

CRISES OF THE POLITICAL AND HUMAN RIGHTS

**Critical perspectives
on the Common World**

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The current political order is marked by large, interconnected spaces, that come to expose more than ever the fragilities of a post-Westphalian sovereignty paradigm, anchored in the national imaginary (Rocha-Cunha 2020). Political and economic cleavages, vulnerable democracies, and social polarizations present in today's globalized world place human rights at the centre of the academic debate of the political realm.

Under this prism, in this volume we hope to contribute to a re-evaluation of the current political crises and the need for human rights-centred political alternatives. The chapters that comprise this book are structured around a transdisciplinary methodological framework, that reflects the evolving and complex affirmations of human rights quest in an ongoing scholarly discussion. All the chapters take a critical analysis approach to a wide range of theoretical frameworks and political and institutional settings.

All chapters involve problems that are simultaneously situated upstream and downstream of the themes explored here. In effect, they start from the observation that the political models, both internal and international, bear the brunt of the difficulties of the modern paradigms of politics and rights, of the reductionist anthropology and scientism that marked the birth of our world. Humanist and nihilistic values have emerged from these difficulties, which have brought to the present day productivism, possessive individualism, complex exclusions around the regulation and redistribution

of goods and authoritarian forms of exercising power. We can thus define two major critical lines in the present moment.

In the first place, the disappearance of responsibility before a common world, as pointed out by Hannah Arendt, who understood common sense not as a subjectivity, but rather as a world of intersubjectivity which, through sharing, would allow immovable truths to be overcome, thus illustrating a form of exercising freedom and human plurality.

Secondly, the permanent crisis of the traditional and programmed forms of the evolution of politics; because the emergence of a global information society has transformed politics and the knowledge that underlies it into challenges to power. In these terms, politics has become opaque and a space of great discursive simplification. This raises the problem of the indeterminacy of politics and the crises it raises, insofar as it is not a question of the appropriation of politics by human plurality, but, above all, the appropriation of the complexity of the social and historical fabric of societies by a model of rationality that is both instrumental and unstable, hybrid in its norms and deprived of a sense of action that goes beyond the adequacy of means and ends, ignoring values and the consequences of action. Hence the well-known disenchantment of the world that Max Weber analysed, as well as the legitimation crisis of the world's dominant social and political systems. This raises the problem of the existence of the dominance of a subsystem, political and financial in nature, which is based on a practical nihilism that only a new political imaginary can reverse.

In light of the above, the first chapter examines today's unique moment in the European integration's history marked by a 'perfect storm' of crises and political dilemmas. In this juncture, human rights are being thrusting to the forefront of the political debate on the European Union's future political path. Indeed, the European project's ability to protect its own values in a 'age of crises' has been called into question, primarily due to concerns about democratic legitimacy. In addition to this, populism and extremist forces have exploited these worries by claiming to protect people's rights and

values yet placing the Union's own existence in jeopardy. Under this prism, the first chapter contributes towards the discussion of bringing values and human rights at the heart of the debate over the future European political model.

In this chapter, Evanthia Balla questions and attempts to respond to whether the EU should be viewed as a model of values, how crises affect the EU's integrity as a defender of those values, and whether this calls for a paradigm shift in the EU's political order. The author argues that the EU's political stalemates place a significant burden on its model as a 'Union of values'. This reality requires a new political approach towards a more 'people of Europe'-centric rather than a mere state-centric paradigm of European integration.

In the second chapter, Irene Viparelli parts for preliminary, yet appealing reflections for a biopolitical reading of human rights. Whether realist and culturalist critiques has shown the "limits" and ambiguities of liberal cosmopolitan tradition rooted in human rights, the main question become how to keep a universal point of view beyond the "ambiguous dialectic" of human rights and cosmopolitanism. Through the young Marx's reflexions on the limits of "political emancipation" and Harvey's critique of cosmopolitan tradition, the first part of this chapter aims to highlight the "removed" of liberal tradition, i. e. the historical genealogies of human rights and the concrete spatialities of cosmopolitanism. In short, abstracting from temporal and geographical constituent contexts allows to build an ideal universalism that, due its indifference for the concrete, can be instrumentalized by political powers. In the second part of the chapter Viparelli leads with the "removed" of human rights tradition, searching for a different theoretical framework for human rights and cosmopolitanism. Thus, through a critical analysis of Boaventura Santos hypothesis of an intercultural translation of human rights in the frame of a "subaltern cosmopolitanism", she finally builds the hypothesis of a biopolitical lecture of human rights, in which the latter become a "common grammar" of emancipation practices.

The third chapter seeks to illuminate the discussion on power relations and political participation in the development of human rights. Paulo Fontes defends that a constitutional framework and an environment conducive to constitutional principles are necessary for the respect and protections of human rights. However, due to movements like nationalism and populism, democracy is in crisis and in danger not only in authoritarian states but also throughout the Western world.

Why do people adhere to resentment and the destruction of the political space as the capacity to think, communicate and influence the real world? Why does oneself close up in the impossibility of one's solitary existence and fill this void with totalitarian ideology? To answer these questions, the author puts forward the core hypothesis that political participation depends on the social inclusion and recognition that each person can achieve and is accountable, as well as the personality traits and resilience capacities correlated with different degrees of emancipation experienced at each stage of life.

Paulo Fontes revisits the great questions of political thought and explores the density of the concept of power as constituted in history. With the contributions of political psychology, we can understand that the formation of the personality of the subjects involved may determine different possibilities and forms of political participation. In this development, through Axel Honneth's theory of recognition and Rainer Forst's justification, conditions capable of ensuring inclusion and political participation in an equitable and emancipatory way are proposed. Furthermore, a transnational theory of justice is sketched out, capable of refocusing the value of politics and conceiving new forms of political participation that can revitalize democracies.

In the fourth chapter, Rafael Franco Vasques parts from the Tvzetan Todorov theses to analyse and debate democracy and human rights existing dilemmas. Today, the West confronts a number of challenges, such as safeguarding democratic values in its own societies, but also upholding the universality of human rights, and fostering peaceful coexistence with the rest of the world. Under

this prism, the author shows that democracies, in contrast to other political regimes, have a dual ‘obligation’, to defend the equality of all citizens and upholding the rule of law. Therefore, totalitarian and tyrannical compulsions must be denied, especially on the basis of the defence of human values. Rafael Franco Vasques claims that the belief that the values of western democratic societies are superior to the rest is dangerous for the preservation of the very own liberal-democratic values. For the author, there is no actual division between civilizations, it is the dread of *others* that makes us dangerous.

In the last chapter, Silverio Rocha-Cunha explores René-Jean Dupuy’s ‘pluriversal realism’ and reflects on some of the fundamentals of his approach to international law and society. In this chapter, Silverio Rocha-Cunha brings back to the centre of the academic debate the conception of an international community that already reflects the development of a civilization that resides in relational and institutional orders and is consequently ‘anterior, interior and exterior’ to international society. By revisiting René Dupuy’s perspectives on a ‘plural’ and ‘pluralistic’ world, the author suggests that this is a vision capable of delineating diverse worldviews of a Common World that, beyond disorder, must be primarily creative.

The EU Human Rights paradigm: Re(politicizing) European Integration

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Evanthia Balla

Introduction

The world nowadays faces a plethora of challenges that question how we consider human rights. The complexity of global perils such as climate change, terrorism and the pandemic require a new approach regarding cooperation and response towards a more 'people of Europe'-centric paradigm rather than a mere state-centric paradigm of European integration.

At the European level, the financial turmoil, the refugee crises, as well as the pandemic crisis have brought human rights at the heart of the political discussion on the EU's current relevance and future political path. The capacity of the European project to defend its own values in an 'age of crises' has also been questioned, mainly based on concerns in terms of democratic legitimacy. These concerns have been manipulated into the hands of far-right parties who rely on polarisation for political success, having seized the crises as an opportunity to gain more power by claiming to defend people's rights and values; yet, placing those same values and the Union itself at an even higher risk. This reality has sparked a wave of public debate and development of academic studies on the nature, origins and relevance of values and human rights in

the Union,¹ as well as on crises and their repercussions on human values.²

Building on this academic discussion, this chapter argues that the EU's political stalemates place a significant burden on its model as a 'Union of values'. We need a more democratic and legitimate political paradigm, based on a solid European public sphere and space, in which European values are at the centre of the discussion.

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- 1 For more on the discussion on human rights in the EU, see: Philip Alston and Joseph H. H. Weiler "An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights", *European Journal of International Law* 9 (1998), available at SSRN: <https://ssrn.com/abstract=803697>; Andrew Williams, *The Ethos of Europe: Values, Law and Justice in the EU* (Cambridge Studies in European Law and Policy, 2010); Mark Dawson, *The Governance of EU Fundamental Rights* (Cambridge University Press: Cambridge Studies in European Law and Policy, 2017), kindle; Sionaidh Douglas-Scott and Nicholas Hatzis eds., *Research handbook on EU law and human rights* (USA: Edward Elgar Publishing Limited, 2017); Steven Greer, Janneke Gerards and Rose Slove, *Human Rights in the Council of Europe and the European Union* (Cambridge: Cambridge University Press, 2018), kindle; Jure J. Vidmar, *European Populism and Human Rights* (Boston: Brill Nijhoff, 2020); Jan Wouters and Michal Ovádek, *The European Union and Human Rights: Analysis, Cases, and Materials* (Oxford: Oxford University Press, 2021), kindle; Gráinne De Búrca, "The Evolution of EU Human Rights Law", in *The Evolution of EU Law*, eds. Paul Craig and Gráinne de Búrca (Oxford: Oxford University Press, 2021); Plamen Akaliyski, Christian Welzel and Josef Hien, "A community of shared values? Dimensions and dynamics of cultural integration in the European Union", *Journal of European Integration* 44, no. 4 (2022), <https://doi.org/10.1080/07036337.2021.1956915>.
 - 2 On crises and their repercussions on human values, see the contributions of: Ramona Coman, "Democracy and the Rule of Law: How Can the EU Uphold its Common Values?", in *Governance and Politics in the Post-Crisis European Union*, eds. Ramona Coman, Amandine Crespy and Vivien A. Schmidt (Cambridge University Press, 2020), kindle; Kolja Raube and Francisca Costa Reis, "The EU's Crisis Response Regarding the Democratic and Rule of Law Crisis", in *The Palgrave Handbook of EU Crises*, eds. Marianne Riddervold, Jarle Trondal and Akasemi Newsome (Cham: Palgrave Macmillan, 2021), kindle; Azeri Siyaves, "The crisis of value, 'right-wing populism' and the prospects for human emancipation", *Critique* 49, 3-4 (2021), <https://doi.org/10.1080/03017605.2021.2003484>.

On this basis, this study seeks to answer the following research questions:

To what extent can the EU be conceptualised as a model of values? How have the crises impacting on the EU's values (such as democracy and the rule of law, combined with the threat of populism) affected the EU's integrity as a defender of those values? To what extent does this lead to the need of a paradigm shift in the EU's political order?

This work contributes towards the discussion of bringing values and human rights at the centre of the debate over the future European political model. In this context, the first section of this chapter presents the foundational values of the EU and the main critiques and scepticisms on human rights related to the EU's nature. The following section explores the evolution of the EU's constitutional framework and the gradual inclusion of its values into the European law. The subsequent section addresses the EU's legitimacy gap, focusing on populism and the recent democratic and rule of law crises within the EU. It seeks to show how those crises impact on the EU's credibility as a 'Union of values'. The final section builds on the discussion regarding the EU's future political model in terms of becoming a more legitimate project capable of effectively expressing and protecting its foundational values.

This chapter pleads for a reflective approach on the future model of the EU, towards a more people-oriented political model as opposed to a mere market- and state-centric one. For the purpose of this analysis, human rights protection in general and fundamental rights in particular are discussed into the largest context of the EU's foundational values.

Foundational values and human rights: main critiques and scepticisms related to the nature of the EU

The EU builds on a political and juridical order of values and rights that are enforceable not only within the Union and its institutions, but also on its Member States. This body of principles are in line with the principles of the United Nations' Charter of 1945, the Universal Declaration of Human Rights of 1948 and the European Convention on Human Rights (ECHR) of 1950, as well as other international treaties, and is formulated by the European Court of Justice. Even after the EU's eventual accession to the ECHR, Article 6(3) of the Treaty on European Union (TEU) still preserves the broad principles of EU law on an equal constitutional standing with these other sources.³

On this basis, the EU unites Europeans under a shared normative discourse through its affiliation with values. However, the EU faces a series of criticisms concerning the essence of these principles, as well as its own role as their provider.

The first critique regards the lack of definition or elaboration of what these values should entail or how they relate to one another. In the EU, human rights, democracy and the rule of law are often amalgamated as part of a larger set of foundational values, as listed in Article 2 of the TEU, which states that:

[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance,

3 Gráinne de Búrca, "The ECJ and the international legal order: a re-evaluation", in *The Worlds of European Constitutionalism*, eds. Gráinne de Búrca and Joseph H. H. Weiler (Cambridge: Cambridge University Press 2012), 120-121.

justice, solidarity and equality between women and men prevail.⁴

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The preamble of the TEU also states that the inspiration and commitment of the signatories are drawn from the “humanistic inheritance of Europe” and their common principles “of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law”⁵ Another reference to the European values is made in Article 3(5) of the TEU, which provides that in its international relations, the Union shall maintain and promote those values “and contribute to the protection of its citizens including the protection of human rights”⁶ The principles that should guide the EU’s international endeavours are also listed in Article 21 of the TEU, namely “democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations’ Charter and international law”⁷ Article 7 of the TEU establishes a mechanism for holding Member States responsible for acts which contradict such ideals by subscribing to their Treaty rights.⁸

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- 4 Official Journal of the European Union. 26.10.2012. C 326/1. Consolidated Version of the Treaty on European Union (TEU). Title I. Common Provisions. Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6:0023.02/DOC_1&format=PDF.
- 5 Official Journal of the European Union. 26.10.2012. C 326/1.
- 6 Official Journal of the European Union. 26.10.2012. C 326/1.
- 7 Official Journal of the European Union. 26.10.2012. C 326/1.
- 8 In an effort to avoid applying Article 7 TEU, the Commission devised the so-called Rule of Law Framework, which basically adds a preventative step before the activation of Article 7 TEU and aims to standardize an otherwise hardly regulated area of EU activity. See also: European Commission. Communication from the Commission to the European Parliament and the Council – A new EU Framework to strengthen the Rule of Law. COM (2014) 158 final 5. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0158>.

Nevertheless, none of these references explore such ideals or how they connect to one another. However, in the political and juridical European discourse, democracy, the rule of law and fundamental rights are intrinsically interrelated. In addition, none can work successfully without the others.⁹

It is worth noting that these values are accompanied by a list of specific objectives, including the promotion of social justice and protection, as well as the fight against social exclusion and discrimination at the European level (Article 2(3) of the TEU).¹⁰ In addition, the legally binding Charter of Fundamental Rights enshrines further key political, social and economic rights for EU citizens under the headings of Dignity, Freedom, Equality, Solidarity, Citizenship and Justice, while stressing the importance of the preservation and the development of these common values.¹¹ The Charter also lays down rights not covered by the European Human Rights Convention, such as data protection, bioethics, and the right to good administration, underlining critical efforts towards prohibiting discrimination based on gender, ethnicity or colour. Moreover, it addresses social rights in the workplace, such as workers' rights to be informed, to negotiate and to take collective action.

Similarly, principles and objectives are mentioned rather than acknowledged. Therefore, given the *sui generis* nature of the EU, especially as an “evolving compromise between national sovereignty and supranational supremacy”,¹² the role of the EU as a defender and promoter of human rights has fostered what Dawson calls ‘human rights scepticism’.¹³

9 Wouters and Ovádek, *The European Union and Human Rights*, 84–86.

10 Official Journal of the European Union. 26.10.2012. C 326/1.

11 Charter of Fundamental Rights of the European Union. OJ C 326, 26.10.2012, 391–407. Document 12012P/TXT 2012/C 326/02.

12 Greer, Gerards and Slowe, *Human Rights in the Council of Europe and the European Union*, 209.

13 Dawson, *The Governance of EU Fundamental Rights*, 19.

In reality, Dawson presents three main critiques. The first being related to the so-called ‘counter-majoritarian difficulty’. Given the nature of the European project, which is based on cultural diversity, but lacks deliberative democratic institutions and processes that can accommodate this diversity, disagreements over the scope of fundamental rights among states – based on their specific national features – can be challenging to accommodate. In this regard, “rights are likely to drain, rather than bolster, the legitimacy of the EU project”.¹⁴

On the other hand, the ‘communitarian critique of human rights’ highlights the European citizenship’s individualistic notion. In other words, European citizenship explicitly lists rights to European citizens, while duties are implied. At the same time, efforts to cultivate the political will and commitment to accomplish them are understated. As Weiler argues, the Union “cultivates self-centred individuals”,¹⁵ rather than fostering the necessary unity, solidarity and political commitment to deliver its principles. In the same line of reasoning, the EU’s fundamental rights are also criticised as being too closely tied to the freedoms of the Single European Market, and hence to economic capital. As Menéndez and Olsen have pointed out, property owners, particularly those who own financial capital, can use their European citizenship to challenge the legitimacy of national policies and regulations that redistribute wealth. Furthermore, these same rights that contribute to the eradication of internal physical borders can be seen as leading to the creation of external borders, as well as to the development of new social and economic barriers. Personifying the EU can thus risk leading to a project “if not ‘less social’, at least ‘less egalitarian’”.¹⁶

14 Dawson, *The Governance of EU Fundamental Rights*, 22.

15 In Dawson, *The Governance of EU Fundamental Rights*, 23.

16 Agustín José Menéndez and Espen D. H. Olsen, *Challenging European Citizenship: Ideas and Realities in Contrast* (Cham: Palgrave Pivot, 2020), 11, kindle.

The third critique is empirical, linked to the eventual added value of the EU's rights with regards to some of its alternatives, such as a set of national rules. In fact, while national judges' legitimacy is derived from a common understanding of national law and the context in which this law was conceived – i.e., international, or in this case EU judges, are often distant from the context and subject matter of their decisions.

The aforementioned 'human rights scepticism' brings us to the matter of the EU's very nature as a model of values. To what extent can the EU be viewed/considered as a model and an advocate of human rights? The answer to that question is linked to the issue of how to conceptualise the EU itself.

The EU has been mainly shaped as a technocratic and functional project. States and institutions have gradually incorporated human rights to the EU discourse and law to bring it closer to the people and legitimise the integration process *per se*. Hence, the people, with a sense of belonging to a *demos*, were not those in charge of setting the criteria for protecting common principles, and of acknowledging the role of the Union itself. In reality, the very own question of the existence of a European *demos* or of a 'European constitutional demos' has raised academic controversy and has been thoroughly discussed, assessing concerns about the EU's democracy and its legitimacy gap.¹⁷

17 It is important to highlight the fact that recently the European Union has been described as a 'demoicracy'. According to the works of Nicolaïdis (2013) and Lacey (2017) and their common work (2020), the Union cannot be founded on the notion of a supranational *demos* or a national *demos* alone, instead the EU is viewed as a coalition of states and individuals who govern together but not as one. See also Kalypso Nicolaïdis, "European Demoicracy and its Crisis", *Journal of Common Market Studies* 51, issue 2, (March 2013) <https://doi.org/10.1111/jcms.12006>; Martina Klicperová-Baker and Jaroslav Košťál, "Towards empirical assessment of the European demos and public sphere: Comparing democratic values orientations of citizens and elites", in *Integration, diversity and the making of the European public sphere*, ed. Hakan G. Sicakkan (Chentelham: Edward Elgar Publishing, 2016); Joseph Lacey and Kalypso Nicolaïdis, "Democracy and Disintegration: Does the State of

As a matter of fact, the EU does not have a classic constitutional order that brings its own authority and power to protect those values at risk, as federal states do. As Weiler stated, in the case of the EU “[...] the European constitutional discipline does not enjoy the same kind of authority as may be found in federal states, where federalism is rooted in a classic constitutional order”.¹⁸ In reality, when regarding shared values, we usually convey the recognised values of Member States, without a reference to a common *demos* or a common European public sphere.¹⁹ However, the very fact that these common values are acknowledged as the foundational

Democracy the EU Put the Integrity of the Union at Risk?”, in *Governance and Politics in the Post-Crisis European Union*, eds. Ramona Coman, Amandine Crespy and Vivien A. Schmidt (Cambridge University Press, 2020), kindle; Joseph Lacey, *Centripetal Democracy: Democratic Legitimacy and Political Identity in Belgium, Switzerland and the European Union*, (Oxford: Oxford University Press, 2017).

On democracy and supranationalism, see: Jürgen Habermas, “Why Europe Needs a Constitution”, *New Left Review* 42, nlr 11 (September – October 2001), <https://newleftreview.org/issues/iii11/articles/jurgen-habermas-why-europe-needs-a-constitution>; ____ *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: Massachusetts Institute of Technology Press, 1996); ____ “Citizen and State Equality in a Supranational Political Community: Degressive Proportionality and the Pouvoir Constituant Mixte”, *Journal of Common Market Studies* 55, no. 2, (March 2017), <https://doi.org/10.1111/jcms.12517>; Richard Bellamy, “Democracy without Democracy?: Can the EU’s Democratic ‘Outputs’ be Separated from the Democratic ‘Inputs’ Provided by Competitive Parties and Majority Rule?”, *Journal of European Public Policy* 17, no. 1 (January 2010), <https://doi.org/10.1080/13501760903465256>; Richard Bellamy, *A Republican Europe of States: Cosmopolitanism, intergovernmentalism and democracy in the EU* (Cambridge: Cambridge University Press, 2019).

- 18 Joseph H. H. Weiler, “In defence of the status quo: Europe’s constitutional Sonderweg”, in *European Constitutionalism beyond the State*, eds. Joseph H. H. Weiler and Marlene Wind (Cambridge University Press, 2003), 21.
- 19 Anne Elizabeth Stie, “Crises and the EU’s Response: Increasing the Democratic Deficit?” in *The Palgrave Handbook of EU Crises*, eds. Marianne Riddervold, Jarle Trondal and Akasemi Newsome (Cham: Palgrave Macmillan, 2021), 700, kindle.

values of the Union implies that these values are on the basis of the construction of a European polity.²⁰

Hence, it is worth tracking the evolution of the human rights paradigm as a matter of EU law, policy, and practice.

The EU human rights paradigm in the Treaties

Human rights were not incorporated in the wording of the first Community, the European Coal and Steel Community (ECSC), which was established in 1951. Human rights, on the other hand, were referenced in two fairly political texts from the same period: the Treaty of Paris, creating a European Defence Community (EDC) and the Treaty creating a European Political Community (EPC) – projects closely tied to one another. In fact, in 1952, the newly formed Assembly of the ECSC was charged with drafting the statute for a European Political Community, with an ‘Ad Hoc Assembly’ being formed for that purpose. Article 2 of the EPC Treaty stated that the Community’s goal would be to contribute to safeguarding human rights and basic freedoms in its Member States. In turn, Article 3 specified that the provisions of the ECHR were to become an integral part of the “new Community Constitution”.²¹ According to Article 45 of the same Treaty, any dispute arising from an action taken by one of the Community institutions that jeopardised the rights safeguarded by the ECHR was to be referred to the Community Court. The Treaty also defined that such jurisdiction would be turned over by the Court to the “European Court of Human Rights in any case involving a question of principle of relevance to all the parties to the ECHR”. Article 104 of the EPC Treaty acknowledged an intervention by the Community to maintain

20 In this chapter, European polity is understood as a political unity among ‘the peoples of Europe’, defined by their active interest in and influence by European politics.

