SQUARING THE CIRCLE: HOW THE RIGHT TO REFUGE CAN BE RECONCILED WITH THE RIGHT TO POLITICAL IDENTITY

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AUTHOR
Sergio Dellavalle

ABSTRACT

From the perspective of the classical dichotomy between the main paradigms of international law and relations – particularism, on the one hand, and universalism on the other – the right to seek refuge in view of a significant threat against the fundamental conditions of a decent life, and the right to preserve the always fragile identity of the political community, seem to be hopelessly irreconcilable. While the supporters of the particularistic understanding of international order claim the unquestionable superiority of the identity of the individual political community, the advocates of universalism decidedly promote the right to seek asylum without consideration of national borders. Yet, on both sides of the apparent dichotomy things are not as definite as they seem to be at first glance. In fact, not every parochialism is insensitive to the rights of "others", and cosmopolitanism has to acknowledge that rights should be regarded as differentiated insofar as they refer to rights-holders in different situations. Building on this potential rapprochement – and, therefore, on the overcoming of the classical dichotomy between particularism and universalism – a framework is developed for the recognition of the right of aliens to refuge which, nevertheless, also presupposes that citizens justifiably hold a "thicker" endowment of rights than strangers. On this basis, the following questions are addressed: a) what are the justifiable specific rights of citizens that make them different from aliens? b) What is entailed in the right to refuge? c) Under which conditions can a right to refuge be claimed? d) And, on the contrary, when is it justified to deny the right to cross borders in the name of preserving the integrity of the political community?

KEYWORDS:

Sergio Dellavalle[*]

Squaring the Circle:
How the Right to Refuge Can Be Reconciled with the Right to Political Identity

1. Introduction

We can define the identity of a political community as the internalization, in the form of ethical habits, of the rules which guarantee a peaceful and cooperative social interaction. These rules are made of two components: a logical nucleus and a historical realization. The logical nucleus is universal and refers to the inescapable conditions of a meaningful communication.[1] But, since this nucleus is always embedded in concrete historical conditions, the fundamental question at the basis of every political community – regarding the principles on which we want to organize our life in its public dimension –[2] has been answered in quite different ways. Factually, the distinct answers are the result of specific historical events and of social struggles – we could say: of "struggles for recognitions" –[3] that shaped the unique identity of every political community. Therefore – and as a matter of fact – the actual identity of a political community is always the result of the substitution of former rules of interaction through new ones, so that political identity is necessarily destined not to last forever – and probably not even for long – but to change from time to time, at more or less short intervals. Nevertheless, it is understandable that a large part of the political community is rather prone to maintain the existing rules, first because of the unshaken belief by the majority of its members in the values embedded in them, second due to the predictability of interaction that is guaranteed by the internalization of the given rules, and third as a consequence of the awareness that a change of the existing rules comes always along with a great amount of suffering and of uncertainties about the future.

On the other hand, the right to refuge, or to seek asylum, is the entitlement by every human being to escape from situations which represent an existential threat or do not guarantee a decent quality of life, to be supported in her/his attempt by her/his fellow humans, and to be welcomed in foreign countries as long as the danger persists. If we consider the right to political identity and the right to refuge each from its own perspective, both entitlements seem to be self-evident: the right to political identity because it is part of the day-to-day experience of most of us, and the right to refuge because it is based on the most essential and intuitive entitlement that we mutually rec-

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[*] Professor of Public Law and State Theory at the University of Turin (Italy), Faculty of Law; senior research affiliate and co-director of the research project "Paradigms of Public Order" at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg (Germany); associate member of the Cluster of Excellence "Normative Orders" at the University of Frankfurt (Germany); email: sergio.dellavalle@unito.it; dellavalle@mpil.de.
[1] Jürgen Habermas, *Vorstudien und Ergänzungen zur Theorie des kommunikativen Handelns*, Suhrkamp, Frankfurt a. M. 1984, at 598; Jürgen Habermas, *Nachmetaphysisches Denken*, Suhrkamp, Frankfurt a. M. 1988, at 73, 105, 123; Jürgen Habermas, *Wahrheit und Rechtfertigung*, Suhrkamp, Frankfurt a. M. 2004, at 110; Sergio Dellavalle, *On Sovereignty, Legitimacy, and Solidarity: Or: How Can a Solidaristic Idea of Legitimate Sovereignty Be Justified?*, 16 Theoretical Inquiries in Law 367 (2015), at 391 et seq., 392 note 68.
[2] Jürgen Habermas, *Erläuterungen zur Diskursethik*, Suhrkamp, Frankfurt a. M. 1991, at 100 et seq.; Armin von Bogdandy, Sergio Dellavalle, *Universalism Renewed. Habermas' Theory of International Order in Light of Competing Paradigms*, 10 German Law Journal 5 (2009), at 23.
[3] Axel Honneth, *Kampf um Anerkennung*, Suhrkamp, Frankfurt a. M. 1992.

ognize to everyone of us, namely the right to protect our lives.[4] Nevertheless, in reality – and, specifically, in the present situation of the Western world – they are increasingly seen as trapped in a mutual contradiction and eventually excluding each other: if the right to political identity has to be taken seriously, the right to refuge should be at least limited as a second-level entitlement or downright ignored; and, instead, if the right to refuge should be put to the fore, the identity of the community runs the risk of being regarded as a selfish and backward-oriented bias. What is happening in the last years in the European Union – but, in general, not only there, and not exclusively in the Western world – as regards the attitude towards migrants gives us a disturbing example of the consequences that can arise from an unbalanced and largely one-sided approach to the question.

The seemingly irresolvable contradiction can be traced back to the inherent relation that each of the rights has to one of the two main paradigms of international law and relations: while the conviction that gives priority to the right to political identity arises from a *particularistic* view of social order, according to which only limited communities with undisputable distinctiveness can be well-ordered, the precedence to the right to refuge presupposes, on the contrary, the *universalistic* persuasion that order can be expanded to the whole *cosmopolis*. Insofar as particularism and universalism are assumed to build a dichotomy,[5] also the seemingly insoluble contrast between the right to political identity and the right to refuge appears to be easily explained: as in all dichotomies, the preference for the one option excludes *per se* the other possibility. Thus, from the standpoint of the traditional dichotomy of particularism and universalism, the state of things is assumed to be quite unambiguous. The supporters of the particularistic understanding of international order claim the unquestionable superiority of the identity of the individual political community, while the advocates of universalism decidedly promote the right to seek asylum, in front of a significant threat against the fundamental conditions of a decent life, without consideration of national borders. The two approaches appear to be rooted in no less clear-cut – and opposite – ideas of rationality and of the use of practical reason. On the one hand, particularism is backed by an idiosyncratic conception of rationality as strictly related to the vernacular communication, to the specific conditions of social interaction and to the interests of an individual community; on the other hand, universalism relies on the conviction that rationality is intrinsically not bound to any form of exclusive identity, thus leading every human being to the shared recognition of common rights and interests and, therefore, to a cosmopolitan obligation to basic solidarity (2.).

Yet, on both sides of the dichotomy things are not as definite as they seem to be at first glance. In fact, not every parochialism is insensitive against the rights of "others", and cosmopolitanism – if it does not want to verge on the utopia of the *civitas maxima* – has to acknowledge that rights should be regarded as differentiated insofar as they refer to rights-holders in different situations (3.). Starting from this assumption, a framework is developed for the recognition of the right of aliens to refuge which, nevertheless, also presupposes that citizens justifiably hold a "thicker" endowment of rights than strangers. As a result, the conceptual presuppositions are given to overcome the former dichotomy, so that the right to refuge has not to be seen as irreconcil-

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[4]   The basic existence of a *conatus sese servandi* – the impulse towards self-preservation – is a largely undisputed *topos* of social philosophy. As such it has been acknowledged as the most basic drive of every living being by authors as far from each other as the Stoics, on the one hand, and the contractualists on the other. See: John Sellars, *Stoicism*, Routledge, New York 2014, at 107 et seq.; Thomas Hobbes, *De Cive* (1642), Royston, London 1651, Part I, Chapter I; Baruch (Benedictus) de Spinoza, *Ethica ordine geometrico demonstrata* (1677), in: Baruch de Spinoza, *Opera*, Carl Gebhardt ed., Winters, Heidelberg 1924, Vol. 2, Part IV, Pro. XXII, Prop. XXVI, Prop. LVI; Andrew Youpa, *Spinozistic Self-Preservation*, in: 41 The Southern Journal of Philosophy 477 (2003).

[5]   Armin von Bogdandy, Sergio Dellavalle, *Parochialism, Cosmopolitanism, and the Paradigms of International Law*, in: Mortimer N. S. Sellers (ed.), *Parochialism, Cosmopolitanism, and the Foundations of International Law*, Cambridge University Press, Cambridge/New York 2012, 40.

able with the centrality of the political identity of the individual community any longer. Many essential questions related to the contemporary debate concerning social order and international justice can hardly find an adequate solution within the horizon of the dichotomy between particularism and universalism – and, therefore, also between the rights to political identity and to refuge. Among them are such fundamental issues as the identification of the specific rights of citizens that make them different from aliens; the definition of what is entailed in the right to refuge and of those who are entitled to claim this right; as well as, finally, the conditions under which it may be justified to deny the right to cross borders in the name of the integrity of the political community. On the basis of a post-dichotomous conceptual framework these problems can be approached from an unusual standpoint: by being reassessed, they are likely to be brought closer to a well-balanced clarification (4.)

2. The Contradiction between the Right to Political Identity and the Right to Refuge as an Expression of the Dichotomy between Particularism and Universalism

Particularism and universalism are the two preeminent paradigms of international law and relations. The difference between the paradigms concerns essentially the potential extension of a well-ordered society. Theories of social order which can be ascribed to the particularistic paradigm maintain that a society has to be regarded as well-ordered – i.e. as a society characterized by effective rules of interaction, which guarantee peaceful and cooperative relations between its members – only if its extension remains limited and the population involved is rather homogeneous. By contrast, universalistic theories of social order assume that the well-ordered society could be expanded to comprehend, at least potentially, the whole world and the entire humankind.

According to the tradition of political and legal thought, particularism and universalism are supposed to radically oppose each other, or, in other words, to build a *dichotomy*, which has two consequences. First, the preference for particularism excludes in principle any advocacy in favour of admitting an even just marginal consistency of universalistic arguments, and vice versa. As a result, the opposite position is not seen as possibly containing elements capable of being integrated into one's own convictions. Rather, it is regarded as an irreconcilable alternative – if not even as the unacceptable claim of the political and ideological counterpart. Secondly, every theory of order belongs necessarily to one camp, or to the other: no overlapping or merging is conceivable.

