

**Cosmopolitan EU?
Minority Rights and the Management of Cultural Diversity**

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**Tese de Doutoramento em Filosofia
Especialidade: Filosofia Moral e Política**

June, 2018

Tese apresentada para cumprimento dos requisitos necessários à obtenção do grau de Doutor em Filosofia Moral e Política, realizada sob a orientação científica de António Marques.

Apoio financeiro da FCT e do FSE no âmbito do III Quadro Comunitário de Apoio.

A chi è già arrivato, a chi arriverà.
Cristina

“The people of the earth have thus entered in varying degrees into a universal community, and this has developed to the point where a violation of rights in one part of the world is felt everywhere. The idea of a cosmopolitan right is therefore not fantastic or exaggerated; it is a necessary complement to the unwritten code of political and international right, transforming it into a universal right of humanity. Only under this condition can we flatter ourselves that we are continually advancing towards a perpetual peace.”

Immanuel Kant, *Towards a Perpetual Peace* (1795)

“If a reasonably just Society of Peoples whose members subordinate their power to reasonable aims is not possible, and human beings are largely amoral, if not incurably cynical and self-centered, one might ask, with Kant, whether it is worthwhile for human beings to live on the earth.”

John Rawls, *The Law of Peoples* (1999)

“What has to be accepted, the given, is — so one could say — forms of life”

Ludwig Wittgenstein, *Philosophical Investigations*, Pt II, p. 226 (1953)

"Tell me how you conceive the world and I will tell you how you conceive Law"

Michel Alliot

COSMOPOLITAN EU? MINORITY RIGHTS AND THE MANAGEMENT OF CULTURAL DIVERSITY

CRISTINA, LUISA PACE

ABSTRACT

The central purpose of this research is to investigate the main progresses in promoting European integration strategies, social cohesion and sense of belonging (both global and European citizenship) within and by the European Union, taking into account the new multicultural realities of our globalized world; promoting a new model of integration which does involve neither homogenization nor hegemonization, allowing for both protection of human rights and the preservation of cultural values. Integration is in fact considered as a key element of the European Union's migration policy, as well as a crucial element for the future development of European societies, besides the very identity of Europe itself. To this end a comparison is made between the classic and contemporary cosmopolitan theories and the human rights theory, in order to discover if and in which way they may or should complement each other. The idea of cosmopolitanism is questioned and criticized in parallel with the classical Westphalian sovereignty model, which represented and still represents the dominant governance model of international law and relations, notwithstanding the recent rise and development of international global institutions and non-governmental actors, proposing an alternative and new model of "global governance". I therefore analyze the relationship between two famously conflicting ideologies of human rights: universalism and cultural relativism, in their philosophical and metaethical meaning of the liberal-communitarian debate; in the historical perspective of the post cold-war scenario, which saw the rise and establishment of an international community based on a "common view and scope" and on allegedly "shared values and principles". The main purpose here is the one of investigating whether or not those values and principles, certified and promoted by the UDHR and other important treaties and declarations since 1948, can be really considered universal and universally shared, besides all cultural differences and relativism. I consider these issues as historically and ideologically related to the actual structure of the international and European system of protection of minorities and cultural diversity, which developed on a parallel although different line. The main intention here is the one of investigating merits and faults of this system, analyzing the new concept and definition of minorities in the European Union context, the European Union competences in this field and the possible mutual cooperation between the EU and other international actors acting for the protection of minority rights. Following OHCHR indications, there is still "*no internationally agreed definition as to which groups constitute a minority*", while it is always stressed the fact that the existence of a minority should be recognized as a matter of fact and that any definition must include both objective and subjective aspects (race, ethnicity, language or religion but also identity and sense of belonging). I eventually evaluate different models of integration and European mechanisms of protection of cultural diversity, suggesting a path for a new model of European integration and human rights protection. The role of both states and supranational institutions like the European Union in protecting those rights is considered as essential in this respect.

Keywords: European Union, European Integration, Cosmopolitanism, Human Rights, Universalism, Cultural Relativism, Sovereignty, Globalization, Global Governance, Minority Rights, Cultural Diversity, Intercultural Dialogue, Multiculturalism.

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List of Abbreviations

COE, Council of Europe

CRC, Convention on the Rights of the Child

ECHR, European Convention on Human Rights

ECRI European Commission Against Racism and Intolerance

ECRML, European Charter for Regional or Minority Languages

EU, European Union

ECOSOC, Economic and Social Council of the United Nations

FRA, European Union Agency for Fundamental Rights

HCNM, High Commissioner on National Minorities

HRC, Human Rights Committee

ICCPR, International Covenant on Civil and Political Rights

ICESCR, International Covenant on Economic, Social and Cultural Rights

IRU, International Romani Union

FCNM, The Framework Convention for the Protection of National Minorities

MRGI, Minority Rights Group International

ODIHR, Office for Democratic Institutions and Human Rights

OHCHR, Office of the United Nations High Commissioner for Human Rights

OSCE, Organization for Security and Co-operation in Europe

UDHR, Universal Declaration of Human Rights

UN, United Nations

UNESCO, United Nations Educational, Scientific and Cultural Organization

UNHCR, Office of the United Nations High Commissioner for Refugees

UNICEF, United Nations Children's Fund

PART 1

I. Introduction

In an increasingly globalized world, borders and their meaning are becoming malleable and the world is shrinking in terms of place and time. Space, borders and time perceptions have changed and this has a strong impact on the relationship between place and identity, on the individual's identification with and against the "Other".

While the challenges brought by globalization concretized a fast metamorphosis of the old concept of Nation-state, urging a reconceptualization of the theory of sovereignty; cosmopolitanism, with its claim to universality and new ethical-legal standards, became the philosophical perspective giving meaning to the universality of human rights, as opposed to nationalism and national particularities.

In this thesis, the cosmopolitan theory is analysed in comparison with the classical Westphalian model, still considered as the dominant governance model, notwithstanding the development of international and supra-national institutions, like the European Union, proposing a new model of "global governance", citizenship and democracy.

The main challenge forward is the one of reconciling the universal claim of cosmopolitanism and universality of human rights with the appeal of minorities (often marginalized communities) to the defence of relativism and cultural diversity; conciliating the ambition to create a "cosmopolitan democracy" and global civil society, with the claim to a "local democracy", against standardization and misuse of power.

Assuming the fact that social conflicts and discrimination tend to take root and become stronger in a time of crisis, namely the current Europe's migration crisis, increasing crimes and illegality; it is assumed that, a non-appropriate integration model, especially in a time of crisis, can lead to phenomena of racial and ethnic discrimination, jeopardizing social cohesion and threatening security.

The main aim of this thesis is the one of analysing the role of a supranational institution like the European Union in dealing with the "threatening" of the universality of human rights and the new, contemporary challenges of the always-changing multiethnic societies of post-Westfalian nation-states.

Is the EU a cosmopolitan entity in the making? Has it an effective impact on the global decision-making process, which is actually the burden of nation-states sovereignty?

I.1 Theoretical Framework

The recent social and political challenges brought by globalization in European societies, the advent of new media and social networks, of new transnational political experiments such as the European Union, led in turn to a complete and fast transformation of the old concept of Nation-state, weakening the old Westphalian system, increasing the interdependence on common issues worldwide.

It is therefore not surprising that cosmopolitanism has for the past decade significantly raised the level of attention in Western political thought, especially if, as some authors sustain, we consider it as a specific heritage of the Western (European) political discourse and liberal tradition.¹

In her book *On Violence*, dating back to 1970, Hannah Arendt's was already referring to "*the bankruptcy of the nation state and its concept of sovereignty*"², inaugurating a modern conception of cosmopolitanism, which seemed to be better suited for a contemporary world in which the sovereign state appeared as having lost his role as a guardian of citizen's rights, failing in its task of protecting its own citizens.

Cosmopolitanism, with its claim to universality and new ethical-legal standards, had therefore been considered since the beginning as opposed and incompatible with the concept of nationalism and national sovereignty, even though many attempts have been made in order to re-conciliate the two concepts, many authors sustaining the potentiality of human beings to reconcile the loyalty to their own nation and relatively closed collectivity with a feeling of global and multilayered citizenship and belonging.³

There have been various conceptions of cosmopolitanism throughout the history of modern thought, some more "radical" (Beitz, Held and Archibugi)⁴, other more

¹ Cfr. Beardsworth, R., (2012), *Assessing Cosmopolitan Theory in World Politics*. E-International relations, and Poulsen F.E., (2008), *Element of an Archaeology of Cosmopolitanism in Western Political Thought. A Return to the French Enlightenment (1713-1795)*, Master's Thesis, Department of Political Science, University of Copenhagen.

² Arendt, H., (1970). *On Violence*. New York: Harcourt, Brace & World, p.6

³ Cfr. Sen, Amartya (2006), *Identity and Violence: The Illusion of Destiny*. Issues of our time. New York: W.W. Norton & Co, and Voronkova, A. (2010). Are nationalism and cosmopolitanism compatible? E-International relations.

⁴ Cfr. Archibugi, D., & Held, D. (Eds.). (1995). *Cosmopolitan Democracy: An Agenda for a New World Order*. Polity Press; Beitz, Charles R. (2005), "Cosmopolitanism and Global Justice", in *The Journal of Ethics*, Volume 9, Issue 1-2, pp 11–27.

“moderate” (Nussbaum, Sen, Habermas), but there is still no consensus among contemporary scholars about a clear definition of cosmopolitanism.

Cosmopolitanism can in fact be considered as a multidimensional concept, which reflects historical and political changes of economic as well as social and cultural structures over time.

In its extreme version, it can be considered as an ambition to the abolition of nation-states in order to realize a “world government”. However, this is only one of the possible perspectives of cosmopolitanism.

The main purpose in this research is to consider cosmopolitanism as that philosophical perspective giving meaning to the universality of human rights, demonstrating the need for a more cosmopolitan approach to the human rights regime, as opposed to the dominance of states power and national sovereignty.

This does not mean that cosmopolitanism is totally incompatible with nationalism, nation-state and “local democracy”, but only that states can and must collaborate in a more effective way to the common aim of protecting human rights and freedoms.⁵

Different conceptions of cosmopolitanism are eventually compared with different ideologies of human rights, analyzing the opposed theories of universalism and cultural relativism in the framework of the liberal-communitarian debate.

While the advocates of universalism and liberalism affirm that all human beings have natural rights by virtue of their humanity, belonging to every human being irrespective of cultures; cultural relativists sustain that any truth is relevant and that every single culture has its own moral values, which in turn lead to the right principles.⁶

According to Taylor, for example, the particularism of the communities is the only valid remedy to their dissolution. Separations and boundaries are for Tylor the only means to guarantee differences, because not everything can coexist with everything.⁷

It is not always easy to reconcile both theories and perspectives. It seems however of foremost importance to reconcile the universal claims of cosmopolitanism and the right

⁵ Giannolla, C., (2009), Vertical Cosmopolitanism: The Intergenerational Approach towards Human Rights of Future Generations, in *Peace Human Rights*, no. 3, p. 114-115.

⁶ Cfr. Donnelly, J., (2003), *Universal Human Rights in Theory and Practice*, 2ndED., New York: Cornell University Press, p. 89.

⁷ Cfr. Tylor, C. (1994), *Multiculturalism: Examining the Politics of Recognition*. Princeton University Press.

to a “local democracy”, representative of the rights of those minorities and marginalized communities, which appears to be excluded from a too centralistic approach. Such recognition leads to a problematization of the same concept of universality.

It appears necessary to take inspiration from both theories: on the one side fully recognizing human rights as universal legal standards applying to all members of humankind; on the other hand, considering the importance of cultural diversity and minority protection, which must be always safeguarded against standardization and misuse of power.

In a European context, the issue of the “europeanization of integration models” will be considered as converging with the issue of protecting minority rights and cultural diversity. The European Union itself recognizes “*the need for a holistic approach which takes into account not only the economic and social aspects of integration but also issues related to cultural and religious diversity, citizenship, participation and political rights*”.⁸

EU policy is nowadays based essentially on policies of “soft coordination” and hardly any research activity has considered how European member states will use instruments and laws and how they will contribute to policy convergence.

As concerning the methodology of my work I would like to underline its particular position “in between”, among moral and political philosophy and more effective links to legal philosophy and political theory, with some important references to sociological and anthropological aspects and to the latest development of International and European law, considered as relevant for the sake of my thesis’ general meaning and objective.

The thesis (Chapter 1 and 2 particularly) is extensively based also on some of my previous published works and academic researches, such as *Robert Alexy’s A Theory of Constitutional Rights Critical Review: Key Jurisprudential and Political Questions* (2012)⁹, and *Behind the Charter: the EU Ethical-Legal Identity in an International Order* (2013)¹⁰ and on some notes and conference papers presented at international conferences and workshops.¹¹

⁸European Commission, Communication from the Commission, *Immigration, Integration and Employment*, COM(2003)336 final, p.18.

⁹DINÂMIA’CET- IUL, Working Paper n° 2012/01, Lisbon, available at: <http://hdl.handle.net/10071/3883>.

¹⁰Berlin Heidelberg: Springer-Verlag, available at: <http://www.springer.com/us/book/9783642324116>.

¹¹Please refer to my CV for further information.

