Aristotle both took it that we shared rationality with the gods, and in Christianity, this became the thought that we are superior to all the other animals because we are made in God's image—not, of course, insofar as we suppose God to have two legs and opposing thumbs, but insofar as we are rational and God is supremely so. In both traditions, this rationality is of a rather special sort. It is not the capacity to do philosophy, mathematics, and science, nor even to figure out means to ends; it is the capacity to set our own ends, to choose good rather than evil; hence its connection with being a moral agent and the idea of free will.[300]

Furthermore, the Christian perspective on human dignity can be said to have been influenced by the work of later Hellenistic and Roman philosophers, such as the Stoics.

> [t]he Church Fathers connected the ancient idea that human beings have a special place in the world because of their rational capacities and their ability for self-formation (the Stoics, Cicero), with the Christian doctrine of the human being as created in the image of God (*imagoDei*) or the redeemed (baptized) human as similar to God (*similitudo*). That is, by participating in God in being His image, human beings at the same time participate in God's reason. Humans have the capacity to reflect on themselves, and to exercise free will (*liberum arbitrium*)."[301]

From both of these ancient traditions of thought Christian theology collected a crucial idea: that 'the point of claiming that the human being is the uniquely rational animal, and thereby has a special sort of status, is to call us to moral duties or responsibilities that we have because we are human.'[302]Such is indeed the argumentative role that such an idea plays in both Christianity and the aforementioned philosophical schools of thought.

On the other hand, Christian tradition's influence on many of the key thinkers that advocated for their own strong conceptions of human dignity appears to be just as undeniable as ancient philosophy's impact on the former. A clear example of this is provided by Kant's introduction, in 1785, of the famous argument according to which everything has either a price or a dignity. Recovering Kant's reasoning, Hursthouse explains that

> [i]f something is exalted above all price and so admits of no equivalent, then it has a dignity, or intrinsic value. Rational beings (humans and God) have dignity; other things do not. Humans are persons and

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[300] Rosalind Hursthouse,'Human Dignity and Charity' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity* (Springer 2007), 60-1

[301] Dietmar Mieth, 'Human Dignity in Late-Medieval Spiritual and Political Conflicts' in Marcus Düwel et al. (eds), *The Cambridge Handbook of Human Dignity* (Cambridge University Press 2014), 74

[302] Rosalind Hursthouse,'Human Dignity and Charity' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity* (Springer 2007), 61

must be treated as ends in themselves; everything else (notably, all the other animals) are called things, have only relative not intrinsic value, and may be treated merely as a means to our ends."[303]

In advancing this definition of dignity, Kant deliberately distanced himself from the more typically classical notion that dignity must be acquired through individual action and adopted the opposite view – that human dignity is innate and inherent. And although the argumentative basis with which he seeks to ground that innateness – a shared rationality – is different from the one advanced by Christian theology –a similitude with God – the internal logic of Kant's reasoning is indubitably inspired by the one developed by Christian theologians. As Brennan and Lo explain,

[s]ince God's love, approval, and commands are traditionally the source and foundation of all values and moral principles, the modern secular notion of moral dignity, value, standing, or right as absolute and unconditional inherits the notions of necessity and universality from Christian theorizing. However, for those who lack the faith in the existence of such a loving and powerful God, what rational grounds are there for thinking that all human beings have equal and necessary dignity, which in turn generates equal, universal, and absolutely inviolate human rights? What, apart from such a powerful theoretical device as God's equal and unconditional love for all human beings, can legitimize the demanding modern democratized conception of dignity?[304]

Kant's answer relies fundamentally in rational agency and autonomy. This does not, however, nullify the substantial debt that his philosophy owes, in this regard, to the Christian perspective.

3.3. Key contributions of the Christian tradition to human dignity

Given the clear influence that the Christian perspective on human dignity had on such relevant intellectual figures in the West, Christian theology's contributions form an important stage in a sort of continuum of Western thought that essentially led us from the *poleis* of ancient Greece to the *Universal Declaration of Human Rights*. Ultimately, 'ideas of dignity and rights reach back to the idea of the nobility of human reason in the thought of ancient Stoic philosophers and, even more importantly, in terms of later developments, to the Judeo-Christian conception of each human being as imago Dei'[305]

The Christian perspective on human dignity has therefore been influenced by a variety of classical sources, and has in turn influenced the subsequent development of these ideas during the Enlightenment and beyond. Within that process of mutual influence, Christian theology – at least, when viewed outside of episodes of fundamentalist excitation, such as the Crusades or the

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[303] Ibid., 62

[304] Andrew Brennan and Y. S. Lo, 'Two Conceptions of Dignity: Honour and Self-Determination' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity* (Springer 2007), 48

[305] Glen Hughes, 'The Concept of Dignity in the Declaration of Human Rights' (2011) 39(1) Journal of Religious Ethics, 5

Inquisition – contributed decisively to establish the equality and universality of human dignity regardless of particular circumstances[306].

Two fundamental ideas stand out in terms of truly novel contributions made by Christianity concerning our understanding of human dignity. The first, as Hursthouse points out, is the fact that 'however wicked and debased you might have made yourself, you still had not lost irrevocably, the thing that made you, as a human, different from the other animals. Every human being is to be loved, is worthy of love, simply because they are human, made in God's image'.[307] This view stands in direct contradiction with most classical thinking, according to which an individual's actions could feasibly deprive the latter of dignity or inherent worth.

The second idea pertains to a certain essential humanism that characterizes the Christian perspective, and which is reflected also in our contemporary understanding of the fundamental importance of not only acknowledging, but actually enforcing the lofty ideals of human dignity and universal rights. Juxtaposing two substantially different perspectives in this regard, Hursthouse notes the following:

> The first (which I will call the 'Greek', even though Christianity, as I just noted, shares it) concerns what we human beings owe to ourselves; each of us, because we are human, ought to be living the life of virtue, the life that befits us, as rational creatures. The second, which I will call the 'Christian', concerns what we human beings owe to other human beings; other human beings, because they are human, made in God's image, ought to be treated with Christian love.[308]

Inasmuch as this latter view can be construed as being less conceptually demanding and more broadly inclusive in the scope of its concern, one could argue that represents a conception of dignity more qualified than most to coherently interface with the notion of human rights. It is not so much concerned with what we owe ourselves as rational beings, but rather with the idiosyncratically Christian moral demand to extend our love and care to the other – regardless of the particular circumstances that make up the other's life and environment. Building from this view, some contemporary Christian theologians have attempted to take the leap to a more consequential and all-encompassing notion of human dignity. An example of this is once again found in the writings of Benedict XVI, who argued for an understanding of imago Dei that necessarily leads to a heightened sense of the relation between human beings and the natural world, as well as an acknowledgement of all ecological and generational responsibilities that arise out of that.[309] According to the assessment of David Hollenbach,

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[306] Andrew Brennan and Y. S. Lo, 'Two Conceptions of Dignity: Honour and Self-Determination' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity* (Springer 2007), 53

[307] Rosalind Hursthouse,'Human Dignity and Charity' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity* (Springer 2007), 61

[308] Ibid., 62

[309] David Hollenbach, 'Human Dignity in Catholic Thought' in Marcus Düwel et al. (eds), *The Cambridge Handbook of Human Dignity* (Cambridge University Press 2014), 255

[t]his support for environmental integrity and sustainability as a requirement of human dignity implies that the person who possesses dignity is a bodily, biological as well as spiritual, being. Recent Catholic discussions of human dignity have stressed that the biblical understanding of the person rejects mind–body dualism. The dignity of the person is not simply the dignity of a spiritual soul or of what Kant would call a "noumenal" self, transcending empirical and bodily existence. Human bodiliness, including the reality of human sexuality, is an aspect of the image of God in the human person. Respect for the dignity of the person thus calls for respect for the person's biological needs such as those for food, shelter and healthcare. It also requires respect for the sexual differentiation of male and female, including the equality of man and woman.[310]

In conclusion, the specificity of the Christian approach to the matter of human dignity lies, essentially, in the connection made between the latter and the notions of *imago Dei* and free will. Upon closer inspection, the first of those concepts – representing the belief that human beings have been created in God's own image, and are therefore endowed with an inalienable inherent dignity as a result of it – may indeed provide an advantage regarding conceptions where human beings' rational ability constitutes the linchpin of human dignity, insofar as the latter, when approached uncharitably, can plausibly be made to exclude certain individuals (e.g. children or the intellectually challenged) from a strict attribution of dignity.

This advantage, however, is less solidly grounded than one might assume, and the very history of the Catholic Church provides several examples where efforts of biblical interpretation were able to advance the opposite conclusion – that certain human individuals, as a result of their supposed moral, cultural, linguistic, or intellectual shortcomings, could legitimately be regarded as devoid of human dignity.

3.4. Human dignity in Pico della Mirandola

Although Giovanni Pico della Mirandola's efforts towards the development of the notion of human dignity can, *de rigueur*, be included in the broader scope of Christian theology, they are different from the mainstream view of the latter. Indeed, the significance and originality of Pico della Mirandola's particular contributions in this regard continue to be widely acknowledged even today. In an extremely summary assessment of his place in the history of these ideas, Harper presents "a sort of drive-by history [of the concept of human dignity] up to Kant: Cicero sensed it, Pico della Mirandola hymned of it, and then Kant explained it."[311]

The "hymn" that Harper attributes to Pico della Mirandola consists essentially in his *Oratio de hominis dignitate* (*Oration on the Dignity of Man*), in which he lauded the inherent dignity of human being as ensuing from their shared nature with the divine (being a key part of Creation), as

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[310] Ibid.
[311] Kyle Harper, 'Christianity and the Roots of Human Dignity in Late Antiquity' in Timothy S. Shah and Allen D. Hertzke (eds), *Christianity and Freedom: Volume 1, Historical Perspectives* (Cambridge University Press 2016), 126

well as – and crucially so – from the human pursuit of knowledge. According to Pico's view, human beings are the only creatures who are able to better themselves out of their own volition (i.e., by striving for greater knowledge about themselves, their moral existence, and the reality around them), and are therefore the sole entity in creation able to act as a driving force in itself – rather than simply being subject to external forces such as the laws of nature.

As we have seen before, most attempts at outlining something akin to what we hold to be the inalienable dignity of human beings that preceded Pico della Mirandola fell somewhat short of the mark, liable to be accused (though sometimes unfairly) of being less than a wholehearted and explicit defense of the inherent dignity of all human beings (Seneca's views on slavery), or of failing to clearly differentiate between the "dignity" of one who holds prestigious office or conducts oneself in a "dignified manner", and the dignity that springs forth spontaneously from one's mere status as a human being (Cicero's account).

Pico della Mirandola's contributions in this regard largely build up on the work of his predecessors, as Rosen acknowledges: "Cicero's extension of dignity from a matter of the position of individuals in particular societies to the place occupied by human beings within the wider order of reality is taken up again in the Renaissance, most famously in Pico della Mirandola's oration known as *De Dignitate Hominis*."[312]

Pico della Mirandola, however, also imbued the concept of dignity with novel ideas, deeply connected with the notions of free will and self-determination:

> In his oration Pico gives an account of human nature that was to be in many ways seminal for the self-understanding of human beings in the modern world. The distinctiveness of man, he claims, lies precisely inthe way that human beings do not simply fulfill a preordained role. On the contrary, man chooses his own destiny, for God has given him the capacity to shape himself according to a range of possibilities not available to other creatures.[313]

Sharing in the general lines of this assessment, James Griffin adds that

> Pico della Mirandola […] gave an influential account of the link between our freedom and the dignity of our status. God fixed the nature of all other things, but left man alone free to determine his own nature. In this he is God-like. Man too is a creator—a creator of himself. It is given to man "to have that which he chooses and be that which he wills". This freedom constitutes, as it is put in the title of Pico's best-known work, "the dignity of man".[314]

Thus, there appears to be a relative consensus regarding the legitimacy of regarding Pico's *Oratio*as preparing the road towards our contemporary understanding of human dignity, decisively contributing the shift from viewing the latter as the privilege of selected few, to consider it the essential birthright of every human being everywhere – connected, to a large extent, to their

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[312] Michael Rosen, *Dignity: Its History and Meaning* (Harvard University Press 2012), 14
[313] Ibid., 14-5
[314] James Griffin, *On Human Rights* (Oxford University Press 2008), 31

capacity for self-determination and free will. That being said, however, if self-determination and free will do indeed play such a key role in the concession of a special dignity to human beings, the question might arise of whether we should perhaps regard human dignity less as a birthright, and more as an individual achievement. And that is, in fact, essentially the same line of reasoning followed by Pico:

> In his own historical context, Pico's vision was no doubt a radical one, for he envisions a humanity who is not simply the *imago dei* but, rather, a "creature of indeterminate image" (5:18). Or, as Ernst Cassirer articulates this now-familiar point, for Pico, humanity's "likeness and resemblance to God is not a gift bestowed on man to begin with, but an achievement for him to work out"; and "the dignity of man . . . consists in the fact that the work of man is the expression of his own will" (321; 344).'[315]

Without surprise, in light of this position, Pico is often credited as being the first thinker to conceive of a significant and almost causal connection between human freedom and human dignity.[316]This brings forth a nuanced interpretation of the concrete reality of human dignity and its source, wherein

> Pico himself never exactly names as 'human dignity' the definitive quality or characteristic of humanity that he celebrates. In the famous opening sections, Pico declares that he is not satisfied with the reasons advanced to explain the "excellence" of human nature. … If dignity thus seems to be a kind of absent presence in this text, one might suggest that this is precisely because the "dignity" of humanity finally resides not in any one particular characteristic but, rather, in its fundamental capacity to make and remake itself.[317]

This latter capacity, being the source of human dignity, is simultaneously the source of the ultimate *responsibility* in that regard. Pico essentially sustains that the development of each individual after birth – the construction of their individual essence, as it were – decisively depends on what aspect of human existence they choose to cultivate: those who focus on the reproductive and nutritive parts will become akin to plants; those who choose to instead indulge in sensual pleasures will become brutes; and only those who cultivate their reason will fulfil the promise of their creation in the image of God, being made one with that divine nature.[318] Although Pico's believes that every human being is equally endowed with the potential to achieve a dignity of the highest order in the whole of Creation, the fulfilment of that potential is decisively linked, in his mind, to the proper exercise of human freedom.[319]

In Pico della Mirandola's own words,

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[315] Scott Cutler Shershow, *Deconstructing Dignity* (University of Chicago Press 2014), 69
[316] Daniel P. Sulmasy, 'Human Dignity and Human Worth' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity* (Springer 2007), 11
[317] Scott Cutler Shershow, *Deconstructing Dignity* (University of Chicago Press 2014), 69-70
[318] Piet Steenbakkers, 'Human Dignity in Renaissance Humanism'in Marcus Düwel et al. (eds), *The Cambridge Handbook of Human Dignity* (Cambridge University Press 2014), 91
[319] Milton Lewis, 'A Brief History of Human Dignity: History and Application' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity* (Springer 2007), 94

[God] took up man, a work of indeterminate form; and, placing him at the midpoint of the world, He spoke to him as follows: "We have given to thee, Adam, no fixed seat, no form of thy very own, no gift peculiarly thine, that thou mayest feel as thine own […].A limited nature in other creatures is confined within the laws written down by Us. In conformity with thy free judgment, in whose hands I have placed thee, thou art confined by no bounds; and thou wilt fix limits of nature for thyself. […] Thou, like a judge appointed for being honorable, art the molder and maker of thyself; thou mayest sculpt thyself into whatever shape thou dost prefer. Thou canst grow downward into the lower natures which are brutes. Thou canst again grow upward from thy soul's reason into the higher natures which are divine".[320]

From the intimate connection that he establishes between human beings' freedom and rational ability, Pico della Mirandola's concept of human dignity is intimately tied not only with our capacity for self-determination broadly understood, but also with our idiomatic desire for knowledge. This, in turn, leads us to a key question in the development of the concept: what kind of dignity do human beings have, and why do they have it? [321] As Rosen puts it,

> if we return to Pico della Mirandola's oration, we can see it as giving an answer to the question what kind of dignity human beings have. *De Dignitate et Augmentis Scientarum* asks about the place and value of learning, and so on. Different things that have dignity have it in different ways, and they may have it for different reasons. Thus Pascal, in one of the most famous of his *Pensées*, agrees with Pico in seeing man as having a dignity elevated above the rest of nature[322]

Therefore, the key question regarding human dignity in Pico's work appears to be twofold: firstly concerning its definition (its *essence*), and secondly concerning how its existence can be explained (its *origin*). Answering both of these questions in a satisfying and coherent fashion is the complex challenge that Pico puts forth in the *Oratio*, and which we will examine in what follows.

Beginning with the attempt at a definition, in the *Oratio* 'dignity itself is identified as an ability internal to the person, one which, when properly exercised, enabled humans to aspire to great moral heights'; at the same time, however, 'Pico recognized the incompleteness and hesitancy of the human being when confronted with the choice of what to be and what to do'[323]. As such, Shershow explains,

> the word and concept of dignity in this text is thus forced, as it were, to do double duty: it denotes the value and worth of a humanity essentially defined by its power "to degenerate into the lower forms of life, which are brutish; [or] to be reborn into the higher orders, which are divine" (5:23); and also, as we have just seen, it denotes the value and worth of those higher orders.[324]

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[320] Giovanni Pico della Mirandola, *On the Dignity of Man* (Hackett Publishing Company 1998), 5
[321] Michael Rosen, *Dignity: Its History and Meaning* (Harvard University Press 2012), 17
[322] Ibid., 17-8
[323] Andrew Brennan and Y. S. Lo, 'Two Conceptions of Dignity: Honour and Self-Determination' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity* (Springer 2007), 45
[324] Scott Cutler Shershow, *Deconstructing Dignity* (University of Chicago Press 2014), 70

Pico's firm belief in the extraordinary power and extent of human freedom appears to have, however, an undesirable consequence in this regard: if human beings are indeed free to transcend base animality through the transformative ability of human reason, they must – following the reverse logic – be equally free to succumb to a degeneration into the state of mere brutishness.[325]And if that is the case, then freedom cannot be rightly claimed to constitute the essence of human dignity. Faced with this quandary, Pico della Mirandolla seems to offer a nuanced explanation: 'Humanity's freedom as such (that is, the freedom that is proper to it, the freedom that is its dignity) actually compels humanity to move only towards those higher orders, because otherwise they sink to the level of "brutes" who are correspondingly defined by their lack of such freedom.'[326]

That is, *genuine* freedom, freedom of the kind that characterizes human beings, is necessarily oriented upwards by the dicta of reason – otherwise it would consequently lead to its direct opposite, and that is a contradiction in terms. As Steenbakkers puts it,

> [t]he originality of Pico's Oration is its bold preference for the power to choose between different routes of development as the distinctive feature of human dignity. There is no external pressure to opt for one rather than the other: "thou art confined by no bounds". Yet it would be a mistake to conclude that the choice is genuinely open: throughout the Oration, Pico vividly depicts the hierarchical organization of creation. Human beings may take the intellectual way to contemplation, or the animal or even vegetable way to physical satisfaction, but God's intention is clear. Those who develop the intellect will be rewarded by peace of mind, those who degenerate into a sensual or vegetative be punished by transforming themselves into lower beings.[327]

However persuasive we may deem Pico's arguments in this regard to be, a substantial problem in his freedom-based conception of human dignity still unavoidably remains. From all that has been stated thus far, it would seem that Pico's answer to that twofold question placed above – regarding the definition and the origin of human dignity – is provided by a single notion: precisely, that of human freedom. But if freedom represents, before anything else, the potential for human beings to fulfil their promise of dignity, how can it simultaneously be synonymous with the actual reality of human dignity? In other words, is freedom the source of human dignity or is it human dignity itself? As Shershow succinctly puts it,

> if dignity names both humanity's potential for self-fashioning and the achieved potential, the particular kind of self that may (or may not) be fashioned, then humanity is "free" only insofar as it chooses correctly to reject animality and manifest itself through reason. Thus both the freedom and the universality of dignity evaporate the very moment that it [freedom] begins to exercise itself in its own most proper form.[328]

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[325] Ibid.
[326] Ibid.
[327] Piet Steenbakkers, 'Human Dignity in Renaissance Humanism' in Marcus Düwel et al. (eds), *The Cambridge Handbook of Human Dignity* (Cambridge University Press 2014), 91-2
[328] Scott Cutler Shershow, *Deconstructing Dignity* (University of Chicago Press 2014), 71

Significantly, out of this seemingly incidental logical incongruity seems to arise the possibility of a pernicious exclusionary stance regarding the actual concession of human dignity:

> it is this potential that makes humanity, as Pico repeats four times in the oration's opening sections, "admirable." But … the argument necessarily marks dignity with a certain inner tension. For human dignity seems to reside both in humanity's general potential for self-fashioning and in the particular self that is fashioned and achieved by *some* though not *all* humans.[329]

There is indeed a crucial difference between Pico's conception of human dignity and the one that we previously ascribed to Christian theology broadly speaking. After all, Pico's Oration seems to deliberately avoid the 'Christian idea that this dignity is something that no man can lose'[330], sustaining instead that human beings can – and must – exercise their freedom in a rational manner in order to elevate themselves to a higher form of life than that of mere beasts. As such, Pico's reasoning appears to focus on the intrinsic worth of the *capacity* to achieve a higher form of existence, rather than focusing on the nature of the latter. This is, as Brennan and Lo acknowledge, a highly consequential approach:

> [c]onsider again the idea central to Pico's oration—that humans all have a similar capacity, but that the exercise of that capacity varies widely from person to person. Two important things flow from Pico's idea, one, widely recognized, the other, not. We have just commented on the first, namely the subsequent attempt to secularize an essentially Christian ethic by appeal to features—reflexive rationality, freedom, the will to power, and so on—that are supposedly unique to human beings. The second feature in Pico is far less often noted but we regard it as significant: this is the distinction he makes between capacities on the one hand, and their exercise on the other[331]

Far from mere topic of scholarly philosophical or theological discussion, this feature of Pico's conception bears substantial practical implications even concerning the contemporary acknowledgement of dignity as a pivotal ethical and legal principle:

> [i]ndeed, if autonomy is what underpins the claim that people have a special moral status, then certain offences against people—unjust detention, for example,—are objectionable not because they interfere directly with the capacities that we have, but because they interfere with the exercise of such capacities. For the modern conception, then, it seems that the possession (or loss) of dignity relies both on having (or lacking) a capacity of certain sort, and also on being able (or unable) to exercise that capacity.[332]

In conclusion, Pico della Mirandola's reflections on human dignity, as outlined in the *Oratio*, represent a substantial step towards a conception of dignity that is intrinsically tied with innate capacities of *all* human beings. This notion, however, is not without fault – namely, the seemingly

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[329] Scott Cutler Shershow, *Deconstructing Dignity* (University of Chicago Press 2014), 69

[330] Rosalind Hursthouse,'Human Dignity and Charity' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity* (Springer 2007), 62

[331] Andrew Brennan and Y. S. Lo, 'Two Conceptions of Dignity: Honour and Self-Determination' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity* (Springer 2007), 49-50

[332] Ibid., 50-1

unresolved question of how can dignity be regarded as a truly universal feature of the entire human race when, at the very onset, it appears to be dependent on an exercise of free-will and power for self determination that is bound to be wildly different for each individual – depending not only on individual differences in terms of innate abilities (a verifiably true assertion, though less than "politically correct" by today's standards), but also on distinct external circumstances that may either potentiate or severely hinder the individuals' ability to put those abilities to proper use towards the *achievement* of their own human dignity.

4. The Enlightenment, Kant and Human Dignity

Immanuel Kant is widely regarded as a (if not *the*) key figure in the Enlightenment's project regarding the establishment of human dignity as a truly universal and foundational concepts in terms of moral and political philosophy. After all, when it comes to human dignity "the concept played only a small role in political theory until the time of that thinker on whose giant shoulders the modern theory of human rights largely rests, Immanuel Kant. It is appropriate that Kant's thought about dignity should stand at the center of any historical account of dignity, for it has been the inspiration—rightly or wrongly—of very much of what has come later."[333]

Whereas many of the previous attempt at doing exactly that found themselves somewhat undermined by a certain level of relativism or subjectivity (be it in the definition of the concept of dignity itself, or in the scope of its application to the whole of the human population), Kant undoubtedly attempts to place the issue well beyond the reach of any such pitfalls.

Perhaps nowhere is this intention more clearly and succinctly stated than the famous passage in the *Groundwork of the Metaphysics of Morals* where Kant draws a comparison between "price" and "dignity" as two essentially different forms of value: 'In the kingdom of ends everything has either a *price* or a *dignity*. What has a price can be replaced by something else as its *equivalent*, what on the other hand is raised above all price and therefore admits of no equivalent has a dignity.'[334]

Above all else, this passage unequivocally affirms the *absolute value* of human dignity – that is, a value that must, by definition, be entirely immune to subjective or utilitarian concerns of any sort. It should come as no surprise that the entirety of Kant's work, both preceding and following this radical statement is either grounded in it, or meant to further affirm it in the context of a broader philosophical system.

4.1. Kant's conception of dignity

Kant's own conception of human dignity, albeit ground-breaking in scope, was certainly not his own creation *ex nihilo*. In fact, the foundations for his work in this respect were, at least in part, laid by several key thinkers and the philosophical – as well as religious – traditions that preceded and, in some cases, inspired him.

To reiterate and summarise a sort of genealogy of the concept up to Kant,

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[333] Michael Rosen, *Dignity: Its History and Meaning* (Harvard University Press 2012), 19
[334] Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Cambridge University Press 1998), 4: 434

"There is a long history of the general concept of dignity understood as a distinguished social standing that is elevated above others …. The ancient Romans considered Roman citizenship as a status worthy of honour and gradually extended citizenship widely even to former 'barbarians' for service in their armies. Rousseau gave modern expression to the equal dignity of all citizens of an ideal republic, and Kant, drawing also from Christianity and Stoicism, extended Rousseau's political ideal into a moral ideal of all of humanity united by common principles. As members of a universal moral commonwealth, even ordinary human beings have a dignity independent of office, social class and political citizenship."[335]

Concerning the specifically Christian source of inspiration for Kant's approach to the concept of dignity, the latter

reflects its origins in the Christian anthropological vision of human beings as creatures distinctively endowed with freedom, reason, conscience, and creative power—each of whom is unique and irreplaceable, and all of whom share both a basic spiritual equality and an obligation to love and respect each other.[336]

Naturally, no consequential thinker has ever worked in a vacuum in what pertains to the specific social, political, and cultural circumstances of the time they lived in. Crucially, however, despite the fact that 'Kant shared some common prejudices of his time about the capacities of women and non-European "races", … his mature works repeatedly affirm the equal dignity of any person with the essential capacities to be a moral agent.'[337]These "capacities", in the context of Kant's work, may easily be deduced as eminently *rational* ones. And since all human beings are essentially rational in nature, dignity is inextricable from the human condition even under the most strenuous of circumstances:

[e]ven those who make the "evil" life-governing choice to subordinate the moral law to self-interest (Kant 1998: 55–61) must be respected as human beings assuming that, despite their bad choices, they have the basic rationality and freedom necessary for being moral agents. No one with these basic capacities can altogether escape rational and felt recognition of the authority of the moral law and consciousness of his or her capacity to choose to conform, for the basis of this recognized authority is not tradition, self-interest, human sentiments, external powers or Platonic forms, but the common practical reason of each person exercised from a standpoint of autonomy.[338]

Following this, a basic understanding of Kantian philosophy should be enough to realise that, if our rational ability and autonomy are *simultaneously* at the root of human dignity and human

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[335] Thomas E. Hill, Jr, 'Kantian Perspectives on the Rational Basis of Human Dignity' in Marcus Düwel et al. (eds), *The Cambridge Handbook of Human Dignity* (Cambridge University Press 2014), 216
[336] Glen Hughes, 'The Concept of Dignity in the Declaration of Human Rights' (2011) 39(1) Journal of Religious Ethics, 6
[337] Thomas E. Hill, Jr, 'Kantian Perspectives on the Rational Basis of Human Dignity' in Marcus Düwel et al. (eds), *The Cambridge Handbook of Human Dignity* (Cambridge University Press 2014), 216
[338] Ibid., 216-7

morality, then dignity and morally must be intimately related. That, according to Kant, is indeed the case. Elaborating on the ideas alluded to above, he states:

> [w]hat is related to general human inclinations and needs has a market price, that which, even without presupposing a need, conforms with a certain taste, that is, with a delight in the mere purposeless play of our mental powers, has a *fancy price* but that which constitutes the condition under which alone something can be an end in itself has not merely a relative worth, that is, a price, but an inner worth, that is, *dignity*.[339]

Making use of the crucial distinction between things that are means to an end (i.e., subjectively valuable) and things that are *an end in themselves* (i.e., absolutely valuable) – a linchpin of his moral writings – Kant clearly illustrates the relationship between rationality, morality and dignity: 'morality is the condition under which alone a rational being can be an end in itself, since only through this is it possible to be a lawgiving member in the kingdom of ends. Hence morality, and humanity insofar as it is capable of morality, is that which alone has dignity.'[340] And thus the argument towards the acknowledgement of a special and irrevocable value of human beings is further reinforced.

4.2. Reason and autonomy

The attribution of dignity to human beings does not ensue from the mere possession of a rational faculty, but rather of *the use of that faculty in a specifically moral manner*. This, Kant argues, is intimately connected the concept of autonomy:

> And what is it, then, that justifies a morally good disposition, or virtue, in making such high claims? It is nothing less than the share it affords a rational being in the giving of universal laws, by which it makes him fit to be a member of a possible kingdom of ends, which he was already destined to be by his own nature as an end in itself and, for that very reason, as lawgiving in the kingdom of ends - as free with respect to all laws of nature, obeying only those which he himself gives and in accordance with which his maxims can belong to a giving of universal law (to which at the same time he subjects himself). [341]

To this, in a later passage, Kant adds that

> nothing can have a worth other than that which the law determines for it. But the lawgiving itself, which determines all worth, must for that very reason have a dignity, that is, an unconditional, incomparable worth; and the word *respect* alone provides a becoming expression for the estimate of it that a rational

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[339] Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Cambridge University Press 1998), 4: 435
[340]Ibid.
[341] Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Cambridge University Press 1998), 4:435

being must give. *Autonomy* is therefore the ground of the dignity of human nature and of every rational nature."[342]

Given this, it would seem that Kant essentially defines dignity as the intrinsic value of a being capable of exercising moral autonomy. This capacity, as Kant also argues, is intimately connected with that being's rational nature, inasmuch as it is only the latter that allows one to conceive of, comprehend, and *willingly follow* rational (and therefore universal) moral laws. Consequently, it is this capacity to exercise moral autonomy that confers a being with an unconditional and incomparable worth that constitutes the essence of dignity.[343] Now, while Kant's own words leave little doubt regarding the key role played by autonomy in the phenomenon of human dignity – it is, after all, "the ground of the dignity of human nature", as we just witnessed – Kant's understanding of "autonomy" must be contextualised and clarified in contrast to the common contemporary definition of same term. Thus, it is important to note that, for Kant,

> [a]utonomy of the will is not the existentialist's freedom from rational constraints or a rational egoist's freedom to do whatever most effectively advances his or her interests. Autonomy is also not any particular right, for example, a right to have one's informed consent be respected in medicine, though it underlies arguments for such specific rights. Kantian rational autonomy, rather, is the general capacity and disposition to govern oneself by rational and reasonable principles that are justifiable to all insofar as they take up a common point of view in which everyone counts as an equal co-legislator of specific moral principles."[344]

Concerning this issue, Michael Rosen's analysis is also helpful in achieving greater conceptual clarity regarding Kant's genuine and systematically consistent understanding of autonomy, as well as how it may contrast with our own:

> "autonomy" has two ingredients: *autos* ("self") and *nomos* ("law"). On an obvious understanding, being "a law unto oneself" means that the self is a sovereign kind of absolute monarch that can choose as it pleases. But this is very far from Kant's idea. Kant writes… that "the lawgiving itself, which determines all value, must for that very reason have a dignity" (Ak. 4:436)—it is, in the first instance, the "lawgiving" that has dignity. What Kant has in mind as autonomy is the idea that the moral law which we must acknowledge as binding upon us is "self-given." This is something quite different from the modern understanding of autonomy as the capacity of individuals to choose the course of their own lives however they see fit.[345]

From this follows that Kant's account of autonomy as the ground for human dignity can only be truly understood in the context of his broader ethical system, in which autonomy is intimately connected with the rational ability to acknowledge and apply universal principles such as the

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[342] Ibid., 4:436
[343] Glen Hughes, 'The Concept of Dignity in the Declaration of Human Rights' (2011) 39(1) Journal of Religious Ethics, 14
[344] Thomas E. Hill, Jr, 'Kantian Perspectives on the Rational Basis of Human Dignity' in Marcus Düwel et al. (eds), *The Cambridge Handbook of Human Dignity* (Cambridge University Press 2014), 217-8
[345] Michael Rosen, *Dignity: Its History and Meaning* (Harvard University Press 2012), 25

categorical imperative. Because they ensue from the optimal exercise of human reason, these principles are ultimately *within us* – they are "self-given", as Rosen puts it – and that is the clearest indication of the autonomy on which human dignity is grounded: the ability to establish for ourselves the universal moral principles that ensue from human reason. Ultimately, it is this very capacity for morality that makes human dignity an end in itself.

4.3. The limitations and potential of Kantian dignity

In light of the rigidity inherent to a philosophical system where every particular component is expected to coherently interface with all other elements that comprise that system, it is perhaps understandable that Kant's account of human dignity – much like other related issues, such as the concrete application of his categorical imperative to real-life scenarios – is not devoid of certain limitations that often seem to lead to morally counter-intuitive conclusions. Chief among the latter is arguably the fact that – when taken to its final consequences – the Kantian thesis seems to irrevocably lead to the moral devaluation of 'animals, children and mentally incompetent human adults, making them subject to treatment merely as means.'[346] In other words,

> [o]ne oft-remarked difficulty that surrounds the Kantian account of dignity concerns the status of some beings who seem not to have rational nature, for example, non-human animals and very young children … If these beings indeed fail to have rational nature, then they have mere price, according to the account. But how, then, is our treatment of them subject to moral constraints?[347]

Naturally, this particular objection to Kantian ethics has long been a significant point of contention between those who seeks to challenge their validity, and those who seek to defend it. The latter often argue, for instance, that the rational nature of individuals must be respected even if it only exists as (yet) unfulfilled potential to fully develop the faculty of reason (in the case of ordinary infants or individuals whose intellectual deficit results from an issue in the process of normal gestation), or as a faculty that was once fully developed, but has since become impaired (such as the case of individuals who become mentally incompetent as a result of accident or disease). Even arguments of this sort, however, are not exempt from criticism regarding the solidity of the ethical principles that they aim to establish. In the words of Kerstein,

> that capacity [to develop a rational nature], which is presumably possessed by human embryos, is obviously not the same thing as rational nature itself, which is presumably not possessed by them. And it is not clear that expressing disrespect for the capacity to develop rational nature amounts to expressing disrespect for rational nature itself."[348]

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[346] Thomas E. Hill, Jr, 'Kantian Perspectives on the Rational Basis of Human Dignity' in Marcus Düwel et al. (eds), *The Cambridge Handbook of Human Dignity* (Cambridge University Press 2014), 218

[347] Samuel J. Kerstein, 'Kantian Dignity: A Critique' in Marcus Düwel et al. (eds), *The Cambridge Handbook of Human Dignity* (Cambridge University Press 2014), 224

[348] Ibid, 225

In addition to this difficulty, there are others that are characteristic of Kant's highly (sometimes impossibly) demanding standards for moral behavior. Kerstein cites three specific situations[349]: in the first one, a soldier chooses to dive onto a live grenade with the intent of saving the lives of his comrades around him; in the second, a journalist in possession of sensitive information is stalked by an individual intent on killing him to stop divulgement of the latter, and is forced to kill that individual in self-defense; in the third scenario, a doctor holds a single dose of a live-saving drug but is faced the impossible decision between two patients who need it – a twenty-year-old and a seventy-year-old. In all of these scenarios, the courses of action that most of us would find logical and reasonable are, in fact, morally impermissible according to Kant's account of dignity.

In sum, the Kantian conception of human dignity may often appear to be at odds with our almost intuitive moral evaluation of situations such as a noble sacrifice to save loved ones, acting in self-defense, or making the sort of impossible but necessary choice that many frontline doctors are faced with regularly. On the other hand, and despite this kind of apparent insufficiencies concerning specific situations, Kant's account of human dignity appears to hold significant potential regarding some of the broader issues related with the universal acknowledgement of human dignity, and how the latter may rightfully manifest itself on matters of human rights and justice. According to Jack Donnelly,

> [o]nly with Immanuel Kant (1724–1804) do we finally find a fully formed account of human dignity that is very similar to that of the Universal Declaration and is placed at the center of moral and political theory. Kant draws on Cicero and the broader Stoic tradition, as well as Samuel Pufendorf (1632–1694), who made significant use of the concept of human dignity … Kant's conception, however, not only was more comprehensive but has had considerable impact on later ideas—including the Universal Declaration of Human Rights.[350]

Taking the matter beyond foundational ethical principles and delving into the complex concrete issues of present-day international law, Kerstein ultimately corroborates the above assertion, pointing out that

> the International Covenant on Economic, Social and Cultural Rights (ICESCR) suggests that the human rights set forth in the Universal Declaration of Human Rights (UDHR) "derive from the inherent dignity of the human person". Some of the rights specified in the UDHR might be anchored in the Kantian account. For example, Article 4 articulates a right not to be held in slavery. Holding a person in slavery would express disrespect for her dignity: it would send the message that she had mere price.[351]

To conclude, in light of Kant's perspective of human dignity and its justification – and assuming that the difficulties mentioned above are satisfactorily addressed – one may indeed find oneself inclined to regard that Kantian perspective as providing well-grounded approach to human rights.

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[349] Ibid, 222-5

[350] Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press 2013), 126-7

[351] Samuel J. Kerstein, 'Kantian Dignity: A Critique' in Marcus Düwel et al. (eds), *The Cambridge Handbook of Human Dignity* (Cambridge University Press 2014), 224

One of its key strengths in this regard lies in the fact that human rights cease to be presented as merely "self-evident" or "self-standing" facts, but rather as an amalgamation of national and international juridical rights, underpinned by ethical principles that reflect an absolute respect for the fundamental dignity of human beings. Ultimately, if that is the case, then there appears to be good reason to value Kant's approach to dignity in terms of our ability to establish a solid foundation – at least from a Western point of view – for both human rights and broad freedoms[352] – which certainly explains why documents such as the Universal Declaration of Human Rights and its spiritual predecessors appear to have attempted to do just that.

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[352]'What Kant calls "The Universal Principle of Right" can be stated as a principle for distribution of freedom: "Any action is right", the Principle says, "if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law" [James Griffin, *On Human Rights* (Oxford University Press 2008), 59]

5. The Early French and U.S. Declarations of Human Rights

TheUniversal Declaration of Human Rights (UDHR), approved in 1948 by the United Nations, is, without a doubt, the most prominent piece of political initiative and legislation devoted to the purpose of enshrining the universality of inalienable human rights and dignity. This fact notwithstanding, the UDHR certainly did not appear out of a vacuum; on the contrary, many Western thinkers and schools of thought of moral and political philosophy can be included in a sort of continuum that moved progressively in the direction of enabling such a document to be drafted in the first place.

In this continuum of ideas and actions that ultimately led to the UDHR, there are two other notable documents that share many of its axiological goals and whose consideration is unavoidable in the scope of an analysis of the concept of human dignity: the United States *Declaration of Independence* and the French *Declaration of the Rights of Man and of the Citizen* (in the original, *Déclaration des droits de l'homme et du citoyen*).

Summarising the aforementioned continuum, Green states:

> The concept of humans having intrinsic value was given expression in the Roman law principle that human beings have fundamental natural rights which they possess by virtue of their humanity as opposed to their being conferred upon them by the State or the law. That is also implicit in the 1789 declaration of the Rights of Man and the Citizen made at the beginning of the French Revolution which asserts that "men are born and remain free and equal in rights" and that "the aim of every political association is the preservation of the natural and imprescriptible rights of man" and the American Declaration of Independence that "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights that among these are Life, Liberty, and the Pursuit of Happiness." Those concepts are reaffirmed in the United Nations Charter and in the Universal Declaration of Human Rights which recognize the "inherent dignity", "worth", and "equal and inalienable rights of the human person".[353]

None of the key documents pertaining to the declarations of human rights mentioned above makes explicit reference to the concept of "human dignity" – once again demonstrating how the concept itself has been much less ubiquitous and consensual throughout human history than what our current understanding of its necessary universality might lead us to believe. Instead, all considerations regarding what we might call the inherent dignity of human life that can be drawn from the aforementioned documents must be drawn indirectly from the context of what is being stated (which is hardly ideal).

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[353] Sir Guy Green, 'Human Dignity and the Law' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity: A Conversation* (Springer 2007), 152

5.1. The common background of the Declarations

Despite being 13 years (and an ocean) apart, both the American *Declaration of Independence* (1776) and the French *Declaration of the Rights of Man and of the Citizen* (1789) can be reasonably said to emerge from a common theoretical and philosophical ground. This is particularly evident if one considers the close connection between the Virginia Declaration of Rights, whose drafting [May 1776] preceded and undeniably influenced the Declaration of Independence, and the two Declarations mentioned above – with Thomas Jefferson ostensibly aiding his friend the Marquis de Lafayette in the drafting of the *Declaration of the Rights of Man and of the Citizen.*

Beyond these more circumstantial connections, the two Declarations espouse certain key philosophical principles as bases for the rights that they seek to promulgate. Their adherence to fundamental tenets of the Enlightenment, such as the focus on individual rights, autonomy, and the political concept of the social contract, is among the most clear and eloquent examples of that theoretical convergence. In addition to this, one other equally obvious commonality between the two documents lies in their emphasis on *natural rights*, rights that are both innate for and inalienable from all human beings – thus simultaneously being also *universal* in scope (in theory, at least, since women and slaves would systematically be regarded as ineligible for the legal benefits ensuing from both Declarations.)

Another similarity between the Declarations regarded their choice of justificatory arguments for the rights being posited. Introducing what she terms the "paradox of self-evidence, Hunt states: '[d]espite their differences in language, the two eighteenth-century declarations both rested on a claim of self-evidence. Jefferson made this explicit when he wrote, "We hold these truths to be self-evident." The French Declaration stated categorically that "ignorance, neglect or contempt of the rights of man are the sole causes of public misfortunes and governmental corruption."'[354]

How and why this constitutes a paradox, and why it should matter that it does, is explained by Hunt in terms quite familiar in other discussions about the topic:

> [t]his claim of self-evidence, crucial to human rights even now, gives rise to a paradox: if equality of rights is so self-evident, then why did this assertion have to be made and why was it only made in specific times and places? How can human rights be universal if they are not universally recognized? Shall we rest content with the explanation given by the 1948 framers that "we agree about the rights but on condition no one asks us why"? Can they be "self-evident" when scholars have argued for more than two hundred years about what Jefferson meant by his phrase?[355]

In any case, the shared philosophical bases of the American and French Declarations mentioned above have largely provided us with the foundations for the modern idea of human rights. In order to serve their ethical and political purpose, those rights must exhibit three fundamentally interconnected qualities: they must be *natural* (deduced from the very essence of human beings),

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[354] Lynn Hunt, *Inventing Human Rights* (W. W. Norton & Company 2007), 19
[355] Ibid., 19-20

egalitarian (extended indiscriminately to all human beings), and *universal* (applicable everywhere, regardless of particular circumstances). Only when all three qualities are present can we truly talk of a conception of human rights that is both internally coherent and practically useful. Tracing the evolution of human rights along these three vectors, Hunt posits that

> [t]he equality, universality, and naturalness of rights gained direct political expression for the first time in the American Declaration of Independence of 1776 and the French Declaration of the Rights of Man and Citizen of 1789. While the English Bill of Rights of 1689 referred to the "ancient rights and liberties" established by English law and deriving from English history, it did not declare the equality, universality, or naturalness of rights. In contrast, the Declaration of Independence insisted that "all men are created equal," and that all of them possess "unalienable rights." Similarly, the Declaration of the Rights of Man and Citizen proclaimed that "Men are born and remain free and equal in rights." Not French men, not white men, not Catholics, but "men," which then as now means not just males but also persons, that is, members of the human race.[356]

Despite the clear similarities in the arguments and conceptual grounds advanced in the declarations mentioned in the passage above, it is equally evident that there exists a relative ambiguity when it comes to the individuals who should be acknowledged as holders of the rights in question. Ascertaining whether the latter are going to be ascribed to "men" (as in "human beings") or to "citizens" is certainly not equivalent in either ethical, political, or even legal grounds – and, therefore, constitutes an issue which bears further consideration.

5.2. Human rights or the rights of citizens?

Any conclusions to be drawn regarding the concept of human dignity from both the American and French Declarations can only be so via a process of inference, given that no explicit mention of the concept is made in either document. This does not, however, mean that reaching such conclusions is impossible, but rather that it requires greater attention to be paid to certain key aspects in the manner in which each of the Declarations seeks to ground their claim to universal and inalienable human rights.

Firstly, if one introduces an added vector of analysis of this issue – namely, a comparison with the later (and broader) UDHR – one finds that key differences in tone and approach between the three documents evidently exist: 'the preamble [to the UDHR] does not seek to locate the universality or significance of the value of equal human dignity in further considerations of human nature or divine gift; it is simply asserted as a fundamental value in its own right. This is in contrast to the parallel passages in the American Declaration of Independence and the French *Declaration of the*

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[356] Ibid., 21

Rights of Man and of the Citizen, which hold, respectively, that people are 'endowed by their Creator' with certain rights and that human rights are 'natural' and 'sacred'.[357]

Despite their reputation as groundbreaking documents in the history of the establishment of *universal* human rights, both the *Virginia Declaration of Rights* and the U.S. *Declaration of Independence* somewhat failed to fully live up to their promise, in terms of the concrete legislation that they subsequently originated. That is, in part, what justifies the perhaps even greater reputation of the French *Declaration of the Rights of Man and of the Citizen* as the truly foundational document in this regard. As Hunt explains,

> [t]he U.S. Bill of Rights only came into being with the ratification of the first ten amendments to the Constitution in 1791, and it was a deeply particularistic document: it protected American citizens against encroachment by their federal government. In comparison, the Declaration of Independence and the Virginia Declaration of Rights of 1776 had made much more universalistic claims. By the 1780s, rights in America had taken a back seat to concerns about building a new national institutional framework. As a consequence, the French Declaration of the Rights of Man and Citizen of 1789 actually preceded the American Bill of Rights, and it immediately attracted international attention.[358]

In any case, it appears to be undeniable that both Declarations implicitly asserted the inherent dignity of human beings, a dignity as innate, inalienable, and universal as the "sacred" and "natural" rights that can be regarded as either the ultimate consequence or seminal underpinning of that dignity in an equally plausible and reasonable manner. Taking this idea further, Shultziner notes that

> the American Declaration of the Rights and Duties of Man (1948) declares that "the American peoples have acknowledged the dignity of the individual" and from this follows their recognition that "the essential rights of man are not derived from the fact he is a national of a certain state, but are based upon attributes of his human personality."…[Hence], it is apparent that human dignity in international instruments is the foundation and justification for rights and duties legislation: because of human dignity, human beings have rights and duties.[359]

The exact nature of the relationship between rights and dignity, however, is not necessarily as straightforward as a merely causal connection, but rather, more often then not, the result of the complex interplay between different foundational principles that ultimately come to shape and justify such a relationship. Explaining this particular take on the matter at hand, Miller points out that

> a set of principles are needed to regulate the relationship between dignity and rights. In Locke they are "life, liberty, property"; in the American Declaration of Independence, "life, liberty and the pursuit of happiness"; and in the French Revolution, "liberty, equality, fraternity."…[Whereas] "freedom,

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[357] Charles R. Beitz, *The Idea of Human Rights* (Oxford University Press 2009), 20
[358] Lynn Hunt, *Inventing Human Rights* (W. W. Norton & Company 2007), 126
[359] Doron Shultziner, 'Human Dignity: Functions and Meanings' in Marcus Düwel et al. (eds), *The Cambridge Handbook of Human Dignity* (Cambridge University Press 2014), 75

equality and participation in a political, social and international order"[may be seen] as the regulative principles of the Universal Declaration. They are goods essential to a life of dignity."[360]

If the roots of the concepts of human rights and human dignity within the Declarations are thus *shared roots*, a crucial difference still remains regarding the ground from whence each Declaration considers those roots to take their nourishment. More specifically, it is a difference that can be immediately perceived simply by reading the title of each document: whereas the French Declaration makes a point of including "citizens" alongside "Man" as the subjects of the universal rights that it posits, in the American Declaration the concept of "citizen" is not only absent from the title, but from the text of the document as well.

This conspicuous absence is not, as one might expect, mere coincidence – nor is it a sign of a markedly different philosophical starting point for both Declarations. Instead, it is a clear reflection of the substantial differences in political circumstances in both nations at the time of the drafting of each document. Since the American people were intent in securing their independence from British rule, a mere focus on civic rights as the foundational argument of their Declaration of Independence would obviously not do; if that argument was to carry any real persuasive weight, the latter would have to a appeal to a broader more like moral-philosophical notion, one that transcended the authority of national governments. And thus the American Declaration's focus on the *universal* rights of *Man*, rather than on the *particular* [civic] rights of *British subjects*. As Hunt explains,

> "[t]he universalistic strand of rights thickened in the 1760s and especially the 1770s as the breach widened between the North American colonies and Great Britain. If the colonists wanted to establish a new, separate country, they could hardly rely merely on the rights of freeborn Englishmen. Otherwise, they were looking at reform, not independence. Universal rights provided a better rationale, and accordingly, American election sermons in the 1760s and 1770s began to cite Burlamaqui by name in defense of 'the rights of mankind.'"[361]

On the interesting tension between particular and universal rights – in the sense that the former were necessary for the practical everyday reality of the rule of law, whereas the latter were needed in the struggle for independence – Hunt adds that

> [t]he events of 1774-76 thus temporarily fused particularistic and universalistic thinking about rights in the insurgent colonies. In response to Great Britain, the colonists could cite their already existing rights as British subjects and at the same time claim the universal right to a government that secured their unalienable rights as equal men. Yet, since the latter in effect abrogated the former, as the Americans moved more decisively toward independence they felt the need to declare their rights as part of the transition from a state of nature back into civil government—or from a state of subjection to George III forward into a new republican polity. Universalistic rights would never have been declared in the

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[360] Milton Lewis, 'A Brief History of Human Dignity: Idea and Application' in Marcus Düwel et al. (eds), *The Cambridge Handbook of Human Dignity* (Cambridge University Press 2014), 100
[361] Lynn Hunt, *Inventing Human Rights* (W. W. Norton & Company 2007), 120

American colonies without the revolutionary moment created by the resistance to British authority. Although everyone did not agree on the importance of declaring rights or on the content of the rights to be declared, independence opened the door to the declaration of rights."[362]

As a means to an end, the American arguments in favour of independence attempted to transcend the customary language and conceptual framework that would be expected of a similar legal document at the time. The focus is not placed in traditional or civic rights, but on the laws of Nature; the Declaration is addressed to the King as a symbol of political authority, but also to God, whose authority must necessarily transcend and overrule the former; and the locus of sovereignty is no longer the King or the Parliament, but rather "We the people".[363]

Following this notable shift, which undeniably served as catalyst for the concept of inalienable human rights to begin pervading the intellectual circles of Europe at the time, the conflict between "natural" and "civil" rights was increasingly thrust into the forefront of some of the most substantial discussions on the subject. This was especially true following the publication of Richard Price's highly influential pamphlet of 1776, *Observations on the Nature of Civil Liberty, the Principles of Government, and the Justice and Policy of the War with America*, which motivated substantial controversy in Britain at the time. Despite the often energetic reactions against it by some of his contemporaries, Price's pamphlet further aided the idea of innate and inalienable natural rights gain not only visibility, but also an increasingly vocal supporter in Europe[364].

Now, it might be assumed that the drafters of the French Declaration knowingly and willingly positioned themselves on the "civil rights" side of the aforementioned debate. That is simply not the case. In fact, as mentioned before, the impact of the American Declaration's claim regarding universal rights for all human beings on the later French Declaration cannot be overstated. What happened, instead, was that the Declaration of the Rights of Man and Citizen, as its very title betrays, sought to conciliate a plurality of rights (and subjects of rights) in a single document – namely, of course, the rights of Man and the rights of French citizens. According to Elliot Young,

> [t]he Declaration of the Rights of Man and of the Citizen during the French Revolution in 1789 held certain "natural" rights to be universal across time and place. The declaration, however, also recognized that national citizenship was the mechanism through which to guarantee such rights. The tension between the universal inalienable rights of man and the rights of citizens came to the forefront in the late nineteenth century as nation-states began to restrict the rights of aliens.[365]

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[362] Ibid., 121-2

[363] Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press 2013), 88-9

[364] Lynn Hunt, *Inventing Human Rights* (W. W. Norton & Company 2007), 123

[365] Elliot Young, *Alien Nation – Chinese Migration in the Americas from the Coolie Era through World War II* (University of North Carolina Press 2014), 97

This lack of clarification on whether the primary focus of an affirmation of innate and inalienable rights should ultimately be on human beings in general or on particular citizens would be further compounded by the often imprecise language of the Declaration – no doubt motivated by a well-meaning but overhasty intent to posit those rights in such a vigorous manner that their legitimacy and necessity would be beyond questioning. Indeed, the apparent vagueness or even excessive abstractness of the French document in this regard does not go unnoticed by its critics, who largely trace it back to the ideological circumstances surrounding its drafting:

> [t]he French deputies in 1789, seeking some sanction for the "sacred'" Rights of Man, turned to natural-right doctrines […]. This natural-right argument not always sufficing them, also they turned to the abstractions and the visions of such speculative minds as Rousseau's. Why did they not turn to precedent, prescription, custom, as did the British? Because the French reformers of 1789 held precedent, prescription, and custom in contempt, as if such influences were the dead hand of the past.[366]

In sum, the French document eventually came to declare that

> all men, and not just French men, were 'born and remain free and equal in rights' (Article 1). Among the 'natural, inalienable, and sacred rights of man' were liberty, property, security, and resistance to oppression (Article 2). Concretely, this meant that any limits on rights had to be established in law (Article 4). 'All citizens' had the right to take part in the formation of the law, which should be the same for everyone (Article 6), and to consent to taxation (Article 14), which should be apportioned equally according to the capacity to pay (Article 13). In addition, the declaration forbade 'arbitrary orders' (Article 7), unnecessary punishments (Article 8), any legal presumption of guilt (Article 9), or unnecessary government appropriation of property (Article 17). In somewhat vague terms, it insisted that 'no one should be disturbed for his opinions, even in religion" (Article 10) while more vigorously asserting freedom of the press (Article 11)."[367]

Rather than doing away with the confusion between *human* rights and the rights *of citizens* through theoretical rigor and legislative clarity, the French Declaration had the consequence of preserving or even deepening it in certain respects. An striking example of this is provided by the fact that, despite having abolished torture and cruel punishment from the penal code on the grounds of those practices' incompatibility with the "principles of humanity", the Committee on Criminal Law decided to institute a purportedly "rights-based" novel form of punishment, dubbed "civic degradation". The latter's procedures were clearly laid out by the Committee:

> [t]he convict would be conducted to a specified public place, where the clerk of the criminal court would read these words aloud: "Your country has convicted you of a dishonorable action. The law and the court take away your standing as a French citizen." The convict would then be put in an iron collar where he would remain exposed to the public for two hours. His name, his crime, and his judgement would be written on a placard placed below his head.[368]

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[366] Russell Kirk, 'The Rights of Man vs. The Bill of Rights' (1990) 20(3) Presidential Studies Quarterly, 499
[367] Lynn Hunt, *Inventing Human Rights* (W. W. Norton & Company 2007), 131
[368] Ibid., 140-1

The fact that this novel form of punishment was accompanied by a public (albeit temporary) revocation of the convict's status as a French citizen, and thus stripped of the rights entailed by that status, is a clear illustration of what the French understood to be the locus of some of the most crucial rights, even in the wake of the lofty universalism of the Declaration. It was not humanity, but *citizenship*. While seemingly controversial, this assertion is further supported by the problem that those individuals who were not considered "citizens" at the time posed in terms of the application of "civic degradation": women, foreigners and repeat offenders represented a significant challenge, inasmuch as neither of they possessed, from the onset, substantial rights (such as the right to vote or hold public office) that could be revoked as form of punishment. As a sort of less than ideal solution to this problem, the Committee prescribed the same two hour period wearing an iron collar and placard, but forewent the public declaration regarding the loss of civic standing.

Though much could be added concerning the apparent substitution of *human* dignity by *civic* dignity, it is clear that the tension between human and civic rights was inherent to both the American and the French declarations (even though only the latter explicitly mentions citizens in its text), and that this would prove to be highly problematic in the future attempted application of the principles espoused by the documents in practical legal terms. As Hunt puts it,

> [i]n both the new United States and France, declarations of rights referred to "men," "citizens," "people," and "society" without addressing differences in political standing. Even before the French Declaration was drafted, an astute constitutional theorist, abbé Sieyès, had argued for a distinction between the natural and civil rights of citizens on the one hand and political rights on the other. Women, children, foreigners, and those who paid no taxes should be "passive" citizens only. "Those alone who contribute to the public establishment are like the true shareholders in the great social enterprise. They alone are the true active citizens".[369]

In the subsequent history of both nations – along many others that were influenced by their revolutionary declarations – systematic attempts to either retain or institute mechanisms of clear exclusion of wide portions of the population (slaves, women, minorities, etc.) from purportedly universal *human* rights clearly demonstrate that civic rights proved to be a much more legally amenable concept in terms of its practical application within the context of national sovereignty that characterised most modern polities. As such, any genuine concern in pursuing human rights (and human dignity) to their fullest extent – with a willingness to truly acknowledge their inherent challenges and ultimate political consequences – would have to wait until the following significant attempt to accomplish exactly that: the *Universal Declaration of Human Rights* of 1948.