At first glance, it seems to be evident that affirming the centrality of the right to political identity – as opposite to the marginality or irrelevance of the right to seek asylum – is an expression of the belief in the particularistic view. Indeed, the strenuous defence of the identity of one's own political community always presupposes the conviction that the individual community is the privileged place to realize a well-ordered society, and a deeply rooted scepticism towards the universalization of order. On the other hand, defending the right to refuge mirrors the universalistic *Weltanschauung* and the rejection of any form of narrow-minded parochialism. As a result, if particularism and universalism are opposite to each other as a dichotomy, then the right to political identity and the right to seek asylum – insofar as they belong respectively to one of the conflicting paradigmatic frameworks – will also exclude each other.

Starting from this assumption, the supporters of the right to political identity present arguments derived from the conceptual organon of particularism in order to back their option and to oppose the centrality of the right to seek refuge. Analogously, but on the other side, the partisans of the right to refuge argue by resorting to the classical universalistic reasons. Both strands of argumentation will be considered more in detail in the following sections.

2.1. Particularism and the Right to Political identity

Particularism – and, therefore, also the strand of political and legal thought that prioritizes the right to political identity by resorting to particularistic arguments – is characterized by a specific form of rationality, in particular with regard to the use of practical reason. Three features are typical for the particularistic rationality: a) cultural and linguistic embeddedness of reason; b) selfishness as rational choice; c) contraposition to alleged external threats as expression of rational behaviour. Most authors who can be related to the particularistic understanding of order preferentially address in their works only one of these characteristics, so that different variants of the paradigm can be distinguished.[6] Nevertheless, we can also find out a significant merging of the distinct positions in some recent theories (d).

a) Western thought generally interpreted rationality as essentially *abstract*, since based mainly on logical procedures of reasoning, and *universal*. In other words, reason was supposed to be one and the same in all human beings and not to be rooted in pre-rational lifeworlds. The beginning of the abstract approach to knowledge can be probably traced back as far as to Plato,[7] or even further to Parmenides.[8] However, no doubts can arise on the fact that it was significantly radicalized by modern rationalism and enlightenment.[9] The emerging of an ever more abstract and universalistic conception of reason raised a counterreaction during the 18th century. First, as we can see in Giambattista Vico's *Scienza Nuova*, the use of practical reason – i.e. the exercise of reason which does not aim at achieving a theoretical knowledge of the world, but at giving rules to subjective and intersubjective action – was explicitly linked to the historical and social conditions of human life.[10] Secondly – and with a significantly more deep-going impact – rational thinking as the distinct feature that characterizes the human species was directly connected to the development of human language by Johann Gottfried Herder.[11] Yet, human language was not interpreted, here, as a logical instrument with the function to build abstract concepts for the theoretical and practical use of reason, but as a semantic tool to allow communication.[12] Moreover, human language was understood as something deeply tied with concrete and tangible experiences not only because it was seen as non-abstract but also insofar as it was regarded as non-universal. In fact, human language – and, therefore, also human reason – is always the language of an individual community, of a specific nation or people (*Volk*).[13] Since the national languages are assumed to be

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6 We can speak, respectively, of a nationalistic, a realistic and a hegemonic variant of particularism. See: Sergio Dellavalle, *The Necessity of International Law Against the A-normativity of Neo-Conservative Thought*, in: Russell Miller, Rebecca Bratspies (eds.), *Progress in International Law*, Martinus Nijhoff, Leiden/Boston 2008, 95, at 105 et seq.

7 Martin Heidegger, *Sein und Zeit* (1927), Niemeyer, Tübingen 1986, at 2 et seq.

8 Michael Theunissen, *Negative Theologie der Zeit*, Suhrkamp, Frankfurt a. M. 1991, at 89 et seq. I am grateful to Eva Birkenstock for this suggestion.

9 René Descartes, *Discours de la Méthode*, Ian Maire, Leyde 1637; René Descartes, *Meditationes de Prima Philosophia*, Amsterdam 1642 (1st ed. 1641) ; Thomas Hobbes, *The Elements of Law, Natural and Politic* (1640), Oxford University Press, Oxford 1994, Part I, Chapter I; Hobbes, *De Cive*, *supra* note 4, Part I, Chapter II, I ; John Locke, *An Essay Concerning Human Understanding* (1690), Prometheus, New York 1995; David Hume, *A Treatise of Human Nature* (1739), Oxford University Press, Oxford/New York 2000; Immanuel Kant, *Kritik der reinen Vernunft* (1781), in : Immanuel Kant, *Werkausgabe*, Wilhelm Weischedel ed., Suhrkamp, Frankfurt a. M. 1977, Vol. III and IV.

10 Giambattista Vico, *Princìci di scienza nuova d'intorno alla comune natura delle nazioni* (1744), in: Giambattista Vico, *Opere filosofiche*, Sansoni, Firenze 1971, 377 et seq., at 379, 466.

11 Johann Gottfried Herder, *Abhandlung über den Ursprung der Sprache*, Reclam, Stuttgart 1997, at 29 et seq., 108 et seq.

12 *Ib.*, at 129 et seq.

13 *Ib.*, at 141 et seq.

intrinsically divisive,[14] the limits of a meaningful communication must coincide with the borders of the nation. Furthermore, because according to political romanticism no rationality is admitted which could claim to be valid beyond the boundaries of the *Volk*, the only rational action will be the one that serves the interests of the nation.[15]

Under the premise that rationality is essentially bound to the nation, also political communication – as the kind of rationality that aims at organizing the life of the community as well as at working out its principles – is assumed to unfold properly, insofar as it claims to be rational, only within the context of the language of the *Volk*. In particular, according to the interpretation proposed by Dieter Grimm, only the existence of a shared language enables the members of the political community to legitimate the institutions of public power as well as their decisions.[16] As a result, if the ethical quality of the political life is regarded as strictly connected to the language of the people and the democratic legitimation of power depends on the presence of a common linguistic heritage, it would be a duty for every true supporter of democracy to slow down the pace of the development of society towards a multicultural and plurilinguistic entity and, therefore, to curb the number of incoming people in search for shelter.

b) The second feature of particularistic rationality is expressed by the assertion that only egoistic behaviour would be really rational. An evidence and an assumption lie at the basis of this conviction. The evidence is that the defence of one's own life and, if possible, the improvement of one's own life condition are to be seen as the highest commands that lead our actions; the assumption, instead, is that the behaviour of other actors can always be a threat to our lives or, at least, to our well-being. As a consequence of the individual priorities and of the dangers that they are always facing, it can be said – according to this approach – that I am acting rationally only in the case that I pursue my own benefit with indifference towards the interests of other, or even against them. The idea that reason would command the pursuit of self-interest – contesting, thus, the belief in universal justice – is nothing new in Western thought. Rather, it can be traced back to the very beginning of Western rationalism, as stated by Plato in his Republic, where the Sophist Thrasymachus is reported to explicitly assert that "justice … is the interest of the stronger."[17] In the same spirit, but even a couple of decades earlier, Thucydides let the Athenian ambassadors reply to the Melian magistrates, who had claimed the superiority of justice over power-oriented selfishness, with the contemptuous remark that "we bless your innocent minds, but affect not your folly."[18] Surely, according to Plato, Socrates successfully rebuffed Thrasymachus' argument by strongly affirming the priority of an idea of justice based on common interests. Moreover, between the end of antiquity and the beginning of Modern Ages Thucydides' power-oriented and egoistic understanding of rationality faded even more into the background in the face of an approach which sought universalistic order and, at least in the Christian message, final salvation in the afterlife. Yet, at the dawn of modernity, the resort to mundane selfishness as the only rational behavioural pattern became powerful again in the political philosophy of Machiavelli. Explicit is the passage of his *Prince*, in which he states – in a Thucydides-like manner – that "a man who wants to practice goodness in all situations is inevitably destroyed, among so many men who are not good."[19]

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[14]   *Ib.*, at 146 et seq.

[15]   As regards the concepts of "nation", national identity and the definition of national interests in political romanticism, see: Adam Müller, *Die Elemente der Staatskunst* (1809), Fischer, Jena 1922.

[16]   D. Grimm, *Braucht Europa eine Verfassung?*, 50 JuristenZeitung 581 (1995), at 588.

[17]   Plato, *The Republic*, Collier, New York 1901, Book I, 338c.

[18]   Thucydides, *The Peloponnesian War*, trans. By Thomas Hobbes, Rutgers Press, New Brunswick (New Jersey) 1975, Book V, 105, at 382.

[19]   Niccolò Machiavelli, *Il Principe* (1513), Einaudi, Torino 1995, Chapter XV (English transl. by James b. Atkinson, Hackett, Indianapolis 1976, at 257).

Machiavelli is regarded as the founder of modern political science, so that it is not surprising that his understanding of political rationality as aiming at maximizing the payoffs of the single agent has profoundly shaped the so-called *realism* – one of the most influential epistemological patterns of political science and philosophy, and probably the most influential of all with regard to the theory of international relations.[20] Finally, slightly more than a decade ago, Jack L. Goldsmith and Eric A. Posner have applied the epistemological framework of rational choice – based on the assumption that only selfishness is rational – to legal theory in order to assert the normative limits of international law.[21] According to their interpretation, since we cannot know precisely what the preferences of other polities are or what their next actions are going to be, we will act rationally – i.e. we will enhance our payoffs – only if our polity does not bind itself to strict supra-state rules, or, if it does so, just in the case that these rules are evidently at the service of its immediate interests.

By shifting the tools of the rational choice theory from the field of individual decisions, for which it was developed, to the actions of collective actors, namely of states,[22] Goldsmith and Posner run the risk – as realism does in general, insofar as it shares the same approach – of falling into an epistemological shortcoming. Still, let us leave aside the question of the epistemological deficit that may occur when individual and collective actors are supposed to have the same ontological features and are analyzed, therefore, with the same conceptual framework – and let us simply consider the practical consequences that the application of the selfish pattern of rationality has for the acknowledgement of a right to refuge. And these consequences cannot but be highly negative. Indeed, if the only rational behavior consists in pursuing the highest individual interest of the political community, foreigners will be sheltered exclusively in the case that their inclusion will bring an advantage, if not for every member of the polity, at least for most of them, or for the polity as a whole.

c) The third feature of particularistic rationality identifies rational behaviour not positively, but negatively, i.e. not starting from the definition of values and interests that bind the members of the community and are shared by them all, but on the basis of existential threats coming from outside.[23] In this case, priority lies in the identification of the *enemy* who endangers the very existence of one's own community. As a result, the *friend* will be everyone who shares the same danger and, therefore, also the same enemy. Not the organization of the polity, with the task of improving the life conditions of its members, is the barycentre of politics, but the defence against the threatening "others", whereas these "others" can be characterized by the most different features. They only need to be perceived as aliens, no matter whether their otherness has an ethnic, cultural, religious, social, or political basis.