I. 2 Outline

Four main objectives will be considered as constituting the main theoretical chapters of my PhD research project and will be analyzed considering the following structure:

The first chapter (Cosmopolitanism and Sovereignty, from International to Cosmopolitan Law?) will recognize the necessity, in the era of globalization and multiculturalism, of a reconceptualization of the theory of sovereignty, considering the rise in the last two decades of “post-national constellations” of political authority,¹² and especially the European Union, an example of emerging “global power” and experiment born to give shape to a post-national political identity.

A new, inclusive definition of citizenship and national identity will be pursued, in order to recognize this change in Western societies, transcending the dominant framework of liberal individualism and nation-state.¹³

The decolonization and globalization process led to new actors and issues which transcend traditional state-centered politics, leading to serious attempts to reconstruct both the notion and the practice of sovereignty beyond the state, to the transition from an international (post-Westphalian) law to a cosmopolitan law.¹⁴

Globalization and mass migration especially during the 20th century in Europe have radically challenged the idea of a sovereign, territorial defined nation state, with a single cultural/social identity and a common language and history. Global challenges require global means in order to be solved, which go beyond particular, national interests.

The European Union is in particular considered as one of the most uncommon and widest-ranging political actor in the international system, and claims to be considered as a borderless cosmopolitan entity, but is it a “cosmopolitan entity in the making”? Does the trajectory of constitutionalization in the EU and the new Charter of Fundamental Rights contribute to a cosmopolitan order with global effect?

¹² Cfr. Habermas, J. (2001), *The Post-National Constellation: Political Essays*, Cambridge: MIT Press

¹³ Cfr. Dobson, L., (2006), *Supranational Citizenship*, Manchester, Manchester University Press.

¹⁴ Cfr. Khan, L. Ali, (1996), *The Extinction of Nation State: A World without Borders*. The Hague: Kluwer Law International; Archibugi, D. Held D. and Kohler M. (eds), (1998), *Re-imagining Political Community: Studies in Cosmopolitan Democracy*. Stanford University Press; Held, D., (2010), *Cosmopolitanism: Ideals and Realities*, Cambridge: Polity.

The second chapter (Cosmopolitan Theory and Human Rights Discourse) will address interconnections and affinities between the classical cosmopolitan theory and the existing international human rights regime, evaluating the contribution of the cosmopolitan theory to the conceptualization of the human rights discourse and to the diffusion of global justice's theories.¹⁵

The idea of cosmopolitanism will be considered as a theoretical perspective 'mainstreamed' throughout the whole research, with the purpose of ascertaining the prospect of universal human rights within the framework of a cosmopolitan project. The history of the concept from the ancient to the current time will be retraced, investigating its complementarities with the existing international human rights discourse.

The question of the theoretical foundation of fundamental rights and of the application of constitutional rights reasoning and norms in different legal systems will be analysed, as one of the foremost issues of all democratic constitutional States where there is a presence of a Bill of Rights, in continental European jurisprudence as well as in other common law jurisdictions.

In this sense, as recognized by various scholars and eminent legal philosophers¹⁶, Alexy's *A Theory of Constitutional Rights*¹⁷ (hereafter *A Theory*), constitutes not only a major classic of German constitutional theory but also, "a seminal contribution to the analysis of how legal reasoning on fundamental rights is intimately connected to the very foundation of democracy".¹⁸

A substantive, structural theory of fundamental rights is in fact essential in every contemporary democratic society, being crucial for the basic legal structure of any modern society.

The third chapter (Multiculturalism and Human Rights: Anthropological Perspectives) will reflect on one of the biggest issues in human rights law: the conflict between universalism and cultural relativism in human rights theory, in its correlation with the cosmopolitan theory and the anthropology of law, with the final aim of

¹⁵ Cfr. Rawls, J., (1999) *A Theory of Justice*, Oxford University Press, Pogge, T., (1992), *Cosmopolitanism and Sovereignty*, in *Ethics*, Vol.103, No. 1; Pogge, T., (2002). *World Poverty and Human Rights*, Cambridge: Polity.

¹⁶ Ronald Dworkin, Jurgen Habermas, Neil MacCormick, Ota Weinberger, H.L.A Hart and Joseph Raz, among others.

¹⁷ Alexy, R., (2002), *A Theory of Constitutional Rights*, Oxford: Oxford University Press.

¹⁸ Menéndez, Agustín J., Eriksen, Erik O. (Eds.), (2006), *Arguing Fundamental Rights*, Springer, p.1, 5.

recognizing interculturality and pluralism as the key concepts in order to overcome this opposition and to realize a human rights dimension closer to the multiethnic reality of post-Westphalian nation States.

Intercultural dialogue and pluralism will be considered also as the most effective instruments of social conflict prevention, for tackling racism and xenophobia, promoting non-discrimination and respect for diversity, fostering human rights and capacity building mechanisms.¹⁹

While the debate about universalism and relativism is quite old in the history of philosophy, its applicability to the human rights theory is quite recent: it was in fact only with the Universal Declaration of Human Rights (UDHR) in 1948 that the universality and inviolability of every human being was definitely stated, the UDHR representing the “*frame within which the international human rights projects unfolds*”,²⁰ human rights meaning essentially “*what is in the Universal Declaration of Human Rights*.”²¹

However, as we will see, since its beginning the design and adoption of the UDHR was not at all immune of criticism and opposition, the UDHR accused of being an instrument of “*Western cultural imperialism*”, a “*mere Trojan horse for the imposition of ‘Western’ commitments upon ‘non-Western cultures*.”²²

Final aim of this section is an effort to reconcile universalism and cultural relativism by taking inspiration from both ideologies: on the one hand fully recognizing human rights as “basic rights and freedoms that all people are entitled to”, as stated in the UDHR itself;²³ on the other hand considering multiethnicity rather than homogeneity as the essential value that states need to take account of in multiethnic societies.

¹⁹ Cfr. An-Na'im, A., (2012), *The Interdisciplinarity of Human Rights*, in Gearty, C./ Douzinas, C. (eds), *The Cambridge Companion to Human Rights Law*, (pp. 97-113), Cambridge University Press.

²⁰ Gear, A. (2012). ‘Framing the project’ of international human rights law: Reflections on the dysfunctional ‘family’ of the Universal Declaration. In C. Gearty & C. Douzinas (Eds.), *The Cambridge Companion to Human Rights Law* (pp.17-35). Cambridge University Press, p.19.

²¹ Donnelly, J., (2003), *Universal Human Rights in Theory and Practice*, 2nd ED., New York: Cornell University Press, p.22.

²² Gear, A. (2012), p.22.

²³ Cfr Article 2 UDHR: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Cosmopolitanism can be referred as the philosophical perspective giving moral value and strength to the human rights doctrine but it does not represent *per se* a synonym of universalism. Even entailing a minimum level of basic rights, which are supposed to be valid for all human beings, irrespective of their origin or culture, human rights in a cosmopolitan perspective must be reinterpreted through discourse and intercultural dialogue, embedded in every single culture with its particularities and differences. The universality and indivisibility of human rights will be however finally reinforced and not dismissed.

The final chapter (Universal Rights and/or Minority Rights? Towards a New Model of Integration) will eventually explore merits and failures of the international system of protection of minorities and cultural diversity, including the new concept and definition of minorities in the European Union context.

It will analyse different models of integration and European mechanisms of protection of minority rights, concentrating on European immigration law and the Europeanization of integration models.

What is the concrete response of the European Union to the always-changing multiethnic societies of post-Westphalian nation-states? What the response to the “threatening” of the universality of human rights? Which is the role of intergovernmental organizations (IGOs), and of a supranational institution like the European Union, which the role of Member States and civil society in dealing with these new challenges?

Charles Jones, among others, stresses that “*the set of rights holders cannot be restricted to citizens of particular nation-states*”.²⁴

The EU claims to intend to develop as a borderless cosmopolitan entity but has in fact been criticized for being extremely bounded when it comes to immigration and the rights of third country nationals.

A non-appropriate integration model can lead to phenomena of racial and ethnic discrimination, social conflict, xenophobia and ghettoization, jeopardizing social cohesion and threatening security, as we will see has been in the special case of the Roma/Gypsies European minority, taken as a case-study example.

²⁴ Jones, C., (1999), *Global Justice: Defending Cosmopolitanism*, Oxford: Oxford University Press, p.57.

This has been broadly recognized by all European and international organizations such as EU, OSCE, UN and Council of Europe.

The research concentrates on the existing mechanisms, at European and international level, to identify and seek early resolution of ethnic tensions that might endanger peace and friendly relations between communities.

A special focus is dedicated to the work of the High Commissioner on National Minorities (HCNM), the Office for Democratic Institutions and Human Rights (ODIHR), the European Commission Against Racism and Intolerance (ECRI, Council of Europe), the European Union Agency for Fundamental Rights (FRA) and the UN Committee on the Elimination of Racial Discrimination, as well as national specialized bodies applying antidiscrimination policies at local level.

PART II

Chapter 1. Cosmopolitanism and Sovereignty, from International to Cosmopolitan Law?

II. Multiculturalism and Globalization in a Postmodern Era.

Around the end of the Seventies of the Twentieth Century, the perception of a crisis of paradigms and values is affirmed in the West. The concept of postmodern enters the philosophical debate, used by some thinkers to diagnose the end of modernity.

The values of modernity disappear when the model of industrial society shared between the capitalist and the communist countries is broken. Postmodern philosophy is strictly connected to a series of historical and social transformations. Behind his contestation of the modern, we find a variegated set of historical events (the world wars, the horrors of the concentration camps, the failures of real socialism, the inequities of capitalism, the dangers of a nuclear conflict, the threat of an ecological catastrophe, etc.) that have undermined the main "myths" of the last centuries, beginning with that of a necessary and endless progress.

The relations between post-modern and "complex" post-industrial society are particularly close. The mediating element is constituted by the pluralistic attitudes of this society, of which the postmodern wants to be the mirrored conscience.

Against all forms of homogenization and planning, the postmodern strives to assert the demands of multiplicity and difference, to the point of becoming the spokesperson of the polycentric and diversified physiognomy of today's multicultural societies; accentuating those aspects that make it an effective or potential ally of policies focused on environmentalism, pluralism, multiculturalism, on the defence of minorities and on respect for all forms of diversity.

Hence the postmodern project is the project of a "plural humanity", able to permanently leave behind the dream of a certain modern universalism of a single truth, a single faith and a unique system of values.

Our world has proved to be complex, also because of the new forms of communication and we must take into account the various plans of our intervention: social, cultural, economic and political.

In 1962, the Canadian sociologist Marshall McLuhan published *The Gutenberg Galaxy*, which states that the technological tools used by communication produce pervasive effects on the collective imagination, regardless of the contents conveyed, involving mechanization and homogenization. This thesis is summarized in the famous formula "*the medium is the message*". In *Understanding Media: The Extensions of Man* (1964), among his most famous works, McLuhan also fears the impersonality of modern communication and the extreme difficulty of controlling it by users: we are all immersed in the "global village" (expression coined precisely in this paper), far away physically but approached in the fictitious spaces created by mass media, which make any message easily accessible, usable by all without distinction and strongly persuasive.

During the Seventies of the Twentieth Century we witness the global diffusion of the media and especially the advent of electronic calculators. The introduction of the first microprocessor (the Intel 4004) made available quite cheap computers, which could be purchased by individuals. In 1990, the world-wide computer network owned by the United States, and until then reserved for scientists and researchers, was opened to the citizens and in 1991 the World Wide Web was born (literally "web of global dimensions"), emblematic symbol of the new communication interconnection.

The knowledge and behaviour of individuals are significantly affected by this formidable revolution. It is now possible to communicate instantly, interact with people scattered across the entire surface of the globe and spread content of all kinds anywhere. The new technological structure and the global techno-science that underlies it is not only the background or the precondition of the phenomenon of globalization, but it is also, to all intents and purposes, one of the causes. The term globalization has been coined quite recently. It appears for the first time during the Seventies of the last Century, in the English weekly "The Economist", a magazine of liberal economics. In the same period, the term "globalization" spreads in French culture, but it does not have the same fortune. In general, globalization, or *mondialisation*, contains a series of interconnected processes, which can be summarized as follows: in the economic and financial sphere, globalization has led to the intensification of exchanges and relations between an ever-increasing number of countries and the consequent breaking down of legal and economic barriers

that limited the movement of goods and people; the increasingly frequent use of new technologies for the exchange of goods and services; a marked competitiveness facilitated by the processes of liberalization, privatization and deregulation; strengthening the interdependence between the different economies, which influence each other in spite of geographical distances; the so-called "dematerialization", by virtue of which intangible factors such as the flow of information, scientific and technological knowledge, etc., play an increasingly important role in every sphere of human activity. In the political sphere, globalization has determined the loss of relevance of the State or of the national system as a fundamental reference point for the economic and political scenario.