21 De Búrca, “Human Rights Law”, 484.

“constitutional order and democratic institutions” within the territory of a Member State.²²

However, those Treaties and the related efforts for a political union were unsuccessful and, with them, human rights were left out of the later Treaties signed in Rome in 1957, namely the European Economic Community (ECC) and Euratom. Indeed, the European project predominantly evolved under a functional paradigm, delineated by the common market mandate, while the subject of human rights protection was remitted mostly to national constitutional systems. In reality, the Union was mainly constructed and developed in a technical form. Nevertheless, as the EU’s pace and depth of integration developed, human rights became increasingly important to the EU and were incorporated into EU legislation.²³ Human rights were viewed as a “mechanism for forging a more politically responsive and citizen-oriented EU project”.²⁴ Throughout the decades, noteworthy transnational action touched on topics of humanistic character, drawing further attention to political leaders.²⁵

The establishment of a ‘European Political Cooperation’ on foreign policy in 1970 and the European Council’s proclamation on European identity in 1973 increased awareness over the EU’s external role and recognised the principles of human rights and values, as critical elements of the EU’s *raison d’être*. Nonetheless, human rights were not included in the Treaties until the signature of the Single European Act (SEA) in 1986. The SEA was the first significant reform of the founding treaties. It intended to accelerate

22 De Búrca, “Human Rights Law”, 485.

23 Wouters and Ovádek, *The European Union and Human Right*, 70-93.

24 Dawson, *The Governance of EU Fundamental Rights*, 20.

25 For a thorough discussion on the Human Rights integration into the European Law and institutional activism, see: Evanthia Balla, “A integração dos direitos humanos no direito europeu: o poder das instituições numa perspetiva teórica neofuncionalista”, in *Justiça e Direitos Humanos numa Era de transição*, eds. Rocha-Cunha, Silvério; Balla, Evanthia; Vasques, Rafael (Vila Nova de Famalicão: Ed. Húmus. 2019), 61-82.

the construction of the single market and reform the European institutions with a view to the accession of new members. In the preamble, the twelve signatories expressed their desire to foster democracy and their awareness of their responsibility to act in ways that reflect their commitments to democracy and human rights to maintain peace and security – a commitment they made within the context of the United Nations Charter.²⁶

The Maastricht Treaty signed in 1992 included provisions that were clear efforts to democratise the integration process and strengthen the EU's political structure. It defined the creation of an 'even closer Union among the peoples of Europe' as a goal and created for that purpose a European citizenship. It also established the European Union as an international actor with legal personality. The Maastricht Treaty also conferred a full Treaty status to human rights, as part of EU law. In addition, under the pillar of Common Foreign and Security Policy, Member States reiterated their commitment to protect their common values and "develop and consolidate democracy and the rule of law, respecting human rights and fundamental freedoms" (Article J.1). However, the rejection of the Maastricht Treaty in French and Danish referendums clearly revealed that national parliaments and the European people's devotion to a mere functional techno-economic project can be fragile. In other words, it showed that the 'permissive consensus' had come to an end. As Coman points out, while the elites drove this next step into the integration process, the outcomes were portrayed as being in line with the desires and expectations of 'the peoples of Europe'. Yet, reforms attempting to legitimise and reinforce the political identity of the EU, came to prove that "governing for the people but without the people of Europe was no longer possible".²⁷

In reality, between the birth of the European project in the 1950s until the beginning of the 1990s, there was a 'permissive

26 Wouters and Ovádek, *The European Union and Human Rights*, 20.

27 Coman, "Democracy and the Rule of Law: How Can the EU Uphold its Common Values?", 362.

consensus, as described by Lindberg and Scheingold in 1970, which in turn progressively gave way to a ‘constraining dissensus’.²⁸ Under the ‘permissive consensus’, there was limited direct involvement from the public and/or national parliaments on European decision-making processes *per se*, and citizens’ trust was mainly output-oriented. With the deepening and widening of the project and the growth in politicisation accompanying this development, it became increasingly difficult to rule without actively involving the ‘peoples of Europe’.

In the 1990s, human rights protection and promotion became increasingly important in the EU’s legislation and policy – a trend that has persisted until today. At the 1993 European Council meeting in Copenhagen, the EU’s growing recognition of the significance of values, namely human rights’ protection, was also apparent. With the view to the following EU accessions, the European Council established that any European state wishing to join the EU must satisfy essential criteria of democracy, market economy and administrative ability (known as the Copenhagen criteria). These criteria, hence, provide that any country that seeks to join the European Union must have stable institutions, guarantee democracy, the rule of law, human rights, as well as respect for and protection of minorities.

The Amsterdam Treaty signed in 1997 came to enshrine these ‘criteria’ for EU accession in its Articles 6 and 49. The Treaty also granted the EU the authority to adopt legislation to combat discrimination within the scope of its competences. Simultaneously, it was the Amsterdam Treaty that established Article 7. The article provides a ‘suspension of rights’ mechanism for ensuring that the values of the European Union are upheld from serious and persistent violations from Member States. The provisions laid down in Article 7 provisions were expanded in the 2001 Treaty of Nice to

28 Leon N. Lindberg and Stuart A. Scheingold. *Europe’s would-be polity: patterns of change in the European community*. Englewood Cliffs: N.J. Prentice-Hall, 1970.

encompass cases in which a Member State is regarded to be on the verge of violating EU values. In reality, the EU's decision to sanction Austria after the outcome of the 1999 Austrian elections and the subsequent formation of a government that included the far-right Austrian Freedom Party, Freiheitlichen Partei Österreichs, FPÖ (known as the "Haider case"),²⁹ raised concerns over the adequacy of the EU's practices of enforcement. As a matter of fact, since then, the EU has adopted a more preventative or softer diplomacy/strategy.

The EU Charter of Fundamental Rights and Freedoms was published in 2000, little over a year after the entry into force of the Amsterdam Treaty and one year prior to the signature of the Treaty of Nice. In 2007, this culminated in the signature of the Lisbon Treaty, which established a constitutional framework for the protection of EU human rights.³⁰ In 2009, signatories to the Lisbon Treaty eventually reaffirmed their commitment to the values of respect for human rights, democracy and the rule of law. The EU Charter of Fundamental Rights and Freedoms was also ultimately granted binding legal substance by the Lisbon Treaty.

29 Austria was penalised in January 2000 for having a government that includes the far-right Austrian Freedom Party. However, EU leaders were hesitant to provide long-term support for a hard stance on this subject. According to Leconte, the breakdown of this "cordon sanitaire" is also largely due to domestic political elites' unwillingness to institutionalise a principle that could be detrimental to their own countries, which could ultimately mean a far-reaching Europeanisation of domestic politics and party strategies. For more on the Haider Affair and the challenging question of enforcement, see: Cécile Leconte, "The Fragility of the EU as a 'Community of Values': Lessons from the Haider Affair", *West European Politics*, 28, issue 3, (published online: 25 January 2007): 620-649, doi: 10.1080/01402380500085905 and Ramona Coman, *The Politics of the Rule of Law in the EU Polity* (Cham: Palgrave Macmillan, 2022), kindle.

30 During this time of significant constitutional shifts in the area of human rights, there were also a number of other interesting institutional developments taking place, such as the establishment of a network of fundamental rights experts and the EU Fundamental Rights Agency.

At the same time, the Lisbon Treaty mandated the ratification of the ECHR by the EU.³¹

It is worth mentioning that the 2004 Constitutional Treaty attempted to integrate human rights in a more ambitious manner. The Constitution would grant the EU a new status to safeguard human rights and principles. However, the document was rejected in referendums in the Netherlands and France, indicating that the constituents were unwilling to provide the EU a constitutional authority.³²

It is evident from the preceding discussion that the EU has progressively incorporated human rights protection into its endeavours as the project has been expanded and deepened. As a matter of fact, recognising common EU values, assuming the protection of human rights internally and externally, and establishing compliance with those rights as a treaty condition for EU membership, are important milestones in the evolution of the European project. In addition, establishing a mechanism to deter Member States from implementing policies against those values is also a significant mark in the EU's integration process. Besides, human rights case laws decided by the European Court of Justice have increased over the years, not only in terms of the total number of decisions, but also in terms of the variety of subject matters that have been judged. Important components in the recognition and preservation of European values also include the EU's own Charter of Rights and the establishment of institutions and mechanisms to support and develop an EU human rights policy.

As observed by Wouters and Ovádek, the “responsibility” to incorporate the highest standards of values and human

31 Wouters and Ovádek, *The European Union and Human Rights*, 24.

32 The Lisbon Treaty was accepted by most Member States in 2008, but an Irish referendum rejected it on 12th of June 2008, threatening the whole project. On the 2nd of October 2009, Ireland approved the treaty in a second referendum.

rights protection within the European *aquis* “has, over time, been acknowledged as a matter of law, policy and practice”³³

However, the EU has been growing as a transnational and multilevel polity but without a ‘standard’ model of democracy. As Coman so eloquently put it, it was the political elites who actually “sought to unify the people of Europe, to generate a feeling of belonging and, ultimately, to legitimise the EU’s *raison d’être* both internally and in its relationship with the wider world”³⁴ This reality has raised concerns over the EU’s legitimacy, particularly in light of the growing deliberation gap between citizens and European institutions, thus leading to a (re)politicisation of the integration process. Moreover, the recent multiple crises which hit the EU have invigorated political debates over national sovereignty and the protection of values. The democracy and rule of law crises in some Member States have particularly challenged the EU’s model of values, creating an even more polarised view of Europe.³⁵

In the next part of this chapter, we will look at how the crises on populism, democracy and the rule of law can challenge the European construction as a Union of values. The central premise is that the formation of a more political union loyal to human values is essential for legitimising the EU’s actions, safeguarding it from crises, and enhancing its ability to respond to them.

33 Wouters and Ovádek, *The European Union and Human Rights*, v.

34 Coman, “Democracy and the Rule of Law”, 359. See also: the discussion over the “paradox of EU’s human rights policies” of Alston and Weiler “An ‘Ever Closer Union’ in Need of a Human Rights Policy”, 661 and, over the legitimacy question, see: Christian Schweiger, “The Legitimacy Challenge”, in *The European Union in Crisis*, eds. Desmond Dinan, Neill Nugent, William E. Paterson (London: Palgrave Macmillan, 2017), 189-190.

35 For a multifaceted approach on EU’s politicisation, see: Taru Haapala and Álvaro Oleart eds, *Tracing the Politicisation of the EU The Future of Europe Debates Before and After the 2019 Elections* (Cham: Palgrave Macmillan, 2022). See also: Vivien A. Schmidt, “Politicization in the EU: between national politics and EU political dynamics”. *Journal of European Public Policy* 26, issue 7, (2019). DOI: 10.1080/13501763.2019.1619189.

Crises and how they challenge the EU as a Union of values

In recent years, in a crisis-ridden climate, European integration has become more politicised, while polarisation inside the EU has deepened. In fact, in areas where there has been greater integration, such as the internal market, depoliticisation³⁶ and lack of active citizenry – has led to (re)politicisation not only by pro-EU parties, but also by anti-EU political forces.³⁷ In particular, right-wing populist parties have achieved noticeable electoral results in some countries, including in key founding Members States, such as France, Italy and the Netherlands, as well as in both the 2014 and 2019 European Parliament elections. These parties have advanced with a nationalist and xenophobic discourse, having gradually become political realities, placing at risk human rights, pluralism and liberal values. As Raube and Reis support, the rise of populism connects to the current crises on democracy and on the rule of law. These interrelated systematic challenges can be understood as a crisis of values as such and as a challenge to the European civil society and to the integration project itself.³⁸ But how does populism relate to these particular crises?

In reality, different interpretations of populism have emerged in relation to democracy. According to some scholars, populism is ultimately a democratic manifestation.³⁹ Others discuss populism

36 According to the Cambridge English Dictionary depoliticisation is ‘the action of causing something or someone to have no political connections’.

37 For Wilde and Trenz reverse politicizations is not “viable”, see: “Can the politicization of European integration be reversed?”, 137; On the other hand, Elena García-Gutián particularly discusses EU Politicisation and the Democratic Deficit Discourse, in *Tracing the Politicisation of the EU*, eds. Haapala and Oleart, 62.

38 Raube and Reis, “The EU’s Crisis Response Regarding the Democratic and Rule of Law Crisis”, 606-607.

39 Ernesto Laclau, *On Populist Reason*, (London: Verso 2005) and Giorgos Katsambekis, “The populist surge in post-democratic times: Theoretical

as a corrective alternative to depoliticisation *per se*.⁴⁰ However, the last decades have served as a warning that democracy can be undermined, and populism may significantly contribute to this (de)democratisation process.⁴¹

Indeed, as Castellà and Simonelli sustain, once populist parties gain power, they tend to undermine the foundations of constitutional democracy and obscure the separation of powers, eroding the independence of the court, granting broad legislative authority to the executive structure, and eliminating limits to presidential term.⁴² Moreover, populists gain control of the media and persecute non-governmental groups, thus restricting the public's capacity to express themselves.⁴³

In addition, the rise of social media has allowed populist forces to propagate their discourse as never before. Online disinformation and the use of negative behaviours – basically by criticising or stigmatising ‘the others’ – have allowed populists to strengthen their propaganda as the only true holders of ‘truth’.⁴⁴ At the same time, they disapprove mainstream media as servants of the interests

and political challenges”, *The Political Quarterly*, 88, issue 2, (April–June 2017), <https://doi.org/10.1111/1467-923X.12317>.

- 40 Margaret Canovan, “Trust the people! Populism and the two faces of democracy”, *Political Studies* 47, no. 1 (March 1999), <https://doi.org/10.1111/1467-9248.00184>; Marc Plattner, “Democracy’s Past and Future: Populism, Pluralism, and Liberal Democracy”, *Journal of Democracy*, 21, no. 1, (January 2010), <https://www.journalofdemocracy.com/wp-content/uploads/2011/12/Editors-Intro-21-1.pdf>.
- 41 Cas Mudde and Cristobal Rovira Kaltwasser, *Populism: A Very Short Introduction* (Oxford: Oxford University Press, 2017), 90.
- 42 Josep Maria Castellà and Marco Antonio Simonelli, “On the Institutional Context of Populism”, WORKING PAPER, DEMOS, June 2020, 5-6.
- 43 Assya Kavrakova, “Facing the Threat of Populism: How the European Commission Can Reconnect with Citizens”, in *The Impact of Populism on European Institutions and Civil Society Discourses, Practices, and Policies. Switzerland*, eds. Carlo Ruzza, Carlo Berti, Paolo Cossarini (Cham: Palgrave Macmillan, 2021), 179.
- 44 Irene Viparelli and Evanthis Balla, “European Crises and Right-Wing Populism: The Case of Lega Nord”. In *Global Politics in a Post-Truth Age*, eds.

of the ‘elites’. Thus, the populist message has been spreading in different local and international online platforms, allowing access and giving public space for debate. This means giving the floor to all, including ‘uncivil’ discourse, personal insults and group insults.⁴⁵ In this regard, populism constitutes a threat to both constitutional and representative dimensions of contemporary democracies. This leads to what Urbinati has broadly described as a disfigured form of representative power/democracy.⁴⁶ In other words, by undermining democracy, rule of law and pluralism,⁴⁷ as well as the respect for human rights, populism lurks the European public sphere *per se*.

How do populist hazards manifest themselves and how do they impact in the EU as a model of values in practice? Increasing the constitutionalisation of values was intended to reinforce the EU’s identity and its normative authority, i.e., its capacity to protect European citizens and define its relations with the rest of the world. Nevertheless, such consensus among EU Member States has not always been ensured. Under the Copenhagen criteria, for instance, each candidate country shall attempt to reform its judicial institutions to secure its independence from political control in order to safeguard admission to the EU.⁴⁸ Nonetheless, following their admission, some new Member States adopted illiberal policies and altered provisions on judicial independence. Hence, threatening the very own essence of democracy to foster plurality, freedom and equality. Indeed, over the last decade, some Member States, such as Romania, Poland and Hungary, have attempted to change democratic norms by reducing the independence of judicial institutions and limiting press freedom, thus challenging the principles and foundations of EU integration and values.

Leo S.F. Lin, Zeynep Selin Balci, Patrick Vernon (England: E-International Relations, 2022), 80, 84-85.

45 See: Howard Tumber and Silvio Waisbord (eds), *The Routledge Companion to Media Disinformation and Populism* (New York: Routledge, 2021).

46 Nadia Urbinati, *Me the People* (Harvard University Press, 2019), 30, kindle.

47 Kavrakova, “Facing the Threat of Populism”, 181.

48 Coman, “Democracy and the Rule of Law”, 362, kindle.

But to what extent have values failed to be taken seriously in the EU? The case of Hungary is an illustrative example of illiberal governmental practices which have threatened the independence of the judiciary, separation of powers, as well as the preservation of fundamental rights. This transformation of the political regime has drawn significant political attention and media coverage and has created a challenge to the legitimacy of the European Union as a model of values.⁴⁹

Indeed, in 2010, the Hungarian government sought to enact a new constitution that would have given the government more power over the country's independent institutions, despite EU laws protecting their autonomy. It further tried to force 274 judges into retirement, which would compromise the efficiency of the country's court system.⁵⁰ The decision of a nine-year term for the National Judicial Office president was equally questioned. In January 2012, the European Commission sued Hungary, and MEPs requested Article 7 to be invoked. The Commission's decision was based on non-compliance with the European regulations on equal treatment and Hungary's act to lower the pension age, breaching the provisions of Article 2. The Commission won, and the Hungarian government adopted the Court's retirement age ruling. Nonetheless, Viktor Orbán's government did not stop passing more measures that undermined constitutional checks and balances, disrespecting human rights, being thus a stark indication that the EU standards do remain vague.

In September 2018, the European Parliament did, in fact, look into whether Hungary was in risk of breaching Article 2's basic rules (Article 7(1) of the TEU). The European Parliament voted in favour of the proposal by a large majority (448 to 197, with 48 abstentions).

49 Ramona Coman, Amandine Crespy and Vivien A. Schmidt, "Introduction: The European Union as a Political Regime, a Set of Policies Governance and Politics in the Post-Crisis European Union", in *Governance and Politics in the Post-Crisis European Union*, eds. Coman, Crespy and Schmidt, 13.

50 Council of Europe, Opinion no.621/2011, 10.

Questions such as “freedom of expression”; “academic freedom”; “freedom of association” and the “functioning of the constitutional and electoral system” in Hungary were among the areas of concern highlighted in the Report of the EU Parliament’s Committee on Civil Liberties, Justice, and Home Affairs.⁵¹ The right-wing populist party, Fidesz, was eventually suspended from the European People’s Party (EPP) on 20 March 2019 (though not expelled).

In 2020, under the shadow of the Covid-19 pandemic and after gaining two-thirds of parliamentary support in three consecutive elections, the coalition of Fidesz and the Christian Democratic People’s Party (KDNP) further solidified their practices and particularly their influence over national institutions. This trend reached its climax in March 2020 with the approval of an emergency statute, which granted the government the power to rule forever by decree. The fight against the pandemic provided the initial justification for this legislation, which was finally annulled by the Hungarian Parliament in June 2020. However, in the 2021 edition of Freedom House’s Nations in Transit Report, Hungary’s Democracy Score further deteriorated from 3.96 to 3.71.⁵²

Some critics of Orbán’s rule, including Bozóki and Heged, have argued that the European Union has given room to hybrid regimes,⁵³ such as Hungary’s. Hungary, as a European Member State, must comply with the Union’s framework – one that the Hungarian government acts upon and which is an important element of the

51 European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)), available at https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.html.

52 Available at <https://freedomhouse.org/report/nations-transit>. See also: Kavrakova, “Facing the Threat of Populism”, 180.

53 Adopting Bogaards’ definition, the authors view ‘hybrid regimes’ as the regimes that fall under a transitional political status, since they are neither democracies nor autocracies. See also: Matthijs Bogaards, “How to classify hybrid regimes? Defective democracy and electoral authoritarianism”, *Democratization* 16, issue 2, doi: 10.1080/13510340902777800.

Hungarian regime, since Member States concede parts of their sovereignty to the EU. In this regard, they explain that “the EU functions as a “regime sustaining”, a “regime constraining, and last but not least, as a “regime legitimising” factor for Hungary, which compels us to describe Hungary’s current political system as an “externally constrained hybrid regime”.⁵⁴ On the other hand, Akaliyski, Welzel and Hien claim that crises, opposed to the Union’s ambition of cultural integration, cast doubts on whether the proclaimed Union of values actually exists or whether it will ever be achieved.⁵⁵

Ultimately, the underlying issue is that, once in power, populists purposefully challenge liberal democracy and the rule of law, persistently reducing the opportunity for public debate. This results in a so-called decrease of civic space – the foundation of every open and democratic society which allows people and civil society organisations to engage and interact freely – thus blocking the violation of these principles by authoritative regimes. Simultaneously, such rhetoric has created further division between ‘the peoples of Europe’ and Brussels, based upon the ‘otherness’ discourse. In light of this, the Union should reconsider its existing political model, moving it closer to the people of Europe to narrow the gap and earn the legitimacy necessary to serve as a model and guardian of values.

The Union calls for a Polity of Europeans (Πολιτεία ευρωπαίων), a participative (and eventually representative) democracy. In order to defend its foundation values, dialogue must break through the “Brussels bubble” and occupy the space left open by populist speech. There is a strong connection between the protection of human rights and political plurality, both of which need a vibrant

54 András Bozóki and Dániel Heged, “An externally constrained hybrid regime: Hungary in the European Union”, *Democratization* 25, issue 7, (2018), doi/full/10.1080/13510347.2018.1455664, 1174.

55 Plamen Akaliyski, Christian Welzel and Josef Hien, “A community of shared values? Dimensions and dynamics of cultural integration in the European Union”, *Journal of European Integration* 44, no. 4 (2022): 570, <https://doi.org/10.1080/07036337.2021.1956915>.

public sphere to thrive. For Habermas, the public sphere is the arena in which citizens may engage in meaningful dialogue towards political and social emancipation.⁵⁶ Similarly, for Bellamy public sphere, that includes ‘common media, discourse and language or languages’, allows citizens to address each other as a public and urge politicians to providing common forums for communication.⁵⁷ On the other hand, Kavrakova has extensively discussed the need for the EU to “sustaining public spaces by supporting civic actors, civic education and encouraging interactions”.⁵⁸ In this vein, maladies such as populism can be countered through an active citizenship and a thorough understanding of the specificities of such phenomena, while crafting responses in favour of the EU’s fundamental rights and values – for instance, related to minorities and their role in an inclusive democratic society.

Brombo follows a similar line of reasoning in arguing that the populist wave now sweeping Europe should be considered as a wake-up call to the EU’s institutions related to the need of making the European project more welcoming to all types of democratic participation. The populist movement has hit Europe just as EU institutions have been trying to cope with the need of a more open and citizen-oriented project that allows individuals to voice their opinions and have a hand in shaping policies and decisions. They should have been able to do so not only by casting a vote every five

56 See: Habermas on “Citizen and State Equality in a Supranational Political Community: Degressive Proportionality and the Pouvoir Constituant Mixte”, *Journal of Common Market Studies* 55, issue 2, (March 2017): 174 doi: 10.1111/jcms.12517. Habermas suggests a new model of ‘double sovereignty’, made of ‘the entire citizenry of Europe, on the one hand, and of the sum of the citizens of the participating nation-states, on the other’. That might contribute to irrigate the cultural supports the EU has always lacked while continuing to provide voice and reassurance to constituencies concerned to protect national interests.

57 Richard Bellamy, *A Republican Europe of States: Cosmopolitanism, intergovernmentalism and democracy in the EU* (Cambridge: Cambridge University Press, 2019).

58 Kavrakova, “Facing the Threat of Populism”, 192-194.

years for their representatives in the European Parliament (an example of representative democracy), but also by joining civil society organisations and by participating in the policymaking process (participatory democracy). This should allow citizens to express their will and contribute to shape the Union they need.⁵⁹

To this end, in 2021, the Commission launched a new Conference on the Future of Europe to supply a frame to motivate and reflect on a better EU and eventually lead to a more substantively polity – generative framework. Nevertheless, broadly speaking, conferences cannot provide such assurances of a more democratically valid project. The resolution of present crises depends on the sense of belonging, solidarity, and a deeper political engagement of European citizens.

Final remarks

The European Union accelerated the deepening and widening of integration, especially after the end of the Cold War. Yet, it aimed at fortifying European unity and bolstering the credibility of EU institutions by reinforcing the ‘Union of values’ frame included in the treaties. By constitutionalising values held by all Member States, a feeling of belonging can be established, ultimately legitimating the EU’s *raison d’être* both at home and in its interactions with the rest of the world. In other words, the EU has sought to achieve an “ever closer union among the peoples” inside an identity-forming narrative centered on the promotion of shared values.

Nevertheless, the realisation of these goals has been overshadowed by a number of crises that have raised serious questions

59 Pierluigi Brombo, “The Interaction Among Populism, Civil Society Organisations and European Institutions”, in Ruzza, Berti, Cossarini.2021. See also: Kavrakova in the same edition. She also highlights that the populist turn should be used by the EC (and other EU institutions) to develop strategies for rebuilding relationships with the people and CSOs.

about the ultimate fulfilment of a Union of values. Questions over ‘solidarity’ in the European Union have arisen since the 2008 financial crisis, the refugee crisis, Brexit, as well as the Covid-19 pandemic and the war in Ukraine. At the same time, populism and Euroscepticism have gained momentum taking advantage of these perils. Moreover, the rise of radical right-wing populist parties in a number of European countries has undermined pluralism and freedom and posed a threat to democratic values and the rule of law.

Populism has raised substantial public concerns about economic, social and cultural issues too. The mostly technocratic model of European integration has incorporated rights into the EU’s politics and law. Regardless of how important that is, the growing (re)politicisation of the EU requires the recognition of the Union as a legitimate provider of rights, not as a conglomerate of states but rather as a Union from the people to the people. Ultimately, we need a more democratic and trustworthy project, including the strengthening of the European public space and sphere as a response to crises against democracy and the rule of law in general, as well as to the populist challenge in particular.