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[369] Ibid., 148

6. Human Dignity in the Modern Human Rights Discourse

Modern discussions surrounding the notion of human dignity are inextricably connected with the Kantian postulation of the inherent and inalienable dignity of human beings that took root during the enlightenment, exponentially grew during the great revolutions of the modern age, and finally bore fruit in the *Universal Declaration of the Human Rights*.

This latter connection – that between human dignity and (universal) human rights – has undoubtedly coloured our current understanding of the very notion of human dignity and everything it ought to entail in a decisive manner. Given the almost straightforward overlapping between human dignity and human rights that this view promotes, any serious analysis of the nature and scope of the current concept of human dignity requires close attention to be paid to the manner in which the latter is presented and understood in the contemporary human rights discourse.

6.1. Human dignity in the *Universal Declaration of Human Rights*

From its onset – its preamble, to be exact – the UDHR leaves little doubt regarding its philosophical heritage in what concern the issue of human dignity. With their very first sentence, the drafters of the Declaration make a point to assert that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.'[370]Further down, and still in the preamble, that idea of an inherent human dignity is reasserted: 'the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women.'[371]

In Article 1, in turn, the Kantian association between dignity and reason reveals itself as a key influence in the document: '[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.'[372]Up to this point, then, all mentions of dignity in the UDHR seem to fundamentally mirror the notion of dignity as something that is both inherent to and inalienable from our very existence as human beings – a key part of human beings' essence without which one's status as such would become imperilled.

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[370]Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A(III) (UDHR)
[371] Ibid.
[372] Ibid.

This notion, however, satisfying as it may be from the purely moral standpoint, quickly becomes impractical when applied to the concrete socio-political realities the UDHR was and is seeking to regulate in the first place. As such, the understanding of dignity presented in the early stages of the document suddenly morphs into a rather different one towards its end. It is a critical shift from dignity as an essential – and therefore stable – feature of human beings, to dignity as a property which, much like health, happiness, and so on, is *subject to contingency*.

Thus, dignity is not rigorously inherent and inalienable, but rather an attribute which is – at least, to some extent – dependent on circumstances that pertain to the individual's enjoyment of certain "universal rights". A good example of this is provided by Article 22, which states: '[e]veryone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of *the economic, social and cultural rights indispensable for his dignity* and the free development of his personality'[373](our italics). Proceeding under a similar understanding, point 3 of Article 23 tells us that '[e]veryone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.'[374]

In this regard, it should be noted that Articles 22 and 23 clearly illustrate how the concept of human dignity, even within the scope of a single document, may harbour significant ambiguity in contemporary human rights discourse. On the one hand, human dignity is often presented as it was at the beginning of the document; on the other, that conceptualisation of human dignity is often quickly replaced by the one reflected on the later articles that we examined: a rather fragile attribute of human existence, which is contingent of things such as economic and social rights, as well as seemingly more trivial aspects like one's work and corresponding remuneration.

In his analysis of the UDHR, Glenn Hughes writes that 'the drafters of the document had to give some indication of why it is that human beings have what is identified as "inalienable rights"— including rights to life, liberty, security; to ownership of property; to equal recognition under the law; to legal protection against discrimination; and to freedom of expression, religious worship, and other freedoms. What is the basis for claiming that human beings have rights?'[375]That critical question, Hughes claims, was purposefully answered without recourse to concepts such as "God" or "[divine] nature" – which would have narrowed the intended universality of the document – but by laying claim to a seemingly secular concept: dignity. As Hughes explains,

> [t]he drafters solved this problem by indicating that human beings have rights because of their intrinsic dignity—because human beings, due to qualities they possess, have a special value or distinctive worth, that in each case and without exception should be respected and nourished. Thus the Declaration's first

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[373] Ibid.
[374] Ibid.
[375] Glen Hughes, 'The Concept of Dignity in the Declaration of Human Rights' (2011) 39(1) Journal of Religious Ethics, 2

words proclaim the "inherent dignity" of each member of the human family …inherent human dignity is therefore the foundational fact and value upon which rests the Declaration's affirmation of rights, and this view of dignity as founding rights has been echoed in numerous charters, conventions, and constitutions produced around the world since 1948.[376]

Echoing this view of the foundational character of the concept of human dignity in contemporary moral and political philosophy, David Walsh argues that the inalienable dignity of human beings constitutes a sort of linchpin of discussion around ethical issues on a global scale, as well as one of the key foundations for most developed systems of government.[377]Taking this point further, Walsh posits that 'our whole way of life is premised on the irreproachable dignity and worth of each one, a commitment most vividly expressed in the guarantee of liberty irrespective of conditions or consequences. Only lawbreaking justifies its suspension.'[378]Ultimately, according to this perspective,the acknowledgement of human beings' essential dignity serves as the foundation for our entire socio-political edifice.

6.2. The inherent ambiguity of human dignity

Despite the critical importance attributed to the concept of human dignity by many – if not most – contemporary thinkers who devote their attention to the moral foundation of present-day human rights debates, much like what happens regarding the notion of *universal* human rights, the concept of human dignity in contemporary discourse seems to largely fall prey to what some authors have dubbed "the paradox of self-evidence". Writing on the subject, Lynn Hunt elaborates:

> [d]espite their differences in language, the two eighteenth-century declarations both rested on a claim of self-evidence. […] Not much had changed in this regard by 1948. True, the United Nations Declaration took a more legalistic tone: "whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." Yet this too constituted a claim of self-evidence, for "whereas" literally means "it being the fact that." In other words, "whereas" is simply a legalistic way of asserting a given, something self-evident.[379]

This claim of self-evidence, whose role as a key argument towards the establishment of universal human rights cannot be neglected, leads us to somewhat of a"paradox: if equality of rights is so self-evident, then why this assertion did have to be made"[380]in the first place – instead of human rights being spontaneously acknowledged at different moments in history, and under varied circumstances? Indeed, and considering what we said above, if one shifts one's analysis from human rights to human dignity, it would also be reasonable to ask: if human dignity is indeed

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[376] Ibid., 3-4
[377]David Walsh, *Third Millenium – Reflections on Faith and Reason* (Georgetown University Press 1999), 98
[378] Ibid., 34
[379] Lynn Hunt, *Inventing Human Rights* (W. W. Norton & Company 2007), 19
[380]Ibid.

inherent and inalienable, how can it simultaneously be dependent of the particular circumstances of the life of the individual?

This ambiguity of dignity in contemporary parlance has led to some interesting – and seemingly paradoxical – results. Michael Rosen provides an example of the latter:

> [w]e should not infer from the close connection between "dignity" and human rights in such texts that talk about dignity is simply a piece of liberal piety, however. In August 2006, President Ahmadinejad of Iran (whose piety, I think it is fair to say, is more apparent than his liberalism) sent a strange letter to the German chancellor, Angela Merkel. It was written, to quote Ahmadinejad's own words, from the conviction that it is "the common responsibility of all people with faith in God to defend human dignity and worth and to prevent violation of their rights and their humiliation, proceeding from the conviction that we are all created by the Almighty and that he has bestowed dignity upon us all and that no one has any special privileges over the other." Ahmadinejad is very fond of the discourse of dignity. Shortly after his letter to Merkel, he rejected calls for Iran to subject its nuclear program to international control. Iran would not be intimidated by the West, he asserted, but would continue on its "path of dignity".[381]

Further muddying the waters between dignity as an inherent feature of human beings and dignity as a contingent aspect of human existence comes the matter of *causation*: on the one hand, we regard human dignity as the root from which human rights stem; on the other, we have come to simultaneously see, as Griffin puts it, 'human rights as protections of that dignity'[382] – that is, as *sine qua non* conditions (as per the UDHR formulations) for the existence of human dignity. It is easy to understand how these two apparently contradictory prepositions may further deepen the ambiguity.

Ultimately, many authors who seek to champion the moral worth of human dignity and the sort of universal human rights it is purported to underpin are coaxed into admitting the vagueness and ambiguity of the idea of an "inherent" human dignity. Nevertheless, they argue, the latter retains its instrumental usefulness in the contemporary human rights discourse:

> [w]e saw earlier that the idea of a human right grew out of a transmutation of the discourse of what is actually right into the discourse of having a natural right. Ethics, I maintained, could do without the discourse of natural rights and still say all that is necessary to it. Still, the discourse has distinct merits. It focuses and gives prominence to obligations that arise, not from social status or special talents or skills, but from the dignity of human status itself. The dignity of human status itself is not the only, or the most, important moral status that human beings have. The case for singling it out is largely practical. Ring-fencing this particular status gives it prominence, ease of transmission, enhanced effectiveness in our social life, and indeed in our moral life, and so on. My stipulation here is of this kind.[383]

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[381] Michael Rosen, *Dignity: Its History and Meaning* (Harvard University Press 2012), 2-3
[382] James Griffin, *On Human Rights* (Oxford University Press 2008), 3
[383] Ibid., 94

What becomes clear is that the concept of human dignity on which much of the contemporary human rights discourse lays, is considerably less stable and less precisely defined than what one might desire.

6.3.*Universal* human dignity?

When dealing with the concept of human dignity in the contemporary human rights discourse – or with the notion of "human rights", for that matter – one comes across an increasing number of accusations regarding the imposition of a markedly Eurocentric view upon nations and cultures whose ethical-political background is substantially different from that of Europe.

In this regard, one is often confronted with views on issues such as international law which have no qualms in asserting that 'international law is a type of law that attempts to constitute the conditions by which human agents can have dignity in a particular field of human conduct: the relations between states.'[384]What perspectives such as this usually fail to address, however, is the extent to what the concept of human dignity they are making use of is i) clearly definable in itself (in light of the ambiguity mentioned above), and ii) to what extent is that operative understanding of human dignity coloured – if not entirely determined – by a *particular European or Western tradition of thought*.

This disparity in particularistic understandings of human dignity might pose substantial problems towards the acknowledgement and implementation of the "universal" human rights that are deduced from a certain conception of human dignity. Thus, when it comes to non-European views on human dignity, one may for instance verify that, in the context of Islamic tradition, 'human dignity is given by Allah to all those pious persons who live according to his commandments. The source of human dignity is the religion of Islam; more precisely the truth revealed by God and contained in the Quran.'[385]This, of course, leaves us with a complicated question regarding the project of universal human rights espoused by the UDHR:

> [d]oes everybody have the same dignity, or is the dignity of mankind in general limited to some elements only, while some other elements are given to those only who are pious Muslims? From what has been said, various conclusions may be drawn. It seems that all human beings have the same gifts as far as man's place in the creation is concerned. This must be a matter of general agreement. It is not clear whether the other elements of human dignity (secure life and what is connected with it) are part of the dignity of all human beings.[386]

And lest one might assume this is a mere theological matter of little contemporary significance, it should be noted that even in the XXI century '[s]ome Muslim authors are ready to acknowledge

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[384] Patrick Capps, *Human Dignity and the Foundations of International Law* (Hart Publishing 2009), 103
[385] Miklós Maróth, 'Human Dignity in the Islamic World' in Marcus Düwel et al. (eds), *The Cambridge Handbook of Human Dignity* (Cambridge University Press 2014), 159
[386] Ibid., 160

that human dignity as such is given to everybody, while some others exclude from human dignity everybody who is not a devoted Muslim.'[387]

This incommensurability between concepts of dignity is, obviously, not limited to Islam. In the Hindu tradition, for example, 'dignity appears as an ambiguous and even paradoxical concept; sometimes it appears as an inherent attribute of the individual, sometimes it is dependent on social class, and sometimes it is a concept related to moral action but is in that quality strongly religious'[388]. Buddhism, on the other hand, also bears its own interpretation of dignity, ranging from 'a strongly individualistic notion and ascribed only to the *arhat*' to 'an egalitarian moral notion', an inherent worth which includes – but is far from being limited to – human beings[389].

Confucianism's understanding of dignity bears some similarities but also

> many differences to contemporary Western accounts of human dignity; the most fundamental of which perhaps is that in Confucianism human dignity is not conceived as inalienable. When an individual lacks steadfastness and acts contrary to his principles out of cowardice or even personal gain, he will lose his dignity: by acting in an animal-like fashion, he will no longer be a human being in the full sense of the word.[390].

Daoism, in turn, postulates that 'animals and nature are ethically relevant: like human beings, they possess unique value because they all have their ground in Dao', while 'excessive interventions [from governmental policies] will lead to imbalance or even disorder in the individual state of being, and potentially infringe upon his path to dignity' – which entails that, from a Daoist perspective, not all policies designed to uphold human rights eventually safeguard the foundational principles of human rights.[391]

Given this spectrum of interpretations regarding human dignity and the patent incompatibility between a number of them, the reasoning of those who consider contemporary human rights to constitute not only overreach, but veritable hubris on the part of a certain European tradition of moral and political philosophy, becomes increasingly clear. Bearing in mind that the differences reflect what are essentially theological and philosophical disagreements, and do not yet take into account the particular socio-political genealogy and make-up of contemporary nations such as Saudi Arabia, India, and China (to name but a few emblematic examples), it should come as no surprise that Western assumptions and expectations regarding "universal" human rights are often

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[387] Ibid.
[388] Ibid., 168
[389] Jens Braarvig, 'Buddhism: Inner Dignity and Absolute Altruism' in Marcus Düwel et al. (eds), *The Cambridge Handbook of Human Dignity* (Cambridge University Press 2014), 175
[390] Luo An'xian, 'Human Dignity in Traditional Chinese Confucianism' in Marcus Düwel et al. (eds), *The Cambridge Handbook of Human Dignity* (Cambridge University Press 2014), 181
[391] Qiao Qing-Ju, 'Dignity in Traditional Chinese Daoism' in Marcus Düwel et al. (eds), *The Cambridge Handbook of Human Dignity* (Cambridge University Press 2014), 186

found at odds with the customs and practices that nations such as these deem legitimate in their own traditions.

The contemporary dissonance between the European and North-American perspectives concerning human rights and those adopted in much of the remaining world is something whose end cannot be accurately foreseen at this point. We must realise that it reflects a profound disagreement in what concerns not only what kind of rights should be regarded as essential and inalienable, but also – and perhaps most decisively – in what concerns the very concept upon which to lay the foundations of such rights: human dignity. And if the concept of human dignity varies from culture to culture, nation to nation, the sort of rights that each of them will espouse – as well as those which will be regarded as unacceptably dangerous towards the prevailing socio-political order – will necessarily vary as well, and will thus be anything but universal.

Chapter 3: Ideas of Universal Human Rights vs. Citizenship

1. Introduction

Since the adoption of the *Universal Declaration of Human Rights*[392], the belief that human rights should be at the heart of the normative perspective of world politics and all cultures has become increasingly popular and is now enshrined in various international and regional institutions and treaties.[393] The UDHR "subverted the rules of the Westphalian system of international relations, in which sovereign states were the only actors, by conferring upon the human person the status of a subject of law beyond domestic jurisdiction."[394] The Preamble to the *Universal Declaration of Human Rights* emphasises and states quite simply that human rights are universal.[395] It states that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[396]

The concept of the universality of human rights was further strengthened by the World Conference on Human Rights in Vienna in 1993, which concluded that human rights are universal, not contingent, contextual and socially, politically and historically constructed.[397] Representatives of 171 states adopted the *Vienna Declaration and Programme of Action* of the World Conference on Human Rights on 25 June 1993, effectively closing the two-week conference and providing a roadmap for global human rights work.[398] This declaration states:

> "The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. The universal nature of these rights and freedoms is beyond question."[399]

Yet, the very idea of universal human rights is paradoxical because its assertion is still based on the particular and exclusive right to citizenship. Citizenship is not a universal right for all human beings, as it was supposed to be. Article 6 of the *Universal Declaration of Human Rights* states:

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[392] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A(III) (UDHR)

[393] Stephen Salkever, 'Aristotelian Phronêsis, the Discourse of Human Rights, and Contemporary Global Practice' (*Repository - Bryn Mawr College*, 2013) <https://repository.brynmawr.edu/cgi/viewcontent.cgi?article=1025&context=polisci_pubs> accessed 2 June 2021

[394] José A. Lindgren Alves, 'The Declaration of Human Rights in Postmodernity' (2000) 22(2) Human Rights Quarterly, 478

[395] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A(III) (UDHR)

[396] Ibid.

[397] BBC World Service, 'World Conference and the Vienna Declaration' (BBC, 1993) <https://www.bbc.co.uk/worldservice/people/features/ihavearightto/four_b/treaties_vienna.shtml> accessed 8 May 2021.

[398] Ibid.

[399] UN General Assembly, 'Vienna Declaration and Programme of Action' (OHCHR, 12 July 1993) <https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx> accessed 29 June 2021

"Everyone has the right to recognition everywhere as a person before the law."[400] However, in order to enjoy universal human rights, an individual must first enjoy his/her right to nationality.[401] International human rights law protects non-citizens. "Nevertheless, in practice, noncitizens are often not in a position to assert their rights."[402] For example, undocumented migrants are often criminalised. Howard-Hassmann emphasises that "even people who enjoy formal citizenship status do not all have the same capacities to (…) fulfil their rights."[403]According to E. Tendayi Achiume, the former UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, "millions of stateless people worldwide – often members of minority groups – (...) are victims of long-standing discrimination which sees them as 'foreign', even though they have been resident in a country for generations or even centuries."[404]

Shachar describes this problem as "the birthright lottery", emphasising that the great majority of the world's population becomes citizens solely as a result of their birth circumstances.[405] There is little doubt that obtaining membership status in a particular state bestows upon some a world full of possibilities while condemning others to a life with little hope.[406]

Hannah Arendt argues that "the rights of man" proved to be an illusion in the case of stateless people and refugees in Europe in the inter-war period.[407] They have been deprived of their rights due to the fact that they were only "human", and that they lacked citizenship.[408]

> "Arendt argues that the plight of stateless people revealed the modern conception of human dignity to be a mere abstraction. In fact, to live as a human outside of political community amounted to a deprived form of existence in which individuals were thrown back on the givenness of their natural condition. In this exceptional situation in which stateless people had nothing left to appeal to but their rights as human beings, they were barely recognizable as human."[409]

In his address to the United Nations General Assembly in 2018, the President of France, Emmanuel Macron, listed a number of issues facing the UN and the international community, including "cultural, historical, and religious relativism," which calls into question the concept of universal

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[400] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A(III) (UDHR)
[401] Rhoda E. Howard-Hassmann, 'Introduction: The Human Right to Citizenship' in Rhoda E. Howard-Hassmann and Margaret Walton-Roberts (eds), *The Human Right to Citizenship: A Slippery Concept* (Penn Press 2015), 2
[402] Ibid., 3
[403] Ibid., 4-5
[404] United Nations, 'Millions Denied Citizenship due to Ideas of National, Ethnic or Racial "Purity": UN Rights Expert' (UN, 5 July 2018) <https://news.un.org/en/story/2018/07/1013982> accessed 8 May 2021
[405] Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press 2009)
[406] Ibid.
[407] Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace Jovanovich 1973)
[408] Ibid.
[409] Andrew Schaap, 'Enacting the Right to Have Rights: Jacques Rancière's Critique of Hannah Arendt' (2011) 10(1) *European Journal of Political Theory*, 23

human rights.[410]Divisions in the UN Security Council continue to hamper the collective capacity of the international community to respond to human rights crises.[411]

The philosophical critique of the human rights discourse reveals various binary hierarchies on which the idea of human rights is based: humanity/citizenship, universal/particular, global/local, right/good, male/female, public/private, and so on. It is essential that the contemporary idea of human rights transcends these binary oppositions.

This chapter shows that the notion of human rights is still closely related and dependent to the notion of citizenship, and that the contemporary notion of human dignity is based on an abstract, rather Kantian notion of humanity. The aim of this chapter is to show that "it makes sense, philosophically, to consider as an alternative to human rights talk Aristotle's (pre-Christian and pre-Western) normative focus on practical reason (*phronêsis*)[412], backed up theoretically by a revised version of Aristotle's idea of the possibilities and problems of human development, those which are implicit in biologically inherited, species-specific, human nature."[413]This chapter also examines the idea of the universality of human rights. Universality is one of the most debated issues in the human rights discourse.[414] However:

> "There is a great deal of conceptual confusion over the meaning of universality. Scholars have identified a variety of senses in which universality is understood and debated. They range from applicability and all-inclusiveness, formal acceptance and adherence, historical origin, formal origin and norm creation, to anthropological and philosophical acceptance, uniformity, indivisibility, legitimacy."[415]

Judith Butler argues that the notion of the *universal* is problematic in itself.[416] According to Butler, "the problem emerges (...) when the meaning of the 'universal' proves to be culturally variable, and the specific cultural articulations of the universal work against its claim to a transcultural status."[417] Butler emphasises that this does not imply that universal human rights are impossible to achieve. "All it means is that there are cultural conditions for its articulation that are not always the same,

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[410] Ahmed Shaheed and Rose Parris Richter, 'Is "Human Rights" a Western Concept?' (*IPI Global Observatory*, 17 October 2018) <https://theglobalobservatory.org/2018/10/are-human-rights-a-western-concept/> accessed 15 February 2021

[411] Ibid.

[412] Aristotle, *Nicomachean Ethics* (W.D. Ross and L. Brown tr, Oxford University Press2009)

[413] Stephen Salkever, 'Aristotelian Phronêsis, the Discourse of Human Rights, and Contemporary Global Practice' (*Repository - Bryn Mawr College*, 2013) <https://repository.brynmawr.edu/cgi/viewcontent.cgi?article=1025&context=polisci_pubs> accessed 2 June 2021

[414] Aristoteles Constantinides, 'Questioning the Universal Relevance of the Universal Declaration of Human Rights' (2008) 62/63 Cuadernos Constitucionales,49

[415] Ibid.

[416] Judith Butler, 'Universality in Culture' Martha Nussbaum, *For Love of Country: Debating the Limits of Patriotism* (Joshua Cohen ed, Beacon Press 1996)

[417] Ibid.

and that the term gains its meaning for us precisely through these decidedly less than universal conditions."[418]

Proponents of universality argue that human rights are universal and "must be the same everywhere and for everyone. By virtue of being human, every individual is entitled to inalienable rights and freedoms."[419] On the other hand, "cultural relativists affirm that the principles contained in the *Universal Declaration of Human Rights* are the product of the Western political history and that they reflect the attempt of Westerners to extend their values to the rest of the world, in a form of cultural imperialism."[420]

Many critics of the notion that human rights are universal argue that the idea of the universal human rights "originated in the West", represent Western objectives, and are thus a tool "of cultural hegemony or a new form of imperialism."[421] According to Gyoung Lee, "the idea of human rights is not absolute and universal as it appears to be, because it is a representation of the international norm at a particular time. Western dominance was at the world's hegemony, when the protection of human rights was primarily invoked; hence, the development of human rights ideals reflects to be one of many Western imperialist phenomena."[422]Samuel Moyn[423], John Patrick[424], John Witte and Justin Latterell[425] argue that human rights stem from a Judeo-Christian tradition.[426] However, the Christian roots of universal human rights and modern liberal principles have been challenged and are the source of long-standing debate.[427] According to Patel, although religion provides a

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[418] Ibid., 45-6

[419]Mary Robinson, 'Universality and Priorities' (*Human Development Reports*, 2000) <http://www.hdr.undp.org/en/content/universality-and-priorities> accessed 8 August 2021

[420] Maria Sole Russo, 'Clash Between Sharia Law and Human Rights in Light of PACE Resolution 2253' (*Ius in Itinere*, 15 October 2019) <https://www.iusinitinere.it/clash-between-sharia-law-and-human-rights-in-light-of-pace-resolution-2253-23827> accessed 2 November 2021

[421] Ahmed Shaheed and Rose Parris Richter, 'Is "Human Rights" a Western Concept?' (*IPI Global Observatory*, 17 October 2018) <https://theglobalobservatory.org/2018/10/are-human-rights-a-western-concept/> accessed 15 February 2021

[422] Lina Na Gyoung Lee, 'Is The Idea Of Human Rights A Universal Concept Or A Representation Of Western Cultural Imperialism?' (OWP, 26 March 2017) <https://theowp.org/reports/is-the-idea-of-human-rights-a-universal-concept-or-a-representation-of-western-cultural-imperialism/> accessed 16 January 2022

[423] Samuel Moyn, *Christian Human Rights*: *Intellectual History of the Modern Age* (University of Pennsylvania Press 2015)

[424] John Patrick, 'Judeo-Christian Influence on Global Health, Human Rights, and Justice' (2019) 6(1) Christian Journal for Global Health, 20-5

[425] John Witte, Jr. and Justin J. Latterell, 'Christianity and Human Rights: Past Contributions and Future Challenges' (2015) 30(3) Journal of Law and Religion, 353-85

[426] However, this concept is multilayered and complex (See: Tamar de Waal, 'Liberal Democracy and the Judeo-Christian Tradition' (2020) 49(1) Netherlands Journal of Legal Philosophy,7-21).

[427] Charles Villa-Vicencio, 'Christianity and Human Rights', (2000) 14(2) Journal of Law and Religion, 579-600; Nicholas P. Wolterstorff, 'Christianity and Human Rights,' in John Witte, Jr. and M. Christian Green (eds), *Religion and Human Rights: An Introduction* (Oxford University Press 2011)

theoretical framework for human rights, this foundation does not solely represent Western viewpoints.[428]

According to John Quick[429] and JoséAlves[430], human rights are a product of the Enlightenment and reflect the values and principles of Western societies. Feminist scholars Irigaray[431], Butler[432], Kristeva[433], Charlesworth and Chinkin[434] and many others argue that human rights are based on the Enlightenment conception of the legal subject defined by Western white men, which includes a number of binary oppositions, such as: male/female, public/private, objective/subjective, justice/care and so forth. According to postcolonial critics of human rights, human rights are conceived in an individualistic Western perspective, without taking into account other cultural traditions that have a different definition of humanity, which is primarily based on collective rights.[435]

In the early 1990s, a debate on Asian values began.[436] The basic argument for Asian values is based on the concept of cultural relativism, according to which social, political and cultural norms from the second half of the twentieth century are Western rather than universal norms.[437] "Asian values" have been contrasted to "Western values" in a debate that took place both inside and outside Asia.[438] According to Boll:

> "Asian values have been defined as putting emphasis on a consensual approach, communitarianism rather than individualism, social order and harmony, respect for elders, discipline, a paternalistic State and the primary role of government in economic development, linked to the premise that 'there are values and patterns of behaviour that are common to Asian countries and peoples'. In contrast, 'Western values' have been associated with transparency, accountability, global competitiveness, a universalistic

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[428] Dipti Patel, 'The Religious Foundations of Human Rights: A Perspective from the Judeo-Christian Tradition and Hinduism' (*Human Rights Law*, 2005) <https://www.nottingham.ac.uk/hrlc/documents/publications/hrlcommentary2005/religiousfoundationshumanrights.pdf > accessed 16 January 2022

[429] John Quick, 'Rethinking Human Rights in the 21st Century' (*La Trobe University*, 2016) <https://www.latrobe.edu.au/__data/assets/pdf_file/0007/764746/Jim-Ife-Sir-John-Quick-Bendigo-lecture.pdf > accessed 15 January 2022

[430] José A. Lindgren Alves, 'The Declaration of Human Rights in Postmodernity' (2000) 22(2) Human Rights Quarterly, 500

[431] Luce Irigaray, *Speculum of the Other Woman* (Cornell University Press 1985)

[432] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990)

[433] Julia Kristeva, 'Women's Time' (1981) 7(1) *Signs*, 13-35

[434] Hilary Charlesworth and Christine Chinkin*, The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000)

[435] John Quick, 'Rethinking Human Rights in the 21st Century' (*La Trobe University*, 2016) <https://www.latrobe.edu.au/__data/assets/pdf_file/0007/764746/Jim-Ife-Sir-John-Quick-Bendigo-lecture.pdf> accessed 15 January 2022

[436] Amartya Sen, *Human Rights and Asian Values* (Carnegie Council on Ethics and International Affairs 1997)

[437] Michael D. Barr, 'Lee Kuan Yew and the "Asian Values" Debate' (2000) 24(3) Asian Studies Review, 309

[438] Alfred M. Boll, 'The Asian Values Debate and its Relevance to International Humanitarian Law' (ICRC, 31 March 2001) <https://www.icrc.org/en/doc/resources/documents/article/other/57jqzl.htm> accessed 8 August 2021

outlook and universal practices, and an emphasis on private initiatives and the independence of the private sector."[439]

This, however, implies that there is a binary social opposition between homogeneous Judeo-Christian values and homogeneous Asian values. This further implies that either of these two points of view 'has historical access to the correct interpretation of universal values"[440], which creates power relations and which is flawed because neither Judeo-Christian values nor Asian values are homogeneous.

Supposedly universal human rights also face a hermeneutical challenge – they are interpreted and applied differently in different societies. For example, the right to freedom of expression is exercised differently in the United States, France, China and Islamic countries. "Human rights law blandly acknowledges that the right to freedom of expression may be limited by considerations of public order and morals. But a government trying to comply with the international human right to freedom of expression is given no specific guidance whatsoever."[441]

According to Alves, the *Universal Declaration of Human Rights* can be perceived as a grand narrative.[442] Grand narratives or metanarratives[443] are socially, politically and historically constructed – thus, they cannot be measured by truth and falsity.[444] They, in fact, reflect different power relations and power structures. Metanarratives describe a political, social, historical or cultural output based on a totalising, coherent, monolithic, one-dimensional perspective that becomes the dominant, widely accepted point of view in public discourse. And following Langlois, it is not "possible to construct a substantive meta-narrative that is able to satisfy the demands of our various traditions and at the same time be applicable universally."[445]

The Universal Declaration of Human Rights emphasises inherent dignity and states that "all human beings are born free and equal in dignity and rights."[446] However, the notion of human dignity remains abstract and vague. Jeremy Bentham dismissed the idea of inalienable human rights as "a rhetorical nonsense – nonsense upon stilts."[447]According to Schopenhauer, the concept of human dignity is "without any genuine substance behind it."[448]Arthur Schopenhauer emphasises: "That

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[439] Ibid.

[440] Tamar de Waal, 'Liberal Democracy and the Judeo-Christian Tradition' (2020) 49(1) Netherlands Journal of Legal Philosophy,17

[441]Eric Posner, 'The Case Against Human Rights' (*The Guardian*, 4 December 2014) <https://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights> accessed 20 February 2021

[442] José A. Lindgren Alves, 'The Declaration of Human Rights in Postmodernity' (2000) 22(2) Human Rights Quarterly, 500

[443]Jean-Francois Lyotard, *The Postmodern Condition: A Report on Knowledge* (Geoff Bennington and Brian Massumi tr, University of Minnesota Press 1984)

[444] Ibid.

[445]Anthony J. Langlois, *The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory* (Cambridge University Press 2001), 80

[446] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A(III) (UDHR), Art. 1

[447] Jeremy Bentham, 'Anarchical Fallacies' in Jeremy Waldron, *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Methuen 1987), 53

[448] Michael Rosen, *Dignity: Its History and Meaning* (Harvard University Press 2012), 1

expression, *dignity of man*, once uttered by Kant, afterward became the shibboleth of (...) moralists who concealed behind that imposing expression their lack of any real basis in morals."[449]

There are also different interpretations of the notion of human dignity from the perspectives of different cultures. Alves argues that the *Universal Declaration of Human Rights* "was not (...) fully consensual. Submitted to a vote before the United Nations on 10 December 1948, it was adopted forty-six to zero, with eight abstentions (South Africa, Saudi Arabia and the European socialist countries)."[450]

The Cairo Declaration on Human Rights in Islam emphasises that "all men are equal in terms of basic human dignity"[451] and that "true religion is the guarantee for enhancing such dignity along the path to human integrity."[452] It also states that the Muslim community, "the Islamic Ummah", should "guide all humanity which is confused because of different and conflicting beliefs and ideologies and to provide solutions for all chronic problems of this materialistic civilization."[453]

The only answer to the question "what are human rights?" or "what rights do Americans and Africans have?" – other than to posit moral-philosophic reference points – is to consider concrete examples of the treatment of people in certain areas and times.[454] Therefore, in practice and in political philosophy, human rights are always contextual (dependent on government, culture, religion and interpretation of human rights in relation to these political, cultural and religious frameworks), and not universal.[455] Butler argues that "the contingent and cultural character of the existing conventions governing the scope of universality does not deny the usefulness or importance of the term *universal*. It simply means that the claim of universality has not been fully or finally made and that it remains to be seen whether and how it will be fully articulated."[456] The nature of human rights is dynamic. According to Butler:

> "The future articulation of the universal, however, can happen only if we find ways to effect cultural translations between those various cultural examples in order to see which versions of the universal are proposed, on what exclusions they are based and how the entry of the excluded into the domain of the universal requires a radical transformation of our thinking of universality."[457]

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[449] Arthur Schopenhauer, *On the Basis of Morality* (Hackett 1989), 100
[450] José A. Lindgren Alves, 'The Declaration of Human Rights in Postmodernity' (2000) 22(2) Human Rights Quarterly, 481
[451] Organisation of Islamic Cooperation, 'The Cairo Declaration on Human Rights in Islam' (*Human Rights Library*, 5 August 1990)<http://hrlibrary.umn.edu/instree/cairodeclaration.html> accessed 3 June 2021
[452] Ibid.
[453] Ibid.
[454] Eric Posner, 'The Case Against Human Rights' (*The Guardian*, 4 December 2014) <https://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights> accessed 20 February 2021
[455] Ibid.
[456] Judith Butler, 'Universality in Culture' Martha Nussbaum, *For Love of Country: Debating the Limits of Patriotism* (Joshua Cohen ed, Beacon Press 1996), 46
[457] Ibid., 51

Stephen Salkever argues that something is wrong with the existing dominant paradigm in international political theory, and suggests that the new, explicitly Aristotelian paradigm challenge and supplement (instead of replace) our current theory on which the modern concept of human rights is based.[458] Aristotle's philosophy is the starting point for discussing contemporary political discourse in new ways that transcends the contradictions between the universal and the particular, the individual and the collective, the global and the local, the West and the East and so on.[459]Aristotelian philosophy is significant for developing a broader understanding of universalism. "Universalism does not consist in an essence or human nature that we are all said to have or to possess, but rather in experiences of establishing commonality across diversity, conflict, divide, and struggle. Universalism is an aspiration, a moral goal to strive for; it is not a fact, a description of the way the world is."[460]

The following sections explore the binary hierarchies on which the idea of human rights is based (humanity/citizenship, universal/particular, global/local and so forth), as well as the problematic nature of the concept of universal human rights, and its confinement to moral philosophy.

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[458] Stephen Salkever, 'Aristotelian Phronêsis, the Discourse of Human Rights, and Contemporary Global Practice' (*Repository - Bryn Mawr College*, 2013)

[459]Aristotle's political philosophy reflects the spirit of the time in which Aristotle lived, when women, foreigners, slaves and many other individuals were excluded from the category of citizenship, and therefore did not have basic rights. Nevertheless, Aristotle's conception of human nature and human flourishing as well as Aristotle's ethics (that opens up space for a contextual approach) are relevant for rethinking the contemporary idea of human rights and overcoming the tensions on which it is based.

[460] Seyla Benhabib, *Dignity in Adversity: Human Rights in Troubled Times* (1st edn, Polity Press 2011), 70

2. The Problem with Decoupling Human Rights and Citizenship

The *Universal Declaration of Human Rights* (1948) has transformed the rights of man into human rights. "The Declaration arose directly from the experience of the Second World War and represents the first global expression of what many believe are the rights to which all human beings are inherently entitled."[461]After the Second World War, one of the greatest transformations of the idea of sovereignty took place. This transformation brings the decoupling of universal human rights and citizenship, since it is the person *qua* human being and not the citizen who is entitled to universal human rights."[462] Nevertheless, there is a large gap between theory and practice – between human rights rhetoric and ideals of moral philosophy, and human rights achievements in the real world.

In reality, human rights have never been separated from the realm of states and citizenship, and fundamentally they cannot be separated. Universal "human rights proved ineffective not because of ill will or intention but because of the logic of sovereignty of the nation-state."[463] This tension between universal human rights and citizenship "challenges the supposed universality of human rights, since those excluded from the *demos*, such as refugees, stateless persons or the prisoners at Guantanamo Bay, have no government to protect their supposedly inalienable rights."[464]

2.1. The paradoxical nature of human rights

After the World War II, the concept of state sovereignty was challenged by the universal human rights regime and the process of globalisation. The *Charter of the United Nations*[465] and the *Universal Declaration of Human Rights* developed standards for measuring human rights and became the basis for other human rights declarations and conventions. However, the implementation of universal human rights remained in the domain of nation-states, which made it weak and controversial.[466]

According to the definition offered by the United Nations:

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[461] Lumen Learning, 'The Universal Declaration of Human Rights' (*History of Western Civilization*, 2020) <https://courses.lumenlearning.com/suny-hccc-worldhistory2/chapter/the-declaration-of-the-rights-of-man/> accessed 28 January 2021

[462] Seyla Benhabib, 'Towards Global Political Communities and New Citizenship Regimes' (2018) 1 Glocalism, 6

[463]Engin F Isin, 'Two Regimes of Rights' (*ECPR Workshop*, 2 April 2009) <https://ecpr.eu/Filestore/PaperProposal/c249d5ae-aa18-4a81-b35e-b06fe25cbea3.pdf> accessed 2 February 2021

[464]Lillian Carson, 'Human Rights and Democracy: An Incompatible or Complementary Relationship?' (*E-International Relations*, 7 May 2017) <https://www.e-ir.info/2017/05/07/human-rights-and-democracy-an-incompatible-or-complimentary-relationship/> accessed 3 February 2021

[465] Charter of the United Nations (adopted 24 October 1945) 1 UNTS XV

[466] Jack Donnelly, *Universal Human Rights in Theory and Practice* (2nd edn, Cornell University Press 2003)

"Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups."[467]

This definition reflects the paradoxical nature of human rights – while human rights are defined as universal, their violators and protectors are governments.[468] Article 1 of the *Charter of the United Nations* (UN Charter) states that one of the main goals of the United Nations is "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[469] On the other hand, Article 2 of the UN Charter states: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter."[470] The UN Charter gives equal weight to universal human rights protection and sovereignty. According to Wang, "the U.N. Charter, therefore, allows selective choice by each member state as to which principle to invoke as legal authority for its position on human rights."[471]

The concept of state sovereignty refers to "a defined and delimited territory, with a permanent population, under the authority of a government."[472]According to Jackson, "governmental supremacy and independence is that distinctive configuration of state authority that we refer to as sovereignty."[473] The concept of sovereignty is dynamic and has changed throughout history. This notion developed from the privilege and sovereignty of the king[474] to the popular sovereignty after the French and American revolutions. After these revolutions the nation is defined as the source of sovereignty.

Early declarations of human rights made it possible for human rights to be obtained only through the state, particularly the modern nation-state. Article 3 of the *Declaration of the Rights of Man and of the Citizen* states: "The nation is essentially the source of all sovereignty; nor can any individual, or any body of men, be entitled to any authority which is not expressly derived from

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[467] UN Human Rights Office, 'International Human Rights Law' (*United Nations Free and Equal*, 2018) <https://www.unfe.org/wp-content/uploads/2018/05/International-Human-Rights-Law-English.pdf> accessed 5 February 2021

[468]Engin F Isin, 'Two Regimes of Rights' (*ECPR Workshop*, 2 April 2009) <https://ecpr.eu/Filestore/PaperProposal/c249d5ae-aa18-4a81-b35e-b06fe25cbea3.pdf> accessed 2 February 2021

[469] Charter of the United Nations (adopted 24 October 1945) 1 UNTS XV

[470] Ibid.

[471] Jiangyu Wang, 'China and the Universal Human Rights Standards' (2001) 29 Syracuse Journal of International Law and Commerce, 150

[472] Robert Jackson, *Sovereignty: The Evolution of an Idea* (1st edn, Polity Press 2007), 6

[473] Ibid., 8

[474] "In 16th-century France Jean Bodin (1530–96) used the new concept of sovereignty to bolster the power of the French king over the rebellious feudal lords, facilitating the transition from feudalism to nationalism." (Britannica, 'Sovereignty' (*Encyclopedia Britannica*, 18 November 2020) <https://www.britannica.com/topic/sovereignty> accessed 7 February 2021)

it."[475] Thus, the invention of the rights of man coincides with the invention of nationalism, which is a direct consequence of the harmonisation of the rights of man and the rights of the citizen of the nation-state. Giorgio Agamben separates the rights of man from human rights, linking the rights of man to the emergence of the nation and human rights to historical insights into the devastating consequences of nationalism.[476] However, the concept of human rights is also exclusionary as it is tied to the concept of citizenship.

According to Isin, it is impossible to make a distinction between "human" and "citizenship" rights.[477] "While the term 'human rights' implies rights that all human beings possess by virtue of being human, 'citizenship rights' designates rights that arise from belonging to the state (or nation-state) as a political community. Yet, the distinction is not as clear-cut in practice. First, how rights that arise from being human are enforced is an issue."[478] Hannah Arendt described the paradox of rights that consists in the impossibility to enforce the rights of man without a state and "without securing the 'rights of citizen'."[479]This is especially evident in the example of refugees "While nation states profess to grant rights to their citizens based on their common humanity, they also exclude all those located beyond their borders in the name of maintaining national sovereignty and demarcating national identity. In this context, the refugee logically becomes an anomaly of the international system of sovereign states."[480] If the rights of man were indeed the universal rights of everyone, the only collective political body produced by the overthrow of the *Ancien Régime*[481] could have a kind of transterritorial community that takes into account every single life of every single person.[482]

On the other hand, the subject of the *Universal Declaration of Human Rights* is not a *man*, but *everyone*.[483] This Declaration refers to all human beings regardless of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[484] Unlike the early declarations of human rights, whose subject was a white, wealthy, "civilised" man, the subject of the UDHR is humanity as a whole. Before the adoption of the *Universal Declaration of Human Rights*, human rights did not exist: there existed only the rights of man. "Equally important is the fact that the imaginary community in which the rights of man were

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[475]France, 'Declaration of the Rights of Man and of the Citizen, 26 August 1789' (*RefWorld*, 2021) <https://www.refworld.org/docid/3ae6b52410.html> accessed 5 January 2021

[476] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Daniel Heller-Roazen tr, 1st edn, Stanford University Press 1998)

[477]Engin F Isin, 'Two Regimes of Rights' (*ECPR Workshop*, 2 April 2009) <https://ecpr.eu/Filestore/PaperProposal/c249d5ae-aa18-4a81-b35e-b06fe25cbea3.pdf> accessed 2 February 2021

[478] Ibid.

[479] Ibid.

[480] Ibid.

[481] The "Ancien Régime" represents social and political system of France before the French Revolution.

[482]Adriana Zaharijevic, 'The Promise of Human Rights' (*Heinrich Böll Stiftung*, 2018) <https://rs.boell.org/sites/default/files/70_deklaracije_eng.pdf> accessed 5 January 2021

[483] Ibid.

[484] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A (III) (UDHR) Art. 2

realized was the nation, while the imaginary community"[485] in which the universal human rights should be realised is a "transnational, trans-territorial space."[486]All human beings are the subject of universal human rights, regardless of citizenship and nationality.

Article 28 of the *Universal Declaration of Human Rights* states: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."[487] However, this article of the UDHR is only a promise which has never been realised. In the current international system, the concept of state sovereignty prevails. "The historical evolution of human rights has always had an impact on changing the nature of sovereignty, especially after the *Universal Declaration of Human Rights*, which led to the paradoxical relationship between the human rights and state sovereignty."[488]

Article 1 of the *Universal Declaration of Human Rights* states: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[489] However, the concept of brotherhood is exclusionary, and the declaration, which guarantees universal human rights, should not emphasise this concept. Only individuals who share citizenship (or have the potential to do so) and who the nation, as a sovereign political entity, represents, are considered to be brothers.[490]Because not everyone is a brother, a brotherhood cannot ever be a true representation of humanity.

2.2. Citizenship as the effective source of human rights

In the past, human rights violations have been largely linked to tyrannical dictatorships.[491] Today, the fact of "more than 270,000 cases of substandard care in Australian nursing homes"[492], "the intensification of campaigns against minorities in the world's democracies"[493], discrimination against migrants, asylum seekers and refugees[494], and many other examples have led to the

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[485]Adriana Zaharijevic, 'The Promise of Human Rights' (*Heinrich Böll Stiftung*, 2018) <https://rs.boell.org/sites/default/files/70_deklaracije_eng.pdf> accessed 5 January 2021
[486] Ibid.
[487] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A (III) (UDHR)
[488] Abdullah Kadir and Zana Amin, 'Can Human Rights be Reconciled with State Sovereignty?' (2017) 4(2) International Journal of Social Sciences and Educational Studies, 36
[489] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A (III) (UDHR)
[490]Adriana Zaharijevic, 'The Promise of Human Rights' (*Heinrich Böll Stiftung*, 2018) <https://rs.boell.org/sites/default/files/70_deklaracije_eng.pdf> accessed 5 January 2021
[491] Tony Evans, *The Politics of Human Rights: A Global Perspective* (2nd edn, Pluto Press 2005)
[492] Elaine Pearson and Louise Chappell, 'Six Human Rights Issues that Defined 2019' (*UNSW Sydney*, 11 December 2019) <https://newsroom.unsw.edu.au/news/social-affairs/six-human-rights-issues-defined-2019> accessed 27 February 2021
[493]Arthur Graham et al., 'Five Human Rights Issues that Need Urgent Attention in 2019' (*Open Canada*, 3 June 2019) <https://opencanada.org/five-human-rights-issues-need-urgent-attention-2019/> accessed 28 February 2021
[494] Oxfam International, 'Fighting Against the Discrimination of Migrants and Refugees Around the World' (*Oxfam*, 2 February 2017) <https://www.oxfam.org/en/fighting-against-discrimination-migrants-and-refugees-around-world> accessed 1 March 2021

rejection of this assumption. State human rights violations have a global reach.[495] This was especially evident at the time of the COVID-19 pandemic. According to the United Nations Secretary-General, António Guterres, the COVID-19 pandemic became a "human rights crisis"[496] and led to "rising ethno-nationalism, populism [and] authoritarianism."[497] Guterres argues that: "the crisis is also highlighting – and aggravating – long-neglected injustices, from inadequate health systems to social protection gaps, digital divides and unequal access to education; from environmental degradation to racial discrimination and violence against women. Along with the profound human toll, these inequalities are themselves threats to democracy."[498]

Despite the international human rights system, billions of people still face various forms of discrimination and inequality, oppression, exclusion and displacement. According to the *Democracy Index 2020*, "only about half (49.4%) of the world's population live in a democracy of some sort, and even fewer (8.4%) reside in a 'full democracy'."[499] Democracy is in decline. "The average global score in the *2020 Democracy Index* fell from 5.44 in 2019 to 5.37. This is by far the worst global score since the index was first produced in 2006."[500]

Only 8.4% of the world's population enjoys a democratic system of government and a range of human rights.[501] The notions of citizenship and state sovereignty are the basic obstacles to human freedom and represent sources of inequality. Ayelet Shachar points out that the citizenship in which we are enrolled at birth determines most of our basic rights, but also the standard of living for which we are condemned by "the birthright lottery."[502] This means that "some people become citizens of wealthy democratic societies by right of either blood or soil, while others become citizens of much poorer, often nondemocratic societies, and yet others have no citizenship at all."[503]

According to Dembour, "the effectiveness of human rights at an individual level depends on the person belonging to the 'right' national state even though they derive from a universal concept of the human being."[504] Even the citizenship of the European Union, which represents a postnational

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[495] Tony Evans, *The Politics of Human Rights: A Global Perspective* (2nd edn, Pluto Press 2005)

[496] Sean Morrison, 'Coronavirus Pandemic Fast Becoming Human Rights Crisis, UN Warns' (*London Evening Standard*, 23 April 2020) <https://www.standard.co.uk/news/world/coronavirus-pandemic-fast-becoming-human-rights-crisis-un-warns-a4421686.html> accessed 2 March 2021

[497] Ibid.

[498] António Guterres, 'International Day of Democracy' (United Nations, 15 September 2020) <https://www.un.org/pt/node/97539> accessed 1 March 2021

[499] *Democracy Index 2020: In Sickness and in Health?* (The Economist Intelligence Unit 2020), 3

[500] Ibid., 4

[501] Ibid., 3

[502] Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press 2009)

[503] Rhoda E. Howard-Hassmann, 'Introduction: The Human Right to Citizenship' in Rhoda E. Howard-Hassmann and Margaret Walton-Roberts (eds), *The Human Right to Citizenship: A Slippery Concept* (Penn Press 2015), 13

[504] Marie Bénédiete Dembour, 'Human Rights Talk and Anthropological Ambivalence: The Particular Context of Universal Claims' in Olivia Harris (ed), *Inside and Outside the Law: Anthropological Studies of Authority and Ambiguity* (Routledge 1996), 23

model of citizenship based on the notion of a multilayered identity[505] "draws the 'outside' – the refugee, the second-generation migrant, the asylum seeker, the economic migrant – into the European political sphere, but in such a way that they are also simultaneously expelled, because they are considered less than full citizens by continuing to be defined as the Other in need of inclusion."[506]

Although human rights are based on the idea of equal value and the rights of all human beings, in practice they are limited to the way states classify individuals.[507]This tension between human rights and citizenship implies the assumption that the international human rights regime does not go beyond the sphere of the nation-state which inexorably classifies individuals as citizens, refugees, asylum seekers, irregular migrants, and so on.

2.3. The dichotomy between the *human* and *the refugee*

The human rights discourse has become increasingly important both in the sphere of academic debate and in the sphere of political decision-making.[508] "Although the concept of human rights emphasises equality between humans, many people are excluded from the enjoyment of their basic human rights, as is the case with refugees, because it is so closely tied to the context of the nation state."[509] Refugees are often not granted rights that are recognised as universal. Thus, they "are not legally considered human."[510]Former United Nations High Commissioner for Refugees and current UN Secretary-General, António Guterres, said that "the global economic crisis brought with it a populist wave of anti-foreigner sentiment, albeit often couched in terms of national sovereignty and national security. This difficult environment highlights the need to prevent the economic crisis from becoming a protection crisis at the expense of refugee rights."[511]

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[505] Elizabeth Meehan describes EU citizenship as follows: "A new kind of citizenship is emerging that is neither national nor cosmopolitan but that is multiple in the sense that identities, rights and obligations associated (…) with citizenship are expressed through an increasingly complex configuration of common Community institutions, states, national and transnational voluntary associations, regions, and alliances of regions."(Elizabeth Meehan, *Citizenship and the European Community* (SAGE 1993), 1)

[506]Aoileann Ní Mhurchú*, Ambiguous Citizenship in an Age of Global Migration* (Edinburgh University Press 2014), 7

[507] Marie Bénédiete Dembour, 'Human Rights Talk and Anthropological Ambivalence: The Particular Context of Universal Claims' in Olivia Harris (ed), *Inside and Outside the Law: Anthropological Studies of Authority and Ambiguity* (Routledge 1996), 16

[508]Anne Karine Jahren, 'Use and Abuse of Human Rights Discourse' (*E-International Relations*, 27 October 2013) <https://www.e-ir.info/2013/10/27/use-and-abuse-of-human-rights-discourse/> accessed 3 March 2021

[509] Iza Kavedzija, 'Inside and Outside the New Global Community Human Rights Discourse in Japan and Beyond' (*Hrcak*, 2011) <https://hrcak.srce.hr/index.php?show=clanak&id_clanak_jezik=111793> accessed 3 March 2021

[510] Marie Bénédiete Dembour, 'Human Rights Talk and Anthropological Ambivalence: The Particular Context of Universal Claims' in Olivia Harris (ed), *Inside and Outside the Law: Anthropological Studies of Authority and Ambiguity* (Routledge 1996), 23

[511]António Guterres, 'Remarks at the Opening of the Judicial Year of the European Court of Human Rights' (UNHCR, 28 January 2011) <https://www.unhcr.org/admin/hcspeeches/4d4693259/antonio-guterres-united-nations-high-commissioner-refugees-remarks-opening.html?query=Refugee%20definition> accessed 4 March 2021

The world is constantly evolving, as are the basic concepts defined by human rights documents. For instance, the phenomenon of "economic refugees" has emerged. Economic refugees are not included in the realm of international law, because the *Convention Relating to the Status of Refugees*[512]does not include this phenomenon.[513]Thus, the law distinguishes between political and economic refugees. The *Convention Relating to the Status of Refugees* protects political refugees[514] while economic refugees are excluded from international provisions.[515] Article 1 of the *Convention Relating to the Status of Refugees* "defines the refugee as a person unable or unwilling to return to his/her country of origin owing to a well-founded fear of being persecuted for reasons of his/her race, religion, nationality, membership of a particular social group or political opinion."[516]

 Althaus emphasises that the term "economic refugee" is not mentioned in any international legal instrument relating to migration.[517] However, the term "economic refugee" is

> "commonly used in the public discourse, often with an unfortunate derogative connotation. It frequently implies that the migrant has freely decided to move with the only aim of improving their financial situation, in other words for 'personal convenience'. At worst, it is suggested, with a xenophobic twist, that 'economic migrants' move to 'steal' the jobs and social benefits of their destination's population."[518]

The distinction between political and economic refugees creates two concepts and the misleading impression that only political refugees have and deserve legal security and rights at the international level.[519] However, the reality is much more complex.

> "Migratory movements are composed of various types of migrants who may have specific protection needs, even if they are not fleeing persecution or a conflict. These include accompanied or unaccompanied migrant children; victims of human trafficking; migrants attempting to reunite with their families; and migrants affected by natural disasters or environmental degradation, including as a consequence of climate change."[520]

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[512] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention)

[513] Marie Bénédiete Dembour, 'Human Rights Talk and Anthropological Ambivalence: The Particular Context of Universal Claims' in Olivia Harris (ed), *Inside and Outside the Law: Anthropological Studies of Authority and Ambiguity* (Routledge 1996), 23

[514] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 Art. 1

[515] The main legal instruments that protect refugee rights are the *Convention Relating to the Status of Refugees* (1951), the *Protocol Relating to the Status of Refugees* (1967), the *Refugee Act* of 1980.

[516]Sanja Ivic, 'Europe's Migration Crisis: A Challenge to Democracy' in Gordana Djeric (ed), *Spatial Demarcations: Between the Politics of Fear and Effects on the Purse* (Institute for European Studies 2016), 86

[517] Anne Althaus, 'The False Dichotomy Between Economic Migrants and Refugees' (IOM, 19 May 2016) <https://weblog.iom.int/false-dichotomy-between-%E2%80%98economic-migrants%E2%80%99-and-refugees> accessed 1 March 2021

[518] Ibid.

[519] Ibid.

[520] Ibid.

More than 30 years have passed since the environmental migration debate first gained momentum.[521] However, the rights of environmental migrants are still not established and this is already the next frontier. "Several UN arrangements explicitly recognize environmental migration, but lack of binding force."[522]Andrew Schoenholtz argues that a new treaty is necessary to address the complex relationships involving refugees in the twenty-first century and to take into account the changing nation-state, economic and environmental migration, population displacement, and modern warfare.[523]

On the other hand, even the rights of political refugees are still not fully protected. "Apart from the dire difficulties of proving that one is actually a refugee, and the often penitentiary-like conditions reserved for the asylum-seekers who have arrived in a 'host' state, it remains true that the international community is ready to accept only very limited duties"[524] towards refugees and migrants. This is reflected, for example, in Europe's refugee and migrant crisis, which arose as a result of the Arab Spring, a wave of pro-democracy protests in the Middle East and North Africa, which began in 2010. "The most recent crisis in Europe started in the aftermath of the Arab Spring and has continuously deteriorated in the course of the subsequent Syrian, Iraqi and Libyan civil wars as well as further upheavals in the Middle East and Africa since July-October 2011."[525] According to Eurostat, in 2015 over 1.2 million asylum seekers[526] entered Europe, and this crisis became the EU's political concern.[527]

This most significant European migration crisis since World War II has caused divisions within the European Union due to disagreements over a common European response to this crisis, thus showing the tension between the supranational and national nature of the European Union. EU Member States have given priority to their national interests and policies over the common European response to the migration crisis[528], which is inconsistent with European values based on democracy, equality, the rule of law, human dignity and freedom let alone the notion of universal

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[521] Chiara Scissa, 'Recognition and Protection of Environmental Migrants in International Law' (*E-International Relations*, 24 June 2021) <https://www.e-ir.info/2021/06/24/recognition-and-protection-of-environmental-migrants-in-international-law/> accessed 10 October 2022

[522] Ibid.

[523]AndrewSchoenholtz, 'The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century' (2015) 16(1) Chicago Journal of International Law, 81-126

[524] Marie Bénédiete Dembour, 'Human Rights Talk and Anthropological Ambivalence: The Particular Context of Universal Claims' in Olivia Harris (ed), *Inside and Outside the Law: Anthropological Studies of Authority and Ambiguity* (Routledge 1996), 23

[525] Ireneusz Pawel Karolewski and Roland Benedikter, 'Europe's Refugee and Migrant Crisis: Political Responses to Asymmetrical Pressures' (2018) 60(2) Politique européenne, 99

[526] Eurostat Press Office, 'Record Number of Over 1.2 Million First Time Asylum Seekers Registered in 2015' (*Eurostat*, 4 March 2016) <https://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/790eba01-381c-4163-bcd2-a54959b99ed6> accessed 6 March 2021

[527] Ireneusz Pawel Karolewski and Roland Benedikter, 'Europe's Refugee and Migrant Crisis: Political Responses to Asymmetrical Pressures' (2018) 60(2) Politique européenne, 99

[528] Shoshana Fine, 'All at Sea: Europe's Crisis of Solidarity on Migration' (*European Council on Foreign Relations*, 14 October 2019) <https://ecfr.eu/publication/all_at_sea_europes_crisis_of_solidarity_on_migration/> accessed 7 March 2021

human rights.[529]Europe's refugee and migrant crisis reflects the tension between the concepts of citizenship and universal humanity, national and European, local and global. "In the postnational era, the concept of the refugee breaks up this modernist identity between man and the citizen, and between birth and nationality, challenging the traditional concepts of the 'territory', the 'nation state' and 'citizenship.' Europe's refugee and migrant crisis requires the rethinking of traditional political categories and, in particular, the idea of human rights based on fraternity[530]"[531] and citizenship.