If on the one hand this phenomenon tends to produce a crisis in the model of democracy that is suitable for the nation-state, on the other side it creates the conditions for the advent of various projects of global or cosmopolitan democracy. In the cultural sphere, globalization has promoted the diffusion on a planetary scale of increasingly homologated models of life and thought. This was possible precisely because of the diffusion and improvement of the mass media, as well as the now unlimited connection of computer systems. The habits and the mentality of the technologically advanced individuals of the whole world, in fact, tend to unify and conform. Although globalization can be analysed under multiple angles, which now focus each other on its basic traits (from the communicative interconnection made possible by new technologies to the contamination of ways of living and consuming, from the migrations of people to the sunset of the sovereignty of the States), there is a widespread tendency to place as its central and structural elements the irresistible expansion of capitalism, its subsumption of other modes of production and circulation, and the hegemony of its values on the whole planet. Indeed, the dynamics of capitalism has virtually transformed the world in a single production and distribution system, a single market whose exploitation is producing a global mass culture that is the result of global marketing and its constantly developing communication technology. Of course, globalization contains more than the totality of industrial capitalism, but this is its core and its defining element.²⁵ The evaluations of global mass culture by scholars are multiple and discordant: there are those who interpret it as common ground that facilitates the understanding and dialogue between cultures that have remained distant and mutually inaccessible, and who instead denounces the

²⁵ See C. Ake, *Dangerous Liaisons: The Interface of Globalization and Democracy*, in A. Hadenius, *Democracy's Victory and Crisis*, Cambridge 1997, pp. 282-296).

confused character, which implies the risk of cancellation of cultural specificities. Moreover, in this hybrid model, which is the symbol of the commercial multiculturalism of travel agencies, critics of globalization see the prevalence of the values of the capitalist West. More generally, there are at least three different and conflicting theoretical propensities towards globalization: 1) the first is decidedly negative and is concretized into interpretations that are also very distant from each other, united by the fact that globalization sees a world-space that summarizes all the evils of capitalism and its pseudo-democracy; 2) the second one is positive and intends globalization as the advent of a new economic order also beneficial for developing countries, which will finally have access to economic well-being and democracy; 3) the third, which also contains a variegated spectrum of interpretive models, tends instead to stand halfway between the first two, because it does not hide the benefits, nor the damage caused by globalization, but, considering it as an inevitable phenomenon, seeks to identify ways to maximize opportunities and to spread overall well-being.

For the Canadian philosopher Charles Taylor, for example, the success of globalization requires the recognition of cultures different from ours. However, the greatest difficulty lies in the hermeneutical criteria with which to recognize such cultures:

“The peremptory demand for favourable judgments of worth is paradoxically—perhaps one should say tragically—homogenizing. For it implies that we already have the standards to make such judgments. The standards we have, however, are those of North Atlantic civilization. And so, the judgments implicitly and unconsciously will cram the others into our categories. For instance, we will think of their “artists” as creating “works,” which we then can include in our canon. By implicitly invoking our standards to judge all civilizations and cultures, the politics of difference can end up making everyone the same”²⁶

This means that our question of confrontation and our eventual acceptance of the "different" tend to reduce the other to our point of view, thus losing its cultural specificity. Despite this importance, Taylor does not prove to be completely pessimistic, provided, he points out, that the West knows how to make its own a form of anthropological and ethical modesty based on *"a sense of our own limited part in the whole human story to accept the presumption."*²⁷ This does not mean that nowadays this "self-limitation" is only an ideal, facing the risk, much more concrete, that the same question of dialogue is

²⁶ Tylor, Charles (1994), *Multiculturalism: Examining the Politics of Recognition*. Princeton University Press, p.71).

²⁷ *Ibid.*, p. 73.

resolved in a form, less aggressive but subtler than in the past, of cultural imperialism.

On the other hand, the English sociologist Anthony Giddens does not share the idea that globalization is synonymous of "Americanization". The cornerstone of his speech is that, with the indiscriminate opening of the market, it represents, finally, an opportunity of growth for the developing countries. It is certainly impossible to foresee with certainty the tendency of this development, which does not follow a rational itinerary, but takes on anarchic and contradictory forms. One fact is however undeniable, according to Giddens: if, by exporting and spreading the Western model of economy, the predatory and irresponsible politics of the most industrialized countries has produced exploitation and misery in the less developed countries; it is precisely the globalization that can favour the entry of the latter in the international economic circuit, an entrance that has already partly taken place:

*“This is true of the global financial system, communications and media, and of changes affecting the nature of government itself. Examples of 'reverse colonisation' are becoming more and more common. Reverse colonisation means that non-western countries influence developments in the west. Examples abound - such as the Latinising of Los Angeles, the emergence of a globally-oriented high-tech sector in India, or the selling of Brazilian TV programmes to Portugal. Is globalisation a force promoting the general good? [...] Now it is surely obvious that free trade is not an unalloyed benefit. This is especially so as concerns the less developed countries. Opening up a country, or regions within it, to free trade can undermine a local subsistence economy. [...] Yet to oppose economic globalisation, and to opt for economic protectionism, would be a misplaced tactic for rich and poor nations alike”.*²⁸

These considerations lead Giddens to affirm that even the rich States must change their attitude, to adapt to the process of transformation under way and thus avoid being overwhelmed. All the old institutions, like the nation, the family and the labour market, have changed in depth and no longer have the same valences of the past. It is a question of establishing a new order, which is not determined by individual wills, nor by the rules of traditional politics, but by a complex of factors which at present is impossible to identify. Giddens, however, is optimistic: after all we are the first generation that moves in these unusual situations and for sure, with time, we will find a way to regulate and govern them.

The Indian economist and philosopher Amartya Sen, in his analysis of

²⁸ Cf. Giddens, A. (1999), *Runaway World. How Globalization is Reshaping our Lives*, London, Profile Books.

globalization, starts from the conviction that there is a close correlation between free market and democracy. In fact, he points out that globalization has brought advantages to peoples who were previously excluded from the market and it has enriched the world from a scientific and cultural point of view. On the other hand, Sen does not hide that the most evident economic result achieved to date by globalization has been the increase in the inequality between rich and poor, both in the case of different countries, and in the case of different social groups within the same country. Suffice it to say that the percentage of global income of the poorest fifth of the world's population fell from 2.3% to 1.4% from 1989 to 1998, while the share forfeited by the fifth wealthier grew; not to mention that, in Sub-Saharan Africa, in many countries the current per capita income is lower, in real terms, than in the seventies of the last century. The central problem, for Sen, is therefore that of an equitable, or at least acceptable, distribution of benefits. For Sen, moreover, both those who believe that globalization in itself favours the affirmation of human rights and the demolition of dictatorial regimes (still widely widespread in the Third and Fourth World), and those who believe that globalization destroys the current political equilibrium, undermining democracies, are wrong. It is consequently useless to try to uncritically favour the process, as well as trying to impede it.

*"The answer that must be given to global doubts is the global construction: there is no way out and no good reason to look for it, from the general process of globalization, of which the anti-globalization protests are a part. Globalization, in the best sense of the term, must at the same time face the ethical and practical issues of crucial importance deriving from it".*²⁹

As an irreversible process, which does not make sense to refuse or hinder (even in the light of the undeniable positive consequences it has produced), globalization must be regulated on the basis of common choices: to the extent that each culture will be able to safeguard its specificity, collaboration in this sense will be beneficial for everyone and not only unilaterally. According to Sen, it is therefore a question of finding the path to effective democratization of the economy, which must not necessarily correspond to the assimilation of all countries to the same political and institutional model.

In *The Decline of the West*, Oswald Spengler predicted that the West would begin his decline when reaching its greatest influence on all other peoples, and at the same time posed the problem of a world history no longer Eurocentric: man of the Euro-Western

²⁹ Sen, Amartya, (2002), *Globalizzazione e Libertà*, Mondadori, Milano 2002, p.9.

civilization, with their feeling of history, are not a rule but an exception. The “world history” is our image of the world, not the one of the “humanity” in general.³⁰ In short, the idea of a universal history belongs, according to Spengler, to the culture of the West which, even when it tries to recognize the history of others, always does so according to a typically Western prejudice.

On the contrary, in *The Crisis of the European Sciences*, Edmund Husserl tended to identify the philosophical rationality typical of the West with the rationality itself, while in the work *A Study of History*, Arnold J. Toynbee strongly posed the problem of the pluralism of civilizations and of their lack of communication. Nowadays, the process of philosophical and historiographic deconstruction of the Eurocentric perspective has developed further. The attention towards the Asian world has made anachronistic the traditional repartition of history in Ancient history, the Middle Ages and Modern history, while the study of the Africa’s history has imposed a new model of historiography based on the interaction of traditions and cultures, blasting the same concept of "periodization". Moreover, chronological contemporaneity in some cases makes little sense compared to historical contemporaneity. There are in fact different cultures among them devoid of contacts, which have logics and times of development completely autonomous, which does not make sense to place on a chronological axis equal to the one adopted for Western history, or rather European. And speaking of "backwardness" of other civilizations compared to the European one, for example due to the lack of a science or technology like ours, is, once again, a typical value judgment based on the preconceived notion of the superiority of Western civilization. It is therefore necessary to renew not only the old historiographical modules but also the axiological ones. Especially since it is now clear to everyone, as Habermas writes, that "behind the shining facade of rational universality one can hide particular interests"³¹. In this sense, it is desirable what has sometimes been defined as a kind of umpteenth "Copernican revolution" of the rationality of the West: a "revolution" which, in our globalized world, correspond to a definitive epistemological and practical-moral decentralization of the Western vision of the world, in the direction of a fruitful dialogue between different civilizations, an “anthropological decentralization”.

³⁰ Spengler, Oswald, 1880-1936, (1928), *The decline of the West*. New York: A. A. Knopf.

³¹ Habermas, J., (2003) *Fondamentalismo e Terrore*, in G. Borradori, *Filosofia del Terrore. Dialoghi con Habermas e Derrida*, Laterza, Roma-Bari, p.48.

From what has been said, it emerges clearly that globalization must be read not only from an economic, political and cultural, but also from an "anthropological" point of view, that is to say with regard to our overall pattern of being in the world. For this reason it is absolutely necessary to keep in mind the negative aspects of this process, such as: 1) the tendency to compress and homologate the various lifestyles (Habermas talks about "colonization" of experience), with the consequent reactive production of those identity-against (as they have been defined) that are the various populisms, localisms and fundamentalisms; 2) the potential crisis of traditional forms of political democracy; 3) the various differences and inequalities in the distribution of goods.

On the other hand, globalization does not involve only risks, but also opportunities (as Giddens and Sen underline). Seizing the *chance* that the processes of globalization entail means to act, as some scholars have pointed out, in the direction of co-responsibility and co-operation, asserting the will to face together, rather than unilaterally, the risks and opportunities of globalization. In any case, it is now clear to everyone, at least to those who believe in the values of democracy and peace, that the urgency of a responsible and democratic process of global processes is not only a moral issue of justice, but it could even become a question of survival.

The term multiculturalism was established in America during the 1960s, particularly in the United States and, even more so in Canada, in reference to some local problems, that is to say a series of conflicts that were determined by the presence of different cultures and languages in the same geographical area, which marked the end of the so-called "melting-pot", namely the end of the peaceful coexistence of English-speakers and French-speakers' citizens. This meaning, important but limited, during the Eighties and Nineties has expanded considerably, following the profound political and ideological changes that have taken place throughout the planet.

Currently the term "multiculturalism", which has become one of the key words of today's political lexicon, alludes to the problem of the coexistence of different cultures, subject to the same legal and political systems, as part of the same society. This problem is made even more urgent by the phenomenon of globalization, and therefore by the intersection, at the planetary level, of different peoples, languages, rights, religions and customs.

Multiculturalism tends to be experienced, both by citizens and by scholars, in

different ways and, eventually, from two radically opposed points of view: on the one hand as a loss of the singular and unrepeatable identity of the different populations, and consequently as a matter of unavoidable tensions; on the other hand, as a source of enrichment and a vital opportunity to build a new kind of public sphere.

In reality, the theme of the relationship with the other is not a novelty, because it has always been placed in history: from the relationship between the Greeks and the Barbarians, to the evaluations of the Europeans on the Amerindians at the time of the "discovery" of America.

We must therefore understand if we can see the problem from a new, original and global perspective. In this regard, scholars are divided. There are those who argue that the multicultural issue is not a "new" issue, but it accompanies the political thought of modernity from its origins as a "karstic river"³²; and there are those who say that multiculturalism is not, as many believe, the new phenomenal form of the old question of tolerance, but it rises from the end of the colonial empires undergoing an unprecedented acceleration with the '89 and with globalization.³³

The irrepressible reality of multiculturalism poses today's philosophical-political thought a series of problems that can be summarized in the following questions: a) is it possible to guarantee unity and social cohesion by making the differences survive at the same time? b) to what extent are cultural diversities combined with respect for the equality of civil rights provided by democratic institutions?

Acknowledging that Western societies have irreversibly become multi-ethnic societies, multiculturalism implies, as Francesco Fistetti observes in the aforementioned book, the question of recognition of the other (of the different from us, the foreign, the stranger). This question is increasingly urgent in the current historical moment, marked by a twofold and contradictory movement: on the one hand the tendency to hybridization and intercultural mixtures; on the other hand, the fundamentalist withdrawal of cultures.

Considered in the light of the "problem of the other", multiculturalism, according to a significant definition provided by Joshua Cohen, Matthew Howard and Martha C. Nussbaum, is

“the radical idea that people in other cultures, foreign and domestic, are human

³² Lanzillo, M.L. (2005), *Multiculturalismo*, Laterza, Roma-Bari, p.9

³³ Fistetti F. (2008), *Multiculturalismo*, UTET, Torino, pp. 8 and 9.

*beings too, moral equals, entitled to equal respect and concern, not to be discounted or treated as a subordinate caste. Thus understood, multiculturalism condemns intolerance of other ways of life, finds the human in what may seem Other, and encourage cultural diversity”*³⁴

The question of the recognition of the other is raised when multiculturalism is accused of being "mono-cultural" and ethnocentric, accusing that set of State policies that during the second post-war period, led to privilege a certain culture, the one of the majority of the population, considering all the other cultures as marginal if not really inferior.