Nevertheless, the gaps in ‘the peoples of Europe’ involvement in the evolution of the project can be remarked as a considerable drawback to the existing political system of the European Union. Hence, a new paradigm shift in the political order of the EU encompasses transiting from the current multiple ‘demoicracy’ model to a participatory and eventually representative European democratic model. This shall give the EU the legitimacy it requires to act as a demos (*δημος*) of values, and fill the void populists occupy to propagate their ideology and perpetuate further crises.

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Preliminary reflections for a biopolitical reading of the “ambiguous dialectic” of Human Rights and Cosmopolitanism

Irene Viparelli

1. Introduction

In the first pages of his *Perpetual Peace*, Kant provides us a classic portrayal of the “virtuous dialectic” between the rights of man, the republican constitution and the establishment of perpetual peace. Thus:

The republican constitution is a constitution that is established, first, according to principles of the freedom of the members of a society (as human beings), second, according to principles of the dependence of all on a single, common legislation (as subjects), and third, according to the law of the equality of the latter (as citizens of the state). [...] Besides the purity of its origin, [...] the republican constitution also offers the prospect for the desired consequence, namely, perpetual peace.¹

Two hundred years later, in his famous essay *Kant’s Idea of perpetual Peace: At Two Hundred Years’ Historical Remove*, German philosopher Habermas showed why the Kantian hypothesis is actually open to doubt. For Habermas, during the 19th and 20th centuries, the rise of republican states did not engender a “virtuous dialectic”

¹ Immanuel Kant, *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*, trans. David L. Colclasure (London: Yale University Press, 2006), 74-75.

between human emancipation and peace in international relations, rather becoming the very reason for new wars: “the republican convictions of citizens were supposed to prove themselves in their willingness to fight and die for Volk and fatherland”.²

However, as is well-known, for Habermas, the incongruities of Kantian’s cosmopolitan theory “support the claim that a conception of cosmopolitan law appropriately reformulated for contemporary conditions might well meet with a supportive constellation of forces”.³ Thus, they lead the way for rewriting the “virtuous dialectic” between human rights and cosmopolitanism in accordance with the historical framework and challenges of the present world.

Indeed, according to Habermas, the history of the 20th century has demonstrated the deep striving between the Kantian grounding of cosmopolitanism in the fundamental rights and the subordination of the “autonomy of citizens” to the mediation of the “sovereignty of [...] States”.⁴ Nonetheless, the history of the 20th century has also overcome the theoretical and political boundary of the Kantian approach. Firstly, “behind the veil of the total war instigated by Hitler, the breakdown of civilisation was so complete that it unleashed a worldwide upheaval and facilitated the transition from international law to cosmopolitan law”.⁵ Thus, all international states have finally committed to respecting human rights, as proclaimed in the Universal Declaration of 1948. Later on, economic globalisation, the boom of new technologies, the rise of the information society and the end of the Cold War further limited the sovereignty of States, bringing additional hurdle towards the constitution of a global community of free and equal

2 Jürgen Habermas, “Kant’s Idea of perpetual Peace: At Two Hundred Years’ Historical Remove,” in *The Inclusion of the Other. Studies in Political Theory*, eds. Ciaran Cronin and Pablo de Greiff (Cambridge: The MIT Press, 1998), 172.

3 Habermas, “Kant,” 171.

4 Habermas, “Kant,” 181.

5 Habermas, “Kant,” 178.

people. Yet, for Habermas, we are leading with an incomplete and precarious transition, always menaced by the implementation of opposite trends at the international level.

The Habermasian redrafting of Kantian project superbly sums up the theoretical assumptions of a generation of “new cosmopolitans”⁶ which, during the last decade of the 20th century, have tried a renewal of cosmopolitan tradition.

Nevertheless, this renaissance has not befallen without polemics. On the one hand, realist thinkers such as Danilo Zolo have defined the “cosmopolitan transition” by Habermas as a “Cosmopolitan Model of the Holy Alliance”.⁷ Indeed, for Zolo, the contemporary international governance is actually based on the power of the Security Council and on a sort of “justice of the victors”, represented by penal international justice. Hence, legal globalism, rather than the limited sovereignty of states, constitutes the political tool used by major world powers to safeguard and deepen their dominance in the international sphere. According to Zolo:

The strategy of global security requires the major powers, seen as responsible for world order, to regard the old principle, sanctioned at Westphalia, of non-interference in the

6 David Harvey, *Cosmopolitanism and the Geographies of Freedom* (New York: Columbia University Press, 2009), 77. (From now on, the acronym CGF followed by the page number will be used in the *corpus* of the text). According to Harvey, “Challenges mounted to the sovereign powers of the state (by, for example, the formation of the European Union and neoliberalisation) and to the coherence of the idea of the nation and the state (through massive cross-border capital flows, migratory movements, and cultural exchanges) have opened a space for an active revival of cosmopolitanism as a way of approaching global political economic, cultural, environmental, and legal questions. Influential thinkers, such as Nussbaum, Habermas, Derrida, Held, Kristeva, Beck, Appiah, Brennan, Robbins, Clifford, and many others, have written persuasively on the topic in recent years” (CGF, 78).

7 Danilo Zolo, *Cosmopolis. Prospects for World Government* (Cambridge: Polity Press, 1997), chap. 1, kindle.

domestic jurisdiction of nation-states as having been superseded. They are called on to exercise and legitimize their right and duty to undertake ‘humanitarian intervention’ whenever force is required to solve crises within individual nations, and particularly to prevent or put an end to serious violations of human rights.⁸

Thus, echoing Schmitt’s famous critique of humanitarian universalism, Zolo demonstrates that the alleged “virtuous dialectic” of human rights and cosmopolitanism in reality represents a “vicious dialectic”. Far from bringing peace in international relations, it entails a contemporary reshaping of the medieval idea of *bellum justum*, which dissolves any juridical regulation of war. Hence, the idea of perpetual peace turns into its opposite: a potentially infinite state of war.

Following a complementary path, the culturalist criticism has also questioned the universality of human rights and, thereby, the claim that human rights can become the basis of a new world order. Already in 1947, the Executive Board of the American Anthropological Association, in its celebre *Statement on Human Rights*, argued: “How can the proposed Declaration be applicable to all human beings, and not be a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America?”⁹

The anthropological analysis, focused on the concrete shaping of individuals by different cultures counter the abstract concept of individuality at the core of the legal and political basis of the Western legal tradition. Over modernity, the Western understanding of man has recognised itself as the only one consistent with

8 Id., *Victors’ Justice. From Nuremberg to Baghdad*, trans. M. W. Weir (London – New York: Verso, 2006), 48.

9 The Executive Board of the American Anthropological Association (AAA), “Statement on Human Rights,” *American Anthropologist* 49, no. 4 (Oct.–Dec., 1947): 539.

the human essence, having proclaimed its superiority over other cultures, declaring “monopoly” on the definition of “human”.

The consequences of this point of view have been disastrous for mankind. Doctrines of the “white man’s burden” have been employed to implement economic exploitation and to deny the right to control their own affairs to millions of peoples over the world, where the expansion of Europe and America has not meant the literal extermination of whole populations.¹⁰

For disrespecting the cultural ground of individualities as well as cultural diversities, human rights necessarily fail to represent the principles of a new world order. Thus, the success of such rights may just lead to a damaging erosion of interculturality – a dangerous westernisation of the world: “An effective world-order cannot be devised except insofar as it permits the free play of personality of the members of its constituent social units, and draws strength from the enrichment to be derived from the interplay of varying personalities”.¹¹

We argue that the two critical approaches discussed herein share virtues and vices. Undoubtedly, both clearly reveal that “virtuous dialectic”, described by Kant and Habermas, may turn into a “vicious dialectic” between a “false universality” and the effective domination of the great Western powers. Hence, they raise key questions: why have human rights become a new tool for legitimising war? Why does the “cosmopolitan transition” reproduce hegemonic relations? How should we deal with human rights after colonial modernity? Is it possible to reconcile cultural pluralism with the universalism of human rights?

However, we argue that the main limit of these viewpoint is represented by the rejection tout court of cosmopolitanism, dismissing “humanity” as the political subject of a common project of

10 The Executive Board of AAA, “Statement,” 540.

11 The Executive Board of AAA, “Statement,” 543.

emancipation. The radical denial of cosmopolitanism, if stretched to its edge, may prove to be politically harmful and may lead to nihilistic views. This risk is well underlined by David Harvey who, while criticising the postcolonial studies of Mehta and Chakrabarty, states: “these authors seem to propose no other way to compensate for liberal or socialist universalism and by extension Kantian failings other than by leaping straight from the Kantian frying pan into the Heideggerian fire” (CGF, 44-45). According to Harvey, the radical refusal of liberal or socialist universalism setting out a theoretical framework exclusively based on the “truth of particular elements”, i.e., on cultural identities and on the local (or, we would add, national) dimension, may open the path to deeply conservative political viewpoints:

At worst, it brings us back to narrow and sectarian politics in which respect for others gets mutilated in the fires of competition between the fragments. And, it should not be forgotten, this was the path that allowed Heidegger to reach his accommodation with Nazism, and which continues to inform the rhetoric of fascism.¹²

We finally identify our main theoretical problem: How can we keep a universal point of view on the basis of the “ambiguous dialectic” between human rights and cosmopolitanism? Is it possible to assume realist and culturalist critiques while avoiding “human subject” fragmentation in state communities or cultural identities? On the basis of political and ideological instrumentalisation of human rights, how can we keep thinking about the historical conditions, allowing “the free development of individualities”?¹³ How to build a world where “the general reduction of the necessary labour of society to a minimum”, i.e., the scientific and technologic

12 David Harvey, *The Condition of Postmodernity. An Enquiry into the Origins of Cultural Change* (London-Cambridge: Blackwell Publishers, 1989), 351.

13 Karl Marx, *Grundrisse*, trans. Martin Nicolaus (New York-Toronto: Random House, 1973), 706.

development, “corresponds to the artistic, scientific, etc. development of the individuals”?¹⁴

In this chapter, we will try to set out some preliminary remarks on a critical review of the “ambiguous dialectic” of human rights and cosmopolitanism from human emancipation viewpoint. We will firstly present some remarks on the culturalist and realist “objections” to human rights. We will then approach the theoretical-political viewpoint of “subaltern cosmopolitanism”, with a particular focus on the analyses of the Portuguese sociologist Boaventura de Sousa Santos. Finally, in the conclusions, we will put forward the hypothesis of a biopolitical understanding of human rights.

2. Revolutionary genealogy, juridical abstraction, justification of the empirical reality

We think that the A.A.A. problem of the conflictual relationship between the universalism of human rights and the cultural relativism finds a productive approach within an old and renowned controversy, held in the early 1840s in the Young Hegelian circle between philosopher Bruno Bauer and the young K. Marx. The debate, as is well-known, was centred on the Jewish people obtaining rights in Germany.

For Bauer, the Jew could not be both a Jew and a citizen, to the extent that its “religious being” represented an element of social exclusion and of segregation from the political community. Consequently, only by denying the “religious privilege” of Judaism, was it possible to join the “community of human beings” and to gain access to human rights. The young Marx radically opposed to this framing of the problem.

The *decomposition* of man into Jew and citizen, Protestant and citizen, religious man and citizen, is not a deception practised

14 Marx, *Grundrisse*, 706.

against the political system nor yet an evasion of political emancipation. It is *political emancipation* itself, the *political* mode of emancipation from religion.¹⁵

The dialectic between human rights and the political State, arising from “political emancipation”, rather than entailing the abolition of concrete differences of religion, culture, social position, etc. between individuals, results from the separation between the political state and civil society. Hence, “political emancipation” presupposes religious, social and cultural differences as its material basis, that political State has to overcome to build the abstract community of free and equal citizens.

It is well known how Marx’s refutation of Bauer’s “culturalist objection” opens the path to a different kind of analysis, i.e., to an eminently dialectical critique of political emancipation, considered as a contradictory synthesis between capabilities and obstacles to the project of human emancipation.

According to Marx, “the *political revolution* dissolves civil society into its elements without *revolutionising* these elements themselves or subjecting them to criticism” (JQ, 46). Firstly, the modern political state rooted in the individual rights aftermaths the rising bourgeoisie’s struggles to liberate “the constituent elements of civil society” by the medieval system of privileges. Therefore, the rising of modern society and the liberation of individuals from the old hierarchical bonds of medieval society reveals a historical and revolutionary genesis. However, the ‘political revolution’ is unable to ‘subject its material elements themselves to criticism’. Indeed, since the political state outcomes from the abstraction of its material bases, erases any trace of the constituent link with any historical contextualisation. Thus, juridical formalisation enables the state’s autonomy towards its revolutionary genealogy, leading

15 Karl Marx, “On the Jewish Question,” in *The Marx-Engels Reader*, ed. Robert Tucker, (New York: Norton & Company, 1978), 35-36 (From now on, the acronym JQ followed by the page number will be used in the *corpus* of the text).

to an attitude of “uncritical indifference”, i.e., of passive acceptance towards its historical conditions of existence. Hence, the “abstract” political community of free and equal men ultimately becomes an instrument for the assertion of the selfish and utilitarian logic that underpins the bourgeois society in formation.

The matter becomes still more incomprehensible when we observe that the political liberators reduce citizenship, the *political community*, to a mere means for preserving these so-called rights of man; and consequently, that the citizen is declared to be the servant of egoistic “man” that the sphere in which man functions as a species-being is degraded to a level below the sphere where he functions as a partial being, and finally that it is man as a bourgeois and not man as a citizen who is considered the *true* and *authentic* man. (JQ, 43)

The identification of the man of the *Declaration de droits de l'homme e do citoyen* with the selfish bourgeois, which made the critique of the young Marx renowned, actually represents the most problematic feature of the Marxian analysis. Firstly, it results from a “conjunctural analysis” of the auroral phase of bourgeois society, based on free market competition between individual capitals, hardly applicable to complex contemporary societies. Indeed, throughout the 20th century, the establishment of social rights, the welfare state and the neo-liberal entailed essential shifts in the relationship between the political and the social spheres. Secondly, as Althusser has rightly pointed out, the Feuerbachian antithesis between individuality and gender points to an essentialist and idealist humanism rooted in an ideological representation of civil society, which eludes its class conflictual core.¹⁶

16 Cf. Louis Althusser, *For Marx*, trans. Ben Brewster (London: The Penguin Press, 1969), available at <https://www.marxists.org/reference/archive/althusser/1965/index.htm>.

However, we argue that, beyond the aforementioned theoretical limits, the critical analysis by a young Marx puts forward a crucial epistemological question, which is still relevant. Indeed, the ground of modern constitutions in the dialectic between the revolutionary struggles of the bourgeoisie and of the legal genealogy 'removal' processes provides a useful hermeneutic standpoint to critically address the complex question of the 'ambiguous dialectic' of human rights and cosmopolitanism.¹⁷

3. Constituent geographies, juridical abstraction, justification of the existent

While the critical analysis developed by American geographer David Harvey on the structural limits of Kantian cosmopolitanism confirms the enduring epistemological validity of the critique of juridical abstraction by the young Marx, it also outlines a successful epistemological shift beyond the boundaries of the modern political state. Hence, the displacement/reformulation of dialectical criticism on the terrain of contemporary cosmopolitanism opens the path for a productive engagement with the realist and culturalist objections mentioned in the introduction.

Harvey's reflection is centred on a critical analysis of Kant's Physical Geography. In addition, Harvey radically challenges the approach of most specialist scholars regarding Kant's philosophy,

17 The contradictory relationship between revolutionary "constituent power" and the processes of juridical institutionalisation is the object of an immense and heterogeneous bibliography. Here we follow the reflections developed by various authors from the tradition of French Althusserism and Italian Workerism. You can see, for example, Antonio Negri, *Insurgencies: Constituent Power and the Modern State*, (Minneapolis: University of Minnesota Press, 2009); Étienne Balibar, *Masses, Classes, Ideas. Studies on Politics and Philosophy Before and After Marx*, (London: Routledge, 1994); Jacques Rancière, "Who is the Subject of the Rights of Man?" *The South Atlantic Quarterly* 103, no. 2/3 (Spring/Summer 2004).

who refuses to consider Physical Geography as a relevant part of the Kantian theory. For Harvey, this stance is partly justifiable. Indeed, despite Kant having taught the course of Physical Geography for almost 40 years, he had never given a systematic form to his geographical studies, which remained in the state of notes (and which, in this form, were published in 1802 by his students):

While most of the text is given over to often bizarre facts of physical geography (indeed, that was the title of his lectures), his remarks on “man” within the system of nature are deeply troubling. Kant repeats without critical examination all manner of prejudicial remarks concerning the curiosity and habits of different populations. (CGF, 26)

For example, we read in Kant’s notes:

In hot countries, men mature more quickly in every respect but they do not attain the perfection of the temperate zones. Humanity achieves its greatest perfection with the White race. The yellow Indians have somewhat less talent. The Negroes are much inferior and some of the peoples of the Americas are well below them. (Kant *apud* CGF, 26)

However, it is exactly because of its “troubling” nature that anthropological and geographical analysis acquires epistemological relevance, providing important evidence of the limits of Kant’s cosmopolitan viewpoint. Harvey then argues: “if geographical knowledge really is a ‘condition of possibility’ of all other forms of knowing, then how can it be so cheerfully ignored in universal theory?” (CGF, 99)? How is it possible that Kant ethics and metaphysics have removed any connection with anthropological and geographical knowledge? For Harvey, this absence is deeply suspicious:

If knowledge of the latter defines (as Kant himself held) the “conditions of possibility” of all other forms of practical knowledge of the world, then on what grounds can we trust Kant’s cosmopolitanism if his anthropological and geographical groundings are so suspect? Yet there is a way to see this as a fruitful starting point for discussion. (CGF, 35)

Kantian cosmopolitanism stands for what Marx characterised as ‘the point of view of political emancipation’. Besides the dialectics of genealogical dependence and abstraction towards the determined, historical context underlies the creation of the modern political state rooted in the rights of man. Therefore, the abstract universality of liberal cosmopolitanism is built upon genealogical dependence and abstraction towards the constituent geographies and identities of colonialism and neo-colonialism. Thus, for Harvey:

The facts of geography and anthropology are occluded, if not actively repressed, thin liberal theory (and its derivative discourses such as economics) because they are judged irrelevant to the universality of its basic conceptions. The geographical and anthropological conditions only become relevant at the moment of application. (CGF, 38)

Resulting from this abstraction, the dialectic between human rights and cosmopolitanism has succeeded in coexisting with a prejudiced and ideological geography and anthropology, having been useful throughout history for the establishment and maintenance of Western domination. Thus, at the very start of modernity, this was characterised by portraying indigenous peoples as “barbaric” or “savage” or through strategies based upon “infantilising” whole peoples” (CGF): “the erasure of all mention of indigenous populations as having an existence, let alone political organisation or rights” (CGF, 38). Moreover, the same “geographical and anthropological ignorance” has allowed the imperial project of the United States of America to flourish in present times:

When, for example, Bush characterised the world in terms of an “Axis of Evil” that includes Iraq, Iran, and North Korea, when particular states are arbitrarily designated as “rogue states” or “failed states,” then a distinctive map of the world is constructed that tacitly defines a legitimate terrain of potentially pre-emptive military action, which no one is in a position to gainsay without adequate counter-knowledge. [...] because U.S. geopolitical ambition has been global and universal, rather than specifically territorially focused, all along. (CGF, 12)

In sum, Harvey’s analysis points to a sort of critical redefinition of the domestic analogy: just as the modern political state was genealogically linked to the struggles of the emerging bourgeoisie, cosmopolitanism is actually rooted in the constituent geographical processes of Western colonisation. Just as the political state achieves its universality by abstracting its historical determinations, the cosmopolitan community erases any link to places and cultural identities. Finally, just as the political state develops an “uncritical attitude” towards the logic of civil society, thus justifying the bourgeois domination, the abstract cosmopolitan community rooted in human rights may also coexist with the colonial project, leading the path for political instrumentation by great powers.

The critical analysis of the “ambiguous dialectic”, inaugurated by the young Marx and reformulated by David Harvey, allows us first of all to unravel the limits of the “culturalist objection”. Indeed, by setting up an *aut-aut* between human rights and cultural relativism, the theoretical perspective of the A.A.A. verges *de facto* on the perspective of the young Hegelian philosopher Bruno Bauer. For A.A.A., individuals (and states), only by refusing their particular cultural and religious features, can access the cosmopolitan community rooted in human rights. However, in accordance with the dialectical analysis, the “creation of a world of free and equal people” is not truly in conflict with the existence of a plural and multicultural world, nor is it seeking to build a monocultural world order. Rather, both the political state and the cosmopolitan

community, through liberal tradition, are built by abstracting from their material, historical and geographical presuppositions: from differences of religion, social position, culture, place, among others. Hence, cultural heterogeneity, far from disappearing, is shifted “into the private sphere”, thereby losing any political significance and becoming a constitutive element of a global civil society.

In sum, beyond the culturalist objection, the dialectical critique of the “ambiguous dialectic” between human rights and cosmopolitanism finally shows that human rights cannot only be regarded as “a system of values”, i.e., as one cultural element among others – the symbol of Western culture in opposition to the other cultures of the world. With Marx, by lacking any substantial content and any “essentialist foundation”, human rights always embody the historical result of the contradictory dialectic between the historical emancipatory processes that arise with capitalist modernisation and the juridical abstraction/removal of the constitutive link. Moreover, with Harvey, this historical dialectic is complemented by the parallel link between the colonial redefinition of world geographies and their abstraction/removal by cosmopolitan theory.

In counterpointing the ‘culturalist objection’, the dialectical critique of legal formalism also reveals its difference with regard to the ‘realist objection’. While the latter considers the cosmopolitan project as immediately functional to the interests of the great Western powers, Marx and Harvey, on the contrary, ground the aforementioned relationship of dependency in the movement of abstraction/separation towards the constituent historical and geographical contexts. This epistemological distinction has absolutely relevant political implications, laying the ground for a critique of juridical globalism from the standpoint of human emancipation, i.e. for rewriting the cosmopolitan theory beyond the limits of the liberal tradition. In fact, the genealogical link between the constituent historical and geographical processes that arise with the capitalistic modernisation and cosmopolitan theory points towards the possibility of a different universality. A global community not

resulting from the processes of juridical abstraction/separation/removal, but rather arising from the establishment of a common political project, rooted in the criticism of the domination logics that shape the historical and geographical horizon.

What does, therefore, require a prior moral and intellectual commitment is that we should offer each other mutual aid in developing the kinds of subaltern cosmopolitanisms (and the pluralisation of the term is deliberate) that can generate emancipatory theory and politics across a politics of difference. This brings us back to the idea of a located and embodied, “actually existing” cosmopolitanism. (CGF, 97)

In short, what’s at stake in dialectical criticism is the possibility of cosmopolitanism “located and embodied” in its historical and geographical contexts, i.e. of a universality grounded in social practices and critical thought, seeking to change the structuring logics of societies. Thus, Harvey concludes:

The rise of an alternative, oppositional, and far more egalitarian cosmopolitanism likewise demands that attention be paid to the prior transformations in the geographical conditions of possibility for such political ideals not only to be realised but even to be fully formulated. If a subaltern insurgent cosmopolitanism is to take hold, it must contemplate no less a radical transformation in its geography than that which the bourgeoisie collectively accomplished. (CGF, 283)

4. Subaltern cosmopolitanism. Which role for human rights?

The “located and embodied” cosmopolitanism seeks to dissolve the juridical processes of abstraction and removal, typical of juridical formalisation, through a different relationship with its constituent

practices that the “ambiguous dialectics” of human rights and cosmopolitanism seems to be overcome once and for all. Hence, Harvey appears to point towards a “politics of difference” that responds to a radically heterogeneous logic with regard to modern legal tradition. The non-removal of the historical and geographical genealogies considers that the political horizon places the plural universe of social and cultural practices as the ground for building a concrete universality, always *in fieri*, resulting by the radical criticism of the dominant and exclusivist logics of world politics.

Thus, a fundamental question arises: does the “politics of difference”, by deconstructing the “ambiguous dialectic” that links liberal cosmopolitanism and human rights, lead us towards a definitive withdrawal from the human rights issue? Or, on the contrary, does it point towards a reformulation of it?

The viewpoint of sociologist Boaventura de Sousa Santos is crucial in this context. Indeed, starting from the critique of the liberal tradition, Sousa Santos has sought to recast a “virtuous dialectic” between human rights and cosmopolitanism, shaping a new link between a “counter-hegemonic” theory of human rights and a subaltern cosmopolitanism.