In Europe, the increase in the number of "irregular" migrants is driving European politics "in a rightward direction"[532] and conflicts between nations are becoming more frequent. The European Union has often been criticised for lacking legal channels for refugees and migrants entering EU territory.[533] This has allowed smugglers to grow their businesses by taking advantage of desperate people who have no other choice. According to EUROPOL, "at least 10,000 unaccompanied child refugees have disappeared after arriving in Europe (…) Many are feared to have fallen into the hands of organised trafficking syndicates."[534] States should pay special attention to children's rights, as they enjoy international protection under the *Convention on the Rights of the Child* (1989).[535]

As the migration crisis intensified, the main challenge for the European Union became its ability to pursue a common asylum policy, stemming from common values and principles of solidarity.[536] A strictly controlled approach to asylum policy has led to a chronic imbalance between human security and state security. Refugees who have found a safe haven in the new environment have faced prejudices, stereotypes and legal difficulties, such as unemployment, inaccessibility of health and education systems, social exclusion, inadequate accommodation and language barriers.

Former US President Donald Trump signed an executive order in 2017 prohibiting citizens from six Muslim-majority countries from entering the USA.[537]Trump has prioritised ending most

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[529]Sanja Ivic, *The Concept of European Values: Creating a New Narrative for Europe* (Lexington Books 2023)

[530] Article 1 of the *Universal Declaration of Human Rights States: "*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

[531]Sanja Ivic, 'Europe's Migration Crisis: A Challenge to Democracy' in Gordana Djeric (ed), *Spatial Demarcations: Between the Politics of Fear and Effects on the Purse* (Institute for European Studies 2016), 88-9

[532] Melissa Rossi, 'Rising Tide of Immigration to Europe Pushing Continent's Politics to the Right, Experts Say' (*Yahoo News*, 19 November 2022) <https://www.yahoo.com/news/rising-tide-of-immigration-to-europe-pushing-continents-politics-to-the-right-experts-say-004400696.html> accessed 20 November 2022

[533] Marie Martin, 'Prioritising Border Control over Human Lives: Violations of the Rights of Migrants and Refugees at Sea' (EMHRN, June 2014) <https://www.refworld.org/pdfid/56fccbcbd.pdf> accessed 7 March 2021

[534] Mark Townsend, '10,000 Refugee Children are Missing, Says Europol' (*The Guardian,* 30 January 2016) <https://www.theguardian.com/world/2016/jan/30/fears-for-missing-child-refugees> accessed 10 March 2021

[535] Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)

[536] Consolidated Version of the Treaty on European Union [2008] OJ C115/13

[537]Amnesty International UK, 'A Licence to Discriminate: Trump's Muslim and Refugee Ban' (Amnesty International, 6 October 2020) <https://www.amnesty.org.uk/licence-discriminate-trumps-muslim-refugee-ban> accessed 13 March 2021

immigration, and as a result of his policies, asylum in the United States has effectively been abolished.[538]

> "These changes have impacted the lives and health of countless individuals attempting to seek safety from persecution. (…) The daily disregard of basic human rights by the current administration has included dismissing documents such as the *Universal Declaration of Human Rights*. (…) Family separation related to the 'zero tolerance policy' for asylum-seekers has resulted in widespread developmental trauma for children taken from their parents."[539]

Recently, the Danish government revoked the residence permit of 94 Syrian refugees after determining that Syria is safe.[540] Refugee and migrant rights director at Amnesty International UK, Steve Valdez-Symonds stated: "The Danish government is seeking to force people back into the hands of this brutal regime is an appalling affront to refugee law and people's right to be safe from persecution (…) This reckless violation of Denmark's duty to provide asylum also risks increasing incentives for other countries to abandon their own obligations to Syrian refugees."[541]

Article 14 of the *Universal Declaration of Human Rights* states: "Everyone has the right to seek and to enjoy in other countries asylum from persecution."[542]Despite the provisions of the *Universal Declaration on Human Rights,* migrants and refugees have repeatedly experienced *de facto* discrimination.

Also the COVID-19 pandemic has negatively affected the rights of refugees, migrants and asylum seekers. Refugees and migrants are among the groups that have experienced the consequences of the COVID-19 pandemic the hardest. They have already endured pre-existing barriers to protection and assistance in most countries around the world, and have been left out of the national COVID-19 responses and assistance programs of many host countries.[543]

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[538]Katherine C. McKenzie, Eleanor Emery, Kathryn Hampton, and Sural Shah, 'Eliminating Asylum: The Effects of Trump Administration Policies' (*Health and Human Rights Journal*, 24 August 2020) <https://www.hhrjournal.org/2020/08/eliminating-asylum-the-effects-of-trump-administration-policies> accessed 18 March 2021

[539] Ibid.

[540] InfoMigrants, 'Denmark Declares Parts of Syria Safe, Pressuring Refugees to Return' (*InfoMigrants*, 4 March 2021) <https://www.infomigrants.net/en/post/30650/denmark-declares-parts-of-syria-safe-pressuring-refugees-to-return> accessed 19 March 2021

[541] Ibid.

[542] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A (III) (UDHR)

[543]Evan Easton-Calabria, 'A Restriction of Responsibility-Sharing: Exploring the Impact of COVID-19 on the Global Compact on Refugees' (*Danish Refugee Council*, 2020) <https://data2.unhcr.org/en/documents/details/79498> accessed 15 March 2021

2.4. Discursive production of humanity

The notion of human rights is "an essentially contested concept."[544]Even the concepts on which the notion of human rights is based, such as democracy, freedom and equality, can also be considered contested concepts. The basic problem of the human rights discourse is "the lack of conceptual clarity."[545]Discourse facilitates the formation' of a symbolic community, but it also results in the exclusion of some individuals through the process of setting boundaries.[546]Discourse analysis shows "how political relationships are reflected through language, as language becomes the medium through which human rights are appropriated in rhetoric."[547]According to Tony Evans, human rights are based on three overlapping discourses: political, philosophical and legal.[548]The legal discourse is the most dominant.

Discourse is a key component of production of human rights and citizenship. The concepts of universal human rights and citizenship reflect power relations in society. Poststructuralist and postmodernist philosophers emphasise that the concepts of citizenship, humanity and human rights are socially and politically constructed.[549] Relying on Michel Foucault's philosophy[550], it can be argued "that juridical systems of power produce the subjects they subsequently came to represent."[551] The notions of citizenship, humanity and human rights are produced through various exclusionary practices. "Juridical power inevitably 'produces' what it claims merely to represent; hence, politics must be concerned with this dual function of power: the juridical and the productive."[552]According to poststructuralist philosophers, there is no need to invoke some universal human rights, because it is unproductive to judge power relations in terms that are themselves part of power relations.[553] The law is also always tied to the mechanism of power: hence, it is not in a position to judge power.[554] Therefore, human rights are not above politics.[555]

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[544] Ibid.

[545] Ibid.

[546]Iza Kavedzija, 'Inside and Outside the New Global Community Human Rights Discourse in Japan and Beyond' (*Hrcak*, 2011) <https://hrcak.srce.hr/index.php?show=clanak&id_clanak_jezik=111793> accessed 3 March 2021

[547] Anne Karine Jahren, 'Use and Abuse of Human Rights Discourse' (*E-International Relations*, 27 October 2013) <https://www.e-ir.info/2013/10/27/use-and-abuse-of-human-rights-discourse/> accessed 3 March 2021

[548] Tony Evans, *The Politics of Human Rights: A Global Perspective* (2nd edn, Pluto Press 2005)

[549] See: Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (1st edn, Routledge 1990); Jacques Derrida, *The Politics of Friendship* (George Collins tr, Verso 2005).

[550] Michel Foucault, *The Archaeology of Knowledge* (1st edn, Pantheon Books 1972)

[551] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (1st edn, Routledge 1990), 2

[552] Ibid.

[553] Michel Foucault, *The Archaeology of Knowledge* (1st edn, Pantheon Books 1972); Jacques Derrida, 'Declarations of Independence' (1986) 7(1) New PoliticalScience, 7-15

[554] Jacques Derrida, 'Declarations of Independence' (1986) 7(1) New PoliticalScience, 7-15

[555] Michael Ignatieff, *Human Rights as Politics and Idolatry* (Amy Gutmann ed, 1st edn, Princeton University Press 2001)

Article 1 of the *Universal Declaration on Human Rights* states that all human beings are "endowed with reason and conscience."[556] The concept of humanity based on reason[557] excludes a large range of individuals. In the past, it excluded slaves, women, workers, African Americans, and today it excludes undocumented migrants, economic refugees, collective groups of people — for instance, indigenous peoples[558] and so on. Even individuals who have formal citizenship status don't always have the same ability to fulfill their rights.[559]

The problem is not only "with the spatial diversification of the enjoyment of rights reinforced by citizenship"[560], but also with ineffectiveness and ambiguity of human rights, and their exclusivist nature. The human rights discourse is based on the distinction between *human* and *non-human*. The concept of humanity defined by the human rights discourse is exclusivist. The human rights discourse still relies on the modernist, fixed, exclusivist notion of subjectivity. It does not resolve "the statist framework of boundaries between inclusion and exclusion, inside and outside, 'us' and 'them'"[561], citizens and refugees. The definition of "humanity" (within contemporary human rights documents) determines the content and scope of the law.[562] Human rights documents define humanity as an abstract, universal concept as they rely on the idea of an abstract citizen originally promoted by the Enlightenment project. The philosophers of the Enlightenment universalised the human being by ignoring religious, cultural, political, philosophical and other differences. The consequence of this point of view is the emergence of the idea of political atomism and modernist conception of citizen as a political atom.[563]Political atomism arose in the seventeenth century, and it was advocated by Samuel Pufendorf, Hugo Grotius, John Locke and others.

However, the abstract, universal, concept of *humanity* employed in human rights documents is non-existent. *Humanity* is clearly not an abstract notion which is independent of historical, social, political and geographical context.

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[556] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A (III) (UDHR)

[557] The philosophical concept of universal humanity based on reason represents the foundation of the idea of human rights. This is also emphasised within the *Universal Declaration of Human Rights*, which states: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood" (Article 1).

[558] Minority Rights Group International, 'Mauritania: Challenging Slavery of Haratine Women and Children' (*Law and Legal Cases*, 13 November 2016) <https://minorityrights.org/law-and-legal-cases/mauritania-challenging-slavery-of-haratine-women/> accessed 19 March 2021

[559] Rhoda E. Howard-Hassmann, 'Introduction: The Human Right to Citizenship' in Rhoda E. Howard-Hassmann and Margaret Walton-Roberts (eds), *The Human Right to Citizenship: A Slippery Concept* (Penn Press 2015)

[560] Ibid., 2

[561]Aoileann Ní Mhurchú*, Ambiguous Citizenship in an Age of Global Migration* (Edinburgh University Press 2014), 5

[562] Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (1st edn, Routledge-Cavendish 2007)

[563]Sanja Ivic, *European Identity and Citizenship: Between Modernity and Postmodernity* (Palgrave Macmillan 2016), 33

3. Human Rights Dichotomies

The enforcement of U.N. Human Rights Covenants still heavily relies on state sovereignty.[564] "On September 19, 2017, [the former] US President Donald Trump delivered a speech to the United Nations General Assembly where he highlighted sovereignty as the guiding principle of international relations."[565] According to Samuel Huntington, despite ongoing globalisation, "nation states will remain the most powerful actors in world affairs, but the principal conflicts of global politics will occur between nations and groups of different civilizations. The clash of civilizations will dominate global politics."[566] This means that the global politics still reflects binary oppositions: transnational/national, global/local, universal human rights/state sovereignty, West/East, and so on.

Globalisation is a paradoxical and complex phenomenon – it challenged state sovereignty and the traditional concept of borders, but at the same time it eventually lead to fragmentation and the rise of nationalism.[567] "The protection of state sovereignty is reflected in the results of the Brexit referendum as well as the rise of populism and authoritarian regimes across the globe. Thus, "globalization (…) and nationalism should be captured and studied as forces relative to and overlapping one another, sometimes antagonistic and sometimes cooperative toward each other, but never harmonious."[568]

Taking into account the differences between the international order and nation-states, between human rights and citizenship, between the global and the national/local, universal human rights can never be fully realised in practice.

3.1. Binary oppositions within the contemporary human rights discourse

There are various binary hierarchies or oppositions that challenge the idea of universal human rights.[569] "The construction of binary oppositions may stem from a particular identity formation, the ways in which people are taught to view themselves and the world."[570] Binary oppositions refer

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[564] Jiangyu Wang, 'China and the Universal Human Rights Standards' (2001) 29 Syracuse Journal of International Law and Commerce, 149

[565] OutRight UN Program, 'What Does "Sovereignty" at the United Nations Really Mean Today?' (*OutRight Action International*, 12 October 2017) <https://outrightinternational.org/content/what-does-sovereignty-united-nations-really-mean-today> accessed 10 February 2021

[566] Samuel P Huntington, 'The Clash of Civilizations?' (1993) 72(3) Foreign Affairs, 23

[567] Arie M Kacowitcz, 'Regionalization, Globalization, and Nationalism: Convergent, Divergent, or Overlapping?' (*Kellogg Institute Working Paper*, December 1998) <https://kellogg.nd.edu/sites/default/files/old_files/documents/262.pdf> accessed 11 February 2021

[568] Ibid.

[569] Jiangyu Wang, 'China and the Universal Human Rights Standards' (2001) 29 Syracuse Journal of International Law and Commerce, 136

[570] Bernadette Muthien and Helene Combrinck, 'When Rights are Wrong: Gender-Based Violence and Human Rights in Africa' (*GBV Prevention Network*, 2013) <http://preventgbvafrica.org/wp-content/uploads/2013/11/whenrightsarewronged.bm_.pdf> accessed 11 February 2021

to one person, social group or worldview, versus or against another person, social group or worldview. According to Jacques Derrida, the meaning in the Western culture is defined in terms of binary oppositions where "one of the two terms governs the other"[571] in a "violent hierarchy."[572] The entire Western culture is based on binary hierarchies such as: we/they; nature/culture; citizen/foreigner; West/East, global/local and so forth.

The contemporary human rights discourse also includes various binary oppositions. These dichotomies include: universal human rights versus state sovereignty, the universality of values versus cultural relativism dichotomy and the civic-political versus economic-social dichotomy.[573] The first dichotomy demonstrates the debate between proponents of universal justice and some governments.

Human rights are not universal, but they reflect binary oppositions between the universal values and principles on the one hand, and nations or states and their values and interests, on the other. Tanzania and India ratified the *Convention on the Rights of the Child*, but child labour still exists in both Tanzania and India.[574] There are restrictions on women's rights in Saudi Arabia, although it ratified the *UN Convention on the Elimination of all Forms of Discrimination against Women* in 2001. Powerful Western countries do business with human rights abusers.[575] Therefore, some states avoid being bound fully to the treaty translations of the provisions of the *Universal Declaration of Human Rights*. On the other hand, some states and governments claim that the United Nations system as well as the *Universal Declaration of Human Rights* represent a reflection of Western conception of rights as well as Western values.[576] These states claim that the United Nations system reflects cultural imperialism.

3.2. Universal human rights vs. state sovereignty

Another problem is the People's Republic of China (hereinafter "PRC" or "China") challenge to the international human rights regime and the tension between the Chinese government's norms with the universal human rights principles. China uses its position in the UN Human Rights Council (HRC) "to present itself as a champion of the developing world and to undermine the legitimacy of the West as a norms' setter. Its position is shifting from a largely defensive role

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[571] Jacques Derrida, *Positions* (Alan Bass tr, 1st edn, University of Chicago Press 1981), 41
[572] Ibid.
[573] Jiangyu Wang, 'China and the Universal Human Rights Standards' (2001) 29 Syracuse Journal of International Law and Commerce, 139
[574] Eric Posner, 'The Case Against Human Rights' (*The Guardian*, 4 December 2014) <https://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights> accessed 20 February 2021
[575] Ibid.
[576] Ibid.

focused on protecting state sovereignty to a more proactive role aimed at promoting development as the main aim for the United Nations, including the HRC."[577]

The power relations between the PRC and Western countries have radically changed since the 1950s. At that time, China was not even a member of the UN and mostly Western countries dominated both the Security Council and General Assembly.[578]"Since then, the PRC not only obtained permanent membership of the UN Security Council – replacing the Republic of China (Taiwan) as the representative of China – but a large number of developing countries also joined the UN. To strengthen their bargaining position, most developing countries became part of a coalition called 'the Group of 77 and China' (G77)."[579]The group has expanded from 77 to 134 countries today at it makes almost 70% of the UN's membership. China has a significant influence over many members of this group. "Unlike any other UN member, China thus has the advantage both of holding veto power in the Security Council and of being an influential participant in the G77."[580]

China aims at defining state sovereignty as the main principle of international relations and relativises the importance of human rights. The PRC also aims at changing the norms of human rights. China delivered a joint statement that emphasised the significance of sovereignty in 2011, at the time of Arab Spring.[581] "On two occasions during 2017, China's envoy Ma Zhaoxu delivered joint statements at the HRC on behalf of a group of 140 countries that endorsed the aim of 'building a community of shared destiny for mankind', a concept launched by Xi Jinping that China is promoting within the UN system."[582]

China aims at ensuring that human rights discussions take place in the Human Rights Council and not in other UN bodies – the UN Security Council and UN General Assembly. While the Human Rights Council remains one of the world's most important global platforms that is responsible for advocating respect for the protection of universal human rights, "it is highly political in operation and more vulnerable to political maneuvers than other, more autonomous, human rights mechanisms, such as U.N. human rights treaty bodies."[583]

The UN Human Rights Council is vulnerable to China's political maneuvers. The UN Human Rights Council's predecessor, the UN Commission on Human Rights was politicised and unsuccessful. It also reflected the tension between the universal human rights principles and the

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[577] Maaike Okano-Heijmans and Frans-Paul van der Putten (eds), 'A United Nations with Chinese Characteristics?' (*Clingendael Institute*, December 2018)<https://www.clingendael.org/sites/default/files/2018-12/China_in_the_UN_1.pdf> accessed 22 February 2021

[578] Ibid.

[579] Ibid.

[580] Ibid.

[581] Ibid.

[582] Ibid.

[583] Yu-Jie Chen, 'China's Challenge to the International Human Rights Regime' (2019) 51 NYU Journal of International Law and Politics, 1180

nation-states, governments, and their interests. In 2005, the former UN Secretary-General, Kofi Annan stated:

> "The Commission's capacity to perform its tasks has been increasingly undermined by its declining credibility and professionalism. In particular, States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticise others. As a result, a credibility deficit has developed, which casts a shadow on the reputation of the United Nations systems as a whole."[584]

The universality of human rights has never been achieved in the real world. According to the report of the International Labour Organization (ILO), 25 million people are victims of forced labor.[585] The rise of xenophobia in Europe, the rise of racism and hate-filled rhetoric, particularly in the USA during the COVID-19 pandemic, detention of one million of Muslims in Xinjiang, violation of LGBT rights in Russia and Nigeria and various other examples show that human rights are simply not universal.

> "Why, for example, do more than 150 countries (out of 193 countries that belong to the UN) engage in torture? Why has the number of authoritarian countries increased in the last several years? Why do women remain a subordinate class in nearly all countries of the world? Why do children continue to work in mines and factories in so many countries? The reason is that human rights were never as universal as people hoped, and the belief that they could be forced upon countries as a matter of international law was shot through with misguided assumptions from the very beginning."[586]

There is also a huge gap between human rights rhetoric and human rights implementation. Human rights are understood and applied differently in different societies. For instance, the right to freedom of expression is differently exercised in different countries.[587] Plainly acknowledged by human rights legislation, the right to freedom of expression may be constrained by factors related to morality and public order.[588]

3.3. Protection of universal values vs. relativist approach to human rights

Another human rights dichotomy reflects a debate between proponents of universal values and proponents of the cultural relativist approach to human rights, who argue that human rights represent a Western construct that cannot be applied to non-Western societies and cultures.

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[584] Kofi Annan, 'In Larger Freedom: Towards Development, Security and Human Rights for All' (OHCHR, 26 May 2005) <https://www.ohchr.org/Documents/Publications/A.59.2005.Add.3.pdf> accessed 23 February 2021
[585] International Labour Organization, 'Global Estimates of Modern Slavery: Forced Labour and Forced Marriage' (ILO, 2017) <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf> accessed 18 February 2021
[586] Eric Posner, 'The Case Against Human Rights' (*The Guardian*, 4 December 2014) <https://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights> accessed 20 February 2021
[587] Ibid.
[588] Ibid.

Since its inception, the United Nations Human Rights Council (UNHRC), have been marked by conflict between those who advocated the adoption of universal, cross-culturally applicable human rights standards and those who emphasised that human rights should be realised – "and thus relativised" – in accordance with certain cultural, religious and political contexts.[589] When the United Nations Human Rights Council began debating a series of resolutions on the topic of "traditional values," the universalism-relativism debate gained new momentum.[590] In 2009, the Russian Federation, led the resolution "Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind"[591]. The majority of non-Western nations supported this initiative. "Protection of the Family"[592] resolution from 2014 launched a series of initiatives that followed the resolution on "traditional values."[593] The traditionalist agenda represents a culturally relativistic approach to human rights, previously supported by the "Organization of Islamic States or countries from the Global South,"[594] and as another chapter of relativistic opposition to the universalist application of human rights.[595]

In addition to undermining UN human rights mechanisms, Russia and China have, since 2009, attempted to change the norms that support the international human rights system by enacting "counter-norms based on the right to development and traditional and family values."[596]

China submitted a resolution to the UNHRC in March 2018 titled "Promoting Mutually Beneficial Cooperation in the Field of Human Rights,"[597]which aimed to do away with nation-specific systems that hold nations accountable for their violations of human rights. The resolution sought to minimise the UNHRC's authority to look into violations of human rights while obscuring China's record on these issues.[598] The resolution was accepted with backing from a number of

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[589] Kristina Stoeckl and Kseniya Medvedeva, 'Double Bind at the UN: Western Actors, Russia, and the Traditionalist Agenda' (2018) 7(3) Global Constitutionalism, 384
[590] Ibid., 385.
[591] UNHRC, Res 12/21: Promoting Human Rights and Fundamental Freedom through a Better Understanding of Traditional Values of Humankind A/HRC/RES/12/21 (2009), https://digitallibrary.un.org/record/668115.
[592]UNHRC, Res 26/11: Protection of the Family A/HRC/RES/26/11 (2014), https://www.oursplatform.org/wp-content/uploads/HRC-Resolution-Protection-of-the-family-2014.pdf.
[593] Kristina Stoeckl and Kseniya Medvedeva, 'Double Bind at the UN: Western Actors, Russia, and the Traditionalist Agenda' (2018) 7(3) Global Constitutionalism, 385
[594] Ibid., 383
[595] Ibid.
[596] Geoffrey Roberts, 'Russia and China have Waged a Decade-Long Campaign to Dismantle the Global Human Rights Order' (*International Affairs*, 6 February 2020)<https://www.internationalaffairs.org.au/australianoutlook/russia-and-chinas-assault-on-the-international-human-rights-system/> accessed 14 May 2023
[597] UNHRC, Res 37/23: Promoting Mutually Beneficial Cooperation in the Field of Human Rights A/HRC/RES/37/23 (2018), https://digitallibrary.un.org/record/668115, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/085/27/PDF/G1808527.pdf?OpenElement
[598] Geoffrey Roberts, 'Russia and China have Waged a Decade-Long Campaign to Dismantle the Global Human Rights Order' (*International Affairs*, 6 February 2020)<https://www.internationalaffairs.org.au/australianoutlook/russia-and-chinas-assault-on-the-international-human-rights-system/> accessed 14 May 2023

authoritarian and third world states, including Saudi Arabia, Pakistan, Venezuela and Cuba, despite a number of amendments from Western countries intended to weaken the original text.[599]

According to Kothari, "given China's expressed support for economic, social, and cultural rights and its oft-claimed record in lifting some of its citizens out of poverty, one might think that this resolution, titled "Promoting Mutually Beneficial Cooperation in the Field of Human Rights," could be a further step to implement ESC [economic, social and cultural] rights globally."[600] This resolution prioritises intergovernmental communication and collaboration as "the only viable option" for international participation, according to an earlier draft, favoring the sovereign state over individuals and communities.[601] The resolution also aims to reform the function of the Universal Periodic Review (UPR), a crucial UN Human Rights Council mechanism.[602] Every UN member state undergoes a review as part of the UPR process once every five years on all matters relating to human rights, not only those covered by treaties to which they are party. It is a crucial tool for identifying issues with human rights and for increasing attention and scrutiny to frequently ignored areas, such as economic, social and cultural rights.

Chinese officials often stress that there are different cultural standards regarding the protection of human rights. They often argue about the Western nature of human rights that cannot be universally applied. In its first Human Rights White Paper, the Chinese government states:

> "Owing to tremendous differences in historical background, social system, cultural tradition and economic development, countries differ in their understanding and practice of human rights. From their different situations, they have taken different attitudes towards the relevant UN conventions. Despite its international aspect, the issue of human rights falls by and large within the sovereignty of each country. Therefore, a country's human rights situation should not be judged in total disregard of its history and national conditions, nor can it be evaluated according to a preconceived model or the conditions of another country or region. Such is the practical attitude, the attitude of seeking truth from facts."[603]

The debate over Asian values began in the early 1990s.[604] The main argument from which the notion of Asian values is derived is based on the idea of cultural relativism – "that many of the hegemonic, political, social and cultural norms of the late twentieth century are Western, rather than universal norms."[605] This argument is based on the idea that human rights emanate from Judeo-Christian, European and Enlightenment heritage and cannot be applied to other, non-

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[599] Ibid.

[600] Miloon Kothari, 'China's Trojan Horse Human Rights Resolution' (*The Diplomat*, 22 March 2018)< https://thediplomat.com/2018/03/chinas-trojan-horse-human-rights-resolution/ > accessed 14 May 2023

[601] Ibid.

[602] Ibid.

[603]Office of the State Council of China, 'Preface, Human Rights in China' (*Law Info China*, 1991) <http://www.lawinfochina.com/display.aspx?lib=dbref&id=1&EncodingName=big5> accessed 16 February 2021

[604] Michael D. Barr, 'Lee Kuan Yew and the "Asian Values" Debate' (2000) 24(3) Asian Studies Review, 309

[605] Ibid., 310

Western cultures.[606] In light of this belief, there is an increasing use of new concepts such as "human rights with Chinese characteristics", "Islamic human rights" and so on. The concept of "human rights with Chinese characteristics" gives priority to principles of sovereignty and national conditions over human rights. It gives priority to the right to development over civil and political rights. "Third, China stresses the unity of duties and rights, as well as the unity of collective rights and individual rights. This position suggests that human rights should be conditioned on the performance of duties by the individual."[607]

The concept of Asian values stems from Confucianism.[608] Most East and Southeast Asian societies are based on paternalism and hierarchy. Cultural perspectives that stem from Confucianism are based on a communitarian view of society, "where everyone knows his or her place in a social hierarchy. This world-view is usually juxtaposed to 'Western' liberal and atomistic view of society that emphasise the autonomy of persons. This contrast enables advocates of 'Asian values' to present communitarian arguments that have strong cultural resonance – arguments that emphasise the 'rights' of the state, the community (…) and the family ahead of the rights of the individual person."[609]

Charles Taylor believes that the fact that rights talk stems from Western culture is an obstacle to building a consensus on human rights.[610] Taylor emphasises that there are certain features of human rights discourse that have roots in "Western history, and there only."[611] He argues that human dignity is considered a universal value within the Western conception of human rights. On the other hand, from the perspective of Asian values, "the pursuit of spiritual as well as material well-being"[612] represents a universal value. The critique of the Western conception of human rights is based on the critique of giving priority to the individual over the collective, while on the other hand the Confucian view prioritises the community.[613]

Charles Taylor raises the question of a universal consensus on human rights:

"What would it mean to come to a genuine, unforced international consensus on human rights? I suppose it would be something like what Rawls describes in his *Political Liberalism* as an 'overlapping

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[606] Ahmed Shaheed and Rose Parris Richter, 'Is 'Human Rights' a Western Concept?' (*IPI Global Observatory*, 17 October 2018) <https://theglobalobservatory.org/2018/10/are-human-rights-a-western-concept/> accessed 15 February 2021

[607] Yu-Jie Chen, 'China's Challenge to the International Human Rights Regime' (2019) 51 NYU Journal of International Law and Politics, 1179-1222

[608] "It is important to note, however, that the Confucianism referred to here is not the original set of ethics advocated by Confucians, but rather the state-centred form adopted by successive Chinese emperors from the second century BC onwards." (Michael D. Barr, 'Lee Kuan Yew and the "Asian Values" Debate' (2000) 24(3) Asian Studies Review, 311)

[609] Ibid.

[610] Charles Taylor, 'Conditions of an Unforced Consensus on Human Rights' (IILJ, 2016) <https://iilj.org/wp-content/uploads/2016/08/Taylor-Conditions-of-an-Unforced-Consensus-on-Human-Rights-1996.pdf> accessed 19 February 2021

[611] Ibid.

[612] Ibid.

[613] Ibid.

consensus.' That is, different groups, countries, religious communities, civilizations, while holding incompatible fundamental views on theology, metaphysics, human nature, etc., would come to an agreement on certain norms that ought to govern human behaviour. Each would have its own way of justifying this from out of its profound background conception. We would agree on the norms, while disagreeing on why they were the right norms. And we would be content to live in this consensus, undisturbed by the differences of profound underlying belief."[614]

The Western conception of rights carries an underlying justification with regard to human nature, universal values and society.[615] According to Taylor, giving a brief overview of the language of rights that has emerged in the West and the related ideas of human agency and the good might be the right place to start the debate. The next step would be to identify specific points of conflict between cultures, after which we might investigate whether anything can be done to resolve these issues.[616]

3.4. The civic-political vs. economic-social dichotomy

A further dichotomy stems from different generations of human rights. Civil and political rights represent the first generation of human rights, and they began to develop in the seventeenth and eighteenth centuries. Social, economic and cultural rights represent the second generation of human rights. The third generation of human rights arose more than forty years ago. These rights are based on solidarity and their nature is collective. They include the right to peace, the right to a healthy environment, the right to humanitarian assistance and so forth.[617] Most of the human rights today represent claims or entitlements, which is a fundamental issue in itself.

China gives priority to the second and third generations of human rights over the first generation of human rights. "The long-term result of China's approach to human rights in the UN would be that the principle of state sovereignty and the right to economic development would be core values in the international system, and that political and civil human rights would lose this role."[618]In the meeting with the European Union's Foreign Affairs Chief in 2019, Chinese officials rejected the idea of universal values and argued that human rights should be measured by "people's well-being."[619] They argued about different approaches to human rights and rejected the idea of

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[614] Ibid.
[615] Ibid.
[616] Ibid.
[617] Patricia Brander et al., *COMPASS: Manual for Human Rights Education with Young People* (2nd edn, Council of Europe Publishing 2020), 399
[618]Maaike Okano-Heijmans and Frans-Paul van der Putten (eds), 'A United Nations with Chinese Characteristics?' (*Clingendael Institute*, December 2018)<https://www.clingendael.org/sites/default/files/2018-12/China_in_the_UN_1.pdf> accessed 22 February 2021
[619] Keegan Elmer, 'China Rejects EU Support for "Universal" Human Rights, Saying "Satisfaction of People" is Most Important Measure' (*South China Morning Post*, 25 October 2019) <https://www.scmp.com/news/china/diplomacy/article/3034644/china-rejects-eu-support-universal-human-rights-saying> accessed 21 February 2021

universality. China rejects the notion of universal human rights arguing that human rights are conditional and depend on the country's level of development.

> "Consequently, the Human Rights Council is a UN body where this contrast in interests is most visible. Through the UN's social and economic bodies, the Chinese government is showing itself as increasingly willing and able to employ the UN to internationalise and legitimise its own domestic interests as well as its economic approach to development. It does so first and foremost by 'UN-ising' its Belt and Road Initiative as a way of showcasing public recognition."[620]

Another problem is identified by Eric Posner[621] who argues "that given the lack of democratic culture in China, and the extraordinary political turmoil that existed there until rather recently, there would be a significant risk to the management of the economy (and even societal peace) if China were to suddenly comply with civil and political rights."[622] This is certainly a valid point, which questions the universality of human rights and makes it clear how much they depend on individual states and citizenship. If you happen to be a citizen of China, for instance, your rights are very different indeed.

[620]Maaike Okano-Heijmans and Frans-Paul van der Putten (eds), 'A United Nations with Chinese Characteristics?' (*Clingendael Institute*, December 2018)<https://www.clingendael.org/sites/default/files/2018-12/China_in_the_UN_1.pdf> accessed 22 February 2021

[621] Eric Posner, *The Twilight of Human Rights Law* (Oxford University Press 2014)

[622]Lillian Carson, 'Human Rights and Democracy: An Incompatible or Complementary Relationship?' (*E-International Relations*, 7 May 2017) <https://www.e-ir.info/2017/05/07/human-rights-and-democracy-an-incompatible-or-complimentary-relationship/> accessed 3 February 2021

4. Questioning the Universality of Human Rights

Over the last few decades, progress has been made on women's rights: more girls are attending school, fewer girls are being forced into early marriages, more women are serving in parliament and leadership positions, and laws are being reformed to promote gender equality.[623] Despite these gains, many obstacles remain: patriarchal laws and social norms still exist, women are still underrepresented at all levels of political leadership, and one in five women and girls aged 15 to 49 reports experiencing physical or sexual harassment by an intimate partner in the previous 12 months.[624]

According to the former UN Women Executive Director, Phumzile Mlambo-Ngcuka:

> "The review of women's rights shows that, despite some progress, no country has achieved gender equality (...) Men are 75 per cent of parliamentarians, hold 73 per cent of managerial positions, are 70 per cent of climate negotiators and almost all of the peacemakers. This is not an inclusive and equal world and we need to take action now to create one that does not discriminate against women. Only half is an equal share and only equal is enough."[625]

All forms of violence against women and girls, especially domestic violence, have increased since the outbreak of COVID-19.[626]While lockdowns and stay-at-home orders may have been important in restricting and preventing the spread of COVID-19, they had a devastating effect on women and girls who are at risk of gender-based violence, as many of the factors that cause or reinforce violence against women and girls (VAWG) are exacerbated by preventive confinement measures.[627] New global data shows an increase in calls to VAWG helplines, especially in Latin America and the Caribbean region.[628]

> "For instance, in Argentina, between 20 and 31 March 2020, the number of daily calls to the 144 Helpline for Gender-Based Violence increased by 39 per cent. In Mexico, emergency calls related to VAWG increased by 53 per cent in the first four months of 2020. During March and April 2020, the National Network of

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[623] United Nations, 'Goal 5: Achieve Gender Equality and Empower all Women and Girls' (UN, 2020) <https://www.un.org/sustainabledevelopment/gender-equality/> accessed 20 April 2021

[624] Ibid.

[625] UN Women, 'Gender Equality: Women's Rights in Review 25 Years after Beijing' (*Reliefweb*, 5 March 2020) <https://reliefweb.int/report/world/gender-equality-women-s-rights-review-25-years-after-beijing> accessed 16 April 2021

[626] United Nations, 'Addressing the Impact of the COVID-19 Pandemic on Violence against Women and Girls' (UN, 27 November 2020) < https://www.un.org/en/addressing-impact-covid-19-pandemic-violence-against-women-and-girls> accessed 23 April 2021

[627] Ibid.

[628] Ibid.

Refuges reported a 77 per cent increase in the number of women using their services compared to the same period in 2019."[629]

Eurobarometer survey shows that the COVID-19 pandemic has had a particularly negative impact on women in the European Union.[630]In the EU, three out of four women (77%) believe that there has been an increase in physical and psychological violence against women as a result of the COVID-19 pandemic.[631]

4.1. Women's and children's rights

Equality between men and women is one of the basic principles of the European Union, a great proponent of universal human rights, especially when it comes to pointing out deficits elsewhere. Over the last few decades, the EU has made progress in gender equality. "However, gender gaps remain and in the labour market women are still over-represented in lower-paid sectors and under-represented in decision-making positions.(…) Women earn on average 16% less than men in the European Union (…) with significant differences between countries."[632]

According to the UN report "Women's Rights in the Review 25 Years after Beijing", advancements in women's and girl's rights has been noted since the adoption of the Beijing Platform for Action.[633] However, progress has been "uneven" and "slow"[634]:

- "Globally, progress on women's access to paid work has ground to a halt over the past 20 years. Less than two thirds of women (62 per cent) aged 25-54 are in the labour force, compared to more than nine out of ten (93 per cent) men.
- Women continue to shoulder the bulk of unpaid care and domestic work, and are on average paid 16 per cent less than men, rising to 35 per cent in some countries.
- Nearly one in five women (18 per cent) have faced violence from an intimate partner in the past year. New technologies are fuelling new forms of violence, such as cyber-harassment, for which policy solutions are largely absent.
- 32 million girls are still not in school.
- Men still control three quarters of parliamentary seats.

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[629] Ibid.
[630] European Parliament, 'New Eurobarometer Survey Highlights Severe Impact of COVID-19 Pandemic on Women' (EP Press Room, 4 March 2022)<https://www.europarl.europa.eu/news/en/press-room/20220223IPR23904/new-eurobarometer-survey-highlights-severe-impact-of-covid-19-pandemic-on-women> accessed 22 October 2022
[631] Ibid.
[632] European Union, 'Women's Rights: Is Gender Equality a Reality in Europe?' (*European Youth Portal*, 21 October 2020)<https://europa.eu/youth/get-involved/your%20rights%20and%20inclusion/womens-rights-gender-equality-reality-europe_en > accessed 23 April 2021
[633]UN Women, 'Gender Equality: Women's Rights in Review 25 Years after Beijing' (*Reliefweb*, 5 March 2020) <https://reliefweb.int/report/world/gender-equality-women-s-rights-review-25-years-after-beijing> accessed 16 April 2021
[634] Ibid.

- Women are largely excluded from peace processes, representing only 13 per cent of negotiators and only 4 per cent of signatories."[635]

According to the *Global Gender Gap Report 2020*, "it will take 95 years to close the gender gap in political representation, with women in 2019 holding 25.2% of parliamentary (lower-house) seats and 21.2% of ministerial positions. (…) As the impact of the COVID-19 pandemic continues to be felt, closing the global gender gap has increased by a generation from 99.5 years to 135.6 years."[636] The *Global Gender Gap Report 2021* states:

"Across the 156 countries covered by the index, women represent only 26.1% of some 35,500 parliament seats and just 22.6% of over 3,400 ministers worldwide. In 81 countries, there has never been a woman head of state, as of 15th January 2021. At the current rate of progress, the World Economic Forum estimates that it will take 145.5 years to attain gender parity in politics."[637]

Children are also subjected to continuing violations of their rights around the world, including violence, poverty and discrimination. Child labour affects nearly one in ten children (about 152 million) around the world, and almost half of them work in unsafe conditions.[638]For a variety of reasons, children can be forced to work. Child labour is most common when families experience financial difficulties or instability, whether as a result of poverty, a caregiver's sudden illness, or employment loss of a primary wage earner.[639] "The consequences are staggering. Child labour can result in extreme bodily and mental harm, and even death. It can lead to slavery and sexual or economic exploitation. And in nearly every case, it cuts children off from schooling and health care, restricting their fundamental rights and threatening their futures."[640] It is estimated that 121 million children will be engaged in child labour by 2025, and 52 million will endure hazardous work.[641]

According to the *KidsRights Index 2020*, the COVID-19 pandemic has negatively affected the children's rights around the world.[642] The *KidsRights Index 2020* reveals that countries around the world allocate insufficient budget for children's rights, especially in areas such as health, protection and education. There are no indications that this will improve anytime soon, given the economic consequences of the corona crisis.[643]

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[635] Ibid.
[636]World Economic Forum, 'Global Gender Gap Report 2021' (WEF, 30 March 2021) <https://www.weforum.org/reports/global-gender-gap-report-2021> accessed 27 April 2021
[637] Ibid.
[638] UNICEF, 'Child Labour' (UNICEF, 3 September 2020) <https://www.unicef.org/protection/child-labour> accessed 25 April 2021
[639] Ibid.
[640] Ibid.
[641] Ibid.
[642] Karin Arts, Dinand Webbink and Myrthe de Jong, *The KidsRights Index 2020: Report* (KidsRights Foundation 2020)
[643] Erasmus University Rotterdam, 'KidsRights Index 2020: "Children's Rights Globally Under Pressure Due to Corona Crisis"' (*KidsRights*, 26 May 2020) <https://kidsrights.org/news/childrens-rights-globally-under-pressure-due-to-corona-crisis/> accessed 28 April 2021

"Not only the economic consequences, but also the measures taken by governments to curb the outbreak of COVID-19 have a disastrous impact on many children. School closures in 188 countries affect 1.5 billion children and youth, leaving boys and girls extra vulnerable to child labor, child marriage and teenage pregnancy. The rise in domestic violence during lockdown measures is especially devastating for girls."[644]

Several judgments of the European Court of Human Rights (ECtHR or the Court): *Garib v the Netherlands*[645], *Napotnik v Romania*[646], *Honner v France*[647], *Mohamed Hasan v Norway*[648]and *B.G. and others v France*[649]dealt with gender equality. The concept of gender equality, which is reflected in the ECtHR's decision on the case *Napotnik v Romania* is too narrow. The same can be argued about the concept of family reflected in the ECtHR's decision on the case *Honner v France*. In the case of *Mohamed Hasan v Norway*, the ECtHR did not take into account the context of extreme domestic violence. In the case of *Garib v the Netherlands*, the ECtHR misses the opportunity to establish important criteria in terms of discrimination based on poverty or social origin and its overlap with other factors such as gender.[650]The case of *B.G. and others v France* "concerns 17 applicants, four families including minor children, who were seeking international protection. They were based in Metz, where they were forced to live in a tent camp on a carpark, sleeping directly on the concrete ground, from 29 June 2013 to 9 October 2013."[651] The European Court of Human Rights found no violation of Article 3 of the *European Convention on Human Rights* (ECHR).[652] Although the applicants' camp was overcrowded and the sanitary conditions were poor, the Court did not consider these factors appropriate to conclude that the applicants had been placed in a situation of material deprivation that met "the level of severity required to fall within the scope of Article 3."[653] These ECtHR judgments reflect a narrow understanding of women's and children's rights.

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[644] Ibid.

[645] *Garib v the Netherlands* App No 43494/09 [2016] *ECHR* 211

[646]*Napotnik v Romania,* App No 33139/13[2020] ECHR 747

[647]*Honner v France*, Application no. 19511/16 [2020] ECHR 806

[648]*Mohamed Hasan v Norway*, Application no. 27496/15 [2020] ECHR

[649]*B.G. and others v France*, Application no. 63141/13 [2020] ECHR

[650] Valeska David and Sarah Ganty, 'Strasbourg Fails to Protect the Rights of People Living in or at Risk of Poverty: The Disappointing Grand Chamber Judgment in Garib v the Netherlands' (*Strasbourg Observers*, 16 November 2017) <https://strasbourgobservers.com/2017/11/16/strasbourg-fails-to-protect-the-rights-of-people-living-in-or-at-risk-of-poverty-the-disappointing-grand-chamber-judgment-in-garib-v-the-netherlands/> accessed 5 May 2021

[651] European Database on Asylum Law, 'B.G. and Others v. France: General Living Conditions in Tent Camp on a Carpark do not Violate Article 3 ECHR' (EDAL, 10 September 2020) <https://www.asylumlawdatabase.eu/en/content/bg-and-others-v-france-general-living-conditions-tent-camp-carpark-do-not-violate-article-3> accessed 3 May 2021

[652]Article 3 of the ECHR states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[653]European Database on Asylum Law, 'B.G. and Others v. France: General Living Conditions in Tent Camp on a Carpark do not Violate Article 3 ECHR' (EDAL, 10 September 2020) <https://www.asylumlawdatabase.eu/en/content/bg-and-others-v-france-general-living-conditions-tent-camp-carpark-do-not-violate-article-3> accessed 3 May 2021

"*The European Convention on Human Rights* (1950) is Europe's core human rights treaty. (…) Article 1 establishes the obligation for Parties to secure the rights and freedoms in the Convention 'to everyone within their jurisdiction'. The enjoyment of these rights must be respected without discrimination on any ground, including sex (Article 14 of the *Convention*). Protocol 12 to the Convention reaffirms the principle of non-discrimination: Article 1 reiterates that the enjoyment of rights set forth by law shall be secured without discrimination on any ground, including sex."[654]

Gender-based violence is not addressed in the *Convention on the Elimination of All Forms of Discrimination Against Women* (1979).[655] In the 1990s, domestic violence was gradually recognised as a human rights issue, especially in the context of the UN General Assembly *Declaration on the Elimination of Violence Against Women*, which was adopted by the United Nations General Assembly in 1993.[656] The *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence* (the Istanbul Convention) enumerates legislative and administrative steps that its Member States must take to deter violence against women in Europe.[657]

At a global level, two conventions, the *International Covenant on Civil and Political Rights* (ICCPR)[658] and the *UN Convention on the Rights of the Child* (CRC)[659], have played a major role in bringing children's rights on the international agenda.

"With the growing jurisprudence and increased influence of the ECtHR[660] as of the 1990s, the CRC, albeit still valid law and incorporated in most domestic legislation, has lost some of its prominence in the adjudication of children's rights in Europe. Although the best interest of the child is an uncontested principle of international law, it is not explicitly mentioned in the ECHR. The ECtHR has incorporated the principle in its interpretation of Art. 8 on the right to family life."[661]

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[654]Council of Europe, 'Gender Equality and Women's Rights' (CoE, 2016) <https://rm.coe.int/168058feef> accessed 8 May 2021

[655] Convention on the Elimination of all Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW)

[656] UN Committee for the Elimination of All Forms of Discrimination against Women, 'General Recommendation No 19' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (29 July 1994) UN Doc HRI/GEN/1/Rev.1

[657] Carola Lingaas, 'Domestic Violence in Child Protection Cases Before the European Court of Human Rights: Double Victimisation of Abused Parents?' (2020) 38(2) Nordic Journal of Human Rights, 124-5

[658] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

[659] Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)

[660] "In its discussion of the 'best interests of the child', the ECtHR frequently refers to the CRC. Such cross-referencing is not entirely unproblematic, since the ECtHR does not have jurisdiction over the CRC and cannot directly apply its provisions. Yet all ECHR Member States have ratified the CRC and are therefore legally bound by both treaty regimes. The cross-referencing between different legal regimes (here between the European and the UN human rights system) is increasingly common and arguably, in light of increasing globalisation, that should be expected and welcomed." (Carola Lingaas, 'Domestic Violence in Child Protection Cases Before the European Court of Human Rights: Double Victimisation of Abused Parents?' (2020) 38(2) Nordic Journal of Human Rights, 129)

[661] Ibid.

Nevertheless, there is a large gap between theory and practice as can be seen from the recent judgments of the European Court of Human Rights.

4.2. Conflicts between individual and collective rights during a pandemic

The World Health Organization (WHO) recognised coronavirus disease as a pandemic on 11 March 2020.[662] The pandemic has various economic, political, social and psychological implications.[663] Lockdown procedures have been implemented in numerous countries and regions throughout the world in response to the significant health concerns posed by COVID-19. In the name of safeguarding public health, these interventions always involve trade-offs between ethical goods and imperatives, putting considerable constraints on core human capabilities – including ability to work, exercise democratic rights, socialise, and access education.[664] "As such, it seems imperative for philosophers to ask whether lockdown measures are ethical."[665] The COVID-19 pandemic has brought the conflict between individual rights and the common good to the foreground.[666] Many pandemic response measures, including forced stay-at-home orders, company and school closures or restrictions, and mask and vaccination regulations, have sparked outrage among those who believe they impinge on their freedom.

"Extraordinary times call for a new balance between the basic rights of the individual and the interests of the community."[667] Lockdowns have been criticised by anti-lockdown demonstrators, who see them as communitarian overreach at the expense of civil liberties. Therefore, it is necessary to talk more about human rights and human responsibilities.[668] However, we must consider what basic individual rights are and should be in order to comprehend how they might enlighten both our current response and its implications for a post-crisis future.[669]

Much of the rhetoric surrounding the pandemic is portrayed as a conflict between basic individual human rights and collective human rights. The third generation of human rights grants human rights to communities, social groups and nations.[670] It includes the right to peace, the right to a

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[662] World Health Organization, 'WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 - 11 March 2020' (WHO, 2020) <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-COVID-19---11-march-2020> accessed 8 July 2021

[663] Clement A. Tisdell, 'Economic, Social and Political Issues Raised by the COVID-19 Pandemic' (2020) 68 Economic Analysis and Policy, 17

[664] Stephen John, 'The Ethics of Lockdown: Communication, Consequences, and the Separateness of Persons′ (2020) 30(3) Kennedy Institute of Ethics Journal, 265

[665] Ibid.

[666] Ibid.

[667] Attila Mraz, 'Rights in a Pandemic' (*Boston Review*, 3 June 2020) <http://bostonreview.net/philosophy-religion-law-justice/attila-mraz-rights-time-pandemic> accessed 8 July 2021

[668] Ibid.

[669] Ibid.

[670] Sanja Ivic, 'Vietnam's Response to the COVID-19 Outbreak' (2020) 12(3) Asian Bioethics Review, 344

healthy environment, the right to humanitarian assistance and so forth.[671] The nature of the third generation of human rights is collective. According to Donnelly, the third generation of human rights is incompatible with the nature of human rights, which is individual.[672] A third generation of human rights, which includes collective rights, could "provide a 'justification' for certain repressive regimes to deny (individual) human rights in the name of these collective human rights; for example, severely curtailing civil rights in order to secure 'economic development'."[673]

Sikkink emphasises that:

> "Balancing of rights is foreseen in the *Universal Declaration of Human Rights* (UDHR), which speaks of limiting rights to 'respect the rights and freedoms of others.' The UDHR goes further, however, and recognizes that each of us has 'duties to the community', and its preamble calls on all of us to promote rights (...) To protect our collective right to health, we may need to recognize that we have a right to freedom of movement, but also a responsibility not to travel in certain circumstances; a right to education, but a responsibility to accept that it may be suspended temporarily or delivered on-line."[674]

Thus, comprehensive implementation of human rights necessitates a greater emphasis on all actors' duties, particularly in times of crisis.[675]Article 25 of the *Universal Declaration of Human Rights* states: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including (...) medical care."[676] Article 3 of the UDHR states: "Everyone has the right to life, liberty and security of person."[677]

At the time of the COVID-19 outbreak in China, it was emphasised that "in the conflict of social health interests versus individual privileges, the government should always prioritize life and health rights and protect human rights to the highest extent."[678] A similar view was expressed by the Vietnamese government.[679] This point of view is in accordance with the "Confucian perspective [that] allows prioritizing life and health rights over civil liberties."[680]According to Peverelli, "each nation deals with the local situation in a way that suits the national or local culture. However, these differences are also causing heated debate about 'the best way' of coping with a new contagious disease like this. That debate is not always conducted with respect for other

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[671] Patricia Brander et al., *COMPASS: Manual for Human Rights Education with Young People* (2ⁿᵈedn, Council of Europe Publishing 2020), 399

[672] Jack Donnelly, *Universal Human Rights in Theory and Practice* (2ⁿᵈ edn, Cornell University Press 2003)

[673] Council of Europe, 'The Evolution of Human Rights' (CoE, 2017) < https://www.coe.int/en/web/compass/the-evolution-of-human-rights> accessed 18 July 2021

[674] Kathryn Sikkink, 'Rights and Responsibilities in the Coronavirus Pandemic' (*Open GlobalRights*, 19 March 2020) <https://www.openglobalrights.org/rights-and-responsibilities-in-the-coronavirus-pandemic/> accessed 17 July 2021

[675] Ibid.

[676] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A (III) (UDHR)

[677] Ibid.

[678] Yuwei Hu, 'Prioritizing Human Rights Helps China Defeat COVID-19: Experts.' (*Global Times*, 11 May 2020) <https://www.globaltimes.cn/content/1188066.shtml> accessed 20 July 2021

[679] Sanja Ivic, 'Vietnam's Response to the COVID-19 Outbreak' (2020) 12(3) Asian Bioethics Review, 341

[680] Ibid., 345

nation's values."[681] Peverelli argues that these policies, based on prioritising collective human rights over individual human rights, work effectively in Asia's communitarian cultural framework.[682] However, they do not work well in Western liberal democracies that give priority to individual rights and freedoms.[683] It is often argued that individuality takes precedence over collectivity in the Western definition of human rights, which promotes liberal principles, and that collective rights take precedence over individual rights in the Eastern understanding of human rights.[684] However, this is a simplified point of view.

> "That often-invoked perspective gives the immediate impression that the primacy of human rights is a fundamental and ancient feature of Western culture, and one not to be found in Asia. It is, as it were, a contrast between the authoritarianism allegedly implicit in, say, Confucianism vis-à-vis the respect for individual liberty allegedly deeply rooted in Western culture. There are good historical reasons to doubt each of the two claims implicit in the contrast. (...) Indeed, the rhetoric of freedom is abundantly invoked in many of the Asian literatures."[685]

Western societies understand human dignity as an inherent value.[686] This value stems from the idea of human beings as rational beings. Thus, this "worth is understood to be innate"[687] as a consequence of human nature.[688] The Judeo-Christian faith teaches that humans are created in God's image and likeness. According to Kant's moral philosophy that influenced the contemporary human rights discourse, humanity is an end in itself.[689] Western ethical systems that claim that rationality is the main characteristic of human nature, also claim that human beings have an inherent value.

> "By contrast, Chinese ethics, especially those rooted in Confucian teachings, typically construe dignity as worth that one acquires by behaving properly within relationships. (…) Relationships of ethics are also relationships of mutual favors, that is to say, there is a relationship of mutual obligation. The logic of ethical–relational principles is found in the components of feeling and obligation."[690]

The Confucian independent values of *jen* and *li* are significant for evaluating relationships within Confucian ethics. The principle of *Li* has several meanings that are usually translated as "righteousness", "respect", "kindness", and point to an ideal standard of conduct.[691] The principle

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[681] Peter Peverelli, 'Coronavirus Pandemic: Human Rights Conference Underway in Chongqing' (2020) quoted in Sanja Ivic, 'Vietnam's Response to the COVID-19 Outbreak' (2020) 12(3) Asian Bioethics Review, 345
[682] Ibid.
[683] Ibid.
[684] Sanja Ivic, 'Vietnam's Response to the COVID-19 Outbreak' (2020) 12(3) Asian Bioethics Review, 345
[685] Amartya Sen, 'Thinking About Human Rights and Asian Values' (*Carnegie Council*, 4 March 1996) <https://www.carnegiecouncil.org/publications/archive/dialogue/1_04/articles/519> accessed 22 July 2021
[686] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A (III) (UDHR)
[687] Daryl Koehn and Alicia Leung, 'Dignity in Western Versus in Chinese Cultures: Theoretical Overview and Practical Illustrations' (2008) 113(4) Business and Society Review, 479
[688] Ibid.
[689] Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Mary Gregor tr, Cambridge University Press 1997)
[690] Daryl Koehn and Alicia Leung, 'Dignity in Western Versus in Chinese Cultures: Theoretical Overview and Practical Illustrations' (2008) 113(4) Business and Society Review, 479-80
[691] Ibid., 480

of *Li* refers to the ideal standard of religious, moral and social behaviour. The principle of *Jen* represents the essence of the duty of a person towards others and is expressed through conscientiousness, altruism, generosity and so forth. This principle is expressed by recognising the values and dignity of others regardless of their social status.[692] According to Koehn and Leung, "a Confucian 'relationship-based' society is governed by relational ethics. These relations begin with dyadic relations of family and kin and then extend outward to all types of interpersonal relationships."[693]

In the Asian human rights debate, the primary reference points are the following: 1. an Asian critique of human rights advocated by Asian political leaders since the early 1990s; China's White Papers on Human Rights; the *Bangkok Declaration on Human Rights* (1993); the Kuala Lumpur Declaration on Human Rights (1993) and Asian representatives' statements at the World Conference on Human Rights in Vienna.[694] The Asian values debate is based on emphasising diversity. It emphasises cultural, historical, political, ethical and religious differences between the West and Asia.[695] The cultural values at the basis of a number of Asian countries' human rights view are derived from the Confucian tradition.[696]

An Asian perspective on human rights[697] expresses a strong critique to the present human rights system and in particular to the role of the West in that system.[698] According to this point of view, the idea of universal human rights reflects the Western interpretation of this concept. Asian values proponents urge the freedom to choose their own political and societal model, including their own perspective on human rights and democracy.[699]

According to Kausikan, "the debate was only secondarily about values and primarily about politics and geopolitics. Values were instruments for these ends."[700] Sen also argues that "Asian leaders have used the 'Asian values' argument as political instruments to legitimize authoritarian rule."[701] Cultural relativism is the basic tactical premise of the 'Asian values' argument.[702] "The argument is only comprehensible in relation to its 'Other'. The 'West' is essentialised and seen as

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[692] Ibid.

[693] Ibid.

[694] Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers 2001), 35

[695] Ibid.

[696] "A strong historical influence of Confucian ideology (…) includes Taiwan, Singapore, Hong Kong, South Korea, China, Japan, and Thailand." (Felicity Menzies, 'Cultural Clusters: Mapping Cultural Distance' (*Culture Plus Consulting*, 24 March 2015) <https://cultureplusconsulting.com/2015/03/24/mapping-cultural-distance-cultural-clusters/)> accessed 10 July 2021)

[697] However, this point of view should not be perceived as homogeneous, as there are different standpoints in the Asian human rights debate.