The recognition of the value and the rights of the other, implies the irreversible crisis of the assimilationist model of the melting-pot, understood as the dominant scheme of social integration based on the so-called WASP (White Anglo-Saxon Protestant). The answer to monoculturalism can be, and has been, of two types:

1) the first is a multiculturalism that seals every culture in the enclosure of its own borders (cultural "mosaic"), considering it as a heritage impervious to historical changes, susceptible of being rediscovered in its pristine essence. This form of multiculturalism leads, on the one hand, to relativism, since understanding cultures as closed worlds means undermining every effort of mutual understanding; and on the other hand, to fundamentalism, that is, an integralistic attitude of defence and preservation of those which are considered the constitutive traits of a culture. Such a view legitimizes, obviously, the desire to violently separate a community from all the others;

2) the second response is a multiculturalism that, avoiding the absolutization of cultures, emphasizes the fact that there is a plurality of civilizations and that each one of them constitutes a historically articulated plot of beliefs, values and social practices, in perpetual transformation and hybridization. In short, it is a multiculturalism that, avoiding fundamentalism, insists on the necessity of a full recognition of cultural differences, seen as all worthy and bearers of a peculiar declination of the human race.

Today's philosophical theories on multiculturalism have mostly a normative inclination: they are not content to describe the present situation, but tend to identify measures and/or behaviours aimed at guaranteeing the recognition of differences (or

³⁴ Okin, Susan Moller; Nussbaum, Martha; Cohen, Joshua; Howard, Matthew (1999). *Is multiculturalism bad for women?* Princeton, New Jersey: Princeton University Press, p.4.

cultural identities) and minority lifestyles. For example, those who believe that these situations are not sufficiently defended, proposes to establish special group rights or "privileges" in favour of minorities.

In this work of normative reconstruction, philosophy cannot help but be confronted with two basic orientations or paradigms: communitarianism and liberalism. Communitarianism, starting from the idea of an individual organically inserted in the social structure of his community, insists above all on the appreciation of differences; liberalism, focusing on the equal rights of individuals, tends to favour a universalistic and egalitarian view.

In particular, the communitarians, bearing in mind the post-structuralist and post-modern critiques of the "oppressive" universality of the moderns, accuse the classical liberal state of "abstract neutralism" and "blindness" in the face of differences. Such attitudes would also be at the basis of the explosions of nationalist tribalism and religious fundamentalism that found their emblematic figure in the tragedy of September 11, 2001.

From this derives the inevitable clash between the philosophers of these two tendencies, but also the research of perspectives capable of keeping in mind their respective requests. For example, some liberals felt the need of a renovation of the traditional liberal-democratic ideology, which with its egalitarianism seems not to take into account the new concept of "difference" elaborated by contemporary philosophy. They have therefore come to elaborate a new form of liberalism "welcoming differences" (typical is the case of Habermas).

This attitude implies not only the project of "letting the other survive", which is also the precious Kantian idea of the "equal dignity" of human beings, but also the typically Twentieth Century's idea of diversity as an ethical and anthropological value.

One of the most significant philosophers of communitarianism is the aforementioned Canadian philosopher Charles Taylor, author, in 1992, of a fundamental essay entitled *The politics of recognition*.

Moving from a communistic-organicistic conception, Taylor hopes that the multi-ethnic society recognizes not only the rights of individuals, but also the rights of the various communities that populate it. In this way, in his opinion, the difference in values in a collective and therefore public area is safeguarded, in contrast to liberalism, which circumscribes the dimension of difference to the private sphere.

Taylor reiterates the opportunity represented by separations and boundaries, as the only means to guarantee differences, because not everything can coexist with everything. He therefore does not wish universal conciliation.

For example:

*"For mainstream Islam, there is no question of separating politics and religion the way we have come to expect in Western liberal society. Liberalism is not a possible meeting ground for all cultures, but is the political expression of one range of cultures, and quite incompatible with other ranges".*³⁵

It is therefore in the particularism of the community that Taylor sees a valid remedy to their dissolution in that meta-community that is the State.

As concerning liberalism, John Rawls is one of the major representatives of this tendency. In *Political Liberalism* (1993)³⁶ the American philosopher states that the contemporary society is characterized by a multiplicity of reasonable but incompatible juridical systems, which are unlikely to ever be unified.

Since it is very difficult for the citizens of a state to recognize themselves in the same thought model, the practice of tolerance is the only possibility.

In this regard, Rawls's theory is not very different from the traditional one, that dates back to the Sixteenth Century. In fact, it is an appeal to mutual respect and dialogue. On the other hand, without tolerance it would not be possible to extend the principles of justice to those who are external to the liberal system and its political tradition.

According to Rawls, conflicts between political values (embodied in public institutions) and non-political values (embodied in the many cultural, linguistic and religious traditions that divide communities) can be resolved in the form of an overlapping consensus: an expression with which Rawls indicates the convergence of the various traditions around a core of shared values, that each sub-group justifies from its own point of view (as happens, for example, for the idea of equality, which everyone accepts and legitimizes on the basis of their own religious, ethical and philosophical tradition).

In other words, it is a matter of finding a sort of "least common denominator" between different beliefs and values, in order to transform society into a fair system of

³⁵ Tylor, Charles (1994), *Multiculturalism: Examining the Politics of Recognition*. Princeton University Press, p.62).

³⁶ Rawls, John., (1993) *Political Liberalism*, Columbia University Press.

cooperation. For Rawls, in fact, we can mitigate our selfish feelings with cooperative incentives, thus ending up "intersecting" our intentions with those of our fellow men, aware of the advantages brought about by collaboration.

Rawls's reflection is a testimony of the North American's neoliberal debate (which has been widely discussed also by other philosophers such as Ronald Dworkin and Joseph Raz): the problem of the reconciliation of the universality of values (on which the legitimacy of the State is based), with the variety of the ways in which they are still interpreted and put into practice by the various communities.

Another Canadian theorist of liberal orientation is Will Kymlicka, (professor at Queen's University in Kingston, Ontario). His 1995 essay entitled *Multicultural Citizenship* has been translated into several languages.

Kymlicka's approach gives ample space to the historical differences of States, distinguishing "multiculturalism", born from the absorption of previously autonomous populations, from "multinationality", arisen first of all from immigration. He takes into more consideration than other scholars, the concrete different areas of differences, integrating the abstractness of philosophical thought with ample anthropological analysis.

In this way Kymlicka distinguishes a political reading and a cultural reading of multiculturalism, within which, in his opinion, at least three distinct questions are mixed: the difference, the rights of minorities, the recognition of identity.

The scholar declares himself favourable both to the freedom of the individual within the group than to the freedom of the various minorities within the state, but in different ways according to the situation.

If new forms of representation are to be introduced into the State, national minorities (such as the Native Americans in the United States or the Catalans in Spain) should be granted with decentralization and self-government; while ethnic groups will enjoy cultural recognition, but not special rights.

In order to avoid solutions similar to the one proposed by Taylor, aimed at establishing a sort of separatism among the "different", Kymlicka proposes a "hybrid" or "pluralizing" model of multiculturalism (as he defines it), which should safeguard at the same time individuals, majority and minority groups within the state.

On the other side, according to Amartya Sen, the attempt to understand the

multicultural components of our world entails a risk of “miniaturization of the individuals”: trying to attribute to a person or a group a determined and unmovable social identity, means to tighten it in a unilateral definition, that is to classify it according to a single criterion.

This is the so-called "solitarist approach" to human identity, which Sen sharply criticizes, observing with humorous sagacity that:

*"the same person can be, without any contradiction, an American citizenship, of Caribbean origin, with African ancestry, a Christian, a liberal, a woman, a vegetarian, a long-distance runner, a historian, a schoolteacher, a novelist, a feminist, a heterosexual, a believer in gay and lesbian rights (...) Each of these collectivities, to all of which this person simultaneously belongs, gives her a particular identity. None of them can be taken to be the person's only identity or singular membership category."*³⁷

The problem of multiculturalism must be therefore faced in a perspective that values the multiple identities of the human being. The same relationship between global identity and local identity must be conceived in an open way, so that the feeling of global belonging does not replace our national allegiances (and vice versa).

In his philosophical-sociological reconstruction of the postmodern, Jurgen Habermas also deals with the problem of multiculturalism in a wide series of essays: *Between facts and norms* (1992), *The inclusion of the other* (1996), *The postnational constellation* (1998).

The intent of Habermas is to mediate the communitarian positions with the liberal ones, in view, as the philosopher recently reiterated, of a society "able to balance between "political equality" and "cultural difference".³⁸

From the liberals, Habermas accepts the thesis of the universality of the law; from the communitarians (es. Taylor) he accepts the necessity of safeguarding the differences.

However, while for the communitarians there are collective cultural rights that can be asserted in legal terms, for Habermas the diversity consists of elements that the law, as universal and valid for all cultures, is not able to incorporate, unless it becomes particularistic and contingent itself, thus losing its unique function as a *super partes*

³⁷ Sen, Amartya (2006). *Identity and Violence: The Illusion of Destiny*. Issues of our time. New York: W.W. Norton & Co, p. 9-10.

³⁸ Cfr: Habermas, J. (2008), *Notes on post-secular society*, New perspectives quarterly. vol. 25.

regulator.

In other words, liberals are right to warn against an identity policy that excessively "overturns" the legal system to the specific needs of cultural minorities, since such a policy would produce "parallel societies".

On the other hand, the communitarians are right to warn against the dangers of eradication and forced assimilation, that is to say the dangers of an abstract politic of integration that programmatically aims at subjecting minorities to the cultural imperatives of the majority.

It follows that the only way out is that of a liberal "inclusive" society capable of accommodating the differences without affecting the principle of political equality. According to Habermas, the inclusion of all citizens in civil society requires a political culture that safeguards us from confusing liberalism with indifference, but requires also the fulfilment of certain material preconditions: for example, a real integration into kindergartens and schools, which neutralizes the social disadvantages, giving equal access to the job market.³⁹

In this way, all the subjects, who are treated equally, are included in the political community, without exception, and it is not necessary to create differentiated strategies to protect minorities and preserve their characteristics (for example schools or classes for the exclusive use of a certain linguistic minority).

It is only with this series of procedures that the demand for multiculturalism, recognition and pluralism, is compatible with the liberal theory of rights, operating within a democratic state which attempts to reconcile what the philosophical-political tradition has thought in a relationship of unresolved tension: private autonomy and public autonomy.

In fact, Habermas argues, these two elements are not mutually exclusive, but complementary, since there is no real public autonomy when citizens are not guaranteed in their rights, and vice versa there are no citizens guaranteed in their rights if there is not effective private autonomy:

"The two concepts are interdependent; they are related to each other by material implication. Citizens can make an appropriate use of their public autonomy, as guaranteed by political rights, only if they are sufficiently independent in virtue of an

³⁹ Cfr. Habermas, J., (1998), *The Inclusion of the Other: Studies in Political Theory*, Cambridge: MIT Press

*equally protected private autonomy in their life conduct. But members of society actually enjoy their equal private autonomy to an equal extent—that is, equally distributed individual liberties have “equal value” for them—only if as citizens they make an appropriate use of their political autonomy.”*⁴⁰

⁴⁰ Habermas, J. (2001), 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?', *Political Theory*, 29, p. 767.

II.1 The Crisis of the Westphalian Model: the European Union and the Reconceptualization of Nation-State.

One of the main effects of the era of postmodernism, globalization and multiculturalism, in the political sphere, is the loss of relevance of the State or of the national system as a fundamental reference point for the economic and political scenario.

If on the one hand this phenomenon tends to produce a crisis in the model of democracy that is suitable for the nation-state, on the other side it creates the conditions for the advent of various projects of global or cosmopolitan democracy.

In any case a crisis of the Westphalian model of nation-state must be recognized as well as the urgency of a reconceptualization of the theory of sovereignty and of a new, inclusive definition of citizenship and national identity.

The last few decades have in fact been a period of constant cultural and social changes for the western world in general and for Europe in particular. Waves of immigration have dramatically altered the ethnic and social configuration of our cities and countries. Immigrants have been seen with diffidence at first, which has turned into open hostility afterwards.

Diversity became one of the main characteristics of modern life and has been both resisted for its dangerous effects on national identity, and rewarded for its contribution to a truly supra national system.

Concurrently with the process of globalisation of economy and markets, a new form of colonisation has emerged, imposing the western way of life to the rest of the population, fostering an increasing homogenisation among western countries, which has been certainly favourable to business, to the detriment of national cultures.

While it has been acknowledged that the two processes of globalisation and migration are reciprocally interdependent, this consciousness has not been sufficient in order to resolve the conflict between the divergent forces of multiculturalism and globalisation. Conflicts resulting from both are often interrelated, so that it becomes quite difficult to establish their respective boundaries.

The Treaty of Westphalia (1648) has been commonly regarded as the beginning of a new political and territorial order in Europe, assisting to the rise and consolidation of the modern nation-state, conceived as a formal political union with well-defined territorial

borders, one or several official language(s), a common currency and legal system; organized either by race or cultural background.

In the nation-state, everybody usually speaks the same language, practice a similar religion and share a common set of “national” values.

A new political order establishing the rights and duties of states was therefore initiated based upon the concept of a sovereign state, the related national identity being defined by its territorial and ethno-cultural characteristics rather than its religious or monarchical features. The “territorial state” system in international politics was finally formally recognized, defining the state as the basic unit of the international system.