Doubtlessly, this is the most radical feature of particularistic rationality and characterizes the most ungenerous attitude towards the inclusion of aliens. Indeed, if the community is always in danger of being destroyed and the danger comes in the most cases from outside, then those who are seeking refuge are to be identified – at first – as possible threats. This is true, by the way, regardless of their behavior or ideological affiliation: being different, they are a danger *per se*, and no inclusive policy can offer – according to this approach – a convincing solution.

d) The three features of particularistic rationality are perfectly synthetized in Samuel Huntington's book *Who Are We?*. The starting point of Huntington's analysis is the claim that the iden-

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[20]   Hans J. Morgenthau, *Politics Among Nations. The Struggle for Power and Peace*, Knopf, New York 1954; Kenneth N. Waltz, *Theory of International Politics*, Addison-Wesley, London 1979.

[21]   Jack L. Goldsmith, Eric A. Posner, *The Limits of International Law*, Oxford University Press, Oxford/New York 2005.

[22]   *Ib.*, at 6.

[23]   Carl Schmitt, *Der Begriff des Politischen* (1932), Duncker & Humblot, Berlin 1963, at 20 et seq.

tity of a political community always entails a sort of distinctiveness. In other words, in order to know what it is, a nation has always to put itself against an "other",[24] and Huntington goes so far in his assertion as to say that the "other" has to be explicitly perceived as an "enemy".[25] This assumption is backed by a short overview of the US history which is presumed to have been essentially characterized by the continuous presence of existential threats, although these threats may have changed during the course of time. As far as the near future is concerned, then, it is to be expected – according to Huntington – that the American identity will be largely shaped by the struggle against Chinese nationalism and militant Islamism.[26] The second point is Huntington's conviction that the so-called American Creed – namely the broad internalization of principles such as "liberty, equality, democracy, civil rights, non-discrimination, rule of law" –[27] is by far too abstract to forge a nation.[28] As a result, the American people, so as not to lose its cohesion and identity, should go back to its roots and revitalize its Anglo-Protestant heritage, which is seen as the crucial basis of the values that shaped the distinctiveness of the American people.[29] Thus, insofar as a migration influx occurs in which the immigrants are not willing to take on the leading values of the hosting society – as Huntington assumes to be true for the Mexican immigration of the last decades – the strength and the very future of the nation is in danger.[30] Finally, given these premises, rational politics cannot but consist in defending the – actually selfish – interests of the individual nation and, without any consideration of the possible existence of an *inherent* right to refuge, in welcoming the influx of migrants only insofar as it can be regarded as immediately advantageous for the hosting people.

Concluding, if we accept a *particularistic* understanding of rationality, according to which rational behaviour is culturally and even ethnically idiosyncratic, short-term-focused on egoistic payoffs and always scared of the possible danger coming from the "other", the identity of the political community can only be re-affirmed – in a somehow oppressive narrow-minded perspective – at the high price of a substantial denial of the right of persecuted people to find shelter. Insofar as this right, in a very limited sense, should be accepted, it would always and generally be submitted to the priorities of the hosting nation.

2.2. Universalism and the Right to Refuge

While particularistic rationality is culturally embedded, egoistic and suspicious towards strangers, if not downright hostile against them, universalistic rationality is culturally neutral – and thus cosmopolitan –, rather altruistic and open to the needs of the "others" as well as to their inclusion. Indeed, the idea of humanity including all human beings is a relatively recent invention in the history of humankind. And, to be developed, it needed a new understanding of the capacities and tasks of human reason.

In Greek and Roman antiquity, the full use of rationality was regarded to have been achieved, both in theoretical and in practical sense, only by civilized peoples, actually by no one else but the Greeks and Romans themselves. Since rationality was essentially linked to argumentation, it was not seen as the objective essence of the world, but rather as a capacity which could be

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[24] Samuel P. Huntington, *Who Are We? The Challenges to America's National Identity*, Simon & Schuster, New York 2004, at 24 et seq.

[25] *Ib.*, at 258 et seq.; 357 et seq.

[26] *Ib.*, at 340.

[27] *Ib.*, at 338.

[28] *Ib.*, at 19, 337 et seq.

[29] *Ib.*, at 37 et seq.

[30] *Ib.*, at 221 et seq.

displayed only within civilized societies and, in their context, just by the sages as the most cultivated individuals. As a result, the only features that were assumed to be shared by all humans were the main characteristics of their physical constitution and, to some extent, a general tendency to sociability. Moreover, from this tendency no universal *nomos* or law could be drawn; rather, every political community was considered to have its specific *nomos*, whereas the different *nomoi* were not only independent of each other but also, the more distant the communities were in cultural sense, largely incommensurable.

It was first with the Stoic philosophy that the idea of a universal rationality made its entry into Western cultural history.[31] The Stoic conception of rationality had three dimensions. First, the Stoics claimed that the *logos* governs the whole world, in both its material and spiritual components. Thus, the *logos* was regarded as the fundament not only of the laws of the physical matter but also of the rules of the moral, social and political world. Secondly – and as a consequence of the first assumption – from the universal *logos* a no less universal *nomos* was derived as a law which embodied the fundamental principles of the worldwide human society. Thirdly, the *nomoi* of the individual social and political communities were based, at least implicitly, on the universal *nomos* and took their legitimacy from this. Within this conceptual framework and due to the universal human sociability (οικέιωσις), every human being could – and had to – be seen as a κόσμου πολίτης, a "citizen of the world".[32] Here lies – according to the scholarship –[33] the very first source of the philosophical concept of "cosmopolitanism". Yet – with the relative exception of a certain influence on the idea of a "universal monarchy" during the reign of Alexander the Great and the following Hellenistic tradition, as well as in the time of the Roman Empire – the impact of the Stoic vision on the real world was, in fact, rather marginal. What made Stoic cosmopolitanism as well as the concept of "natural law", which had been developed within the same philosophical context, highly influential on the political and intellectual history of the following centuries was the fact that many of the Stoic ideas – and, in particular, cosmopolitanism and natural law – were adopted by the nascent Christian philosophy.

As testified by the commandment to the *missio ad gentes*, which implies the duty to spread the Christian Gospel universally, the cosmopolitan vocation of Christendom was unequivocal from the very beginning.[34] The *communitas christiana* was thus conceived of as including, at least potentially, the whole humankind, without any restraint due to the different cultural or ethnic belongings of the individuals. After the Christian religion became politically dominant in the Western world, the question arose on how its universalism could be conveyed into an adequate institutional and legal frame. Two variants of the idea of an ethical, political and legal order of universal scope were developed: a first one in which political power was located under the aegis of the papacy and legitimated by this;[35] and a second one, in which political power took the form of a universal monarchy with autonomous legitimacy.[36] In the first case the guarantor of the universal scope of order was the pope; in the second the emperor.

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[31] Johannes von Arnim, *Stoicorum veterum fragmenta*, Teubneri, Lipsiae 1905, Vol. I, at 85; Vol. I, at 98; Vol. III, at 4; Vol. III, at 323.

[32] According to Diogenes Laertius the terminus was used for the first time by Diogenes of Sinope: Diogenes Laertius, *Vitae philosophorum*, Clarendon, Oxford 1964, Book VI, 63. See also: Otfried Höffe, *Demokratie im Zeitalter der Globalisierung*, Beck, München 2002 (1st ed. 1999), at 234.

[33] Martha C. Nussbaum, *Kant and Stoic Cosmopolitanism*, in: 5 *The Journal of Political Philosophy* 1 (1997).

[34] *The Holy Bible*, *New Testament*, Matthew, 28, 19; Acts, Chapter 2.

[35] Henricus Hostiensis, *Summa Aurea* (1250–1261), Servanius, Lugduni 1556. In a more moderate form, we can find the idea of the spiritual origin of all mundane power also in: Thomas Aquinas, *Summa theologica* [1265–1273], W. Benton-Encyclopedia Britannica, Chicago 1980, Part II, Section II, Question 12, Article 2; Thomas Aquinas, *Political Writings*, R. W. Dyson ed., Cambridge University press, Cambridge/New York 2004, at 278.

[36] Dante Alighieri, *De Monarchia* (1310–1314), in: Dante Alighieri, *Opere minori*, Vol. II, Utet, Torino 1986. Although independent of the spiritual power as regards the source of legitimacy, the authority of the emperor was never-

Two significant changes occurred at the beginning of the 16th century. First, both pillars of universal order – the authority of the papacy, and that of the emperor – which, in fact, had already been trembling for a long time, collapsed definitively. The pillar that broke down first was the idea of the universal power of the Holy Roman Empire: though never a realistic option, it was not explicitly abandoned by the most influential political and legal philosophers until the beginning of Modern Ages. Since the late Middle Ages the state of things was better described, indeed, by the Latin phrase according to which *rex in regno suo est imperator*,[37] than by the abstract pretension to universal authority by the emperor. Nevertheless, even if the real power in Europe was already recognized as belonging factually to the territorial kings, a higher prerogative was still acknowledged to the emperor through the assumption of the so-called *translatio imperii*. Hereby he was assumed to possess, if not real authority in front of the territorial kings of Europe, at least higher political dignity and – what mattered most – an original *imperium* as regards the newly discovered territories.[38] For the explicit rejection of this claim – and for the recognition that the emperor is only the sovereign of its own limited territory and population – it was necessary to wait until the first half of the 16th century.[39] Francisco de Vitoria, namely the author who openly contested the theory of the emperor as "the lord of the whole world", shook also the second pillar of medieval universalism, i.e. the assumption that the pope is "the civil or temporal lord of the whole world."[40] For the first time in the history of Christian political thought, one of the outstanding thinkers of his time – maybe the most relevant of all – asserted that the pope has spiritual authority only over Christian believers.

Thus, at the beginning of Modern Ages universalism had been deprived of both its former foundations. As a result, since the idea of universal order could not rely on political, legal or religious authority any longer, it had to be based on a different, purely abstract source – and natural law was identified as the best solution available on the basis of the epistemological means at hand. From the beginning of the 16th century universalism and the vision of a cosmopolitan order were strictly related to the conviction that a law can be detected which corresponds to the commandments of reason and is valid, therefore, for the whole community of humankind. The dependence of the conception of universal order from the centrality of natural reason and law was perfectly expressed in 1612 by Francisco Suarez in his *De legibus ac Deo legislatore*. Having specified, first that "*jus gentium* and natural law agree … in that both are in a sense common to all mankind,"[41] and, second, that natural and *jus gentium* differ, nevertheless, insofar as the latter does not derive only from reason, but is "human and positive" law,[42] he adds a very illuminating passage:

> The rational basis … of this phase of law [of the *jus gentium*] consists in the fact that the human race, into howsoever many different peoples and kingdoms it may be divided, always preserves a certain unity, not only as a

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theless assumed to be also by Dante as lastly inferior to that of the pope because of the intrinsically inferior nature of mundane things if compared to spiritual matters (*ib.*, Book III).