[698] Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers 2001), 36

[699] Ibid.

[700] Bilahari Kausikan, 'The "Asian Values" Debate 30 Years on' (*The Straits Times*, 16 March 2021) <https://www.straitstimes.com/opinion/the-asian-values-debate-30-years-on> accessed 15 July 2021

[701] Chang Yau Hoon, 'Revisiting the Asian Values Argument used by Asian Political Leaders and its Validity' (2004) 32(2) Indonesian Quarterly, 154

[702] Ibid., 155

the homogeneous 'Other'. Consensus, harmony, unity and community are values that are commonly proposed as the essence of Asian culture and identity. These are contrasted with the values said to characterize the 'Other', namely, absence of consensus, conflict, disunity, and individualism."[703]

Attila Mraz argues that it is possible to perceive the COVID-19 pandemic "situation not as a sacrifice of individual rights to community interests but rather as a rebalancing of some individual rights against others. This understanding of our response – one based on a conflict between basic individual rights, not between individuals and the community – helps to give both liberal vigilance and social solidarity their due in critical and post-critical times alike."[704]Thus, the political and legal system responsible for establishing and balancing individual rights in a fair and inclusive manner has to be improved. Neither solidarity nor basic individual rights should be reserved for times of normalcy. Instead, we must constantly reassess what basic rights we should have based on a broad and inclusive assessment of all members of society's core interests.[705] "This is the only way to respect both the liberty of individuals and solidarity between them in extraordinary as well as more ordinary times."[706]

The conflict between individual rights and freedoms and the collective right to health and security can be resolved by relying on Aristotle's virtue ethics. In this view, the imposition of remaining at home or observing social distance does not conflict with individual liberty because such a decision is made in the sake of the common good.[707] Relying on Aristotle's virtue ethics, Belazzi and Boyneburgk argue that this conflict is the result of "a false perception. It only appears to us because we look at the issue through our contemporary moral philosophy of utilitarianism and an understanding of freedom as absence of constraints. Both these views can be substituted with more sophisticated alternatives, namely an ethics of virtue and a notion of freedom of the will."[708]Accepting responsibility for one's own conduct is inextricably tied to the Aristotelian perspective's core goal of "freedom of conscience"[709] and "reason,"[710] as outlined in his *Nicomachean Ethics*.[711]

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[703] Ibid.

[704] Attila Mraz, 'Rights in a Pandemic' (*Boston Review*, 3 June 2020) <http://bostonreview.net/philosophy-religion-law-justice/attila-mraz-rights-time-pandemic> accessed 8 July 2021

[705] Ibid.

[706] Ibid.

[707] Vassilios Makrakis and Nelly Kostoulas-Makrakis, 'Responsibility and Co-Responsibility in Light of COVID-19 and Education for Sustainability through an Aristotelian Lens' (2021) 14(3) Sustainability and Climate Change, 159

[708] Francesca Bellazzi and Konrad V. Boyneburgk, 'COVID-19 Calls for a Virtue Ethics' (2020) 7(1) Journal of Law and the Biosciences, 1

[709] Ibid.

[710] Vassilios Makrakis and Nelly Kostoulas-Makrakis, 'Responsibility and Co-Responsibility in Light of COVID-19 and Education for Sustainability through an Aristotelian Lens' (2021) 14(3) Sustainability and Climate Change, 159

[711] Aristotle, *Nicomachean Ethics* in Jonathan Barnes (ed), *The Complete Works of Aristotle* (Princeton University Press 1984)

Aristotle argues that responsibility and co-responsibility are stated at the level of moral behaviour, not metaethics.[712] According to Aristotle, politics

> "makes use of the other practical sciences, and since it further ordains what men are to do and from what to refrain, its end must include the ends of the others, and must be the proper good of man. For though this good is the same for the individual and the state, yet the good of the state seems a grander and more perfect thing both to attain and to secure; and glad as one would be to do this service for a single individual, to do it for a people and for a number of states is nobler and more divine."[713]

Virtue ethics emphasises the centrality of moral character in ethical behaviour in contrast to deontological ethics that emphasises rules.[714] Slowing the rate of transmission requires social distancing, which is viewed as the most responsible response to the COVID-19 pandemic.[715] In the *Nicomachean Ethics*, Aristotle demonstrates that people's activities are voluntary and up to the people who are the causes of the outcomes.[716] Individual liberty is not infringed upon by the compulsion of staying at home or observing social distance, according to this viewpoint, because such a decision is made for the common good.[717] In Aristotle's words, *phronêsis*, concerns decisions made for the common good.[718] However, this demands a certain amount of *paideia* (education), which addresses the whole person, including mind, heart and body and is made possible through education.[719] According to Aristotle:

> "Nothing but a good moral training can qualify a man to study what is noble and just – in a word, to study questions of Politics. For the undemonstrated fact is here the starting point, and if this undemonstrated fact be sufficiently evident to a man, he will not require a 'reason why.' Now the man who has had a good moral training either has already arrived at starting-points or principles of action, or will easily accept them when pointed out."[720]

Vassilios Makrakis and Nelly Kostoulas-Makrakis argue that "empathy is a basic condition for acting with phronesis."[721] The network of ties that the ethics of care includes is based on the idea of common humanity.[722] However, this point of view is in contrast to mandatory vaccination

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[712] Aristotle, *Nicomachean Ethics* in Jonathan Barnes (ed), *The Complete Works of Aristotle* (Princeton University Press 1984); Vassilios Makrakis and Nelly Kostoulas-Makrakis, 'Responsibility and Co-Responsibility in Light of COVID-19 and Education for Sustainability through an Aristotelian Lens' (2021) 14(3) Sustainability and Climate Change, 159

[713] Aristotle, *Nicomachean Ethics* (5th edn, F.H. Peters tr, Kegan Paul 1983), 3

[714] Audiey Kao, 'Ethics Talk: Virtue Ethics, Moral Authority, and COVID-19' (*AMAJournal of Ethics*, 12 August 2020) <https://edhub.ama-assn.org/ama-journal-of-ethics/video-player/18532788> accessed 18 July 2021

[715] Vassilios Makrakis and Nelly Kostoulas-Makrakis, 'Responsibility and Co-Responsibility in Light of COVID-19 and Education for Sustainability through an Aristotelian Lens' (2021) 14(3) Sustainability and Climate Change, 159

[716] Ibid.

[717] Ibid.

[718] Ibid., 160

[719] Ibid.

[720] Aristotle, *Nicomachean Ethics* (5th edn, F.H. Peters tr, Kegan Paul 1983), 6

[721] Vassilios Makrakis and Nelly Kostoulas-Makrakis, 'Responsibility and Co-Responsibility in Light of COVID-19 and Education for Sustainability through an Aristotelian Lens' (2021) 14(3) Sustainability and Climate Change, 161

[722] Carol Gilligan, *In a Different Voice. Psychological Theory and Women's Development* (Harvard University Press 1982)

against COVID-19, which violates bodily autonomy (one of the basic human rights) and represents another form of conflict between individual rights and freedoms and the collective right to health.

4.3. The model of human nature, law and ethics of care

Understanding global normative issues requires an analysis of the model of human nature rooted in the human rights discourse. "The model of human nature implicit in the human rights discourse is central to our understanding of contemporary norms and practices at the global level."[723] The human rights discourse (and in particular the European judicial discourse) relies on Kant's idea of humanity. According to Peterson, "the world's majority (*all* who are 'marginalized') are excluded"[724] from Kant's model of human nature. "Their experiences provide alternative models, and these alternatives must be acknowledged and drawn upon if we are to achieve global solidarity and a just world order."[725]

Human rights instruments have largely failed to protect the "inherent dignity"[726] and "the equal and inalienable rights"[727] of much of the world's population (migrants, refugees, Roma, older persons, women, children and so forth). The philosophical foundations of the human rights discourse are inadequate because they fail to bridge the gap between the ideals of freedom and equality, on the one hand, and the real world, on the other.

The idea of universal human rights, within the framework of the *Universal Declaration of Human Rights* is based on Kant's idea of humanity.[728] The same can be argued for the *European Convention on Human Rights*, which is based on the *Universal Declaration of Human Rights*.[729]Humanity as an idea implies characteristics common to all human beings as it is stated in the Preamble of the UDHR which emphasises "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family."[730]

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[723] V. Spike Peterson, 'Whose Rights? A Critique of the "Givens" in Human Rights Discourse' (1990) 15(3) Alternatives: Global, Local, Political, 306
[724] Ibid., 306
[725] Ibid., 306
[726]Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A (III) (UDHR), 'Preamble'
[727] Ibid.
[728] Marlen van den Ecker, 'Human Rights by Virtue of Reason – Kant's Latent Contribution to the Declaration of Human Rights' (*Researchgate*, 2019) <https://www.researchgate.net/publication/337940285_Human_Rights_by_Virtue_of_Reason_-_Kant\'s_latent_contribution_to_the_Declaration_of_Human_Rights> accessed 24 May 2021
[729] "Originally proposed by Winston Churchill and drafted mainly by British lawyers, the Convention was based on the United Nations' Universal Declaration of Human Rights. It was signed in Rome in 1950 and came into force in 1953" (Equality and Human Rights Commission, 'What is the European Convention on Human Rights?' (Equalityand Human Rights Commission, 19 April 2017) <https://www.equalityhumanrights.com/en/what-european-convention-human-rights> accessed 4 May 2021)
[730] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A (III) (UDHR)

If we compare the first article of the *Universal Declaration of Human Rights* with some of Kant's views, it becomes clear why Kant's philosophy is often mentioned as the philosophical basis of this declaration.[731] Article 1 of the *Universal Declaration of Human Rights* states: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[732] Kant's argument in favour of human rights is based on the value of dignity. Kant argues: "Now I say that the human being and in general every rational being exists as an end in itself, not merely as a means to be used by this or that will at its discretion; instead he must in all his actions, whether directed to himself or also to other rational beings, always be regarded at the same time as an end."[733] Kant also emphasises: "In the kingdom of ends everything has either a price or a dignity. What has a price can be replaced by something else as its equivalent, what on the other hand is raised above all price and therefore admits of no equivalent has a dignity."[734]

According to Kant, dignity cannot be replaced by anything else, it is "above all price, with which it cannot be brought into comparison or competition at all without, as it were, assaulting its holiness."[735] Kant emphasises that human dignity is "an unconditional, incomparable worth."[736]Emphasising the significance of dignity, Kant attempts to define man as a moral being in the kingdom of ends: "Now, morality is the condition under which alone a rational being can be an end in itself, since only through this is it possible to be a lawgiving member in the kingdom of ends. Hence, morality and humanity insofar as it is capable of morality, is that which alone has dignity."[737]Kant's philosophy "explicitly demands the protection of 'innate rights', which are closely synonymous with our current understanding of human rights"[738] in the framework of the *Universal Declaration of Human Rights*, the *European Convention on Human Rights* and other human rights instruments.

The ECtHR's decisions described earlier reflect Kant's model of humanity that assumes atomic individuals who share equal potential for rationality.[739] This point of view encourages dualistic categorisations and gives priority to universal principles over particular contingencies. The consequence of prioritising the abstract, formal side of legal concepts is the difficulty of addressing concrete, lived experiences.[740] Kantian ethics is based on binary oppositions: male/female,

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[731] Thomas Bridges, *The Culture of Citizenship: Inventing Postmodern Civic Culture* (State University of New York Press 1994)

[732] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A (III) (UDHR)

[733] Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Mary Gregor ed, Cambridge University Press 1997), 37

[734] Ibid., 42

[735] Ibid., 43

[736] Ibid.

[737] Ibid., 42

[738]Garrett Wallace Brown and Mads Andenas, 'The European Convention of Human Rights as a Kantian Cosmopolitan Legal Order' (2020) 9(3) Global Constitutionalism, 497

[739] V. Spike Peterson, 'Whose Rights? A Critique of the "Givens" in Human Rights Discourse' (1990) 15(3) Alternatives: Global, Local, Political, 303-344

[740] Ibid., 310

public/private, right/good, mind/body, reason/emotions and so forth. Kant's ethics based on reason marginalises women's and children's moral experience.[741] "Gender differences are reified in establishing a set of social dichotomies that are seen as 'fully human', that is, rational, self-interested individuals who participate in the public, political world. Women are dependents – lesser individuals consigned 'naturally' to the realm of familial, private, and apolitical affairs."[742]

Kant argues that all human beings have dignity – as rational beings they "have the capacity for moral self-legislations."[743] According to Kant, morality presupposes autonomy of the will. "Autonomy of the will is that property of it by which it is a law to itself independently of any property of the objects of volition."[744]Kant's notion of humanity excludes a large number of individuals who do not fall under his criteria of rationality. Feminist philosophers reject Kant's idea of autonomy and Kant's concept of the self.[745] Kant's concept of the self is often defined as "atomistic" – it is abstracted from social relations in which individuals are rooted.[746]

> "Such a conception of the self is associated with the claim that autonomous agents are, and ought to be, self-sufficient, which in turn is associated with the character ideal of the 'self-made man'. Feminist philosophers challenge this character ideal and question whether self-sufficiency, or 'substantive independence', is really a value that a theory of autonomy, and normative theories in general, should promote."[747]

Feminist critics of legal institutions point out that these institutions do not sufficiently protect women and their rights. The human rights discourse "excludes much of women's experiences (…) The specific experiences of women must be added to traditional approaches to human rights in order to make women more visible and to transform the concept and practice of human rights in our culture so that it takes better account of women's lives."[748]

It is unlikely that women's arguments will be respected by legal systems that are contradictory, hierarchical and exclusionary.[749] "In an attempt to visualize how human rights would be

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[741] Rosemarie Tong and Nancy Williams, 'Feminist Ethics' (*Stanford Encyclopedia of Philosophy*, 18 April 2018) <https://plato.stanford.edu/archives/win2018/entries/feminism-ethics/> accessed 27 May 2021
[742] V. Spike Peterson, 'Whose Rights? A Critique of the "Givens" in Human Rights Discourse' (1990) 15(3) Alternatives: Global, Local, Political, 315
[743] Peter Schaber, 'Human Rights and Human Dignity: A Reply to Doris Schroeder' (2014) 17(1) Ethical Theory and Moral Practice, 157
[744]Immanuel Kant, *Fundamental Principles* of *the Metaphysics of Ethics* (Thomas Kingsmill Abbott tr, Longmans, Green, and Co 1946), 71
[745] Alison M. Jaggar, *Feminist Politics and Human Nature* (Rowman and Allanheld 1985); Lorraine Code, *What Can She Know?* (Cornell University Press 1991)
[746]Natalie Stoljar, 'Feminist Perspectives on Autonomy' (*Stanford Encyclopedia of Philosophy*, 2018) <https://plato.stanford.edu/entries/feminism-autonomy/> accessed 23 April 2021
[747] Ibid.
[748] Charlotte Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' (1990) 12(4) Human Rights Quarterly, 487
[749] Gayle Binion, 'Human Rights: A Feminist Perspective' (1995) 17(3) Human Rights Quarterly, 513

understood if women's experience were the foundation for such policymaking, Charlotte Bunch[750] has asked what is basic to women's view of their humanity."[751] While this effort to define human rights through the lens of women's experiences is a first step toward bringing women into the process of protecting and operationalising human rights, the results are not completely female-centric.[752]

The European Court of Human Rights has been significant in developing the concept of gender equality. However, "progress towards gender equality has been limited."[753] Although the liberal political tradition serves to minimise the incidence of direct violence, it stops short of challenging structural violence.[754] Within the European legal and judicial discourse, the principle of gender equality is not taken into account in all of its complexities. Charlesworth and Chinkin emphasise that "we also need to understand and address the gendered aspects of fundamental concepts such as 'economy,' 'work,' 'democracy,' 'politics,' and 'sustainable development'."[755] In order to address gender discrimination and other human rights violations, it is necessary to reconsider the notion of humanity on which human rights discourse is based. Kant equates the term "humanity" with "rational nature" and "rational agency". According to Kant:

> "This principle of humanity, and in general of every rational nature, as an end in itself (…) is not borrowed from experience; first because of its universality, since it applies to all rational beings as such and no experience is sufficient to determine anything about them; second because in it humanity is represented not as an end of human beings (subjectively), that is, not as an object that we of ourselves actually make our end, but as an objective end that, whatever ends we may have, ought as law to constitute the supreme limiting condition of all subjective ends, so that the principle must arise from pure reason."[756]

However, Kant draws a clear line between "humanity" and "human beings per se."[757] He claims that "a systematic union of rational beings through common objective laws, that is, a kingdom, which can be called a kingdom of ends"[758] is certainly only an ideal. According to Kant:

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[750] Charlotte Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' (1990) 12(4) Human Rights Quarterly, 486

[751] Gayle Binion, 'Human Rights: A Feminist Perspective' (1995) 17(3) Human Rights Quarterly, 514-5

[752] Ibid., 515

[753] Elisabeth Kelan, 'Why Aren't We Making More Progress Towards Gender Equity' (*Harvard Business Review*, 21 December 2020) <https://hbr.org/2020/12/why-arent-we-making-more-progress-towards-gender-equity> accessed 5 April 2021

[754] Structural violence is a type of violence in which a social system or social organization harms people by denying them the opportunity to meet their basic needs.

[755] Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000), 231

[756] Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Mary Gregor ed, Cambridge University Press 1997), 39

[757] Robert Johnson and Adam Cureton, 'Kant's Moral Philosophy' (*Stanford Encyclopedia of Philosophy*, Spring2021) <https://plato.stanford.edu/entries/kant-moral/> accessed 11 September 2021

[758] Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Mary Gregor ed, Cambridge University Press 1997), 61

"For all rational beings stand under the law that each of them should treat himself and all others never merely as means but always at the same time as an end in himself. Hereby arises a systematic union of rational beings through common objective laws, i.e., a kingdom that may be called a kingdom of ends (certainly only an ideal) inasmuch as these laws have in view the very relation of such beings to one another as ends and means. (…) A rational being belongs to the kingdom of ends as a member when he legislates in it universal laws while also being himself subject to these laws. He belongs to it as sovereign, when as legislator he is himself subject to the will of no other."[759]

The kingdom of ends[760] cannot serve as the basis of humanity and universal human rights because it is only an ideal. "A kingdom of ends is an idealized world in which all rational beings act in full accord with rational principles. This is a vision of a utopian world in which rational beings recognize their full potential. This world can only be achieved by rational agents choosing to be members of this kingdom of ends before it obtains in reality."[761]

According to Barbara Herman, Kant's moral philosophy and his idea of humanity require us to deal with morality instead of the subject of our actions and natural aspirations.[762] Second, they lead us to alienate and belittle our own emotions and deny the value of emotions as morally valuable motives.[763] Third, they require overcoming even the most basic projects and special commitments by a moral motive, so that it distances us from ourselves and our personal values.[764]

This problem is reflected in the ECtHR's decisions described earlier. These ECtHR's decisions exclude empathy and contextual peculiarities. They reflect the Kantian model of humanity which is based on rationality and dualisms such as male/female, public/private, reason/emotion and so forth.

"In recent decades (…), in the work of such scholars as Martha Nussbaum (from classics), Antonio Damásio (from neurobiology), and John Elster (from political theory), we have become aware that the emotions have a rational component: in certain situations at least, we require the emotions in order to act reasonably. This scholarship has also reminded us that Aristotle's theory of emotions enunciated in the *Rhetoric*, is deeply cognitive, and that in the *Ethics* Aristotle asserts (…) that the emotions are central to ethics."[765]

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[759] Immanuel Kant, *Grounding for the Metaphysics of Morals* (James W. Ellington tr, Hackett Publishing Company 1983), 39-40

[760] According to Kant: "In the kingdom of ends everything has either a price or a dignity. If it has a price, something else can be put in its place as an equivalent; if it is exalted above all price and so admits of no equivalent, then it has a dignity… Now morality is the only condition under which a rational being can be an end in himself; for only through this is it possible to be a law-making member in a kingdom of ends. Therefore morality, and humanity so far as it is capable of morality, is the only thing which has dignity…" (Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Mary Gregor ed, Cambridge University Press 1997), 62)

[761] Daniel Mattox, 'Objectified in the Best Possible Way: A Radical Feminist Solution to the Kantian Sex Problem' (MA thesis, Morehead State University 2014), 14

[762] Barbara Herman, *The Practice of Moral Judgment* (Harvard University Press 1993)

[763] Ibid.

[764] Ibid.

[765] Alan G Gross and Ray D Dearin, *Chaim Perelman* (State University of New York Press 2003), x

According to Nussbaum, Aristotle restores emotions to the central position of morality from which Plato had exiled them.[766] Aristotle argues that rational choice is made under the influence of the emotions. He believes that a genuinely good person will not only behave well, but will also experience the necessary emotions in response to their moral decisions.[767] Aristotle does not distinguish between the emotional and the cognitive.[768] Emotion can play a cognitive function, and cognition must rely on the work of the emotive elements if it is to be properly informed.[769] "Aristotle argues for the ethical priority of concrete description to general statement, particular judgment to general rule."[770] Nussbaum emphasises that "practical matters lack fixity" and for that reason the Court's decisions should not reflect only general rules.[771]

The Aristotelian tradition and the approach advocated by Martha C. Nussbaum can contribute to rethinking the human rights discourse and the interpretation of legal texts.

> "Reconciling the universality of the provision of law and the individuality of the factual circumstances of a particular case is a complex cognitive process, in which the judge plays a special role. An experienced judge finds a 'middle ground' between the formality, the generality of the law, and the individual, special features of a particular case, which is the most important point in a judge's knowledge: to interpret the general legislative norm taking into account the special features of a particular situation. The role of the judge in the application of law is that, interpreting the abstract norm of law, he/she simultaneously acts as the creator of its meaning in each case, 'here and now'."[772]

According to Dworkin, "legal practice is an exercise in interpretation not only when lawyers interpret particular documents or statutes but generally."[773] Thus, legal practice is "the activity of hermeneutical understanding."[774] Legal documents cannot "be interpreted objectively so as to provide a fixed meaning."[775] Aristotle argues that rules have a place within morality, but he stresses that they are too general to be appropriate for action-guidance. According to Aristotle: "Nor is practical wisdom concerned with universals only – it must also recognize the particulars; for it is practical, and practice is concerned with particulars."[776]

Aristotle advocates justice and the obligation to apply the law in individual cases and certain contexts, which legislators often cannot foresee. The criteria on which the principles of justice are

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[766] Martha C. Nussbaum, *Love's Knowledge: Essays in Philosophy and Literature* (Oxford University Press 1990)
[767] Ibid.
[768] Ibid., 78
[769] Ibid.
[770] Ibid., 69
[771] Ibid.
[771] Ibid., 71
[772] Nataliia Huralenko et al., 'Interpretive Activity in the Judge's Professional Occupation' (*Amazonia Investiga*, 2020) <https://amazoniainvestiga.info/index.php/amazonia/article/view/1407/1328> accessed 7 March 2021
[773] Ronald Dworkin, 'Law and Interpretation' (1982) 9(1) Critical Inquiry, 179
[774] Francis Joseph Mootz, 'Hermeneutics and Law' in Naill Keane and Chris Lawn (eds), *The Blackwell Companion to Hermeneutics* (Blackwell 2015), 2
[775] Ibid., 3-4
[776] Aristotle, *Nicomachean Ethics* in Jonathan Barnes (ed), *The Complete Works of Aristotle* (Princeton University Press 1984), 1802

founded cannot be compared with the uniqueness and rationality of mathematical principles. Aristotle emphasises: "What creates the problem is that the equitable is just, but not the legally just but a correction of legal justice. The reason is that all law is universal but about some things it is not possible to make a universal statement which shall be correct."[777]Similarly, Jacques Derrida distinguishes between law and justice. He points out that law cannot be equated with justice.[778] Derrida emphasises that justice cannot be assessed, and its application cannot be ensured by applying uniform rules.

According to Chaim Perelman, "when the jurist defends a logical interpretation of law (…) the word 'logic' does not designate in any of these cases formal logic, the only one practiced by the majority of professional logicians, but juridical logic, which modern logicians entirely ignore."[779] Perelman argues that "judicial logic is similar to the process of deliberating about values outside the courtroom."[780] Legal practice as an interpretation should include empathy and care, and not just be based on rationality. However, empathy is still not a well-defined concept. It often overlaps with other related concepts such as sympathy, compassion and emotional contagion.[781]

> "Empathy is often defined as understanding another person's experience by imagining oneself in that person's situation: One understands the other person's experience as if it were being experienced by the self, but without the self actually experiencing it. A distinction is maintained between self and other. Sympathy, in contrast, involves the experience of being moved by, or responding in tune with, another person."[782]

The Aristotelian principle of *phronêsis* most commonly interpreted as "practical wisdom" or "prudence," tends to be similar to empathy-related capacities.[783]"Practical wisdom is characterized by Aristotle as a kind of knowledge of how to act in situations that cannot be judged by applying algorithms (rules of action), but only by thoroughly understanding the concrete situation at hand and judging what to aim for in this particular case."[784]Aristotle identifies five virtues of thought in the sixth Book of the *Nicomachean Ethics*: *phronêsis* (practical wisdom), *epistêmê* (scientific knowledge), *nous* (intellectual insight), *sophia* (philosophical wisdom) and *technê*(technical

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[777] Aristotle, *Nicomachean Ethics* (W.D. Ross and L. Brown tr, Oxford University Press 2009), 1137b
[778] Jacques Derrida, *Acts of Religion* (Gil Anidjar ed, Routledge 2002)
[779] Chaim Perelman, Preface to Introduction àla Logique Juridique, by Georges Kalinowski (Librarie Generale de Droit et de Jurisprudence 1965), v, quoted in Alan G Gross and Ray D Dearin, *Chaim Perelman* (State University of New York Press 2003), 25
[780] Alan G Gross and Ray D Dearin, *Chaim Perelman* (State University of New York Press 2003), 25
[781] Benjamin M.P. Cuff, Sarah J. Brown, Laura Taylor and Douglas J. Howat, 'Empathy: A Review of the Concept' (2016) 8(2) Emotion Review, 144-53
[782] Sara D. Hodges and Michael W. Myers, 'Empathy' in Roy F. Baumeister and Kathleen D. Vohs (eds), *Encyclopedia of Social Psychology* (SAGE 2007), 297
[783] Fredrik Svenaeus, 'Empathy as a Necessary Condition of Phronesis: A Line of Thought for Medical Ethics' (2014) 17(2) Medicine, Health Care and Philosophy, 293-9
[784] Ibid., 294

expertise).[785] According to Svenaeus, empathy is a "source of moral knowledge by being the feeling component of phronêsis."[786]

Empathy is also an integral part of the ethics of care. The ethics of care was developed in the 1980s as an alternative to the ethics of justice that promoted the idea of moral universalism and the priority of the right over good.[787] Representatives of the ethics of care include Carol Gilligan, Nel Noddings, Joan Tronto, Victoria Held, Selma Sevenhuijsen, Fiona Williams and many others.[788] The ethics of care is not based on the idea of individualism, but on the idea of interdependence.

This ethics aims at rethinking Kant's idea of humanity that presupposes atomic individuals who share equal potential for rationality.[789] The ethics of care rejects Kant's ideal of the kingdom of ends. Care ethics "emphasizes that human beings are not abstract individuals who morally relate to each other following principles such as justice and non-violation of autonomy."[790]Kantian ethics emphasises traits such as autonomy, reason, independence, freedom, separation, and justice, while care ethics emphasises traits such as emotion, care, community, body, solidarity and connection.[791] The principles that underpin the ethics of care have been attributed to the private sphere.

> "It is hardly surprising, then, that the idea of an ethics of care was originally developed by feminists (…). It forms part of a sphere of work that is devalued because it is not paid. When it is paid, as it is in the case of professional caregivers such as medical professionals, the traditional association between caring and gender roles leads to a disproportionate distribution of directly caring roles to female staff."[792]

The ethics of care does not deny individualism, but is based on the idea that the self can only develop in relation to others, "who recognize and confirm"[793] our "sense of individuality."[794] The ethics of care abandons the notion of the autonomous and independent self that is inherited from Kant's ethics of justice and other dominant ethical theories.[795]Care ethics requires rethinking

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[785] Aristotle, *Nicomachean Ethics* (W.D. Ross and L. Brown tr, Oxford University Press 2009), 1139b15

[786] Fredrik Svenaeus, 'Empathy as a Necessary Condition of Phronesis*: A Line of Thought for Medical Ethics' (2014) 17(2) Medicine, Health Care and Philosophy, 293

[787]Sanja Ivic, *European Identity and Citizenship: Between Modernity and Postmodernity* (Palgrave Macmillan 2016), 107

[788] WIll Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford University Press 2002)

[789] V. Spike Peterson, 'Whose Rights? A Critique of the "Givens" in Human Rights Discourse' (1990) 15(3) Alternatives: Global, Local, Political, 303-44

[790] Raja Halwani, 'Care Ethics and Virtue Ethics' (2003) 18(3) Hypathia, 168

[791]Rosemarie Tong and Nancy Williams, 'Feminist Ethics' (*Stanford Encyclopedia of Philosophy*, 18 April 2018) <https://plato.stanford.edu/archives/win2018/entries/feminism-ethics/> accessed 27 May 2021

[792] Alan Thomas, 'Virtue Ethics and an Ethics of Care' (2011) 14 Eidos, 136-7

[793] Selma Sevenhuijsen, 'The Place of Care: The Relevance of the Feminist Ethic of Care for Social Policy' (2003) 4(2) Feminist Theory, 184

[794] Ibid.

[795] WIll Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford University Press 2002)

traditional institutions of justice at both national and international level.[796]The proponents of the ethics of care argue that, unlike the universalist ethics of justice that applies to the entire human race, the ethics of care applies to specific individuals and to their needs and interests in specific circumstances.[797]

The ethics of care distances itself from Kant's moral philosophy, utilitarianism, and neoliberalism and rejects the notion of rationalist, autonomous and abstract subjectivity on which these approaches are based. This ethics aims at rethinking moral universalism and emphasises the importance of contextual peculiarities, feelings, care and empathy.[798] Care ethics abandons moral universalism and the "one size fits all" approach.[799] In her book *In a Different Voice*, Carol Gilligan determines the ethics of care in opposition to the ethics of justice.[800] The ethics of justice is mostly derived from Kant's deontological ethics founded on a categorical imperative, which proclaims the priority of the right(universal morality based on reason) over the good (cultural, religious and other particularist beliefs).[801] Although the ethics of care abandons the idea of moral universalism and other presuppositions of the ethics of justice, it does not completely reject the ethics of justice.[802] The sharp distinction between the ethics of care and the ethics of justice places *care* outside the framework of *justice*, which is not in accordance with the main goal of the ethics of care – social justice.[803]

Many scholars point out the similarities between Aristotle's virtue ethics and the ethics of care.[804] Aristotle also emphasises interdependence[805], and his virtue ethics is based on the idea "that we are social animals who need to negotiate the ways we are to deal and live with each

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[796]Joan C. Tronto, 'Democratic Caring and Global Responsibilities of Care' (*Western Political Science Association*, 2013)<http://www.wpsanet.org/papers/docs/Tronto%20WPSA%20paper%202013.pdf> accessed 7 March 2021
[797] Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford University Press 2002)
[798] Carol Gilligan, *In a Different Voice. Psychological Theory and Women's Development* (Harvard University Press 1982)
[799]Iris Marion Young, *Justice and the Politics of Difference* (1st edn, Princeton University Press 1990)
[800] Carol Gilligan, *In a Different Voice. Psychological Theory and Women's Development* (Harvard University Press 1982)

[802] Ibid.
[803]Ibid.
[804] Howard J. Curzer, 'Aristotle: Founder of the Ethics of Care' (2007) 41(2-4) Journal of Value Inquiry, 221-43; Raja Halwani, 'Care Ethics and Virtue Ethics' (2003) 18(3) Hypathia, 161-92; Aafke E. Komter, 'Justice, Friendship and Care: Aristotle and Gilligan – Two of a Kind' (1995) 2(2) European Journal of Women's Studies, 151-69; Steven Steyl, 'Towards an Aristotelian Theory of Care: A Comparison of Neo-Aristotelian Virtue Ethics with Feminist Ethics of Care, and the Fundaments of a Virtue Ethical Theory of Care' (PhD thesis, The University of Notre Dame 2019); Alan Thomas, 'Virtue Ethics and an Ethics of Care' (2011) 14 Eidos, 132-51.
[805] According to Halwani: "However, one might object that while CE [care ethics] takes human relationships to be ontologically basic, VE [virtue ethics] does not. Instead, it takes the individual as ontologically basic and the individual's flourishing as ethically basic. If so, then VE does not take caring for others as ethically basic. But then VE would not incorporate CEs claims well and would not seriously accommodate its central claims. The objection raises a serious worry, but much depends on what we mean by 'ethically basic' and on how we construe the claims of VE." (Raja Halwani, 'Care Ethics and Virtue Ethics' (2003) 18(3) Hypathia, 168)

other."[806]According to Steyl, in contemporary moral philosophy, the convergence of virtue and care ethics has not been sufficiently explored.[807] Curzer argues that:

> "Aristotle cannot be an ethics of care advocate without a concept of care, but Aristotle does have a concept of care. Although the Greek terms *philēsis* and its infinitive version *to philein* are typically translated as 'love,' or 'friendly feeling,' or 'friendly affection' by Aristotle's translators, Aristotle uses *philēsis* and *to philein* to mean approximately what advocates of the ethics of care mean by 'caring' and 'care.'"[808]

Aristotle's concept of *to philein* includes caring relationships. According to Aristotle: "We may describe *to philein* towards anyone as wishing for him what you believe to be good things, not for your own sake but for his, and being inclined, so far as you can, to bring these things about."[809]*Philēsis* entails a high level of familiarity with the other person as a result of "meaningful personal interactions"[810] with that person. Empathy and compassion are essential components of care.

Care and its components are not included in Aristotle's list of virtues, but they are part of his account of friendship, and one fifth of the *Nicomachean Ethics* is dedicated to Aristotle's account of mutual love in relationships, which he calls friendships.[811]

 "The care ethical attack on the public/private distinction, to take a clear example, echoes numerous comments made by Aristotle throughout the *Nicomachean Ethics* and the *Politics* and raises weighty questions about the value of 'feminine' means of reasoning and of having someone to 'speak for the household' in the 'political' arena. So it looks like Aristotelian virtue theory and care ethics would make for natural bedfellows insofar as they share an interest in political ethics."[812]

Both Aristotle's virtue ethics and the ethics of care are essential to rethinking Kant's idea of humanity, which is based on rationality and excludes emotions, empathy and care, and which is one of the foundational elements for the idea of universality of human rights..

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[806] Ibid.
[807] Steven Steyl, 'Towards an Aristotelian Theory of Care: A Comparison of Neo-Aristotelian Virtue Ethics with Feminist Ethics of Care, and the Fundaments of a Virtue Ethical Theory of Care' (PhD thesis, The University of Notre Dame 2019), iv
[808] Howard J. Curzer, 'Aristotle: Founder of the Ethics of Care' (2007) 41(2-4) Journal of Value Inquiry, 221
[809] Aristotle, *Nicomachean Ethics* in Jonathan Barnes (ed), *The Complete Works of Aristotle* (Princeton University Press 1984) quoted in Howard J. Curzer, 'Aristotle: Founder of the Ethics of Care' (2007) 41(2-4) Journal of Value Inquiry, 221
[810] Howard J. Curzer, 'Aristotle: Founder of the Ethics of Care' (2007) 41(2-4) Journal of Value Inquiry, 221
[811] Ibid., 222
[812] Steven Steyl, 'Towards an Aristotelian Theory of Care: A Comparison of Neo-Aristotelian Virtue Ethics with Feminist Ethics of Care, and the Fundaments of a Virtue Ethical Theory of Care' (PhD thesis, The University of Notre Dame 2019), 6

Chapter 4: Ideas of World Citizenship: Attempting to Overcome the Conflict between the Exclusive and the Universal

1. Introduction

We live in an age of increasingly fragile states, increasing armed conflicts, displacement, global poverty and climate change. Human rights do not exist universally, but only as worthwhile reference points of moral philosophy, and otherwise only in certain geographical and political areas, where the conditions are such that human rights are at least partially respected and guaranteed for their citizens (or residents). Given that there are global cultural, political and religious differences in interpretations of what is considered *human rights*, there can be no universality because human rights are still closely tied to the concepts of citizenship and states. Human rights cannot be universal because they are inextricably tied to citizenship, which is absolutely exclusive, and therefore human rights are always exclusive, i.e. applicable only to certain groups of persons who possess citizenship that at least to some extent guarantees their human rights.

Because of the inextricability of human rights and citizenship, the idea that human rights can be even normatively universal is problematic and that the only way human rights can exist is as a function of citizenship. Human rights are as broad and narrow and as exclusive as citizenship itself.

The concept of state sovereignty was challenged after World War II by the universal human rights regime and the process of globalisation. The *Charter of the United Nations*[813] and the *Universal Declaration of Human Rights*[814] established standards for assessing human rights and served as the foundation for subsequent human rights declarations and conventions. The implementation of human rights, on the other hand, remained in the domain of nation-states, making it weak and contentious. Human rights protection and sovereignty are given equal weight under the UN Charter. Article 2 of the UN Charter states: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter."[815]

Today, it is crucial to re-examine the practice and concept of sovereignty.[816] Differences in global power relations mean that democratically made decisions within a nation-state cannot be

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[813] Charter of the United Nations (adopted 24 October 1945) 1 UNTS XV
[814] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A (III) (UDHR)
[815] Charter of the United Nations (adopted 24 October 1945) 1 UNTS XV
[816] Joseph A. Camilleri and Jim Falk, *The End of Sovereignty? The Politics of a Shrinking and Fragmenting World* (Ashgate 1992)

considered democratic from a cosmopolitan perspective.[817] For instance: "A state's decision to use nuclear energy has environmental consequences for the citizens of neighbouring countries. Immigration policies in the European Union have a significant impact on the economic development of Mediterranean Africa. All this happens without the affected citizens having a say in the matter."[818]

According to cosmopolitan democrats, democracy and accountability can no longer be associated with sovereignty and non-intervention.[819] Democracy ought to express itself on a global scale, transcending the frontiers of single states.[820]

> "Leading cosmopolitan theorists seek to challenge the inter-state framework of the UN Charter period, established in the aftermath of the Second World War, which prioritised the principles of sovereign equality and of non-intervention. They argue that these principles need to be replaced by new ones based on a higher level of public accountability, which make the universal individual rights of members of 'global society' the primary focus. Rather than the rights of states being the founding principle of international society it should be the rights of individual citizens."[821]

Instead of focusing on expanding citizens' territorially limited rights at the national level, more emphasis should be made on extending democracy and human rights to the international domain.[822] It is necessary to develop the concept of "global citizen as a subject of international law"[823] and extend democracy beyond states. The term "global" used here refers to the interconnectedness of all humans and all living beings "that exist within the same planetary systems of the Earth"[824], including natural (e.g. oceans, atmosphere) and human-made (power relations, social inequalities, etc.).

> "Cosmopolitanism is a Western notion that epitomizes the need social agents have to conceive of a political and cultural entity, larger than their own homeland, that would encompass all human beings on a global scale. Cosmopolite in Ancient Greece meant citizen of the world. (...). Much of the malaise and misunderstanding cosmopolitanism may provoke are related to its ambiguity, i.e. its unique way of uniting difference and equality, an apparent paradox of wishing to reconcile universal values with a diversity of culturally and historically constructed

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[817] Daniele Archibugi, 'Principles of Cosmopolitan Democracy' in Daniele Archibugi, David Held and Martin Köhler (eds), *Re-Imagining Political Community* (Polity 1998)

[818] Ibid., 204

[819] David Chandler, 'New Rights for Old? Cosmopolitan Citizenship and the Critique of State Sovereignty' (2003) 51 Political Studies, 333

[820] Ibid.

[821] Ibid., 332

[822] Ibid.

[823] Ibid., 335

[824] Paul Orlowski and Ghada Sfeir, 'Global Problems Require a Global Citizenry: The Case for Teaching Global Citizenship' in Lloyd Kornelsen, Geraldine Balzer and Karen M. Magro (eds), *Teaching Global Citizenship: A Canadian Perspective* (Canadian Scholars 2020), 18

subject positions. (...) The composition of the Greek term, cosmopolis, already indicates this unsolved tension: *cosmos*, a natural universal order, is related to *polis*, society's variable order."[825]

Ulrich Beck argues that a cosmopolitan society represents "a new way of doing business and of working, a new kind of identity and politics as well as a new kind of everyday space-time experience and of human sociability."[826] A cosmopolitan society represents a paradigm shift from societies operating within a nation-state.[827] Cosmopolitan society not only strengthens solidarity with foreigners, but also creates conditions for a world society of people that is legally binding.[828]

Cosmopolitanism cannot be understood without reference to the cultural, social, economic and political characteristics of the modern globalised era, marked by interconnectedness in which identities, cultures, ideas and politics intertwine in the transnational and global.[829] "The boundaries between home and away, local and global, traditional and de-traditionalized, and here and there, have become increasingly blurred."[830] There are different philosophical perspectives of cosmopolitanism based on different foundations – some focus on moral principles, others on political institutions and common markets.[831] Cosmopolitanism offers hope for the development of a new model of citizenship.

> "The old political order, which was closely tied to nation-states, has its individual analogue in the citizen, who participates in politics at a variety of levels (borough, city, nation). But a new political order needs a new type of transnational citizen, a cosmopolitan who is no longer 'anchored in fixed borders and territories' but instead pursues 'basic democratic arrangements' at the level of cities or regions – and especially transnationally."[832]

Global or world citizenship implies global responsibility towards the same planet we share. Global citizenship is a primary component of cosmopolitan moral discourse.[833] A solution to the paradoxical nature of universal human rights may be to reconceptualise the notions of citizenship and justice, which will overcome the "tragic conflict between citizenship and humanity"[834]–

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[825]Gustavo Lins Ribeiro, 'What is Cosmopolitanism?' (*CiteSeerx*, 2005) <http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.615.1132> accessed 3 August 2021
[826] Ulrich Beck, 'The Cosmopolitan Society and its Enemies' (2002) 19 (1-2) Theory, Culture and Society, 30
[827] Ibid.
[828] Ibid.
[829] Zlatko Skrbis, Gavin Kendall and Ian Woodward, 'Locating Cosmopolitanism: Between Humanist Ideal and Grounded Social Category' (2004) 21(6) Theory, Culture and Society, 116
[830] Ibid.
[831]Pauline Kleingeld and Eric Brown, 'Cosmopolitanism' (*Stanford Encyclopedia of Philosophy*, 17 October 2019) < https://plato.stanford.edu/entries/cosmopolitanism/> accessed 10 August 2021
[832] Zlatko Skrbis, Gavin Kendall and Ian Woodward, 'Locating Cosmopolitanism: Between Humanist Ideal and Grounded Social Category' (2004) 21(6) Theory, Culture and Society, 124
[833] Luis Cabrera, 'Global Citizenship as the Completion of Cosmopolitanism' (2008) 4(1) Journal of International Political Theory, 85
[834] Andrew Linklater, 'What Is a Good International Citizen?' in Paul Keal (ed), *Ethics and Foreign Policy* (Allen & Unwin 1992), 25

between nation-states and universal justice.[835] The development of the notions of international citizenship and justice will weaken the exclusive character of nation-states and overcome the difference between outsiders and insiders.[836]Andrew Linklater attempts to rethink the state-citizen vs. humanity question and proposes a solution that falls halfway between realist pessimism and cosmopolitan optimism.[837] "In this endeavor, Linklater develops the idea of international citizenship – a citizenship that (...)weakens the exclusionary character of the modern state."[838]Linklater emphasises that we must "break with the supposition that national populations have the sovereign right to withhold their consent from any developments within international organizations which clash with their conception of national interest."[839]According to this standpoint, the tensions between the universal and particular claims to rights will not be overcome unless state citizenship is redefined to include tolerance of diverse loyalties, including those that emerge when people interact more with non-state organisations and institutions.[840]

Kimberly Hutchings argues that it is feasible to think of "rule of the people" outside of the confines of the nation-state and without achieving world government.[841] "According to this account what is relevant to the idea of international citizenship is the fact that humans as species inhabit the same community and that in regard to certain issues (in particular issues of the environment, peace and human rights) all individuals existing in the world are citizens of the world, bearers of rights and responsibilities."[842]

The problem with this viewpoint is that it is a long distance from the realities of world and national politics, where state interests continue to reign supreme.[843]David Chandler argues that cosmopolitans propose replacing the territorially constrained political community of the state as the focus "of international decision-making by new flexible frameworks"[844] based on global citizen rights that are not bound by territorial boundaries.[845] According to Daniele Archibugi:

"If some global questions are to be handled according to democratic criteria, there must be political representation for citizens in global affairs, independently and autonomously of their political

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[835] Tony Evans, *The Politics of Human Rights: A Global Perspective* (2nd edn, Pluto Press 2005)
[836] Ibid.
[837] Tony Evans, 'Citizenship and Human Rights in the Age of Globalization' (2000) 25(4) Alternatives: Global, Local, Political, 423
[838] Ibid.
[839] Andrew Linklater, *The Transformation of Political Community* (Polity 1998), 192
[840] Tony Evans, 'Citizenship and Human Rights in the Age of Globalization' (2000) 25(4) Alternatives: Global, Local, Political, 425
[841] Kimberly Hutchings, 'The Idea of International Citizen' in Barry Holden (ed), The Ethical Dimensions of Global Change (Springer 1996), 113
[842] Ibid., 115
[843] Ibid.
[844] David Chandler, 'New Rights for Old? Cosmopolitan Citizenship and the Critique of State Sovereignty' (2003) 51 Political Studies, 334
[845] Ibid.

representation in domestic affairs. The unit should be the individual, although the mechanisms for participation and representation may vary according to the nature and scope of the issues discussed."[846]

Cosmopolitans claim that the state and representative democracy continue to play a significant role, but that these institutions cannot "have the final say in decision-making"[847], especially when human rights are at stake. According to Chandler, in some circumstances, sovereignty must be able "to be overridden by institutions which are 'autonomous and independent', and whose legitimacy is derived from the universal human rights of the global citizen, unconstrained by the nation-state framework."[848]

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[846] Daniele Archibugi, 'Principles of Cosmopolitan Democracy' in Daniele Archibugi, David Held and Martin Köhler (eds), *Re-Imagining Political Community* (Polity 1998), 212
[847] David Chandler, 'New Rights for Old? Cosmopolitan Citizenship and the Critique of State Sovereignty' (2003) 51 Political Studies, 334
[848] Ibid.

2. The Origins of Cosmopolitanism

To clarify what cosmopolitanism is and what it involves, we need to return to the very beginnings of the idea of cosmopolitanism. "The contemporary resurrection of cosmopolitanism theorising owes much to the debate sparked by Nussbaum's polemical essay[849] on patriotism and cosmopolitanism."[850] However, this idea has been present in Western philosophical thought for more than two thousand years and owes its existence to Diogenes of Sinope (also known as Diogenes the Cynic). Diogenes declared himself a cosmopolitan ("citizen of the world"[851]), not only to express his connection with the world, but to emphasise his disagreement with the laws of the ancient Greek *polis* (the city-state). Although Diogenes' idea of cosmopolitanism can be considered political, the Stoics primarily developed cosmopolitanism as an ethical concept. According to Nussbaum, "this clearly did not mean that the Stoics were proposing the abolition of local and national forms of political organization and the creation of a world state. The point was more radical still: that we should give our first allegiance to no mere form of government, no temporal power, but to the moral community made up by the humanity of all human beings."[852]

Citizenship is a fluid and contested concept because there is no single definition of citizenship. Nevertheless, citizenship has been "a key aspect of Western political thinking since the formation of classical Greek political culture."[853] The origin of the idea of world citizenship can be traced back to Greco-Roman antiquity. However, the concept of "world citizen" received its first philosophical development in the ideas of Greek and Roman Stoicism.[854] "Such different figures as the Roman jurist and philosopher Cicero (106 - 43); the apostle Paul (fl. 50 - 60); Philo (c. 30 B.C. - A.D. 45), the Alexandrian exegete of the Torah; and the Roman emperor Marcus Aurelius (reigned 161-180) also express cosmopolitan sentiments."[855]

The principles of cosmopolitanism can also be found in Aristotle's political philosophy that emphasises the social dimension of human nature and the characteristics of reason that give it a special position in relation to other beings.[856] On the other hand, Kleingeld and Brown emphasise that "the political culture idealized in the writings of Plato and Aristotle is not

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[849] Martha C. Nussbaum, 'Patriotism and Cosmopolitanism' (1994) 19(5) Boston Review, 3

[850] Zlatko Skrbis, Gavin Kendall and Ian Woodward, 'Locating Cosmopolitanism: Between Humanist Ideal and Grounded Social Category' (2004) 21(6) Theory, Culture and Society, 115

[851] Diogenes Laertius, *The Lives and Opinions of Eminent Philosophers* (C.D. Yonge tr, George Bell 1905), 240-1

[852] Martha C. Nussbaum, 'Patriotism and Cosmopolitanism' in Mitchell Cohen (ed), *Princeton Readings in Political Thought: Essential Texts from Plato to Populism* (Princeton University Press 2018), 740

[853] Bryan S. Turner, 'Introduction' in Bryan S. Turner (ed), *Citizenship and Social Theory* (SAGE 1993), vii

[854] Martha C. Nussbaum, 'Kant and Stoic Cosmopolitanism' (1997) 5(1) Journal of Political Philosophy, 1

[855] A. A. Long, 'The Concept of the Cosmopolitan in Greek and Roman Thought' (2008) 137(3) Daedalus, 58

[856] Valida Repovac Niksic and Amila Zdralovic, 'Cosmopolitan Perspective in the Work of Zygmunt Bauman' (2017) 7 (13-14) Socioloski diskurs, 14

cosmopolitan."[857]Both Plato and Aristotle place citizens in a particular community (*polis*). They are representatives of classical parochialism, which meant that the citizen was involved in creating and promoting justice, defending the city-state, and improving its institutions.[858] By leading a good and moral life, citizens contribute to the common good of the *polis* and all fellow citizens with whom they share a common destiny.[859] However, "it would (...) be wrong to assume that Classical Greek thought was uniformly *anti-cosmopolitan*."[860] Kleingeld and Brown argue that "it would be more accurate to call the Classical emphasis on the polis *uncosmopolitan*."[861]

> "Yet even as Plato and Aristotle were writing, other Greeks were issuing cosmopolitan challenges. Perhaps the most obvious challenges came from the travelling intellectuals who insisted on the contrast between the conventional ties of politics and the natural ties of humanity. Notice, for example, the way Plato has the Sophist Hippias address the motley crew of Athenians and foreigners present at Callias' house in Plato's *Protagoras* (337c7–d3): 'Gentlemen present … I regard you all as kinsmen, familiars, and fellow-citizens – by nature and not by convention; for like is by nature akin to like, while convention, which is a tyrant over human beings, forces many things contrary to nature.'"[862]

The essential difference between the pre-Stoic and Stoic political philosophy lies in the fact that in the first case the notion of citizenship was limited to belonging to the *polis*, while in the second case the concept was extended to the world as a whole.[863]

Montaigne states that Socrates was asked:

> "Where he came from. He replied not 'Athens', but 'the world'[864]. He, whose imagination was fuller and more extensive, embraced the universe as his city, and distributed his knowledge, his company, and his affections to all mankind, unlike us who only look at what is under foot."[865]

Socrates believed in the absolute sovereignty of justice and his ethical beliefs are universal.[866] Cosmopolitan perspectives were often represented by travelling intellectuals who gave universal humanity priority over the territorial conception of political subjectivity within a bounded community of *polis*.

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[857] Pauline Kleingeld and Eric Brown, 'Cosmopolitanism' (*Stanford Encyclopedia of Philosophy*, 17 October 2019) < https://plato.stanford.edu/entries/cosmopolitanism/> accessed 10 August 2021
[858] Frederick Copleston, *A History of Philosophy, Vol. I: Greece and Rome* (Image Books 1993)
[859] Ibid.
[860] Pauline Kleingeld and Eric Brown, 'Cosmopolitanism' (*Stanford Encyclopedia of Philosophy*, 17 October 2019) < https://plato.stanford.edu/entries/cosmopolitanism/> accessed 10 August 2021
[861] Ibid.
[862] Ibid.
[863]Gustavo   Lins   Ribeiro,   'What   is   Cosmopolitanism?'   (*CiteSeerx*,   2005) <http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.615.1132> accessed 3 August 2021
[864] The same answer is also attributed to Diogenes the Cynic who replied: "I am a citizen of the world."
[865] Michel de Montaigne, *The Complete Essays of Montaigne* (Donald M Frame tr, Stanford University Press 1965), 116
[866] A. A. Long, 'The Concept of the Cosmopolitan in Greek and Roman Thought' (2008) 137(3) Daedalus, 50-8

However, the boundaries of the notion of citizenship have always been challenged.[867] "Even the Ancients wrestled with such debates: the Greek warriors and peasants fought bloody wars for centuries and there was never a long period where the institution was stable and durable. Similarly, Roman patricians and plebeians fought violent battles to define and redefine citizenship."[868]The Stoics are considered to be the first significant proponents of the idea of cosmopolitanism in the history of Western philosophy.

This chapter looks at the emergence of contemporary postnational models of citizenship. In particular, the origin of the idea of world citizenship, Seyla Benhabib's idea of global citizenship, Marta Nussbaum's idea of world citizenship, Yasemin Soysal's conception of postnational citizenship and Ayelet Shachar's conception of *jus nexi* principle will be examined. It will be investigated whether these new models of citizenship may succeed in decoupling human rights and citizenship.

2.1. Philosophical roots of the idea of world citizenship

Cosmopolitan ideas were mainly emphasised by Stoic ethical and political thought. Although the first cosmopolitans perceived the universe as their true home, they recognised only those fellow citizens who shared their perception of the world and morality based on reason. According to Epictetus:

> "When a man therefore has learnt to understand the government of the universe and has realized that there is nothing so great or sovereign or all-inclusive as this frame of things wherein men and God are united, and that from it come the seeds from which are sprung not only my own father or grandfather, but all things that are begotten and that grow upon earth, and rational creatures in particular —for these alone are by nature fitted to share in the society of God, being connected with Him by the bond of reason—why should he not call himself a citizen of the universe and a son of God?."[869]

However, Epictetus claimed that only rational beings – those who understand "the administration of the universe" – can be called *citizens of the universe*.[870]Marcus Aurelius also derives the idea of the citizenship of the world from the universal laws of reason:

> "If we have intelligence in common, so we have reason (logos), which makes us rational beings, and that practical reason which orders what we must or must not do. If so, then the law is also common to

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[867] Engin F. Isin and Patricia K. Wood, *Citizenship and Identity* (SAGE 1999), 5
[868] Ibid.
[869]Epictetus, 'The Discourses of Epictetus' (*Sacred Texts*, 1916) <http://www.sacred-texts.com/cla/dep/dep010.htm> accessed 11 August 2021
[870] Darrin M. McMahon, 'Fear & Trembling, Strangers & Strange Lands' (2008) 137(3) Daedalus, 9

us and, if so, we are citizens. If so, we share a common government. And if so, the universe is, as it were, a city. For what other common government could one say is shared by all mankind?"[871]

The Roman Empire aimed to expand local law to universal principles that apply to all."In serving Rome, it seemed, one served the universal will."[872] The Stoics developed the concept of the citizen of the world "arguing that each of us dwells, in effect, in two communities – the local community of our birth, and the community of human argument and aspiration."[873] The Stoics gave priority to the community of human aspiration and ascribed various social and moral obligations to this cosmopolitan idea of political community.[874]

According to the Stoics, the moral worth of each individual should serve as the foundation for human community.[875] "Reason, in the Stoic view, is a portion of the divine in us. And each and every human being, just in virtue of being rational and moral (…) has boundless worth."[876] The Stoics recognised humanity as the foundation of citizenship. According to Marcus Aurelius, "it makes no difference whether a person lives here or there, provided that wherever he lives, he lives as a citizen of the world."[877]The Stoics understood human nature as part of a meaningful cosmic order. The significance of the Stoic philosophy is reflected in the idea that the natural equity of people, as well as ethical and political ideals, should be found in the inner life of the individual, and not in public political life.

Cosmopolitan ideas can also be found in Christianity. Saint Paul tells us: "You are no longer foreigners and aliens, but fellow citizens with God's people and members of God's household."[878]The idea of "God's household" is presented in St. Augustine's *De Civitate Dei* (The City of God) – a Christian community that transcends territorial and temporal categories.[879] However, this Christian idea is based on the dichotomies between the "heavenly" and the "earthly", the "universal" and the "particular", because "the city of God stood against the pagans."[880] Hence, it can be concluded that both the ancient and Christian ideas of world citizenship reflect the tension between the *universal* (humanity) and the *particular* (community membership).

Citizenship has existed for approximately three thousand years.[881] It has been the main institution controlling membership in political communities throughout its lengthy history, and it has given

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[871] Marcus Aurelius, *The Meditations* (G.M.A. Grube tr, Hackett Publishing Company 1983), IV.4
[872] Darrin M. McMahon, 'Fear & Trembling, Strangers & Strange Lands' (2008) 137(3) Daedalus, 10
[873] Martha C. Nussbaum, 'Kant and Stoic Cosmopolitanism' (1997) 5(1) Journal of Political Philosophy, 6
[874] Ibid.
[875] Ibid.
[876] Ibid., 7
[877] Marcus Aurelius, *The Meditations* (G.M.A. Grube tr, Hackett Publishing Company 1983), X.15
[878] Ephesians 2:19
[879] St. Augustine, *The City of God* (Marcus Dods tr, Image 1958)
[880] Darrin M. McMahon, 'Fear & Trembling, Strangers & Strange Lands' (2008) 137(3) Daedalus, 12
[881] Luis Eduardo Guarnizo, 'The Fluid, Multi-Scalar, and Contradictory Construction of Citizenship' (2012) 10 Comparative Urban and Community Research, 11

the philosophical justification for societies' socio-political organisation and legitimate forms of governance.[882] Citizenship became "the institutional building block of national membership and international relations"[883] in the twentieth century.