A working definition of Nation-State has been provided by Valery Tishkov, which defines states as “*self-identifies deriving their political legitimacy from serving as a sovereign entity for a country as a sovereign territorial unit*”.⁴¹

The state is a political and geopolitical entity; the nation is a cultural and/or ethnic entity. The term "Nation-State" implies that the two geographically coincide, and this distinguishes the Nation-State from the other types of state, which historically preceded it.

From an historical point of view, we have assisted to the collapse of the Soviet Union and the consequent end of the East-West conflict, to the recent EU’s enlargements (2004, 2007 and 2013) and the increase in mass migration and refugees’ movements, the blurring of state borders and the changing environment of international relations.

All of that contributed to an expedited and complete metamorphosis of the old concept of nation-state, further undermining the old Westphalian system.

The concept of sovereignty, based on this idea of “homogeneous” states and national identities, has been confronted with a profound reconceptualization, becoming one of the most challenged political notions.

Various attempts have been made in order to build a new post-national political idea, contributing at the same time to a new, inclusive definition of national identity.⁴²

⁴¹ Tishkov, V., (2000), Forget the 'Nation': Post-Nationalist Understanding of Nationalism, in *Ethnic and Racial Studies*, 23.4, p.627.

⁴² (Cfr. Habermas, 1998).

A thorough contestation of the concept emerged in correspondence with new phenomena usually considered as belonging to the general phenomenon of globalization: the increasing transnational interconnectivity between markets, institutions and people, as well as the changing ideas about human dignity, the results of technological developments, the intensification of regional integration, the increasing interdependence on common issues worldwide and last but not least, the new emerging global threats which transcend the state level (especially environmental issues and global security threats like terrorism).

These are some of the events which characterize an entry into a post-Westphalian era, in which the investigation of possible post-national forms of politics, acquires growing importance, as well as a greater understanding of the fact that global threats require common action in order to be solved.

New ideas of governance embrace, for example, the idea of a “*world government*”⁴³, the building of a “*cosmopolitan democracy*”⁴⁴ or the development of mechanisms of global governance as “*multi-level governance*”.⁴⁵

New actors other than nation-states (non-state actors) are therefore emerging as novel players in the international relations game, assuming a progressively more important role: actors such as regional and supranational organizations (e.g. the European Union), but also non-governmental organizations and multinational companies.

Furthermore, it is important to recognize that a significant contribution to the evolution of this concept has developed from the role played by civil society organizations, which have commented and criticized both national and European policies, thus contributing to the emergence of a new European civil society.

This is even more important if we consider that the last two hundred years of European political history have witnessed the rise and legitimization of a modern Nation-State, which have a tendency to become an “*ethnic State*”, that is to say a “*State which belong to an ethnic majority.*”⁴⁶

⁴³ Lu, Catherine (2008). World Government. The Stanford Encyclopedia of Philosophy (Fall 2008 Edition), Edward N. Zalta (ed.).

⁴⁴ Cfr. Held, D., (1995), *Democracy and the Global Order. From the Modern State to Cosmopolitan Governance*, Cambridge: Polity Press; and Archibugi, D., (2008) *The Global Commonwealth of Citizens. Toward Cosmopolitan Democracy*. Princeton: Princeton University Press.

⁴⁵ Cfr. Enderlein, E., Wälti, S., Zürn, M. (eds.), (2010), *Handbook on Multi-Level Governance*, Cheltenham, UK: Edward Elgar Publishing.

⁴⁶ Gheorghe N.; Acton T., (1994/1995), “Dealing with Multiculturality: Minority, Ethnic, National and

This idea of “state unity” was often put into practice through a policy of socio-cultural homogenization and political integration of the population of a State, and frequently imposed by hegemonic political *élites* to subordinate social groups considered as socially marginal.

The rise of Nation-States required the construction of a national identity that was supposed to be different from “others” not belonging to “us”, to the nation.

The identity of a nation, in this way, was directly interlinked with the creation of “*the Others*”, conceived at the same time as a concern and a threat to the majority society.⁴⁷

Many scholars have however recently challenged the “homogeneity” of Nation-states and the idea of a homogenous culture and language as the main prerequisite of every nation-state.

By closer examination the idea of an ethno-cultural homogenous state where people speak the same language, have a similar ethnic background and share the same religion has always been only an illusion.

“Homogeneous states” of the old Westphalian system were never all that homogeneous as it seems as well as the national identity has never been so exclusive.

The advent of the globalization era has finally outdated the old idea of homogenous nation states, even though the majority of western countries are still reluctant in accepting these changes, while countless religious, ethnic, linguistic and cultural communities now inhabit European countries and cities.

As explained by Edward Said in his classical work *Orientalism* (1978), it is possible to retrace the origin of negative stereotypes towards minorities considering the Western historical background of colonization. The age of colonization and imperialization contributed to the formation of an unfair and unbalanced view of non-European people and cultures.

In his book, Said underlines the term “*Orientalism*” as a collection of false preconceptions characterizing Western attitudes toward non-western-countries, arguing that a long tradition of romanticized images of Asia and the Middle East in Western

Human Rights”, in *OSCE ODIHR Bulletin* Vol.3, No. 2, p.29.

⁴⁷ Please refer also to: Anderson, 2006, in which the author reflects on the origin and global spread of nationalisms and examines the creation of “*imagined communities*” of nationality.

culture has served as an implicit justification for the European and American imperial ambitions.

The contraposition between “us” and “them” can however become dangerous and create social conflicts when “we” are always defined as good, rational and law-abiding, and “them” are always defined as bad, irrational and criminals. Such contraposition can in fact lead to a general negative attitude towards migrants and foreigners, weakening social cohesion and solidarity with migrants.

On the other side, as concerning the ongoing political debates on the possible power shift from traditional industrial powers to emerging post-national powers, the EU can be considered as an emerging global, international actor, which significantly differs from traditional forms of power (e.g. Member States).

In a contemporary, “globalized world”, in which western nation-states are experiencing major political, socio-economic and cultural transformations, the European Union can be considered one of the most significant attempts to create a post and supra-national political identity, exemplifying how, in the last two decades, the rise of “*post-national constellations*” of political authority has led to serious attempts to renovate “*both the idea and the practice of sovereignty beyond the state*”.⁴⁸

Regarding the European Union as an outstanding example of regional supranational organization, it is possible to historically affirm that it has progressed well beyond a simple confederal-style union, developing exclusive competences over certain issues, especially through the development of the “*acquis communautaire*” over national legislations, and the supranational jurisprudence of the European Court of Justice (ECJ).⁴⁹

The question however remains, how and whether the EU can be regarded as an “effective” global power in world politics, one that makes a difference to both the local and global *equilibrium*, able to extend its values and exert its influence over an extensive part of the world, in what concerns both its impact on economy and development, its capacity to deliver external aid and its security and defence policy.

Attempts have been certainly made in order to provide the EU with a symbolic legitimacy and “ethical identity”, for example through the stipulation of the European

⁴⁸ Cfr. IFL, Institute for Philosophy of Language, FCSH, UNL, (2011). Post-national Sovereignty: The EU path towards a political identity.

⁴⁹ Cfr. Weiler, J.H.H., (1991). The Transformation of Europe. *The Yale Law Journal*, Vol. 100, No. 8, Symposium: International Law, 2403-2483

Constitutional Treaty⁵⁰ and the adoption of a Charter of Fundamental Rights which aimed to consolidate the European political identity through the recognition, promotion and protection of a common ethical and legal background, as well as providing a set of common rights and shared values, and in so doing, justifying a supra-national sovereign intervention.

However, despite the fact that many achievements have been positively reached at EU level, namely the enhancement of peace and stability in the continent and the establishment of a common market and monetary union; many important “*legitimacy deficiencies*” have been pointed out and the EU has been often classified as a weak and divided entity, particularly incoherent regarding its role as a global actor in international politics.⁵¹

Problems related to the EU internal and institutional structure, its democratic deficit and the largely intergovernmental nature of its foreign policy have been often underlined.⁵²

The EU is therefore described as “*a novel type of entity whose principled and constitutional status is ambiguous and incomplete, and whose underlying telos is not clear*”.⁵³ Many indicators have pointed to such weaknesses and internal division in the past number of years.

For example, the lack of a consistent and effective intervention during the Balkans war, the exclusion of the EU from the final negotiations at the COP15 (15th session of the Copenhagen Climate Change Conference), the EU’s indecision concerning the US’s plan to intervene in Iraq each represented a rather weak standing of the EU in the global scene.

It is certainly true that Europe has always had the ambition of playing a role on a global and international scale, recognized as early as 1937 by Young, who entitled this phenomenon “*Europeanization*”.⁵⁴

⁵⁰ Which was however rejected by the French and the Dutch *referenda* in May and June 2005.

⁵¹ Eriksen E. O. and Fossum J.E., (2004), Europe in Search of Legitimacy: Strategies of Legitimation Assessed. *International Political Science Review*, Vol 25, No. 4, p. 435.

⁵² Cfr. MacCormick N., (2007), *The European Superpower*, Basingstoke: Palgrave Macmillan.

⁵³ Eriksen E. O. and Fossum J.E., (2004), Europe in Search of Legitimacy: Strategies of Legitimation Assessed. *International Political Science Review*, Vol 25, No. 4, p. 435.

⁵⁴ Young, G., (1937). Europeanization, *Encyclopedia of the Social Sciences*, vol. 5. New York: Macmillan, 623-625.

Certainly, Europe has long been considered at the centre of the most revolutionary technological, institutional and political inventions and “*Western values and assumptions have been internalized to a remarkable degree in almost every other major culture*”.⁵⁵ The European Union’s presence in the world’s economy is still considered powerful. EU represents:

*“the largest single economic entity in the world, with half a billion people and a gross domestic product (GDP) slightly larger than that of the United States [...] The EU’s presence in the world economy manifests itself not only through trade, capital and migratory flows but also via an intense regulatory activity. It is, if not the main, at least the second most important regulatory power in the world in just about every area, including: competition policy, [...], environmental protection, [...]; money, with the euro being the second largest international currency in the world (behind the US dollar); and financial market regulation, with European markets also ranking number two in the world (again behind the US). The European Union is not only a global economic power, more or less on a par with the United States. It is also the undisputed regional economic power of a geographical area that encompasses Europe, the Middle East and North Africa (EMENA)”*⁵⁶

Yet, some authors still speak of a “*European malaise*”⁵⁷ and the EU is considered to be consistently lacking all the essential characteristics that are usually associated with the notion of “global power”.

Such characteristics are instead mostly associated with the concept of a traditional nation-state, which entails a clearly defined hierarchy and centre of authority, as well as extensive control over all fields of life of its citizens (in the political, economic, social and cultural sphere).

Furthermore, such a perception relates to the classical conception of international security, which has been traditionally linked to the protection of physical and political integrity of sovereign states; consequently, requiring the protection of internationally recognized boundaries (if necessary also through the use of military force), the prohibition of the use of force between states and the principle of non-intervention in the internal affairs of other states.

The European Union indeed has a peculiar role within the international arena, one that differs from any traditional form of power (nation-state), especially regarding both

⁵⁵ Roberts, J.M., (1985), *The Triumph of the West. The Origin, Rise and Legacy of Western Civilisation*, London: Phoenix Press, p.278.

⁵⁶ Sapir, A. (ed.). (2007), *Fragmented Power: Europe and the Global Economy*, Brussels: Bruegel, p.1.

⁵⁷ Beck, U. and Grande E., (2007) *Cosmopolitan Europe*. London: Polity Press, p.1.

its institutional structure and the intergovernmental nature of its foreign policy.⁵⁸

Such uniqueness is based on differing levels of policy, whereupon some areas of policy are dealt with at a communitarian level, while also respecting the different priorities and concerns of each member country as well as their respective foreign policies and the overriding intergovernmental framework.

However, some authors (e.g Manners, 2006)⁵⁹ sustain that it is exactly what is commonly considered to be a point of weakness (at least compared with old-style power politics) that makes the EU powerful on the global scene.

The EU power manifests not through the use of force or in a “traditional fashion”, but predominantly through its character of normative and civilian power and the use of soft-power instruments and legislative agendas, such as economic incentives and the prospect of membership that in turn attracts and influences the policy and behaviour of other states.

For example, policies of conditionality and economic incentives made it possible for the EU to exercise a broad influence over potential candidate countries, which became deeply dependent on the EU’s trade services, policies and financial opportunities.

In conclusion, the EU can be effectively considered as a “world power”, especially regarding its communitarised policies (namely trade and monetary policy), even though its effectiveness is largely based on specific policy fields and related to specific regions of the world.⁶⁰

On the other hand, the EU can be considered as less effective in other regions or policy areas and in particular, in regards to its capabilities in the security and defence policy, its soft-power measures having been often criticized as “too soft”, only reactive and ultimately ineffective.

On a final note, it should be highlighted that the complex structure of the EU should not be seen as a detracting factor, but rather an important characteristic of the nature of the EU, particularly due to its crucial role in the destabilization of the traditional

⁵⁸ Cfr. MacCormick N., (2007), *The European Superpower*, Basingstoke: Palgrave Macmillan.

⁵⁹ Manners, I., (2006). The European Union as a Normative Power. *Millennium – Journal of International Studies* 35, 167-180.