Sousa Santos’s starting point is the statement that, since the 1970s, “human rights began to play an unforeseen leading role in the international arena when it was adopted as the only available emancipatory narrative in the face of the apparent failure of the socialist utopia and the crisis in the idea of the nation state”.¹⁸ Therefore, any discussion on human emancipation, on the one hand, is bound to deeply confront this hegemonic language. On the other hand, it

18 Boaventura de Sousa Santos, Bruno Sena Martins, “Introduction,” in *The Pluriverse of Human Rights. The Diversity of Struggles for Dignity*, eds. Boaventura de Sousa Santos and Bruno Sena Martins (New York and London: Routledge, 2021), 5 (All our references are taken from the “Introduction” and from Boaventura de Sousa Santos’s Chapter on “Human Rights, Democracy and Development”. From now on, the acronym PHR followed by the page number will be used in the *corpus* of the text).

simultaneously needs to hold a critical perspective with regard to the aporias and constitutive limits of this language.

Sousa Santos, by recognising the foundation of the “hegemonic vision” in an “abyssal genealogy”, i.e., in the removal/abstraction of its essential link to the capitalist and colonial framework, provides a theoretical approach that, in many ways, is very close to that defined by Marx and Harvey:

We must begin by acknowledging that law and rights have a double genealogy in western modernity. On the one hand, they have an abyssal genealogy. I understand the dominant versions of western modernity as constructed on the basis of an abyssal thinking that divided the world sharply between metropolitan and colonial societies [...]. The division was such that the realities and practices existing on the other side of the line, i.e. in the colonies, could not possibly challenge the universality of the theories and practices in force on this side of the line. As such, they were made invisible.¹⁹

While human rights are proclaimed universals, in practice, they have always been in force (though only on one side of the abyssal line) in the metropolitan society which, throughout modernity, established a virtuous dialectic of “regulation and emancipation” (PHR, 7). By contrast, in the colonial world, the dominance of the logic of “appropriation and violence” (PHR, 9) has systematically excluded any humanist vision and, thereby, the very logic of rights. With the end of the colonial world, the abyssal division, rather than dissolving in favour of the unification of humanity, has redrawn the lines of separation and established new dynamics of abyssal exclusion: “neocolonialism, racism, xenophobia, the

19 Boaventura de Sousa Santos, “Human Rights: A Fragile Hegemony,” in *Human Rights and Diverse Societies: Challenges and Possibilities*, eds François Crépeau, Colleen Sheppard, (Newcastle upon Tyne: Cambridge Scholars Publishing, 2013), 18.

permanent state of exception regarding terrorists, undocumented immigrant workers, asylum seekers or even ordinary citizens who are the victims of austerity measures dictated by financial capital” (PHR, 22) thus represent the new marginalised of “humanity”.

In short, both in the colonial era and in post-colonial contemporaneity, human rights are applied following a “double criterion” of implementation, which leads to the systematic exclusion of part of humanity – the global South – from the logic of rights. Therefore, it leads to the reply of discriminatory and dehumanising logics.

By not recognising its abyssal genealogy, the hegemonic vision of human rights inevitably melts away its emancipatory potential. In practice, being “incapable of confronting systemic injustices and oppression caused by capitalism, colonialism and patriarchy” (PHR, 1), human rights avoid the very injustices that are constitutive of Western civilisation itself. Hence, its range of action narrows down significantly, reaching only “the minimum denominators of the law according to an individualist, neoliberal, colonial, North-centric world order” (PHR, 1).

How to render to human rights their emancipatory power? For Boaventura de Sousa Santos, this involves setting out a “counter-hegemonic concept of human rights” (PHR, 11) which, anchored in the avowal and criticism of the abyssal genealogy, finally encompasses within its scope the structural violence of Western modernity. In this regard, by setting aside any pretence of universality or any presumption of superiority, the West finally relativises its own viewpoint, opening up new spaces of encounter and dialogue with other cultures, traditions and grammars of human dignity. Then, through a “sociology of absences”, which sheds lights to the realities existing to the other side of the abyssal line, it “will it be possible to understand the grammars of dignity in terms of the different senses of the human that emerge from the contexts in which they are lived” (PHR, 3).

Human rights, by recognising themselves as part of this pluriverse, engage in dialogues and “adequate procedures of intercultural

translation”;²⁰ progressively deconstructing their abyssal genealogy. In parallel, the cultural heritage that had lain hidden beyond the line finally regains visibility. Therefore, all elements of a real “ecology of knowledges”²¹ are established by pushing the discourse of emancipation towards a “post abyssal thinking”²² and a subaltern cosmopolitanism:

At a time when democratic, economic and ecological challenges call for renewed politics of existence and grammars of good living, the vitality of anti-colonial, anti-patriarchal and anti-capitalist struggles nowadays offers Western modernity the only opportunity to reinvent itself, ironically on the basis of forms of humanity which it has so eagerly subjugated. (PHR, 11)

To conclude, following Sousa Santos, the overcoming of the boundaries of Western tradition entails a paradigmatic change in the epistemological framework of human rights, finally moving beyond its “minimalist” horizon. Thus, a logic of broadening and blurring the lines of exclusion is inaugurated, entailing not only a new trend towards dissolving the abyssal line between human and sub-human, between North and South, but also encouraging a redefinition of the very boundaries between human and nature. Indeed,

The possibility emerges of a paradigm shift that will enable us to move beyond an anthropocentric vision to a biocentric concept of human rights, in the light of colonised ontologies and world views that have been disqualified for so long. Nothing could make better sense, given that we are living in a world that presents us with modern problems for which there are no modern solutions. (PHR, 36)

20 Boaventura de Sousa Santos, *Epistemologies of the South. Justice against Epistemicide*, (London and New York: Routledge, 2014), chap. 7, kindle.

21 Santos, *Epistemologies*. chap. 7.

22 Santos, *Epistemologies*. chap. 4.

Can we argue that the counter-hegemonic concept of human rights underpins the political project of ‘a located and embodied cosmopolitanism’ as described by Harvey?

Harvey writes:

There is nothing wrong with a subaltern cosmopolitan perspective remaining particularistic and local in orientation, provided the dialectical connectivity to global conditions is sustained. But at this point de Sousa Santos’s view that the only task for critical intellectuals is to “amplify the voice of victimised” itself poses a barrier to deeper critical engagement. Vital though that role is, even a subaltern cosmopolitanism has to engage critically in the task of translation of particularist demands and local engagements into a common language of opposition to the neoliberal capitalism and imperialist strategies that lie at the root of current problems. But this in turn requires a far deeper understanding of how the geographical principles of space and place construction relate to the actual unfolding of any cosmopolitan project. (CGF, 96-97)

We argue that, by stressing the “lack of dialectical connectivity”, Harvey points to an important limit to Sousa Santos’s theoretical framework. Indeed, the idea of an “intercultural translation” of human rights seems hardly consistent with the problem of the “ambiguous dialectic” between revolutionary genealogy and juridical abstraction discussed in the previous sections.

On the one hand, Sousa Santos recognises the “revolutionary genesis” of human rights: “in the eighteenth century”, he writes “human rights were the main language of the ongoing revolutionary processes”.²³ However, he finds that this genealogy was limited to a particular historical conjuncture, which marks the founding process of modern bourgeois society, and which ends with the revolutions of 1848: “after the 1848 revolutions, human rights were no

23 Santos, “Human Rights,” 19-20.

longer part of the revolution imaginary and became rather hostile to any idea of a revolutionary change of the society”²⁴ Since then, according to Sousa Santos, this hegemonic standpoint has lost its emancipatory dimension while establishing itself as the expression of the Western’s point of view in opposition to the other grammars of human dignity. Therefore, Human rights became the emblem of the western culture in opposition to other cultures.

Is it not the same standpoint made by Bruno Bauer and the A.A.A? In this vein, while Boaventura Santos establishes the adequate theoretical basis for the hypothesis of the “paradigmatic shift”, the question of the contradictory dialectics between the constitutive dependence and removal processes towards the practices and the constituent historical movements loses its centrality in favour of the “interculturalist hypothesis”.

5. A biopolitical approach to the “ambiguous dialectics”

As Norberto Bobbio has rightly pointed out, transformations in historical and geographical contexts throughout the 20th century have led to an evolutionary process of human rights, which has resulted in the affirmation of different generations of rights, i.e., the progressive emergence of new rights. Bobbio writes:

The new generation rights, as they have been called [...] are all born out of the dangers to life, liberty and security arising from the increase in technological progress. Three examples that are central to the current debate are sufficient: the right to live in an unpolluted environment [...] the right to privacy, which is placed at serious risk by the possibility that the public authorities have of memorising all the data relating to a person’s life and thus controlling their behaviour without them realising it; [...] the

24 Santos, “Human Rights,” 20.

right to the integrity of one's genetic heritage, which goes far beyond the right to physical integrity.²⁵

Danilo Zolo, deepening Bobbio's analysis, has read the most recent "new rights" as voices of resistance to neoliberal globalisation processes. Thus, following Zolo, the growing interdependency between peoples and cultures:

Encourages particularistic and pluralistic claims for "new rights", in particular by the marginalised masses within rich countries, indigenous minorities and weak and poor countries, that is, humanity most painfully subjected to fear, insecurity, misery, hunger, contagious diseases, early death. Typical and highly symbolic in this sense was the Declaration on the Rights of Indigenous Populations, adopted by the United Nations in 2007, which followed, in June 2008, the first International Summit of Indigenous Populations on the Japanese island of Hokkaido?²⁶

Neoliberal capitalist globalisation, according to Zolo, has been and continues to be the setting for the arising of new emancipatory impulses: environmental, feminist, anti-racist, alterglobalisation, indigenous peoples' movements, etc. These represent the historical-geographical constituent bases of new processes of institutionalisation and legal formalisation, i.e. of the most recent generations of human rights.

In our view, all the heterogeneous problems of the "new rights" – the environmental and genetic question, the society of control, the new protagonism of the "marginalised masses" or the rights of Indigenous Peoples, etc. – represent clear signs of a profound transformation taking place in the field of human rights. Indeed,

25 Norberto Bobbio, *A Era dos Direitos*, trans. Carlos Coutinho (Rio de Janeiro: Elsevier, 2004), 96.

26 Danilo Zolo, *Rumo ao Acaso. Os direitos humanos, o medo, a guerra* (São Paulo: Grupo Conceito, 2011), 49.

these “new rights” all tend to relativise the individual dimension of human rights, central to the liberal Western tradition, enabling to rethink the “human” itself from a different epistemological horizon. Following the “evolutionist” vision of Bobbio and Zolo, we can conclude that the “bio-centric turn”, pointed out by Sousa Santos as a result of the radical paradigmatic change, seems to be a trend immanent to the development of human rights themselves over the last few decades.

How to read the new trends of Human Rights? Can we reach the conclusion, by stretching Sousa Santos’ point of view to extremes, that the paradigmatic shift to interculturality of Western tradition is actually ongoing? Or, on the very contrary, shall we conclude that the expansion of the horizon of rights actually perpetuates the “ambiguous dialectic” between the genealogical dependence to emancipatory practices and the juridical processes of abstraction/formalisation, generating the uncritical attitude to the material basis that make possible the political instrumentalisation of human rights grammar?

In our view, by recognising the current tendencies towards de-individualisation, as well as the new centrality of the bio-centric trend, a new theoretical framework arises, i.e., the opportunity to analyse the “ambiguous dialectic” between human rights and cosmopolitanism through the prism of the biopolitical theory. The remarks of Italian philosopher Antonio Negri on the contemporary shifts in the relationship between constituent and constituted power seems particularly interesting in this context.

As widely known, Negri’s thoughts belong to the “neo-workerist” tradition, i.e., a neo-Marxian viewpoint, seeking to read contemporary society on the basis of the articulation of the Marxian concept of “living labour”²⁷ with the Foucauldian concept of biopolitics.

27 “Labour as *absolute poverty*: poverty not as shortage, but as total exclusion of objective wealth. Or also as the existing *not-value*, and hence purely objective use value, existing without mediation, this objectivity can only be an

Neo-workerist scholars read the international crisis of 1970 as a veritable ontological rupture; a radical transformation in the paradigm of production, defined as the passage from the Industrial to the Biopolitical mode of production. Whilst classical capitalism was essentially linked to merchandises production, the contemporary mode of production is essentially anthropogenetic, setting itself up as a double system of value extraction: from nature and from the social biopolitical body. Thus, the *bios*, human life in all its aspects – knowledge, desires, cultures, artistic forms, symbols, language, ways of life – becomes the basis of contemporary capitalist valorisation.

This essential metamorphosis of the mode of production has brought about profound transformations in the structuring logics of societies and then in the relationships between the social, the political and the juridical. Negri, in his “In Search of the Commonwealth”, writes:

The problem is that the government of the concrete is no longer what it used to be in modern’ constitutionalism and administration. The concrete is not the individual term of a juridical decision, but a substantial and living – dare I say, *biopolitical* – web; acting on this web entails grasping its activity. The juridical act used to impose itself on the real; now, as it comes into contact with biopolitical reality, it confronts, comes up against, and reforms itself.²⁸

objectivity not separated from the person: only an objectivity coinciding with his immediate bodily existence. Since the objectivity is purely immediate, it is just as much direct not-objectivity. In other words, not an objectivity which falls outside the immediate presence [*Dasein*] of the individual himself. (2) *Not-objectified labour, not-value*, conceived *positively*, or as a negativity in relation to itself, is the *not-objectified*, hence non-objective, i.e. subjective existence of labour itself. Labour not as an object, but as activity; not as itself *value*, but as the *living source* of value” (Marx, *Grundrisse*, 296).

28 Antonio Negri, “In Search of the Commonwealth,” trans. Arianna Bove, <https://transversal.at/transversal/0811/negri/en>.

This shift of the legal processes of institutionalisation from the single individual to the terrain of the “biopolitical web” constantly producing and reproducing social life in its various forms sets up lines of continuity and radical discontinuities with regard to the ruling logic of modernity. Indeed, the anthropogenic core of contemporary production is made by endless processes of encounters, sharing and hybridisation of knowledge, symbols, cultures, languages, genres, cosmologies that introduce an indefinite modification of social forms of life. It is basically a widespread framework of imaginative and potentially emancipatory social practices, that encompasses all social dimensions and all places on earth and is well synthesised by Cohen’s expression: “creolisation”.²⁹ Faced with this new ontological core, the link between the constitutive historical and geographical practices and the institutionalisation processes is profoundly transformed:

This paradigm only calls upon the ability – and the power, perhaps – to investigate whether or not, in each of the fields of the plurality of jurisprudence and constitutional developments, a different horizon is emerging, one where the classical definition of constituent power as an original and extra-judicial power is abandoned in favour of a juridical notion of constituent power (*potere*) as a power (*potenza*) that is internal to the ordering and indefinitely entangled with it. [...] We will later see how

29 “Mobile, transnational groups are seen to practise shared forms of social behaviour, just as diversity and international mobility have crisscrossed and sometimes deeply subverted dominant, formerly more monochromatic cultures. It is this last quality that lends credence to the notion that cultures are no longer as bounded or autonomous as they perhaps once were and that complex and asymmetrical flows have reshaped inherited social identities in new ways. While we accept that creolization had its *locus classicus* in the context of colonial settlement, imported black labour and a plantation and/or island setting, by indicating that there are other pathways or possible theatres of interaction with similar features, we argue that creolization has gained a potentially universal applicability”. Robin Cohen, Olivia Sheringham, *Encountering Difference*, (Cambridge: Polity Press, 2016), 16.

the very concept of revolution must be declined to this renewal of constituent power and its definition as an ‘internal source of law’, and to the possibility that it can also operate from within constitutions, inside constituted power, indefatigably.

In short, it seems that the biopolitical roots of contemporaneity dissolve the “ambiguous dialectic” between the revolutionary genealogy of rights and the processes of legal abstraction. In present times, insofar that the *dispositifs* of governance are grounded in the plurality of social practices, the abstraction processes that radically separated the political from the social seem to be definitively blurred. Thus, the legal framework actually recognises this dependence through its historical and geographical bases, establishing a trend towards the paradigmatic change and a new intercultural openness, as pointed out by Sousa Santos. However, this “democratic aspect” coexists with another opposing and radically contradictory trend. Negri continues:

But, note! Speaking of governance is like walking through a minefield. In and by itself, governance is not a democratic tool; it is a managerial *dispositif*. What opens this machine to democracy is its use for democratic interests, the democratic exercise of a force that effectively opposes the exercise of another force (one that might be oriented towards undemocratic ends). The importance of this tool and its potential for democratic openings do not derive from its essence, but from the socio-political characteristics of its agents.

Negri’s definition of the *dispositif* of governance as a “managerial *dispositif*” highlights the element of continuity with the transcendental-political *dispositif* of modernity. Despite reshaping the relation between constitutive and constituted power, governance does not definitely give up the juridical tendency to separation and autonomy from constitutive social practices, being punctually reproduced in relation to all aspects of social life. In

other words, ruling bodies tend to remove the genealogical link with its democratic basis, that is, with the biopolitical processes of production of social life, in order to control the biopolitical according to capitalistic valorisation processes. Then, the *dispositif* of governance melts its democratic core, becoming a tool for the “desocialisation of the common”,³⁰ for the fragmentation and hierarchisation (ethnic, national, religious) in the global biopolitical body and for submitting the *bios* to the double extractive logics (from nature and from biopolitical body) of contemporary anthropogenetic capitalism.

Negri concludes that the coexistence of the two tendencies is extremely contradictory, insofar as the need of control block the social processes of “productive creolisation” of social life, destroying the anthropogenetic basis of capital valorisation. Moreover, from this perspective, phenomena such as fundamentalisms, nationalisms, movements of the “renationalisation” of politics, identity movements, etc., far from representing a regression to a hypothetical Westphalian paradigm, must be read as the expressions of the deep crisis of global governance, of the failure to find a balance between the contradictory trends of contemporaneity, leading to a destructive absolutisation of the unproductive dimension of “control” and “fragmentation”: necropolitics.³¹

In a nutshell, the biopolitical core of contemporaneity transforms the “ambiguous dialectic” between the constituent historical-geographical settings and the legal processes of institutionalisation, building a different epistemological context for questioning the relationship between human rights and cosmopolitanism. On the one hand, by recognising its historical and geographical genealogies, cosmopolitanism finally seems able to “located and embodied itself”, establishing a truly virtuous

30 A. Negri, C. Vercellone, “Il rapporto capitale/lavoro nel capitalismo cognitivo,” *Posse*, 2007: 46-56, <https://halshs.archives-ouvertes.fr/halshs-00264147> (translation is mine).

31 Cf. Achille Mbembe, *Necropolitics* (Durham: Duke University Press, 2019).

dialectic towards the social processes of claiming new rights. Thus, a productive dialogue with interculturality and productive creolisation seems to be definitely arisen. On the other hand, this trend coexists – in a maximally contradictory way – with technocratic mechanisms, which tend to reproduce, in a selective way, the division between the legal and the social, establishing the control over the biopolitical body. In short, the relational pluriverse based on intercultural dialogue, described by Boaventura Santos, expresses an immanent trend of contemporaneity that, contradictorily, coexists with the legal mechanisms of fragmentation and control over the contemporary biopolitical body.

In short, the logic of difference, the intercultural pluralism and the creolisation of social life dissolves the identities mythologically constructed and represent the material basis of a “located and embodied” cosmopolitanism. However, this plurality only exists as an internal element of antagonistic paradigm between social practices of subjectivation and technocratic processes of subjugation. In this framework, and within the horizon of a political project of constitution of a located and embodied cosmopolitanism, human rights might protect their emancipatory basis, becoming the “common language of opposition to the neoliberal capitalism and imperialist strategies that lie at the root of current problems” (CGF, 97). A global biopolitical grammar.

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Power relations and political participation in the development of human rights

Paulo Vitorino Fontes

1. Introduction

Where do human rights go? What are the main challenges facing the universal human rights system? The answers, although complex, may be mainly related to the following challenges.¹ First, with the advent of liberal democracy, the democratic challenge and also the strengthening of universal institutions, the main guarantor of human rights is the state, which is responsible for respecting, guaranteeing and taking steps to fulfil international obligations.

Human rights need a constitutional context and an environment in which constitutional values are possible. However, democracy is in crisis and at risk not only in countries with some freedom, but throughout the Western world due to phenomena such as nationalism and populism.

The former replaces civic nationalism by ethnic nationalism and undermines the model of constitutional citizenship based on pluralism. In addition, it is characterised by a lack of respect for the constitution and laws, the rule of law, the separation of powers, judicial independence and the work of a free press. In this situation, as Pope Francis pointed out in the recent encyclical *Fratelli*

1 Carlos R. Fernández Liesa, “Perspectivas del Sistema Universal de Protección de los Derechos Humanos,” *Papeles El Tiempo de los derechos*, no. 1 (2022): 9, <https://redtiempodelosderechos.files.wordpress.com/2022/01/perspectivas-sistema-universal-ddhh-01-22.pdf>.

Tutti, “politics is no longer a healthy debate on long-term projects for the development of all and the common good but limited to ephemeral marketing recipes whose most effective resource is in the destruction of the other”² This implies a radicalisation based on the friend-enemy dialectic already promoted by authors such as Carl Schmitt, with tragic consequences.

Secondly, the main challenge for human rights lies in their sustainability, which, once normativity is achieved, is not assured. The sustainability of rights requires a sustained effort, as well as a context in which they are conceivable and effective. Phenomena such as globalisation, the weakening of the state, the degradation of liberal democracy, the economic crisis and nationalism seem to put human rights in crisis.

In the face of the idea of progress, we are not immune to a regression of the heritage of rights. One example is the return of the Taliban to control Afghanistan. Moreover, we see massive and gross breach to human rights remaining unpunished. The war in Syria, the Arab Spring, the situation in Libya or the invasion of Ukraine, Colombia, genocides, disappearances, Guantánamo, Venezuela or North Korea show that there is room for ineffectiveness. One of the main challenges for human rights is to achieve greater levels of effectiveness.

In recent decades, we have witnessed the void of the ideal of participatory democracy. On the one hand, if we go back to the original formulations of the 1960s and 1970s, we see that these indicated the need to expand the spaces of collective democratic management in daily life, particularly in the workplace. On the other hand, the models of the subsequent decades accepted the circumscription of democratic practices to the state. In a parallel movement, the critique of representative institutions and the political passivity they promote were set aside in favour of a perception in which the

2 Pope Francis, *Encyclical Letter Fratelli Tutti* (Roma: Libreria Editrice Vaticana, 2020), 5; https://www.vatican.va/content/francesco/pt/encyclicals/documents/papa-francesco_20201003_enciclica-fratelli-tutti.pdf.

difference between participation and representation is practically annulled. With this, the radicality of the critique regarding the participation deficit in liberal democracies is lost.

In a post-modern context, in which the ailments of modernity have not been healed, together with the generalised lack of interest in politics, especially among the younger age groups, there is an urgent need to revitalise the sleeping democracies, mostly in the Western world. Our work is built on the commitment to rehabilitate the space of politics, and on the dialogue with various authors, following the tradition of the German critical theory, in the search for antidotes to the dangers that Western democracies face, more specifically the escalation of right-wing populism and the disintegrating threat of an instrumental rationality that is colonising all areas of our existence.

It becomes pertinent to revisit the great questions of political thought and, on the basis of existing scientific knowledge, explore the density of the concept of power that has been constituted in history. Such can thus contribute to the imagination and conceptualisation of new forms of political participation, which can renew the democratic system in the face of the pathologies it faces and contribute to a greater realisation of human rights.

2. Totalitarianism and populism

The study of totalitarianism, even after the profound studies by Carl J. Friedrich and Hannah Arendt after World War II on Italian fascism, German national socialism and Stalinism and their different replicas, continues to reveal its complexity and to summon our critical capacities. We are inspired by Marilena Chauí's understanding of applying the global reality to a neoliberal system, for the identification of a homogeneous society which, despite its formally democratic and uncensored regimes, tends to refuse social heterogeneity, the plurality of ways of life, the diversity of behaviours, beliefs, opinions and choices.

Despite the polysemic meanings of the concept of totalitarianism, it remains useful to characterise an emerging time in the context of the catastrophe we are living through, like a sudden end or as a turning point and abrupt change that is capable of deeply affecting humanity.

In times of dystopias, determined by mechanisms of control and standardisation that the pandemic has been able to install as the foundations of a new and oppressive “normality”, it is important to study the phenomenon and the concept of totalitarianism and its correlations with the growing right-wing populism seen in European democratic societies.

In this sense, some unavoidable questions that Hannah Arendt³ confronted, both on a practical and on a theoretical level, remain unanswered, such as totalitarian ideologies, persecutions against Jews and other minorities, the question of statelessness and the question of the “right to have *rights*”.

One of the first conclusions reached was that such phenomena were possible because of a deep modern crisis – the root of which was essentially political. The progressive disappearance of a common space, the space of politics, led to sphere where human beings can break out of existential solitude and achieve what Arendt⁴ called “the redeeming grace of a companionship that saves them from duality, equivocation and doubt”. Modern individuals are, for the author, individuals alienated from the world, ones that are unable to interact with others in an authentic way that goes beyond social automatisms.