However, by the early twenty-first century, legal and theoretical conceptions of citizenship, as well as everyday practices, had undergone significant changes. The majority of academic study has determined that these shifts have been propelled in large part by a complex and interrelated set of global dynamics, ranging from capital and people mobility to the implementation and use of universal rights to the development of information and communication technology.[884]According to Thomas Meyer, contemporary notions of citizenship and political identity have to encompass a broad spectrum.[885] This applies not only to issues such as the preservation of the environment, world peace and protection against terrorism and violence, but also to the global framework of political action in society as a whole and throughout the world.[886]Therefore, it is necessary to form new forms of flexible political identities on several levels, a new form of political citizenship, which includes the national, regional and global level.

As a result of the subsequent scholarly debates on the implications of citizenship transformation, a number of new categories of citizenship have emerged, which are frequently employed to describe contemporary changes. Among the numerous varieties of new concepts of citizenship lately coined by social scientists are global, world, international, urban, cosmopolitan, postnational, transnational, nested environmental, postmodern and so forth.[887]

One of the central arguments of this chapter is that the new conceptions of citizenship have largely failed to overcome the tension global and local, universal and particular, universal humanity and citizenship, and that a reconceptualisation of contemporary notions of citizenship is necessary. Contemporary ideas of global citizenship are based on a territorial notion. Therefore, they failed to overcome the limitations of the modern, Kantian idea of world citizenship. Although he argues that the surface of the earth is the common possession of mankind and that all human beings should have the right to travel and engage in commercial relations, Kant does not develop the idea of global citizenship (or citizenship of the world). Kant's idea of hospitality is conditional and is tied to borders. Thus, Kant does not move away from national autonomy, as is clear from the third definitive article presented in his *Perpetual Peace*.[888]

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[882] Ibid.

[883] Ibid.

[884] Sanja Ivic, *EU Citizenship: Towards the Postmodern Conception of Citizenship?*(Vernon Press 2019)

[885] Thomas Meyer, *Die Identität Europas: Der EU eine Seele?* (Suhrkamp 2004)

[886]Ibid.

[887] Luis Eduardo Guarnizo, 'The Fluid, Multi-Scalar, and Contradictory Construction of Citizenship' (2012) 10 Comparative Urban and Community Research, 11

[888] Immanuel Kant, 'Perpetual Peace' in Hans Reiss (ed), *Kant: Political Writings* (2nd edn, Cambridge University Press 1991), 105-8

2.2. Kant's conception of world citizenship

In his *Perpetual Peace*, Immanuel Kant tries to defend cosmopolitan values. Although Kant only briefly discusses Stoic views, he was significantly influenced by them.[889] Kant advocates the idea of the kingdom of free rational individuals equal in humanity, in which all individuals are treated as an end in themselves, regardless of where they live. Both Kant and the Stoics advocated the concept of world citizenship founded on the idea of universal humanity based on reason. This means that "the first form of moral affiliation for the citizen should be her affiliation with rational humanity; and this, above all, should define the purposes of her conduct."[890] Kant advocated a truly universal, not a communitarian policy, one based on reason and not on "patriotism and group sentiment."[891]According to Kant:

> "The peoples of the earth have (...) entered in varying degrees, into a universal community, and it has developed to the point where a violation of rights in *one* part of the world is felt *everywhere*. The idea of a cosmopolitan right is therefore not fantastic and overstrained; it is a necessary complement to the unwritten code of political and international right, transforming it into a universal right of humanity."[892]

According to both the Stoics and Kant, the concept of world citizenship does not require giving up all "local identifications and affiliations."[893]This is especially evident in Kant, whose idea of world citizenship does not go beyond the concept of borders and does not include the idea of "equal personhood" because it neglects women's rights.[894]On the other hand, the Stoics accepted the institution of slavery and "the practices associated with it", although they advocated the concept of world citizenship based on universal humanity.[895]

Kant reconsiders the concept of a *citizen of the world*, placing it at the center of the Enlightenment project. The Enlightenment project emphasised the universality of reason that transcends all particularist values. This project represented strong beliefs that formed the basis of the idea of rights and freedoms for more than three hundred years.

Kant's idea of public right includes three branches: 1. the constitution of the state; 2. international law ("the rights of states in relation to one another") and 3. cosmopolitan right ("the relations between nations and their members at global level").[896] According to Kant, the idea of

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[889] Martha C. Nussbaum, 'Kant and Stoic Cosmopolitanism' (1997) 5(1) Journal of Political Philosophy, 5
[890] Ibid.
[891] Ibid., 3
[892] Immanuel Kant, 'Perpetual Peace' in Hans Reiss (ed), *Kant: Political Writings* (2nd edn, Cambridge University Press 1991), 107-8
[893] Martha C. Nussbaum, 'Kant and Stoic Cosmopolitanism' (1997) 5(1) Journal of Political Philosophy, 9
[894] Ibid., 14
[895] Ibid.
[896]David Miller, 'The Idea of Global Citizen' (Nuffield College, 16 February 2011) <http://www.nuff.ox.ac.uk/Politics/papers/2011/David%20Miller_working%20paper%202011_02.pdf> accessed 2 September 2021

cosmopolitan law is "a necessary complement to the unwritten code of political and international law, transforming it into universal law of humanity."[897] The main goal of Kant's political philosophy is to find a solution for maintaining eternal peace and his cosmopolitan thoughts stem from this idea.

In the first definitive article of his *Perpetual Peace* Kant claims that "the civil constitution of every state shall be republican."[898] Kant argues that this constitution is founded on "the principle of *freedom* for all members of a society"[899] as human beings; on "the principle of the *dependence* of everyone upon a single common legislation (as subjects)"[900]; and on "the principle of legal *equality* for everyone (as citizens)."[901]Kant distinguishes between *humanbeings* and *citizens*. He argues that all human beings are entitled to freedom but, on the other hand, he ties equality to citizenship and borders. Thus, Kant's cosmopolitan ideas do not transcend the tensions between the *universal* (humanity) and the *particular* (citizenship).

In the second definitive article of his *Perpetual Peace*, Kant argues that the law "of nations shall be based on a federation of free states"[902] According to Kant:

> "Each nation, for the sake of its own security, can and ought to demand of the others that they should enter along with it into a constitution, similar to the civil one, within which the rights of each could be secured. This would mean establishing *a federation of peoples*. But a federation of this sort would not be the same thing as an international state. For the idea of an international state is contradictory, since every state involves a relationship between a superior (a legislator) and an inferior (the people obeying the laws), whereas a number of nations forming one state would constitute a single nation. And this contradicts our initial assumption, as we are here considering the right of nations in relation to one another in so far as they are a group of separate states which are not to be welded together as a unit."[903]

Kant emphasises that states, in accordance with their laws of nations, would not accept the idea of the state of nations (*civitas gentium*) that would embrace all human beings on earth. He explains that for that reason he does not advocate the idea of a world-republic, but only a federation of states. However, as David Miller points out, the term "federation" is misleading, because Kant emphasises that the purpose of a federation is only to prevent war and "there is no transfer of

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[897] Immanuel Kant, 'Perpetual Peace' in Hans Reiss (ed), *Kant: Political Writings* (2nd edn, Cambridge University Press 1991), 108
[898] Ibid., 99
[899] Ibid.
[900] Ibid.
[901] Ibid.
[902] Ibid., 103
[903] Ibid., 102

governmental powers to a federal body."[904] Moreover, membership in the league is only voluntary.[905]

Kant is often perceived as a leading philosopher in the modern rethinking of the idea of cosmopolitan citizenship because he aims to develop the rights of man as citizens of the world. Kant's political philosophy aims to develop cosmopolitan law: "The idea of a cosmopolitan right is therefore not fantastic and overstrained; it is a necessary complement to the unwritten code of political and international right, transforming it into a universal right of humanity. Only under this condition can we flatter ourselves that we are continually advancing towards a perpetual peace."[906]

Kant's idea of cosmopolitan law is related to his moral philosophy and his *formula of humanity*, which is a universal law: "'So act that you treat humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means."[907] Kant argues that human beings are not means to an end, but an end in themselves.[908] However, Kant emphasises that "it is not human beings *per se*, but the 'humanity' in human beings that we must treat as an end in itself."[909]According to Kant's formula for humanity, treating rational nature as an end in itself entails treating people according to the principles they would uphold if they were entirely rational.[910] For instance, if someone is ill, depressed, confused or ignorant he/she should be treated in accordance with the principles that he/she would accept if he/she was fully rational.

Kant argues that he does not derive his formula of humanity from the particular attributes of human nature:

> "Whatever is deduced from the particular natural characteristics of humanity, from certain feelings and propensions (…) may (…) supply us [only] with a maxim, but not with a law; with a subjective principle on which we may have a propension and inclination to act, but not with an objective principle on which we should be enjoyed to act, even though all our propensions, inclinations and natural dispositions were opposed to it."[911]

Kant equates the term "humanity" with "rational nature" and "rational agency". For Kant, dignity has an unconditional moral worth. This means that it can't be quantified. Kant's formula of

[904]David Miller, 'The Idea of Global Citizen' (Nuffield College, 16 February 2011) <http://www.nuff.ox.ac.uk/Politics/papers/2011/David%20Miller_working%20paper%202011_02.pdf> accessed 2 September 2021

[905] Immanuel Kant, 'Perpetual Peace' in Hans Reiss (ed), *Kant: Political Writings* (2nd edn, Cambridge University Press 1991)

[906] Ibid., 108

[907] Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Mary Gregor ed, Cambridge University Press 1997), 429

[908]Ibid.

[909] Robert Johnson and Adam Cureton, 'Kant's Moral Philosophy' (*Stanford Encyclopedia of Philosophy*, Spring2021) <https://plato.stanford.edu/entries/kant-moral/> accessed 11 September 2021

[910]Sanja Ivic, *European Identity and Citizenship: Between Modernity and Postmodernity* (Palgrave Macmillan 2016), 110

[911] Immanuel Kant, *Groundwork for the Metaphysics of Morals* (Lara Denis ed, Broadview Press 2005), 84

humanity implies that it cannot be said that a thousand persons losing their human dignity is worse than one person losing his/her dignity.

Nevertheless, Kant does not fully develop the idea of world citizenship. Although he claims that the surface of the earth is a common possession of mankind and that all human beings should have the right to travel and engage in commercial relations, Kant's idea of hospitality is conditioned and tied to borders. Thus, Kant does not move away from national autonomy, as is clear from the third definitive article of his *Perpetual Peace.*

In the third definitive article Kant states that "cosmopolitan right shall be limited to conditions of universal hospitality."[912] Kant emphasises that he is concerned "not with philanthropy, but with right"[913] and that is why his idea of hospitality is limited to the right of visitation (and does not imply a permanent stay). Kant argues that "hospitality means the right of a stranger not to be treated with hostility when he arrives on someone else's territory."[914]

Hence, Kant's idea of world citizenship is based on the territorial notion of being, because his notion of hospitality is conditional and based on the sharp distinction between the right of residence and the right to hospitality. Kant's idea of hospitality does not include the right to be a permanent visitor or resident.[915]Thus, Kant's conception of hospitality does not transcend tensions between the global and the local. Kant does not develop the idea of world citizenship, but he expresses "cosmopolitan hope" because he believes that the unity of mankind can be achieved in the future.[916] However, Kant claims that "a systematic union of rational beings through common objective laws, that is, a kingdom, which can be called a kingdom of ends"[917] is certainly only an ideal.

"Modernist liberal civic culture tended to present the culture of citizenship as a totalizing culture to which all particularistic ethnic, class, and religious cultures were subordinate both cognitively and morally."[918]A new, postmodernist conception of world citizenship should be based on the unconditional idea of hospitality[919] that overcomes the tension between the *global* (world citizenship, universal human rights) and the *local* (borders, the right of residence, conditional idea of hospitality).

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[912] Immanuel Kant, 'Perpetual Peace' in Hans Reiss (ed), *Kant: Political Writings* (2nd edn, Cambridge University Press 1991), 105
[913] Ibid.
[914] Ibid.
[915] Ibid.
[916]David Miller, 'The Idea of Global Citizen' (Nuffield College, 16 February 2011) <http://www.nuff.ox.ac.uk/Politics/papers/2011/David%20Miller_working%20paper%202011_02.pdf> accessed 2 September 2021
[917] Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Lawrence Pasternack ed, Routledge 2002), 41
[918] Thomas Bridges, *The Culture of Citizenship. Inventing Postmodern Civic Culture* (State University of New York Press 1994)
[919] Jacques Derrida, *On Cosmopolitanism and Forgiveness* (Mark Dooley and Michael Hughes tr, Routledge 2001)

2.3. The emergence of contemporary alternative models of citizenship

Dominant trends in citizenship studies define the notion of citizenship within two opposing perspectives: one is a modernist, statist, exclusive model of citizenship, and the other is a postnational, inclusive model of citizenship.[920] According to Sassen, it is becoming clear today that the institution of citizenship is not unitary, and has multiple dimensions, only some of which are inextricably linked to the nation-state.[921]

> "The context for this possible transformation is defined by two major, partly interconnected conditions. One is the change in the position and institutional features of national states since the 1980s resulting from various forms of globalization. These range from economic privatization and deregulation to the increased prominence of the international human rights regime. The second is the emergence of multiple actors, groups and communities partly strengthened by these transformations in the state and increasingly unwilling to automatically identify with a nation as represented by the state."[922]

Traditional borders have begun to dissolve with the development of technology that has called into question the sharp distinction between *global* and *local*. The development of information and communication technologies and artificial intelligence opens space for the emergence of new forms of citizenship because new technologies can be used to develop and also abuse democratic practices, public debate, voting, deliberative decision-making and so on. Internet communications enable the development of new democratic practices and the formation of new forms of collective identity, as well as new communities.

This opens new horizons of social and civic life and enables psychological mobility that transcends territorial boundaries. New forms of social mediation and mutual exchange between different societies could transcend the divisions between the "global" (universal) and the "local" (particular).

> "However, even the new forms of identity, resulting from development of media and new technologies, can reflect modernist hierarchies. Global networks with their possibilities of instrumental exchange selectively switch on and off individuals, social groups, regions, and even entire countries depending on their capacities to meet the objectives that are processed within the network in a relentless torrent of strategic decisions (...) In this way an insurmountable binary opposition is created between 'self' and 'network'."[923]

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[920] Aoileann Ní Mhurchú, *Ambiguous Citizenship in an Age of Global Migration* (Edinburgh University Press 2014), 27
[921] Saskia Sassen, 'Towards Post-National and Denationalized Citizenship' in Engin F. Isin and Bryan S. Turner (eds), *Handbook of Citizenship Studies* (SAGE 2002), 277
[922] Ibid.
[923] Sanja Ivic, *EU Citizenship: Towards the Postmodern Conception of Citizenship?* (Vernon Press 2019), 62

Nevertheless, this technology advancement contributes to the development of a postmodern, flexible, deterritorialised idea of political subjectivity and opens space for the development of new, post-statist, decentralised forms of politics.[924]

Contemporary societies reflect the characteristics of both modernism (fixed identity, borders, nations, etc.) and postmodernism (multiculturalism; supranational political communities, such as the European Union; transnational institutions and so forth). Although we live in a postmodern world, borders (geographical, symbolic, historical, sociological and political) have not yet disappeared. "The drawing and redrawing of maps brought about the historical processes of nationalism, imperialism and decolonisation made evident that borders are not natural phenomena but man-made demarcations which are integral to the exercise of power in physical and mental forms."[925]

Although there are different definitions of global and postnational citizenship, these concepts remain unclear. That is why the idea of citizenship of the world is often misunderstood. For examplenot long ago, the former Prime Minister of the United Kingdom, Theresa May, criticised the idea of global citizenship based on postnational values. She stated: "But if you believe you are a citizen of the world, you are a citizen of nowhere. You don't understand what citizenship means."[926] On the other hand, proponents of anti-cosmopolitanism often see the idea of global citizenship as a threat to patriotism, national identity and the fatherland: "As for the oldest of anti-cosmopolitan accusations – that the citizen of the world is a threat to the fatherland —we need only open a newspaper in Europe or America to know that this fear is still with us, and busy putting up walls."[927]

The rise of nationalism in Europe presents another challenge for the further development of the idea of global citizenship. Leaders of many European countries give priority to the nation over global (postnational) citizenship. "Warsaw and Budapest have begun to define new old values: the fatherland, the Christian faith, family. Similar political and social ideals have emerged in the Czech Republic and Slovakia: a counter-movement to the relatively open societies of Western Europe."[928]

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[924] Ibid.

[925] H-Borderlands, 'Exploring Borders and Borderlands: Fact and Fiction' (H-Net, 2015) < https://networks.h-net.org/node/2720/discussions/84567/cfp-exploring-borders-and-borderlands-fact-and-fiction> accessed 16 September 2021

[926] Max Bearak, 'Theresa May Criticized the Term "Citizen of the World" But Half the World Identifies that Way' (*The Washington Post*, 5 October 2016) <https://www.washingtonpost.com/news/worldviews/wp/2016/10/05/theresa-may-criticized-the-term-citizen-of-the-world-but-half-the-world-identifies-that-way/?noredirect=on> accessed 10 September 2021

[927] Darrin M. McMahon, 'Fear & Trembling, Strangers & Strange Lands' (2008) 137(3) Daedalus, 16

[928] Volker Wagener, 'Rising Nationalism and the EU's Split with the East' (DW, 8 January 2018) <https://www.dw.com/en/rising-nationalism-and-the-eus-split-with-the-east/a-42073959> accessed 18 September 2021

According to toRainer Bauböck[929]and CatherineDauvergne[930], statist, modernist notions of citizenship still dominate even in the contemporary postmodern world. These exclusivist conceptions of citizenship rely on the idea of"the primacy of the nation-state a the rightful (and only realistic) basis for political community."[931]David Miller emphasises that our experience of citizenship has always been associated with the idea of bounded citizenship — initially citizenship within the polis, later citizenship within the borders of the nation-state.[932]Ní Mhurchú argues that "this particularistic exclusive model of political membership is increasingly being challenged by a universal model linked to a more inclusive postnational or transnational understanding of political identity and belonging."[933]The close relationship between citizenship and the nation has been problematised in recent decades as a result of migration, economic globalisation, the development of information and communication technologies, the establishment of transnational institutions and various other demographic, cultural, economic and political processes.

The postnational idea of citizenship based on this new idea of belonging is supported by movements such as environmental activism and various human rights and feminist movements. The postnational model of citizenship (as well as postnational ideas of belonging and postnational political identities) is often perceived as a challenge to an exclusivist, modernist notion of citizenship, which is tied to the concept of the nation-state. Postnational citizenship is perceived as a kind of citizenship that is inclusive and stems from global political changes.

Michael Edwards[934], Ann Florini[935] and many other scholars make a sharp distinction between the postnational and the global model of citizenship. Postnational citizenship involves relations that transcend borders, however, these relations are not always global. Postnational citizenship is based on the idea of multiple membership involving complex systems of duties and rights, as well as on a multilayered notion of identity that includes global, regional, national and local aspects. Yasemin Soysal argues that the new postnational forms of identity and belonging are reflected in the example of immigrants in Europe.[936] What makes these individuals full members of society is the fact that they share a common public, social space, which contains a set of rights and duties.

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[929] Rainer Bauböck, 'Introduction' in Rainer Bauböck (ed), *Migration and Citizenship: Legal Status, Rights and Political Participation* (Amsterdam University Press 2006)

[930] Catherine Dauvergne, 'Citizenship with a Vengeance' (2007) 8(2) Theoretical Inquiries in Law, 489-508

[931]Aoileann Ní Mhurchú, *Ambiguous Citizenship in an Age of Global Migration* (Edinburgh University Press 2014), 14

[932]David Miller, 'The Idea of Global Citizen' (Nuffield College, 16 February 2011) <http://www.nuff.ox.ac.uk/Politics/papers/2011/David%20Miller_working%20paper%202011_02.pdf> accessed 2 September 2021

[933]Aoileann Ní Mhurchú, *Ambiguous Citizenship in an Age of Global Migration* (Edinburgh University Press 2014), 4

[934] Michael Edwards, 'Introduction' in Michael Edwards and John Gaventa (eds.), *Global Citizen Action* (Earthscan 2001)

[935] Ann Florini, (ed), *The Third Force*: *The Rise of Transnational Civil Society* (Japan Center for International Exchange/Carnegie Endowment for International Peace 2000)

[936] Yasemin Soysal, *The Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago Press 1994)

Tomas Hammar[937], Rogers Brubaker[938] Zig Layton-Henry[939] and Jessurun D'Oliveira[940] argue that citizenship should not be determined by nationality, but by place of residence. According to Soysal, the postnational concept of citizenship is based on personhood, not nationality.[941]Although postnational citizenship has moved from emphasising a common nationality to emphasising a common humanity, it has retained the modernist idea of identity, which defines both categories as fixed and monolithic. "What this shift ignores is how appeals to humanity continue to reproduce the idea that people share something in common, such as is expressed in a nation conceptualised as a territorialised entity with (…) calculable boundaries demarcating inside from outside."[942]The problem, therefore, is that the postnational idea of citizenship still relies on a modernist, fixed, exclusivist notion of subjectivity.

> "The spatial characteristics of the state continue to dictate how the post-statist and trans-statist realm is understood in such literature; it continues to be understood in terms of a new post-statist or trans-statist but still *bounded* community (that can be separated from other cultural and economic realms) and in terms of a bounded individual who engages in that community."[943]

Postnational citizenship does not resolve "the statist framework of boundaries between inclusion and exclusion, inside and outside, 'us' and 'them'."[944]Thus, postnational citizenship does not pose a significant challenge to the modernist, exclusivist model.

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[937] Tomas Hammar, 'Denizen and Denizenship' in Atsushi Konda and Charles Westin (eds), *New Concepts of Citizenship: Residental/Regional Citizenship and Dual Nationality/Identity* (CEIFO 2003)

[938] Rogers Brubaker, *Nationalism Refrained: Nationhood and the National Question in the New Europe* (University of California Press 1996)

[939] Zig Layton-Henry, (ed), *The Political Rights of Migrant Workers in Western Europe* (Sage Publications 1990)

[940] H.U. Jessurun D'Oliveira, 'Union Citizenship: Pie in the Sky?' in Allan Rosas and Esko Antola (eds), *A Citizen's Europe. In Search for a New Order* (SAGE 1995)

[941] Yasemin Soysal, *The Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago Press 1994)

[942] Aoileann Ní Mhurchú, *Ambiguous Citizenship in an Age of Global Migration* (Edinburgh University Press 2014), 40

[943] Ibid., 38

[944] Ibid., 5

3. Global citizenship and human rights

We live in an era in which new modalities of membership have evolved, with the result that the nation-state system's definitions of political community no longer suffice to regulate political membership.[945]According to Seyla Benhabib, the development of a notion of global citizenship based on the principle of universal hospitality is required to address the transnational movement of peoples, which has emerged as a key challenge of our times.[946] Benhabib argues that democratic rule has been predicated on a number of fundamental illusions, including territorial self-sufficiency and homogeneity of the people.[947]

According to Benhabib, global citizenship and the formation of global political communities are aspirations that reflect the transnational reality of people's lives in today's world.[948]To understand and analyse the metamorphosis of the contemporary world, it is necessary to change the perspective from national to cosmopolitan.[949] Benhabib argues that non-territorial models of representation are absolutely possible: one's ethnic heritage, religious affiliation, linguistic identity, professional activities, and so on can all be represented by an individual or group of individuals.[950] Apart from territorial residency, representation can be based on a variety of factors. The discourse principle of legitimacy, which requires that all persons who are affected by the repercussions of a norm's adoption have a say in its formulation, undoubtedly leads to a multiplicity of representational and discursive engagement.[951] "For example, the community of those affected by the fall of acid rain cuts across the Canadian/USA border and unites there individuals around shared interests, concerns, and activities. Globalization, insofar as it increases both the intensity and the interconnectedness of human factors around the world, results in the creation of new sites and new logics of representation."[952]

The decoupling of political identities from national membership is welcomed by proponents of postnational citizenship. "Disaggregated citizenship permits individuals to develop and sustain multiple allegiances and networks across nation-state boundaries, in inter- as well as transnational contexts. Cosmopolitanism, the concern of the world as if it were one's *polis*, is furthered by such multiple, overlapping allegiances which are sustained across communities of language, ethnicity,

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[945] Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004), xiii
[946] Ibid., 1
[947] Ibid., 171
[948] Seyla Benhabib, 'Towards Global Political Communities and New Citizenship Regimes' (2018) 1 Glocalism, 8
[949] Ulrich Beck, 'The Cosmopolitan Perspective: Sociology of the Second Age of Modernity' (2008) 51(1) British Journal of Sociology, 79
[950] Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004), 218
[951] Ibid.
[952] Ibid., 218-9

religion and nationality."[953] The clearest signs of cosmopolitan norms are changes in citizenship, in which rights are provided to persons based on residency rather than cultural identity.[954] Nonetheless, according to Benhabib, cosmopolitanism in the international arena has not been achieved insofar as persons whose membership status remains unclear – such as refugees, undocumented migrants and asylum seekers whose applications are in progress – are often treated as criminals by existing polities.[955]

3.1. Benhabib's conception of the new politics of membership

Benhabib emphasises that the concept of global citizenship must renegotiate and reconcile tensions between universal human rights and particularist attachments to culture, ethnicity, religion, language, state, and so on.[956] While other scholars have looked into different aspects of the possibility of a new kind of cosmopolitan politics, Seyla Benhabib stands out as the first to develop a concept of cosmopolitan federalism that can "accommodate more interpretations of the current political landscape."[957]In *The Rights of Others: Aliens, Residents, and Citizens*, Benhabib advocates cosmopolitan federalism and moral individualism, "open but rather porous borders", and first-admittance rights for asylum seekers and refugees, but accepts democracies' rights "to regulate the transition from first admission to full membership."[958]

The conflict between states' sovereign claims to regulate their borders and universal human rights is highlighted by Benhabib.[959] She claims that there are no easy answers to the challenges that these conflicting responsibilities offer. Benhabib does not advocate for global citizenship or the abolition of the state system. She "addresses the tension between individual universal rights and sovereign self-determination by positing a modified Kantian 'cosmopolitan federalism.'"[960]

According to Benhabib, although state sovereignty in the technological, military and economic fields has been significantly violated, it is still strongly affirmed in matters of transnational migration, and national borders, although permeable, are still there to "keep out aliens and intruders."[961]Benhabib claims that it is our responsibility as citizens to question the limits of our *demos* "and ask why or how the stranger can become a co-citizen."[962] There are still tensions

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[953] Ibid., 174-5
[954] Ibid., 177
[955] Ibid.
[956] Ibid., 4
[957] Saskia Sassen, 'Response' (2007) 6(4) European Journal of Political Theory, 433
[958] Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004), 220-1
[959] Ibid., 2
[960] Saskia Sassen, 'Response' (2007) 6(4) European Journal of Political Theory, 433
[961] Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004), 6
[962] Ibid., 8

between the *global* and the *local*, which can only be resolved by acts of transnational solidarity with the rights of foreigners (refugees, asylum seekers, migrants and so forth). [963]

According to Seyla Benhabib, attempts to locate a point of convergence between the preservation of a universal political identity and the maintenance of national forms of belonging have so far failed to find a place in the policies of world governments.[964] As a result, the concept of the individual as a global citizen risks becoming an aspirational ideal devoid of practical and empirical translations.[965] For this reason, the notions of transnational solidarity and hospitality must be better developed in public political discourse. "Universal human rights seem to be closely connected to (...) cosmopolitan principles of hospitality and solidarity. Although today's increasing social and political integration seems to facilitate the observation of the right to (...) hospitality, it is noted that the right to asylum and the physical vulnerability of the individual are increasingly suspended or cancelled by the same states who claim to be custodians of the universal values of man."[966]

Benhabib, following the Kantian cosmopolitan federalism tradition, emphasises the importance of political membership within bounded communities and advocates the need for "democratic attachments" that extend beyond national borders.[967] Benhabib argues that "a cosmopolitan theory of justice cannot be restricted to schemes of *just distribution*[968] on a global scale, but must also incorporate a vision of *just membership*.[969] "Such just membership entails recognising the moral claims of refugees and asylees to just admittance, a regime of *porous* borders for immigrants, an injunction against denationalization and the loss of citizenship rights, and the vindication of the right of every human being 'to have rights', that is, to be a legal person, entitled to certain inalienable rights, regardless of the status of their political membership."[970]

Seyla Benhabib develops the concept of "democratic iterations", which refers to "complex processes of public agreement, deliberation, and learning through which universalist right claims are contested and contextualized, invoked and revoked, throughout legal and political institutions as well as in the public sphere of liberal democracies."[971] Benhabib points out that the development of global citizenship requires "the new politics of membership" that will negotiate a "complex relationship between the rights of full membership, democratic voice, and territorial residence."[972] According to Benhabib, such democratic iterations and negotiations "take place in the context of a world society of states."[973] Through democratic iterations, the distinctions between "us" and

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[963]Seyla Benhabib, 'Towards Global Political Communities and New Citizenship Regimes' (2018) 1 Glocalism, 8
[964] Ibid., 1.
[965] Ibid.
[966] Ibid.
[967] Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004), 3
[968] See: John Rawls, *A Theory of Justice* (Harvard University Press 1971).
[969] Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004), 3
[970] Ibid.
[971] Ibid., 19
[972] Ibid., 20
[973] Ibid.

"them", "citizens" and "aliens", become more fluid and negotiable.[974] Benhabib emphasises that only then will it be possible to progress toward a postnational conception of cosmopolitan solidarity, in which all human beings are increasingly brought under the net of universal rights only by virtue of their humanity, while privileges of membership are gradually eroded.[975] Through democratic iterations, "national polities can commit to constitutional and international norms when mediated by the will of democratic majorities."[976]

Benhabib argues that cosmopolitan citizenship "entails the reclaiming and repositions of the universal — its iteration — within the framework of the local, the regional, or other sites of democratic activism and engagement."[977]According to Saskia Sassen, Benhabib's view of the nature of the relationship between nation states and universal human rights is based on a binary in which "the national and the global are mutually exclusive."[978] When she discusses globalisation and the disintegration of the nation state, Benhabib uses a similar binary in her analysis.[979] Globalisation also includes processes of fragmentation as shown by Brexit, the Catalan or Scotland question, the rise of nationalism around the world after 2016 and so on, which Benhabib has not sufficiently acknowledged. Sassen states:

> "My research of the last 15 years shows that such binary analytics keep us from adequately understanding the foundational transformation afoot today (...) The epochal transformation we call globalization is taking place inside the national to a far larger extent than is usually recognized. It is here that the most complex meanings of the global are being constituted, and the national is also often one of the key enablers and enactors of the emergent global scale."[980]

Sassen argues that the definition of nationality, including complete nation-based legal membership (citizenship), may be changing rapidly enough to shift the distinction between members and non-members.[981] Such shifts within the national indicate that fundamental changes in the definition of citizenship may not necessitate postnational citizenship. According to Sassen, "citizenship need not go post-national to undergo foundational change. This type of distinction is precluded by Benhabib's argument as long as it is centred in nation-state closure and the mutual exclusivity of the national and the non-national."[982]

Sassen perceives a process in which global logic is partially formed within the nation state and the state apparatus itself, resulting in the denationalisation of what was traditionally created as

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[974] Ibid., 21
[975] Ibid.
[976] Saskia Sassen, 'Response' (2007) 6(4) European Journal of Political Theory, 433
[977] Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004), 23-4
[978] Saskia Sassen, 'Response' (2007) 6(4) European Journal of Political Theory, 435
[979] Ibid.
[980] Ibid., 437
[981] Ibid., 443
[982] Ibid., 442

national.[983] According to Sassen, "this opens up possibilities for cosmopolitan federalism that Benhabib overlooks given her national/global binary."[984]

3.2. Ideas of universal hospitality and transnational solidarity

Seyla Benhabib states that transnational migrations are fundamental to a normative theory of global justice.[985] However, theories of global and international justice have remained silent on the issue of transnational migration.[986]Benhabib emphasises that "in the early decades of the twenty-first century, exile, statelessness and migration have emerged as universal experiences of humanity. In 2000, there were 175 million migrants out of 6 billion of the world's population."[987] In 2020, there were over 280 million international migrants in the world.[988]

Benhabib points out that all pleas for the development of post-Westphalian conceptions of sovereignty[989] are ineffective unless they also address the normative regulation of the mobility of people beyond territorial borders.[990] "From a philosophical point of view, transnational migrations bring to the fore the constitutive dilemma at the heart of liberal democracies: between sovereign self-determination claims on the one hand and adherence to universal human rights principles on the other."[991] According to Benhabib, internal reconstruction of this dualism is necessary. In this context, the notion of global citizenship and global political communities must be considered.[992]

The notion of global citizenship is inseparable from the notions of transnational solidarity and universal hospitality. Therefore, we must determine the global mobility and treat each individual, regardless of political standing, with the dignity of moral personhood.[993] According to Benhabib, this entails acknowledging that crossing borders and seeking admittance into various polities is not a criminal act, but rather a manifestation of human freedom and the pursuit of human development in a world that we all share.[994] Benhabib emphasises that automatic membership does not apply to

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[983] Ibid., 433
[984] Ibid., 433
[985] Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004), 2
[986] See: Charles R. Beitz, *Political Theory and International Relations* (revised ed, Princeton University Press 1999); Thomas W. Pogge, 'Cosmopolitanism and Sovereignty' (1992) 103(1) Ethics, 48-75; Allen Buchanan, 'Rawls's Law of Peoples: Rules for a Vanished Westphalian World' (2000) 110(4) Ethics,697-721.
[987] Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004), 4
[988]United Nations, 'International Migration 2020 Highlights' (DESA, 15 January 2021) <https://www.un.org/en/desa/international-migration-2020-highlights> accessed 1 October 2021
[989] Allen Buchanan, 'Rawls's Law of Peoples: Rules for a Vanished Westphalian World' (2000) 110(4) Ethics,697
[990] Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004), 2
[991] Ibid.
[992]Seyla Benhabib, 'Towards Global Political Communities and New Citizenship Regimes' (2018) 1 Glocalism, 4
[993] Ibid.
[994] Ibid.

those who are admitted for the first time.[995] At the national, subnational, regional, and local levels, democratic peoples will still have to determine membership rules.[996]

Benhabib argues that Kant's proposal for permanent peace among nations has visionary depth, but that his idea of hospitality needs to be revised.[997] Kant makes a distinction between the "temporary right of sojourn" and the "right to be a permanent visitor."[998] Benhabib points out that, according to Kant, "the right to be a permanent visitor is awarded through (...) special agreement, a 'contract of beneficience'. It is a special privilege which the republican sovereign can award to certain foreigners who abide in their territories, who perform certain functions, who represent their respective political entities, who engage in long-term trade, and the like."[999] The right to hospitality, according to Kant, comprises a claim to temporary residence that cannot be denied if doing so would result in the annihilation of the other.[1000] It is untenable, according to Kant, to refuse a sojourn to victims of religious warfare, piracy victims, or shipwreck victims where such rejection would result in the individual's harm.[1001]

According to Benhabib, Kant's contention that first entrance cannot be denied to those who seek it if doing so would result in their "destruction" has been integrated into the *Geneva Convention on the Status of Refugees[1002]* as the concept of "non-refoulement."[1003] The principle forbids member governments from forcibly returning refugees and asylum seekers to their home countries if doing so would put their lives and freedom in jeopardy. Benhabib argues that, when it suits their objectives, sovereign states can exploit this article to define life and freedom more or less narrowly.[1004]Benhabib expresses concern over the insurmountable gap that Kant suggests between the right of permanent residence and the right of temporary sojourn. According to Benhabib, the first is a privilege, the second is a right.[1005] Benhabib points out that Kant's idea of cosmopolitan right is based on the right of a temporary sojourn. According to Benhabib, the concept of cosmopolitan citizenship requires bridging the gap between the right of permanent residency and the right of temporary visitation.[1006]

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[995] Ibid.

[996] Ibid.

[997] Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004), 25

[998] Ibid., 27

[999] Ibid., 27-8

[1000] Immanuel Kant, 'Perpetual Peace' in Hans Reiss (ed), *Kant: Political Writings* (2nd edn, Cambridge University Press 1991)

[1001] Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004), 28

[1002] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention)

[1003] Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004), 35

[1004] Ibid.

[1005] Ibid., 38

[1006] Ibid., 134

The current debate over absolute and conditional hospitality, as well as various theoretical approaches to problems of immigrants and their (un)acceptance within (cosmopolitan) Europe[1007], is significant because it raises issues of transnational solidarity and universal hospitality that should be addressed by postnational models of citizenship (such as European citizenship) and supranational political communities (such as the European Union).

Globalisation places the state in volatile situations where its ability to influence decisions and outcomes is limited in terms of ecological, economic, international and other issues.[1008] Nonetheless, monopoly over territory is exerted through immigration and citizenship policies, despite the alteration of old ideas of sovereignty.[1009]This is especially evident in the example of the European Union, which is a supranational political community, but does not have a common, European asylum policy, but each EU member state has its own asylum policy and makes decisions on refugees, migrants and asylum seekers. Although the Dublin Regulation[1010], the main pillar of the common European asylum system (CEAS) was supposed to create a common European asylum policy, this goal has not been achieved. According to Fratzke, in reality, the Dublin system was never intended to distribute or equalise asylum burdens.[1011] Its primary goal is to establish a procedure that quickly assigns responsibility for processing an individual asylum claim to a single EU member state.[1012] "Hungary and Poland have refused to implement measures agreed to in 2015, and, along with Slovakia and the Czech Republic, have ignored rulings by the European Court of Justice (ECJ) that compelled them to take in displaced people. And, after the brief early suspension of the Dublin rules, Germany and certain countries on the Balkan route to the European Union placed restrictions on their borders: Some tried to make them impenetrable."[1013]

The Dublin Regulation, as it is now administered, is mainly failing to meet its primary objectives.[1014]Fratzke states that "the Dublin Regulation (and its predecessor, the Dublin Convention) seeks to ensure quick access to protection for those in need, and to discourage abuses

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[1007]Lana Pavic, 'The Principle of Hospitality and the Problem of European Cosmopolitanism' (PhD thesis, University of Zagreb 2019)

[1008] Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004), 4-5

[1009] Ibid.

[1010] European Union: Council of the European Union, 'Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third-country National or a Stateless Person' (*RefWorld,* 26 June 2013)<https://www.refworld.org/docid/51d298f04.html> accessed 8 October 2021

[1011] Susan Fratzke, *Not Adding Up:The Fading Promise of Europe's Dublin System* (Migration Policy Institute Europe 2015), 1

[1012] Ibid.

[1013] Bernd Riegert, 'Lack of EU Unity on Asylum Keeps Refugees at the Margins' (DW, 4 September 2020) <https://www.dw.com/en/lack-of-eu-unity-on-asylum-keeps-refugees-at-the-margins/a-54804177> accessed 8 October 2021

[1014] Susan Fratzke, *Not Adding Up:The Fading Promise of Europe's Dublin System* (Migration Policy Institute Europe 2015), 1

of the asylum system by preventing applicants from 'shopping' for the Member State with the most favourable procedures or reception conditions."[1015]

Aside from a few exceptions such as unaccompanied minors and family unity, the 'responsible' EU member state is usually the one where the asylum applicant originally entered.[1016] In fact, this usually implies Greece or Italy for individuals who entered irregularly. As a result, while delegating responsibility for the evaluation of claims, the Dublin Regulation does not take into account the preferences of asylum seekers.[1017] Regular entrance avenues to the EU for the purpose of protection, such as resettlement, are extremely limited, and the majority of asylum seekers arrive irregularly. Given the geographical bias in assigning accountability, this system does not result in a fair distribution of duty among the 27 EU Member States.[1018]

The Dublin system's efficiency has been harmed by low effective transfer rates and a continually high prevalence of secondary migration among asylum seekers (both before and after submitting an application).[1019] Asylum advocates have expressed worries about the delays caused by Dublin procedures in the examination of protection claims. According to Fratzke, delays like these can break up families and put vulnerable people in danger.[1020] Applicants may be sent back to countries (such as Greece) with underdeveloped asylum systems that are unable to process their claims or offer sufficient reception conditions.[1021]"The criticism most often levelled at the Dublin Regulation, however, is that it has prompted a transfer of asylum-processing responsibilities from Europe's north to its southern borders – a charge that is not borne out by the evidence."[1022]

Given that national rather than collective European interests dominated the search for a solution to the migration crisis, the European Union faced the erosion of solidarity as one of its core values.[1023]Article 2 TEU defines the European Union as a political community in which "pluralism, non-discrimination, tolerance, justice, solidarity and equality (...) prevail."[1024]Since the European Union is a supranational political community, national interests should not prevail.[1025] For this reason, Benhabib's idea of global citizenship, enriched by Jacques Derrida's idea of universal hospitality, is relevant to defining the contemporary conception of postnational citizenship.

[1015] Ibid.
[1016] Evangelia (Lilian) Tsourdi, 'COVID-19, Asylum in the EU, and the Great Expectations of Solidarity' (2020) 32(2) International Journal of Refugee Law, 376
[1017] Ibid.
[1018] Ibid.
[1019] Susan Fratzke, *Not Adding Up:The Fading Promise of Europe's Dublin System* (Migration Policy Institute Europe 2015), 1
[1020] Ibid.
[1021] Ibid.
[1022] Ibid.
[1023] Sanja Ivic, *The Concept of European Values: Creating a New Narrative for Europe* (Lexington Books 2023)
[1024] Consolidated Version of the Treaty on European Union [2008] OJ C115/13
[1025] Sanja Ivic, *The Concept of European Values: Creating a New Narrative for Europe* (Lexington Books 2023)

Jacques Derrida explained the old European idea of cosmopolitanism by understanding hospitality as a right to asylum. In this context, he called for the realisation of cosmopolitanism through *cosmopolitics*, a necessary practical response to the increasingly restrictive immigration rules introduced by France and other European countries in the mid-1990s.[1026] Derrida concludes that today it is extremely important to revive the idea of cosmopolitanism as true hospitality.[1027]Derrida subjected the notions of cosmopolitanism and hospitality to deconstruction[1028], confronted with various narratives that portray refugees, asylum seekers and economic migrants, especially those entering European countries, as a threat to national security.

Derrida made a distinction between the "law of hospitality", on the one hand, and the "laws of hospitality", on the other. According to Derrida:

> "The law of unlimited hospitality (to give the new arrival all of one's home and oneself, to give him or her one's own, our own, without asking a name, or compensation, or the fulfilment of even the smallest condition), and on the other hand, the laws (in the plural), those rights and duties that are always conditioned and conditional, as they are defined by the Greco-Roman tradition and even the Judaeo-Christian one, by all of law and all philosophy of law up to Kant and Hegel in particular, across the family, civil society, and the State."[1029]

Derrida introduces the concept of unconditional (unlimited) hospitality. He also distinguishes between the politics of hospitality and the ethics of hospitality. Hospitality policy is defined by borders, limitations and caution, while hospitality ethics requires a radical openness to the Other, regardless of the dangers that may arise. "From Derrida's writings it seems that true hospitality is somewhat of an enigma. This is not due to any philosophical conundrum, but perhaps because hospitality is not a matter of objective knowledge. Hospitality exists within lived experience; it is a git given by the 'host' to the 'guest', and then shared between them."[1030]

According to Derrida, when Kant used the term hospitality as one without which there are no rights of the citizens of the world, he connected the principle of hospitality and the idea of cosmopolitanism with the notions of rights and conditioning.[1031] Derrida refers to Kant's essay "Perpetual Peace" in which the concept of universal hospitality is defined "as the right of a stranger not to be treated as an enemy when he arrives in the land of another. One may refuse to receive him when this can be done without causing his destruction; but, so long as he peacefully occupies his place one may not treat him with hostility."[1032]

[1026] Jacques Derrida, *On Cosmopolitanism and Forgiveness*, ed. by Simon Critchley and Richard Kearney (Mark Dooley and Michael Hughes tr, Routledge 2001), 4
[1027] Lana Pavic, 'The Principle of Hospitality and the Problem of European Cosmopolitanism' (PhD thesis, University of Zagreb 2019)
[1028] Catherine Zuckert, 'The Politics of Derridean Deconstruction' (1991) 23(3) Polity, 335
[1029] Jacques Derrida, *Of Hospitality* (Anne Dufourmantelle invites Jacques Derrida to respond) (Stanford University Press 2000), 77
[1030] Kevin O'Gorman, 'Jacques Derrida's Philosophy of Hospitality' (2006) 8(4) Hospitality Review, 56
[1031] Jacques Derrida, 'Hostipitality' (2003) 5(3) Angelaki: Journal of Theoretical Humanities, 3
[1032] Ibid., 3

Kant argues that the right of hospitality does not derive from "the love of man as a sentimental motive"[1033]– that it is a subject of right, not philanthropy. Universal hospitality is the result of a legal obligation – it is a duty "regulated by law."[1034] Furthermore, Kant restricts the right to hospitality to a "right of visit," based on an initial common possession of the earth's surface, rather than a "right of residence" (which would necessitate a special convention between nation-states requiring that the foreigner be a citizen of another nation-state).[1035] Derrida opposes Kant's "conditional" hospitality with "unconditional" or "absolute" hospitality, which is devoid of conditions and "does not seek to identify the newcomer, even if he is not a citizen."[1036]

According to Derrida, in order to be real, hospitality should not discriminate. Even if that means always opening the door to indiscriminate otherness, it should be open to it. "The law of absolute, pure, unconditional, hyperbolic hospitality, asks us to say "yes" to the newcomer [arrivant], before any determination, before any prevention, before any identification – irrespective of being a stranger, an immigrant, a guest or an unexpected visitor. "[1037]

Derrida's concept of absolute hospitality is not only a critique of Kant's conditioned hospitality, but it is also a way of seeking the best solutions in the interest of human rights development. Derrida warned through a deconstructive reading of Kant's cosmopolitan law that the principle of hospitality as a foreigner's limited right to visit was inadequate. Emphasising the difference between unconditional and conditional hospitality, Derrida showed how huge disproportion there is between the unconditional acceptance of the Other and the conditional acceptance of an endangered foreigner who as a refugee, asylum seeker or economic migrant, stands on the border of a nation state or on the border of a supranational political community (such as the European Union).[1038] Behind the establishment of unconditional hospitality was not the prescribing of public policies, but the diversion of attention to the ethical dimension of hospitality, which often disappears from modern asylum policies.[1039] In this context, Derrida's reflections clearly indicate that policies from which the ethical dimension of accepting the *Other* is abstracted are completely inappropriate for a time dominated by rising migration, and that such policies are detrimental to foreigners as well as citizens.[1040]

The task of modern cosmopolitanism is to create opportunities for mutual acquaintance of both the *host* and the *guest*, with mutual effort. Only such hospitality, as a cosmopolitan process of transformation of the guest and the host, opens the possibility for acceptance, instead of mere

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[1033] Jacques Derrida, *Of Hospitality* (Anne Dufourmantelle invites Jacques Derrida to respond) (Stanford University Press 2000), 34
[1034] Ibid.
[1035] Gerasimos Kakoliris, 'Jacques Derrida on the Ethics of Hospitality' in Elvis Imafidon (ed), *The Ethics of Subjectivity. Perspectives since the Dawn of Modernity* (Palgrave Macmillan 2015), 146
[1036] Ibid., 147
[1037] Ibid., 146
[1038] Lana Pavic, 'The Principle of Hospitality and the Problem of European Cosmopolitanism' (PhD thesis, University of Zagreb 2019)
[1039] Ibid.
[1040] Ibid.

mutual suffering. In other words, hospitality then becomes an act of the possible, regardless of the fact that it takes place in a world of endless national, religious, ethnic, national, economic, linguistic, and cultural differences.[1041]The principles of hospitality require the law of absolute hospitality in order to place and maintain them in a constant state of improvement. "On the other hand, without the conditional laws of a right and a duty to hospitality, the law of unconditional hospitality would be in danger of remaining abstract, ineffective, wishful thinking, utopian."[1042]

Derrida sees a twofold imperative as the logic that conditions the concept of hospitality within Western culture.[1043] Derrida

"locates a double or contradictory imperative within the concept of cosmopolitanism: on the one hand, there is an unconditional hospitality which should offer the right of refuge to all immigrants and newcomers. But on the other hand, hospitality has to be conditional: there has to be some limitation on rights of residence. All the political difficulty of immigration consists in negotiating between these two imperatives. Derrida's identification of a contradictory logic at the heart of the concept of cosmopolitanism is not staged in order to paralyse political action, but, on the contrary, in order to enable it."[1044]

In this context, Derrida interprets hospitality on two levels, although both bring with them certain problems. At the first level, hospitality stands as a right, guaranteed by national or international law which, according to Derrida, is Kant's idea and an important ideal that has its history within the European cosmopolitan tradition.[1045] Such hospitality is characterised by conditionality through a contract established between the host and the guest. According to Derrida, this idea of hospitality stems from the idea of "sovereignty of oneself over one's home", and "sovereignty can only be exercised by filtering, choosing, and thus by excluding and doing violence."[1046] Derrida emphasises that "injustice, a certain injustice, and even a certain perjury, begins right away, from the very threshold of the right to hospitality."[1047]

Derrida, on the other hand, introduces the notion of unconditional hospitality. It is an ethical understanding of hospitality whose fundamental problem is the lack of a very clear answer to the question of what hospitality is, given that hospitality is yet to come.

"For Derrida, the logic of the concept of hospitality is governed by an absolute antinomy or aporia. On the one hand, there is the law of unlimited hospitality that ordains the unconditional reception of the

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[1041] Ibid.
[1042] Gerasimos Kakoliris, 'Jacques Derrida on the Ethics of Hospitality' in Elvis Imafidon (ed), *The Ethics of Subjectivity. Perspectives since the Dawn of Modernity* (Palgrave Macmillan 2015), 148
[1043] Ibid., 145
[1044] Simon Critchley and Richard Kearney, 'Preface' in Jacques Derrida, *On Cosmopolitanism and Forgiveness* (Mark Dooley and Michael Hughes tr, Routledge 2001), x
[1045] Lana Pavic, 'The Principle of Hospitality and the Problem of European Cosmopolitanism' (PhD thesis, University of Zagreb 2019)
[1046] Jacques Derrida, *Of Hospitality* (Anne Dufourmantelle invites Jacques Derrida to respond) (Stanford University Press 2000), 77
[1047] Ibid.

stranger. On the other hand, there are the conditional laws of hospitality, which relate to the unconditional law through the imposition of terms and conditions (political, juridical, moral) upon it. For Derrida, the responsible action and decision consists of the need to continuously negotiate between these two heterogeneous requirements."[1048]

Both unconditional forgiveness and unconditional hospitality are central to Derrida's political philosophy. Both themes are linked to his future vision of democracy. In his *The Politics of Friendship*[1049], *Spectres of Marx*[1050], and *Rogues: Two Essays on Reason*[1051], Derrida develops the idea of democracy to come. This idea refers to a political and ethical endeavour aimed at breaking down binary hierarchies and rethinking traditional democracy's exclusivist nature. "'To come' in Derrida's formulation, then, points to a transformative and disruptive potential at the heart of democracy, it points to a promise of change in the here and now."[1052]

Citizens who perceive foreigners a priori as enemies tend to hand over too much power to the state in order to protect themselves from foreigners, thus unknowingly depriving themselves of their freedom.[1053] It follows that the freedom and right of a foreigner are a precondition for the freedom and rights of a citizen, and therefore the debate on cosmopolitanism and hospitality is the key to the contemporary debate on human rights.[1054] By subjecting the principle of hospitality and the idea of cosmopolitanism to deconstructive reading, Derrida thus showed that only radical hermeneutics can relaunch a strong contemporary debate on the old notions of hospitality and cosmopolitanism.[1055]

3.3. Ideas of world citizenship

Citizenship contradicts and is directly opposed to the idea of universal human rights.[1056] According to Dimitry Kochenov, "citizenship has emerged as a blood-based global tool for the distribution of inequalities and exclusion."[1057] The distribution of citizenship rights globally is neither logical nor

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[1048] Gerasimos Kakoliris, 'Jacques Derrida on the Ethics of Hospitality' in Elvis Imafidon (ed), *The Ethics of Subjectivity. Perspectives since the Dawn of Modernity* (Palgrave Macmillan 2015), 145

[1049] Jacques Derrida, *The Politics of Friendship* (Verso 2005)

[1050] Jacques Derrida, *Specters of Marx: The State of the Debt, the Work of Mourning, and the New International* (Routledge 1994)

[1051] Jacques Derrida, *Rogues: Two Essays on Reason* (Stanford University Press 2005)

[1052] Daniel Matthews, 'The Democracy To Come: Notes on the Thought of Jacques Derrida' (*Critical Legal Thinking*, 16 April 2013)<https://criticallegalthinking.com/2013/04/16/the-democracy-to-come-notes-on-the-thought-of-jacques-derrida/> accessed 9 October 2021

[1053] Lana Pavic, 'The Principle of Hospitality and the Problem of European Cosmopolitanism' (PhD thesis, University of Zagreb 2019)

[1054] Ibid.

[1055] Jacques Derrida, *On Cosmopolitanism and Forgiveness* (Mark Dooley and Michael Hughes tr, Routledge 2001)

[1056] Dimitry Kochenov, 'Abstract Citizenship in the Age of Concrete Human Rights' (SSRN, 23 January 2023)<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4335201>accessed 25 January 2023

[1057] Ibid.

apparent, and "different citizenships are not equal."[1058] Kochenov emphasises that citizenship is currently at a crossroads because the widely accepted myth that global equality of all people can be ensured within states is losing ground.[1059]

> "In a world where inequalities are spatialized and borders signify exclusion from opportunity and – as long as these are policed by citizenship – blood-based segregation between the haves and have nots, citizenship emerges as the core tool of exclusion of the racialized 'other', not belonging to the global aristocracy of the former colonizers, the 'super citizens.'"[1060]

Martha Nussbaum argues that the concept of world citizenship transcends the exclusivist nature of the modern idea of citizenship. Nussbaum points to a long tradition of the cosmopolitan thought in Western political philosophy –a possibility of politics that focuses on humanity that we all share rather than the marks of local origin, status, race, class, nation or gender that divide us.[1061] Nussbaum argues that the cosmopolitan ideal and the idea of a person with a sense of belonging to a global human society are more appropriate to our situation in the contemporary world.[1062]

According to Nussbaum, children should be taught to perceive themselves as world citizens "whose allegiance is to the worldwide community of human beings."[1063] However, relying on the Stoics, Nussbaum argues that one does not have "to give up local identifications" to become a global citizen.[1064]Nussbaum describes the connection between world citizenship and national citizenship as relying on the metaphor of concentric circles:

> "The first [circle] is drawn around the self; the next takes in one's immediate family; then follows the extended family; then, in order, one's neighbors or local group, one's fellow city-dwellers, one's fellow countrymen (…) Beyond all these circles is the largest one, that of humanity as a whole. Our task as citizens of the world, and as educators who prepare people to be citizens of the world, will be to 'draw the circles somehow toward the center', making all human beings more like our fellow city dwellers, and so on. In other words, we need not give up our special affections and identifications, whether national or ethnic or religious but we should work to make all human beings part of our community of dialogue and concern."[1065]

In order to establish the idea of world citizenship, Martha Nussbaum underlines the importance of education. Students need to be "taught that they are, above all, citizens of a world of human

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[1058] Ibid.
[1059] Ibid.
[1060] Ibid.
[1061]Martha C. Nussbaum, 'Cosmopolitanism and Global Citizenship' (Youtube, 10 January 2020) <https://www.youtube.com/watch?v=pcGQXM8MYAE/> accessed 5 March 2021
[1062] Martha C. Nussbaum, 'Patriotism and Cosmopolitanism' in Martha Nussbaum, *For Love of Country: Debating the Limits of Patriotism* (Joshua Cohen ed, Beacon Press 1996), 4
[1063] Ibid.
[1064] Ibid., 9
[1065]Martha C. Nussbaum, *Cultivating Humanity: A Classical Defense of Reform in Liberal Education* (Harvard University Press 1997), 60-1

beings"[1066], and that they share this world with residents of other countries.[1067] The concept of world citizenship aims to overcome the shortcomings of the modern idea of citizenship, which originates from the philosophy of the Enlightenment. According to Kochenov, "the proclamation of equal rights at the inception of citizenship was precisely the ideological tool that facilitated the *de facto* socioeconomic exclusion and legitimation of the authority in charge of the preservation of the *status quo*, solidifying inequalities and paralysing social change as T.H. Marshall explained."[1068]

Nussbaum aims to develop the concept of cosmopolitan education and offers four arguments for making world citizenship the main focus of cosmopolitan education.

1. Through cosmopolitan education, nations learn more about themselves by learning about the rest of the world. Nussbaum states: "Our nation is appallingly ignorant of most of the rest of the world. I think this means that it is also, in many crucial ways, ignorant of itself."[1069]

2. Cosmopolitan education enables the solution of problems that require international cooperation.[1070] We need to understand not only the geography and ecology of other countries, but also a great deal about their cultures in order to conduct a global dialogue and be able to respect their traditions and convictions.[1071] The background required for this kind of dialogue would be provided by a cosmopolitan education.[1072]

3. Cosmopolitan education enables the recognition of "moral obligations to the rest of the world."[1073] If we genuinely believe that all people are created equal and have certain unalienable rights, then we have a moral responsibility to consider what that conception calls for us to do for the rest of the world.[1074] According to Kochenov, "distributed like prizes in a lottery where four-fifths of the world's population loses, citizenship is clothed in the language of self-determination and freedom, elevating hypocrisy as one of the status's core features. (...) Citizenship, for most of the world's population, is thus an empty rhetorical shell deployed to perpetuate abuse, dispossession, and exclusion."[1075]Nussbaum argues that the cosmopolitan education that leads to world citizenship transforms the modernist conception of citizenship.