⁶⁰ Predominantly, this includes the “enlargement regions” of Central and Eastern Europe and recently South Eastern Europe. For instance, the EU remains highly invested in post-conflict state building and in bringing democracy and stability to the Balkans’ region.

Westphalian notion of power.

The EU's multi-layered structure and post-national governance model could instead be considered to be an advantage when addressing the complex and interconnected challenges of today, increasingly so if the EU continues to adequately meet the challenges expressed in its foreign policy objectives, namely the promotion of regional cooperation, human rights, peace and good governance, the promotion of the rule of law and the protection of minorities.

The EU may therefore be “*unlikely to be transformed into a superpower in the near future, but maybe it will become a trend setter for a modern form of foreign policy in a globalized world*”.⁶¹

Despite practitioners contradictory definitions underling the *sui generis* character of the European Union, described in turn as an “*unidentified political object*”⁶², a “*federation*”⁶³, a “*normative power*”⁶⁴, a “*super state*”⁶⁵ or a “*strange animal*”⁶⁶, the EU's historical aspirations to become a supra-national power from a global perspective can be recognized from the very beginning of the European project and has been reconfirmed by the final adoption of an articulated “Bill of Rights” for the EU, as a medium for improving the constitutional and political legitimacy of the Union.

⁶¹ Cfr. Guérot, U., (2009). After Lisbon: Is Europe Becoming a Global Power? European Council on Foreign Relations, (ECFR.EU). See also: Haas, C., (2009). The European Union: a global power? E-International Relations, and Wetzell, J. (ed.), (2012), *The EU as a 'Global Player' in Human Rights?* London: Routledge.

⁶² Jacques Delors 1985, in Drake, H. (2000), *Jacques Delors: A Political Biography*. London: Routledge, p.24.

⁶³ Fischer, J., (2000). From Confederacy to Federation. Thoughts on the Finality of European Integration. Speech delivered at the Humboldt University, Berlin, Germany.

⁶⁴ Manners, I., (2001), Normative Power Europe. The International Role of the EU. Paper presented at the biennial meeting of the European Community Studies Association, Madison (WI), USA.

⁶⁵ Morgan, G., (2005), *The Idea of a European Superstate*, Princeton: Princeton University Press.

⁶⁶ Cameron, F., (2007), *An Introduction to European Foreign Policy*. London: Routledge, p.24.

II.2 The European Union: is it a Cosmopolitan Entity? The European Union Charter of Fundamental Rights.

Does the European Union can be considered as a real cosmopolitan entity?

We can certainly look at the European Union as an outstanding example of regional, supranational organization, and it is possible to historically affirm that it has progressed well beyond a simple confederal-style union.

The adoption of a Charter of Fundamental Rights aimed to consolidate the European political identity through the promotion and protection of a common ethical and legal background, providing a set of common rights and shared values, and in so doing, justifying a supra-national sovereign intervention.

The European Charter of Fundamental Rights can be therefore considered as one of the main EU instrument fostering the image of the Union on an international scale and as a global, post-national and supranational power.

In implementing the Charter the EU has certainly made human rights' protection a central aspect of its policy and relations, recognizing at the same time, their cosmopolitan identity.

A consideration of the broader history which brought to the proclamation and entering into force of the Charter is therefore essential for an understanding of several subsequent issues. To have an idea about the reasons behind the Charter and its value in the global international scene, it is in fact necessary to expand upon its background and founding rationale, delving deeper into the justifications for its creation.

I will attempt to clarify those reasons, further explaining why the Charter was considered necessary since the European citizens seemed to be already well equipped in this respect, in particular after the adoption of the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in 1950, and the remarkable work conducted by the European Court of Human Rights (ECtHR) in Strasbourg during the last sixty years.

The analysis will show that, despite the fact that a common European "Bill of Rights" was already contained within the ECHR⁶⁷ and that a corpus of Community

⁶⁷ All EU member states are also parties to the ECHR, even though the EU itself is currently not. However, article 6 (2) TEU of the Lisbon Treaty foresees the obligation on the EU to accede to the ECHR.

fundamental rights could have continued to develop in the framework of the European Court of Justice's (ECJ)'s law-making practice; the European Charter of Fundamental Rights was still considered necessary for the sake of legal clarity and in order to foster the image of the Union on an international scale.

Additionally, the Charter operated to compensate the democratic deficit of European institutions, making rights more visible for the citizens of the Union.

At first glance, the Charter does not seem to refer to the external relations of the EU, and the document is presented as a constitutional document for "internal use" only, in order to consolidate fundamental rights applicable at the Union level (European Council, Presidency Conclusions, 1999).

However, as the Charter addresses not only Member States but also the institutions and bodies of the Union, there can be no doubt that EU institutions and bodies are equally legally bounded by it when acting in the context of EU external activities.⁶⁸

The Charter will then be considered in the context of its symbolic and practical link to the debate concerning the EU's ethical-legal and cultural identity, which in turn attests to the Community's gradual transformation into a post-national political entity.

It will be therefore evaluated in the global international scene, especially in the light of its scope, limitations and applicability and in consideration of the coming into force of the Lisbon Treaty on 1 December 2009, which made the Charter legally binding for the EU and all its Member States, in turn reinforcing its external dimension.

Starting with the European Council held in Cologne in 1999, it took a significant period of time, approximately ten years, for the Charter to gain the status of primary law of the EU.

The Charter is also the first European legal instrument to include all categories of rights in a single text, those being economic, social and cultural rights as well as civil and political, consequently reinforcing the international agreements on the indivisibility of all human rights, democracy and the rule of law reached at the United Nations Vienna World Conference on Human Rights of 1993.

⁶⁸ Wouters, J., (2001), *The EU Charter of Fundamental Rights. Some reflections on its external dimension*, Editorial for *Maastricht Journal of European and Comparative Law*, 2001/1, p.4.

The aim of the Charter, to build and reinforce the role of “*Europe as an actor on the global stage*”, is explicitly declared and recognized by the EU itself when stating that such a role has to be achieved “*by bringing together Europe's external policy tools, both in policy development and policy delivery*” giving Europe “*a clear voice in relations with our partners worldwide, and sharpen the impact and visibility of our message*”. This will also bring “*more coherence between the different strands of EU external policy – such as diplomacy, security, trade, development, humanitarian aid, and international negotiations on a range of global issues*” and will mean “*an EU able to play a more responsive and effective part in global affairs.*”⁶⁹

From an historical point of view, the Charter is the end product of a lengthy discussion within Europe about the form of which recognition of fundamental rights should take, both within the European Community as well as in its external dimension.

In their nascence, the EU Treaties did not include any reference to fundamental or human rights. The need for a codified catalogue of fundamental rights at the EU level emerged only in 1970 when, in the *Internationale Handelsgesellschaft* case, the German court stated that a piece of EU legislation was infringing the German Constitution. Answering to the German court, the ECJ stated that respect for fundamental rights did form an “*integral part of the general principles of law protected by the Court of Justice*” and that inconsistency with fundamental rights protection could eventually authorize judicial review and legal challenges to European law.⁷⁰

With this ruling, the ECJ developed a doctrine of “unwritten rights”, subsequently binding on the Community institutions. The ECJ’s fundamental rights jurisprudence was eventually accepted and incorporated as hard law with a statement to that effect into the Maastricht Treaty in 1992. With the Treaty of Amsterdam in 1997, new specific human rights competences were created, especially in the area of non-discrimination.

Human rights provisions were also incorporated during the accession process of new Member States, allowing for their suspension in cases of systematic breaches of human rights. However, the EU general human rights competences were only recognized in 1999 when the European Council in Cologne formally decided to initiate the drafting

⁶⁹ European Union, Communication from the Commission to the Council - Reforming Europe for the 21st Century. /* COM/2007/0412 final */

⁷⁰ ECJ, Judgment of the Court of 17 December 1970. *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*.

of a codified catalogue of fundamental rights for the EU (European Council, Presidency Conclusions 1999).

The Charter of Fundamental Rights of the European Union was officially proclaimed in 2000 during a meeting of the European Council in Nice (European Council, Presidency Conclusions, 2000). However, it was still considered as a merely “solemn proclamation”, while its tangible legal status remained uncertain and without full legal effect. It was only ten years later, with the entering into force of the Lisbon Treaty, that the Charter assumed its current status as the Union’s own Bill of Rights.

Although strongly criticised at its outset,⁷¹ the Charter, which was written in a very short time frame (only nine months), subsequently garnered considerable praise, particularly due to the innovative “Convention’s method”⁷² and the inherent allowances for broad participation by the civil society.⁷³

Since the entering into force of the Lisbon Treaty in 2009, the Charter became officially binding: EU bodies, institutions and member states of the Union must now act and legislate consistently with the Charter and EU’s court will invalidate EU legislations that contravene it.

The Commission further committed itself to elaborating annual reports aiming to increase public awareness regarding the application of the Charter and to measure the progress of its implementation.

Additionally, a Fundamental Rights Agency (FRA) was set up in 2007, through a process of revising the mandate of an existing monitoring centre.

The Charter applies equally to member states, however only in situations when they are implementing Union law and does not extend the competences of the EU beyond the competences given to it into the treaties.⁷⁴

The Charter further places obligations and responsibilities on the EU’s institutions and provides citizens with effective means of enforcing their rights either in national

⁷¹ Cfr. The Economist (2000), The EU and human rights – necessary? and Weiler, J.H.H., (2000). Does the European Union Truly Need a Charter of Rights? *European Law Journal*, Vol. 6, No. 2, 95-97.

⁷² Particularly if compared with the traditional method of the intergovernmental conference (ICG).

⁷³ Cfr. Deloche-Gaudez, F., (2001). *The convention on a charter of fundamental rights: a method for the future? Research and policy paper, 15*, Notre Europe, Paris, France.

⁷⁴ See: Article 51/2 of the Charter concerning the Charter’s field of application: “*The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties*”.

courts or in the ECJ.

While including in a single document all categories of rights, the Charter's advocates have noted that the standard of human rights protection it provides may be even higher than that of the ECHR, usefully complementing it. The ECHR is mostly confined to civil and political rights whereas the Charter evidently contains a much wider breadth of rights.

The Charter also reveals an innovative character that goes beyond the meaning of traditional rights, including some "new rights" or so-called "third generation rights". These rights refer to modern trends in language and to issues of global concern such as the environment, bioethics, data protection and good governance.⁷⁵ The inclusion of such rights in the Charter was the end-result of an intense debate on the adaptation of fundamental rights to the challenges of a constantly changing society.

As underlined in the Preamble of the Charter itself: "*it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter*" (Fourth recital of the Charter's preamble).

Consequently, the Charter is considered as a far-reaching and up-to-date declaration of rights for EU citizens, containing rights that were not envisaged at the time of the ECHR in 1950, leaving the ECHR to represent rights goals on basic level and the ECJ free to further develop and go beyond the rights contained in the ECHR.

In fact, as recognized in article 52(3) of the Charter, the EU may be afforded a higher standard of protection, since it foresees that "*this provision shall not prevent Union law providing more extensive protection*". As a consequence of this norm, the EU and national courts may be able to develop and extend the rights contained in the ECHR via interpretations of the Charter.

As concerning the Charter's external characterization, which is also the primary focus of this paragraph, it is possible to assert that the Charter has an additional role in

⁷⁵ See: Article 3, Right to the integrity of the person; Article 8, Protection of personal data; Article 37, Environmental protection; Article 41, Right to good administration. Cf. also Article 9, Right to marry and right to found a family, in which the right to marry and found a family is more in line with national legislations which recognize other ways of creating a family outside of the traditional marriage confines, while the ECHR speaks only of the right of a man and woman to marry.

the external dimension of EU policy, especially concerning human rights, development issues and the promotion of regional cooperation.

The Charter furthermore reconfirms the EU's historical aspirations to become a global power, even though, as briefly mentioned in the introduction, it is presented at first sight as a constitutional document for "internal use only".

The Charter is in fact addressing not only the member states of the Union but also EU institutions and bodies, meaning that the latter are equally legally bound by the Charter concerning their external and third-party relationships.

The Charter's external dimension is particularly evident when considered in the context of state applications for EU membership, as far as EU accession requires the complete adherence to the principles set out in Article 6 TEU⁷⁶, which reads:

Article 6 (TEU)

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles

⁷⁶ 2007/C 306/01, Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007. Article 49 EU subjects membership applications of European countries to the respect for the principles set out in Article 6(1) EU.

of the Union's law.

States requesting to join the “European club” should therefore fully comply with the principles set out in this article, including the respect for human rights and fundamental freedoms. Article 7 TEU provides for the suspension of rights of Member States if there is “*a clear risk of a serious breach by a Member State of the values referred to in Article 2*”.

Even if the Charter do not require any additional standards to be met in order to claim membership rights, the human rights standards that must be attained by applicant states have been meanwhile increased and reinforced.

It is evident that the Charter has the advantage of providing greater transparency and legal clarity both for the EU internal and external dimensions as well as for other external actors interacting with the EU, such as third countries, NGOs and international organizations.

It is important to highlight that since the early 1990s, human rights have had an increasing importance in the external policies of EU.

Even if the delimitation of the Community’s external human rights competences is still controversial, the emergence of human rights as a “transversal” Community objective is quite clear: human rights clauses have been included in all EU major international agreements with third countries, either through “special incentive” mechanisms or “conditionality requirements”.

As recognized in the Charter itself (Article 51(2)), member states’ constitutional traditions, the role of the ECHR and the jurisprudence of the ECJ contributed to an already significant level of normative protection of human rights in the European Union, long before the adoption of the Charter.