For Arendt, the great success of totalitarianism was based on its ability to fill the existing void in this context of alienation and absence of space for true political participation. It was the power

3 Among others, check Elisabeth Young-Bruehl, *Hannah Arendt: For Love of the World* (New Haven: Yale University Press, 1982) and Giuseppe Ballacci, “Hannah Arendt”, in *História da Filosofia Política*, ed. João Rosas (Lisbon, Editorial Presença, 2020), 573-590.

4 Hannah Arendt, *Origins of Totalitarianism*, trans. Roberto Raposo (São Paulo: Companhia das Letras, 1973), 529.

of totalitarian ideologies in giving a sense of the inevitable to the phenomena of history that attracted millions of individuals, as undifferentiated and disoriented masses.⁵

Thus, power needs to be investigated taken into account the complexity of the subject, besides considering the centrality and diversity that the phenomenon assumes in its numerous manifestations and approaches.

3. Power relations

From Max Weber, we can see that the relations of command and obedience, more or less confirmed over time and typically found in politics, tend to be based not only on material foundations or on the mere habit of obedience of the subjects, but also and principally on a specific foundation of legitimacy. Of this legitimate Power, which is often designated by the word Authority, Weber specified three pure types: legal power, traditional power and charismatic Power.

However, most definitions of the concept of power either explain it as a negative phenomenon, as a form of domination, or, by failing that, follow at least Weber's path of a conflict model. Weber's famous definition understands power as "the probability of imposing one's will, within a social relationship, even against all resistance and whatever the basis of that probability".⁶

Such approaches focus on the exercise of power as an imposition of will, or as a constraint on others by external or internal means. This often entails that positive counterparts may be equally incomplete and focus on communicative forms of power. One example is Hannah Arendt's conception⁷ of power as acting

5 Arendt, *Origins of Totalitarianism*, 525-531.

6 Max Weber, *Economía y sociedad*, trans. J. Medina Echavarría et al. (Madrid: Fondo de Cultura Económica, 2002), 43.

7 Hannah Arendt, *Crises of the republic* (Orlando: Harcourt Brace & Company, 1972), 143, 140.

in concert, based on a free and equal consensus and thus distinct from violence or force. Arendt's intuitions are important, but the conceptual contrast she draws may be limited by reserving the concept of power for a negative or purely positive form of the phenomenon. For, as Robert Goodin has shown,⁸ power can be both constraining and liberating.

In turn, to try to overcome these obstacles, Rainer Forst constructs a concept of noumenal power, in which it is not a separate form of power alongside its threats of force. Rather, it is the very core of such threats as exercises of power.

To understand how the exercise of power moves people, we need a cognitive notion of power that is neutral in terms of its positive or negative evaluation. Forst, when updating Robert Dahl's formal definition of power, states: "power as A's ability to motivate B to think or do something that B would not otherwise have thought or done. [...] It remains open whether this is done for good or bad reasons and whether it is for or against B's interests – and through what means"⁹ The means in question may be a powerful speech, a well-founded recommendation, an ideological description of the world, a seduction, a command that is accepted, or a threat that is perceived as real. These are all exercises in noumenal power. A threat gives the threatened person a reason to react, but to the extent that a power relationship exists, at least one alternative course of action is open. Otherwise, one would be a mere object, like a stone or a tree to be moved. Thus, a case of pure force, in which A only moves B by physical means, handcuffing or arresting, is no longer an exercise of power, because the handcuffed does not react, but is rather attacked. In this case, the above definition no longer applies.

8 Robert Goodin, *Manipulative politics* (New Haven: Yale University Press, 1980).

9 Rainer Forst "Noumenic power," *Las Torres de Lucca. Revista Internacional de Filosofía Política* 8, no. 14 (enero, 2019): 167, <https://revistas.ucm.es/index.php/LTDL/article/view/76802>.

Thus, in contrast to the exercise of physical force or violence, power rests on recognition, but not necessarily in a consensual or reflected way. Power rests on recognised and accepted justifications – some good, some bad, some in-between. A threat (or a weapon) can be seen as such a justification, as a reasonable argument. However, power only exists when there is such acceptance.

All these ways driven by justifications are noumenal in the relevant sense, insofar as they involve a certain relation in the space of justifications. The cognitive and normative character and quality of justifications vary enormously. An analysis (and critique) of power must reconstruct these different modes and their possible combinations in a given social situation. As one of the greatest theorists of power, Machiavelli defended that it is useful to combine some of these modes when generating power and support for a particular kind of government.

Thus, the phenomenon of power is noumenal in nature: having and exercising power means – to varying degrees – influencing, using, determining, occupying and even sealing the space of reason of others, so that a social order is accepted as an order of justification. Relations and orders of power are relations and orders of justification. Thus, power arises and persists where social justifications and relations arise and persist, which are embedded in certain narratives of justification.¹⁰

In general, for Forst, an approach to power should not give a central role to the notion of interests, either to those in power or those subject to power. An approach to belief reasons is more appropriate to explain why people act in a certain way and how power works. Reasons explain beliefs, and beliefs explain interests and actions. Therefore, the deeper you dig, the more you need to investigate people's reasons. This is the basic level at which to

10 Rainer Forst and Klaus Günther, "The formation of normative orders: on the idea of an interdisciplinary research programme," *Revista Direito e Práxis* 7, no. 4 (2016): 716-740, <https://doi.org/10.12957/dep.2016.25459>.

explain their actions as their own – as they see them as justified. Justifications are basic, though not interests or desires.¹¹

With contributions from Jürgen Habermas, with his communicative rationality versus strategic rationality and, agreeing with Axel Honneth on the relationship of recognition and on the auscultation of the norms and justifications that allow such rationalities, Forst¹² distinguishes four aspects of noumenic power:

- A) Every social order in general, and every social subsystem, is based on a certain understanding of its purpose, goals and rules – in short, it is a normative order as an order of justification.
- B) The structures that are accepted on the basis of such narratives and justifications often find their main support in the idea that, despite the tensions in their justificatory basis and perceived shortcomings, there is no available alternative. Thus, these structures are not only based on certain constellations of noumenal power. They also produce and reproduce such constellations, both affirming them and suggesting that their functioning is natural, so that a second nature can develop. Through their everyday functioning, these structures limit what can be imagined. Contrary to Habermas, they themselves achieve a certain status in the lifeworld of how things are and will be. The normative power of the factual is thus reproduced by these structures, and is a form of noumenal power, i.e., justification through everyday practice and socialisation into a certain mentality.
- C) In this way, structures that rest upon and reproduce noumenal power have a certain influence over people, so that they present themselves as a form of power insofar as they influence and provide opportunities for its exercise.

11 Luc Boltanski and Laurent Thévenot, *On justification: Economies of worth*, Trans. C. Porter (Princeton: Princeton University Press, 2006).

12 Forst, “Noumenic power,” 173-174.

- D) This brings us to how power is exercised within structures. Since the essential power of the contours of structures is new, defining values, norms and rules, and social positions, the contours of power structures allow people with sufficient new capital in the appropriate sphere – such as a priest, a civil servant or a businessman – to use their social recognition and their position within the structure as a resource for the exercise of power over others. Here, Forst extends Bordieu’s concept of symbolic capital by applying it to all forms of means of power, including material ones.

To illustrate the aspects of noumenic power within social structures – the grounding, reproduction, influence and resource aspects of the exercise of power – Forst calls upon Marx’s brief analysis of the fetishist character of commodities. In his critique of social alienation, Marx¹³ shows a certain mystical idea of commodities dominating the new realm of the capitalist economy and transforming social relations into relations between things, concealing the verdict of social relations and establishing a narrative of false justification of them.

Founded upon a particular notion of value, the capitalist economy produces a second nature of people who see themselves as participants in the market and remain captive to certain conceptions of commodity, labour and exchange that form a complex of justification that influences and controls people’s lives, ultimately allowing some to exploit others, thus leading the exploited to accept their position as natural or inevitable. A critique of this kind of political economy must therefore begin in the realm of the noumenal, describing social life differently and dispelling “all the mysticism of the commodity world, all the magic and phantasmagoria surrounding the products of labour”.¹⁴ Thus, the whole

13 Karl Marx, *El capital*, trans. P. Scaron (Mexico: Siglo XXI Editores, 2008), 87.

14 Marx, *El capital*, 93.

social structure can only be as firm as its justifications are firmly grounded – and a critique of power has to aim at the core of these justifications.

The real site of power struggles, as all the great theorists and theorists (and practitioners) of power have recognised, is the discursive realm. Such where justifications are shaped and reformed, questioned, tested and possibly sealed and reified. It is the place where interests and preferences are formed, and where the ideological acceptance of subordination finds its hegemonic justification.¹⁵

So how should the analysis of power relations proceed? In Forst's proposal,¹⁶ it should function on at least two levels. Firstly, it should provide a discursive analysis of the dominant or possibly hegemonic justifications of certain forms of thought and action that eventually materialise in a social order as an order of justification. Secondly, it should identify the positions of power within a society: Who has the ability to influence the dominant order of justification? What is the actual configuration of relations of justification within various social spheres and in political life in general? What are the justifications that move people?

In this sense, to analyse power relations, we need to develop a method of analysis within the two dimensions mentioned above: the level of discourse and its specific content (dominant reasons and narratives of justification) and the different normative positions and powers (or noumenal capital) of the agents in relation to their ability to generate and use discursive power (status, competence, institutional structures, etc.).

If we want to make our analysis of power a critique of power, we need to develop a critical theory of relations of justification along the lines mentioned.¹⁷ This theory has a material component. That is, it is a critical understanding of the dominant justifications of

15 Steven Lukes, *Power: A radical view* (Houndmills: Palgrave, 2005).

16 Forst, "Noumenic power," 177.

17 Rainer Forst, *Justification and critique: Towards a critical theory of politics*, trans. C. Cronin (Cambridge: Polity, 2013).

particular social relations, and critically points to false, or at least biased, justifications of asymmetrical social relations that do not satisfy the criteria of reciprocity and generality. In short, relations of domination.

In the political sphere, domination must be defined as a government without adequate justifications. Reflexively speaking, as a government without the adequate structures of justification. A critique on the relations of justification points to a study of the various social and political positions that generate and exercise discursive power in different social and political spheres. Normatively speaking, this critique aims to establish a basic structure of justification between free and equal persons as the first demand of justice, or as Forst calls it, fundamental justice.¹⁸ The question of power will then be the first question of justice. We thus assume that the realisation of the right to justification depends on the possibilities of political participation.

4. Inclusion and political participation

Faced with the contradictions of our times, it is important to refocus politics in our lives, considering Arendt's sense of the participation of each person in the community and their destiny within that community, experiencing their contribution in the public sphere.

Arendt¹⁹ intended to recover the value of politics as a non-instrumental human activity. Therefore, with an end in itself, enabling human beings to exercise freedom. In this regard, freedom characterises action. Nonetheless, no corresponding to the freedom of free will or liberal individual autonomy, but a public and

18 Rainer Forst, *The right to justification: Elements of a constructivist theory of justice*, trans. J. Flynn (New York: Columbia University, 2012), ch. 4, 8, and 12; Forst, *Justification and critique: Towards a critical theory of politics*, ch. 1 and 5.

19 Hannah Arendt, *The Human Condition* (Rio de Janeiro: Forense Universitária, 2007).

collective freedom: something that is only realised when we act with others. The development of this potential only occurs in a context of plurality. Plurality is the essential condition that determines action, in interaction with other individuals who possess the same capacity to act.²⁰

The great existential value of politics lies in the fact that it allows individuals to reveal their own identity in the public space through action and discourse. Hence, for Arendt, the impossibility of acting politically is equivalent to being dead to the world, since we live a life that is not shared with other human beings.²¹

Here arises the theme that occupied much of Arendt's research: the centrality and fragility of politics in our lives. That the world increasingly dominated by instrumental reason leaves little space to exercise freedom, participation and authentic interaction with others, which would be the true value of politics for Arendt.

Starting from Arendt, it is important to dialogue with other authors, but also to investigate the paths of psychoanalysis, in the tradition of German critical theory, the great dilemma that Arendt gave great emphasis to. From her study on the trial of Eichmann, drawn upon the inability to think about one's own actions, that is, to judge, which is considered the banal root of evil. On the other hand, if we think with Arendt that thought is, by its very nature, a threatening activity for politics, insofar as it can alienate us from commitment to the common world,²² then a duality appears. Such that has the potential to explain this disconnection of the world of survival and labour from the world of politics and possibility. Judgement is situated in the middle of this contradiction, which for Arendt characterises politics as such. In other words, judgement is the faculty that unites thought, which deals with abstractions,

20 Hannah Arendt, *Between past and future. Six Exercises in Political Thought* (New York: The Viking Press, 1961), ch. 4.

21 Arendt, *The Human Condition*, 189-193.

22 Hannah Arendt, *The Life of the Mind*, vol. 1 (New York: Harcourt Brace Jovanovich, 1978), 69 ff.

with the realm of practice, of the concrete world, allowing the realisation of thought.

Now, political judgements, such as aesthetic judgements, are not motivated by specific interests on a given object, going beyond personal conditioning. They go beyond subjective points of view, aiming at a more general validity, in which it is possible to debate and reach a consensus. However, for there to be the possibility of understanding between diverse political opinions, common sense and imagination are fundamental. Common sense, as a general sense, allows, through dialogue, to ensure the existence of a reality common to all,²³ while imagination allows us to broaden our mentality through the adoption of an impartial position, moving away from our own interests and convictions, thus allowing us to create the space for the reproduction within ourselves of the views of others.²⁴

However, both common sense and the exercise of imagination depend on the existence of a public space that enables a dialogue between different points of view. From this confrontation and dialectic with others, it is possible to understand others' positions and form our own, in a precarious balance, which always depends on our ability to judge and debate with others.

In this sense, it is important to recover, on the one hand, and project, on the other, forms of political participation. A political participation that depends on the measure of social inclusion of a society, threatened by the rising fragility and populist escalations. Why do people adhere to resentment and the destruction of the space of politics, as the capacity to think and to influence the real world? Why do human beings close themselves up in the impossibility of their solitary existence and fill this void with totalitarian ideology? To provide a capable answer, it does not seem

23 Arendt, *The Life of the Mind*, 50.

24 Arendt, *Between past and future*, 221-222. Hannah Arendt, *Lectures on Kant Political Philosophy* (Chicago: The University of Chicago Press, 1982), 42-44, 63-68.

sufficient to consider only the level of social inclusion and recognition that each individual manages to achieve without taking into account different personality traits and resilience capacities correlated with different degrees of emancipation experienced at each stage of life.

In the last thirty years, several studies in the field of political psychology have shown that the way a person relates to the world and to others also influences his or her political choices. Greater openness to experience predicts a vote to the Left, while greater conscientiousness predicts a vote to the Right. For James Dennison²⁵, the reason is plausible: more open-minded people who value diversity in their own lives are more accepting of less orthodox social behaviours, usually associated with the Left political spectrum. In turn, conscientiousness signals a tendency to use pre-existing social rules and norms – a rather conservative predisposition that predicts a centre-right vote. The author explains that other personality traits certainly come into play, such as neuroticism which increases the likelihood of being Left-wing, assuming that people who have more negative feelings towards the current situation are less likely to see the *status quo* in positive terms, which theoretically increases the likelihood of Left-wing attitudes.

The remaining two traits – extroversion and agreeableness – have less robust scientific support. Nevertheless, as Dennison points out, there is some evidence that extraversion predicts a centre-right vote, while agreeability predicts a centre-left vote. Of course, there may be different forces clashing within the same person. However, within the two most predictive traits of political leanings, it is not uncommon to have conflicts. In addition, it is rare to see someone with high openness to simultaneously experience high conscientiousness. Though, when personality traits predict different

25 Among other studies, see James Dennison, “How Issue Salience Explains the Rise of the Populist Right in Western Europe Get access Arrow,” *International Journal of Public Opinion Research* 32, no. 3, (Autumn 2020): 397-420, <https://doi.org/10.1093/ijpor/edzo22>.

spheres, there is a greater chance of having undecided voters, who are not very loyal to parties and more volatile.

For Helena Marujo,²⁶ personality conditions the experience of emotions and these, especially when negative, are central to political positioning. There has been a recent tendency to link support for populist movements to the expression of negative feelings, such as anxiety provoked by far-reaching societal changes. Similarly, anger against the establishment has become a trademark of anti-austerity, anti-vaccine and other protests. The basis therefore appears to be emotional, with the latter as the means of communication. Nonetheless, one seems to carry more weight than the other. Populism seems to be more appealing to anger rather than anxiety among citizens. The defining components of populism – the external attribution of blame and its moral and fiercely confrontational outlook – resonate strongly with the underlying evaluations of anger, which makes populism particularly well-suited to express this emotion.

For Patrício Costa and Frederico Silva, who have carried out research in the area of electoral behaviour and political marketing, it is not only the personality traits of voters that lead them toward their choices. The opinion that they have about the candidates, including their personality, is also fundamental, which refers to a phenomenon known as the personalisation of politics. The thesis of the personalisation of politics consists of demonstrating the greater salience of political figures and their characteristics in relation to parties and, more specifically, to party identification.

In 2015 and 2018, Costa and Silva²⁷ published two scientific papers based on data from seven European countries – Portugal,

26 See recent interview: Helena Marujo, “Right or Left. A question of personality?” *Diário de Notícias*, April 2, 2022.

27 Patrício Costa and Frederico Ferreira da Silva (2015) “The Impact of Voter Evaluations of Leaders’ Traits on Voting Behaviour: Evidence from Seven European Countries,” *West European Politics* 38, no. 6 (2015): 1226-1250, <https://doi.org/10.1080/01402382.2015.1004231>; Frederico Ferreira da Silva & Patrício Costa, “Do we need warm leaders? Exploratory study of the role of

Spain, Ireland, Germany, the United Kingdom, Italy and Hungary – and aimed to understand the effects of the personal characteristics of political leaders on electoral participation and voting. The evaluated traits were organised into two dimensions: a more social or affective one, composed of characteristics such as empathy, credibility, honesty and tolerance, and a more intellectual or competence-related one, which groups features such as competence, persistence and intelligence. The research showed that the affective component has greater influence than competence in the choice of vote. Party leaders with greater social attractiveness, generated by their empathy, sympathy and even physical appearance, tend to have greater power of influence.

Besides the five major personality traits previously mentioned, there is another widely used personality evaluation scale: the Dark Triad, which evaluates three socially undesirable personality traits: narcissism, psychopathy and Machiavellianism. Respectively, the overvaluation of oneself and contempt for others, a significant lack of empathy and a strong tendency to manipulate. It is this triad that may help explain the growing rise of populism, as well as recent electoral results.

According to Alessandro Nai,²⁸ populist politicians clearly score the highest on the Black Triad, while scoring high on extroversion and low on agreeableness. Thus, this is why they like to provoke and subvert the norms of civilised discussions. According to the author, candidates with this profile typically run more negative and aggressive campaigns, with many incivilities and appeals to fear. The good news is that, in general, voters do not appreciate this behaviour. The bad news is that, even so, these politicians tend to

voter evaluations of leaders' traits on turnout in seven European countries," *European Journal of Political Research* 58, no. 1 (2019): 117-140. <https://doi.org/10.1111/1475-6765.12273>.

28 Alessandro Nai, "Going Negative, Worldwide: Towards a General Understanding of Determinants and Targets of Negative Campaigning," *Government and Opposition* 55, no. 3 (2020): 430-455. <https://doi.org/10.1017/gov.2018.32>.

have better electoral results. It seems a contradiction, though not entirely, as different voters react emotionally different and those who also score higher in this triad feel highly mobilised to vote for these candidates, hardly joining the ranks of abstentionists. The bases of these candidates are voters who support dark politics with these traits as they are also dark. Thus, very high scores are obtained on this triad, based on populist attitudes and low scores on conflict avoidance. Thus, the detrimental effect of these antisocial traits and negative campaigns blurs across the majority of the population, leading them to good results.

These attempts to explain the rise of populism and anti-democratic tendencies reveal that people with personality traits that make them more likely to cause social distress resort to leaders, supporting such traits and often taken by feelings of fear and anger. And what comes next? For Helena Marujo, normalisation. In other words, the attitudes and values of social agents are marked by the political values established by a given society or community, in a process of construction. Every time a leader with personality traits that used to be seen as socially condemnable is elected, such become slightly more acceptable to many people.

The constitution of personality and the recognition that each individual manages to achieve assume a fundamental character in explaining the aporias of political participation. In assuming that intersubjective relations of recognition have a profound influence on the formation of personality, the contribution of Axel Honneth²⁹ is important in conceptualising the three spheres of recognition: Love, Law, and Social Esteem, initially identified by Hegel. These spheres of interaction, through the cumulative acquisition of self-confidence, self-respect and self-esteem, create not only the social conditions for individuals to achieve a positive attitude towards themselves, but also give rise to the autonomous individual.

29 Axel Honneth, *Struggle for recognition: towards a moral grammar of social conflicts*, Trans. Jorge Telles de Menezes (Lisbon: Edições 70, 2011 [1992]).

The sphere of love constitutes the primary affective relations of mutual recognition that structure the individual from birth, and which are dependent on a fragile balance between autonomy and attachment. According to Honneth,³⁰ the symbiotically nurtured bond, which is initially formed by a reciprocally desired delimitation between mother and child, creates the dimension of individual self-confidence. This is the fundamental basis for an autonomous participation in public life.

From the normative perspective of the generalised other, which teaches us to recognise others as holders of rights, we are able to understand ourselves as legal persons. Thus, the sphere of law develops on a historical process, with its potential for development being verified in the generalisation and materialisation of legally recognised relations.³¹

In order to achieve an uninterrupted self-relationship, human subjects also need a social esteem that allows them to relate positively to their concrete properties and capacities, besides the experience of affective dedication and juridical recognition. We are in the sphere of social esteem, in a third relation of reciprocal recognition, on the assumption of symmetrical valuation, in which individuals consider each other in the light of values that manifest the capacities and properties of themselves and the other as important for the common experience. The symmetrical relationship does not mean reciprocal valuing in an equal measure, but rather the challenge that any subject has the opportunity to experience themselves as valuable to society through their capacities and properties. Only then, following Honneth's reasoning,³² under the notion of solidarity can social relations access a horizon in which individual competition for social valuation can be free from experiences of disrespect.

In the succession of the three forms of recognition, to which parallel experiences of social disrespect can be attributed, the

30 Honneth, *Struggle for recognition*, 131-146.

31 Honneth, *Struggle for recognition*, 147-164.

32 Honneth, *Struggle for recognition*, 165-176.

degree of the person's positive relationship with themselves progressively increases. With each level of mutual regard, the subjective autonomy of the individual also grows.

Honneth's contribution allows materialising the political demand of the "right to have rights" that Arendt³³ previously invoked, as the first fundamental right. Based on an analysis of Honneth's bibliographical path³⁴ starting from the concept of recognition, seen as a fundamental need of the human being, a theory of justice is developed, seeking to specify the intersubjective conditions of individual self-realisation. Honneth's conception of justice³⁵ is based, in the first place, on the replacement of the distributive scheme by the conception of an inclusion of all subjects in the relations of recognition developed in each situation. Secondly, in place of the construction of a fictitious procedure, a normative reconstruction that reveals historically and genetically the fundamental moral norms of those relations of recognition should be placed. Finally, upon the exclusive look at the regulatory activity, in which the rule of law should be complemented by a decentralised consideration of non-state agencies and organisations. A reconstructively proceeding theory of justice is currently faced with the challenge of defending in the name of individual autonomy, rather than one normative principle, but three such principles: depending on the respective social sphere, it must highlight and strengthen the moral standpoints of deliberative equality, the justice of needs and the justice of performance. A pluralism of these theories, however difficult it may seem to manage, meets the differentiations that the subjects themselves operate topically in questions of justice. As a series of empirical studies reveal, cooperation-related problems also

33 Arendt, *Origins of Totalitarianism*, 330.

34 Paulo Fontes, "The politics of recognition and Axel Honneth's theory of justice," *OXÍMORA Revista Internacional de Ética y Política*, no. 18 (enero 2, 2021): 56–67, <https://doi.org/10.1344/oxi.2021.io.31707>.

35 Axel Honneth, "The texture of justice. On the limits of contemporary proceduralism," *Civitas* 9, no. 3 (Sept.-Dec. 2009): 360, <https://doi.org/10.15448/1984-7289.2009.3.6896>.

often distinguish the three areas mentioned in everyday life, thus applying to each of them the corresponding principle of justice.³⁶

In turn, Rainer Forst,³⁷ influenced by Kantian republicanism, underlines independence as a basic moral principle of right for rational beings inhabiting a shared social space. It implies the right to have all other rights (and duties) justified in a strictly reciprocal and general way. Thus, the right to justification of independent agents grounds all other rights. It takes place in a discursive and reflexive, rather than a deductive, manner. On the moral constructivism model, this leads to a conception of moral rights. On the political constructivism model, it leads to a conception of human rights and a conception of democratic political and social justice. Human rights include all rights that people who respect each other as free and equal individuals cannot deny each other within a normative order of legal, political and social life. The main point here is again reflexive: no one should be subject to a normative order that cannot be adequately justified to him. This is the basic human right and the basic claim of justice, corresponding to the “right to have rights” that Arendt had already advocated.