37   The phrase is generally attributed to Baldus de Ubaldi, but can be traced back, in fact, to earlier authors. See: Jean Rivière, *Sur l'origine del la formule juridique: "Rex imperator in regno suo"*, in: 4 Revue des Sciences Religieuses 580 (1924).

38   For the last – but very radical and, unfortunately, highly influential – expression of this theory, see: Juan López de Palacios Rubios, *El Requerimiento* (1513), in: http://www.encyclopediavirginia.org/El_Requerimiento_by_Juan_Lopez_de_Palacios_Rubios_1513 ((accessed 10 September 2015).

39   Francisco de Vitoria, *De Indis et De Jure Belli Relectiones*, Oceana, New York/London 1964, Section II, 1 et seq..

40   *Ib.*, Section II, 3 et seq.

41   Francisco Suarez, *De legibus, ac Deo legislatore* (1612), in: Francisco Suarez, *Selections from three Works*, Clarendon Press, Oxford 1944, Book II, Chapter XIX, 1, at 341.

42   *Ib.*, Book II, Chapter XIX, 3, at 343.

species, but also a moral and political unity (as it were) enjoined by the natural precepts of mutual love and mercy; a precept which applies to all, even to strangers of every nation.[43]

The ontological basis of natural law, on which the universal rules of interaction are rationally based, is therefore located in the borderless community of humankind. This has been a *topos* of the philosophy of the 17th and 18th centuries, which can be found – with only marginal differences – in authors very distant from each other in many other aspects, like Johannes Althusius,[44] Alberico Gentili,[45] Hugo Grotius,[46] Samuel Pufendorf,[47] and Christian Wolff.[48] Following the theological tradition of the Middle Ages,[49] Catholic authors like Vitoria[50] and Suarez[51] still believed that human beings are capable, with the only help of their reason, to detect the derivation of natural law from the law of God. On the contrary, Protestant philosophers assumed that original sin made humans unfit to understand by means of reason the plans of God, with the consequence that, on the one hand, only faith can bring humans, as natural-born sinners, nearer to God's commands, and, on the other, that natural reason has to develop a specific methodology to discover its own truth,[52] independently of what God's plans may be. However, this distinction makes no difference as regards the conviction – common to both Catholics and Protestants – first, that order is universal; secondly, that universal order is a command of natural law and reason; and, thirdly, that it is based on the borderless community of humans.

The second change that happened at the beginning of the 16th century was the consequence of the discovery of the American continent and of its colonization. The questions that arose, then, were whether the occupation of the overseas territory could be justified and, if so, on the basis of which arguments. Lastly, almost the entire debate was about defending invasion, and just a few raised their voices against it.[53] Yet, a quite relevant difference can be detected. While some authors explicitly endorsed the invasion of the New World by invoking the presumed superiority of the European peoples,[54] some others sought to maintain a presumably universalistic approach by giving an unprecedented legal and philosophical reach to the concept of *hospitality*.[55] This notion was not new, but had been regarded, up to that time, rather as a private virtue than as a cornerstone of worldwide order. Surely, the new centrality of hospitality may be seen – with some good

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[43]   *Ib.*, Book II, Chapter XIX, 3, at 348.

[44]   On Althusius' concept of *corpus consociationis universalis* see: J. Althusius, *Politica methodice digesta* (1614), Harvard University Press, Cambridge (Ma.) 1932, Chapter IX, No. 22, 92.

[45]   Alberico Gentili, *De jure belli libri tres* (1612), Clatendon Press, Oxford 1933, Book I, Chapter XV, at 107.

[46]   Hugo Grotius, *De jure belli ac pacis* (1625) [*The Rights of War and Peace*], ed. By Richard Tuck, Liberty Fund, Indianapolis 2005, "Prolegomena", t 1747 et seq.

[47]   Samuel Pufendorf, *De jure naturae et gentium libri octo* (1672), Hein, Buffalo (NY) 1995, Book II, Chapter II, No. VII; Book II, Chapter III, No. XV; Book VIII, Chapter VI ff.; Samuel Pufendorf, *De officio hominis et civis libri duo* (1673), Oxford University Press, Oxford/New York 1927, Book I, Chapter VIII.

[48]   Christian Wolff, *Institutiones juris naturae et gentium*, Halle/Magdeburg 1750, Book IX, Chapter I, No. V.

[49]   Thomas Aquinas, *Summa theologica*, *supra* note 35, Part II, Section I, Question 91, Article 2.

[50]   Francisco de Vitoria, *De potestate papae et concilii*, in: Francisco de Vitoria, *Relecciones Teológicas*, Luis G. Alonso Getino ed., La Rafa, Madrid 1934, II, at 216; Francisco de Vitoria, *De eo, ad quod tenetur homo, cum primum venit ad usum rationis*, in: Francisco de Vitoria, *Vorlesungen*, Kohlhammer, Stuttgart 1997, II, at 158 et seq.

[51]   Suarez, *De legibus*, *supra* note 41, Book II, Chapter IV, 9, at 176.

[52]   Gentili, , *De jure belli libri*, *supra* note 45, Book I, Chapter I, at 10; Grotius, *De jure belli ac pacis*, *supra* note 46, Book I, Chapter I, X, at 150 et seq., in particular: 5, at 155 et seq.

[53]   The most prominent among them was that of Bartolomé de Las Casas. See: Bartolomé de Las Casa, 1563, *Tratado de las doce dudas*, German transl. in: Bartolomé de Las Casas, *Werkauswahl*, Mariano Delgado ed., Schöningh, Paderborn 1996, Vol. 3/2, II, 8, at 291; II, 26, at 346 et seq.

[54]   See: John Major, *In secundum librum sententiarum* (1510), 2nd ed. Paris 1519; Juan Ginés de Sepúlveda, *De justis belli causis apud indos* (1544–1545), Fondo de Cultura economica, Mexico 1941.

[55]   For a reconstruction of the history of the concept of "hospitality" in modern political philosophy, see: Georg Cavallar, *The Rights of Strangers*, Ashgate, Aldershot 2002.

reasons – mainly as the outcome of a hypocritical attitude. Nevertheless, the link that was established hereby between the universality of natural law and hospitality can be inspiring up to the present day.

The first and most outstanding advocate of hospitality in modern philosophy was Francisco de Vitoria. In his *Relectio prior de Indis recenter inventiis* of 1538/39, he analyzed, first, the illegitimate titles for the submission of the American aborigines by the Spaniards,[56] then those which he maintained to be legitimate.[57] Among the latter, a most prominent place was given to what Vitoria called the "natural society and communication" (*naturalis societas et communicatio*), on which the first legitimate title of the Spanish dominion is grounded.[58] By the concept of *naturalis societas et communicatio* is meant that all human beings build a worldwide society based on their natural capability to communicate and interact with each other. As a result, everyone is entitled to travel to the land of his/her choice, where he/she believes that an improvement of his/her life conditions can be achieved, and settle down there, provided that no harm is done to the natives. In the case that the native inhabitants of those territories would oppose the entitlements of the newcomers – Vitoria adds – these latter would have the right to wage war on the natives and even submit them.

Vitoria's theory ends up being, actually, a justification of the conquest for at least three reasons. First, the right to travel can only be seen as just if reciprocity is guaranteed; yet, what Europeans can do in the Americas cannot be done by Native Americans in Europe. Secondly, insofar as common property is not recognized, the lands of the natives are simply regarded as *res nullius* and, therefore, rightfully seized.[59] Thirdly, the duty of hospitality is not thought, primarily, to protect the persecuted, but to make the settlement of foreigners rightful. However, while the duty of hospitality should be seen as unrestricted only for those in life-threatening conditions, good arguments speak for some kind of restraints for other travellers, for instance the consent given by the native inhabitants, or the protection of the identity of the existing political community. Since Vitoria does not address these questions, the universality of his worldwide community of humankind turns out to be, lastly, a quite useful basis for colonialism and imperialism.[60] Nevertheless and regardless of all its biases, Vitoria's theory of hospitality contains some elements which are highly forward-oriented even from today's perspective. He was, for example, an early and uncompromising defender of the *jus soli*.[61] Furthermore, he rejected the expulsion of "strangers who have committed no fault,"[62] thus implicitly opposing the practice of refoulement. And his plea for an unrestricted right to immigration grounded on the common belonging to the universal community of humankind may deliver some useful arguments to those who radically oppose the rightfulness of any defence of parochial and particularistic identities. Lastly, even the supporters of free trade can find in Vitoria an intriguing anticipation of their position.[63]

Due to Vitoria's contribution, the right – and duty – to hospitality became an essential component of the modern idea of international order as well as of the emerging *jus gentium*. However, some authors who took on his intuition also introduced important changes and specifications. The first was Hugo Grotius. Being, as a Dutch philosopher, far more sensitive than his Spanish predecessor to the dangers that could arise for the very existence of a small political community from an unrestricted right to travel and settle down, he reinterpreted hospitality in a more moderate

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[56]   Vitoria, *De Indis*, *supra* note 39, Section II.
[57]   *Ib.*, Section III.
[58]   *Ib.*, Section III, 1.
[59]   *Ib.*, Section III, 4.
[60]   Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, Cambridge/New York 2005.
[61]   Vitoria, *De Indis*, *supra* note 39, Section III, 5.
[62]   *Ib.*, Section III, 1.
[63]   *Ib.*, Section III, 3.

sense.[64] Concretely, not all human beings, who – regardless of whether they are endangered or not – wish to travel and find a new territory in order to settle down, hold of the right of hospitality, but only those who are forced to flee their country: "a fixed abode – Grotius wrote – ought not to be refused to strangers, who being expelled from their own country, seek a retreat elsewhere: provided they submit to the laws of the state, and refrain from everything that might give occasion to sedition."[65] In this sense, Grotius brings the concept of hospitality nearer to its most usual understanding in the current debate.