[1066] Martha C. Nussbaum, 'Patriotism and Cosmopolitanism' in Martha Nussbaum, *For Love of Country: Debating the Limits of Patriotism* (Joshua Cohen ed, Beacon Press 1996), 9
[1067] Ibid.
[1068] Dimitry Kochenov, 'Abstract Citizenship in the Age of Concrete Human Rights' (SSRN, 23 January 2023)<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4335201>accessed 25 January 2023
[1069] Martha C. Nussbaum, 'Patriotism and Cosmopolitanism' in Martha Nussbaum, *For Love of Country: Debating the Limits of Patriotism* (Joshua Cohen ed, Beacon Press 1996), 9
[1070] Ibid., 12
[1071] Ibid.
[1072] Ibid.
[1073] Ibid.
[1074] Ibid., 13
[1075] Dimitry Kochenov, 'Abstract Citizenship in the Age of Concrete Human Rights' (SSRN, 23 January 2023)<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4335201>accessed 25 January 2023

4. Cosmopolitan education enables making "a consistent and coherent argument based on distinctions we are prepared to defend."[1076] Nussbaum points to the significance of this type of argument on the example of the United States. Nussbaum argues: "We say that respect should be accorded to humanity as such, but we really mean that Americans as such are worthy of special respect. And that... is a story that Americans have told for far too long."[1077] Cosmopolitan education enables the transformation and overcoming of such narratives.

However, Nussbaum's point of view that children should be taught to perceive themselves as world citizens "whose allegiance is to the worldwide community of human beings"[1078] creates a binary opposition national/cosmopolitan. According to Nussbaum, the "emphasis on patriotic pride is both morally dangerous and, ultimately, subversive of some of the worthy goals patriotism sets out to survive –for example, the goal of national unity in devotion to worthy moral ideals of justice and equality."[1079]

According to Bok, teaching "children that claims to national and other identities are 'morally irrelevant'" is problematic, because "educational programs that declare either a global or a more bounded perspective to be the only correct one are troubling insofar as they short-circuit reflection concerning such choices."[1080] To prevent having to choose between patriotism and cosmopolitanism, questions like education, ethical aspiration, and political commitment need to be reframed.[1081] Instead of focusing on the exclusive correctness of either pole, such a recasting anticipates ongoing political dialogue and an "ethos of inclusiveness."[1082] Another solution is to promote cosmopolitan democracy and ethical transnationalism by separating democratic practice from the state.[1083]

However, Nussbaum draws her conception of cosmopolitan education from the philosophical tradition. In recent years, debates about world citizenship and universal human values have found their way into different philosophies and educational theories. Divergent approaches and educational strategies are developed by David T. Hansen[1084], James Donald[1085], Jeremy

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[1076] Martha C. Nussbaum, 'Patriotism and Cosmopolitanism' in Martha Nussbaum, *For Love of Country: Debating the Limits of Patriotism* (Joshua Cohen ed, Beacon Press 1996), 14
[1077] Ibid., 15
[1078] Ibid., 4
[1079] Ibid., 4
[1080] Sissela Bok, 'From part to Whole' in Martha Nussbaum, *For Love of Country: Debating the Limits of Patriotism* (Joshua Cohen ed, Beacon Press 1996), 42
[1081] Richard Falk, 'Revisioning Cosmopolitanism' in Martha Nussbaum, *For Love of Country: Debating the Limits of Patriotism* (Joshua Cohen ed, Beacon Press 1996), 58
[1082] Ibid.
[1083] Ibid., 58-9
[1084] David T. Hansen, 'Curriculum and the Idea of Cosmopolitan Inheritance' (2008) 40(3) Journal of Curriculum Studies, 289-312
[1085] James Donald, 'Internationalisation, Diversity and the Humanities Curriculum: Cosmopolitanism and Multiculturalism Revisited' (2007) 41(3) Journal of Philosophy of Education, 289-308

Waldron[1086], Troy Jollimore and Sharon Barrios[1087]. These debates stem from a philosophical "tradition that had diverse origins in classical Greek political theory, in Rousseau's educational theory, and in the cultural legacy of the German *Bildungsroman*. This tradition says that the education of the citizen in the virtues is essential if that individual is to achieve personal autonomy."[1088]

In his political writings as well as in his literary works, Jean-Jacques Rousseau criticises the rise of cosmopolitan values in early modern Europe.[1089]

"Rousseau's political writings also show his preference for small, isolated, and self-sufficient states whose economies center on agriculture, not trade. He repeatedly upheld ancient Rome and Sparta as models, warning his fellow Genevans to abandon their emerging commercial ethos and return to their traditional values (…) To Rousseau, trade with foreigners was not a civilizing or democratizing force; rather, it was a poisonous source of inequality and corruption."[1090]

Unlike other eighteenth-century philosophers, who emphasised the importance of the universal values of humanity, Rousseau argues: "Today, whatever one may say, there are no longer any Frenchmen, Germans, Spaniards, or even Englishmen…there are only Europeans. They all have the same tastes, the same passions, and the same customs."[1091]

Nevertheless, Rousseau's political thought is inconsistent. In some of his works, he wrote about cosmopolitanism.

"In the Discourse on the Origin of Inequality, he praised the 'great Cosmopolitan Souls' who resisted particularist or nationalist sentiments and 'embraced all of mankind in their benevolence'. In the Discourse on the Sciences and the Arts, he similarly celebrated those philosophers, such as Bacon, Descartes, and Newton, who distinguished themselves by being 'tutors of mankind'. In his own writings, Rousseau claimed to adopt 'a language that suits all Nations', and to promote the 'felicity of mankind'. By these contradictory statements, what he seems to be saying is not that all cosmopolitanism is bad, but that true cosmopolitanism is rare."[1092]

[1086] Jeremy Waldron, 'Teaching Cosmopolitan Right' in Kevin McDonough and Walter Feinberg (eds), *Education and Citizenship in Liberal-democratic Societies. Teaching for Cosmopolitan Values and Collective Identities*(Oxford University Press 2003)

[1087] Troy Jollimore and Sharon Barrios, 'Creating Cosmopolitans: The Case for Literature' (2006) 25 Studies in Philosophy and Education, 363-83

[1088] Bryan S. Turner, 'Cosmopolitan Virtue, Globalization and Patriotism' (2002) 19(1-2) Theory, Culture and Society, 45-63

[1089] Helena Rosenblatt, 'Rousseau, the Anticosmopolitan?' (2008) 137(3) Daedalus, 60

[1090] Ibid., 61

[1091] Jean-Jacques Rousseau, 'Considerations on the Government of Poland' in Victor Gourevitch (ed), *Rousseau: The Social Contract and Other Later Political Writings* (Cambridge University Press 2019), 187-8

[1092] Helena Rosenblatt, 'Rousseau, the Anticosmopolitan?' (2008) 137(3) Daedalus, 63-4

Rosenblatt concludes that, although Rousseau is often seen as an anti-cosmopolitan who supports nationalism, Rousseau's novel "*Emile* can (…) be read as a book about the formation of a true cosmopolitan."[1093]

 "Rousseau began by dismissing the notion that Emile should be raised as a patriotic citizen. He declared that 'there is no longer a fatherland', and thus the word 'citizen' should be 'erased from modern languages'. Hence the young boy is not taught national character or patriotism. He is raised to be a 'man' rather than a 'citizen'. Kept away from cities and society while he is young and impressionable, he is prevented from acquiring corrupt tastes such as the desire to please or to dominate others. Instead, he is given an education in conformity with nature, designed precisely to foster his sentiments of humanity. He is then taught to 'generalize' and 'extend' his compassion to 'the whole of mankind'. All of this prepares him for adulthood, when he will be well equipped to enter into healthy social relations with others. As a finishing touch to Emile' s education, he is advised to take long trips abroad, which will allow him to get to know other peoples. A free spirit, unencumbered by national prejudice, the adult Emile spends almost two years choosing where to live, only to conclude that 'I shall loosen all the bonds which attach me to [wealth] .... Rich or poor, I shall be free. I shall not be free in this or that country, in this or that region. I shall be free everywhere on earth'. Elsewhere, Emile remarks: 'What does it matter where I am? Wherever there are men I am among my brothers'."[1094]

Hegel was not a philosopher who advocated cosmopolitanism. However, in his *Elements of the Philosophy of Right* some remarks on cosmopolitan values and educational strategy for the development of world citizenship can be found:

 "It is part of education (*Bildung*), of thinking as consciousness of the individual in the form of universality, that I am apprehended as a universal person, in which all are identical. A human being counts as such because he is a human being, not because he is a Jew, Catholic, Protestant, German, Italian, etc. This consciousness, which is the aim of thought, is of infinite importance, and it is inadequate only if it adopts a fixed position – for example, as cosmopolitanism – in opposition to the concrete life of the state."[1095]

Hegel didn't advocate "the possibility of a global political federation of states."[1096] But in this short passage, he emphasises the key element for achieving the universal human values on which the idea of global citizenship is based, and that is education.

The same viewpoint is present in contemporary philosophy. For instance, Martha C. Nussbaum identifies three capacities that are essential for cultivating humanity: 1. "the capacity for critical examination of oneself and one's own traditions"[1097]; 2. the idea of world citizenship and 3.

[1093] Ibid., 65
[1094] Ibid., 65-6
[1095] Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right* (Cambridge University Press 1991), 240
[1096] Rebecka Lettewall, 'The Idea of Kosmopolis*:* Two Kinds of Cosmopolitanism' in Rebecka Lettewall and My Klockar Linder (eds), *The Idea of Kosmopolis: History, Philosophy and Politics of World Citizenship* (Södertörn Academic Studies 2008), 46
[1097]Martha C. Nussbaum, *Cultivating Humanity: A Classical Defense of Reform in Liberal Education* (Harvard University Press 1997), 42

narrative imagination and empathy – which means the ability to understand otherness and "to think what it might be like to be in the shoes of someone different from oneself."[1098] According to Nussbaum, a dramatic shift from national citizens to citizens of the world may occur if an education strategy is developed. This strategy should "promote understanding other cultures and acceptance of a moral obligation to 'the rest of the world'."[1099] Nussbaum's concept of world citizenship is based on the following idea: "Citizens who cultivate their humanity need a further ability to see themselves as citizens of some local, regional group – but also, and above all, as human beings, bound to other human beings by ties of recognition and concern."[1100]

Martha Nussbaum develops the idea of world citizenship, which is founded on the concept of humanity.[1101] According to Nussbaum, the common traits of humanity are: rationality, human dignity and universal morality expressed by Kant's idea[1102] of "the kingdom of ends."[1103] Relying on the Stoics, Nussbaum argues: "We should give our first allegiance to no mere form of government, no temporal power, but to the moral community made up by the humanity of all human beings."[1104]

Given that it embraces every human being, Nussbaum contends that the cosmopolitan ideal founded on the concept of the person might reconstruct the concept of citizenship. As shown in Article 6 of the UDHR, the "citizen" is replaced by "person" in the international human rights discourse.[1105] The term "person" is gradually replacing the "citizen" in the global constitutional terminology and theorising.[1106] According to this reasoning, belonging to a society is what "deserves" the place of an individual in a nation, and not the place of birth and nationality.[1107] Kochenov argues that although these two logics are in blatant opposition to one another, they both do little to aid the victims of citizenship.[1108] Their division differentiates thinking that begins with legal facts from reasoning that begins with social facts.[1109] Kochenov emphasises that:

[1098]Ibid., 44

[1099] Bryan S. Turner, 'Cosmopolitan Virtue, Globalization and Patriotism' (2002) 19(1-2) Theory, Culture and Society, 55-6

[1100] Ibid., 43

[1101] Martha C. Nussbaum, *Cultivating Humanity: A Classical Defense of Reform in Liberal Education* (Harvard University Press 1997); Martha C. Nussbaum, 'Patriotism and Cosmopolitanism' (1994) 19(5) Boston Review, 3-34

[1102] Kant argues that "a systematic union of rational beings through common objective laws (…) can be called a kingdom of ends." (Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Mary Gregor ed, Cambridge University Press 1997), 41)

[1103] Martha C. Nussbaum, *Cultivating Humanity: A Classical Defense of Reform in Liberal Education* (Harvard University Press 1997), 42

[1104] Martha C. Nussbaum, 'Patriotism and Cosmopolitanism' in Martha Nussbaum, *For Love of Country: Debating the Limits of Patriotism* (Joshua Cohen ed, Beacon Press 1996), 7

[1105]Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A(III) (UDHR)

[1106] Dimitry Kochenov, 'Abstract Citizenship in the Age of Concrete Human Rights' (SSRN, 23 January 2023)<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4335201>accessed 25 January 2023

[1107] Ibid.

[1108] Ibid.

[1109] Ibid.

"Ultimately it appears that whether personhood or citizenship are taken as a starting point makes little difference, from the perspective of those victims of citizenship who are *outside* of the jurisdiction in question. Personhood thus potentially emerges as a counterpart of citizenship –traditionally the key legal tool for sanctioning the erection of a border dividing 'us' from 'them' based on entirely contingent considerations of political convenience, while also creating legally and socially meaningful racial, cultural and linguistic groups – what Bourdieu characterised as the 'practical activity of 'worldmaking'."[1110]

Nussbaum does not clearly define the values on which the world community should be based.[1111]"Cosmopolitanism, Nussbaum assures us, does not involve the creation of a 'world state'. But ... she speaks of 'the world citizen' and 'world citizenship', terms that have little meaning except in the context of a state... If nationality as she says, is 'morally irrelevant' for the cosmopolitan ideal, so is the polity that defines the nation, and so is the idea of citizenship."[1112] Nussbaum speaks of the "world community of justice and reason"[1113], the "substantive universal values of justice and right"[1114], the "common aims, aspiration, and values"[1115] of all human beings, but she does not sufficiently define these ideas and they remain abstract. Therefore, the idea of "values of humanity as a whole" is basically utopian and non-existent in reality and cosmopolitan values are not accepted by many non-Western societies, cultures and traditions.[1116]

3.4. A postnational model of citizenship

Contemporary societies reflect the characteristics of both modernism (fixed identity, borders, nations) and postmodernism (multiculturalism; supranational political communities, such as the European Union; transnational institutions, and so forth). Although we live in a postmodern world, borders (geographic, symbolic, historical, sociological and political) have not yet disappeared. "The drawing and redrawing of maps brought about the historical processes of nationalism, imperialism and decolonisation made evident that borders are not natural phenomena but man-made demarcations which are integral to the exercise of power in physical and mental forms."[1117]

[1110] Ibid.

[1111] Amy Gutmann, 'Democratic Citizenship' in Martha Nussbaum, *For Love of Country: Debating the Limits of Patriotism* (Joshua Cohen ed, Beacon Press 1996), 70

[1112] Gertrude Himmelfarb, 'The Illusions of Cosmopolitanism' in Martha Nussbaum, *For Love of Country: Debating the Limits of Patriotism* (Joshua Cohen ed, Beacon Press 1996), 74

[1113] Ibid.

[1114] Ibid.

[1115] Ibid.

[1116] Ibid., 76

[1117] Neyha Tyagi, 'Exploring Borders and borderlands: Fact and Fiction' (H-Net, 22 September 2015) <https://networks.h-net.org/node/73374/announcements/84440/first-interdisciplinary-research-scholars-conference> accessed 2 June 2022

Balibar[1118], Isin[1119] and Walker[1120] argue that citizenship should be seen beyond the metaphysics of presence (borders, territory, sovereign essence and status) and offer a conception of citizenship as a process (difference, rupture). The metaphysics of presence implies the possibility for a citizenship that corresponds to a specific territory. On the other hand, "a framework based on a metaphysics of process[1121] would allow us to think about citizenship as trace."[1122] Citizenship as trace is based on the idea of fragmented self which overcomes the idea of a modernist, coherent sovereign subject, included or excluded from the state.[1123]Postnational citizenship is based on the idea of multiple memberships that includes complex systems of duties and rights, as well as a multilayered notion of identity that includes global, regional, national and local aspects.

Soysal argues that new postnational forms of identity and belonging are reflected in the example of Turkish immigrants in Berlin or Surinamese in Amsterdam, and Pakistanis in London and so on.[1124] Soysal argues that at the end of the Second World War there was a rethinking of the national model of citizenship towards a postnational model of citizenship.[1125] The key changes that caused this shift towards a model of postnational citizenship originate from the progress in the field of international law and from cosmopolitan ideas according to which human rights are no longer derived so much from citizenship and citizen status as from more universal frameworks and the fact that we all belong to a transnational community that govern international legal norms and conventions.[1126]Soysal aims to draw attention to the process that began in the second half of the twentieth century and concerns the dialectic between universal human rights and national sovereignty.[1127] This process led to the gradual separation of the dimensions of rights and identity, conceptually united in citizenship.[1128] This is not to ignore the fact that even the domain of universal human rights is operationalised and protected within the framework of state legal mechanisms.

Soysal argues:

[1118] Étienne Balibar, 'The "Impossible" Community of the Citizens: Past and Present Problems' (2012) 30(3) Environment and Planning D: Society and Space, 437-49

[1119] Engin F. Isin, *Being Political: Genealogies of Citizenship* (University of Minnesota Press 2002)

[1120] R.B.J. (Rob) Walker, 'Citizenship after the Modern Subject' in Kimberley Hutchings and Ronald Dannreuther (eds), *Cosmopolitan Citizenship* (Macmillan 1999)

[1121] " A framework based on the metaphysics of process would allow us to consider how becoming citizen might be based upon disruptions and discontinuities, figuring in indeterminate times and spaces, and not simply conceptualised as extended in time across the absolute space of modern subjectivity." (Aoileann Ní Mhurchú, *Ambiguous Citizenship in an Age of Global Migration* (Edinburgh University Press 2014), 3)

[1122]Aoileann Ní Mhurchú, *Ambiguous Citizenship in an Age of Global Migration* (Edinburgh University Press 2014), 4

[1123] Ibid., 13

[1124] Yasemin N. Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago Press 1994)

[1125] Ibid.

[1126] Ibid.

[1127] Yasemin N. Soysal, 'Institutional Underpinnings, Global Reach, and the Future of Ordinal Citizenship' (2021) 72(2) The British Journal of Sociology, 174-80

[1128] Ibid.

"My intention is to highlight the emergence of membership that is multiple in the sense of spanning local, regional, and global identities, and which accommodates intersecting complexes of rights, duties, and loyalties. Turkish migrants in Berlin represent an example of this emerging form of membership (so, for that matter, do Moroccans in Paris, Pakistanis in London, and Surinamese in Amsterdam). As foreign residents of Berlin, Turkish migrants share a social space with foreigners from other countries and with German citizens. They pay taxes, own businesses and homes, work in factories and in the service sector, receive welfare, rent government-subsidized apartments, and attend schools. They form political associations, join unions and political parties, organize protests, formulate platforms and advance claims. Either selectively or concurrently, they invoke, negotiate, and map collective identities as immigrant, Turk, Muslim, foreigner, and European."[1129]

Soysal emphasises that the postnational model of citizenship is founded on the idea of separating citizenship and national identity.[1130]

"These forms are exemplified in the membership of the long-term non-citizen immigrants, who hold various rights and privileges without a formal nationality status; in the increasing instances of dual citizenship, which breaches the traditional notions of political membership and loyalty in a single state; in the European Union citizenship, which represents a multi-tiered form of membership; and in subnational citizenships in culturally or administratively autonomous regions of Europe (for example, Basque country, Catalonia and Scotland)."[1131]

According to Soysal, the main organisational principle of modern states is no longer derived from the logic of national citizenship, but from the logic of personhood.[1132] Within this supranational discourse, the personhood goes beyond the range of rights guaranteed by the notion of citizenship defined by nationality. The concept of the personhood includes the rights of those individuals who are not members of national states and enables them to actively participate in the national community, and accordingly, enables the development of a broader, supranational constellation of membership. This change was initiated by the dialectical tension between national citizenship and universal human rights. Individual rights and duties that were historically determined through belonging to a certain nation state have been universalised over time, transcending the borders of nation states.

The first comprehensive list of individual rights in Europe was given as part of the *Declaration of the Rights of Man and of the Citizen*[1133], where human rights were considered inseparable from citizenship and national sovereignty. Today, however, individual rights are redefined as human rights, which have a universal basis and are therefore at the transnational level. In this way, the

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[1129] Yasemin N. Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago Press 1994), 166

[1130] Yasemin N. Soysal, 'Citizenship and Identity: Living in Diasporas in Post-war Europe?' (2000) 23(1) Ethnic and Racial Studies, 6

[1131] Ibid.

[1132] Yasemin N. Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago Press 1994), 3

[1133] National Assembly of France, 'Declaration of the Rights of Man and of the Citizen, 26 August 1789' (*RefWorld*, 2021) <https://www.refworld.org/docid/3ae6b52410.html> accessed 5 January 2021

importance of national citizenship is diminished and the perception of nations only through territorial determination is overcome.[1134] The same set of human rights that were guaranteed by the constitution of national states in the previous few centuries as a set of rights and duties guaranteed by the status of citizenship gained a new meaning in the second half of the twentieth century as a set of international norms and components of postnational discourse.[1135]

Soysal argues that the configuration of the modern concept of citizenship contributed to the transformation of the organisations of the international system of states, the consequences of which are increased mutual dependence and connection, intensified interaction and organisation, and the emergence of transnational political structures, which called into question the sovereignty and jurisdiction of national states.[1136] In the post-World War II era, many aspects of the public domain, previously exclusively under the authority of nation-states, have become a legitimate issue of international discourses and spheres of action.[1137] The case of immigrant workers clearly demonstrates this change. The national state no longer has complete control over the immigrant population, but supranational communities and international organisations, such as the European Union and the United Nations, prevent these states from discriminating against immigrants and oblige them to protect them.[1138] According to Soysal, this is certainly a different conception of the international system than the one in the nineteenth century, which implied a world composed of nation-states with exclusive sovereignty over territory and population.[1139]

Soysal argues:

"I emphasize the broader trends in the post-World War II period that indicate a significant shift in the very foundations of good citizenship and social justice. The new social project transpires a citizenship model that privileges individuality and its transformative capacity as a collective good. Thus, while expanding the boundaries and forms of participation in society, this project at the same time burdens the individual, rather than the state, with the obligation of ensuring social cohesion and solidarity."[1140]

Soysal claims that another significant phase of development that contributed to the configuration of the postnational conception of citizenship is the development of universal human rights.[1141] She emphasises that various international declarations, conventions and charters attribute universal rights to every individual, regardless of status in the nation-state.[1142] In other words, they oblige

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[1134] Yasemin N. Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago Press 1994)
[1135] Ibid., 3
[1136] Yasemin N. Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago Press 1994)
[1137] Ibid.
[1138] Ibid.
[1139] Ibid.
[1140] Yasemin N. Soysal, 'Citizenship, Immigration, and the European Social Project: Rights and Obligations of Individuality' (2012) 63(1) The British Journal of Sociology, 1
[1141] Yasemin N. Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago Press 1994)
[1142]Ibid.

nation states not to make decisions based on nationality when granting certain civil, social and political rights.[1143]*The Universal Declaration of Human Rights* asserts that "all human beings are born free and equal in dignity and rights"[1144], regardless of their race, gender, class, color, national or social origin, religion, political or other opinion, sex, birth and property.[1145]*The European Convention on Human Rights* prescribes almost identical provisions, including protection against collective expulsion of aliens (Protocol No. 4).[1146] Both the principles and values of the *Universal Declaration of Human Rights* and the *European Convention on Human Rights* have been incorporated into the constitutions and laws of many countries.

However, Soysal argues that:

> "While rights acquire a more universalistic form and are divorced from national belonging, (thus giving rise to more inclusionary forms of membership), at the same time, identities become intentionally particularistic and exclusionary practices (on the basis of identity) prevail. And this we observe in the increasingly restrictive immigration policies of European countries, the vocalization of ethnic minority and religious groups for cultural closure, and the discriminatory citizenship practices. So more inclusionary forms of rights clash with more exclusionary practices of identity."[1147]

According to Soysal, paradoxically, identities continue to be particularistic, and they are still locally defined and organised, even as the origin and legitimacy of rights move to the transnational level.[1148] The same international laws and institutional structures that uphold human rights and personhood also normalise group identities based on national and ethnoreligious particularism.[1149] According to Soysal, this is largely due to the efforts of international organisations like UNESCO, the United Nations, the Council of Europe, and the like, through which the universal right to "one's own culture" has grown in legitimacy and been redefined as a category of human rights.[1150]Culture, language, and traditional ethnic traits –which were once thought to represent the particularistic characteristics of collectivities – have evolved into different manifestations of the essence of humanity or selfhood that is universal.[1151] Soysal states that:

> "The seeming naturalness and inevitability of diaspora formations (and theorizing immigrant communities as diasporas) are part and parcel of this global and hegemonic discourse of identity. Once institutionalised as natural, the discourse about identities creates ever increasing claims about cultural distinctiveness and group rights. Ethnic/national identities are enacted and improvised for mobilizing

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[1143] Ibid.

[1144]Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A(III) (UDHR) Art. 1 and 2

[1145] Ibid., Art. 2

[1146]European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14 (4 November 1950) ETS 5

[1147] Yasemin N. Soysal, 'Citizenship and Identity: Living in Diasporas in Post-war Europe?' (2000) 23(1) Ethnic and Racial Studies, 6-7

[1148] Ibid., 6

[1149] Ibid.

[1150] Ibid.

[1151] Ibid.

and making claims in national and world polities, authenticating diaspora as an idiom for the politics of identity."[1152]

The significance of collective identity is a major topic of disagreement in the literature on postnational citizenship.[1153] While some believe that a postnational form of identity is desirable in the development of citizenship in supranational political communities such as the European Union[1154], others[1155] doubt the viability of a collective identity at this supranational level.[1156]According to Katherine Tonkiss, "post-national citizenship should be accompanied by a form of post-national identity."[1157] Tonkiss makes the case that a paradigmatic shift in how collective identity is formed in postnational contexts must go hand in hand with the emergence of postnational citizenship rights.[1158]

Although there is debate over the proper nature of this identity, many forms of postnationalism contain some form of postnational identity that accompanies citizenship rights.[1159] In order to promote unity beyond traditional national boundaries, some theorists[1160] contend that the development of a "thick" form of collective identity at the transnational level is crucial for the realisation of postnational citizenship in contexts like the European Union and other supranational communities and organisations. "However, others have critiqued this perspective for simply replicating the national model of identity, and rather have conceptualised post-national identity as a reflexive and critical relationship with national pasts."[1161] According to these scholars, this type of national identification coexists with a more expansive, postnational identity motivated by adherence to universal liberal democratic norms.[1162]

[1152] Ibid., 6-7.

[1153] Katherine E. Tonkiss, 'Post-National Citizenship without Post-National Identity? A Case Study of UK Immigration Policy and Intra-EU Migration' (2013) 9(1) Journal of Global Ethics, 35

[1154] Willem Maas, *Creating European Citizens* (Rowman and Littlefield 2007); James A. Caporaso, 'The Possibilities of a European Identity' (2005) 12(1) Brown Journal of World Affairs, 65-75

[1155] Justine Lacroix, 'Does Europe Need Common Values? Habermas vs Habermas' (2009) 8(2) European Journal of Political Theory, 141-56; Jan-Werner Müller, *Constitutional Patriotism* (Princeton University Press 2007); Kalypso Nicolaïdis, 'The New Constitution as European Demoi-Cracy?' (2004) 7(1) Critical Review of International Social and Political Philosophy, 76-93

[1156] Katherine E. Tonkiss, 'Post-National Citizenship without Post-National Identity? A Case Study of UK Immigration Policy and Intra-EU Migration' (2013) 9(1) Journal of Global Ethics, 35

[1157] Ibid.

[1158] Ibid., 35-48

[1159] Ibid., 36

[1160] See: Jürgen Habermas, *Between Naturalism and Religion* (Polity Press 2008); James A. Caporaso, 'The Possibilities of a European Identity' (2005) 12(1) Brown Journal of World Affairs, 65-75; Willem Maas, *Creating European Citizens* (Rowman and Littlefield 2007).

[1161] Katherine E. Tonkiss, 'Post-National Citizenship without Post-National Identity? A Case Study of UK Immigration Policy and Intra-EU Migration' (2013) 9(1) Journal of Global Ethics, 36

[1162] Jürgen Habermas, 'Citizenship and National Identity: Some Reflections on the Future of Europe' in Ronald Beiner (ed), *Theorising Citizenship* (State University of New York Press 1995); Jan-Werner Müller, *Constitutional Patriotism* (Princeton University Press 2007); Justine Lacroix, 'Does Europe Need Common Values? Habermas vs Habermas' (2009) 8(2) European Journal of Political Theory, 141-56

Yasemin Soysal argues that the concept of postnational citizenship is based on the idea of personhood:

> "Postnational citizenship confers upon every person the right and duty of participation in the authority structures and public life of a polity, regardless of their historical or cultural ties to that community. A Turkish guestworker need not have a 'primordial' attachment to Berlin (or to Germany, for that matter) to participate in Berlin's public institutions and make claims on its authority structures."[1163]

Soysal claims that the universality of personhood as the basis of political membership is clearest in the case of political refugees, whose status in new societies rests on the principles of universal human rights.[1164] Refugees can be defined as persons who have crossed an international border to find safety in another country, and are protected and granted their rights as human beings, not as citizens. Thus, the most universal aspects of citizenship are those built on personhood.[1165]

However, a postnational conception of citizenship based on the personhood does not solve the problem of exclusion and essentialism. Soysal overlooks that the concept of the person within international documents that guarantee human rights, such as the *Universal Declaration of Human Rights* and the *European Convention on Human Rights*, is of a universalist and essentialist character. Article 1 of the *Universal Declaration of Human Rights* states: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[1166] In this way, human nature is universalised and identified with the same postulates of reason, independent of cultural, social, gender and other differences. The human rights discourse assumes the concept of the subject predominant in the era of Enlightenment as a unified, stable, conscious, fixed, rational, autonomous category. This determination of the subject contradicts the basic principles of the postnational conception of citizenship, which primarily emphasises the diversity, complexity and multiplicity of identity.

Poststructuralist authors made the greatest contribution to questioning the state-oriented conception of citizenship based on a fixed, spatial notion of political subjectivity. They offer an alternative conception of citizenship based on a new perception of humanity. Thus, they offer a new perspective of thinking about political subjectivity, which includes otherness and diversity and transcends modernist boundaries. Julia Kristeva provides an alternative basis for the study of citizenship by conceptualising a different way of thinking about the human being.[1167] "This is an understanding of being human which is no longer based on a metaphysics of presence vis-à-vis the state – as inside or outside, included or excluded – but is instead based on an ontology of plurality and hybridity."[1168]Kristeva and other poststructuralist authors offer new conceptions of

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[1163] Yasemin N. Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago Press 1994), 3
[1164] Ibid.
[1165] Ibid.
[1166]Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A(III) Article 1
[1167] Julia Kristeva, 'Cultural Strangeness and the Subject in Crisis' in Ros M. Guberman (ed), *Julia Kristeva Interviews* (Columbia University Press 1996)
[1168] Ibid.

political subjectivity beyond modern, sovereign-bounded conceptions. They offer more universal concepts of identity and political community.

Soysal, basing its conception of postnational citizenship on the idea of the personhood defined by various human rights instruments, overlooks that these human rights instruments categorise and essentialise the notion of person. Soysal, as one of the most important authors who deal with issues of postnational forms of citizenship, inspires a whole tradition of theoreticians who, in a similar way, base postnational citizenship on the essentialist politics of human rights.

Human rights policy is essentialist because it gives priority to one form of identity, highlighting certain characteristics such as "consciousness" or "rationality", perceiving them as separate from other forms of identity determined by culture and social circumstances. It mobilises identity around a fixed axis and puts pressure on individuals to identify with it as the source of their identity. The second form of essentialism produced by human rights politics is closely related to the first form – generalisations produced as part of identity politics also have a disciplinary function, and therefore not only describe, but also dictate self-understanding and self-determination.

Another problem faced by most definitions of postnational citizenship is that expanding the list of rights is not the same as creating postnational citizenship. Expanding the list of rights, which goes beyond national borders and national identity, is necessary but not sufficient for building a postnational concept of citizenship. This problem can also be identified within the legal definition of European Union citizenship, which, although it includes multiple identities, is reduced to the citizenship of an EU Member State.

Although postnational citizenship has made a shift from emphasising common nationality to emphasising common humanity, it has retained the modernist idea of identity, which defines both categories as fixed and monolithic. In this way, both categories "nationality" and "humanity" are exclusivist. "What this shift ignores is how appeals to humanity continue to reproduce the idea that people share something in common, such as is expressed in a nation conceptualised as a territorialised entity with (…) calculable boundaries demarcating inside from outside."[1169]Thus, the problem lies in the fact that the postnational idea of citizenship still relies on a modernist, fixed, exclusivist notion of subjectivity. "There is an ideal of subjectivity which continues to underpin this universal model: an ideal of subjectivity as autonomous and sovereign in the last instance."[1170]Postnational citizenship does not resolve "the statist framework of boundaries between inclusion and exclusion, inside and outside, 'us' and 'them'.*"[1171]

Therefore, postnational citizenship does not represent a substantial challenge to the modernist, exclusivist model. "The spatial characteristics of the state continue to dictate how the post-statist

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[1169]Aoileann Ní Mhurchú, *Ambiguous Citizenship in an Age of Global Migration* (Edinburgh University Press 2014), 40
[1170]Ibid., 4
[1171]Ibid., 5

and trans-statist realm is understood in such literature; it continues to be understood in terms of a new post-statist or trans-statist but still *bounded* community (that can be separated from other cultural and economic realms) and in terms of a bounded individual who engages in that community."[1172]

According to Ní Mhurchú, postnational and transnational concepts of citizenship retain "a modern sovereign statist bounded territorial understanding of Being (political possibility)."[1173]In this way, even the contemporary postnational, "inclusivist" model of citizenship "draws the 'outside' – the refugee, the second-generation migrant, the asylum seeker, the economic migrant – into the European political sphere, but in such a way that they are also simultaneously expelled, because they are considered less than full citizens by continuing to be defined as the Other in need of inclusion."[1174]

The inclusivist citizenship literature is still based on the distinction between a "'citizen' (as particular identity defined in terms of the state) and 'man' (as a universal identity defined in terms of humanity)."[1175] On the other hand,

> "the concept of humanity appears in the philosophical conceptual framework at the same time as the concept of man, in the age of Enlightenment and it is inseparable from the idea of historical progress. However, the Enlightenment conception of humanity is exclusive and it does not leave room for *every*man, but only to the limited group of people. Thus it is necessary to review the very idea of man left to us as the legacy of the Enlightenment."[1176]

Richard K. Ashley[1177], Judith Butler[1178] and David Campbell[1179]also emphasise the limitations of a state-oriented perspective. However, they do not sufficiently develop an alternative understanding of political subjectivity. The same can be said for feminist and human rights analyses that aimed to question citizenship, but still relied on the modernist notion of subjectivity. On the other hand, the postnational inclusivist model of citizenship, focusing on the domicile and modernist idea of political subjectivity, re-emphasised territory and political subjectivity defined in relation to the territorial state.[1180]

[1172]Ibid., 38

[1173]Ibid., 38-9

[1174]Ibid., 7

[1175]Ibid. 47

[1176] Sanja Ivic, *European Identity and Citizenship: Between Modernity and Postmodernity* (Palgrave Macmillan 2016), 28

[1177] Richard K. Ashley, 'Untying the Sovereign State: A Double Reading of the Anarchy Problematique' (1988) 17(2) Millennium: Journal of International Studies, 227-62

[1178] Judith Butler, 'Changing the Subject: Judith Butler's Politics of Radical Resignification' in Sara Salih and Judith Butler (eds), *The Judith Butler Reader* (Blackwell 2004)

[1179] David Campbell, *National Deconstruction: Violence, Identity, and Justice in Bosnia* (University of Minnesota Press 1998)

[1180]Aoileann Ní Mhurchú, *Ambiguous Citizenship in an Age of Global Migration* (Edinburgh University Press 2014), 86

Postnational citizenship studies still understand the concept of citizenship "in terms of the relations *between* individuals (or groups of individuals) and the sub-/supra-/super-state, and therefore in terms of sovereignty and autonomy (…) Different role are emphasized for the state in the post-national and in the trans-national models, but from both perspectives the state remains the ordering principle."[1181] For this reason, attempts to deterritorialise citizenship practices and identities have failed.[1182]

The postnational model of citizenship should abandon the idea of "sovereign autonomous subjectivity"[1183] and emphasise the importance of recognising subjectivity beyond modernist categories that include borders and fixed notions of identity defined by the ideals of modernity. It is necessary to revise the modernist idea of subjectivity that created our understanding of political subjectivity in terms of our relationship to the state. Political subjectivity is complex and hybrid and should not be defined spatially. Engin Isin, ÉtienneBalibar, and poststructuralist thinkers (Michel Foucault, Julia Kristeva, Judith Butler and so forth) problematise the coherence of categories: human/citizen, universal/particular, identity/difference and question the modernist idea of being as an autonomous, unified and coherent entity which can be perceived as included or included.

Poststructuralist thinkers abandoned the modernist notion of subjectivity and humanity and showed that humanity is not an abstract concept that is independent of the historical, social, political and geographical context. That is why the abstract concept of "humanity" used in human rights documents does not exist. Poststructuralist feminist scholars reject the idea of subjectivity (presented in legal and political texts) as a reflection of neutral universality.

3.5. The *jus nexi* principle as a new membership criterion?

The idea of universal human rights is paradoxical because it is based on a particular and exclusivist right to citizenship. Citizenship is not a universal right for all human beings. Article 6 of the UDHR states: "Everyone has the right to recognition everywhere as a person before the law."[1184] However, in order to enjoy universal human rights, an individual must first enjoy his/her right to citizenship[1185], Hannah Arendt's right to have rights. International human rights law protects non-citizens. "Nevertheless, in practice, noncitizens are often not in a position to assert their rights."[1186] For example, undocumented migrants are often criminalised.[1187] There are also many collective

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[1181]Ibid., 37
[1182] Michael Lister and Emily Pia, *Citizenship in Contemporary Europe* (Edinburgh University Press 2008), 58
[1183]Aoileann Ní Mhurchú*, Ambiguous Citizenship in an Age of Global Migration* (Edinburgh University Press 2014), 20
[1184]Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A(III) (UDHR)
[1185] Rhoda E. Howard-Hassmann, 'Introduction: The Human Right to Citizenship' in Rhoda E. Howard-Hassmann and Margaret Walton-Roberts (eds), *The Human Right to Citizenship: A Slippery Concept* (Penn Press 2015)
[1186] Ibid., 3
[1187] Ibid.

groups that suffer discrimination in terms of citizenship: "Palestinians in Israel are formally citizens but suffer from discriminatory legislation and practices especially regarding rights of residence in so-called Jewish areas (…) Even people who enjoy formal citizenship status do not all have the same capacities to…fulfill their rights."[1188]

Citizenship is an exclusivist and contingent category, which can be partial, soft, obscured, non-existent and so on.[1189] According to Ayelet Shachar,

> "in a world in which membership in different political communities translates into very different starting points in life, upholding this legal connection between birth, political membership, and life opportunities raises important questions of distributive justice. These questions are particularly pressing given that the vast majority of the world's population – 97 out of every 100 people – acquire political membership via circumstances beyond their control, that is, according to where and to whom they were born."[1190]

Shachar identifies significant ways by which citizenship creates inequalities. She highlights the injustice of the global inequities that citizenship creates by comparing property rights with citizen rights.[1191] As for Kochenov, for Shachar, birthright citizenship is intrinsically unjust because it is inherited without having to work for it, much like inherited property.[1192] Shachar develops "the analogy between birthright citizenship and inherited property in the context of a world of severe inequalities of wealth and opportunity."[1193] Why should the contingent, morally arbitrary fact of one's place of birth have so much impact on everything that follows?[1194] According to Shachar, such false wealth preservation is not in accordance with the modern liberal project itself.[1195] "It is surely true that countless struggles within liberalism have been organized around the market-derived concepts of 'choice' and 'merit,' and birthright citizenship directly violates and even contradicts the ideology."[1196]

Shachar argues that the concept of citizenship is flawed and emphasises the necessity to reconsider birthright citizenship in general, as well as its role in sustaining global injustice. She defines birthright citizenship as a "form of untaxed inherited property"[1197] and emphasises that "the acquisition of automatic (birthright) membership in the polity is the least defensible basis for distributing access to citizenship because it allocates rights and opportunities according to aspects of our situation that result from unchosen circumstances that are fully beyond our control."[1198]

[1188] Ibid., 4-5
[1189] Ibid., 2
[1190] Ayelet Shachar, 'The Worth of Citizenship in an Unequal World' (2007) 8(2) Theoretical Inquiries in Law, 368
[1191] Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press 2009), 3
[1192] Ibid.
[1193] Ibid., 15
[1194] David Abraham, 'The Geometry of Inside and Outside' (2011) 9(1) Issues in Legal Citizenship, 2
[1195] Ibid.
[1196] Ibid.
[1197] Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press 2009), 3
[1198] Ibid., 124

One of the most important changes in the modern world is that people now perceive themselves to be members of many different communities, including local, national, and supranational communities.[1199] According to Shachar, despite this, it is still premature to overcome the concept of citizenship.[1200] Nevertheless, the concept of citizenship needs to be transformed. She examines potential solutions that can contribute to rethinking the concept of citizenship: 1. open borders: eliminating formal borders in favour of embracing world citizenship; 2. revitalising borders: using defensive strategies to stem the flow of immigrants, such as stricter admission standards and border control programs; 3. commodifying citizenship: transforming citizenship into a tradable good that can be "sold or auctioned to the highest bidder among qualified applicants"[1201] for which Kälin makes a case[1202]; 4. de-territorialisation of citizenship, or the decoupling of politics from citizenship and 5. "more open admission policies by increasing the number of admitted immigrants."[1203] Ayelet Shachar opposes all of these conceptions, with the exception of the last one, which she supports, and asks for the imposition of a "birthright privilege levy"[1204] (BPL).

> "Shachar is concerned that the concept of birthright citizenship is both over- and under-inclusive. It is over inclusive because it is usually automatically granted to citizens' children born abroad, who may have never even visited their country of citizenship. It is also under-inclusive, because citizenship is not automatically granted to people who reside in the territory, such as permanent residents, even though they may have strong ties to their country of residence."[1205]

Shachar proposes a new membership criterion, *jus nexi*, which emphasises actual membership, civic activity, and social relationships after examining the historical origins of the norms via which citizenship is transferred. A genuine and functional bond between a person and a society is the focus of *jus nexi*. It establishes membership based on true connection and significant links rather than territory and ancestry. Habitual residence, family bonds, the focus of one's life, involvement in public life, and the individual's interests are a few examples of these ties.[1206] "Instead of making citizenship turn solely on the initial, almost frozen-in-time moment of entry, some proximity or nexus must be made between taking root and pursuing full membership status in the polity and an actual share in its rights and obligations."[1207]

According to Shachar, citizenship laws constitute a "birthright lottery" comparable to "inherited property."[1208] This means that "some people become citizens of wealthy democratic societies by

[1199] Ayelet Shachar, 'Introduction: Citizenship and the "Right to Have Rights"' (2014) 18(2) CitizenshipStudies,115
[1200] Ibid.
[1201] Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press 2009), 54
[1202] Christian Kälin, *Ius Doni: The Acquisition of Citizenship by Investment* (Ideos Verlag AG 2016)
[1203] Liav Orgad, 'The Citizenship Puzzle' (2011) 59(2) The American Journal of Comparative Law, 599
[1204] Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press 2009), 69
[1205] Liav Orgad, 'The Citizenship Puzzle' (2011) 59(2) The American Journal of Comparative Law, 600
[1206] Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press 2009), 166-70
[1207] Ayelet Shachar, 'Earned Citizenship: Property Lessons for Immigration Reform' (2011) 23 Yale Journal of Law and the Humanities, 121-2
[1208] Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press 2009)

right of either blood or soil, while others become citizens of much poorer, often nondemocratic societies, and yet others have no citizenship at all … She proposes instead a *jus nexi* right to citizenship."[1209] Shachar argues that the gap between an abstract right to membership and its materialisation shows how the inequality of real life opportunities associated with membership in particular political communities are hidden by the emphasis on formal equality of status.[1210] In practice, entitlement to political membership in one country or another has significant effects on people's identities as well as other aspects of their lives, such as their chances of surviving and being in good health, the extent of their rights (including basic human rights) being protected, their ability to move freely across borders, and the opportunities for a fulfilling life that they can reasonably expect.[1211] "The wealth, standard of living, personal safety, quality of services, and range of opportunities, freedoms, and choices that are enjoyed by the vast majority of members of flourishing polities lie well beyond the wildest dreams of most members of poor polities, many of whom do not enjoy even the basic preconditions for a decent life."[1212] Thus, considering citizenship as inherited property offers a fundamental insight: it prompts us to consider the enormous impact of the legal practice of granting political membership based on birthright, forcing us to ask why such entitlement is even allowed in the first place and emphasising the urgent need to address its resulting inequities, especially the way it entrenches privilege structures across the globe.[1213]

Shachar argues that we can no longer limit our attention to the point of entry as the sole determinant of legal status in order to define membership in a way that is consistent with the idea of rootedness.*[1214] Jus nexi* asks that we pay attention to the actual connections an individual has made with a society, such as their family, friends, employment, association membership, professional contacts and so forth.[1215] "Jus nexi takes seriously the idea that inclusive, democratic citizenship should reflect a nexus between rights and duties as well as between membership and social attachment, rather than one that immediately ties long-term settlement with an interest in becoming a citizen."[1216]

Shachar emphasises that *jus soli* (Latin: "the law of the soil") and *jus sanguinis* (Latin: "the law of blood"), two governing concepts that determine citizenship in a state must be distinguished when discussing birth as a source of citizenship.[1217]*Jus soli* and *jus sanguinis* are frequently contrasted, but it's vital to remember that both depend on and uphold the idea of bounded membership.[1218]They

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[1209] Rhoda E. Howard-Hassmann, 'Introduction: The Human Right to Citizenship' in Rhoda E. Howard-Hassmann and Margaret Walton-Roberts (eds), *The Human Right to Citizenship: A Slippery Concept* (Penn Press 2015), 13
[1210] Ayelet Shachar, 'The Worth of Citizenship in an Unequal World' (2007) 8(2) Theoretical Inquiries in Law, 377
[1211] Ibid., 379
[1212] Ibid.
[1213] Ibid., 387
[1214] Ayelet Shachar, 'Earned Citizenship: Property Lessons for Immigration Reform' (2011) 23 Yale Journal of Law and the Humanities, 137
[1215] Ibid.
[1216]Ibid., 140
[1217] Ayelet Shachar, 'The Worth of Citizenship in an Unequal World' (2007) 8(2) Theoretical Inquiries in Law, 370
[1218] Ibid.

both start with the premise of scarcity: only a select group of people can naturally become citizens of a certain state.[1219] The laws of all contemporary states include and apply the reliance on "the accident of birth".[1220] According to Shachar, a "blind spot" in current citizenship theory is the notion that dependence on birth is in some way "a natural" and apolitical" event."[1221] She emphasises that in a world like ours, where current state borders separate not just one jurisdiction from another, but also the rich from the poor, this circumstance might result in major injustices.[1222]

The territoriality and parentage principles make citizenship an ascriptive status for the vast majority of people in the world by legally designating birth, either in a particular territory or to certain parents, as the determining factor "in the distribution of the life-long good of membership."[1223] Shachar argues that "the reliance on birth-based principles in defining access to membership in particular political communities closely correlates with strikingly different prospects for well-being, security, and freedom to individuals, based merely upon considerations of bloodline or birthplace."[1224]

Since both the *jus soli* and *jus sanguinis* concepts of citizenship are exclusivist, Shachar proposes a *jus nexi* principle that bases citizenship on practical and emotional bonds, not only on institutional and formal ones. The concept of *jus nexi* citizenship[1225] is based on "the social fact of membership" and informal relationships.[1226] This concept of citizenship is founded on "connection, rootedness and linkage."[1227] This conception of citizenship is based on the "actual, real, everyday, and meaningful web of relations and human interaction."[1228]Shachar draws attention to the discrepancy between the inclusion of nationals who dwell abroad and have severed their ties to their country of origin and the exclusion of resident immigrants, whether legal and illegal.[1229] She makes the case that benefits acquired through inherited entitlement should not take precedence over real community involvement.[1230] The principle *jus nexi* is based on this "genuine

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[1219] Ibid.
[1220] Ayelet Shachar, 'The Worth of Citizenship in an Unequal World' (2007) 8(2) Theoretical Inquiries in Law, 371
[1221] Ibid.
[1222] Ibid.
[1223] Ibid.
[1224] Ibid., 376-7
[1225] "The significance of this is that it opens up the possibility of going beyond thinking about political participation in terms of birthplace, descent and in terms of what takes place simply through involvement in the labour force, business ownership or military service – which are archetypal state institutions- – to thinking about it in terms of informal and affective relationships, such as friendship, family ties and membership of local associations (including sport, leisure, educational associations) developed within society." (Aoileann Ní Mhurchú, *Ambiguous Citizenship in an Age of Global Migration* (Edinburgh University Press 2014), 85)
[1226] Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press 2009), 165
[1227] Ayelet Shachar, 'Earned Citizenship: Property Lessons for Immigration Reform' (2011) 23 Yale Journal of Law and the Humanities, 116
[1228] Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press 2009), 167
[1229] Anna Moltchanova, 'The Birthright Lottery: Citizenship and Global Inequality by Ayelet Shachar' (2010) 24(4) Ethics and International Affairs Journal, 432
[1230] Ibid.

connection."[1231]Shachar's "recommendation is for states to adopt a functional criterion for defining citizenship, and thus provide a path to citizenship to qualifying immigrants."[1232]

Ayelet Shachar proposes two solutions to lessen the injustice brought about by the arbitrary birthright citizenship system: a "birthright privilege levy"[1233] and a new criterion for membership –*jus nexi*.[1234] "For it is only when we view citizenship as an arbitrary advantage obtained through the accident of birth, as codified in extant citizenship laws that it makes sense to view the demand that recipients contribute toward the welfare of those excluded from the immense opportunities that attach to inherited membership in terms of obligation."[1235]According to Shachar, birthright citizenship should be taxed, and the money raised used to reduce global inequality rather than being abolished.[1236] She makes a compelling case for rethinking birthright citizenship as a type of property right that transfers an extraordinarily rich combination of rights, advantages, and chances from parents to children.[1237]Shachar points out "that ninety-seven percent of the citizenship of the world population is transferred at birth, either in a specific territory (*jus soli*) or from a specific ancestor (*jus sanguinis*)."[1238] Shachar argues that both *jus sanguinis* and *jus soli* rules share a crucial characteristic "reliance on birthright transfer of entitlement."[1239]

Birthright citizenship is comparable to property transfers in several ways, including the right to exclude that comes with bounded membership, the preservation of unequal wealth and power accumulation in the hands of heirs, and the fact that citizens of wealthy nations, like property owners, are given more opportunities to reach their full potential.[1240] "People born with the 'wrong' citizenship are more likely to be poor, suffer starvation and disease, and die younger than those born with the 'right' citizenship, who are more likely to enjoy better life opportunities, social conditions, and freedoms. Shachar asserts that the rules of acquiring citizenship at birth – through either birthplace or bloodline – are morally arbitrary."[1241]

[1231] Ibid.

[1232] Ibid.

[1233] "Individuals will be subject to exemptions and deductions similar to those in tax law to ensure the levy is sensitive to citizens' disparities of wealth within the affluent countries. The levy can also be paid in the form of public service. One way of calculating the amount of transfer an affluent country should owe per year would be to multiply the number of its newborns by a per capita rate, which would be set based on the economic standing of the country. A country would be able to pay at a lower rate by admitting more immigrants, by establishing a public service option, or by using some other measure that contributes to global redistribution." (Anna Moltchanova, 'The Birthright Lottery: Citizenship and Global Inequality by Ayelet Shachar' (2010) 24(4) Ethics and International Affairs Journal, 431)

[1234] Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press 2009), 69

[1235] Ayelet Shachar, 'The Worth of Citizenship in an Unequal World' (2007) 8(2) Theoretical Inquiries in Law, 387-88

[1236] Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press 2009), 5

[1237] Bernard Yack, 'Birthright, Birthwrongs: Contingency, Choice and Cosmopolitanism in Recent Political Thought' (2011) 39(3) Political Theory, 410

[1238] Liav Orgad, 'The Citizenship Puzzle' (2011) 59(2) The American Journal of Comparative Law, 599

[1239] Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press 2009), 7

[1240] Anna Moltchanova, 'The Birthright Lottery: Citizenship and Global Inequality by Ayelet Shachar' (2010) 24(4) Ethics and International Affairs Journal, 431

[1241] Liav Orgad, 'The Citizenship Puzzle' (2011) 59(2) The American Journal of ComparativeLaw, 599

Shachar argues that the International Court of Justice already supports the concept of *jus nexi* citizenship.[1242] "Advocacy groups – including conservative ones in the United States – have emphasized jus nexi in an effort to frame the debate around undocumented immigration and nonstatus members of their communities. Unlike domicile, jus nexi applies to persons who are absent or inconsistently present in a territorial polity."[1243]

According to Liav Orgad, although the current citizenship allocation procedures may be arbitrary, there is not necessarily a moral or legal need to impose a levy on the richest countries.[1244] "The wealth, rights, and freedoms associated with Western citizenship are man-made political and social achievements."[1245] They are not the result of natural resources; rather, they are the result of the sacrifice and hard work of a political community, whose members put their lives in danger to ensure a better future for themselves, their children, and their grandchildren. In a similar vein, the achievements "of other political communities from which immigrants flee are, to a large extent, their political and social failure."[1246] The distribution of social benefits associated with citizenship is not arbitrary.[1247]Linda Bosniak argues that "the jus nexi principle depends, in significant and crucial respects, upon an ethical privileging of being in a states territory ex ante. (...) That place might not be a national place – it might be a local place or a transnational border region place – but it is placeness in some sense that provides the medium in which the ties that count develop."[1248]

Shachar's assertion that the *jus sanguinis* and *jus soli* citizenship rules are frequently over- and under-inclusive is reasonable.[1249] However, her notion of *jus nexi* does little to help the system improve.[1250] On the one hand, "states would still have to adopt some rules of citizenship acquisition at birth since the relevant ties – habitual residence, family ties, the center of one's life, participation in public life, and a person's interests – do not usually exist at the moment of birth but in a later stage in life."[1251]

Shachar wants to maintain the institution of citizenship. Bosniak argues that "from this perspective, the birthright levy solution allows her to try to both have and eat her cake – to maintain citizenship as an institution while at the same time ameliorating the global structural inequalities that are associated with it."[1252] However, Shachar does not rethink the bounded and exclusionary nature of

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[1242] Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press 2009)
[1243] Harald Bauder, 'Domicile Citizenship, Migration and the City' in Harald Bauder and Christian Matheis (eds), *Migration Policy and Practice: Migration, Diasporas and Citizenship* (Palgrave Macmillan 2016), 82
[1244] Liav Orgad, 'The Citizenship Puzzle' (2011) 59(2) The American Journal of Comparative Law, 601
[1245] Ibid.
[1246] Ibid.
[1247] Ibid.
[1248] Linda Bosniak, 'Citizenship in an Unequal World: A Discussion of *The Birthright Lottery: Citizenship andGlobal Inequality*' (2011) 9(3) Perspectives on Politics, 623
[1249] Liav Orgad, 'The Citizenship Puzzle' (2011) 59(2) The American Journal of Comparative Law, 601
[1250] Ibid.
[1251] Ibid.
[1252] Linda Bosniak, 'Citizenship in an Unequal World: A Discussion of *The Birthright Lottery: Citizenship andGlobal Inequality*' (2011) 9(3) Perspectives on Politics, 622

citizenship.[1253] According to Bosniak, "it is sometimes unclear whether" Shachar "is arguing that citizenship is similar to property, or also that citizenship is itself a form of property, and/or further, that citizenship is an institution that works in the service of dominant property allocations."[1254]

John Echeverri-Gent emphasises that Shachar places little attention on the global context because her concentration is on citizenship.[1255] She disregards the effects of global anarchy and does not see the BPL's practical constraints as a result.[1256] Perhaps more significantly, she underestimates the degree to which citizenship encourages the creation of laws that support global inequality.[1257] According to Echeverri-Gent, "it is impossible to deny that Shachar's BPL fails to address perhaps the most iniquitous source of global inequality – rules fashioned by powerful countries to enhance their citizens' welfare by discriminating against poor countries."[1258]

Shachar advocates a new idea of citizenship that will deal with the issue of global inequality rather than cosmopolitanism. She claims to establish "a new balance between political justice and global justice without substantively detracting from the participatory and enabling qualities of membership in a self-governing polity."[1259]Shachar imagines a world in which "no child, no matter where or to whom she is born, is left without access to basic goods, such as clean water, food, shelter, education, health care, and so on."[1260]She suggests that we tax the benefits that citizenship bestows in order to increase the opportunities for those who are disadvantaged by the borders of wealthy states.[1261] Nevertheless, if the BPL "were to be genuinely legally binding, then it would seem to require the kind of cosmopolitan political institutions that she elsewhere eschews. How else would such a legal claim, for example, be enforced? This returns us to some of the paradoxes and tensions with which we began between cosmopolitan and national citizenship."[1262]

Shachar doesn't support any version of the communitarian or democratic self-government argument, nor does she support the cosmopolitan open borders argument.[1263] Instead, she proposes the concept of a "birthright privilege levy", which is effectively the inheritance tax given her description of citizenship as a form of inherited property.[1264] She makes the right assumption that

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[1253] Ibid., 623

[1254] Ibid., 621

[1255] John Echeverri-Gent, 'Citizenship in an Unequal World: A Discussion of *The Birthright Lottery: Citizenship andGlobal Inequality*" (2011) 9(3) Perspectives on Politics, 628

[1256] Ibid.

[1257] Ibid.