Thus, the demand for justification itself becomes practical. The basic claim of human rights, for example, is that there are certain fundamental rights to have the status of a guaranteed free and equal authority of justification, and that membership in a democratic legal community is an essential part of this. In this vein, the first requirement of justice consists, reflexively speaking, in the claim that the establishment of a basic framework of justification is necessary to ensure that generally valid norms can acquire and merit this validity in corresponding practices of justification.³⁸

The conception outlined by Forst uses a discourse-theoretical notion of non-domination. Domination, as we have seen, has two

36 Axel Honneth, “The texture of justice,” 365.

37 Rainer Forst, *Normativity and Power. Analyzing social orders of justification*, trans. Ciaran Cronin (Oxford University Press, 2017), 160.

38 Forst, *Normativity and Power. Analyzing social orders of justification*, 66.

aspects: being subject to a normative order that cannot be properly justified by someone, or being subject to a normative order in which there are no adequate institutions and possibilities of justification. The second is the most severe form of domination, as it denies the possibility of codetermining the normative order as a structural question.

5. Enforcement of Human Rights – towards a transnational theory of justice

A world without domination, in which all human beings have their rights safeguarded, is still a utopia. It takes us back to the challenges initially launched herein about the effectiveness of human rights, of their real implementation – and we realise that there is still a long way to go to reach a consolidated universal human rights system. The realisation of human rights requires measures beyond international law, as it is a task in which society as a whole must collaborate. A social environment favourable to the great values supports coexistence; far from friend-foe dialectics, polarisation, stereotypes and activities that are consciously discriminatory.

A theory of justice along the lines drawn by Forst³⁹ does not frame an idealised picture of perfect global distribution as an “end state”, nor does it start from a Rawlsian “original position” that includes all human beings from the same veil of ignorance. Instead, it pursues existing forms of subjugation and exploitation, of structural asymmetries and arbitrary rules, in order to demand relations of justice, and hence of justifiability, wherever such forms of domination are found. This projects a panorama of necessary relations, structures, actors, and institutions that, at first glance, may seem confusing.

The appropriate response to this problem is a theory of fundamental transnational justice. The basic structure of justification to

39 Forst, *Normativity and Power. Analyzing social orders of justification*, 166.

which this theory refers aims to create structures of participation and legitimation that can assume and perform the tasks of openness and critique, culminating in the justification and adoption of binding transnational and international norms. The guiding principle is that of political autonomy and equality. However, coherence also requires this principle to be maintained within states, which often deny their citizens this autonomy, and as a principle that seeks to counterbalance the asymmetries between stronger and weaker states. The essential actors in this process are primarily states, but reflexive forms of participation must be found to prevent these actors from continuing to dominate parts of their own population, other states, or parts of other states. Therefore, when existing supranational, international and transnational organisations reproduce specific asymmetrical relations of governance, they can only provide the starting point for more participatory and reflexive political forms. The principle of fundamental transnational justice gives each political community the right to participate in cross-border and normative discourses on an equal footing. In addition, it also allows affected parties below the state level to simultaneously have the right to demand participation in such discourses if the latter otherwise ignore or perpetuate specific relations of domination. This means that the corresponding fora should be open to opposition parties from states, as to civil society actors, such as those organised in the World Social Forum, for instance. Therefore, transnational mechanisms of domination can also be discovered and denounced through transnational critical alliances that constitute a politically relevant *demos* by virtue of being subjugated under specific structures of domination. Political communities with the corresponding means at their disposal have a duty to establish such a basic structure of justification. However, this does not give them the right to determine the form this structure should take. On the contrary, it is a fundamental requirement of justice and human rights that relations of justification are established in which the opportunities to generate and exercise justificatory power are distributed equitably.

As a result, the first task of justice is to create structures of justification in which arbitrary rule is banished. Structures in which those who are subordinate to rule or domination, whether of an economic, political or legal kind, can bring ‘the force of the best argument’ against those who exercise such rule or domination.

Democracy as a practice of justice takes on special importance in this context. First, it must be freed from the narrow choice between a ‘world state or world of states’, and it is better understood as a normative order in which those who are subject to rules or norms must also be the normative authority, and this in an active sense within a practice of justification. Thus, the relevant question for a *demos* is answered in terms of the existing normative structures, and the answer to the question of codetermination and the necessary institutional form will depend on the degree of subjugation.⁴⁰

5. Concluding remarks

Finally, and taking up the initial challenge, perhaps more than any other philosopher of the twentieth century, Hannah Arendt sought to defend the centrality and integrity of politics. The author considered this to be necessary because politics had been doubly denigrated and repressed within the Western tradition.

What Arendt sought was to reorient politics away from individual or collective will and towards what she calls ‘the world’ or ‘the middle ground’. Politics requires and creates a common space of plurality, a “space of appearances” – an intersubjective realm between people, constituted by their differences. For Arendt, ‘the common’, the public-political realm or *res publica*, is never unified or homogeneous. It is rather defined by difference, conflict and competition. Yet, it carries with it the promise of ordinary moments when people come together freely. This is then the sense in which

40 Forst, *Normativity and Power. Analyzing social orders of justification*, 167-168.

politics can be understood as an end in itself: the highest goal of politics is to ensure through action the continued existence of a world in which politics. Therefore, freedom, plurality and action are possible.

In this challenge, the thought of Honneth and Forst represent a decisive contribution to the contemporary debate on theories of justice and political philosophy by questioning positions already taken as presupposed in much of this debate, seeking to offer a response of their own within the framework of a renewed critical theory.

Forst, by centring the concept of power in the realm of reasons or in the normative space of freedom and action, reduces the uncertainty of the struggle for recognition proposed by Honneth, in which the right to justification is the first fundamental right, capable of enabling and legitimising all others.

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Democracy and Human Rights between barbarians and civilised people: on the humanist theses of Tzvetan Todorov

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Civilised or barbaric: this is the contrast that characterises today's wars and conflicts. But how did we get here? Through fear and resentment – two of the strongest feelings that mark international relations in the current period of history. Democratic values and respect for human rights seemed to have no political opponent after the fall of the Soviet bloc, which generated the illusion that it would be possible to create a more harmonious world order. The proof that such did not happen started with the widely considered historical milestone of the terrorist attacks of 11th September 2001, which demonstrated that the response of Western democracies, faced with a new reality in the political and social coexistence between peoples, turned into moral wars, into a kind of clash between civilisations, as some political currents advocate.

The West thus faces a set of complex challenges ranging from the defence of democratic values and ideals within the Western bloc itself, to respect for the universality of human rights or healthy coexistence between peoples with different collective identities. Peace, harmony and the dignity of all members of the human race are primordial objectives of the European humanist legacy that have been weakened to the extent that international realism has been reinforced, where force, coercion and an unconditional, even messianic, belief that the values of western democratic societies are superior to the rest. This new panorama, as we intend to demonstrate, is a dangerous scenario for the preservation of liberal-democratic values, which should make us reflect on the return to a

humanist agenda, not only for our democratic societies but as a way of guiding the world around us and regulating relations between all human beings. To this end, let us turn to the theses of the famous philosopher Tzvetan Todorov, who sought to demonstrate the falsity behind the thesis of a clash of civilisations, alluding to the fact that it is the fear of *others* that makes *us* dangerous.

Before expounding Todorov's humanist thought, it is imperative to introduce and contextualise the author. Tzvetan Todorov (1939-2017) was a Bulgarian philosopher and linguist who lived under Soviet totalitarianism until 1963, when he settled in France, where he lived until his death. His childhood would mark his work for stark two reasons: 1) the counterpoint between his experience as a subject of a totalitarian society *versus the* experience of life in an advanced democratic society; 2) the relationship with the "*other*", with the foreigner – a condition that he claimed for himself and that he declared to have never stopped feeling, despite his full integration into French society. Through such life experience, Todorov became a thinker who, according to Eugene Goodheart, "repudiates totalitarianisms that dehumanise their enemies and xenophobes who, wanting to preserve the purity of the race, anathematise exiles, immigrants and foreigners".¹ Nonetheless, his work extends beyond these two milestones. It is intended as a wake-up call to all those who claim to judge a person or society according to universal canons of justice, freedom and equality. These are the factors that make Todorov a member of the humanist family, a defender of anthropocentric doctrines that "place man as the point of departure and point of arrival of all human action".²

As a humanist, Todorov focuses on an agenda consisting of three elements: the autonomy of the *self*, the purpose of the *you* and the universality of the *they*.³ An agenda centred on the motto of the French Revolution which, for the author, represents a triple

1 Goodheart, "Tzvetan Todorov's Humanism", 183.

2 Todorov, *Imperfect Garden: the legacy of humanism*, 6.

3 Todorov, *Imperfect Garden...*, 30.

humanist demand in which freedom represents the autonomy of the subject, equality and unity of the entire human race, and fraternity as an ideal in which *others*, as brothers and sisters, deserve to be the target of human affection and action. By adopting these three principles, transposing them from an individual to a collective level, in which the exercise of collective power represents the sovereign power of the popular will and the well-being of its subjects the ultimate goal of its action, where the universality of law for all citizens is the basic rule of its function, modern democratic states have acquired a real relationship with the humanist thought. However, it is wrong to think that humanism and democracy are two sides of the same coin. Enlightenment thinking, which has greatly influenced liberal democracy, is not only limited to the humanist legacy. Other “families” of thought coexist and shape the democratic ideology, such as conservative thoughts.

It is worth remembering that the French Revolution did not only produce revolutionary and progressive thoughts with the purpose of breaking with the previous order. In this regard, Todorov states that when revolutionary ideas were transformed into actions and institutions, they also provoked a wave of resistance. This resistance started from so-called conservatives, whose starting point always passed through a position of conservation, translated by the principle of valuing and seeking to preserve the existing order against revolutionaries and reformers from all political backgrounds.⁴ For conservatives, what already exists deserves to exist and changes have, on the whole, more disadvantages than advantages. Thus, if not immobility, conservatives at least favour gradualism. As Todorov states, the conservative “family”, at least the one that also accepted democracy, is characterised by their acceptance of a minimum modernity threshold. That is, it accepts the possibility of individuals and communities to be autonomous. Nonetheless, this freedom, *per se*, is too dangerous and its benefits render to be insufficient. As it is preferable to opt for a model that

4 Todorov, *Imperfect Garden...*, 11.

confers a lesser degree of freedom but is capable of containing new disadvantages, this position is sustained by conservatives on the grounds that the price of modern man's freedom rests on two pillars: 1) he is destined to become "individualistic", in the sense that he is concerned only with himself, ignoring all ties that bind him to other men; 2) he is condemned to become "materialistic", i.e., a being without ideals who does not cherish any value above his personal interest and, as such, a man without a moral code.⁵ Thus, conservatives hold traditions so dear. They represent a reservoir of collective wisdom superior to individual reasons. In counterpoint to the morally imperfect and intellectually weak man, traditions contain a sagacity that individuals may not be able to explain but must respect. Therefore, an individual's autonomy, one's earned freedom, must be restricted.

Conservatism privileges the social over the individual. Todorov states that conservative human beings only acquire their identity through the groups, institutions and customs in which they participate. Individuals must therefore submit to the common values of the group to which they belong to, and duties towards the group prevail over individual rights as members of the human race. Man is thus made by the community and owes allegiance to it.⁶ The political order, on the other hand, is dictated by national interest which may consequently differ from country to country.

Thus, the international order, post-Westphalian but still with many remnants that come from 1648, reflects the two legacies previously pointed out. Adriano Moreira, for instance, in an essay entitled *As Duas Europas*, drew attention, using the example of the United Nations Organisation, to the fact that this organisation incorporates both a humanist legacy, present in the General Assembly and the Machiavellian legacy of the Security Council.⁷ The Machiavellian legacy of which Adriano Moreira speaks is the

5 Todorov, *Imperfect Garden...*, 12-13.

6 Todorov, *Imperfect Garden...*, 14.

7 Moreira, "As Duas Europas", 2 sqq.

legacy of international realism, which is in line with conservative thinking of maintaining the *status quo* and of domination of powers over other states. A *status quo* that obviously does not promote equal rights among human beings, since it is the national interest of the powers that guides international politics. Europe, and consequently the world, live on the permanent tension between both legacies, although the Machiavellian legacy still prevails over the humanist legacy.

However, the current international panorama is far removed from the idea that only states make up the international system and that human beings are grouped into political units according to a single nation, a single language or a single culture. Globalisation has been changing this reality, which is beginning to shape a new model. Nonetheless, it is precisely in a period of transformation that direction must change.

As globalisation advanced, driven by the technological revolution in the aftermath of World War II, we have witnessed an almost instantaneous production and proliferation of information, not to mention the ease and speed with which individuals currently move around the world. It is now possible to relate to other peoples and cultures, whether through tourism, the movement of goods or even images and reports that reach us through television. This was unheard of in other periods of human history. However, globalisation does not only produce advantages. It also facilitates, for instance, access to weapons of mass destruction, namely bombs and explosives, whose manufacturing instructions, one can imagine, circulate on the internet and the products needed to make them are easily available. According to Todorov's analysis, we are currently facing an entirely new situation, whereby it is not necessary to have state power to inflict damage on enemies. A small group of individuals can orchestrate an attack, inflicting thousands of deaths, as was the case on 11th September 2001. Thus, the face of 'hostile forces' has changed radically because the state no longer holds a monopoly on the use of force. Moreover, it is important to note that the scarcity of resources in the face of a global population that

continues to inevitably increase gives rise to competition between countries, which involves acts of aggression from those who have fewer resources against those who have more. On the other hand, it also generates some disquiet from the latter, who want to conserve and protect their way of life.

While it is true that technological advances have brought about major changes in habits and ways of life, the truth is that, as Todorov states, they have not made the previous world disappear. Quite the reverse, they have caused “a juxtaposition between the archaic and the ultra-modern”⁸ This can be seen not only between states but also within states themselves. While certain population groups are characterised by communication between contemporaries who are permanently networked, in other cases there is communication aimed at ensuring the transmission of traditions. This situation gives rise, as is often the case in the largest cities in the world, to a coexistence between populations of diverse origins and radically different customs. The result, as Todorov states, is the growth of feelings of envy, rejection and contempt that provoke an explosive mixture in which conflicts multiply.

Todorov describes this new international context through a characterisation that, although unconventional, is quite sharp. He divides the states of the world into three distinct groups. The first are the so-called ‘*appetite*’ countries, that is, those countries that have hitherto remained on the margins of wealth distribution and which, by virtue of their current economic capacity, seek at all costs to reap the benefits of globalisation, consumption and leisure. This group of countries includes, for example, Russia, China and India. The second group is called by Todorov the *countries of resentment*. Mostly composed of Muslim countries or former European colonies, the *countries of resentment* are those whose attitude is the result of a myriad of humiliation, either real or imagined, inflicted on them by the richest and most powerful countries, to whom they blame for their private misery and public impotence. Finally, and

8 Todorov, *El miedo a los bárbaros*, 14.

perhaps the most interesting of these three groups, are the *countries of fear*. The *countries of fear* are precisely those of the so-called Western bloc that have dominated the world in recent centuries. They are called the countries of *fear* because of their reaction to the former groups. On the one hand, they fear the countries of “*appetite*”, due to their economic strength and capacity to control and influence the markets, and on the other, they fear the countries of resentment through physical violence, terrorist attacks or energy reprisals, since the largest oil reserves are located in their territories.⁹

For Todorov, calling Western states *countries of fear* does not challenge their legitimacy and full right to defend themselves and, above all, not to tolerate any form of aggression or threat to the values on which democratic regimes are based. In this respect, Todorov is what we may call a moderate humanist, in the sense that he does not deny the need to use force in the face of acts of aggression or attacks on the democratic values that legitimately must be defended to preserve our political regime. What matters to the author is “the disproportionate, excessive and abusive reaction that produces results contrary to those expected”.¹⁰ As he states, “fear becomes a danger to those who feel it and should not be allowed to play a dominant passion”.¹¹ What Todorov wants to affirm is that fear plays a determining role as it triggers a double reaction that applies to any political community. On the one hand, it provokes on *us* a violent and irrational response towards the *other*. On the other hand, any behaviour from the *other* is seen by *us* as a barbaric, inhuman or immoral act, because of its difference and the fear it provokes on us. It is fear that leads to being capable of killing *others* in order to protect *our own*, without thinking for a moment that those whom we tend to demonise also act out of fear of *us*. Thus, Todorov states that the overreaction that we have been

9 Todorov, *El miedo...*, 14-16.

10 Todorov, *El miedo...*, 17.

11 Todorov, *El miedo...*, 17 sqq.

witnessing from the *countries of fear* manifests itself not only in their own territory but in others' territories. In their own territory, we are witnessing a regression of the rule of law, for instance through the legalisation of torture, spying on their own citizens, increasing security measures to the detriment of freedom, among others. In other territories, we are observing the temptation to use force through disproportionate means. Take the case of the intervention in Afghanistan or Iraq. For Todorov, this policy only leads to failure by creating resentment and a desire for revenge that will not be eliminated through military victory. On the other hand, it tends to destroy the Western world from within, because in order to defend democratic values we end up renouncing them.¹² The worst that can happen in the fight against terror is for the counterterrorist to be confused with the terrorist.

Western liberal democracies have adopted a posture in relation to other people and political regimes which assumes such as the vanguard of true civilisation. Thus, the representation of true universal values of human progress that distinguishes itself from other values and regimes considered barbaric. It was this stance that led authors such as Samuel P. Huntington, among others, to argue in the 1990s that the new world order was heading towards a multipolar and multi-civilisational world, in which the rivalry of superpowers would be replaced by the clash of civilisations.¹³ With naturalness, Huntington drew a dividing line between the truly civilised peoples of the West and the barbarism of others. Tzvetan Todorov is an opponent of this idea. For him, one cannot and should not speak of a clash of civilisations as there are no civilised and/or barbarous societies. What exists, in any society, are acts and values that bring us closer to the idea of civilisation or barbarism.¹⁴

12 Todorov, *El miedo...*, 18.

13 Huntington, *The Clash of Civilizations and the Changing World Order*, 28-29.

14 Todorov, *El miedo a los bárbaros*.

In response to this idea of a clash of civilisations, Todorov goes back to Ancient Greece to explain what lies behind the idea of the civilised and the barbarian. The word barbarian became part of the common Greek language, especially after the war against the Persians, and was used to distinguish all those who did not belong to the Greek community, that is, it served to classify “*the others*”, the foreigners. Belonging to one of the groups depended on the use and mastery of the language, so that barbarians were all those who did not understand or speak Greek.¹⁵ To this relative meaning of the word barbarian, relative in the sense that the mastery of language does not represent a value judgement about certain people, but a disability that can be fleeting and overcome, a second meaning was introduced. Such made the barbarians/Greeks opposition similar to the distinction between “savage” and “civilised”. Thus, such second meaning, of an absolute nature, was attributed to the word barbarian, associating it with cruelty and violence. Barbarians were, according to Todorov, grouped into a large category: “those who do not recognise that other people are human beings like themselves, considering them to be comparable to animals, judging them to be incapable of reasoning and, thus, of negotiating. They are unworthy of living in freedom, relating only with their relatives and do not know city life which is governed by common laws”.¹⁶ There is also another characteristic invoked by Todorov, which has been attributed to the barbarians and which is very remarkable to remember in current times: “that the defeat of their enemies is not enough for them, not even death, and they must expose in full view, at the gates of the city, the humiliation of these former rivals who have become mere prey”.¹⁷

Being civilised is opposed to *barbarism* in the sense that being civilised corresponds to recognising at all times and places the humanity of others. That is, to discover, on the one hand, that the

15 Todorov, *El miedo...*, 31.

16 Todorov, *El miedo...*, 33.

17 Todorov, *El miedo...*, 33.

ways of life of others are different from our own and, on the other, the acceptance that others are also bearers of the same humanity. The idea of civilisation, according to Todorov, also corresponds to what Kant called “common sense” or “broad thinking”. In this regard, the ability to make judgements that take into account representations of other men in the world, and which partly escape from egocentric or ethnocentric formations.¹⁸ If civilisation is, for the author, something to which we can aspire, barbarism is something to which we must turn away, as neither is wholly confused with concrete beings. This is why the division between barbarian and civilised must be made on the basis of acts and not by way of differentiation between individuals or peoples. Here, Todorov draws on Rosseau when he claimed that “good and evil emanate from the same source, and that this source is none other than the irreducible need to live with others, our capacity to identify with them, our sense of common humanity”.¹⁹ If good and evil emanate from the same source – men – then we must admit that men do not cease to be humans even when they behave hatefully. Instead, one should rather accept that men are imbued with both qualities and faults.

Based on this principle, Todorov outlines several ways to approach the formation of civilisation. The first is by establishing prolonged relations with different human groups. Another step occurs when these groups together form superior entities such as a people, a country or a state. An even more advanced stage takes place when universality is reached, i.e., when common ideals are verified within other members of the human species. By believing that we are the only properly human group, we do not allow room to experience anything beyond our own experience. Thus, we do not allow ourselves to recognise the plurality of human groups, societies and cultures. According to Todorov, another way to progress from *barbarism* towards civilisation consists in putting ourselves

18 Todorov, *El miedo...*, 40.

19 Todorov, *El miedo...*, 39.

in *another's* place, exercising critical judgement not only on *others*, but also on *ourselves*. This is not a question of denying what one is, but rather the ability to scrutinise ourselves, the community to which we belong or the people to which we belong in order to discover that *we* too – and not only *others* – are capable of committing barbaric acts.²⁰

Returning to Huntington's critique of the clash between civilisations, Todorov states that this thesis starts from two erroneous premises. The first is that the practicality of conflicts arises on one side of the lines that delimit the major civilisations of the world. Todorov argues that here lies the first weakness of this thesis, as the use of the word civilisations, in the plural, provides a sense of the so-called "great cultures" in space and/or time. Among the eight "great cultures" presented by Huntington (Chinese, Japanese, Hindu, Muslim, Orthodox, Western, Latin American and African civilisations),²¹ there is successive change of criteria, in which in some cases either considers religion, or language or even geography as identification criteria. By looking at the definition of Islam, for instance, considering religion alone can be restrictive to serve as a criterion to unify an entire civilisation, whose extension includes part of the African continent and much of Asia. Furthermore, Todorov states that civilisations are marked by influences from various cultures, as in the case of Western civilisations. Therefore, any individual is the bearer of multiple cultures as culture is an alive concept, one that is in constant transformation.²² The truth is that even within what is called the West, it is possible to find cultural differences, despite the common shared values.

The second argument that characterises Huntington's thesis lies on the survival of the West being dependent upon the unity of the Western civilisation against the challenges posed by non-Western civilisations. In this respect, Huntington claims that religion, as the

²⁰ Todorov, *El miedo...*, 41.

²¹ Huntington, *The Clash of Civilizations and the Changing World Order*, 35.

²² Todorov, *El miedo a los bárbaros*.

main feature identifying civilisations and the most profound difference between peoples, represents an enormous danger in itself, especially through religious wars. Todorov rejects this idea, counterpointing that all wars have always responded to political, economic, territorial and demographic issues. For the author, political conflicts can, up to a certain extent, be solved through negotiations. If such were effectively a question of wars between civilisations, this would have been impossible to achieve. Nonetheless, why is society still faced with the lingering effects of religious or identity wars? According to Todorov, it is a language that is available to all, allowing us to reaffirm the feeling of belonging to a particular community.²³ Moreover, the author argues that identities are not the cause of conflicts, but rather conflicts make identities dangerous. For instance, in the case of global terrorism, or the warmongering discourse of rulers in certain Arab countries such as Iran or Syria, it is not religion that is the determining factor of conflict. It is their mutual interest of making the West a scapegoat, as a homogeneous civilisation and a political bloc responsible for the deplorable conditions of the populations subjugated by these dictatorial regimes.²⁴ Religion appears here as an ideology of war because of its legitimising capacity. The same is true in relation to the West when it legitimises military interventions for the sake of defending democratic values and human rights. Thus, Todorov concludes that the theory of the clash of civilisations is only interesting to adopt as an attempt to explain the complexity of the world in which we live, through the confrontation between simple and homogeneous entities. This represents a Manichean view of international relations by camouflaging political and economic purposes and transforming them into cultural and civilizational wars.