However, the contribution of the Charter can be still considered of great importance as it stands as the first written, codified catalogue of rights for the EU, and consequently contributes to the reinforcement of legal security and transparency as well as to an increasing legitimacy of the European Union both among its citizens and at a global level.

Furthermore, the new mentioned Article 6 TEU of the Lisbon Treaty demonstrates that clear steps have been taken for the protection of fundamental rights in Europe. A

clear example of this commitment can be seen in the obligations placed on the EU to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), (Article 6(2) TEU, Lisbon Treaty).

Attempts have been made in this direction through the acquirement and use of symbols and instruments that are most commonly associated with the central characteristics of a traditional political identity.

The attempted stipulation of an European Constitution (rejected by the French and the Dutch *referenda* in 2005) as well as the proclamation and following adoption of the Charter of Fundamental Rights of the European Union, witnessed this willingness on the part of the EU to become a political, as well as an economic entity, thus overcoming the so called “functionalist approach” which advocated the idea that a common trade policy would have automatically instigated social and political integration.

The European Charter of Fundamental Rights was therefore adopted into the framework of a specific strategy aimed at developing a European political identity through the recognition of a set of rights and common values.

Such an identity would have favoured the construction of a common political system of ethics, making Europe stronger at the international level and attesting to the Community’s gradual transformation into a post-sovereign cosmopolitan entity.

The central aim of the Charter is also explicitly mentioned in its Preamble, stating “*the peoples of Europe, in creating an ever-closer union among them, are resolved to share a peaceful future based on common values*” (First recital of the Charter's preamble). The Charter “*presents itself as a fully up-to-date ‘Ius Commune Europaeum’ of human rights protection in Europe*”⁷⁷, and aims in particular, to establish a common ideology and a common idea of European citizenship.

It was furthermore stressed the fact that the Union “*is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity*” (Second recital of the Charter's preamble), which acts to reinforce the international understanding on the indivisibility of all human rights, democracy and the rule of law reached at the United Nations Vienna World Conference on Human Rights on 25 June 1993.

⁷⁷ Wouters, J., (2001), *The EU Charter of Fundamental Rights. Some reflections on its external dimension*, Editorial for *Maastricht Journal of European and Comparative Law*, 2001/1, p.3.

It was however emphasized that “*the Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe*” (Third recital of the Charter's preamble), underlining the central idea of a compromise in which the elements of a “European identity” would mingle with both the cultural and political differences of the different member states composing it.

Even the dynamics in which the Charter was drafted and the registered broad participation of civil society and non-state actors, evidences the contribution of different European “political families” and the necessary “balance of values” among them.

In spite of this, even if at a European internal level the Charter does not extend the competences of the EU beyond the competences given to it in the treaties (Article 51(2)), when considering the impact of the Charter on EU external relations, a risk may emerge that third countries may judge the European “Bill of Rights” as written from a “Eurocentric perspective”, acting as an instrument for exporting (or imposing) European cultural values and democracy outside the EU borders.

Such a consideration leads us to the central question of whether the EU is or has ever been willing to promote a universal model of human rights standards throughout the world.

The principle of universality and indivisibility of all human rights, which characterize the “Western vision” of the international system for the protection of human rights, has been consistently defended by the EU as the guiding principle for both its internal and external actions, in a view to promote basic rights and fundamental freedoms worldwide.

As stated in the introduction to the *EU Annual Report on Human Rights and Democracy in the World in 2010*:

“2010 was the first full year in which the EU began to work under the provisions of the Treaty of Lisbon, which spelt out the principles underlying CFSP as follows:

The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations

*Charter and international law.*⁷⁸

The EU has always declared that human rights clauses inserted in international agreements concluded by the EC, do not seek to establish new standards for the international protection of human rights and that the basic terms of reference are related to the already existing international standards such as the Universal Declaration of Human Rights (UDHR), which is, at this point, customary law.

Additionally, the human rights clauses do not seek to change the basic nature of agreements, simply constituting a “*mutual reaffirmation of commonly shared values and principles*” and a “*precondition for economic and other forms of cooperation.*”⁷⁹

Nonetheless, such standards should be re-analysed to conform with the new confines laid out by the Charter, and the indivisibility of human rights should be re-defined in this new context.

The Charter itself contains an argument for protecting diversity through Article 22, which states that “*the Union shall respect cultural, religious and linguistic diversity*”, applicable not only inside EU internal borders but also in its external dimension.

However, a harsh criticism has already been put forward concerning the EU external policy on fundamental rights, with the EU having been accused of Western human rights imperialism, Eurocentrism, or European Messianism.⁸⁰

Such criticisms are predominantly put forward by those countries which do not share the same values and priorities of the EU and which do not have the same conception of human rights, dignity and democracy.

Another harsh critique levelled against the EU is the accusation of adopting an “*inconsistent and incoherent approach to fundamental rights protection.*”⁸¹

⁷⁸ European External Action Service (EEAS), EU Annual Report on Human Rights and Democracy in the World in 2010. Published by the European External Action Service, p.6.

⁷⁹ Brandtner, B. and Rosas A., (1998). Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice. *European Journal of International Law*, 9, p.474.

⁸⁰ Sjursen, H., (2006). The EU as a ‘normative’ power: How can this be? *Journal of European Public Policy*, 13(2), p.242, and Gerrits, A (ed), Aggestam L., Manners I., Romanova T., Toje A., Wang Y., (2009). Normative Power Europe in a Changing World: A Discussion. The Hague: Netherlands Institute of International Relations. *Clingendael European Papers no. 5.*

⁸¹ Mathisen, K. L., (2010). The Impact of the Lisbon Treaty, in particular Article 6 TEU, on Member States’ obligations with respect to the protection of fundamental rights. University of Luxembourg, p. 4.

This entails the idea that the strong focus on fundamental rights protection in EU external relations does not seem to correspond to an equally strong “internal” protection of fundamental rights, being the EU considered unable to properly protect the human rights of its own citizens (or persons residing in the EU territory), inside its own internal borders.

In light of the EU’s aspirations to be recognized as an emerging global and democratic power, the EU should be willing and ready to respond to such criticisms.

In conclusion, the Charter was identified as an effective vehicle to improve the political legitimacy and credibility of the Union as a global player in the field of human rights, effectively reconfirming human rights and the rule of law as two of the main cornerstones of the European Union.

This is particularly significant if considered in the context of the contemporary debate on emerging global powers and in a time in which the democratic deficit of EU institutions is presented as a permanent defect.

The reflections made aim to outline the importance of the value of the Charter within the global international scene as well as to reconfirm the EU’s aspirations to become a cosmopolitan, supra-national power in world politics and global order.

The fundamental bases for such a power are (or should be) the values of “*human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities*” (Article 2 TEU), which have been at the heart of the European project since its nascence.

Criticisms of the Charter’s impact and importance must equally be addressed and internalized, such as those which blame the EU for its weak or cautious standing in the international scene or those which accuse the EU in turn of “Western human rights imperialism”, “Neo-colonialism”, “Euro-centrism” or “European Messianism”.

As has emerged from this paragraph, the EU continues to be criticized as a weak and internally divided entity, particularly concerning its role as a global actor in human rights, while many authors remain skeptical of the effectiveness of the EU’s burgeoning role as a “human rights organization”.

Furthermore, the EU’s activity in this area remains politically constrained, existing predominantly in the realm of inter-governmental decision-making processes.

However, beyond the classical conception of nation-state and “global power”, the European Union may still be considered as having a unique role within the international arena, one that differs and surmounts “old-style” and traditional forms of power.

Significant developments have also been reached in the field of human rights, especially if we consider that the total abolishment of the death penalty is now a reality in all the EU countries and that the EU has been granted special rights for participation in the work of the UN, while also giving its full support (technical but also financial) to the ICC and the UN treaty bodies.

The EU manifests its power in a “non-traditional manner”, through its “legalistic approach”, its fundamental characteristics of normative and civilian power, and the use of soft-power instruments and legislations. The EU can therefore be effectively considered as a “world power”, even though its power mainly affects specific regions and policy fields.

Furthermore, the complex structure of the EU, its post-national governance model, and multi-layered structure, should not be seen as an obstacle, but rather as an advantage, especially when addressing the interconnected contemporary challenges of today’s globalized world.

The new Charter of Fundamental Rights of the European Union may have a role in meeting those challenges, by pursuing, in parallel with a better protection of human rights at an EU level, a better promotion of regional cooperation, peace and good governance at a global level.

An in-depth reflection on this topic and suggestions, in the academic field as well as in the institutional one, may certainly aid in addressing all major criticisms while concurrently tackling the challenges of a progressively transforming world.

PART III

Chapter 2 Cosmopolitan Theory and Human Rights Discourse

III. Cosmopolitanism, Human Rights and Global Justice.

The main purpose of this paragraph is to compare the cosmopolitan and human rights approach, in order to discover in which way they complement each other, evaluating the contribution of the cosmopolitan theory to the establishment and shaping of the existing international human rights regime.

Cosmopolitanism, classically considered as a set of philosophical theories whose ideal is a world where all human beings are considered as members of the same community, has in fact several affinities with human rights considered as rights and freedoms to which all humans are entitled (see: UDHR Article 1).

Human rights and cosmopolitanism are also often valued and criticized with similar arguments.

Cosmopolitanism derives from the Greek word *kosmopolitês* (“citizen of the world”), from *kosmos* (world) and *polites* (citizen) and is a moral-political theory which can be traced back to Diogenes of Sinope, a philosopher who lived between the V-IV century BC. He was the founding father of the Cynic movement in Ancient Greece. To those who asked him what his country was, Diogenes replied that he was a "citizen of the world".

It is however with the Stoic philosophy that a first conceptual articulation of this ideal took place, based on the idea of a common belonging of human beings to a universal law that governs the world.

This idea is then taken up and developed in Rome by Cicero, in particular in his work *De Officiis*, where for the first time cosmopolitanism begins to transform itself from a political ideal to a political project.

However, modernity and Enlightenment had to be awaited in order to re-launch the idea on philosophical ground, having had its major elaboration in the Kantian philosophy of the Enlightenment.

In major works such as *Idea for a Universal History with a Cosmopolitan Purpose* (1784) and *Towards a Perpetual Peace* (1795), Kant outlines for the first time a concrete project of a cosmopolitan political order, aimed at ensuring peace and rights to all citizens of the world.

Cosmopolitanism is therefore a tradition of moral philosophical thought that sinks its origins in the beginnings of Western philosophy and considers all human ethnic groups as belonging to a single community based on a shared morality, regardless of ethnic, social or political affiliation.⁸²

The analysis of Immanuel Kant was essential for the speculation of many contemporary philosophers and scholars.⁸³

Many authors supported the Kantian idea of a federation of nations based upon principles of international right and suggest a “cosmopolitan community” as the “*locus of a global democratic order and the necessary framework for the maintenance of human rights.*”⁸⁴

On the other side a strong cosmopolitanism is in most cases considered as requiring the creation of an unrealizable world government, or as a consequence of “*an imperialist project in which existing cultural differences are either nullified or privatized.*”⁸⁵

Along the same lines, many authors still defend the ideal universal value of human rights principles, while others criticize their applicability, especially in terms of ‘justiciability’, when it comes to some basic social and economic rights and to peoples often described as belonging to the “Developing World”.

⁸² Cfr. Kleingeld, P., Brown, E., (2013), "Cosmopolitanism", *The Stanford Encyclopedia of Philosophy* (Fall 2013 Edition), Edward N. Zalta (ed.).

⁸³ Jurgen Habermas, John Rawls, Charles Beitz, David Held, Jack Donnelly, Ulrich Beck, Daniele Archibugi, Thomas Pogge, Martha Nussbaum, to name some of them.

⁸⁴ Cfr. Anderson-Gold, S. (2001), *Cosmopolitanism and Human Rights*. Cardiff: University of Wales Press. See also: Held, D., (2010), *Cosmopolitanism: Ideals and Realities*, Cambridge: Polity and Santos, B., (2007), Human Rights as an Emancipatory Script? Cultural and Political Conditions, in Santos, Boaventura de Sousa (org.), *Another Knowledge is Possible: Beyond Northern Epistemologies*. London: Verso.

⁸⁵ Miller, D., (2010) “Cosmopolitanism: a critique”, in *Critical Review of International Social and Political Philosophy*, 5:3, p.80.

On the other side the idea of human rights is often considered as a Western political construct, hiding a new form of imperial political power and culturally insensitive force behind an ethical mask.⁸⁶

Strengths and weaknesses of the cosmopolitan theory should be therefore analyzed, considering the contemporary tension between its global orientation, the needs of local communities and its prospect in a time of economic constraints.

Cosmopolitan ideals will be considered as an essential tools for a reconceptualization of the human rights discourse and cosmopolitan ethics, necessary in a world where the challenges brought by multiculturalism and globalization have generated many obstacles (but also many positive inputs) to the application and protection of human rights as a universal concept worldwide.

Taking into consideration the contemporary background of war and crises of human rights, it will be underlined the contradiction in terms of a supposedly cosmopolitan humanitarianism which, even when advocating for inclusion into a sphere of global justice, nevertheless continues to carry on exclusion from it, as far as many categories of persons still find themselves outside this framework of dignity and protection.

Human rights, considered in their profound universal value, are often claimed to be a product of cosmopolitan ethics.