A similar argumentation is formulated also in Samuel Pufendorf's work, yet with a significantly more negative note. While Grotius started with the positive claim that shelter should be guaranteed to strangers, and then introduced in a second step the limitation that those strangers have to be in danger and that they should not act against the rules of the hosting country, Pufendorf turned the direction of the reasoning upside down. In fact, he first criticizes Vitoria for his idea of an unrestricted right to travel and to settle down,[66] whereas he admits, then, that a duty to welcome foreigners has to be admitted on the basis of reciprocity,[67] or in cases of persecution, provided that for the interests of one's own community it is better if the strangers "are eminent for wealth and industry"[68] and their influx does not involve great numbers.[69]

A second novelty was introduced by Immanuel Kant, who explicitly contested the traditional idea that universalism must be based on natural law and on its assumption of an inherent human sociability as well as of a worldwide community of humankind. During the period between the beginning of the 16th century and the end of the 18th century hospitality was regarded as derived from natural law, thus rather as a moral command than as a legal duty. As a result, it was seen as a part of the *jus gentium*, which was positive, but unwritten law. In short, insofar as hospitability should receive a legal dimension, this had to be founded on customs and purely rational considerations, and not so much on positive and written legal instruments. Kant changed this perspective by a threefold intervention. First, he inserted the duty of hospitality into his system of public law.[70] Secondly, he affirmed explicitly that "the rational idea of a universal … union of all nations upon the earth … is a *juridical* principle, as distinguished from philanthropic or ethical principles."[71] In doing so, he detached universalism from that reference to natural law that characterized the approach of his predecessors.[72] Thirdly – and as a consequence of the unequivocally legal frame in

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[64] Grotius' sensitiveness for the right of political communities to identity, however, was limited to the European peoples. As regards native populations, on the contrary, his defence of the European occupation was probably even more unequivocal than Vitoria's and lastly better suited to a "modern" form of colonialism which – carried out, in particular, by Protestant countries – combined a highly differentiated concept of sovereignty with a certain obfuscation of the distinction between private and public domain. See: Edward Keene, *Beyond the Anarchical Society*, Cambridge University Press, Cambridge/New York 2002. In fact, Grotius did not justify the seizing of the lands of the natives by resorting, like Vitoria, to the universal right to hospitality, which entailed the entitlement to settle down everywhere in the territory of one's own choice. Rather, he achieved largely the same effect, first, by denying the rightfulness of common property, thus regarding all possessions of the natives as *res nullius*, and, second, by praising the desire to acquire private property as a noble expression of the human aim at improving life conditions. See: Grotius, *De jure belli ac pacis*, *supra*, note 46, Book II, Chapter II, at 420 et seq.

[65] *Ib.*, Book II, Chapter II, XVI, at 447.

[66] Samuel Pufendorf, *De jure naturae et gentium libri octo* (1672) [*On the Law of Nature and Nations*], Lichtfield, Oxford 1703, Book III, Chapter III, IX, at 193.

[67] *Ib.*, Book III, Chapter III, IX, at 192.

[68] *Ib.*, Book III, Chapter III, X, at 194

[69] On Pufendorf's reservations as regards the extension of the right to hospitality, see: *infra*, note 99 et seq.

[70] Immanuel Kant, *Zum ewigen Frieden. Ein philosophischer Entwurf* (1795), in: Kant, *Werkausgabe*, *supra* note 9, Vol. XI, 191, "Erster Zusatz", at 203, 223.

[71] Immanuel Kant, *Metaphysik der Sitten* (1797), in: Kant, *Werkausgabe*, *supra* note 9, Vol. VIII, 309, § 62, at 475.

[72] Undeniably Kant was no positivist in the common sense of the word. Yet, insofar as it can be assumed that his political and legal philosophy contains elements of natural reason, these have to be located not into his under-

which it was set – the idea of universal order was then expressed by the new term of *jus cosmo-politicum*.[73] However, the progress in the rational systematization of the duties which every human being owes to every fellow human goes along with a quite "thin" *corpus* of rights that should be recognized, in particular if compared to what was granted by Vitoria's *naturalis societas et communicatio*. In fact, they were limited to the prohibition to treat strangers like enemies, whereas no right of settlement is acknowledged and the specific condition of persecuted foreigners is not addressed.[74]

Kant paved the way for a *juridical* understanding of universalism in which world order, if it is ever to be realized, should take essentially the form of a legal system that includes all peoples and states worldwide and the validity of which is extended on a global scale. Kant's view was then radicalized by Hans Kelsen, the most uncompromising supporter of legal universalism. Kelsen carried out the process of radicalization by completely deleting that political dimension of universal order which, along with the juridical component, was nevertheless present in Kant's global order of peace and protection of essential human rights. Since in Kelsen the order of interactions bearing public interest is nothing else than the legal order of public law,[75] also the most wide-ranging and inclusive level of interactions bearing public interest, namely the level of interactions that are regulated by international law, cannot but be a system of laws for the guarantee of peace and the protection of essential human rights. Furthermore, Kelsen combines his uncompromisingly innovative legal conception of universalism with a rather traditional feature of this understanding of order, namely with the marginalization of the role of the individual political community, in particular of the state as its most significant expression. In this case too, Kelsen's approach to the question is utterly radical. Indeed, not only international law is explicitly put at the apex of the legal system,[76] but the individual state is also reduced to being the mere executor of what is permitted by international law within a certain territory.[77] Therefore, if Kelsen's universalism, on the one hand, leaves definitively the foggy lands of natural law, on the other it seems to forget that order, to be accepted, needs a robust legitimacy, and that this legitimacy is deeply connected to the processes that unfold within the parochial community of the fellow citizens.

3. Building Bridges

Particularism and universalism stand traditionally against each other – with significant consequences for the attitudes towards migrants. For the supporters of particularism, the gate should stay closed for the most time and in the most cases, being opened only if the influx of immigrants is in the reasonable interest of the hosting community. On the other hand, universalists either deny that any good reason could be given for gates and borders to exist, or at least claim that these

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standing of the legal system – which is completely positivized – but into the relationship between the legal system and practical reason as a whole, the highest command of which consists in guaranteeing moral autonomy to the individuals.

[73] See: *supra* note 70 and 71.

[74] Kant, *Zum ewigen Frieden*, *supra* note 70, "Dritter Definitivartikel", at 213; Kant, *Metaphysik der Sitten*, *supra* note 71, § 62, at 475 et seq.

[75] Hans Kelsen, *Gott und Staat* (1923), in: Hans Kelsen, *Staat und Naturrecht. Aufsätze zur Ideologiekritik*, Ernst Topitsch ed., Fink, München 1989 (1st ed. 1964), 29, at 54; Hans Kelsen, *Reine Rechtslehre*, Deuticke, Leipzig/Wien 1934, VIII, 46 et seq., at 116 et seq.

[76] Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920), Scientia, Aalen 1981; Kelsen, *Reine Rechtslehre*, supra note 75, IX, 50, g), at 140 et seq.

[77] Kelsen, *Reine Rechtslehre*, supra note 75, IX, 50, g), at 149 et seq.; Hans Kelsen, *Peace through Law*, University of North Carolina Press, Chapel Hill 1944, I, 8, at 35.

gates and borders should be porous, regardless of the possible cost that one's own community would come to bear, in order to let those fellow humans in who fear for their lives and safety.

Yet, the arguments of both sides show weaknesses. Starting with particularism, its reaffirmation of the political identity of the community – be it based on cultural and ethnic tradition, on egoistic interest, or simply on the existential fear of the "other", or even on a mixture of all these elements – is bought at a very high price. This regards not only the violation of the moral intuition that the destiny of our fellow humans should not leave us indifferent, but also the inherent rational inconsistency – or at least lacking of compelling evidence – of what the supporters of particularism assert in order to justify their scepticism towards hospitality, or its sheer rejection. In the first place, the idea that rationality is inevitably and exclusively embedded in a particular cultural tradition is actually more than questionable. In fact, finding some reasonable basis for understanding also with those who do not originally belong to our own society belongs to day-to-day experience. This understanding may be sometimes difficult, or only partial, but it is – no question about this – *possible* in principle as well as in practice. Furthermore, egoistic advantage does not coincide necessarily with the greatest advantage; as a result, opening the gate for immigrants may bring the highest long-term payoffs. Lastly, politics can be interpreted not as the struggle against the enemy, but as the construction of a well-ordered *polis*, so that nothing speaks against the involvement of immigrants in the edification of the common polity.

No more compelling, however, are the claims developed by the supporters of a universalistic understanding of order. As shown in the former section, the idea that foreigners have a right to be hosted – unconditionally for some authors, only under some circumstances for others – has been based on one of the following assumptions: the existence or the perspective of a *civitas maxima*; principles of natural law; or a system of positive laws for the protection of peace and essential human rights. Yet, none of these proposals is really convincing. In fact, the *civitas maxima* proved to be unrealizable and, if conceived of as a global state, not even desirable. For their part, the principles of natural law took often the form of abstract commands, rather detached from the concreteness of political interactions and legal norms. Finally, the idea of a global legal system for the guarantee of peace and human rights, if considered alone, i.e. without political integration, lacks the necessary sensibility for the political processes that actually bring laws into existence and found their legitimacy. In general, traditional universalism underestimates the central pole played by the individual political community, with its specific and strong identity, in forging the legitimacy and justification of public power.

Facing these mirror-inverted inconsistencies, some innovative exponents on both sides of the dichotomy began to "build bridges" towards the other shore. More concretely, they tried to include into the own conception some elements taken from the opposite view. In doing so, they showed that a rapprochement of the poles is necessary and possible.

3.1. *Extending Particularism*

The particularistic understanding of order tends generally to be *exclusive*, in the sense that the individual well-ordered social and political community does not recognize any binding force to higher situated rules and principles of interaction as well as that it "excludes" non-members from the advantages that may be derived from the order of the individual community. But does this mean that particularistic rationality rules out the acknowledgement of any kind of order outside one's own community? Not necessarily. Indeed, particularistic thinking can recognize – under some circumstances – that alien societies display well-ordered forms of interaction, although these are always separated from one's own structure of order and largely incommensurable with it. In this

case, recognition turns out to be the acknowledgement of the "different", without any ambition to encompass the distinct systems of order under just one overarching dome of compelling rules and shared principles of interaction. In its most ambitious variant, this understanding of particularism can even accept that some basic principles that characterize the social interaction of one's own community may be valid also for other communities, but always under the condition that the individual identity of every community – and, thus, not universal order – is still regarded as the highest value. This idea of a non-exclusive particularism, with a horizontal recognition of an equal dignity of "other" systems of social order, but without any involvement of a vertical and multilayered structure of rules and principles, can be labeled as *extended particularism*.

The idea of extended particularism took different shapes over the course of time. Four approaches can be identified – without claiming to be exhaustive – which share the assumption that a particularistic conviction does not lead necessarily to hostile confrontation with what lays outside the borders of one's own community. The first approach is *enlightened nationalism*. Indeed, the exclusion of the "other" – often inciting openly the use of violence – has been an essential part of a very influential strand of nationalistic thinking from its very beginning at the dawn of the 19th century.[78] Yet, the aggressive rejection of the "other" was contrasted by an alternative understanding of "nation", in which the self-affirmation of the individual community did not stand necessarily in contradiction with an analogous self-affirmation by other communities, but was rather favoured by this. The self-determination of a people goes hand in hand, here, with the same claim expressed by any other nation, according to a plan – attributed by some authors directly to God's providence –[79] in which the freedom of one improves the freedom of the others. The most relevant juridical result of this conception has been the liberal international law theory after 1870, which "tried to balance … moderate nationalism with … liberal internationalism."[80]

The second approach of extended particularism is represented by what has been called "constitutional tolerance".[81] By this concept, which has been developed to describe, in particular, the process of European integration, the specific constitutional identity of the polity is reaffirmed as the bulwark of its fundamental values. Given this premise, the constitutional identity of the "other" is neither denied in the name of one's own alleged superiority, nor for the sake of a higher located supranational system of norms. The alien should not be aggressively subdued or benevolently assimilated, but simply recognized and accepted in his or her "otherness". As a result, a plurality of constitutional orders acknowledging each other in mutual respect should replace the idea of a top-down framework of norms and institutions. If some kind of federalism has to exist, this cannot and should not be realized – according to the supporters of "constitutional tolerance" – but in the form of a pluralism of individual constitutional identities.