As observed in recent decades, so-called “humanitarian” wars have taken on an unprecedented central role in the international panorama. In this respect, the famous German jurist Carl Schmitt

23 Todorov, *El miedo...*, 138.

24 Todorov, *El miedo...*, 136.

had already stated in his work *The Concept of the Political* that “when a state fights a political enemy in the name of humanity, this is no war of humanity, but a war in which a particular state, faced with its opponent in the war, seeks to occupy a universal concept [...] in order to claim it for itself and refuse it to the enemy”.²⁵ He also added that “humanity” was nothing more than an ideological instrument at the service of imperialist expansions in ethical-humanitarian form. The danger of “humanitarian” wars therefore lies in this need to deny a universal concept to the political enemy. Thus, it is possible to exercise brutal, disproportionate violence on the enemy, outside any law or international convention, as if the enemy were not human. Then, the laws of men do not apply to them. Paradoxically, so-called “humanitarian” wars have the capacity to bring about greater “*barbarism*”.

Returning to the analysis of the dangers and challenges of liberal democracies in the West, Todorov states that one of the factors bringing the Western world closer to a more barbaric than civilised attitude is precisely the way in which, after 11th September 2001, Western democratic states reacted to so-called international terrorism. The “war on terrorism” has become a practice of this new century, which has taken on the features of a global war. The declarations of the Bush Administration, the North American neo-conservatives and some European governments have contributed a great deal to this, despite some reluctance towards certain practices that will be address ahead. At that time, George W. Bush stated that Western democracies and states were facing a war against the so-called “axis of evil”.²⁶ At a first stage, Bush attributed such axis to the Muslim Middle Eastern involved, or supposedly involved, as in the case of Iraq, with groups considered to be terrorists. However, over the subsequent years, this concept of “axis of evil” expanded

25 Schmitt, *O Conceito do Político*, 98.

26 In this respect, see the State of the Union address that George W. Bush delivered in 2002, which can be found at: <https://georgewbushwhitehouse.archives.gov/news/releases/2002/01/20020129-11.html>.

to all those non-democratic states that, for one reason or another, present themselves as adversaries of the United States in the international scene.

Todorov presents himself as a huge critic of this new kind of war. Firstly, because he considers it as a metaphorical war, in the sense that, “unlike a traditional war, it is not the human adversary that is being fought, but a scourge that may never be completely removed”.²⁷ In fact, what Todorov intends to warn, as other thinkers have also done, is that a war against terrorism, or against a particular evil, leads to an unlimited war in time and space. An endless war that reduces the enemy to an unidentified abstraction, which can appear anytime, anywhere. Contrary to what might appear at first sight, in these cases, a military victory does not necessarily correspond to the conquest of a people for a cause that is supposed to be defended. It may even deepen the sense of revolt, increasing the number of militants of a particular terrorist organisation. This happens because the truth is that a war against terrorism tells us nothing about the overall objective or the particular motivations of its militants. Thinking about terrorism only informs us about the purpose of a person or an organisation which, not acting on behalf of a state, indiscriminately attacks civilians, soldiers, buildings or means of transport. It is precisely for this reason that a war of this kind involves great caution in avoiding association between a particular group of individuals and an entire people or culture.

Focusing more on the negative aspects that the war against global terrorism implies for Western democracies, Todorov warns of the harm that the state of war has for the democratic rule of law. Firstly, this is seen in the possibility of suspending rights, liberties and guarantees, while strengthening executive power over legislative power.²⁸ Entering into a true state of exception, as described by Carl Schmitt, corroborates the justification of sovereignty as a means of guaranteeing the integrity of a state. Indeed, as the war

27 Todorov, *Torture and the War on Terror*, 2.

28 Todorov, *Torture...*, 7-8.

against terrorism may never end, this suspension may continue indefinitely. Secondly, Todorov claims that the status of truth in a country's public life is majorly affected in such type of war. Freedom of speech and criticism of government policy are no longer seen as natural in a democratic rule of law, but rather perceived as a betrayal of one's own country, in the sense that those in a critical position do so because they defend the practices of the enemy.²⁹ For instance, by assessing the way in which the US government sacrificed the truth, to the detriment of the will to power, when it was proven that Saddam Hussein's regime had no links to Bin-Laden's Al-Qaeda, nor did it possess weapons of chemical or mass destruction – two of the great arguments that motivated the illegal American intervention. Or how, after the fall of Baghdad, images of torture and summary executions in Abu-Ghraib prison were denied, despite having circulated throughout the world, while the US government claimed that democracy was gaining ground within the country.

Todorov alerts that in the so-called “first democracy in the world” there is an irrefutable paradox: while the US government proclaimed that its forces were committed to the pursuit of human rights, hundreds of prisoners were detained and tortured in Guantánamo, without the right to a legal trial or the slightest possibility of defence. It must be stressed that we are not referring to a totalitarian regime or a traditional repressive regime, but to one of the main democracies in the world whose population, despite living in an open and pluralist regime, was convinced that the truth was false and that the lie was true.³⁰

The truth is that, for a long time, international relations have been reduced to the Schmittian friend/enemy alternative. However, Todorov argues that this position on international relations is reductive in the sense that “supposing it being possible to eliminate the bearers of ‘evil’, what benefit would there be in that if we

29 Todorov, *Torture...*, 8.

30 Todorov, *Torture...*, 10.

ourselves had to become evil in order to do so?”³¹ He therefore strongly criticised the disproportionality of the US response to the attacks of 11th September 2001. Compared to the approximately 3,000 people who were victimised in that attack, between 60,000 and 600,000 Iraqis are estimated to have died in the first four years of the war in Iraq alone.³² Admitting these figures to be true, it is thought that between 20 and 200 Iraqis were killed for every American citizen. It is this disproportionality that led Todorov to question, “is bombing someone you consider an enemy more or less civilised than, for example, cutting off a person’s guarantee?”³³

In line with Todorov’s argument, it seems highly doubtful that good can be imposed by force. The truth is that however much Western democracies think they are exporting certain political values to other parts of the world, non-Western peoples see military interventions as a pretext for controlling oil resources or establishing military bases. It is impossible to believe that Western values can be accepted after subjugating a country by bombing it, killing thousands of people, torturing them or arbitrarily imprisoning them. Such actions have nothing to do with true democratic values, but rather to simply undermine them.

Modern Western democracies are currently imbued with a political messianism that excludes any political regime and all values other than Western values. This is a common element in all wars that followed the fall of the Soviet bloc and in which Western democracies participated. This has been the rhetoric used to justify the means to an end. However, Todorov states that, even considering the noble ideals of this project, these types of actions should make us fearful. Fearful in the sense that this form of political messianism converges with earlier forms of political messianism such as the communist promises and the colonial projects which,

31 Todorov, *Torture...*, 13.

32 Regarding these estimates Todorov refers us to studies published in the scientific journal *The Lancet* and the *Iraq Body Count* project. Todorov, *Torture...*, 16.

33 Todorov, *Torture...*, 19.

while also promising the arrival of freedom, equality, fraternity and dignity, did not shy away from doing so through force and military actions of conquest. However, how can a political project aimed at promoting the good be so dangerous? The answer Todorov gives to this question is that, by assuming a clear distinction between good and bad, it would be necessary to declare war on all those who do not share the same ideals. Thus, to achieve an “ideal” world would require a large number of victims. But that is not the only problem. The very nature of defending such an ideal entails other problems: “is it enough to talk about freedom for us all to agree? Do we not know that the tyrants of the past often appealed to freedom? As for democracy and the equal dignity of all members of the human race, what does it mean when we prevent other people from choosing their fate for themselves?”³⁴ Thus, we can conclude that believing oneself to be imbued with the spirit of mission to make freedom triumph over its enemies demonstrates a conception of the world in which all paths to achieving it become lawful, in favour of a supreme good. Nonetheless, by doing so, Western states abdicate their own principles, especially the key concept of pluralism, whose value is fundamental to any truly democratic regime. Todorov also adds that this political project is unsuccessful from the outset, as freedom will never definitively triumph over its enemies. It is human beings themselves who control their libertarian impulses. Therefore, to achieve this other world, we would need to be faced with a species other than our own. Even more important is the sagacity of a critical spirit that enables us to understand that “this messianic aspiration to establish a harmonious order in the world only appeared at a given historical moment, like the other previous messianic aspirations, as a mere rhetorical weapon, without practical consequences, having been replaced by a vision no less messianic, though not universal, but national: to impose the will of the United States on the rest of the world”³⁵

34 Todorov, *Los Enemigos Íntimos de la Democracia*, 54.

35 Todorov, *Los Enemigos...*, 55.

It is in this sense that Todorov states that: unlike power for power's sake, ideals and principles have a formidable force, often overlooked, because an ideal of freedom and justice represents a promise of a happier and more dignified life. When these values are truly exported, they help the weak triumph over the strong.³⁶ Examples include the cases of decolonisation in the 20th century, when Western ideals of freedom and equality turned against colonial potentials and produced popular uprisings that fought for the principle of self-determination of peoples.

Another important factor for today's liberal democracies is the unfinished "promise" of the restriction of the use of force and violence by law. It was thought that, due to the brutality of the Second World War, an ideal of civilisation had been reached, which would moderate and diminish the use of force and violent acts. Nevertheless, the novelty of the current situation in Western democracies, namely in the largest democracy in the world, i.e., the United States, was the introduction of the use of institutionalised torture through several memos produced by the American Department of Justice,³⁷ defining and establishing the limits of what was, or was not, considered torture. Such practices, whose purpose would be to gather information as a means of preventing further attacks, represent a clear violation of human rights, not only as it goes against the principles of the Universal Declaration of Human Rights and various other international conventions, but also because torture is not measured by a matter of degree. This was precisely the point at which the civilised, in the end, became the barbaric.

In this respect, Todorov states that we can state that all this new reality has given rise to the existence of three groups of perpetrators of violent acts: the common criminal, the enemy soldiers and the

36 Todorov, *Torture...*, 20.

37 In this respect, see one of the most important memos, now declassified, which can be found at: <https://www.washingtonpost.com/wpsrv/nation/documents/dojinterrogationmemo20020801.pdf>.

terrorists. Common criminals are those who normally commit a crime within a given state. They are subject to the laws of the state where the crime was committed. Enemy soldiers, when captured, are covered by international treaties and conventions that govern how combatants should be treated by their captors. Terrorists, however, are on another level. They are denied the status of common criminals or war combatants. In other words, no international legislation or conventions apply to them, which allows them to be subjected to any illegal means deemed necessary,³⁸ as is the notorious case of the prisoners in Guantánamo. Naturally, terrorists have been given the title of barbaric, inhuman. And, as we have been trying to demonstrate, the laws of civilisation do not apply to barbarians.

There is another relevant point to be stressed. A more careful reflection highlights that the illegal means that have been used by the democratic states have not kept terrorists away or reduced their numbers or even diminished violence. What we have seen is that, through these methods, a stronger rhetoric has been created to recruit new members for these organisations. Thus, the argument that the integrity of liberal democracies would be preserved by resorting to extreme means fell apart, especially as victory became even more unlikely. As Todorov states, “it is difficult to win the sympathy of populations when one has earned the reputation of a torturer”.³⁹ According to Todorov, when we terrorise terrorists, we indicate our willingness to become their reflection and to be even more determined as terrorists than they have been. In this vein, the use of torture is something entirely unjustifiable, as it is an attack on the very idea of humanity, being the surest indication of barbarism, of the extreme of human behaviour that makes us reject the humanity of the other.⁴⁰

38 Todorov, *Torture...*, 32-33.

39 Todorov, *Torture...*, 61.

40 Todorov, *Torture...*, 60.

In conclusion, democratic societies need to understand that moralizing between “good” and “bad” peoples makes no rational sense. Human beings are not necessarily either one thing or another. However, there is one quality in every human being that should not be neglected: openness toward “others” and the refusal to reject them without prior examination. Thus, Todorov reminds us of the urgency of avoiding prejudices and simplistic judgments, based on a “purely relative distinction between those who belong to our group and those who do not, since such judgment must have as its substrate ethical principles”.⁴¹ Democracies, in contrast to other political regimes, have a double “obligation”: the recognition of the equality of all citizens and the duty to respect and enforce the laws of the rule of law. And so it must, no matter how exceptional the situation may be, it must reject totalitarian and tyrannical impulses on the pretext of defending it. On the contrary, this reaction only demonstrates that his actions are not are, in fact, no different from those of his adversaries.

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41 Todorov, *Nosotros y los otros*, 432.

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Chasms in the search of an ecumenical society of the law of the nations regarding René-Jean Dupuy's "pluriversal realism"

Silvério da Rocha-Cunha

§ 1.

Born in Tunis, of a Neapolitan mother and French father, René-Jean Dupuy fought in World War II with the Americans, dazzled by the universalist sense of his master Georges Scelle. Founder of the Institute of Peace and Development Law at the University of Nice, winner of the Grand Prize of Philosophy of the French Academy, holder of a chair at the Collège de France, tireless world traveller, UNESCO advisor, member and president of various scientific societies, a staunch Mediterranean man (site of warriors, merchants and prophets¹). René-Jean Dupuy (1918-1997) is the author of relevant works in favour of a new vision of international law and of legal-international thought, as well as others dedicated to specialised aspects of international law and to themes within the history of political ideas.²

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- 1 Dupuy *apud* Aumond, *op. cit. infra*, 23. In this study the expressions between comas, sometimes unsigned, are taken from Dupuy's works under consideration, although the most important ones are always cited and located, and which thus allow one to deduce which part of his work is under analysis.
 - 2 Dupuy's most relevant works to the economics of this study are: *Dialectiques du Droit International. Souveraineté des Etats, Communauté Internationale et Droits de l'Homme*, Paris: Ed. Pedone, 1999; *La Communauté Internationale entre le Mythe et l'Histoire*, Paris: Economica/UNESCO, 1986; *La Clôture du Système International. La Cité Terrestre*, Paris: P.U.F., 1989; *L'Humanité dans l'imaginaire des nations*, Paris: Julliard, 1991.

§ 2.

A demanding vision, first of all. Starting from Péguy's distinction between misery and poverty, Dupuy points out how the poor aspire to get out of their condition, unlike those who suffer from a feeling and a situation of misery, who, living in despair, are condemned to a resentful resignation.³ With this, he immediately points out how the level of techno-economic development of a society and/or a political unit does not legitimise the abandonment of the fight for the institution of human rights. Referring to the institution of these rights in developing countries, the author highlights the need to not abandon anything to the ease of historical thickness and, consequently, to give in, but rather to never stop traversing the historical horizon with a broad vision around the rights historically consecrated in Western Modernity. Nevertheless, this position, in itself susceptible to controversy, marks a constant in Dupuy's work –the rejection of simple ideological projections that hypertrophy the sense of truth. This topic is important as even the author resists the possible ideological weight of religion, of his religion (Catholic as he was), not accepting its translation in terms similar to those “idols” that punctuated the most recent secular era: “reason for the liberals, history for the socialists, science for the positivists”.⁴

It is not very important here to debate the weight Dupuy attributes to ideologies, a theme on which he slides in his work on the history of political ideas, although one of the most authoritative

3 Cf. Dupuy, *Dialectiques*, 214.

4 Cf. the important work of F. Aumont, “Unité et Diversité. Réflexion sur l'œuvre de René-Jean Dupuy (1918-1997)”, (PhD diss., Université d'Angers, 2010), 26. Therefore, concludes Aumont, freedom is for Dupuy an attitude that implies a double refusal: (i) an absolute refusal of the weight of a certain History, the one that imprisons man, the History of the weight of the past, the History of the episodes that generate resentment, of which the memory of the successive conflicts between France and Germany is an example; (ii) a refusal of the “History-promise”, that is, of History understood as the design of a future free of contradictions, which easily falls into inhumanity.

specialists on his thought points out the influences of Valéry, Camus and Saint-Exupéry –thinkers who, questioned by historical events, prefer to testify rather than demonstrate.⁵ Therefore, he sees pervading all his work a “cry for freedom”, if one may say so, which immediately signifies Dupuy’s relative intolerance of finished and naturally dogmatic juridical-political constructions. In this sense, it could be said that part of his work translates into the defence of a certain liberalism, which fights for freedom against the despotism of the collective, which even criticises the radical and identarian constructions of democracy in the name of particularisms that the evolution of time never fails to crystallise in societies. Under the aegis of the plural, one can understand his propensity for federalism as an adequate way of, at one and the same time, preserving the specific and maintaining unity towards an ecumenical universalism that his master Georges Scelle already defended.⁶

This position of Dupuy, who examines the problematic of the international system in a poly-faceted way, is based on the fact that law is constituted as a language that expresses itself in the form of fictions and masks, some stronger than others, sovereignty being the great cornerstone of international law and international political theory.⁷ Mythical and polysemic, sovereignty emerged in the modern era as the foundation of the state in terms which enabled it to be affirmed on the basis of the logic of Westphalia. This logic simplified the “management” of territory and population in such a way as to enable to implement the “European System of States”, driving the theory and practice of the *positivisation* of law by political power, managing to create the “horizontal structure of international society”,⁸ in which states dominate as the preferred

5 Cf. Aumont, “Unité et Diversité. Réflexion sur l’œuvre de René-Jean Dupuy (1818-1997)”, 34.

6 Aumont, 35 sq.

7 Cf. per all L. Bal, *Le mythe de la souveraineté en droit international* (Saarbrücken, Presses Académiques Francophones, 2016).

8 Bal, *Le mythe...*, 30 sqq.

subjects of legal-international relations. There are therefore two sides of the same coin: internal sovereignty and external sovereignty. Although sovereignty is, in fact, a pluralist concept, since a state is only sovereign if considered among all other sovereign states, which necessarily relativises it, paradoxically, the sovereignty of each state is presented as unique and omnipotent.⁹ Hence, it is a mythical concept, which hides the fact that no sovereignty can, by itself, impose any kind of normativity on other sovereignties. Thus, we can say that the origin of international law lies on the intersubjectivity arising from the coordination between states and some international institutions that they recognise and in which they participate.¹⁰ It is from the intersubjective practice that a mythical idea of an objective international legal order emerges.¹¹ And it is from this configuration, and its rigidity, that unanticipated effects contradictorily arise. In effect, the impulse that sovereignty provides to the sovereignty of states is the same that propitiates conflicts and the anarchy typical of international society. It is true that, since 1945, there has been a greater affirmation of international law as the result of a better coordination between states. However, at the same time, various structural movements have emerged which have ended up jeopardising this coordination. Indeed, the general decolonisation process that took place from the second half of the 20th century onwards gave rise to nationalisms based on sovereignty. The same happened when, after the collapse of the Soviet bloc, the states that were part of that bloc experienced a strong nationalist impulse supported by mythical ideals of sovereignty that called liberal representative democracy itself into question.

9 Bal, *Le mythe...*, 34.

10 Bal, *Le mythe...*, 43 sqq.

11 Bal, *Le mythe...*, 43.

Sovereignty brings with it border obsession. Dupuy's critical reflection on this theme begins by looking at what we can appropriately call the structural violence of the international system. In an essay published in 1963,¹² the author examines the problem of democracy in international society. There, he reflects on the anarchic nature of this same society, with states emerging as the "great liberators", insofar as sovereignty guarantees them, in theory, absolute primacy. However, he notes that political thought has, from early on, recognised that this society is profoundly unequal, thus giving rise to the constructions that sought to take international society out of its "state of nature". Alluding to Woodrow Wilson and his plans for peace, which also presupposed a liberal society based on universal understanding, Dupuy points out the shortcomings of this project, namely: (i) forgetting that in a society of states, states naturally resort to the means that the law of nations has always authorised: the erratic explosion of power; (ii) the non-existence of real equality for all peoples, by virtue of the colonial phenomenon, which in itself carries the use of force; (iii) the fact that the institution built for the preservation of peace, the S.D.N, has been constituted exclusively by states, distancing the ultimate addressees of international relations – individuals – from the process of power ("like the proletarian in capitalist society, the individual encamped in the society of states"), as well as nations "as carnal realities". Dupuy adds that even the institution of democratic regimes brought with it an abyssal and perverse side: the advent of citizenship went hand in hand with nationalism, "that of universal suffrage with general mobilisation".¹³ Thus, the sovereign people in fact inherited the "right to war" once reserved for monarchs ("war was democratised"). In turn, the gigantic killings of World War I led to the creation of organisations that began to pursue the scope of ending violence.

12 Now in Dupuy, *Dialectiques...*, 71 sqq.

13 Dupuy, *Dialectiques...*, 72.

In this sense, peace plans have always been based on states, even since the Soviet Revolution. Whilst proclaiming internationalism, it ended up consolidating the state as a suitable apparatus, not only for the consolidation of the revolution, but also as a “fortress” for the international defence of the new regime. The primacy of states is therefore a fact, and the power to seek a hypothetical Universal Common Good is vested in them.

Therefore, is the aim of democratically seeking the Universal Common Good achievable? Dupuy theorises this primacy by fixing connections between internal society and international society, establishing homologies between the individual member of the political body and the state member of the international political body. Just as each citizen has an equal right to participate in the formation of the law, something similar operates in the international system, where each state guards its sovereignty within the inter-state organisation. Even in the “bicameral” system that is the UN, the fact that some States have the privilege of the right of veto can and should be understood as an obligation to pursue this same Universal Common Good.

But the question remains: will States be in a position, beyond institutional mechanisms, to promote this common good? For the author, we would still find ourselves, in theory, in the full field of similarity with the individual: “it is the general will: not that all speak, but that each one speaks on behalf of all”.¹⁴ However, for Dupuy, the fact that states enter into the framework of an organisation does not necessarily presuppose that they have abandoned their habits of entities living in a state of nature, since “the state positions itself as *sein* rather than *mit-sein*”,¹⁵ its “tendency is to position itself by opposing itself”.¹⁶ In fact, the author recognises that the States enter in the organisations by necessity, but also full of “historical residues made of rancour, mental reservations,

14 Dupuy, *Dialectiques...*, 74.

15 Dupuy, *Dialectiques...*

16 Dupuy, *Dialectiques...*

even hope of revenge”,¹⁷ transforming the foreseen dialogue into dispute. In addition, as in the Modern era general will can only be expressed from a high point of view that can no longer be in the name of God or by the Prince on His behalf, it will necessarily be expressed as an expression of wisdom, which requires assuming that the Common Good will have to be said by “intrinsic transcendence”. Thus, “by subjects of Law that go beyond the point of view of their interests”.¹⁸

The author then speaks of a duty of “moral restlessness” that goes far beyond the observance of political rituals. Dupuy is not unaware, of course, of the existence and function of juridical and political fictions. He notes how both political theocracy and democracy forget the human being in situation. The former presupposes the human being as guilty, while the latter presupposes that the human being is saved, when in truth the human being should very probably be in an intermediate stage, being simultaneously subject and sovereign. What happens, then, is a tension between a principle proclaiming a transcendent authority and a principle proclaiming freedom. Both take all their merits for granted, when they have yet to be conquered.

For Dupuy, the mystery of the universal Common Good lies in the capacity to consider the General Will as an end that obliges the members of the political body to a duty of discovery of “common agreement with others”. In international society, non-compliance with this duty is more frequent, since all presuppose unanimity as a legitimate way of maintaining sovereignties, refusing the organisation in which they are included any transcendental power, which is in turn implicitly translated into the opposite of a hypothetical veto recognised to all, favouring refusal more than adherence.

The introduction of majority principles shows the progressive awareness of the need to introduce this flexibility into the international General Will. However, this does not mean that the

17 Dupuy, *Dialectiques...*

18 Dupuy, *Dialectiques...*

constellations of sovereigntist interests, at any rate instrumental and strategic, no longer hang over international society, making international organisations a place for the confrontation of socio-cultural blocks from which any search for the Common Good has been banished. For Dupuy, the propensity for the affirmation of each state with regard to common history is maintained, being limited to a coexistence that is always difficult, even in the most successful cases such as regional integration. The author obviously recalls the Universal Declaration of Human Rights as the place where the human being is recognised as an instance of supra-state transcendence that the world needs, making the state, race or party sacred. Nonetheless, he also remains reticent to point out that this recognition implies reciprocity between all those involved. Moreover, this reciprocity will always be imperfect, since international bodies with a reasonable margin of executive power are to a large extent made up of individuals who, obliged to maintain statutory independence in the name of the higher interests of the organisations, see themselves as “technicians” performing highly politically charged functions and not as representatives of the people. It occurs to Dupuy to speak in this regard of the “profound Proudhonian and Saint-Simonian origins”¹⁹ of this type of organisation, expressly referring to the then Common Market, evoking a “federation of federations”, to some extent stripped of excessive political power and seeking a balance between social and political regimes with a general economic impact.²⁰

In these cases, we may speak, according to the author, of an interaction between different political traditions –tradition and inter-statism, parliamentarianism and the government of “technicians”– conjugating State, Nation and Individual around a Common

19 Dupuy, *Dialectiques...*, 60-62.

20 Dupuy draws attention, along the lines of Saint-Simon, to the dialectic between “critical periods dominated by politics, a ferment of war and division, and organic periods, animated by fruitful attempts at unification thanks to the primacy of economics”.