[1258] Ibid.

[1259] Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press 2009), 22

[1260] Ibid., 96

[1261] Ibid.

[1262] Ibid., 16

[1263] Duncan Ivison, 'Transcending National Citizenship or Taming it? Ayelet Shachar's Birthright Lottery' (2012) 7(2) The Ethics Forum, 13

[1264] Ibid.

states will remain the dominant political form in world and that bounded political communities will still exist.[1265]

3.6. From universal human rights to global human rights

Even though we live in the digital age, the modernist Westphalian system in which hierarchical structures and laws rule has not yet been overcome. This hierarchy is fragile and prone to conflicts between different strata of society, and the state itself survives by capitalising on these tensions. All individuals have some degree of autonomy, albeit to varying degrees, and those who rank lower in the hierarchy aspire to higher rank and greater freedom. In a global sense, countries strive to gain an advantage over each other, and this can be manifested in the form of foreign occupation and exploitation. Consequently, violence and war are inevitable as long as states exist. In light of this, it is difficult to argue that the universal claim of human rights is valid.

Article 1 of the *Universal Declaration of Human Rights* states: "All human beings are born free and equal in dignity and rights", but this cannot be true if individuals are born into a hierarchical society and do not have equal status. Therefore, the idea of universal human rights should be replaced by what I call basic global human rights or just global human rights, which has cross-cultural resonance and can be seen as a "global medium" even for developing post-national identities and global citizenship.[1266]

According to Cook, a number of scholars dismiss the *Universal Declaration of Human Rights* as idealistic or unrealistic, seeing it as a non-legally binding document that countries may claim to adhere to on the international stage but completely disregard depending on their own political agendas, given the numerous challenges to human rights the world faces. "China, in particular, has used its economic clout to advance an alternative vision to liberal democracy, arguing that development is a foundational right from which other human rights flow, thus subordinating civil and political rights."[1267]

The development of global citizenship requires the development of basic global human rights. The 1948 Declaration is outdated, and the human rights in the *Universal Declaration of Human Rights* can never be universal.

"Despite the declaration calling for an end to discrimination on the basis of race, sex, religion, national origin or ideology, it remains rife in countries across the world, from persecution of Uyghur Muslims

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[1265] Ibid.
[1266] Bryan S. Turner, 'Cosmopolitan Virtue, Globalization and Patriotism' (2002) 19 (1-2) Theory, Culture and Society, 46
[1267] Ana Lankes and Christopher Sabatini, 'Conclusions: Reforming, Rebuilding, Modernizing the International Human Rights System' in Christopher Sabatini (ed), *Reclaiming Human Rights in a Changing World Order* (Brookings Institution Press/Chatham House 2022), 337

in China to systemic racism in the US. Stark inequalities between the Global North and South continue to widen, while we witness a rollback in reproductive rights, deepening divides in access to healthcare, and the advent of climate change threatening lives and livelihoods in the nations least responsible for global emissions."[1268]

The development of technology, climate change, the migration crisis and the rise of populism in the 21st century have brought various threats to the human rights order and require rethinking of the international human rights system in order to respond to these threats.[1269] Human rights do not represent an absolute truth and their nature is dynamic.[1270] Wypych emphasises that "if we wish to effectively apply human rights on a global level there is a need to create something that might be called a global democracy. In such a case, we would have to do with a shift from universal human rights to global human rights, which are obviously not the same."[1271] The shift from universal human rights to global human rights involves pluralism and fragmentation, not just homogenisation.[1272]

A number of scholars question the idea that the notion of global citizenship should be based on universal human rights. According to Bryan S. Turner, "there are three arguments against human rights discourse as a global medium for framing post-national identities."[1273] The first argument is that human rights are associated with Western liberal values that advocate individualism.[1274] The second argument is that the essentialisation and universalization of human rights has produced various forms of inequality and discrimination. The third argument points to the abstract nature of human rights.[1275]

Michael Ignatieff emphasises that:

"There are three distinct sources of the cultural challenge to the universality of human rights. Two come from outside the West: one from resurgent Islam, the second from East Asia; and the third, from within

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[1268] Pip Cook, 'Universal Declaration of Human Rights: Fit for the 21st Century?' (*Geneva Solutions*, 9 December 2022)<https://genevasolutions.news/human-rights/universal-declaration-of-human-rights-fit-for-the-21st-century> accessed 21 January 2023

[1269] Ana Lankes and Christopher Sabatini, 'Conclusions: Reforming, Rebuilding, Modernizing the International Human Rights System' in Christopher Sabatini (ed), *Reclaiming Human Rights in a Changing World Order* (Brookings Institution Press/Chatham House 2022), 337

[1270] Sanja Ivic, 'Dynamic Nature of Human Rights: Rawls's Critique of Moral Universalism,' (2010) 33(2) Trans/Form/Ação, 223

[1271] Bartosz Wypych, 'Discrimination, Democracy, and Postmodern Human Rights' (2013) 42(1) Polish Political Science Yearbook, 176

[1272] Ibid.

[1273] Bryan S. Turner, 'Cosmopolitan Virtue, Globalization and Patriotism' (2002) 19 (1-2) Theory, Culture and Society, 46

[1274] Ibid.

[1275] Bartosz Wypych, 'Discrimination, Democracy, and Postmodern Human Rights' (2013) 42(1) Polish Political Science Yearbook, 170

the West itself. Each of these is independent of the others; but taken together, they have raised substantial questions about the cross-cultural validity and hence legitimacy of human rights norms."[1276]

To overcome these criticisms, the global human rights should not be based on Western individualism and should apply to both individuals and peoples. They should also avoid abstract, metaphysical concepts that define rights as inherent and natural.

According to Johannes Morsink, the drafters of the *Universal Declaration of Human Rights* drew on the philosophers of the Enlightenment from the eighteenth century and "took over from them the idea that human rights are inherent in the human personand not simply the result of social, legal or political processes."[1277] Morsink argues that the doctrine of inherent human rights "consists of two complementary theses about the universality of human rights" that originate from the philosophy of the Enlightenment.[1278] The first universality thesis focuses on the metaphysical nature of the world. "It states that people everywhere and at all times have rights that are not man-made."[1279] Morsink[1280] argues that this standpoint is reflected in the preamble of the *Universal Declaration of Human Rights*, which states that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[1281] The first universality thesis is also reflected in Article 1 of the *Universal Declaration of Human Rights:* "All human beings are born free and equal in dignity and rights."[1282]

According to Morsink, "the second universality thesis is a matching epistemological one which tells us that ordinary people in any of the world's villages or cities can come to know in a natural manner – unaided by experts – that people everywhere have the moral birthrights spoken of in the first universality thesis."[1283] Morsink[1284] argues that the second universality thesis is reflected in the second sentence of Article 1 of the UDHR, which emphasises that all human beings "are endowed with reason and conscience and should act towards one another in a spirit of brotherhood"[1285] as well as in the preamble of the UDHR which states that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind."[1286]

[1276] Michael Ignatieff, 'Human Rights as Idolatry', The Tanner Lectures on Human Values (Princeton University 2000) <https://tannerlectures.utah.edu/_resources/documents/a-to-z/i/Ignatieff_01.pdf> accessed 2 January 2023

[1277] Johannes Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (Penn Press 2009), 18

[1278] Ibid., 17

[1279] Ibid.

[1280] Ibid.

[1281] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A(III)

[1282] Ibid.

[1283] Johannes Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (Penn Press 2009), 17

[1284] Ibid.

[1285] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A(III)

[1286] Ibid.

Ignatieff argues that human rights should not be based on foundational arguments and that support for human rights should be built "on the basis of what such rights actually *do* for human beings."[1287]Ignatieff argues that:

> "It may be tempting to relate the idea of human rights to propositions like the following: that human beings have an innate or natural dignity, that they have a natural and intrinsic self-worth, that they are sacred. The problem with these propositions is that they are not clear and they are controversial. (...) Because these ideas about dignity, worth, and human sacredness appear to confuse what is with what ought to be, they are controversial, and because they are controversial they are likely to fragment commitment to the practical responsibilities entailed by human rights instead of strengthening them. Moreover, they are controversial because each version of them must make metaphysical claims about human nature that are intrinsically contestable."[1288]

Michael Ignatieff and John Rawls offer a narrow conception of human rights to address these issues. Ignatieff recommends a minimalist list of human rights that advocates for dignity and human agency.[1289] According to Ignatieff,

> "the universal commitments implied by human rights can only be compatible with a wide variety of ways of living if the universalism implied is self-consciously minimalist. Human rights can command universal assent only as a decidedly 'thin' theory of what is right, a definition of the minimum conditions for any kind of life at all. Even then it may not be minimal enough to command universal assent."[1290]

John Rawls also advocates a "thin" conception of human rights that represents the minimum condition necessary for individuals and societies to engage in social and political cooperation. According to Nickel, Rawls makes a distinction between the political rights that citizens have in a reasonable constitutional democratic regime, on the one hand, and human rights, which he defines as "a special class of urgent rights"[1291], on the other hand.[1292]Rawls's minimalist conception of human rights includes:

> "The right to life (to the means of subsistence and security); to liberty (to freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to property (personal property); and to formal equality as expressed by the rules of natural justice (that is, that similar cases be treated similarly). Human rights, as thus understood,

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[1287] Michael Ignatieff, 'Human Rights as Idolatry', The Tanner Lectures on Human Values (Princeton University 2000) <https://tannerlectures.utah.edu/_resources/documents/a-to-z/i/Ignatieff_01.pdf> accessed 2 January 2023

[1288] Ibid.

[1289]Michael Ignatieff, *Human Rights as Politics and Idolatry* (Amy Gutmann ed, 1st edn, Princeton University Press 2001)

[1290] Michael Ignatieff, 'Human Rights as Idolatry', The Tanner Lectures on Human Values (Princeton University 2000) <https://tannerlectures.utah.edu/_resources/documents/a-to-z/i/Ignatieff_01.pdf> accessed 2 January 2023

[1291] John Rawls, *The Law of Peoples With 'The Idea of Public Reason Revisited'* (Harvard University Press *1999*), 79

[1292]James Nickel, 'Human Rights' (*Stanford Encyclopedia of Philosophy*, 16 September 2003) <https://plato.stanford.edu/entries/rights-human/> accessed 21 August 2021

cannot be rejected as peculiarly liberal or special to the Western tradition. They are not politically parochial."[1293]

Rawls argues that a minimalist list of human rights represents a solution to the *aporia* of contemporary discourse on human rights, because it is acceptable to non-Western societies and different countries, not only liberal democracies.[1294] "The second reason is that he viewed serious violations of human rights as triggering permissible intervention by other countries, and only the most important rights can play this role."[1295] The new global basic human rights should be based on a narrow understanding of human rights in order to overcome the contradictory nature of the contemporary idea of universal human rights that are never really universal and to be acceptable to different societies, cultures and traditions.

According to Bilder, "an expansion of the list of human rights may involve certain penalties. To the extent human rights increasingly embrace the whole range of social aspirations, their usefulness as an ordering concept may be distorted, diminishing their helpfulness in solving those crucial and recurrent conflicts between competing values which every society confronts."[1296] New global human rights should be minimalist in order to avoid universalising and essentialising human rights. Global human rights need to overcome binary oppositions such as global/local, individual/collective, West/East and so forth.

Since individualism is incompatible with certain non-Western traditions, this is the main reason why non-Western countries, especially Asian ones, do not accept the Western idea of human rights.[1297] "Although 'the typical reaction in the West has been to dismiss the concept of Asian values by questioning the political motives of Asian governments who seemed to be employing a euphemism for authoritarian rule,' it is a fact that (...) there is some commonality (...) in Asian values, which is different from the Western values."[1298]

Therefore, what we would call now global human rights should "be compatible with moral pluralism."[1299] According to Ignatieff, they should be able to establish human rights protection in a wide range of cultures, traditions and religions – even those that have very different ideas about what constitutes a good human life.[1300] In other words, while people from different cultures may

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[1293] John Rawls*, The Law of Peoples With 'The Idea of Public Reason Revisited'* (Harvard University Press *1999*), 79
[1294] James Nickel, 'Human Rights' (*Stanford Encyclopedia of Philosophy*, 16 September 2003) <https://plato.stanford.edu/entries/rights-human/> accessed 21 August 2021
[1295] Ibid.
[1296] Richard B. Bilder, 'Rethinking International Human Rights: Some Basic Questions' (1969) 1 Wisconsin Law Review, 175
[1297] Zhihe Wang, 'Toward a Postmodern Notion of Human Rights' (2002) 34(2) Educational Philosophy and Theory, 177
[1298] Ibid.
[1299] Michael Ignatieff, 'Human Rights as Idolatry', The Tanner Lectures on Human Values (Princeton University 2000) <https://tannerlectures.utah.edu/_resources/documents/a-to-z/i/Ignatieff_01.pdf> accessed 2 January 2023
[1300] Ibid.

continue to disagree about what is morally right, they might agree about what is unquestionably wrong.[1301]

Global basic human rights should place equal focus on communities and individuals, as well as duties and rights.[1302] According to Wang, due to different cultural traditions, historical backgrounds and social and political structures, Asian and Western conceptions of human rights are very different from each other. This fact should be recognised and respected.[1303] When Jack Donnelly asserts that "non-Western cultural and political traditions lack not only the practice of human rights but the very concept"[1304], he is referring to the modern conception of human rights.[1305] Wang emphasises that Donnelly overlooks the fact that there are other conceptions of human rights, not just modernist.[1306]

A narrow conception of global human rights does not aim at the essentialisation and universalization of human rights and overcomes the limitations of Western individualism.

[1301] Ibid.

[1302] Zhihe Wang, 'Toward a Postmodern Notion of Human Rights' (2002) 34(2) Educational Philosophy and Theory, 177

[1303] Ibid., 178

[1304] Jack Donnelly, 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights' (1982) 76(2) The American Political Science Review, 303

[1305] Zhihe Wang, 'Toward a Postmodern Notion of Human Rights' (2002) 34(2) Educational Philosophy and Theory, 178

[1306] Ibid.

Chapter 5: A New Framework of Global Human Rights

1. Introduction

It has been shown that human rights do not and cannot actually exist universally, because they depend entirely on the state and citizenship. They are mere reference points of (Western) moral philosophy.

Truly universal human rights would require a world state, which is unfeasible because humans have always organised in hierarchical structures and congregated around the ethnic, cultural, linguistic and other defining elements to form communities. There cannot be one world community, but only the cooperation of different communities, each of which can have very different value systems.

The following is an outline of a new concept or framework of Global Human Rights that transcends tensions between the *global* (humanity; universal human rights) and the *local* (citizenship; borders and particularist identities and values). "Although many accounts of justice insist that its principles are universal, this does not determine the reach of justice: principles can combine universal form with restricted scope."[1307] This is also a new theory of justice as a responsibility that extends beyond national borders and international institutions to encompass all human life through shared experience and shared humanity.[1308]

It was shown that there cannot be universal human rights independent of state and citizenship. As a consequence, a new concept of global human rights must necessarily be based on the fact that there are states and citizenships related to states, which may enforce or may not enforce rights.

What is needed is a new conception of global civic culture and a new philosophical ethics on which to base global human rights. "A postmodern civic culture must be defined at least by a rhetorical turn – i.e., a turn away from the universalism of the modernist rhetoric of pure theory, and by a teleological turn – i.e. a turn away from the formalism of the civic ethics of authenticity and autonomy."[1309] A modern concept of human rights is founded on the ethics of justice, which gives priority to the *right* over the *good*. The ethics of justice defines rights as universal concepts based on reason. The ethics of justice does not take into account the particularist conceptions of the good (which include the cultural, religious and philosophical realms). This universalist ethics implies homogeneity. However, universal humanity is a myth that denies diversity. That is why

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[1307] Onora O'Neill, *Justice Across Boundaries: Whose Obligations?* (Cambridge University Press 2016), 2
[1308] However, this notion of humanity will avoid essentialist definitions.
[1309] Thomas Bridges, *The Culture of Citizenship: Inventing Postmodern Civic Culture* (State University of New York Press 1994), 40

postmodern civic culture needs a new ethics that does not give priority to the *right* over the *good* and acknowledges diversity.

Proponents of the idea of universal human rights argue that human rights are self-evident, inalienable and applicable to all humans.[1310] According to O'Neill: "In fact, as we well know, the present world order is a grotesque parody of this rosy story. Many states fail to guarantee various rights, including basic rights of the person, for some or many of their citizens; many others cannot guarantee various rights (in particular economic, social and cultural rights) for many of their citizens. And there are many stateless persons."[1311] Contemporary international institutions and much current thought about human rights appear to fall short of protecting rights for those whose states do not do so, or for those who do not have a state.[1312] Refugee and migrant situations are frequently harsh and uncertain, and they rarely achieve complete or secure enjoyment of human rights.[1313]

Global Human Rights, however, should include the idea of universal (or global) obligations, otherwise it remains abstract.[1314] Therefore, the concept of global justice should rely not on the idea of universal rights, but also on the idea of universal obligations.[1315] According to O'Neill: "It seems that we do little more than gesture in talking in abstraction from institutions about universalrightstogoodsorservices,sincewecannotidentifywhichsetsof obligations held by specific individuals or institutions would correspond to universal economic, social or cultural rights."[1316] Because the "counterpart obligations" cannot be universal, abstract thinking informs us very little about rights to goods and services.[1317] O'Neill argues that if nothing is said about the "counterpart obligations", the rights that are declared will not be accepted seriously.[1318] If we are to take rights seriously, we must address how the obligations that support them should be distributed among individuals, institutions and officeholders.[1319]

We have to reinterpret the Western culture of human rights and separate it from the universalist worldview of the Enlightenment[1320], which created a dichotomy between humanity (universal human rights) and citizenship.

The UN Charter did not transcend the modern world order as well as the idea of national sovereignty. The UN Charter did not lead to the concept of "post-sovereign governance" that is

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[1310] Jack Donnelly, *Universal Human Rights in Theory and Practice* (2nd edn, Cornell University Press 2003)
[1311] Onora O'Neill, *Justice Across Boundaries: Whose Obligations?* (Cambridge University Press 2016), 152
[1312] Ibid.
[1313] Ibid.
[1314] Ibid., 154
[1315] Ibid.
[1316] Ibid., 154-5
[1317] Ibid., 155
[1318] Ibid.
[1319] Ibid.
[1320] Thomas Bridges, *The Culture of Citizenship: Inventing Postmodern Civic Culture* (State University of New York Press 1994)

"non-exclusive, non-hierarchical and post-territorial."[1321] The challenges of the contemporary era would necessitate an effective reconstruction of the United Nations in order to accommodate the world community's broader interests. Concurring with David Held, the veto structure and representational system of the UN Security council should be transformed.[1322]

For human rights to be truly global, jurisdiction is important (laws that apply globally and courts that assume global jurisdiction[1323]).There are elements of this approach already in the current system of the UN, ICC, ECHR, national legislation that is being extraterritorially expanded to give e.g. Belgian or German courts the right to assume war crime complaints from elsewhere. That system should be significantly expanded, with a universal global court that every citizen of the world can appeal to. Such a court would need to assume global jurisdiction, and any state that supports it would need to undertake enforcement of decisions. David Held argues that reform of the United Nations requires "compulsory jurisdiction before the International Court [and] creation of a new International Human Rights Court."[1324] Only in this way, gradually, and with the engagement of individual states, the application of human rights would be more global, and citizenship become more global, because only the rights embedded in citizenship that are actually enforceable are of any use.

David Held's idea of reconstructing democracy in the modern global order, enriched by Nussbaum's capabilities approach, can contribute to rethinking the idea of human rights. The new global order should reflect both the principles of cosmopolitanism and Nussbaum's capabilities approach. Nussbaum argues that rights should also be perceived as capabilities and creates a list of central capabilities that are necessary to ensure respect for human dignity. Nussbaum's capabilities approach offers a broader understanding of human rights that unifies theory and practice and law and lived experiences.

John Rawls's conception of human rights is another valuable element in reconstructing the idea of universal human rights. John Rawls's idea of human rights recognises the dynamic and contextual nature of human rights that is neglected by current human rights documents. Reconstructing the contemporary human rights discourse requires a contextually oriented and hermeneutical approach to human rights. Such an approach allows us to create a theory of human rights based on different cultural perspectives and specific experiences, and to bring different contexts, perspectives and situations into the human rights discourse. A clear distinction needs to be made between "the

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[1321] Bradley C. Karkkainen, 'Post-Sovereign Environmental Governance' (2004) 4(1) Global Environmental Politics, 72
[1322] David Held, 'Globalization and Cosmopolitan Democracy' (1997) 9(3) Peace Review: A Journal of Social Justice, 312
[1323] David Held, *Democracy and Global Order: From the Modern State to Cosmopolitan Governance* (Stanford University Press 1995), 279
[1324] Ibid.

contextualized discourse of human rights"[1325] and "the universal substance of human rights."[1326] The failure to make this distinction has led both Western and non-Western intellectuals and scholars to reduce human rights to Western values and culture.[1327]

[1325] Willy Moka-Mubelo, 'Towards a Contextual Understanding of Human Rights' (2019) 12(4) Ethics & Global Politics, 46
[1326] Ibid.
[1327] Ibid.

2. A Postmodern Global Society without Borders?

Postmodern philosophy[1328] is significant for the reconstruction of contemporary concepts of citizenship, human rights and global justice.[1329] "'Postmodernism' (...) has been described as less a concept than a label appended to a diverse set of literatures and developments. (...) Aspects of contemporary cultural and political change (...) indicate a transition to a postmodern era, with postmodernism being its cultural expression."[1330] Postmodernist thinkers advocate the idea of the fluid and heterogeneous nature of the concept of identity.[1331] Postmodern philosophy[1332] offers "a broadened concept of rights – including the right to define one's situation and experience across a broad range of social situations and institutions, for example, imply limitations to traditional welfare state citizenship, premised on socio-economic entitlements stemming from the state."[1333]

According to postmodernists[1334], the concept of "border" is a powerful metaphor. The fluidity that postmodernists attach to this idea dissolves the strong differences between genres and disciplines, and theory and practice, resulting in the loss of binary hierarchies such as universal/particular, global/local, self/other.[1335] These hierarchies lose their fixed meaning and become nothing more than "a game of dispersed signs."[1336]Robert Cooper argues that the postmodern state "is more pluralist, more complex, less centralised than the bureaucratic modern state."[1337]

Cooper emphasises that the state interest becomes less of a decisive element in foreign policy when the state becomes less dominant: the media, the interests of certain groups or regions, even transnational groups, all play a significant role.[1338] Cooper argues that the deconstruction of the

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[1328] "Representatives of postmodern and poststructuralist thought are attempting to reconceptualise the rational tradition on which the modernist thought is founded. They argue that this rational tradition has produced physical and political oppression. Postmodernism dismisses the ideal of a justice governed by reason that produces universality, coherence and equality. (…) It does not embrace grand narratives but promotes (…) the notion of a more flexible and shifting identity and advocates otherness and difference." (Sanja Ivic, 'Brexit and the Emergence of Nationalist Narratives in Europe: Creating a New Narrative for the European Union' in Marcello Sacco (ed), *Brexit: A Way Forward* (Vernon Press 2019), 3)

[1329] José A. Lindgren Alves, 'The Declaration of Human Rights in Postmodernity' (2000) 22(2) Human Rights Quarterly, 478-500

[1330] Sue Penna and Martin O'Brien, 'Postmodernism and Social Policy: A Small Step Forwards?' (1996) 25(1) Journal of Social Policy, 55

[1331] Jacques Derrida, *Of Grammatology* (John Hopkins University Press 1997)

[1332]Jean-Francois Lyotard, *The Postmodern Condition: A Report on Knowledge* (University Of Minnesota Press 1984)

[1333] Sue Penna and Martin O'Brien, 'Postmodernism and Social Policy: A Small Step Forwards?' (1996) 25(1) Journal of Social Policy, 57

[1334] Jacques Derrida, *TheOtherHeading:ReflectionsonToday'sEurope* (Pascale Anne Brault and Michael B. Naas tr, IndianaUniversity Press 1992); Jean Baudrillard, *Simulacra and Simulation* (Sheila Faria Glaser tr, University of Michigan Press 1994)

[1335] Sanja Ivic, 'Europe's Migration Crisis: A Challenge to Democracy' in Gordana Djeric (ed), *Spatial Demarcations: Between the Politics of Fear and Effects on the Purse* (Institute for European Studies 2016), 85

[1336] Ibid.

[1337] Robert Cooper, *The Post-Modern State and the World Order*(2nd edn, Demos 2000), 31

[1338] Ibid.

modern state is not over yet, but it is moving fast: the European Union, "the movement in many countries towards greater regional autonomy and the more or less universal movement towards privatisation"[1339] are part of the process in different ways.

According to Robert Cooper, the Organization for Security and Co-operation in Europe (OSCE) creates a postmodern world whose traits are: "the growing irrelevance of borders"[1340]; blurring the distinction between foreign and domestic affairs; basing security on mutual openness, transparency, mutual vulnerability and interdependence; mutual surveillance and interference in domestic affairs; rejection of force as a means of resolving disagreements "and the consequent codification of rules of behaviour."[1341]

The postmodernist idea of borders leads to the concept of "post-sovereign governance", which is "non-exclusive, non-hierarchical and post-territorial"[1342]However, the nature of the contemporary world order is still tied to the modern idea of sovereignty. The UN Charter did not go beyond the modern world order and the idea of national sovereignty. The UN Charter emphasises the equal importance of universal protection of human rights and sovereignty.[1343] According to Cooper, the United Nations attempted:

> "to establish law and order within the modern state system. The UN Charter emphasises state sovereignty on the one hand and aims to maintain order by force. The veto power is a device to ensure that the UN system does not take on more than it can handle by attacking the interests of the great powers. The UN was thus conceived to stabilise the order of states and not to create a fundamentally new order."[1344]

Nevertheless, there are some concerning issues in the modern world order. The lack of a true balance of power in many parts of the world is the most striking feature.[1345] There are powerful states that could become destabilising actors in certain circumstances (for example, Russia, China, Iran and so forth).

Cooper argues that the role of the United Nations is to maintain the *status quo*, and not to establish a new order.[1346] "The status quo is maintained by a world body of overwhelming power (the hegemonic element), which throws its weight on the side of a state which is the victim of aggression – the balance-of-power, that is, with the world community as the balancing actor. This

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[1339] Ibid.

[1340] Ibid., 22

[1341] Ibid.

[1342] Bradley C. Karkkainen, 'Post-Sovereign Environmental Governance' (2004) 4(1) Global Environmental Politics, 72

[1343] Article 2 of the UN Charter states: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter."

[1344] Robert Cooper, *The Post-Modern State and the World Order*(2nd edn, Demos 2000), 16

[1345] Ibid., 17

[1346] Ibid., 37

is the old world of state sovereignty in which others do not interfere, of coalitions, of security through military force."[1347]

The challenges of the new millennium require an effective transformation of the United Nations in order to integrate the broader interests of the world community.[1348]According to David Held, "above all, the U.N. does not provide a forum of democratically elected representatives who have a mandate to deal with global issues. Nation-states meet at the U.N. to consider pressing problems, but many of the most important international and transnational issues are handled ad hoc and often in the midst of crisis."[1349] Held argues that the veto structure and representational system of the UN Security Council has to be altered.[1350] Following an international constitutional convention, a democratic second chamber of the United Nations should be established.[1351]Held argues that the International Court's jurisdiction "must be made compulsory."[1352] According to Held, it is necessary to establish a new International Human Rights Court, as well as an international military force that is effective and accountable.[1353] However, Held argues that:

> "Unfortunately, these changes would face many barriers. Nation-states still constitute the world's essential political units. Other powerful forces, such as the world economy, escape the boundaries of the nation-state. New forms of tribalism and fundamentalism have arisen, all asserting the superiority of one religious, cultural, or political identity over all others, and all asserting their sectional aims and interests."[1354]

The postmodern system is not based on sovereignty and the separation of internal and foreign affairs.[1355] According to Cooper, the *Treaty of Rome*[1356](which established the European Economic Community) and the *Treaty on Conventional Armed Forces in Europe* (*CFE Treaty*) exemplify the postmodern system.[1357] Cooper argues that treaty parties must report the location of their heavy weapons (which are already restricted by the treaty) "and allow challenge inspections."[1358]According to the CFE Treaty, "numbers of conventional armaments and equipment" should "not exceed 40,000 battle tanks, 60,000 armoured combat vehicles, 40,000 pieces of artillery, 13,600 combat aircraft and 4,000 attack helicopters."[1359] As a result, the

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[1347] Ibid.

[1348] Ibid.

[1349] David Held, 'Globalization and Cosmopolitan Democracy' (1997) 9(3) Peace Review: A Journal of Social Justice, 311

[1350] Ibid., 312

[1351] Ibid.

[1352] Ibid.

[1353] Ibid.

[1354] Ibid.

[1355] Robert Cooper, *The Post-Modern State and the World Order*(2nd edn, Demos 2000), 20

[1356] European Union, 'Treaty of Rome' (Rome, 25 March 1957) <https://netaffair.org/documents/1957-rome-treaty.pdf> accessed 5 February 2022

[1357] Robert Cooper, *The Post-Modern State and the World Order*(2nd edn, Demos 2000), 20

[1358] Ibid.

[1359] U.S. Department of State, 'Treaty on Conventional Armed Forces in Europe (CFE)' (OSCE, 19 November 1990) <https://www.osce.org/files/f/documents/4/9/14087.pdf> accessed 5 February 2022

legitimate monopoly on force, which is at the heart of statehood, is subject to international – but self-imposed – restraints.[1360]Cooper also points to the risks of establishing a postmodern state: "In political terms, an excess of transparency and an over-diffusion of power could lead to a state, and to an international order, in which nothing can be done because there is no central focus of power or responsibility. We may all drown in complexity."[1361] The Ukraine-Russia war has also shown how naive this is, including the CFE Treaty.

Robert Cooper emphasises that the European Union can be seen as a postmodern political community, because it blurs the distinction between domestic and foreign affairs of EU Member States and transcends national territory and national identity.[1362] Cooper states that "the EU is the most developed example of a postmodern system – it represents security through transparency, and transparency through inter-dependence. The EU is more a transnational than a supranational system."[1363]

According to Cooper, Canada can also be considered a postmodern political community, while the United States represents a postmodern political community to some extent.[1364] Cooper states that "the USA is the more doubtful case since it is not clear that the U.S. government or Congress accepts either the necessity and desirability of interdependence, or its corollaries of openness, mutual surveillance and mutual interference to the same extent as most European governments now do."[1365] The United States is not a signatory to the Rome Statute of the International Criminal Court (Rome Statute), which established the International Criminal Court (ICC) in 2002 as a permanent international criminal court with the mission of bringing to justice the perpetrators of the worst crimes known to humanity.[1366] The United States' refusal to recognise the jurisdiction of the International Criminal Court and its relative reluctance about challenge inspections in the *Chemical Weapons Convention* (CWC) are examples of US distancing from postmodern conceptions.[1367] The U.S. simply does what is in its interest.

The fact that democratic institutions and democracy are inextricably linked to the territorial state is a challenge for the post-modern state.[1368] Cooper argues that national territory, national identity, a national economy, a national army, and national democratic institutions have all shown to be enormously successful.[1369] Although legislation, defense and the economy are increasingly rooted in international frameworks, and territorial boundaries are becoming less relevant, the nature of

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[1360] Robert Cooper, *The Post-Modern State and the World Order*(2nd edn, Demos 2000), 20
[1361] Ibid., 41
[1362] Ibid., 20
[1363] Ibid.,24
[1364] Ibid., 29
[1365] Ibid.
[1366] Human Rights Watch, 'The International Criminal Court and the United States' (HRW, 2020) <https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states> accessed 3 February 2022
[1367] Robert Cooper, *The Post-Modern State and the World Order*(2nd edn, Demos 2000), 27
[1368] Ibid., 23
[1369] Ibid.

political identity and democratic institutions remains national.[1370] These are the reasons why traditional states, even though they no longer behave in traditional ways, will continue to constitute the primary unit of international relations for the foreseeable future,[1371] and why there will not be a postmodern society without borders.

[1370] Ibid.

[1371] Ibid.

3. New Conceptions of Global Human Rights

The contemporary global order requires the reconstruction of the concept of human rights. It is necessary to build a new institutional order at the global level. According to David Held, "we can no longer govern the world on the model of historical power from the 16th century to the end of the 20th century."[1372] This world order is changing, and if we want collective institutions that can govern in the name of the wider interests of humanity, we must "build a fairer, more democratic, global and more sustainable world order."[1373]

Many United Nations conflict management and resolution initiatives have failed or stagnated, as shown by the crises in Afghanistan and Myanmar.[1374] The UN system, founded in 1945, is increasingly at odds with the rapidly changing contemporary world.[1375] The contemporary global order combines two things – the interest of sovereign states, on the one hand, and the values of the UN Charter, on the other, which produces different tensions.[1376] This means that the UN system combines "cosmopolitan and universal values, on the one hand, with sovereign interest, on the other, producing contradictory effects."[1377] Therefore, the United Nations must be reformed.

David Held proposes the creation of a Global Parliament and a globally networked legal system, beginning with a UN reform. When disputes of jurisdiction (local, national, regional, or cosmopolitan) needed to be resolved, a 'Boundary Court' would have to be established; "and an effective international military force would have to be organized, diminishing the reliance on a national hegemonic military power like the United States."[1378] The reform of the United Nations requires "compulsory jurisdiction before the International Court [and] creation of a new International Human Rights Court."[1379] Such a court would assume global jurisdiction.

The global order can be more democratic if the representative system of states and peoples at the UN level is reconstructed.[1380] David Held emphasises that the UN Security Council, the World Bank, the IMF and other institutions have to be more representative.[1381] Held believes that it is

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[1372]David Held, 'Principles and Institutions of Global Justice' (United Nations University, 2013) <https://www.youtube.com/watch?v=djJ45PPkh-Y> accessed 15 March 2022
[1373] Ibid.
[1374] See: Chapter 3.
[1375]David Held, 'Principles and Institutions of Global Justice' (United Nations University, 2013) <https://www.youtube.com/watch?v=djJ45PPkh-Y> accessed 15 March 2022
[1376] Ibid.
[1377] Ibid.
[1378] Adam Lupel, *Globalization and Popular Sovereignty: Democracy's Transnational Dilemma* (Routledge 2009), 113
[1379] David Held, *Democracy and Global Order: From the Modern State to Cosmopolitan Governance* (Stanford University Press 1995), 279
[1380]David Held, 'Principles and Institutions of Global Justice' (United Nations University, 2013) <https://www.youtube.com/watch?v=djJ45PPkh-Y> accessed 15 March 2022
[1381] Ibid.

necessary to develop a diverse system of representation at the global level and that the European Parliament can serve as a model for the development of the global parliament.[1382]

It is also necessary to develop a universal constitutional order. Held argues that "stepping stones to a universal constitutional order (...) are (...) set down by some of the most important achievements of international law and institution building in the 20th century. These developments generate a conception of rightful authority tied to human rights and democratic values."[1383] A universal constitutional order[1384] would guarantee "the rights of all peoples."[1385] The possibility of a global referendum would also lead to the development of global citizenship and better implementation of human rights. According to Erwin Mayer, "a global referendum is the means to overcome (...) segregated interests and to decide on the fair distribution of resources globally."[1386]

David Held argues that this new institutional order should be based on the principles of cosmopolitanism: 1. equal moral worth of every human being; 2. self-determination; 3. consent and deliberation; 4. sustainability; and 5. social justice.[1387] Nevertheless, Held's approach neglects the lived experience, which makes these principles of cosmopolitanism too abstract.

The new institutional order should reflect not only the principles of cosmopolitanism, but also Nussbaum's capabilities approach. Martha C. Nussbaum developed a list of essential human functional capabilities that must be met in order to respect human rights and the dignity of human life. These central human functional capabilities are:

> 1. "Life. Being able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living.
>
> 2. Bodily Health. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.
>
> 3. Bodily Integrity. Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence (…).
>
> 4. Senses, Imagination and Thought. Being able to use the senses, to imagine, think and reason (…).

[1382] Ibid.

[1383] David Held, 'The Migration Crisis In The EU: Between 9/11 And Climate Change' (*Social Europe*, 10 September 2015) <https://socialeurope.eu/the-migration-crisis-in-the-eu-between-911-and-climate-change> accessed 1 March 2022

[1384] Marc Weller, 'The Reality of the Emerging Universal Constitutional Order: Putting the Pieces of the Puzzle Together' (1997) 10(2) Cambridge Review of International Affairs, 40-63

[1385] David Held, 'The Migration Crisis In The EU: Between 9/11 And Climate Change' (*Social Europe*, 10 September 2015) <https://socialeurope.eu/the-migration-crisis-in-the-eu-between-911-and-climate-change> accessed 1 March 2022

[1386] Democracy International, 'Global Referendum should Follow UN Climate Treaty' (*Democracy International*, 2015)<https://www.democracy-international.org/global-referendum-un-climate-treaty> accessed 6 March 2022

[1387] David Held, 'Principles and Institutions of Global Justice' (United Nations University, 2013) <https://www.youtube.com/watch?v=djJ45PPkh-Y> accessed 15 March 2022

5. Emotions. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence.

6. Practical Reason. Being able to form a conception of the good and to engage in critical reflection about the planning of one's life.

7. Affiliation. Being able o live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imaging the situation of another (…).

8. Other Species. Being able to live with concern for and in relation to animals, plants, and the world of nature.

9. Play. Being able to laugh, to lay, to enjoy recreational activities.

10. Control over One's Environment. (…) Being able to participate effectively in political choices that govern one's life. (…) Being able to hold property (…) being able to work (…) and entering into meaningful relationships of mutual recognition with other workers."[1388]

A new Charter of Rights needs to be developed that reflects cosmopolitan principles as well as the capabilities approach. David Held's idea of reconstructing democracy in the modern global order, enriched by Nussbaum's capabilities approach, can contribute to the reconstruction of the idea of universal human rights.

3.1. Nussbaum's Capabilities Approach for Reconstructing Human Rights

Although some aspects of the capabilities approach may be traced back to Aristotle, Adam Smith, and Karl Marx, it was economist and philosopher Amartya Sen[1389] who pioneered it, and philosopher Martha Nussbaum who significantly developed it.[1390]Nussbaum emphasises the importance of the capabilities approach in international debates on well-being and quality of life. Another advantage of the capabilities approach is that it places education at the center of the extension of freedoms and capabilities, as well as the attainment of functionings.[1391]

[1388] Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (1st edn, Cambridge University Press 2001), 78-9
[1389] Amartya Sen, *Commodities and Capabilities (*North-Holland 1985); Amartya Sen, *Inequality Reexamined* (Clarendon Press 1992)
[1390] Ingrid Robeyns and Morten Fibieger Byskov, 'The Capability Approach' (*Stanford Encyclopedia of Philosophy*,2021)<https://plato.stanford.edu/entries/capability-approach/> accessed 19 April 2022
[1391]F. Melis Cin and Necmettin Doğan, 'Navigating University Spaces as Refugees: Syrian Students' Pathways of Access to and Through Higher Education in Turkey' (2021) 25(2) International Journal of Inclusive Education, 298-312

There are three key distinctions between Nussbaum's and Sen's approaches to capabilities. Nussbaum criticises Sen for not openly rejecting cultural relativism.[1392] Nussbaum also criticises Sen for not basing his theory on the Aristotelian concept of authentic human functioning.[1393] Third, Sen does not give an explicit list of central capabilities.[1394] On the other hand, Sen has criticised attempts to present a comprehensive list of central capabilities.[1395]

> "According to Nussbaum, pursuing global justice from the capabilities approach requires that international co-operation envisaged as a contract for mutual advantage is jettisoned in order to prioritise the achievement of basic entitlements for all human beings. This understanding of social cooperation focuses on fellowship grounded in a shared principle of a world in which all persons enjoy the minimum of what is required to live a dignified life. Thus, the capabilities approach is closely allied with a rights-based perspective."[1396]

Nussbaum explores the relationship between the capabilities approach and human rights.[1397] She argues that the capabilities approach takes precedence over human rights in that it can take a firm stand on topics that the latter cannot, as well as provide a defined aim. Human rights theorists, for example, frequently argue over the genesis and foundation of rights, but Nussbaum claims that the capabilities approach is free of such criticisms.[1398]

The capabilities approach is a theoretical framework that includes two normative claims: first, that the freedom to achieve well-being is of main moral concern, and second, that well-being should be interpreted in terms of individual's functionings and capabilities.[1399] "Capabilities have also been referred to as real or substantive freedoms as they denote the freedoms that have been cleared of any potential obstacles, in contrast to mere formal rights and freedoms."[1400] The capabilities approach has been used in philosophy to generate numerous conceptual and normative frameworks, most notably in political philosophy, development ethics, environmental ethics and climate justice, public health ethics and philosophy of education.[1401]

> "The account of human capabilities has been used as an answer to a number of distinct questions, such as: What is the living standard? What is the quality of life? What is the relevant type of equality that

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[1392]Chad Kleist, 'Global Ethics: Capabilities Approach' (*Internet Encyclopedia of Philosophy*, 2010) <https://iep.utm.edu/ge-capab/> accessed 10 April 2022
[1393] Ibid.
[1394] Ibid.
[1395] Ibid.
[1396] Kerry Preibisch, Warren Dodd and Yvonne Su, 'Pursuing the Capabilities Approach within the Migration–Development Nexus' (2016) 42(13) Journal of Ethnic and Migration Studies, 2114
[1397] Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (1st edn, Cambridge University Press 2001)
[1398]Chad Kleist, 'Global Ethics: Capabilities Approach' (*Internet Encyclopedia of Philosophy*, 2010) <https://iep.utm.edu/ge-capab/> accessed 10 April 2022
[1399] Ingrid Robeyns and Morten Fibieger Byskov, 'The Capability Approach' (*Stanford Encyclopedia of Philosophy*,2021)<https://plato.stanford.edu/entries/capability-approach/> accessed 19 April 2022
[1400] Ibid.
[1401] Ibid.

we should consider in political planning? It has also been closely linked to discussion of a theory of justice, because such a theory has a need for an account of what it is trying to achieve for people."[1402]

Nussbaum argues that the capability approach "is a species of a human rights approach."[1403] The capability approach has raised awareness that it is impossible to secure the fundamental elements of democracy without also focusing on tangible issues like health care, gender equality, human dignity and universal primary and secondary education.[1404] Nussbaum argues that "the approach was initially developed as a way of looking at nations one by one and comparing them with one another. But, used in my version, with a list of specific capabilities as a benchmark for a minimally decent human life, it is well suited to address inequalities between nations."[1405]

According to Nussbaum, proponents of human rights frequently assert rights in relation to property (for example, a right to shelter).[1406] However, she notes that when changing a language of rights to capabilities, this statement becomes difficult because it can be interpreted in a variety of ways, including capabilities, resources and utility.[1407] "The human rights tradition would discuss it in terms of resources; however, merely providing resources does not necessarily raise everyone to the same level of capability in order to allow them to fulfill their function."[1408] Second, the capabilities approach does not include all of the baggage associated with human rights.[1409] Although Nussbaum criticises the notion that human rights are commonly described as merely being Western, she claims that the capabilities approach avoids the problems that this argument has brought up.[1410]"If we begin with the idea that all world citizens are entitled to a decent minimum level of the capabilities on my list, we can work back from that starting point to think about how nations, international organizations and agreements, multinational corporations, NGOs, and individuals can share the duties corresponding to those entitlements."[1411]

The central capabilities are valued not only for their utility in furthering goals, but also for their intrinsic significance in making a life completely human.[1412] However, they are regarded to be especially important in all else we plan and choose.[1413] "In that sense, central capabilities play a role similar to that played by primary goods in Rawls's more recent account: They support our

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[1402] Martha C. Nussbaum, 'Capabilities and Human Rights' (1997) 66 Fordham Law Review, 279
[1403] Martha C. Nussbaum, 'Human Rights and Human Capabilities' (2007) 20 Harvard Human Rights Journal, 20
[1404] Ibid.
[1405] Ibid.
[1406] Chad Kleist, 'Global Ethics: Capabilities Approach' (*Internet Encyclopedia of Philosophy*, 2010) <https://iep.utm.edu/ge-capab/> accessed 10 April 2022
[1407] Ibid.
[1408] Ibid.
[1409] Ibid.
[1410] Martha C. Nussbaum, 'Capabilities and Human Rights' (1997) 66 Fordham Law Review, 286
[1411] Martha C. Nussbaum, 'Human Rights and Human Capabilities' (2007) 20 Harvard Human Rights Journal, 22
[1412] Ibid.
[1413] Ibid.

powers of practical reason and choice, and have a special importance in making any choice of a way of life possible."[1414]

Nussbaum emphasises the relationship between economic stability and capability (what a person can accomplish and be).[1415] She wrote a detailed description of the most important capabilities that should be the focus of public policy. Nussbaum argues that the list is continually being amended and adjusted, in accordance with her "methodological commitment to cross-cultural deliberation and criticism."[1416]

According to Nussbaum, rights should be perceived as a set of capabilities.[1417] The right to freedom of movement, the right to freedom of thought, conscience and religion, the right to political participation, the right to freedom of opinion and expression, the right to education are all examples of functional capacities.[1418] As a result, securing human rights in these areas entails placing them in a position of combined capabilities to operate in that field.[1419]"Classic liberal human rights conceptions are characterized by a generalized detachment from a collective body politic where democratic forms of deliberation can take place."[1420] Viewed through the lens of the capabilities approach, this deprives marginalised social groups, refugees, and stateless people of the ability to identify common interests and needs, as well as the ability to negotiate and challenge current socioeconomic arrangements affecting their situation.[1421]

Statelessness, gender and age discrimination, and many sorts of social inequality could all be avoided if Nussbaum's list of basic capacities were actively promoted. Her capability approach is based on the idea that dignity is "meta-hierarchical and belongs to all beings that have capacity for agency very broadly understood."[1422] Nussbaum's approach aims at rethinking the idea of human dignity within the Western tradition.[1423] According to Nussbaum, the main institutions of the global economic order have to be built to be fair to developing countries and the poor.[1424]

Nussbaum's capabilities approach is also relevant to tackling the refugee and migrant crises because it emphasises the importance of equal opportunities for the flourishing of human life. The

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[1414] Ibid.
[1415] Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (1st edn, Cambridge University Press 2001)
[1416] Martha C. Nussbaum, 'Capabilities and Human Rights' (1997) 66 Fordham Law Review, 277
[1417] Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (1st edn, Cambridge University Press 2001)
[1418] Alicia Paulina Hogan, *Managing Migration for Development? The Promise of Temporary Worker Schemes* (Georgetown University 2008), 20
[1419] Ibid.
[1420] Ibid., 7
[1421] Ibid.
[1422]Martha C. Nussbaum, 'Cosmopolitanism and Global Citizenship' (Youtube, 10 January 2020) <https://www.youtube.com/watch?v=pcGQXM8MYAE/> accessed 5 March 2021
[1423] Ibid.
[1424] Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Belknapp/Harvard University Press 2006)

capabilities approach is significant for solving the problem of unequal treatment of refugees by the European Union. The EU's emphasis on universal rights is undermined by failing to ensure equal treatment of refugees from Syria and Ukraine. Prior to the Russian attacks on Ukraine, Europe was already dealing with the Syrian refugee crisis, which has polarised European Union members in recent years over what to do with the 1.1 million Syrians who sought sanctuary in Europe.[1425] Meanwhile, since Russia's invasion on 24 February 2022, neighboring EU Member States have quickly responded with a united show of solidarity to the influx of more than 2 million Ukrainian refugees.[1426] According to Andrew Geddes, "the EU is much more willing to internalize a refugee situation where the people who are being forced to flee are white Europeans, and has been much more reluctant to offer protection for people who are from Africa and the Middle East."[1427] Asylum seekers from the Middle East and Africa are fundamentally perceived as being different culturally, racially and socially.[1428]

The EU's unwillingness to accept refugees from Syria reflects the binary opposition[1429] (Christianity/Islam) on which the concepts of European identity and values are based.[1430] Commenting on the acceptance of refugees from Syria in 2015, the mayors of the French cities of Belfort and Roanne, said that they would consider only Christian families.[1431] The same position was expressed in Slovakia in August 2015, where it was emphasised that only Syrian refugees who are Christians could be accepted.[1432]

Nussbaum argues that international legal and political discourse seems to impose obligations of respect including ending aggressive war, supporting people who have been unjustly attacked, and banning crimes against humanity including genocide, rape and torture.[1433] But it does not impose obligations of material assistance and providing equal chances for all. Without such help, dignity is still an abstract concept.[1434]

Nussbaum states that the Western tradition defines the dignity of moral choice as complete in itself. Western tradition claims that in order for people to be treated as having truly equal dignity, money, rank and power are not necessary.[1435] The Western tradition seems to hold that material

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[1425] Deena Zaru, 'Europe's Unified Welcome of Ukrainian Refugees Exposes 'Double Standard' for Nonwhite Asylum Seekers: Experts' (*ABC News*, 8 March 2022)<https://abcnews.go.com/International/europes-unified-ukrainian-refugees-exposes-double-standard-nonwhite/story?id=83251970> accessed 12 April 2022

[1426] Ibid.

[1427] Ibid.

[1428] Ibid.

[1429]Binary oppositions represent metatheoretical presuppositions that undermine the idea of universal human rights.

[1430] Joseph Weiler, *Un'Europa cristiana: un saggio esplorativo* (BUR 2003)

[1431] The Express Tribune, 'French Govt Admonishes "Christian Refugees Only" Policy of Some Mayors' (*The Express Tribune*, 2015)<https://tribune.com.pk/story/953373/french-govt-admonishes-christian-refugees-only-policy-of-some-mayors> accessed 19 April 2022

[1432] Ibid.

[1433] Ibid.

[1434] Ibid.

[1435]Martha C. Nussbaum, 'Cosmopolitanism and Global Citizenship' (Youtube, 10 January 2020) <https://www.youtube.com/watch?v=pcGQXM8MYAE/> accessed 5 March 2021

possessions don't affect the exercise of our capacity for choice and other aspects of human dignity.[1436] However, the concept of human dignity should not only relate to the accidents of torture, slavery and unjust war. Individuals who are malnourished, lack clean water and access to health-related resources, material goods and education are not equally able to express their basic human dignity and cultivate their capacities for choice.[1437] The world is a world of capabilities.

According to Nussbaum, "material inequality is a large fact of human life for its effects to be overlooked. A child born in 2020 in US has a life expectancy of 79,1 years, while a child born in Swaziland can expect to live only 49 years."[1438] Clear water, sanitation, adequate nutrition, health services, maternal health and safety, access to education – all these basic human goods are very unevenly distributed around the world.[1439] According to the capabilities approach, "multinational corporations have responsibilities for promoting human capabilities in the regions in which they operate."[1440]

The United Nations Development Program (UNDP)[1441] is an organisation based on the capabilities approach's theoretical ideas.[1442] Its objectives include assisting countries in developing the best solutions for crisis prevention and recovery, the environment and energy, poverty reduction, democratic governance, poverty reduction, and fighting HIV/AIDS.[1443]

> "The UNDP has put forth eight Millennium Development Goals (MDGs). The MDGs include the following: (1) eradicate extreme poverty and hunger, (2) achieve universal primary education, (3) promote gender equality and empower women, (4) reduce child mortality, (5) improve maternal health, (6) combat HIV/AIDS, malaria and other diseases, (7) ensure environmental sustainability and (8) develop a global partnership for development."[1444]

This approach, however, was insufficiently successful since it did not adequately address the issues that democracy faces in the contemporary global order. "Reconstruction in this context connotes reflection upon the basic concepts and circumstances of modern politics with the aim of elucidating the conditions and possibility of democratic political community in the contemporary world."[1445] Consequently, the future of democratic politics should be considered at the subnational, national and transnational levels.

[1436] Ibid.

[1437] Ibid.

[1438] Ibid.

[1439] Ibid.

[1440] Shannon Buckley, 'Statelessness, Vulnerability and the Capability Approach' (*Human Development andCapability Association*, 2013) <https://hd-ca.org/> accessed 8 April 2022

[1441] United Nations, 'United Nations Development Program' (UN, 1965) <https://www.undp.org> accessed 15 April 2022

[1442]Chad Kleist, 'Global Ethics: Capabilities Approach' (*Internet Encyclopedia of Philosophy*, 2010) <https://iep.utm.edu/ge-capab/> accessed 10 April 2022

[1443] Ibid.

[1444] Ibid.

[1445] David Held, *Democracy and Global Order: From the Modern State to Cosmopolitan Governance* (Stanford University Press 1995), 143

3.2. Reconstructing the idea of Universal Human Rights

A close examination of the major human rights documents, particularly the *Universal Declaration of Human Rights*, reveals a lack of coherence in the presentation of legal, political and moral aspects of human rights.[1446] Such incoherence necessitates a theoretical reconstruction of the concept of human rights.[1447] According to Charles Beitz, "a theory of human rights faces a double challenge: not only to clarify the meaning and grounds of human rights, but also to illuminate the ways we might bring them into some reasonable relationships with other values with which they might conflict."[1448]

A cross-cultural reconstruction of the concept of human rights is necessary.[1449] "The standard of human rights provided by major documents and treaties of human rights must be respected, but at the same time, there are rights that must be developed in accordance with a particular context and specific needs of the people."[1450]

The argument that human rights are universal does not gain broad acceptance. Some non-Western scholars and intellectuals "reject the idea of the universality of human rights because, they argue, human rights reflect and perpetuate the Western culture, which is sometimes at odds with non-Western cultures."[1451] They advocate for the legal, political, and moral-philosophical status of human rights to be reconstructed and clarified.[1452] We attempt to do this here having a global viewpoint through still Western lenses.

The theoretical explication of the UDHR's seeming incoherence regarding the legal, political, and moral-philosophical status of human rights must be sensitive to the numerous roles and justification grounds of human rights.[1453]According to Moka-Mubelo:

"The question then becomes: should human rights be understood within a specific context, be it political, economic, or cultural? In other words, should the discourse on human rights be historically contingent? If so, isn't there a risk that they lose their universal character? In answering these questions, it can be argued that the standard of human rights provided by major documents and treaties of human

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[1446] Willy Moka-Mubelo, 'Towards a Contextual Understanding of Human Rights' (2019) 12(4) Ethics and Global Politics, 45
[1447] Ibid.
[1448] Charles R. Beitz, *The Idea of Human Rights* (Oxford University Press 2009), xii
[1449] Willy Moka-Mubelo, 'Towards a Contextual Understanding of Human Rights' (2019) 12(4) Ethics and Global Politics, 45
[1450] Ibid., 40
[1451] Ibid.
[1452] Ibid.
[1453] Ibid.

rights must be respected, but at the same time, there are rights that must be developed in accordance with a particular context and specific needs of the people."[1454]

The preamble of the *Universal Declaration of Human Rights* states that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[1455]However, the *Universal Declaration of Human Rights*and other human rights instruments do not sufficiently recognise the dynamic and contextual nature of human rights. Human rights are constantly evolving, and there are different generations of human rights.

The first generation of human rights encompasses political and civil rights. The second generation of human rights encompasses social, cultural and economic rights. The third generation of human rights includes collective rights, such as the right to a healthy environment, the right to self-determination, the right to participate in cultural heritage, the right to natural resources and so on.[1456] The fourth generation of human rights has evolved in the digital age. "The point of a fourth generation of human rights is to protect human life in light of ongoing technological innovation, but then also in the presence of new kinds of intelligence."[1457] The dynamic and contextual nature of human rights is not recognised in human rights documents in which they are described as a homogeneous and static concept, which they are not.

The Vienna Declaration and Programme of Action states:

"The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. The universal nature of these rights and freedoms is beyond question."[1458]

Both the *UniversalDeclaration of Human Rights* and the *Vienna Declaration and Program of Action* describe human rights as static and fixed. The same can be said for the UN Charter and other human rights documents. The UN Charter states that one of the purposes of the United Nations is "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human

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[1454] Willy Moka-Mubelo, 'Towards a Contextual Understanding of Human Rights' (2019) 12(4) Ethics and Global Politics, 45-6

[1455]Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A(III)

[1456] Sanja Ivic, 'Dynamic Nature of Human Rights: Rawls's Critique of Moral Universalism,' (2010) 33(2) Trans/Form/Ação, 223

[1457] Mathias Risse, 'The Fourth Generation of Human Rights: Epistemic Rights in Digital Lifeworlds' (*De Gruyter*, 27 April 2021)<https://www.degruyter.com/document/doi/10.1515/mopp-2020-0039/html> accessed 2 May 2022

[1458]UN General Assembly, 'Vienna Declaration and Programme of Action' (OHCHR, 12 July 1993) <https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx> accessed 29 June 2021

rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[1459]

In this way, human rights are described as absolute truth. However, human rights cannot represent the absolute truth.[1460] Human rights understood as absolute truth would represent an ideology that is incompatible with the freedoms associated with "the basic idea of human rights."[1461] Therefore, the main presuppositions of the current idea of human rights, included in the *Universal Declaration of Human Rights*, need to be redefined and restated.

3.3. Western vs. Confucian understanding of human rights

If we consider the historical development of the idea of universal human rights and their emergence, it is clear that they are based on the liberal values of Western civilisation. As shown earlier, the concept of human rights reflected in the *Universal Declaration of Human Rights* relies on the *Declaration of Independence* (1776) and the *Declaration of the Rights of Man* and of the *Citizen (*1789). The concept of universal human rights is derived from Western culture, and it can be assumed that it is not fully applicable to non-Western cultures. According to Ingram, "theoretical and practical accounts of human rights, even when suitably conjoined, retain residues of elitism unless they are submitted to dialogical criticism and emendation that cuts across cultures and permits local flexibility in application and interpretation."[1462]

As the idea of the universality of human rights has proved unsuccessful, it is necessary to rethink human rights, taking into account different traditions and cultures. "The clarification of the status of human rights must be sensitive to the multiple functions and justificatory grounds of human rights. Because of such sensitivity, political and legal theories must take into consideration (...) the ecumenical moral content of human rights documents."[1463]

The human rights dispute is often presented as a conflict between opposing sides: Asia *vs.* the West, Eastern (Confucian) communitarianism *vs.* Western individualism "Asian values" *vs.* "Western values," and so forth.[1464] According to Randall Nadeau, "this debate has assumed a series of associations: Asian, Confucian, communitarian, authoritarian, and statist, on the one hand; Western, Christian, individualist, and liberal-democratic, on the other."[1465] Proponents of "Asian

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[1459] Charter of the United Nations (adopted 24 October 1945) 1 UNTS XV Art 1

[1460] Sanja Ivic, 'Dynamic Nature of Human Rights: Rawls's Critique of Moral Universalism,' (2010) 33(2) Trans/Form/Ação, 223

[1461] Ibid.