The recognition of the "other" is also at the centre of a further variant of extended particularism, which originated from one of the most influential debates in the political philosophy of the last decades, namely from the controversy between liberals and communitarians. While liberals – inspired by the work of John Rawls –[82] maintained that human society can only be justified, taking up the basis of the classical contractualist assumption, by rational decisions taken by individuals, communitarians assumed that without a pre-existent idea of the "good" no justice can be achieved. Moreover, what is "good" for a society is not thought to be, primarily, the consequence

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[78]   See: *supra* note 15.

[79]   See: Giuseppe Mazzini, *Dei doveri dell'uomo*, RCS, Milano 2010, at 67 et seq.

[80]   Martti Koskenniemi, 2001, *The Gentle Civilizer of Nation: The Rise and fall of International Law 1870–1960*, Cambridge University Press, Cambridge/New York 2001, at 4.

[81]   Joseph H. H. Weiler, *Federalism and Constitutionalism: Europe's Sonderweg*, in: Kalypso Nicolaidis, Robert Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union*, Oxford University Press, Oxford/New York 2001, 54–70.

[82]   See: John Rawls, *A Theory of Justice*, Harvard University Press, Cambridge (MA) 1972.

of the rational exercise of free will by the political actors, but the result of a pre-rational sentiment of belonging, due to common experiences and education as well as shared values like the ethical heritage of the community.[83] At first glance, it seems to be evident that while liberals tend to adhere to a universalistic understanding of order, communitarians are inclined towards a rather particularistic view of society. Yet, a distinction has to be made, here, which is relevant for our question. Communitarianism presents, in fact, two different versions, one of which goes beyond short-sighted particularism. Some communitarianists assume that the social bond that holds individuals together can only work if it is grounded on a strenuous and one-sided defence of the values and interests of one's own community – even, and in many cases explicitly, against values and interests of other nations.[84] But others, the *republican* communitarianists, embrace a remarkably more open-minded attitude. In their view, social identity does not precede intersubjective interaction, but is, in its essence, *dialogically* constituted.[85] Given this premise, it cannot be ruled out, in principle, that migrants participate in the dialogical interaction that constitutes the identity of the community. And, even if we should follow the communitarian perspective in assuming that this possibility is made difficult by the decisive influence of the different cultural backgrounds of migrants and resident population, a quite evident universalistic element remains. In fact, if the identity of the community is positively understood as the result of interaction, and not negatively as the expression of the defence against the "other", there is no reason why we should not welcome the establishment of different identities besides ours. "Everyone – therefore – should be recognized for his or her unique identity."[86] The outcome is a committed plea in favour of multiculturalism and the politics of mutual recognition.[87]

The last approach of extended particularism takes up Kant's *republicanism*, yet not focussing at first – as usual – on the cosmopolitan dimension, but rather on the *parochial* origin of people's self-determination. As Mortimer Sellers puts it, "people are parochial in their commitments and beliefs, and rightly so."[88] In fact,

> we live, for the most part, among our neighbours, in our home places, with local landscapes, customs, climates, and conventions. Much that is sweetest in life is built among human societies, according to the happenstance of provincial circumstances.[89]

Yet, there is a necessity for international law in order to govern matters that cannot be regulated within the parochial community.[90] The domain of international law, however, derives its legitimacy entirely from the democratic procedures established at the national level. In particular, Sellers assumes that the self-determination of individual human beings who create the political community has to be understood as conceptually analogous to the self-determination of states which con-

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83 In short, communitarians focus on "the richer [than the purely deontological approach – S.D.] background languages in which we set the basis and point of the moral obligations we acknowledge" (Charles Taylor, *Sources of the Self*, Harvard University Press, Cambridge (MA) 1989, at 3.

84 Alasdair MacIntyre, *Is Patriotism a Virtue?*, "The Lindley Lecture", University of Kansas, Dept. of Philosophy, 1984.

85 Charles Taylor, *The Politics of Recognition*, in: Amy Gutmann (ed.), *Multiculturalism*, Princeton University Press, Princeton (NJ) 1994, 25, at 32 et seq. See, also: K. Anthony Appiah, *Identity, Authenticity, Survival*, in Gutmann (ed.), *Multiculturalism*, *supra* note 85, 149, at 154.

86 Taylor, *The Politics of Recognition*, *supra* note 85, at 38.

87 Will Kymlicka, *Multicultural Citizenship*, Clarendon, Oxford 1995; Will Kymlicka, *Politics in the Vernacular*, Oxford University Press, Oxford/New York 2001.

88 Mortimer N. S. Sellers, *Introduction*, in: Mortimer N. S. Sellers (ed.), *Parochialism, Cosmopolitanism, and the Foundations of International Law*, Cambridge University Press, Cambridge/New York 2012, at 1.

89 *Ib.*

90 Mortimer N. S. Sellers, *Parochialism, Cosmopolitanism, and Justice*, in: Sellers (ed.), *Parochialism, Cosmopolitanism, and the Foundations of International Law, supra* note 88, 250, at 252.

strue the international society.[91] As a result, if the decisions of the individual state arise from the free will of its citizens, also international law that is generated through the consent of republican states has to be regarded as fully legitimated.[92] Consistently, the most remarkable task of the cosmopolitan principles consists in allowing the self-determination of peoples.[93] Nevertheless, if the international society is made essentially of states – and only quite indirectly, and in a far distance, of politically non-situated human beings – individuals cannot but miss, in the perspective of republicanism, precisely that non-state-related moral and legal standing which is their only endowment when any previous belonging is challenged by adverse circumstances.

Unquestionably, these four approaches push particularism beyond its usual bounds, proving that it can cope with a certain – and even a relatively high – degree of openness. None of them, however, shows the way for a convincing overall solution of the contradiction between the right to refuge and political identity.[94] Indeed, migrants are to be hosted and welcomed, under these premises, only if they can be acknowledged as members of a community bearing a different identity, or as new citizens, willing to contribute to the destiny of one's own community. Unfortunately, migrants are in neither of these conditions: often, their identity is shaken and their community is lost; moreover, in many cases they are rather reluctant to engage in the life of the alien society in which they think to be only temporarily hosted. In their existential nakedness, they are nothing more – and nothing less – than fellow humans. However, it is precisely this kind of universal humanity that particularism – even in its more progressive forms – misses to address. Lacking an epistemological tool to conceive of humans in their universal dimension and to give an adequate shape to their rights even beyond their cultural and political belongings,[95] should we turn our backs on them?

3.2. Contextualizing Universalism

It did not take long until the Modern Ages' supporters of universalism became aware of the necessity to give concreteness to the rather abstract claim of a worldwide order. This happened by introducing two elements: first, a higher attention towards the role played by the individual political communities; and, second, a certain limitation of the right to travel freely and to settle down in foreign countries. Both aspects aim at a *contextualization* of universalism.

As regards the sensibility to the individual identity of states, two authors deserve to be recalled for the outstandingly innovative character of their proposals. The first is Francisco Suarez, who developed a remarkably differentiated conception of the legal system, in which the normatively higher layer of universalistic norms – represented by the *lex divina*, the *lex naturalis* and the *jus gentium* – is counterbalanced by the individuality of the *leges civiles* of the different states.[96] The second groundbreaking author is Kant who not only – as already mentioned before –[97] gave to

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[91] *Ib.*, at 254.

[92] Mortimer N. S. Sellers, *Republican Principles in International Law*, Palgrave Macmillan, New York 2006.

[93] Sellers, *Parochialism, Cosmopolitanism, and Justice*, *supra* note 90, at 271 et seq.

[94] This comes in addition to some problems which affect – according to many interpreters – the very fundament of the particularistic conception of society, such as the narrow horizon of an idea of society in which the "good" always prevails over the "just", as well as the contestable assumption that personal identity essentially depends on cultural heritage (and far less on transcendental-pragmatic communication, or, on a completely different level, on basically emotional forms of interaction).

[95] The problem arises if the "right to have rights" is essentially linked to citizenship. See. Hannah Arendt, *The Origins of Totalitarianism*, Harcourt Brace & Company, San Diego/New York/London 1973 (1st ed. 1948), at 290 et seq.

[96] Suarez, *De legibus*, *supra* note 41, in particular Books I–III.

[97] See: *supra*, 2.2.

universalism the shape of positive law, but also put all three parts of his body of public law at the same level of dignity and relevance. Thus, even if we admit that the *jus cosmopoliticum* has a higher normative quality because of its stronger inclusive character,[98] nevertheless its relation with the constitutional law of the individual state is not characterized by hierarchy. In fact, state law has an explicit autonomy in its field of competence, and the more universalistic layers of norms and institutions cannot simply impose "from above" and authoritatively what is legitimate within the boundaries of the individual state. As a legal system, the tri-partitioned structure of Kant's public law is therefore rather polyarchic, so that we can conclude to have here, to a certain extent, the first anticipation of a conception in which conflicts cannot be resolved by authority, but only by means of dialogue. Furthermore, the endowment of rights is here differentiated depending on the position that the rights holder assumes within its specific context of action – concretely, the context regulated by state law, or that shaped by international law.

As far as the second aspect of the contextualization of universalism is concerned, namely the limitation of the influx of foreigners for the sake of the safeguard of the political identity of the individual community, the most unequivocal warning comes from Pufendorf:

> it seems very … absurd – he writes – to allow others an indefinite or unlimited right of travelling and of living amongst us, without reflecting either on their number, or on the design of their coming; whether … they intend only to take a short view of our country, or whether they claim a right of fixing themselves with us forever.[99]

As a result, it is up to "every state" to "judge proper for its interest and safety."[100] Essentially, the duty to host strangers – in particular if they are not in dire need, or if they are incoming in so great numbers that the identity of the community could be put at stake – should be well balanced with "the community's duty of self-preservation,"[101] or, in a less ethnic and naturalistic understanding, with its will to preserve its own political identity. Pufendorf's aim, in fact, is not to deny the right to find shelter, but rather to remind of some reasons that stand for a certain degree of cautiousness: in particular the dimension of the influx of strangers, as well as their motivations and intentions. Some of Pufendorf's arguments may be hardly acceptable – for instance, the reference to wealth and education as criteria for the favorable reception of those who are searching for refuge – but, in general, his plea for a cool-minded and non-ideological approach to the question should be born in mind also in the current debate.