Good. This, in turn, will only be strictly determined from the moment in which international organisations pass from a stage of cooperation to a higher stage of the organisation of subordination. Dupuy resorts, as he did abundantly, to the ethical-political thought of Camus when he advocates a new Social Contract of a universalist nature.²¹

And here we can speak of a usual deviation in Dupuy's thoughts, who resorts to authors for whom knowing is, rather than demonstrating or explaining, having access to the vision of authors who address themselves more to the consciences than to the intelligences.²² However, this somewhat "ethical-regulatory" sympathy always yields to a "realist" perspective when he presents arguments of a historical-political nature, when he maintains that the nature of the state does not disappear in the current stage of world evolution.

What is more, Dupuy clearly states that any attempt to give a non-state content to this type of development of political-legal relations would be fruitless, as a possibly totalitarian power structure would reappear in any case and without any guarantee of the establishment of a democratic regime. Regional integration processes are, from a political point of view, a good device as they

21 Dupuy, *La Clôture...*, 109 sqq, refers to the ethical position and "anti-historicist" Camus as one who somehow always contests the results of historical evolution, to the extent that this is governed by a "law of the simplest: the end justifies the means". According to Dupuy, as for Camus, man does not have to bow "to the raw material of history". Moreover, Dupuy quotes a passage from a play by Camus, *Les Justes* (currently in A. Camus, *Œuvres*, coll. Quarto (Paris: Gallimard, 2020), 785 sqq., where a character (Kaliayev) states: "... But I love those who live today on the same earth as I do, and it is they whom I greet. It is for them that I fight and that I consent to die. And for a distant City, of which I am not sure, I will not wound the faces of my brothers. I will not add to living injustice a dead justice..." (803). Elsewhere in the play we can find another statement by the same character who says: "... The revolution, of course! But the revolution for life, to give life a chance..." (792).

22 See Aumont, "Unité et Diversité. Réflexion sur l'œuvre de René-Jean Dupuy (1818-1997)".

establish the national state as a kind of “intermediate body” that safeguards freedom, partly liberal and partly “personalist”, as conceived by Dupuy. It distrusts the state only and only insofar as it tends to exclusively define the Common Good, here supranational. In fact, to overcome the relative primitivism of international relations, he sees international reality as a construction that is at once elitist and democratic, looking directly at the then still incipient European construction: elitist, because he does not see how there cannot be a somewhat technocratic structure (such as the executive powers at the European level: the Council of States and the European administration); democratic, because it must be subject to parliamentary control. All in a “functional conjunction between the State, the Nation and the individual” in order to determine the Common Good.²³ However, the state is not without a positive side, a role itself of controlling the eventually totalitarian power of a “Super-Leviathan” which would constitute a global political organisation. And here Dupuy persists in his dual vision. The state “balkanises the collectivity of peoples”,²⁴ without doubt, but it is also an entity which must, at the present historical moment, respect the plurality of human life within its borders and, outside them, be an element “among other factors of regrouping, of international society”.²⁵ In reality, an intermediate body which guarantees spaces of freedom and national identity. Nevertheless, democracy does not cease to matter in the international system because it introduces “leavenings of equality and fraternity” into it. Equality, because the accepted rule in international organisations is to give one state one vote. Of fraternity, through programmes and mechanisms of aid for development and social progress.

And yet, states always end up moving towards other organisations that guarantee relative prevalence, integrating and founding new institutions in order to satisfy their strategic interests. Dupuy

23 Dupuy, *Dialectiques...*

24 Dupuy, *Dialectiques...*, 81.

25 Dupuy, *Dialectiques...*

never fails to affirm an essential tension between the centrifugal and centripetal forces that simultaneously inhabit political systems, using subterfuges, strategies and even idealistic arguments, especially when concealed “in the messianism of the dollar and the diplomacy of the rouble”. And in this he detects a “lack of universalism”, since the international world dynamic has been (and continues to be) reduced to the UN as a mechanism for collective security and appeasement. Nonetheless, this organisation ended up, as a result of its exponential growth, becoming a global forum where the risks are forced to fraternise with the poor.²⁶

§ 4.

In these terms, through Dupuy’s thought one can observe something more than just a simple moderate realist position. In fact, René-Jean Dupuy is not interested in presenting a systematic thought. He was not interested in presenting a systematic thought, but rather in developing a reflection based on contradiction and making it the lever through which he could understand reality. He calls it “open dialectics”.²⁷ Defining it as a “method based on the study of contradictions and the confrontation of opposing tendencies”,²⁸ which “provides very varied experiences thanks to the contact it allows with the sinuous nature of reality”,²⁹ the author intends to “highlight the contradictions and complexities, always renewed, of the whole of the social phenomenon studied”.³⁰ Not a finalist, as he classifies Hegelian and Marxian dialectics, he does not offer

26 In support of his thesis, Dupuy quotes Sartre when he states: “there are two kinds of poor, those who are poor together and those who are poor alone. The first are the real ones, the others are the rich who have had no luck” (*Dialectiques...*, 29 sqq.).

27 Dupuy, *La Communauté...*

28 Dupuy, *La Communauté...*, 30.

29 Dupuy, *La Communauté...*

30 Dupuy, *La Communauté...*

a synthesis, intending only to “study antagonisms for their own sake”, rejecting any system, with it not leading to “either salvation or despair”, namely not intending to prophesy about the future of Humanity, nor exhibit a juridical “cosmogony”. Dupuy maintains, in fact, that “any progress is contemporary with a compensatory regression”,³¹ since progress is not linear. Not to mention a profound reciprocity of determinations between super and infrastructures, whose contradictions interweave with each other, to the point that it is no longer possible to defend the existence of an original state of nature in relations between states, as well as the existence of an institutional world arising from a refined rationalisation of social and political relations. In a world full of tensions, where cooperation and competition are waged and multiplied among diverse objects of the most varied nature, where such clash among immense formal instances, where they are enriched by the fact that they meet the collective needs of humanity, it would be a mistake to suppose that pure models exist.

In truth, according to the author, unity and conflict are two sides of the same coin. Moreover, one supposes the other. In fact, we are confronted, he says, with dialectical planes. It is essential to examine the contrast between “relational law” and “institutional law”. Dupuy calls relational law the set of old rules that correspond to the voluntarism of political units according to their specific needs. Institutional law translates those norms originating in a different context, where institutions exist to organise and facilitate the expression of common interests between these political units. Relational law presupposes a political-international system that is not based on any kind of transcendence, corresponding to the concept that *Rex est imperator in regno suo*, i.e., a *collectivity* of sovereign states that begins to be clearly constituted with the wars of religion in the 16th and 17th centuries in the form of the “European System of States”. Institutional law is born from the emergence of phenomena of coordination between states, at the

³¹ Dupuy, *La Communauté...*, 31.

limit of subordination, through the existence of organisations that somehow act according to norms that establish supra-state and supra-national powers. An interesting example of which is the European Danube Commission, created in 1856 after the Crimean War, by treaty between states such as Great Britain, France, Prussia, the Russian Empire, the Ottoman Empire, the Austro-Hungarian Empire and the Kingdom of Sardinia.³² Nonetheless, the institutional order did not replace the relational order, as both models are synchronous, coexist, interpenetrate and confront each other. However, both remain in each other's conjuncture and horizon.

The relational model is characterised by:³³ (i) the diffusion of power concentrated in states, which historically share territory and population, exclude individuals and thus do not tend to have common interests; (ii) unconditioned power, i.e., state power understood as a maximum power, with the respective plenitude of competences ("sovereignty is the power of no"), a spontaneous power that does not obey previous rules, a libertarian power in the sense of the refusal of the "right of subordination", insofar as it is a voluntary right coming from the will of the states;³⁴ (iii) violence of power, i.e. the possibility of resorting to the use of force to defend a "subjective" conception of legitimacy, by virtue of the "absent third party"; to use Bobbio's expression, the absence of the intervening third-party judge, the absence of supra-state

32 Now the International Commission for the Protection of the Danube River, which brings together fourteen European states, some members of the European Union and others not.

33 Cf. Dupuy, *La Communauté...*

34 In this regard, Dupuy adds that this right is the result of the coordinating wills of the States, as has always been advocated by the Soviet School of International Law, finding foundation in the sources of international law, including in Article 38 of the Statute of the International Court of Justice when it speaks of the general principles of law "recognised by civilised nations" which, as we know, has been increasingly criticised for its implicit division between "civilised" and "uncivilised" nations, today extended to other differentiations, whose legitimacy is definitively shaken.

coercive means to restore order in the event of a breach, making room for diverse interactions, naturally including palliatives against structural violence (diplomatic exercises, arbitration, compromises such as the so-called Briand-Kellog Pact of 1928) which, in reality, are also manifestations of this profound mark of the relational model, in which the state can do anything.

The institutional model:³⁵ (i) concentrates power. States abandon the possibility of everything being ignored to join organisations which, to a certain extent, represent a form of “assembly” of states where they debate, adjust positions and negotiate, on a permanent and stable basis; and not as if it were an exceptional diplomatic conference where a body expresses an organic will. Various political forms are possible, but what is most important here is the emergence of a somewhat independent structure, with concrete individuals assuming the role of supranational rulers-administrators-representatives, adding the possibility of individuals becoming subjects of law before these bodies, namely when they see their fundamental rights violated; (ii) it conditions power: when the State integrates the organisation, when it enjoys a statutorily durable organic and normative autonomy, by the normative hierarchy that the institution never ceases to establish in the name of the general interest, by the procedures densifying the relations between its members and between these and the organisation itself, by the possibility that it always has to manifest its will as an organisation, creating a pole of legitimacy that contradicts state voluntarism; (iii) it is also characterised by the repression of the power-force, such as, for example, the establishment and control of the prohibition of the use of force.

In reality, these two models must be distinguished, though they cannot be separated. This is the topic that interests Dupuy. Historical reality never exposes pure models, the fact is that in this case both are mixed and confused. And, this is so because an institutional system so perfect that it would set aside historical

35 Dupuy, *La Communauté...*, 48 sqq.

and human limitations is not even conceivable. In this regard, the author speaks of the disaster that fixist models such as Plato's or Campanella's abstract utopias, which build completely unworkable "rational and frozen universes", always represent. In this regard, the effective and mixed models end up feeding off each other. They even end up concerting, as only their coexistence allows to understand historical complexity. More than coexistence, one could speak of complementarity, which does not mean complicity, since the relational simultaneously intrudes into the core of the institutional and the institutional project itself into the relational order, remaining in its orbit. As a result, complexity has increased. Nonetheless, as the same actors –states– participate in both models, it produces a mixture which ends up translating the 'contagion' of one into the other. It is enough to think of the influence of the institutional model on the conclusion of multilateral treaties, or the institutionalisation of the Law of the Sea, to appreciate the extent of this dual movement. This is very clear in the letter of Resolution 2625 (XXV, 1970), which lays down that all states enjoy *sovereign equality* within the international community beyond their *de facto* differences. In fact, this formula introduces a difference in weight compared to simple sovereignty. Moreover, Resolution 2627 (XXV, 1970) speaks of international conventions as expressions of the moral conscience of mankind that must be respected by all members of the International Community. In turn, Resolution 2997 (XXVII, 1972) establishes the need to protect the environment for the benefit of present and future generations, prescribing measures to be taken by the International Community, opening the way to the concept of the Common Heritage of Humanity. In essence, an appeal is made to material and immaterial goods that only make sense outside a territorial concept of power.

We thus live in a hybrid situation, since the reigning intersubjectivity in contemporary international society suffers the compression of two phenomena that produce contrary and antinomic effects.

Firstly, the appearance of formally sovereign states, following victorious independence movements, did not always coincide with “real” borders, i.e. corresponding to their cultural origins, but rather with colonial borders. This is particularly true in Africa, where the OAU itself (now the African Union) accepted the borders previously fixed by colonialism as the basis for the sovereignty of the new states. This has resulted in a permanent malaise that has not yet been overcome, as the sovereignty that was accepted following treaties and struggles for independence does not always correspond to the idea of sovereignty experienced from a historical-cultural point of view.

Secondly, and as Dupuy notes,³⁶ the problematic of sovereignty contains within its genesis a knot of contradictory themes that historical intrigue has nuanced and somehow shaped. The advent of the modern state –in its absolutist origin and resulting from the Wars of Religion that culminated in the Westphalia model, with a first theological-political manifestation in the so-called “Controversy of the Investitures” still in the Middle Ages³⁷– ended up transforming the way sovereignty was established in (and framed by) a society that became “legicentrist”, secular and the root of individualism. Dupuy sharply cuts across how this model of culture was generated and became dominant from the 19th century onwards, as it culminated in a supreme contradiction: from a liberal affirmation of religious tolerance, but maintaining a very strong religious matrix (the case of Protestant American culture), it passed to the “death of God” through the revolutionary anticipation of the future in the present (the very clear case of the French Revolution), for which it was necessary to impose a “negative theology”, in which the rejection of the divine obliges the “affirmation of the primacy of man to be universal from the start”.³⁸ Therefore, there is com-

36 Dupuy, *La Clôture...*

37 Cf. G. Poggi, *Lo Stato* (Bologna: Ed. Il Mulino, 2021); M. Gauchet, *L'Avènement de la Démocratie. I – La Révolution Moderne* (Paris: Gallimard, 2007).

38 Dupuy, *La Clôture...*, 95.

patibility between a state that refuses the *Res publica Christiana*, in theory homogeneous, in favour of an anarchic system of sovereignties that refuse any transcendence, and an idea of man that aspires to his individual freedom and seeks it in internal political systems. Several consequences flow from this: (i) the individual, who is the ultimate addressee of international relations (insofar as one pays taxes, fights in wars, lives in territories, etc.), is not considered as a category to be addressed by international relations, being no longer considered as a category to be taken into account in the international system, but rather exercises their rights within the framework of the states to which they belong; (ii) the international system becomes, in essence, interstate, which in time implies a dilution of the universal cosmopolitan principles that, since antiquity, have always been part of Western thought; (iii) these consequences were to some extent historically feasible as long as, as Dupuy³⁹ notes, the Earth was sufficiently vast to cover up the differences, inconsistencies and violence that this compatibility created. Nonetheless, the planet has nowadays become an authentic “Earth City” where the main actors no longer believe in any transcendence above them, especially because of the common challenges facing a demographically explosive Humanity: “the City suffers the checked pattern of sovereignties. The Earth has only one people and the world is populated by foreigners”.⁴⁰

The issue of sovereignty also constitutes a complex brake on this idea that Dupuy formulates, not in the sense of making this last fact –the Terrestrial City– a normative impossibility, but because sovereignty contains within itself a double face. On the one hand, it is a response to a historical reality that arose with the split operated by the Reformation and Counter-Reformation. On the other hand, it is a form of manifestation of domination that competes with other powers, thus requiring a “common social substratum” that unites all those who find themselves within an arc of obedience

39 Dupuy, *La Clôture...*, 96 sqq.

40 Dupuy, *La Clôture...*

that only makes sense within the framework of the same internal adherence from a socio-historical point of view.⁴¹

§ 5.

Serge Sur⁴² is therefore right when he places the normative dimension of International Law under the aegis of three ideas: (i) as a utopia, it is the right of the weak; (ii) as an organisation, it is in principle the right of equals; (iii) as a “register”, it is the right of the powerful. Other authors highlight this complexity in another way, when they speak of the existence of three spheres in the international system, which criss-cross, often collide and sometimes painfully coexist: that of human rights and that of the rights of peoples, as well as that of the law of states, where the latter plays the role of the realism of power and the former expresses the utopia of a community without frontiers.⁴³ It is thus possible to understand why the international system has been consenting to the design of an International Community. This is how Sur frames part of Dupuy’s thought. However, he goes further, as he proposes that in a politico-international world without transcendence, a value should be found that crystallises the awareness of an imposed common destiny. And this value is the primacy of man. Thus, Dupuy summarises his thought arguing that it is man “who must be extracted from the State, where the eternal dialogue between Antigone and Creon continues, always with the same result. It is to him that the powers must be submitted”.⁴⁴ And it is in this consciousness

41 Cf. the luminous study by N. Ramiro Rico, “La Soberanía”, in N. Ramiro Rico, *El animal ladino y otros estudios políticos* (Madrid: Alianza Ed., 1980), 119 sqq.

42 Cf. S. Sur, “Système juridique international et utopie”, in *Archives de Philosophie du Droit*, 32/1987, 41.

43 Cf. B. Kriegel, *Cours de Philosophie Politique* (Paris, Librairie Générale Française, 1996), 110 sqq.

44 Dupuy, *La Clôture...*

motivated by the common conscience that the spirit and letter of norms concerning the organisation of the international community, as well as of norms concerning human rights, are found. In other words, it is from this junction that the idea of the individual in international life emerges. This is, of course, a very difficult harmonisation. Indeed, historical and cultural differences cannot presuppose absolute transcendence, but rather a practical thinking towards which spiritual families and value systems converge.⁴⁵ However, this same need for practical thinking leads, in the face of a World International System such as the one that emerged after 1945, to confront an archipelago of very different cultures that ferment the fracture between peoples, cultures and religions. Yet, Dupuy's question is to know the true scope of the declarations of human rights, particularly the Universal Declaration of Human Rights. Convinced that the intention behind this document is to unite all human beings, he maintains that its intention is to "desacralise everything that is not man and especially the State, race, party".⁴⁶ He concludes that there is a fundamental presupposition for this profound desideratum to materialise: that humans accept each other unconditionally. This idea has profound juridical-political implications, as it not only presupposes freedom and fraternity, but also implies brotherhood. We thus find ourselves under the motto of the French Revolution without its nationalist substratum. However, Dupuy's moderate realism will lead him to a relative scepticism regarding the capacity of human beings, by themselves and together, to escape the dogmas of power.

Is this a community of rights? For Dupuy, the problem of human rights is a thorny one, since "any representation of man comes from a socio-culture made up of values, conducts and products. The former emanates from [...] the conception of the world.

45 Dupuy, *La Clôture...*, 100. According to the author, both the secular vision of existence and the Christian vision converge in their ultimate foundations towards an acceptance of human rights.

46 Dupuy, *La Clôture*, 101.

The conducts that manifest themselves in the ways of being, feeling, thinking and acting express a rationality. Such products are realised through arts, science, technology and law. These are what is most commonly referred to as civilisation, while values and conducts correspond to culture, *stricto sensu*.⁴⁷ In this regard, the problem of rights is posed, not so much by making concessions to those who impose on them the need for more material progress, or utopias of means, which often fall into murderous abstraction. Rather, it is assumed as a reference of a universal man who appears in modern Europe as the bearer of a general Common Good of an inclusive nature. However, is this universal man easy and natural to perceive? Of course not. Namely because, as Dupuy notes, political rights (which mark the victory of Antigone over Creon) only require the sovereign state to abstain, while the way of looking at rights in lateral terms implies relations between individuals and imposes on them respect for the other. A way intrinsic on religious origins, leading to fraternity and thus flowing into economic, social and cultural rights, which translate into the Social State of Law at an internal level and, at an external level, into cooperation between states for a just world development.⁴⁸ Strictly speaking, whenever rights are violated, the existential-social awareness of these same rights is displayed. How can one perceive the *raison d'être* of rights? Through the awareness that the human community ferments in communicative interaction, which has the intuition that common agreement and effort are inherent to the human condition at its base. In this regard, we can consider declarations and other documents on rights as elements that concretise their intrinsic prophetic value.⁴⁹

Thus, the contestation of rights that start from the assumption that they are manifestations of Eurocentrism has, for Dupuy, no validity, since respect for rights tends towards the “universal

47 Dupuy, *La Clôture...*, 114; Id., *Dialectiques...*, 213 sqq.

48 Dupuy, *La Clôture...*

49 Dupuy, *La Clôture...*, 104.

Common Good”, while respecting differences, since difference “cannot blow up the unity of human nature”;⁵⁰ It is possible that there are no historical conditions for an effective recognition of universal human rights, in the sense of real conditions that would allow the recognition of a “world society” that recognises in each human being a *status mundialis*, as well as to future generations. Nonetheless, we may ask, is it also necessary, in any case, for a philosophy of international law to set up a theory of human rights in which these are global and projected within a worldwide parameter? Undoubtedly. Starting from human dignity as an anthropological-cultural premise of law and democracy as a consequence at the organisational level, it will be important to defend a perspective on the rights that help human beings to become persons. Obviously, this process of development of the person, legal, political, symbolic, universal cultural normative frameworks has an enormous importance, with variations in the scope of the maximum possible awareness in force in a certain socio-historical system, the indispensable alterity for the substantive existence of the rights of each one, implying the reference to the “neighbour” that allows the interrelation between human dignity and democracy to be gauged. In addition, it is impossible to forget how the architecture of sovereignty was separately conceived and realised from the idea of human dignity, since even “popular sovereignty”, the ultimate avatar of the modern reformulation of political power, became more entrenched in the discussion with its adversary versions than in deepening questions relating to anthropological fraternity, forgetting the denser themes relating to human dignity. Once again, the solution will be that which walks in the context of an inextricable association between the “image of man”, the “image of the State” and the “image of the World”, under the aegis of the construction of a world *ethos* between peoples and cultures. In short, this is how Dupuy understands human rights: as there can and must be a good propensity for human rights, these in their universal version are

⁵⁰ Dupuy, *Dialectiques...*

today elements of a common culture as a global society, but without a “world state”.⁵¹

This is undoubtedly a difficult image to establish, since sovereignty has come to correspond to an ideological simplification of the images of the world. The multiple archipelago of differences contradicts the drive towards the “one” that runs through all socio-historical systems and myths that are rooted in the respective social imaginaries. However, as we have seen, fragmentation leads to historical conflict, because identities tend to assert themselves against the idea of a Humanity reconciled within itself. Modernity, that is, the European idea of a universalism based on reason, ended up crumbling with its own development, which accentuated the relativity of scientific truth, which had to be seen as a complex process of ruptures.⁵² From this point of view, Dupuy’s theses anticipate the current problem of identities in dispute, which are usually accompanied by a generalised anger⁵³ that challenges any policy of compromise with regard to a political system or even an international regime. For Dupuy, there is an obvious need for the recognition of a new right: the right to difference,⁵⁴ as such will constitute the sign “of a radical transformation in the perception of humanity”.⁵⁵

In effect, the idea of the international community already corresponds to a civilisational evolution that inhabits the relational and institutional orders, and is thus anterior, interior and exterior to international society.⁵⁶ Therefore, a “*pluriversal*” perspective is necessary. That is, simultaneously plural and pluralist-distended, as Dupuy points out, which is the sign of a vision capable of articulating

51 Cf. one of the first reflections on this subject: L. Cabral de Moncada, *Filosofia do Direito e do Estado*, II (Coimbra: Atlântida, 1966), 224 sqq.

52 Dupuy, *La Clôture...*

53 Cf. M. Benraad, *Géopolitique de la Colère* (Paris: Le Cavalier Bleu, 2020), 103 sqq.

54 Dupuy, *La Clôture*, 115.

55 Dupuy, *La Clôture...*

56 Dupuy, *L’Humanité...*

different visions of the world, as a way of understanding the Earthly City which, beyond disorder, must above all be creative.⁵⁷ And it is here that Dupuy's thought goes beyond its moderate "realism" to become, at one and the same time, the thought of a *savant* and a *sage*.

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57 Dupuy, *La Clôture...*

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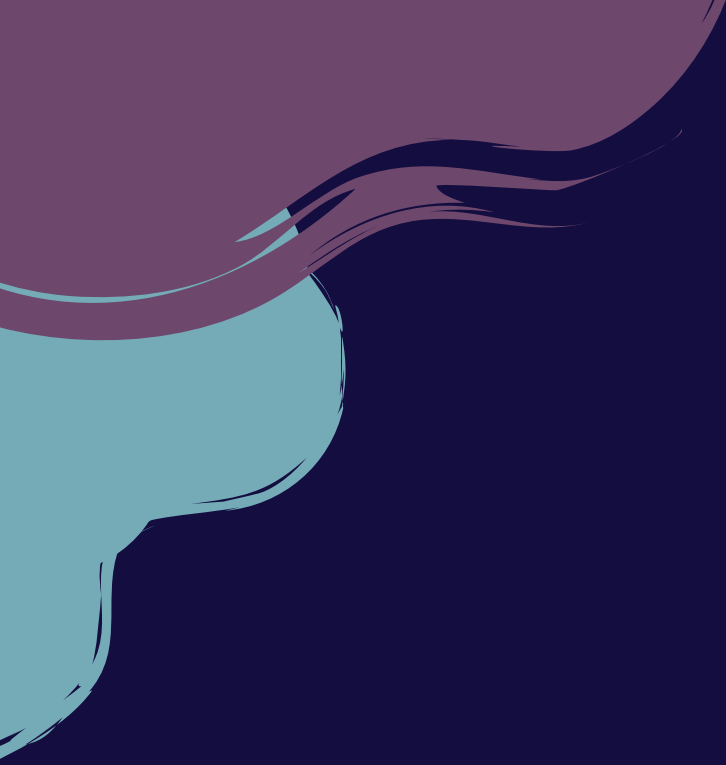
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