[1462] David Ingram, *World Crisis and Underdevelopment: A Critical Theory of Poverty, Agency, and Coercion* (Cambridge University Press 2018), 231

[1463] Willy Moka-Mubelo, 'Towards a Contextual Understanding of Human Rights' (2019) 12(4) Ethics and Global Politics*,* 45

[1464] Randall Nadeau, 'Confucianism and the Problem of Human Rights' (2002) 11(2) Intercultural Communication Studies,107

[1465] Ibid.

values" often argue that Western liberal democracies have "an oppressive, imperialist agenda"[1466], threatening the viability of societies in a transformation.

The incompatibility between Confucianism with the acceptance of the idea of universal human rights is usually demonstrated by drawing a link between human rights and Western philosophy.[1467] The common perception is that the assertion of rights is underpinned by Western views of the self that lean toward atomism or at least a focus on autonomy, and that no individualistic perspective is relevant in a Confucian society, which emphasises the primacy of the community and the individual's obligation to others.[1468] According to May Sim:

> "To the Western eye, Confucianism seems ritualistic and paternalistic, making ethics a matter of manners and human relationships a matter of filiation (that is, bonding through role-playing). To a Confucian, the Western idolatry of the individual and the glorification of autonomy is an exaggeration of style that leads to extremes of conduct and disrupts settled patterns of culture and human relationship."[1469]

The concept of universal human rights can also be derived from Confucianism, not just Western individualistic values. Nadeau argues that:

> "Confucian values are a powerful, universal resource for a profound affirmation of human freedom expressed in both individual and communitarian terms. Far from asserting the hegemony of the state, community, or family over and against individuals, Confucianism supports human liberation for individuals-in-community. Western liberal democracy is not the only model for universal human rights. (...) Confucianism can and should be a universal ethic of human liberation."[1470]

Chinese society whose values are based on Confucianism[1471] as a religion and philosophy emphasises the collective aspect of law and belonging to a family, social group or state. Chinese cultural history is more than 3,500 years old.[1472] Chinese culture is characterised by respect for older adults and authority, obligations to the family, the importance of belonging to a group and the need for harmony.[1473]These are all values worth considering also from a Western perspective. The Chinese idea of human rights is based on these values, which emphasises the priority of the collective over individual rights. "A number of scholars have argued that the language of human rights depends upon Western individualism, which is conceptually absent from the Confucian tradition. Indeed, we find no equivalents in Classical Chinese to any of the following concepts so

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[1466] Ibid.
[1467] May Sim, 'A Confucian Approach to Human Rights' (2004) 21(4) History of Philosophy Quarterly, 337
[1468] Ibid.
[1469] Ibid.
[1470] Randall Nadeau, 'Confucianism and the Problem of Human Rights' (2002) 11(2) Intercultural Communication Studies,107
[1471] The East Asian countries (China, Taiwan, Vietnam and so on) are strongly influenced by Confucianism.
[1472] Mancur Olson, *The Logic of Collective Action- Public Goods and the Theory of Groups* (Harvard University Press 2002)
[1473] Ibid.

basic to Western human rights discourse: 'freedom,' 'liberty,' 'individual,' 'autonomy,' 'rights,' 'choice,' 'equality,' and 'dignity'."[1474]

Another point of contention between the Western idea of human rights and the Chinese idea of human rights is the different views on the first generation and the second generation of human rights.[1475] Western countries give priority to the first generation of human rights, which include the political and civil rights of the individual. In human rights debates, China gives priority to the second generation of human rights (social, economic and cultural rights) over the first generation of human rights.[1476] "Looking at the Western values underlying human rights, we can see why 'first-generation' rights are given so much emphasis. These include the radical autonomy of the individual, the soul in a transcendent relationship *vis-à-vis* the world, the prioritizing of the individual over the family, and the prioritizing of the individual over the state."[1477] The Confucian viewpoint offers a different perspective on the individual's relationship to his or her family and community.[1478]Individual identity is shaped by one's relationship to his or her family, community, and state. Human rights are best understood in the Confucian tradition as "freedom for" participation in the fullness of human interactions, rather than "freedom from" the restrictions of community life.[1479] As a result, human rights are linked to human duties. Individuals are placed in integration relationships with others based on their rights and obligations as members of their communities.[1480] According to Nadeau:

> "The conflict between first generation and second generation human rights assumes the separability between individual and community: This is a conflict that arises only when one accepts Western individualism as the basis for human rights. But from a Confucian point of view, just as self and community are conceptually inseparable, so too are first generation and second generation human rights inseparable in practice. Insofar as self and community are mutually generative (that is, self and community produce one another), first-generation and second-generation human rights are mutually productive."[1481]

Much of the rhetoric around the COVID-19 pandemic exhibits the conflict between individual and collective human rights.[1482] Response measures to the COVID-19 pandemic, such as orders to stay at home, mask regulations and company closures and restrictions, have shown the actual predominance of collective rights over individual rights even in Western countries. This is another example of the contextual and dynamic nature of human rights, which are both individual and

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[1474] Randall Nadeau, 'Confucianism and the Problem of Human Rights' (2002) 11(2) Intercultural Communication Studies,111
[1475] Ibid., 110
[1476] Ibid.
[1477] Ibid., 110-1
[1478] Ibid., 111-2
[1479] Ibid., 112
[1480] Ibid.
[1481] Randall Nadeau, 'Confucianism and the Problem of Human Rights' (2002) 11(2) Intercultural Communication Studies,114
[1482] See: Chapter 3.

collective." Confucianism can contribute greatly to this mutual understanding, not by emphasizing the community over and against the individual, but by providing a positive model for their interaction, which includes, at times, the defense of individual freedoms against the oppressive tendencies of the family or state."[1483] Contemporary debates on human rights can benefit from the values found in both Western and Eastern countries' different cultural traditions.[1484]

3.4. Contextual approaches to human rights

The modern idea of human rights rejects particularism and contextualism. The re-articulation of the contemporary human rights discourse however clearly requires a context-oriented approach to human rights. This approach not only allows us to create a theory of global human rights based on specific experiences, but it also highlights the importance of bringing different situations and contexts into the human rights discourse, even if they "do not necessarily share the same understanding of human rights ethics."[1485] According to David Ingram, "theoretical and practical accounts of human rights, even when suitably conjoined, retain residues of elitism unless they are submitted to dialogical criticism and emendation that cuts across cultures and permits local flexibility in application and interpretation."[1486] Global human rights need to be applicable in all contexts, they need to be inherently contextual.

A contextual approach to human rights highlights the need of being willing to learn from one another and gives a foundation for criticising not only "selective readings, tendentious interpretations, and narrow-minded applications of human rights, but also that shameless instrumentalization of human rights that conceals particular interests behind a universalistic mask – a deception that leads one to the false assumption that the meaning of human rights is exhausted by their misuse."[1487]

Ivana Radacic and many other scholars advocate the application of contextual ethics in case law.[1488] Radacic cites numerous examples of the essentialist interpretation of the idea of gender and gender equality in the cases of the European Court of Human Rights related to the wearing of the Islamic veil.[1489] In most of these cases, the European Court of Human Rights assumes that wearing the Islamic veil is a forced patriarchal practice that signifies the subordination of

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[1483] Randall Nadeau, 'Confucianism and the Problem of Human Rights' (2002) 11(2) Intercultural Communication Studies,110

[1484] Ibid.

[1485] Ibid., 47

[1486] David Ingram, *World Crisis and Underdevelopment: A Critical Theory of Poverty, Agency, and Coercion* (Cambridge University Press 2018), 231

[1487] Jürgen Habermas, *The Postnational Constellation: Political Essays* (MIT Press 2001), 129

[1488] Ivana Radacic, 'Gender Equality Jurisprudence of the European Court of Human Rights' (2008) 19(4) European Journal of International Law, 843

[1489] Ibid.

women.[1490] However, as numerous studies have shown, a number of women disagree with this interpretation. They point out that they wear a hijab or burqa from religious beliefs, and for some this practice is a way of expressing their identity.

Unlike widely recognised human rights literature and public belief that human rights are a collection of Western values and principles, Moka-Mubelo suggests that there must be a clear separation made "between the universal substance of human rights and the contextualized discourse of human rights."[1491] The debate on the universal human rights takes a wrong turn without such a distinction.[1492] The failure to make this distinction has resulted in both Western and non-Western scholars reducing human rights to Western values and culture.[1493] According to Moka-Mubelo:

> "If we understand universality as the applicability of all human rights equally to all people at the same time regardless of their socio-political and economic context, then rights that are developed in response to particular circumstances will face the challenge of universality. But if we understand universality as equal moral concern for all human beings, then the objection becomes irrelevant. The confusion about the universality of rights developed from a particular context comes from the tendency to associate universality with simultaneity. Contextualization and universalization do not exclude each other. Once we dissociate simultaneity from universality, we grasp the universal character that resides in human rights developed in response to particular circumstances and contexts because they can be conceived so by any morally responsible being."[1494]

John Rawls's conception of human rights reflects the dynamic and contextual nature of human rights.

> "Consider for example the right to life. This right is relevant and applicable to everyone regardless of the person's cultural identity, political ideology, sexual orientation, skin colour, or geographical location. Rejecting such a right on the basis that the current human rights corpus is embedded in Western culture is denying the right to life of some people. Here John Rawls' political approach to human rights can be useful in supporting the argument against those who reject human rights on the basis that they are the heritage of Western culture."[1495]

The conception of liberalism in Rawls' *Political Liberalism* and the *Law of Peoples* shifts from a universalist definition to a particularistic definition. The denial of a "political master narrative" is represented by Rawls's critique of a foundational role for any comprehensive liberalism (based on comprehensive doctrines that represent different philosophical, moral, and religious beliefs –

[1490] Ibid.
[1491] Willy Moka-Mubelo, 'Towards a Contextual Understanding of Human Rights' (2019) 12(4) Ethics and Global Politics, 46
[1492] Ibid.
[1493] Ibid.
[1494] Ibid., 47
[1495] Ibid.

different conceptions of what a good life is) and his shift to a "'freestanding' or 'political' liberalism."[1496]

Rawls's goal was to provide a "thinner" conception of human rights that would be acceptable to a variety of societies. As a result, different cultures and peoples will be more familiar with human rights, which will lead to greater human rights implementation. Rawls's conception of human rights is more open to diversity than the conception of human rights presented in the *Universal Declaration of Human Rights*. "Rawls rejects the idea of moral universalism."[1497]

The "Universal Declaration of Human Rights is neither a magical formula nor a sacred decalogue. Its Preamble and Article 1 sound today, perhaps, outdatedly metaphysical. According to the prevailing currents of contemporary social thought, people are not born 'free and equal' anywhere, nor do they properly make up a 'human family'."[1498]

Rawls's conception of human rights presented in his *Law of Peoples* represents "a special class of urgent rights, such as freedom from slavery and serfdom, liberty (but not equal liberty) of conscience, and security of ethnic groups from mass murder and genocide."[1499] Rawls reduces human rights to a minimum, claiming that this is part of his political liberalism's neutrality (i.e., it neither denies nor accepts any comprehensive doctrine). Rawls rightly outlines the core human rights that every society should respect. He states:

> "Among the human rights are the right to life (to the means of subsistence and security); to liberty (to freedom and slavery), serfdom, and forced occupation, and to a sufficient measure of liberty of conscience (to ensure freedom of liberty and thought); to property (personal property); and to formal equality as expressed by the rules of natural justice (that is that similar cases be treated similarly)."[1500]

According to Rawls, human rights cannot be viewed just as a reflection of Western tradition – "they are not politically parochial."[1501]

Rawls states: "If all societies were required to be liberal than the idea of political liberalism would fail to express due toleration for other acceptable ways (…) of ordering society."[1502] In his article "Justice as Fairness: Political not Metaphysical", Rawls points out that his conception of justice is no longer a metaphysical conception of justice that aspires to absolute truth, but only a political conception.[1503] Unlike the metaphysical, the political conception of justice is compatible with the

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[1496] Donald Beggs, 'Rawls's Political Postmodernism' (1999) 32(2) Continental Philosophy Review, 129
[1497] Sanja Ivic, 'Dynamic Nature of Human Rights: Rawls's Critique of Moral Universalism,' (2010) 33(2) Trans/Form/Ação, 224
[1498] José A. Lindgren Alves, 'The Declaration of Human Rights in Postmodernity' (2000) 22(2) Human Rights Quarterly, 499
[1499] John Rawls, *The Law of Peoples*: *With 'The Idea of Public Reason Revisited'*(Harvard University Press 1999), 79
[1500] Ibid., 65
[1501] Ibid.
[1502] Ibid., 54
[1503] John Rawls, 'Justice as Fairness: Political not Metaphysical' (1985) 14(3) Philosophy and Public Affairs, 223-51

conditions of modern pluralistic and complex societies.[1504] Modern society is characterised by a pluralism of comprehensive philosophical, moral and religious doctrines, and no conception of good can have a privileged status in society. According to Rawls:

"The point, then, is that the problem of stability is not that of bringing others who reject a conception to share it, or to act in accordance with it, by workable sanctions, if necessary, as if the task were to find ways to impose that conception once we are convinced it is sound. Rather, justice as fairness is not reasonable in the first place unless in a subtle way it can win its support by addressing each citizen's reason, as explained within its own framework."[1505]

Political liberalism does not require us to hesitate and be insecure or skeptical about our own beliefs. Instead, we should accept the practical impossibility of reaching a reasonable and achievable political agreement on the truth about comprehensive doctrines, especially agreements that could serve political purposes, for example, to achieve peace and harmony in a society characterised by moral and philosophical doctrines. "Rawls's theory of human rights represents a political conception, i.e. it is not based on any comprehensive doctrine. His conception of human rights is 'thin' and is not based on any authoritative foundation. Consequently, it differs from the rights presented in the *Universal Declaration of Human Rights*."[1506] Human rights, as defined by Rawls in his *Law of Peoples*, can be interpreted in two ways. First, they can be seen as a part of the liberal political theory of justice, which is defined as "liberties secured to free to all free and equal citizens in a constitutional liberal democratic regime."[1507] Second, they can be perceived from an associationist perspective "which sees persons first as members of groups, associations, corporations, and estates."[1508]

Because reasonable pluralism is a trait of every democratic society, Rawls's key idea his *Law of Peoples* is that it must be built on overlapping consensus.[1509] Rawls's idea of overlapping consensus represents his belief that proponents of different comprehensive doctrines (and consequently diverse conceptions of good) might agree on the same essential principles of justice.[1510] "Therefore, Rawls's conception of liberalism accepts the possibility of different conceptions of justice that are equally consistent with a political interpretation of liberal doctrine,

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[1504] According to Rawls, "an essential feature of a well-ordered society associated with justice as fairness is that all its citizens endorse this conception on the basis of what I now call a comprehensive philosophical doctrine. (...) Now the serious problem is this. A modern democratic society is characterized not simply by a pluralism of comprehensive religious, philosophical, and moral doctrines but by a pluralism of incompatible yet reasonable comprehensive doctrines. no one of these doctrines is affirmed by citizens generally." (John Rawls, *Political Liberalism* (Columbia University Press 1993), xvi)

[1505] John Rawls, *Political Liberalism* (Columbia University Press 1993), 143

[1506] Sanja Ivic, 'Dynamic Nature of Human Rights: Rawls's Critique of Moral Universalism,' (2010) 33(2) Trans/Form/Ação, 224

[1507] John Rawls, *The Law of Peoples*: *With 'The Idea of Public Reason Revisited'* (Harvard University Press 1999), 68

[1508] Ibid.

[1509] Sanja Ivic, 'Dynamic Nature of Human Rights: Rawls's Critique of Moral Universalism,' (2010) 33(2) Trans/Form/Ação, 232

[1510] Ibid., 232

because it is founded on reasonable conception of justice which cannot be valued by cognitive standards of truth and falsehood."[1511]

Rawls's conception of human rights opens up space for a hermeneutical approach[1512] Rawls argues that his idea of human rights might be interpreted in several ways. He describes his theory of human rights as "thin" in order to allow for multiple justifications for these rights.[1513] Rawls's human rights theory is based on his understanding of political liberalism and the fact of reasonable pluralism. This means that Rawls's human rights standards embrace "the Other" and "diversity", making them multicultural, contextual, and consequently anti-Western imperialist.[1514]"Rawls's conception of human rights leaves room for a hermeneutic approach and values the 'Other' in a more substantive way than the *Universal Declaration of Human Rights*. Rawls's idea of human rights is criticised by a number of authors, however, it in fact leads to more substantive idea of rights and citizenship, because it values diversity."[1515]

Rawls's political theory contains numerous binary oppositions (rational/ reasonable, right/good, norms/justifications, public/private, political/moral and so forth), which indicate that Rawls's theory does not go beyond modernist aporias, and does not completely represent the postmodern idea of human rights. Nevertheless, the assumptions on which Rawls's ideas are based represent a significant initial step for the development of postmodern civic culture[1516], establishing a theory of global human rights that could be applicable across cultural, national, religious and other borders.

Modern liberal political theory has established liberal political principles and moral ideas within the framework of universalist philosophical systems, which means that the acceptance of liberal principles also means the acceptance of a certain metaphysical point of view. Rawls aims at modifying the modern understanding of political liberalism, emphasising that liberal doctrine should be perceived as political, not metaphysical.[1517]"Rawls's move from 'moral and comprehensive pluralism' based on reason to the 'freestanding pluralism' based on reasonability represents his attempt to take into account the 'other', the 'difference', not in an instrumental, but in a substantive way."[1518]

According to Bridges, this view of liberalism paves the way for a postmodernist conception of political liberalism. If the moral ideals of certain class, ethnic, national minority and other groups are viewed as arbitrary and contingent historical artifacts, then the moral ideals of political

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[1511] Ibid.
[1512] Ibid., 235
[1513] Ibid.
[1514] Ibid.
[1515] Ibid., 237
[1516] Thomas Bridges, *The Culture of Citizenship: Inventing Postmodern Civic Culture* (State University of New York Press 1994)
[1517] John Rawls, 'Justice as Fairness: Political not Metaphysical' (1985) 14(3) Philosophy and Public Affairs, 223-51
[1518] Sanja Ivic, 'Dynamic Nature of Human Rights: Rawls's Critique of Moral Universalism,' (2010) 33(2) Trans/Form/Ação, 231

liberalism can be viewed in the same way.[1519] Rawls's definition of liberalism as a political, not a metaphysical or epistemological doctrine, is a contingent and contextual view of liberalism.[1520]

This rhetorical turn from metaphysical to political liberalism also implies a rethinking of modern liberal doctrine on the priority of the *right* over the *good*.[1521] The liberal principle of the priority of the *right* needs to be redefined in substantive, particular and teleological terms.[1522] The rhetorical turn towards postmodern political liberalism implies a teleological turn.[1523]According to Bridges, the postmodern liberal doctrine should no longer be a doctrine that establishes a set of universally binding laws and principles as conditions for achieving a good life.[1524] The conception of good on which the notion of citizenship is based should be defined as substantive (based on the idea of good in itself), and not instrumental (based on the idea of good as a means to an end)."It can be argued that the universalist notion of human rights presented in the *Universal Declaration of Human Rights* is based on universalist ethics. (...) This ethics gives priority to the conception of humanity understood as universal and essential over understanding of humanity as contingent and historically and socially constructed concept."[1525] But this priority may lead to misunderstandings:

> "It may be thought, for example, to imply that a liberal, political conception of justice cannot use any ideas of the good at all, except perhaps those that are instrumental; or else those that are a matter of preference or of individual choice. This must be incorrect, since the right and the good are complementary; no conception of justice can draw entirely upon one or the other but must combine both in a definite way."[1526]

Rawls points out that his idea of justice as fairness does not represent a universal conception of justice, but is only one conception compared to many other liberal conceptions of justice. Rawls's political liberalism is a postmodern conception of liberalism, because the notion of justice is not based on "truth" but on "reasonableness."[1527] Thus, Rawls's project offers a political-philosophical rather than a metaphysical idea of justice and liberal doctrine that are in accordance with the postmodern ethics.

Thomas Bridges and Donald Beggs point out that Rawls's political liberalism generates a postmodern conception of citizenship. According to Begs, the paradigm shift represented by Rawls rejection of "comprehensive" or "moral" liberalism and support for the ideas of "impartial" or

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[1519] Thomas Bridges, *The Culture of Citizenship: Inventing Postmodern Civic Culture* (State University of New York Press 1994)
[1520] Ibid.
[1521] Ibid.
[1522] Ibid.
[1523] Ibid.
[1524] Ibid.
[1525] Sanja Ivic, 'Dynamic Nature of Human Rights: Rawls's Critique of Moral Universalism,' (2010) 33(2) Trans/Form/Ação, 232
[1526] John Rawls, *Political Liberalism* (Columbia University Press 1993), 203
[1527] Donald Beggs, 'Rawls's Political Postmodernism' (1999) 32(2) Continental Philosophy Review, 123-41

"political liberalism" in his later work is based on a series of assumptions that make Rawls' theory of political liberalism postmodern.[1528]

"To find a shared idea of citizens' good appropriate for political purposes, political liberalism looks for an idea of rational advantage within a political conception that is independent of any particular comprehensive doctrine and hence may be the focus of an overlapping consensus."[1529] Rawls does not separate the "right" from the "good" in his theory of human rights; he does not advocate for a universal conception of justice; instead, he argues that people can agree on norms, prescriptive principles of justice (which is the domain of "right"), but they justify and interpret those norms differently in accordance with their comprehensive doctrines.[1530] "Ethics based on the priority of the right over the good points to only one conception of human nature. Therefore, it can be argued that it is imperialist and fixed."[1531]

Representatives of the ethics of justice advocate the idea of morality based on neutrality, while representatives of postmodern ethics believe that neutrality is only an ideal. Postmodern ethics is a contextual and particularist ethics.[1532] On the other hand, the ethics of justice is based on universalist and essentialist notions.[1533] "Equating the substance of human rights with Western culture is denying the possibility for other cultures to have the very rights we want to defend and promote while affirming that those who are not part of Western culture are excluded from the radar of human rights."[1534]

The postmodern idea of politics, since it encompasses personal, local, regional, national and supranational identities, requires a more responsible and broader definition of citizenship and human rights.[1535] Postmodern liberalism is opposed to Enlightenment liberalism based on the principles of reason and the equalization of all human beings.[1536] Proponents of postmodernism rightly reject "one-size-fits-all" ethics.[1537]

Postmodern liberalism requires a post-metaphysical global citizenship and global human rights culture based on the idea of transnational solidarity and agreement.[1538] Postmodern global

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[1528] Ibid., 123

[1529] John Rawls, *Political Liberalism* (Columbia University Press 1993), 108

[1530] Sanja Ivic, 'Dynamic Nature of Human Rights: Rawls's Critique of Moral Universalism,' (2010) 33(2) Trans/Form/Ação, 234

[1531] Ibid.

[1532] Sanja Ivic, *European Citizenship and Identity: Between Modernity and Postmodernity* (Palgrave Macmillan 2016), 110

[1533] Ibid.

[1534] Willy Moka-Mubelo, 'Towards a Contextual Understanding of Human Rights' (2019) 12(4) Ethics and Global Politics, 46

[1535] Timo Cantell and Poul Poder Pedersen, 'Modernity, Postmodernity and Ethics - An Interview with Zygmunt Bauman' (1992) 93 Telos, 133-44

[1536] Thomas Bridges, *The Culture of Citizenship: Inventing Postmodern Civic Culture* (State University of New York Press 1994)

[1537] Iris MarionYoung, *Justice and the Politics of Difference* (1st edn, Princeton University Press 1990)

[1538] Ibid.

citizenship and global human rights culture requires a new ethics based on care, responsibility and solidarity rather than reason and individual interests.

The project of modernism has clearly separated politics from ethics, the *right* from the *good* and public from private. The role of postmodern ethics is reflected in reconciling these binary oppositions. The nature of postmodern ethics is contextual. Global human rights must also be contextual. The ideal of neutrality, which is the central concept of modern political liberalism, suggests that the same rules should apply to all situations. The principle of neutrality derives from Kant's deontological ethics, which gives priority to the *right* over the *good*. Kant believes that the moral value of an action is determined by the maxim by which the subject decided on it, and not by the purpose that this action should achieve.[1539] Kant rejects the contextual approach, emphasising that the moral value of an action is determined by universalising the maxim, which is at its core, and by asking whether this maxim can serve as a universal law.[1540]

The principle of neutrality is the basis from which the idea of a monolithic, homogeneous and exclusionary public sphere originates. The challenge of the ethics of justice is postmodern ethics, which challenges institutional domination and forms the idea of a heterogeneous public sphere that recognises group differences. The ethics of justice and its principle of justice based on reason rejects the possibility of including abilities, feelings, desires and needs, since they do not reflect the universality of rationalist principles.[1541] Empathy and care are defined as irrational and are therefore excluded from the modernist idea of morality. The ethics of justice creates dichotomies between the general will and individual interests, the rational and the irrational, and so on.[1542] Postmodern political theory revises the dichotomies of modernism, and representatives of postmodernism argue that the ideal of neutrality has always, like any ideal, been unattainable. It is not possible to adopt an impartial, universal and impersonal view, which is completely separated from any context and interest.[1543]

According to Zygmunt Bauman, in the postmodern era:

"We do not trust large institutions to tell us what to do any more. The authority of churches, political parties, academic institutions and so on is dearly declining. The responsibility which was taken away from the individual is coming back – you and I are very much left alone with our decisions. We do not have a moral code which has all the visibility of being absolute and universal. We confront moral problems again as if modernity had not happened: we are thrown back to individual responsibility. That is why I think sociological theories of morality which see society as the author and the guardian of

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[1539] Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Lawrence Pasternack ed, Routledge 2002)

[1540] Kant formulated his categorical imperative in two ways: 1. . "Act only according to that maxim by which you can at the same time will that it should become a universal law" (Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Lawrence Pasternack ed, Routledge 2002), 50) and 2. "So act as to treat humanity, whether in your own person or in another, always as an end and never as only a means." (Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Lawrence Pasternack ed, Routledge 2002), 108)

[1541] Iris MarionYoung, *Justice and the Politics of Difference* (1st edn, Princeton University Press 1990)

[1542] Ibid., 103

[1543] Ibid.

morality have to be revised. This seems a crucial element in any attempt to understand the postmodern condition."[1544]

Bauman points out that postmodern ethics abandons the idea of rational determination of the value of the "good" and that the contextual approach to morality is the basic principle of postmodern ethics.[1545]This must also be the basic approach to postmodern global human rights. Unlike the universalist ethic of justice, which applies to all of humanity, postmodern ethics refers to specific individuals and their needs and interests in specific circumstances. Bauman states that "postmodernity, which does not entail that 'everything goes and do whatever you like,' simply means that there are no hard and fast ways of separating the right and the wrong way, the right and the wrong culture, and so on."[1546]

The idea of the supremacy of reason was most pronounced in the age of the Enlightenment, whose representatives believed that freedom and equality could develop only from the idea of rationality as universal and absolute truth.[1547] The doctrine of the autonomy of reason expresses the belief that human reason transcends the boundaries of historical and social circumstances, acquiring universally valid knowledge.[1548] Civic culture based on these assumptions creates a discourse whose goal is to show that democratic norms derive from objective and absolute truth.[1549] The moral ideal of modern political theory is independent of any particular ethnic, religious or cultural ideal, which the representatives of the modern political thought classified as an arbitrary, historically and socially conditioned notion of good.

A postmodern approach should define the concept of human rights independently of the binary hierarchies of the Enlightenment tradition such as: right/good, reason/emotion, universal/particular, essential/contingent and public/private and so forth. Postmodern thought is polyphonic, it indicates diversity and heterogeneity. According to Bridges, civic culture from a postmodern standpoint is a collection of various narratives, discourses and notions that serve as the justification for the standards that establish the liberal concept of the citizen.[1550] Bridges argues that the narratives, discourses and concepts that make up a particular historical period's civic culture are contingent and cannot be universalised.[1551]

According to Bridges, from a postmodern perspective, civic culture is a set of different narratives, ideas and discourses that are the basis for justifying the norms that define the liberal notion of the

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[1544]Timo Cantell and Poul Poder Pedersen, 'Modernity, Postmodernity and Ethics - An Interview with Zygmunt Bauman' (1992) 93 Telos, 137
[1545] Ibid.
[1546] Ibid., 138
[1547] Thomas Bridges, *The Culture of Citizenship: Inventing Postmodern Civic Culture* (State University of New York Press 1994)
[1548] Ibid.
[1549] Ibid.
[1550] Ibid.
[1551]Ibid.

global citizen.[1552]Bridges emphasises that narratives, representations and discourses that make up the civic culture of a certain historical period are of a contingent character and cannot be universalised.[1553]

Bridges argues that postmodern civic culture has two essential tasks: 1) to present a new understanding of citizenship and 2) to define a new rhetorical strategy that will motivate citizens to develop a new civic identity.[1554] Postmodern civic culture rejects the notion of citizenship that relies on the categories of reason.[1555] Postmodern civic culture is not based on metaphysical and epistemological principles. A new theory of global human rights must be based on these premises.

The postmodern condition implies pluralism and ambivalence, and postmodernism should be understood as a re-examination of modernist concepts and categories, not as their rejection. The modernist idea of citizenship and human rights overlooks the dynamics and constant changes faced by the postmodern public sphere, which replaces the homogeneous, centralised public sphere of modernism.[1556] A homogeneous public sphere never existed, it was just an ideological myth of modern liberal democracy.[1557] The fragmentation and eclecticism of the postmodern age have further transformed the political category of citizenship primarily derived from the idea of the state as a conglomeration of different values, beliefs and conceptions of the good life.[1558] The greatest significance of postmodern theory is in the broader view of equality, which is no longer derived from one-size-fits-all ethics, as well as in the new understanding of difference, which is no longer defined as a deviation and attack on the established order of values.

The postmodern notion of citizenship is part of the project of creating a postmodern, post-Enlightenment global civic culture, which will develop a contingent, particularist and culturally constructed conception of citizenship and global human rights.[1559] This conception of citizenship presupposes the historical contingency and cultural particularism of liberal moral ideals. The project of creating a postmodern civic culture requires a different understanding of the nature of the liberal-democratic conception of citizenship and human rights, which will not be founded on the supremacy of reason.[1560]

The main idea presented here is that the discourse on human rights is based on different metanarratives, which create tensions between *humanity* and *citizenship*. The broader aim of this study was to contribute to the investigation of the transformation of the nature of human rights in light of the challenges of postnational and postmodern political discourse. Although the problem

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[1552] Ibid.
[1553] Ibid.
[1554] Ibid.
[1555] Ibid.
[1556] Ibid.
[1557] Ibid.
[1558] Ibid.
[1559] Ibid.
[1560] Ibid.

of supposedly universal human rights is widely discussed[1561], the question of the philosophical roots of the tension between humanity and citizenship is still not sufficiently explored. Although some studies explore this tension[1562], they do not offer a philosophical analysis of the exclusivist nature of the main concepts on which the idea of human rights is built. Identifying the metatheoretical assumptions on which the idea of human rights is based is necessary for rethinking the discourse of human rights. This is also very significant because of the erosion of human rights that we are facing today.

The problem of the universality of human rights can also be seen through the different views of different generations of human rights. Concepts of universal human rights and social justice are intrinsically incompatible with the current system of dividing the world into sovereign nations that utilize citizenship and immigration restrictions to distinguish and protect themselves from others. Human rights and dignity are limited to specific national spaces, within which they can be normatively postulated. Therefore, universal human rights and global justice are not possible while retaining the modernist notions of citizenship and nation-state. "The promise of human dignity and social justice has not been met and can never be fully realised"[1563] within the current system.[1564]

According to Samuel Huntington, in the post-Cold War world,

> "the fundamental source of conflict (...) will not be primarily ideological or primarily economic. The great divisions among humankind and the dominating source of conflict will be cultural. Nation states will remain the most powerful actors in world affairs, but the principal conflicts of global politics will occur between nations and groups of different civilizations. The clash of civilizations will dominate global politics."[1565][1566]

[1561] See:Seyla Benhabib, 'The Legitimacy of Human Rights' 137(3) (2008) Daedalus,94-104; John Rawls, *The Law of Peoples With 'The Idea of Public Reason Revisited'* (Harvard University Press 1999); Michael Ignatieff, *Human Rights as Politics and Idolatry*(Amy Gutmann ed, 1st edn, Princeton University Press 2001); Eric Posner, *The Twilight of Human Rights Law* (Oxford University Press 2014); Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2010); Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishing 2000).

[1562] See: Aoileann Ní Mhurchú, *Ambiguous Citizenship in an Age of Global Migration* (Edinburgh University Press2014); SeylaBenhabib, 'Towards Global Political Communities and New Citizenship Regimes' 1 (2018) Glocalism, 1-10; Kate Nash, 'Between Citizenship and Human Rights' 43(6) (2009) Sociology, 1067-83; Harald Bauder and Christian Matheis (eds), *Migration Policy and Practice: Interventions and Solutions* (Palgrave Macmillan 2016); Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge-Cavendish 2007).

[1563] Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishing 2000), 15

[1564] As Costas Douzinas correctly identifies, "the record of human rights violations since their ringing declarations at the end of the eighteenth century is quite appalling (…) The twentieth century is the century of massacre, genocide, ethnic cleansing, the age of Holocaust" (Ibid., 2). In the twenty-first century, we are witnessing various various violations of the human rights of migrants and refugees, as well as a huge "gap between the poor and the rich in the Western world and between the north and the south globally." (Ibid., 2)

[1565] Samuel P Huntington, 'The Clash of Civilizations?' (1993) 72(3) Foreign Affairs, 49

[1566] According to Huntington,"a civilization is thus the highest cultural grouping of people and the broadest level of cultural identity people have short of that which distinguishes humans from other species. It is defined both by

These differences between different civilisations make the concept of universal human rights illusory, because "the people of different civilizations have different views on the relations between God and man, the individual and the group, parents and children, husband and wife, as well as differing views of the relative importance of rights and responsibilities, liberty and authority, equality and hierarchy. These differences are the product of centuries. They will not soon disappear. They are far more fundamental than differences among political ideologies and political regimes."[1567] Huntington emphasises that differences in culture and religion lead to disagreements on political issues ranging from the environment to trade and commerce to human rights and immigration.[1568]

Huntington argues that:

"the West is now at an extraordinary peak of power in relation to other civilizations. (...) Decisions made at the U.N. Security Council or in the International Monetary Fund that reflect the interests of the West are presented to the world as reflecting the desires of the world community. The very phrase 'the world community' has become the euphemistic collective noun (replacing 'the Free World') to give global legitimacy to actions reflecting the interests of the United States and other Western powers."[1569]

The values common in other civilisations are fundamentally different from those in the West. Huntington emphasises that Confucian, Islamic, Hindu, Japanese, Buddhist, or Orthodox cultures frequently have nothing in common with Western ideas of liberalism, human rights, individualism, equality, liberty, constitutionalism, democracy, the rule of law, the separation of church and state and free markets.[1570] According to Huntington, "the very notion that there could be a 'universal civilisation' is a Western idea, directly at odds with the particularism of most Asian societies and their emphasis on what distinguishes one people from another."[1571] This requires

"the West to develop a more profound understanding of the basic religious and philosophical assumptions underlying other civilizations and the ways in which people in those civilizations see their interests. It will require an effort to identify elements of commonality between Western and other civilizations. For the relevant future, there will be no universal civilization, but instead a world of different civilizations, each of which will have to learn to coexist with the others."[1572]

Charles Taylor explores what would it entail to have a genuine, unforced international consensus on human rights.[1573] He argues that this consensus on human rights might resemble the

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common objective elements, such as language, history, religion, customs, institutions, and by the subjective self-identification of people." (Ibid., 24)

[1567] Ibid., 25
[1568] Ibid., 29
[1569] Ibid., 22
[1570] Ibid., 22
[1571] Ibid., 41
[1572] Ibid., 22
[1573] Charles Taylor, 'Conditions of an Unforced Consensus on Human Rights' (IILJ, 2016) <https://iilj.org/wp-content/uploads/2016/08/Taylor-Conditions-of-an-Unforced-Consensus-on-Human-Rights-1996.pdf> accessed 19 February 2021

"overlapping consensus" that Rawls refers to in his *Political Liberalism*.[1574] In other words, while having divergent core beliefs about things like theology, metaphysics and human nature, many organisations, nations, religious communities, and civilisations would agree on a set of rules that should guide human behavior.[1575] Each would have its own method of defending these norms in light of its profound underlying assumptions.[1576] Thus, the human rights discourse represents a "particularistic doctrine with universalist claims."[1577]

However, Taylor emphasises that there are numerous challenges standing in the way of achieving this human rights consensus.[1578] First and foremost, "rights talk" has origins in Western society. Certain aspects of this discussion have their origins solely in Western history.[1579] This is not to suggest that other places do not contain concepts quite similar to the underlying principles expressed in "schedules of rights".[1580] Nevertheless, they are not spoken in this language.[1581] Furthermore, non-Western authors frequently criticise the Western understanding of human rights, which places a strong emphasis on human dignity.[1582]On the other hand, the Western idea of human rights is based on a philosophy that gives primacy to the individual, while the non-Western one gives primacy to the community. Therefore, the concept of human rights remains ambiguous.

The first generation of human rights, which includes civil and political rights, arose in the seventeenth and eighteenth centuries. The second generation of human rights includes social, economic, and cultural rights. More than 40 years ago, the third generation of human rights emerged. These rights are collective in origin and founded on solidarity. They include the right to peace, the right to development, the right to a healthy environment, the right to humanitarian assistance and so forth.[1583]

China prioritises the second and third generation of human rights over the first generation of human rights, which Western democracies emphasise. As much as modern China has violated many of the human rights we like to see as universal, not least the appalling situation of its Muslim minorities in Western China, its system that otherwise violates many human rights has made

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[1574] John Rawls, *Political Liberalism* (Columbia University Press 1993)

[1575]Charles Taylor, 'Conditions of an Unforced Consensus on Human Rights' (IILJ, 2016) <https://iilj.org/wp-content/uploads/2016/08/Taylor-Conditions-of-an-Unforced-Consensus-on-Human-Rights-1996.pdf> accessed 19 February 2021

[1576] Ibid.

[1577]Anthony J. Langlois,*The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory* (Cambridge University Press 2001), 74

[1578]Charles Taylor, 'Conditions of an Unforced Consensus on Human Rights' (IILJ, 2016) <https://iilj.org/wp-content/uploads/2016/08/Taylor-Conditions-of-an-Unforced-Consensus-on-Human-Rights-1996.pdf> accessed 19 February 2021

[1578] Ibid.

[1579] Ibid.

[1580] Ibid.

[1581] Ibid.

[1582] Ibid.

[1583] Patricia Brander et al., *COMPASS: Manual for Human Rights Education with Young People* (2nd edn, Council of Europe Publishing 2020), 399

significant achievements that no other nation or system has ever achieved – it has lifted about a billion people out of poverty in the last few decades.[1584]

> "Over the past 40 years, the number of people in China with incomes below $1.90 per day – the International Poverty Line as defined by the World Bank to track global extreme poverty– has fallen by close to 800 million. With this, China has contributed close to three-quarters of the global reduction in the number of people living in extreme poverty. At China's current national poverty line, the number of poor fell by 770 million over the same period."[1585]

Other countries can learn a number of lessons from China's experience, including the importance of a focus on education, sustained focus and public investment in infrastructure, an outward orientation and structural policies that support competition.[1586] Because of such examples, it is very important to abandon the illusionary universalistic definition of human rights and promote a contextual approach to human rights. In order to reconstruct the current human rights discourse, it is necessary to rely on a contextually oriented and hermeneutic approach to human rights. Drawing on this approach, we can create a theory of global human rights that is based on different cultural perspectives and experiences, as well as integrate many contexts, viewpoints and circumstances in the human rights discourse.

It is impossible to respect national and cultural differences while insisting on universality of human rights. Human rights depend on citizenship and context, and so it is not even normatively possible to speak of universal human rights. Human rights are anything but universal, and both citizenship and human rights are dynamic, not static categories.[1587]

[1584] The World Bank, 'Lifting 800 Million People Out of Poverty – New Report Looks at Lessons from China's Experience' (The World Bank, 1 April 2022) <https://www.worldbank.org/en/news/press-release/2022/04/01/lifting-800-million-people-out-of-poverty-new-report-looks-at-lessons-from-china-s-experience> accessed 17 September 2022

[1585] Ibid.

[1586] Ibid.

[1587] Sanja Ivic, 'Dynamic Nature of Human Rights: Rawls's Critique of Moral Universalism,' (2010) 33(2) Trans/Form/Ação, 234

4. Conclusion: A Theory of Global Human Rights

As shown before in detail, the *Universal Declaration of Human Rights* and other human rights documents represent a modernist account of human rights based on Western moral universalism.

Therefore, a new theory of Global Human Rights is needed, a theory that will reflect the postmodern conception of human rights, which will not be based on Western moral universalism and which will include diversity and therefore is fundamentally liberal.

According to Rawls, "basic human rights are to express a minimum standard of well-ordered political institutions for all peoples who belong, as members in good standing. to a just political society of peoples."[1588] The postmodern conception of human rights is not based on epistemological absolutism and ontological monism. "With regard to postmodernism, rights are perceived through discursiveness and multi-subjective understanding of reality, in the context of which 'natural rights' are seen not as a phenomenal vision of human life but as a fair distribution of resources and opportunities in the course of social development."[1589] The postmodern idea of Global Human Rights is not founded on the notion of universality.[1590] It denies foundationalism and allows for different interpretations. Human rights in the postmodern era, including the new Global Human Rights proposed here, should embrace universality and particularity, identity and difference, individuality and collectivity.[1591] Human rights need to be viewed and interpreted from the perspective of different cultures, geographies and peoples.[1592] This postmodern conception of human rights promotes the interaction between different values and beliefs, and agreeing on a common minimum understanding that in reality most if not all cultures, religions and states can agree to, because human rights are nothing if most states do not embrace and actively support them. Therefore Global Human rights must be established as a set of rights and principles which have the potential to be effectively be embraced and supported across the world.

Wang argues that "one major characteristic of postmodern human rights is regarding human rights as a whole. (...) The idea of human rights in terms of a postmodern perspective is neither the Western nor the Eastern but global human rights. At the same time, it is both the Western and the

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[1588] John Rawls, 'The Law of Peoples' (1993) 20(1) Critical Inquiry, 57
[1589] Valentyna Kultenko et al., 'The Natural Human Rights within the Postmodern Society: a Philosophical Socio-Cultural Analysis' (2022) 13(1) Postmodern Openings, 191
[1590] Ibid., 229
[1591] Ibid.
[1592] Ibid.

Eastern. Such an approach can successfully respond to the challenges from the East about human rights."[1593]

A new, postmodern theory of Global Human Rights respects diversity and is based on a principle that is neither Western nor Eastern. On the most fundamental level, this new theory of globally acceptable human rights or Global Human Rights can be based on the principle of the Golden Rule, which is best represented by Confucius, who said: "Do not do to others what you do not want others to do to you."[1594] The Golden Rule also occurs in Matthew 7:12: "So in everything, do to others what you would have them do to you," and Luke 6:13 "Do to others as you would have them do to you". The positive wording of Matthew and Luke is inherently weaker then the negatively formulated rule by Confucius, because people like masochists or psychopaths could apply it with detrimental outcomes for others, which is the same reason why the categorical imperative of Kant is fundamentally deficient and does not work. For it to work, the Golden Rule must be worded as per Confucius. The Golden Rule "has been affirmed in many religions, traditions, indigenous cultures and secular philosophies as a fundamental principle of life."[1595] It is a fundamental principle in the creation of a new theory of global human rights and global ethics, because it is present in almost all religions, cultures and traditions. "And because the Golden Rule crosses so many traditions and philosophies, it possesses tremendous moral authority and reveals a profound unity underlying the diversity of human experience."[1596]

A new theory of Global Human Rights based on the principle of the Golden Rule transcends the East-West dichotomy. The Golden Rule is neither Western nor Eastern and may represent the foundation upon which the basis of global ethics and global human rights can be built. "The Golden Rule is not just a moral ideal for relationships between people but also for relationships among nations, cultures, races, sexes, economies and religions. Clearly, the Golden Rule has the capacity to be the ethical cornerstone in developing a Global Ethic as the human family works together to build a peaceful, just and sustainable global society."[1597]

As the Golden Rule is not only an ethical standard for interpersonal relationships, but also for interactions between groups of people from different racial, cultural, economic, and religious backgrounds,[1598] it is well suited as a foundation and can serve as the "ethical cornerstone" for creating a new theory of global human rights.[1599] "Using the golden rule as our guide, we can

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[1593] Zhihe Wang, 'Toward a Postmodern Notion of Human Rights' (2002) 34(2) Educational Philosophy and Theory, 178

[1594] Confucius, *The Analects* (Penguin Classics 1998), XV.24

[1595] Mussie Hailu, 'The Golden Rule: The Path Way to Human Right and World Peace' (Federation of World Peace and Love, 2012) <http://www.fowpal.org/peak-view/golden-rule-path-way-human-right-and-world-peace> accessed 23 May 2023

[1596] Ibid.

[1597] Ibid.

[1598] Mussie Hailu, 'The Golden Rule: The Path Way to Human Right and World Peace' (Federation of World Peace and Love, 2012) <http://www.fowpal.org/peak-view/golden-rule-path-way-human-right-and-world-peace> accessed 23 May 2023

[1599] Ibid.

define rights in this way: one must recognize another's right to those things that any person would fight to defend or to acquire. (...) This definition is powerful and universal because it is based not on the presence of external moral strictures that one may or may not recognize, but on one's regard for his own well-being and on fear of conflict with those as dangerous as himself."[1600]

The Golden Rule, which has its roots in many different world civilizations, can also serve as a benchmark that many cultures can refer to when resolving conflicts.[1601] According to Mussie Hailu:

> "If we truly want to open a new chapter in human history and see a new world based on a culture of peace and social justice, (...) it is high time to promote the Golden Rule throughout the world as it is a fundamental principle that addresses critical issues such as democracy, human rights, respect for each other, gender equity, social development, interfaith harmony, constructive dialogue among nations, conflict prevention and right human relationship. By acting wisely, effectively and collectively under the Golden Rule we can create a more peaceful, ethical and better world for all."[1602]

According to Gebel, "in reality (...) much would be gained if (...) the Golden Rule was respected. (...) If this were the case, there could be no institutions, politicians, religions nor majority, which have the right to interfere with people against their will in their own sphere, their way of life."[1603]

Unfortunately, states will not endorse the Golden Rule, which we could actually call the first and possibly only human rights rule needed. States are reliant on the existence of their citizens, and as a result every state must expect its citizens to obey and do what the state authorities view best for its own survival: thus is the nature of the state. This even applies to Western liberal-democratic states. While from a moral-philosophical viewpoint this rule could replace all current universal human rights, it is equally not possible to apply and thus beyond the Golden Rule as a moral-philosophical preamble, a set of concrete Global Human Rights ought to be established that would likely be endorsed from most if not all states, because they would be acceptable within the context of their own cultural environment and context. In reviewing the current human rights and their actual adoption and building on the ideas of Rawls and Ignatieff in this regard, I would identify the following seven Global Human Rights, with the moral-philosophical Golden Rule as Preamble, from which in many ways those seven rights are derived: Do not do to others what you do not want others to do to you. As Global Human Rights we can define the following: *1*. Right to inviolability of the person; 2. Right to rule of law; 3. Right to subsistence; 4. Right to sufficient measure of liberty; 5. Freedom from forced occupation; 6. Freedom of expression; 7. Freedom of association.

[1600] Eliott Pearce, 'Human Rights and the Golden Rule' (The Observer, 10 February 2013) <https://ndsmcobserver.com/2013/02/human-rights-and-the-golden-rule/> accessed 24 May 2023

[1601] Mussie Hailu, 'The Golden Rule: The Path Way to Human Right and World Peace' (Federation of World Peace and Love, 2012) <http://www.fowpal.org/peak-view/golden-rule-path-way-human-right-and-world-peace> accessed 23 May 2023

[1602] Ibid.

[1603] Titus Gebel, *Free Private Cities: Making Governments Compete for You* (CreateSpace Publishing 2018), 20

These seven Global Human Rights represent the postmodern conception of human rights because they do not tend to represent an absolute truth based on the idea of universal morality, and they can be accepted by different cultures, traditions and societies. "If we want to live in freedom and self-determination, then we need more diverse systems, not fewer."[1604]

The seven Global Human Rights are also largely in line with Rawls's conception of human rights, which he presents in his *Law of Peoples*. These rights can be accepted by different societies and cultures. Rawls's conception of human rights transcends Western moral universalism. This new global conception of human rights, which avoids basing human rights on metaphysical ground, overcomes the "weaknesses of modernity."[1605] "The significance of John Rawls' theory of human rights is that he does not derive human rights from a metaphysical, authoritative source, such as reason or a conception of human nature."[1606] Therefore, it can be considered a postmodern conception of human rights. "The postmodern vision of human rights is free from debates devoted to human nature and natural rights. It tries to be free from any kind of metaphysics and essentialism."[1607] Rawls emphasises that:

> "[T]hese [human] rights do not depend on any particular comprehensive moral doctrine or philosophical conception of human nature, such as, for example that human beings are moral persons and have equal worth or that they have certain particular moral and intellectual powers that entitle them to these rights. To show this would require a quite deep philosophical theory that many if not most hierarchical societies might reject as liberal or democratic or else as in some way distinctive of Western political tradition and prejudicial to other countries.."[1608]

Rawls's conception of human rights is significantly different and more open to diversity than "international human rights documents such as the Universal Declaration of Human Rights."[1609] It is in line with the postmodern idea of human rights. "The postmodern notion of human rights emphasises dialogue between different values and 'tolerance toward the various dimensions of difference and fundamental community sentiments.'"[1610] This is the essence of these seven Global Human Rights defined above.

[1604] Titus Gebel, *Free Private Cities: Making Governments Compete for You* (CreateSpace Publishing 2018), 1

[1605] Bartosz Wypych, 'Discrimination, Democracy, and Postmodern Human Rights' (2013) 42(1) Polish Political Science Yearbook, 175

[1606] Sanja Ivic, 'Dynamic Nature of Human Rights: Rawls's Critique of Moral Universalism,' (2010) 33(2) Trans/Form/Ação, 223

[1607] Bartosz Wypych, 'Discrimination, Democracy, and Postmodern Human Rights' (2013) 42(1) Polish Political Science Yearbook, 184

[1608] John Rawls, 'The Law of Peoples' (1993) 20(1) Critical Inquiry, 56-7

[1609] Matthias Katzer, 'Rawls's List of Human Rights and Self-Determination of Peoples' in Valerio Fabbrizi and Leonardo Fiorespino (eds), *The Persistence of Justice as Fairness. Reflections on Rawls's Legacy* (UniversItalia 2022), 91

[1610] Zhihe Wang, 'Toward a Postmodern Notion of Human Rights' (2002) 34(2) Educational Philosophy and Theory, 181

Rawls introduces the concept of the Society of Peoples, based on principles that will accommodate "cooperative associations and federations among peoples, but will not affirm a world-state."[1611] In his *Law of Peoples*, Rawls explains the nature of his narrow conception of human rights[1612]:

> "The Law of Peoples does not say, for example, that human beings are moral persons and have equal worth in the eyes of God; or that they have certain moral and intellectual powers that entitle them to these rights. To argue in these ways would involve religious or philosophical doctrines that many decent hierarchical peoples might reject as liberal or democratic, or in some way distinctive of Western political tradition and prejudicial to other cultures. Still, the Law of Peoples does not deny these doctrines."[1613]

Rawls's conception of human rights is based on "the value of self-determination of peoples."[1614] The value of self-determination is also emphasised by Cohen who argues "that the value of political self-determination itself recommends resistance to the idea that every political society has to meet the requirements of equal basic liberties."[1615] Rawls believes that some non-liberal peoples (non-liberal forms of political society) should be tolerated and accepted as "equal participating members in good standing of the Society of Peoples."[1616] According to Rawls: "Here to tolerate means not only to refrain from exercising political sanctions, it also means to recognize these non-liberal societies as equal participating members in good standing of the Society of Peoples with certain rights and obligations."[1617]

In his *Law of Peoples*, John Rawls identifies two criteria for decent hierarchical societies. First, a decent hierarchical society should not have aggressive objectives. Second, a decent society should provide: a minimum set of human rights, *bona fide* moral duties and obligations imposed on all persons, and "a sincere and not unreasonable belief on the part of judges and other officials who administer the legal system that the law is indeed guided by a common good idea of justice."[1618]

In addition to the seven Global Human Rights, Rawls's eight rights of peoples are significant, as they can be considered *the right to self-determination of peoples*. This is a collective right that

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[1611] John Rawls, *The Law of Peoples*: *With 'The Idea of Public Reason Revisited'* (Harvard University Press 1999),36
[1612] "However, Rawls's conception of human rights is more demanding than minimal standards for state conduct as they are conceived in international law under the concept of ius cogens, i.e. peremptory norms of international law which may not be changed by states. While there is no consensus on the content of ius cogens, it has been thought to encompass norms such as prohibition of genocide, prohibition of crimes against humanity, basic rules of international humanitarian law, prohibition of racial discrimination and apartheid, prohibition of slavery, and prohibition of torture" (Matthias Katzer, 'Rawls's List of Human Rights and Self-Determination of Peoples' in Valerio Fabbrizi and Leonardo Fiorespino (eds), *The Persistence of Justice as Fairness. Reflections on Rawls's Legacy* (UniversItalia 2022), 95)
[1613] John Rawls, *The Law of Peoples*: *With 'The Idea of Public Reason Revisited'* (Harvard University Press 1999), 68
[1614] Matthias Katzer, 'Rawls's List of Human Rights and Self-Determination of Peoples' in Valerio Fabbrizi and Leonardo Fiorespino (eds), *The Persistence of Justice as Fairness. Reflections on Rawls's Legacy* (UniversItalia 2022), 91
[1615] Joshua Cohen, 'Is There a Human Right to Democracy?' in Christine Synopwich (ed.), *The Egalitarian Conscience. Essays in Honor of G.A.* Cohen (Oxford University Press 2006), 234
[1616] John Rawls, *The Law of Peoples*: *With 'The Idea of Public Reason Revisited'* (Harvard University Press 1999), 59
[1617] Ibid.
[1618] Ibid., 66

states may or may not embrace depending on where they currently stand and this changes over time, but should also be an essential element in Global Human Rights as it is fundamental for their enforcement: only if peoples have a right of self-determination and thus the right to form their own, sovereign state, can any human rights that those peoples wish to subscribe to be effectively implemented and enforced.

Rawls's Society of Peoples is based on eight principles:

"1. Peoples are free and independent, and their freedom and independence are to be respected by other peoples.

2. Peoples are to observe treaties and undertakings.

3. Peoples are equal and are parties to the agreements that bind them.

4. Peoples are to observe a duty of non-intervention.

5. Peoples have the right of self-defense but no right to instigate war for reasons other than self-defense.

6. Peoples are to honor human rights.

7. Peoples are to observe certain specified restrictions in the conduct of war.

8. Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime."[1619]

Also these rights are significant for the development of a new theory of Global Human Rights, because they represent the right to self-determination of peoples.

The Global Human Rights

Preamble

All our laws and enforcement of laws shall be guided by the following Golden Rule: Do not do to others what you do not want others to do to you.

We undertake to adopt and enforce within our jurisdiction the following global human rights:

1. Right to inviolability of the person

2. Right to rule of law

[1619] Ibid., 37

3. Right to subsistence

4. Right to sufficient measure of liberty

5. Freedom from forced occupation

6. Freedom of expression

7. Freedom of association

8. Right to self-determination of peoples

States could choose to adopt those rights that they agree to. For example, the rights 1 - 3 will probably be subscribed to by all states, while additional to 1 – 3 for 4 and 5 a large majority of states will subscribe to this additional subset, and for the additional rights No. 6, 7 and 8 liberal democratic Western states should subscribe to the entirety of these Global Human Rights.

Rights are only useful if they are enforceable. Therefore, states subscribing to these Global Human Rights also undertake universal jurisdiction for these rights, i.e. any person in the world may apply in their courts for violations of these Global Human Rights, and undertake to enact appropriate laws in their jurisdictions that provide for suitable sanctions on violators of these rights, depending on which rights the relevant states have subscribed to. Only such a system would ensure the compatibility of sovereign rights of states and global human rights, and for the latter to be effective.

One cannot argue that any two individuals of different nationality, citizenship, cultural heritage, or economic or social status have equal rights. It is fundamentally impossible as long as these different statuses exist, especially citizenship, as this right is inherently exclusive. The same applies to states and certain other entities that aggregate citizens within a certain area with certain autonomy: there is and remains a global hierarchy. That is why we must reduce the human rights that we aim to achieve to a common denominator, to a minimum set of values, of rights, that we can say that could exist also across states and across all cultures and times, something that is both from a moral-philosophical standpoint and normatively legitimate to claim and also from a political standpoint internationally feasible to agree on between states. The narrow conception of this new theory of Global Human Rights overcomes the limitations of Western individualism, and thus can be the new paradigm for effective human rights for the future.

Table of Legislation

Charter of the United Nations (adopted 24 October 1945) 1 UNTS XV

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