Regardless of the innovative aperçus introduced into the relation between right to refuge and right to political identity, the thinkers who tried to contextualize universalism eventually failed in their attempt to reconcile the opposites. In fact, if the two rights should be really brought nearer, the condition is that an autonomous basis for legitimacy is recognized for each of them within the context of a synthetic theory, i.e. of a theory which finds a way beyond the dichotomy of universalism and particularism. Yet, precisely this goal was not reached by any of the most important exponents of universalism until the paradigmatic revolution that we have experienced in the last decades.[102] One strand of them – comprehending, among many others, also Suarez and Pufendorf – identified the basis for universalism in the assumption of a worldwide community of humankind

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[98]   This assertion is justified by the assumption that the normative quality of a system of rules and principles depends – among other factors, in particular the procedures for the legitimation of norms – on its capacity to include as many members of the community of humankind as possible, in the best case all members without any exception.

[99]   Pufendorf, *De jure naturae et gentium*, *supra* note 69, Book III, Chapter III, IX, at 193.

[100]   *Ib.*, Book III, Chapter III, X, at 194.

[101]   Cavallar, *The Rights of Strangers*, *supra* note 55, at 204.

[102]   See: Sergio Dellavalle, *Addressing Diversity in Post-unitary Theories of Order*, GlobalTrust Working Paper No. 05/2015, The Buchmann Faculty of Law, University of Tel Aviv, 1.

sharing values and interests; the other strand, to which Kant's philosophy contributed significantly, located the same basis, instead, in the rather abstract rational capacities of the individuals. In the first case, universalism is guaranteed by the assumption of a *holistic* community of all human beings; in the second, by the *individualistic* principle according to which all individuals – with no exceptions – possess worldwide the same endowment of rights, interests and reason. However different the holistic and the individualistic variants of universalism may be, they have one important point in common: they lack to identify an autonomous basis for the right to political identity. Both fundaments for the legitimacy of social and political norms and institutions, which have been laid down by the two strands of universalistic thinking – i.e. the assumption of a community of humankind sharing an essential set of common values and interests on the one hand, and the transcendental conception of the abstract individuality on the other – are rather tailored, in fact, for the justification of the creation of a worldwide social, legal and institutional system. Within this horizon, instead, the defence of the political identity of the single community remains just accessory. Concretely, if the essence of social life is the worldwide community of human beings, the identity of the single community will be only justified insofar as it fits into the broader framework. And, on the contrary, if the essence is the transcendental and globally rootless individual, why should the contract among the few to build a state have the same relevance as the much more inclusive contract among all to create a universal order?[103]

4. *Beyond the Dichotomy*

I have presupposed, in the former Sections, that the apparent incompatibility between the right to seek asylum and the right to political identity is based on two elements: first, on the inherent connection between the right to seek asylum and the universalistic paradigm of international order, on the one hand, as well as between the right to political identity and particularism on the other; and, second, on the dichotomous character of the relation of universalism and particularism. If these assumptions are correct, the outcome cannot but be that, if a way beyond the dichotomy of universalism and particularism is identified, also the right to seek asylum and the right to political identity can be possibly led to some form of conciliation. Put this way, the solution seems to be quite simple. In truth, however, it is not – in particular, because a possible solution runs against one of the most essential tenets of the traditional conception of order.

In the whole history of political thought, order has always been conceived as something unitary, regardless of the extension of what could be seen as the "well-ordered society". In fact, this could be as small as the Greek *polis*, or as huge as the entire humankind. In any case, both the institutions and the legal system of the "well-ordered society" were represented as a coherent and hierarchical pyramid, thus leaving no possibility open that more than one norm could be valid and more than one institution could have authority in the same place and at the same time. As a consequence, also the individuals could consistently claim only *one* belonging – or, at least, the priority was unequivocal. In other words, one could claim to be either the citizen of a nation, or – to the contrary – a citizen of the world, but not both at the same time. If one did so – and we have seen that it was not unconceivable, at least for those universalists and particularists who were commit-

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[103] As I said before, Kant did recognize autonomy to state law against international and cosmopolitan law, and no evident hierarchy is presumed to exist among them. Nevertheless, he failed to identify a specific ontological and epistemological foundation for state law, which is no less individualistically based than the other, more inclusive legal systems. As a result, without assuming its own ontological and epistemological basis, the autonomy of state law is – from a conceptual point of view – lastly groundless.

ted at "building bridges" towards the other side – the hierarchy between the two belongings was, nevertheless, more than palpable. Yet, precisely this kind of "twofold belonging" is what we need if we want to reach beyond the dichotomy between particularism and universalism and, therefore, also beyond the contradiction between the right to refuge and the right to political identity. The need of a step forward in the understanding of social and political belonging – away from traditional monism, and towards new forms of pluralism – has been outlined through innovative concepts like "multiple *demoi*"[104] and "dual democracy".[105]

It is rather evident that the introduction of this kind of new concepts implies a deep-going re-adjustment of the old categories of "social order" and "social belonging" – downright a paradigmatic revolution in the way how the "well-ordered society" is conceived. But, concretely, how is the ontological foundation of the transition from a single belonging to multiple belongings to be understood? Or, put differently, what are the essential theoretical features of an idea of society in which the individual can be at the same time – and without hierarchical priority – citizen of a specific polity, and member of the global community of humans? The challenge can be successfully met if we accept three conceptual presuppositions. First, society has to be conceived of as made of a plurality of contexts of interaction. As examples, we can recall the interactions that we have in our neighbourhood, within the community with which we share a common cultural heritage or religious beliefs, in the political arena, or with every human being we may meet in our life.[106] Two contexts of interaction, among many others, are relevant for our research: the interaction among citizens, and that involving any possible fellow human in her or his essential quality as a human being, without any further endowments like citizenship and the like. No doubt can arise about the fact that we interact with our fellow citizens. But the interaction with any other human being is hardly questionable as well, even less in times of increasing exchanges of material and immaterial goods all over the globe, as well as of growing migration.

The second presupposition is that each interaction is rationally structured by resorting to specific discourses, each of them characterized by an issue – or by a question – around which communication develops. In other words, within each context of interaction, the discursive communication that gives rational shape to interaction unfolds by resorting to a special question, which distinguishes that specific context from any other. Considering, now, the interactions that are central for our research, it is therefore eminently important to clarify what are the questions that shape the discourses concerning, respectively, the interaction between fellow citizens, on the one hand, and that between human beings in general on the other. On the whole, we can assume that the question that characterizes the discourse about citizenship – and *with* fellow citizens – is about how we conceive the idea of a "good life" in political terms. Here, a specification has to be introduced. In religious terms, a "life" may be regarded as "good" if it is guided by values that respect what are assumed to be the commands of God. In existential terms, we lead a "good life" insofar as we are able to give some sense to our existence. The questions addressed are different, however, if we consider the definition of a "good life" from the political perspective. The discourse

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[104] Joseph H. H. Weiler, *The Constitution of Europe*, Cambridge University Press, Cambridge/New York 1999, at 344 et seq.

[105] Anne Peters, *Dual Democracy*, in: Jan Klabbers, Anne Peters, Geir Ulfstein (eds.), *The Constitutionalization of International Law*, Oxford University Press, Oxfrod/New York 2009, 263, at 297 et seq.

[106] Some of us may argue – with some good arguments – that the community of interaction should be extended, under certain premises, also to at least some non-human animals. See: Peter Singer, *Animal Liberation*, Harper Collins Publishers, New York 1975; Tom Regan, *The Case for Animal Rights*, University of California Press, Berkeley/Los Angeles 1983; Gary Francione, *Animals as Persons: Essays on the Abolition of Animal Exploitation*, Columbia University Press, New York 2008; Mark Rowlands, *Animal Rights: Moral Theory and Practice*, Palgrave Macmillan, New York 2009 (1st ed.1998); Sue Donaldson, Will Kymlicka, *Zoopolis. A Political Theory of Animal Rights*, Oxford University Press, Oxford/New York 2014 (1st ed. 2011).

that shapes the interaction, here, is not about giving an existential sense to our lives, but rather about how to organize justifiable answers to problems of common concern, i.e. to problems which involve *all* individuals living within a specific territory. In particular, for the sake of all those who share the membership of a political community, some questions are necessarily to be addressed: for instance, the level of taxation; the organization of public administration and justice; health and education systems; the provisions for children, young mothers, and elderly; the spheres of reproduction, matrimony and, in general, sexual relations; the rules concerning the transmission of property and estate; and, last but not least, the legitimation of public power. The discourses that present arguments in favour of one preference or the other as regards these fields are to be considered *political* in essence.

Political discourses must be clearly distinguished from those which address issues concerning our interaction with human beings who are not fellow citizens. In this case, at the centre of the discourses are not the topics mentioned above, but what we necessarily owe to every human being for the mere reason of our shared humanity. Fundamentally, we are able to meet every human being with due respect for our shared humanity if we guarantee peace and the safeguard of essential human rights. Therefore, discourses addressing the conditions for peace and the respect of human rights are those which are specifically to be located within the cosmopolitan horizon. In their essence, they are *moral* discourses at first, due to the universal character of their content and scope, but involve a *legal* dimension as well, insofar as they influence the creation of legal norms, and a *political* aspect when it comes to specify which institutions have the task to implement them.

The third presupposition that has to be assumed in order to overcome the conflict between the right to refuge and the right to political identity maintains that different contexts of interaction can coexist, just like the discourses that shape the interaction on the basis of arguments. Indeed, we are involved *at the same time* in all interactions I mentioned above – with our neighbours, with the members of our cultural or religious community, with our fellow citizens, and with all human beings – and even in many more. Furthermore, we also participate in different discourses, or exchanges of arguments, the aim of which is to define contents and purposes of those interactions. Due to the simultaneous and parallel presence of a plurality of contexts of interaction and of discourses, it is necessary, nevertheless, that we identify clearly in which context of interaction we are acting, as well as the issue and purposes of the discourse which we are currently carrying out. Otherwise, if we misunderstand the context of interaction in which we are presently involved, the consequence may be that we address the issues emerging from it with the wrong arguments. For example, we could discuss questions concerning our duties towards fellow humans resorting to the same criteria that we adopt when it comes to citizens' rights – and vice versa – although conditions and rights of the involved may be quite different. The result is a sense of confusion and a debate which is twisted and mixed up by either one-sided universalistic, or no less one-sided particularistic biases – quite precisely the situation we are currently experiencing.

If we accept the three presuppositions I have just mentioned, the most important consequence that we can draw is that the contradiction between universalism and particularism is no longer to be regarded as an inescapable condition. To the contrary, it is consistent to be universalists as fellow humans, and particularists as fellow citizens. Moreover, we can accept to have stronger and more deep-going duties towards the members of our political community – or, with the words of Thomas Nagel, an "associative obligation" towards "those with whom we stand in a strong political relation"[107] – without denying hereby our commitment towards global citizen-

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[107]   Thomas Nagel, *The Problem of Global Justice*, 33 Philosophy and Public Affairs 113 (2005), at 121.

ship.[108] The condition that must be met – admittedly, one that requires a lot of sensitivity – is only to distinguish clearly between the issues of citizenship and the discourse which defines them, on the one hand, and discourses and practices aiming at the worldwide protection of human rights on the other. On the basis of this readjustment of the conceptual framework, we can go back to the fundamental questions raised at the end of the introduction, starting with the first of them, namely: what are the justifiable specific rights of citizens that make them different from aliens? Indeed, no doubts can be raised on the fact that being born within a specific political and social community is completely accidental, so that no difference should be made, on this account, between citizens and non-citizens. Yet, the consequences of the accidental fact of being born in a certain country are by far not as ethically neutral as the fact itself. In particular, although our initial belonging may be fortuitous, the circumstance of being raised within the horizon of values of a specific society makes of us – more or less consciously – members of precisely *that* community. The condition of particular belonging has two dimensions, the first of which consists in the participation in the *political* interaction with the purpose of determining the way how common concerns are addressed. Surely, in traditional societies this participation is rather passive, whereas within a democratic institutional framework the contribution by the individuals is expected to be active and reflexive. In any case, the specific way to address political questions that characterizes a particular society necessarily requires, in order to survive, a support – an implicit one, at least – by the citizens (or the subjects). And, since the problems addressed by political means are, case by case, the questions of a specific society, the individuals involved in the political discourse cannot but be the members of *that* society – and no one else.[109] On the basis of this involvement we can justify the exclusive political rights of citizens. Furthermore, given that democratic institutions require – and allow – a higher level of participation, it is even more important for democracies to clarify who is entitled to be politically involved, and who is not: due to the connection between democratic self-governance and territorial representation, we have to assume that territorial closure is essential for democratic legitimacy.[110]

Political rights, however, are not the only ones which belong to citizens, and, in general, only to them. Also some *social* rights may be exclusive as well. In fact, the accidental circumstance of being born into a society transforms individuals into members of a social bond. Within this bond we may expect more solidarity than from outside – for the simple reason that we are willing to guarantee the same level of solidarity to the other members – and we are disposed to a more substantial redistribution of resources. Certainly, the safeguard of social rights and the benefits that can be derived from them are hugely different from one country to the other. But inequalities, insofar as they are not depending on past or present external interventions leading to exploitation, are generally based on a kind of *social contract* that distinguishes a specific society from any other. In other words, how many resources are spent on health care, social security, or education of the disadvantaged, builds upon the specific agreement between distinct social groups and interests in that particular society, as well as on what every citizen was and is disposed to give for the common welfare. The balance between social groups – always endangered by selfish interests – and the quality of the provisions may be easily endangered by a dramatic influx of migrants who never contributed to the charges deriving from the agreement. An unrestricted right to immigration

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[108] On the perspectives of global citizenship, see: Robert C. Paehlke, *Hegemony and Global Citizenship*, Palgrave Macmillan, New York 2014.

[109] Nevertheless, insofar as decisions taken by a state, according to its own procedures, involve non-citizens, a "right to be heard" should be granted to them. See: Sergio Dellavalle, *Opening the Forum to the "Others": Is There an Obligation to Take Non-National Interests into Account within National Political and Juridical Decision-Making-Processes?*, 6 Göttinger Journal of International Law 217 (2014).

[110] Seyla Benhabib, *The Rights Of Others*, Cambridge University Press, Cambridge/New York 2004, at 17 et seq., 219 et seq.

would put all immigrants in the condition of being full members of the hosting society, with the entire endowment of political and social rights. Hence, given that political rights and some social rights are owned only by citizens, we are justifiably entitled to deny unlimited entry to non-citizens. However, we have also to take into account that individuals who have been born into an authoritarian or unjust society are not responsible for their fate. The answer cannot consist, nevertheless, in opening indistinctively all gates of the democratic and more affluent societies, but in supporting generous projects for the development of the living conditions in the countries of origin of the would-be immigrants, as well as in allowing the entry of a sustainable number of immigrants on yearly basis.[111] In this context, the one-sided preference for the admission of skilled and well-educated individuals[112] is morally justifiable only under the condition that their immigration can be of benefit for both the immigrants themselves and the society they are leaving. Otherwise, more fair-minded criteria should be preferred.

If it is justifiable that citizens have different (and more) rights if compared to non-citizens – and that we have different duties towards them – then we can maintain that only a *weak* right to free immigration exists, and, thus, no right to settle down in the country of one's own choice. On the other hand, however, a *strong* right to immigration must be assumed for specific reasons.[113] On this basis, we can turn to the second and the third question which have been posed at the end of the introduction, namely: under which conditions can a right to refuge be claimed? And, what is entailed in the right to refuge? As for the conditions, it is reasonable to assert that individuals have a strong right to immigrate if their "current state of residence is unable or unwilling to adequately protect [their] human rights".[114] In other words, given that the conditions for interaction and mutual recognition among fellow humans require the protection of life and the safeguard of essential human rights, then we have the duty to protect the life of individuals and social groups when they are in danger and their essential rights are systematically violated. In order to manage properly the influx of migrants, we are allowed to try to protect them in their own countries, for example by establishing no-flying zones and safe harbours in case of armed conflicts, or by guaranteeing decent life conditions in the event of natural disasters or in regions hit by dire poverty. Yet, if these measures prove to be inefficient, no other solution is morally justifiable but to open our gates and let them in. In this last circumstance, immigrants are not entitled, in principle, to become full-fledged citizens because it is assumed that their stay is only temporary. Nonetheless, since it is morally untenable to have a two-level society, with people living under the same conditions but endowed with different rights, also the temporary migrants must have full access to education and unrestricted healthcare from the very beginning of their stay. Moreover, if their sojourn turns out to last for a longer period than expected, we must recognize to them a right to become fellow citizens and, thus, full members of our society – possibly by giving them priority, in the process of naturalization, over other candidates.

Against the background of our absolute duties towards all fellow humans, the question remains on whether it is justified to deny the permission to cross borders in the name of the integrity of the political community – and, if so, when. While addressing this issue, Liav Orgad has recently taken on the argument that the political community has a "duty to exist".[115] I do not believe that this is a promising approach. Indeed, the impulse towards self-preservation was regarded as

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[111] As regards this aspect, it should be pointed out that the criterion of "sustainability" should be strongly qualified and not used as an overall excuse to shut out the less fortunate.

[112] For an attempt to justify this argument, see: Caleb Yong, *Immigration Rights*, Manuscript, at 23 et seq.

[113] *Ib.*, at 2 et seq.

[114] *Ib.*, at 18.

[115] Liav Orgad, *The Cultural Defense of Nations: A Liberal Theory of Majority Rights*, Oxford University Press, Oxford/New York 2015, at 129 et seq.

essential by many political philosophers.[116] Yet, an "impulse" is by no means a "duty". Furthermore, the impulse is essentially related to individual living beings, and not to collective entity. Therefore, an unqualified transposition of the concept from the individual level, for which it was conceived, to the collective always entails the risk of a conceptual fallacy. Collective entities, in short, do not have autonomous will. Nonetheless, members of a society may have, as individuals, a reflexive will to protect the form of social and political interaction that they have realized in their country. And it is intellectually hypocritical to deny that a huge influx of migrants from different political and social traditions can be – and probably is – a relevant challenge to the established way of life of a country. Surely, no Western society is on the verge to disappear, so that the spreading fears are highly exaggerated.[117] Nevertheless, surveys seem to confirm that descendants of migrants, even in their third generation, maintain views which are astonishingly at odds with relevant tenets of Western societies, such as the separation between religion and the state, tolerance, and equality between men and women.[118] We could counter the anxiety by recalling that no society is unchangeable in its ethical foundation and that the *demos* is nothing but the result of a process of self-constitution.[119] Moreover, the definition of "citizens" and "aliens" is a discursive process which occurs through ongoing "democratic Iteration".[120] Yet, even if we admit that the contents of the idea of the common good that essentially characterizes a society are not given forever, at least the rules of interaction and mutual recognition, which guarantee that all participants in the process of definition of those contents are equally involved, should be preserved – and a society has a right to be highly sensitive as regards the protection of this fragile achievement of human civilization.

In order to find a point of balance between the commitment to liberal values and openness and what he calls "majority rights", Orgad has recently proposed a two-stage immigration procedure.[121] In a first stage – coinciding with admission – the immigrants are required to accept liberal-democratic rules governing human behaviour. In the second step – namely in the course of the naturalization process – they must show a sufficient knowledge of the basic elements of the constitutional system of the country whose citizenship they are applying to acquire. Furthermore – I would add – they should be expected to possess an adequate familiarity with the language of the country. The fact that those who are already in possession of the citizenship are not obliged to demonstrate such proficiencies may be considered, at first glance, a kind of discrimination. Nonetheless, we have some reasons to assume that most citizens have interiorized, during their socialization, rules of interaction, basic institutional knowledge and language.[122] Anyway, the procedures related to admission and naturalization should be conceived in a perfectly fair and transparent way, so to exclude biases and unnecessary harshness, and without any hidden thought aiming at preventing, as far as possible, any significant influx of strangers.

When a politically relevant question is addressed from the normative perspective, it is always necessary to keep in mind that one thing is to specify what is morally or ethically permitted to do, another to spell out concretely which are the specific measures that have to be taken as a result of the normative horizon that has been outlined. Indeed, not only the contents of such measures but also the normative principles that lie at their basis are the results of ongoing discursive interactions which elaborate only temporary answers, and never a definitive solution. Nonetheless, what we can take for sure at the end of our inquiry is that neither the defence of political

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[116] See: *supra* note 4.
[117] Orgad, *The Cultural Defense of Nations*, *supra* note 115, at 51 et seq.
[118] *Ib.*, at 39 et seq.
[119] Benhabib, *The Rights Of Others*, *supra* note 110, at 216.
[120] *Ib.*, at 21, 47, 179.
[121] Orgad, *The Cultural Defense of Nations*, *supra* note 115, at 203 et seq.
[122] *Ib.*, at 211.

identity with disregard of our cosmopolitan humanity, nor – to the contrary – a commitment to protect our fellow humans that ignores the relevance of the parochial, are necessary. From the conceptual point of view, the reconciliation of the universal and the particular is possible – and normatively desirable. Therefore, let us put aside the useless contraposition, and move on to find a way to keep on being, at the same time, committed citizens and caring human beings.