Both concepts have gone through the same tensions and disruptions, having been in turn defended or criticized with similar arguments along the time.

While retracing the history of the concept we come through the Kantian's idea of a universal organization of nations where morality would eventually win over self-interest.

Kant's reflection remains a major point of reference for all universalistic claims associated with cosmopolitanism and it is considered as fundamental for the speculation of all the subsequent discourse on cosmopolitanism and human rights.

Citing Kant's own words:

⁸⁶ Gearty, C., (2008) *Essays on human rights and terrorism: comparative approaches to civil liberties in Asia, the EU and North America*. Cameron May, London, UK.

“The people of the earth have thus entered in varying degrees into a universal community, and this has developed to the point where a violation of rights in one part of the world is felt everywhere. The idea of a cosmopolitan right is therefore not fantastic or exaggerated; it is a necessary complement to the unwritten code of political and international right, transforming it into a universal right of humanity. Only under this condition can we flatter ourselves that we are continually advancing towards a perpetual peace” (Immanuel Kant, *Towards a Perpetual Peace* (1795)).⁸⁷

This paragraph will analyze various conceptions and definitions of cosmopolitanism throughout the history of thought, underlying the fact that there is still no consensus about a clear definition of it.

Following Poulsen’s definition we may define cosmopolitanism as a *“discourse located in the West, problematising the local and the general, and squeezed in between (inter)nationalism and universalism.”*⁸⁸

Besides all distinctions and contradictions in terms, it seems however already possible to recognize the contemporary cosmopolitan moral and political character as a fundamentally western liberal construct, even when this includes a positive recognition and auto-criticism of both neo-liberal globalization process and liberal nationalism, recognizing that

*“with present shifts away from Northwestern hegemony, with an emerging new world order in which liberalism is not a given, but a political project (for many, faltering), cosmopolitan theoretical engagements need to change gear and become more empirically driven in order to be persuasive.”*⁸⁹

The question is

*“no longer one of working out cosmopolitan theory as such (in the context of globalization, extreme poverty, mass immigration, etc.), but of re-tuning this theory so that it can help shape empirical challenges in a globalized, but plural world. Simply put, it is no longer today a question of doing normative cosmopolitan theory as such, but of normatively shaping empirical challenges besetting the world as a whole (in the context of a pluralization of power).”*⁹⁰

⁸⁷ Cfr. Kant, I., 1991(c), “Perpetual Peace: A Philosophical Sketch”, translated by Hugh Barr Nisbet, pp 93-130 in Hans Reiss (ed), *Kant, Political Writings*, 2nd Ed., Cambridge: Cambridge University Press.

⁸⁸ Poulsen F.E., (2008), *Element of an Archaeology of Cosmopolitanism in Western Political Thought. A Return to the French Enlightenment* (1713-1795), Master’s Thesis, Department of Political Science, University of Copenhagen, p.3.

⁸⁹ Beardsworth, R., (2012), “Assessing Cosmopolitan Theory”, in *E-International Relations*.

⁹⁰ *Ibidem*.

The cosmopolitan character of human rights principles cannot be yet denied as well as the need for a stronger application of the cosmopolitan theory to the human rights regime.

The main aim is certainly the one of exploring the challenges brought to the cosmopolitan theory in a world where multiculturalism, globalization and multipolarity have generated complex patterns of cultural and political identity.⁹¹

Cosmopolitanism and issues related to global justice have for the past decade unquestionably raised the level of attention in Western political thought, having the globalization process led to new actors and issues which transcend traditional state-centered politics and require global means in order to solve global challenges and conflicts.⁹²

Much doubt and uncertainty persist on how to best categorize those new issues and actors according to traditional dichotomies: how to take into account ‘other’ political actors which are neither NGOs nor states and cannot be easily classified in any traditional manner?

Cosmopolitanism has, as a matter of fact, always been considered as opposed and incompatible with the concept of nationalism and national sovereignty.

However we can affirm that the classical Westphalian sovereignty model, based on nation states central authority and intergovernmentalism, still represents the dominant governance model of international law and relations, notwithstanding the recent rise and development of international global institutions and non-governmental actors, proposing an alternative and new model of “global governance”.

Undoubtedly large part of the global legal order continues to keep on Westphalian intergovernmentalism, while the post-Westphalian supranationalism represents only an exception.

Nation states are still holding an excessive executive power in the international arena nowadays.

A contemporary definition of cosmopolitanism was already inaugurated dating back to 1970, when Hannah Arendt was referring to “*the bankruptcy of the nation state*”

⁹¹ Cfr. Beck, 2000; Garrett and Held, 2010; Onuma, 2010; An-Na’im, 2012, Kymlicka, 2007.

⁹² Like for example terrorism and environmental security but also economic inequalities, global wars, mass migration and refugees.

and its concept of sovereignty”⁹³, declaring that a modern cosmopolitanism would be better suited for a contemporary world in which the sovereign state appeared as having lost his role as a guardian of citizen’s rights, failing in its task of protecting its own citizens.

Human rights, on the other side, acquires a particular significance in a global era where the world is becoming smaller and even more interdependent, levelling distance and differences among individuals and peoples.

Human rights became “cosmopolitan entities” because nothing better than them can represent global shared moral values, being human rights held by every human being everywhere, without distinctions of any kind; being cosmopolitanism a doctrine which consider human beings as bearing the same rights as equal citizens of a unique world.

Danilo Zolo stresses for example the fact that:

“the human rights doctrine presents a cosmopolitan inclination since [...] it assigns the nature of subjects to the international orders not just to states (or to collective subjects), but also to individuals”.⁹⁴

Anderson-Gold affirmed that:

*“human rights are by nature a universal or international concern and therefore are outside or beyond the exclusive jurisdiction of individual states” having human rights naturally an “international jurisdiction.”*⁹⁵

All of this highlights the need for a stronger cosmopolitan legislation that would strengthen and reinforce human rights protection worldwide.

But are state sovereignty and cosmopolitan principles reconcilable to some extent? Can states have a more “cosmopolitan thinking”? Being more inclined to apply and respect an international human rights regime, being less jealous as concerning their sovereignty, banning any restriction to human rights linked with membership?

And, on the other side, is the increasing emergence of supra-state regions as the European Union, the African Union and others an indication of constitutionalization of the international order based on the principles of democracy and the rule of law; or are

⁹³ Arendt, H., (1970). *On Violence*. New York: Harcourt, Brace & World, p.6.

⁹⁴ Zolo, D., (1995), *Cosmopolis: la prospettiva del governo mondiale*, Milano, Feltrinelli, p.139.

⁹⁵ Anderson-Gold, S. (2001), *Cosmopolitanism and Human Rights*. Cardiff: University of Wales Press, p.42

those supra-national institutions guided by an authoritarian if not imperialistic rule? Some scholars have indeed seen this as a matter of concern.⁹⁶

From a moral point of view, philosophies and religions have been declaring the universality of human dignity for thousands of years.

However, even if the formulations of human rights can be dated back to 539 BC when Cyrus the Great conquered Babylon,⁹⁷ a positive formulation of human rights and dignity was concretized only with the Universal Declaration of Human Rights in 1948 (UDHR, 1948).

Documents asserting individual rights, such as the Magna Carta (1215), the Petition of Right (1628), the US Constitution (1787), the French Declaration of the Rights of Man and of the Citizen (1789), and the US Bill of Rights (1791) are the written precursors to many of today's human rights documents, but it was only with the UDHR in 1948 that the inviolability of every human being was definitely stated.

That means that in order to achieve a positive formulation of human rights through an internationally recognized declaration, there was the need of one of the worst human wrong ever, namely the enormous loss of life and atrocities committed during the Second World War.

After the world's catastrophe, the universality and indivisibility of all human rights was declared to provide a common understanding of what everyone's rights are and establish the basis for a world built on justice freedom and peace.

This is the historical background that led human rights to be as cosmopolitan as they are nowadays.

In a more extreme vision, cosmopolitan thinkers have also declared an aspiration to practically realize a "world state" in which nation-states would be definitely abolished.

The centrality of the states in international relations has been indeed seen as an hindrance to the realisation of mechanisms that would enhance human rights and has been therefore proposed a "de facto" transition from an international law, based on intergovernmentalism and the centrality of states, to a cosmopolitan law and

⁹⁶Kreuder-Sonnen, C., Zangl B.,(2015), "Which Post-Westphalia? International Organizations between Constitutionalism and Authoritarianism", in *European Journal of International Relations*, Vol. 21(3) 568–594.

⁹⁷ The Cyrus Cylinder has been recognized as the world's first Charter of human rights.

“cosmopolitan democracy”, in which international non-governmental institutions, like the UN for example, could enhance their effective power and responsibilities.

On the basis of what has been said so far, it is clear that in contemporary political philosophy we are witnessing the clash of two great trends: the "realist" and the “utopian” ones.

Political realism, from Thucydides to Hobbes, from Schmitt to today's theorists, pursues a complete and comprehensive adhesion to the factual reality.

It does not intend to outline possible futures scenarios, let alone indefinite utopias, but intends to analyse the actual political situations in order to identify viable solutions in a current scenario.

On the other hand, the Kantian model of cosmopolitan philosophy outlines the traits of a future global democracy, believing that the task of political philosophy is not to identify the characteristics, possibilities and limits of an already existing situation, but to look for conditions and possibilities that are not yet real. In this way it strives to free the thought from the constrictions and limitations of the present.

Political realism makes significant objections to transcendental utopias, stating that, for example, the extension of the criteria of justice from *polis* to *kosmopolis*, (ie. from the State level to the international sphere), could generate imbalances and conflicts.

Doubts are put forward about the idea that solutions which are found for internal peace could possibly apply also to wider scenarios.

However, while addressing plausible critiques of the Kantian model, realism fails to diminish its ideal charge, nor to reduce its persistent validity.

In fact, even if realism severely limits the possibilities of manoeuvre in a given historical context, it does not diminish the meaning of a research of possible and better alternatives.

Moreover, those who continue to be inspired by the Kantian model, still continue to ask: why a world founded on peace and justice should be ideally impossible?

Hence the various projects of a “reasonable”, or “realistic utopia”, in the Rawlsian style, which is a type of philosophy that, while not renouncing to the exploration of the possible, tries to avoid both the dream of a perfect society and the indifference to the actual context.

Such projects entail the commitment to take reality "as it is", investigating at the same time the objective possibilities it can offer.

In this regard Salvatore Veca, an Italian scholar who has given much thought to these issues, says:

*"Accepting constraints means accepting that not everything is possible, but accepting that not everything is possible is not the same as saying that nothing is possible and that the space of the politically possible is an empty space"*⁹⁸

In one of the most significant passages of *The Law of Peoples*, Rawls observes:

*"If a reasonably just Society of Peoples whose members subordinate their power to reasonable aims is not possible, and human beings are largely amoral, if not incurably cynical and self-centered, one might ask, with Kant, whether it is worthwhile for human beings to live on the earth."*⁹⁹

In any case, avoiding war, safeguarding human rights at the same time, is only possible if there is a right that is global or at least trans-national.

In *Toward a Perpetual Peace*, Kant proposed the realization of a "World State" as a remedy against the widespread conflicts between States.

Assuming that a cosmopolitan project under the supervision of a single sovereign State would be dangerous for freedom, since it could originate the most horrible despotism (as it happened in the great supranational empires of Antiquity), Kant supported a federative perspective.

This model left open the possibility of opting for a joint federation of sovereign States or for a "post-national constellation", that is for a political body founded on the overcoming of the pre-existing structure of national sovereign States.

The first solution was adopted by John Rawls (the North-American perspective), the second one by Jurgen Habermas (the European perspective).

The analogy between Rawlsian and Kantian positions, evident also in the preference given to a federation of States rather than to a World State (considered potentially despotic or intrinsically weak), must not eliminate the differences among

⁹⁸ Veca, S., (2002), *La bellezza e gli oppressi. Dieci lezioni sull'idea di giustizia*, Feltrinelli, p.8.

⁹⁹ Rawls, J., (1999), *The law of Peoples, with The idea of public reason revisited* Cambridge, Mass. : Harvard University Press, p.128.

them.

Contrary to the German philosopher, which in the society of peoples only welcomed the liberal ones, Rawls, in homage to the contemporary ideas of pluralism and tolerance, also includes the so-called "decent" peoples, indicating with this expression the peoples who, despite being "well-ordered people", providing spaces for popular participation in political choices, are not liberal nor governed by Western-style democratic-constitutional institutions.

He excludes instead all those peoples (starting with the "outlaw" states) who, for different reasons, fail to respect the principles of the Law of Peoples.

In this way Rawls gives shape to the project of a confederation of liberal-democratic States and of States that declare themselves committed to observe eight fundamental principles of international justice:

1) Peoples are free and independent, and their freedom and independence must be respected by other peoples;

2) Peoples are bound to ensure compliance with its international obligations and treaties;

3) Peoples are equal and must take part in the agreements that bind them;

4) Peoples are bound to ensure compliance with the duty of non-intervention;

5) Peoples have the right to self-defence, but have no right to start a war for reasons other than self-defence;

6) Peoples are bound to respect human rights;

7) Peoples are bound to ensure compliance with certain specific restrictions when conducting a war;

8) Peoples have the duty to assist other peoples who are in unfavourable conditions, preventing them from having a just or "decent" social and political regime.

These principles are susceptible to universal consensus, as every people can accept them on the basis of their different moral, religious or philosophical conceptions.

Furthermore they are valid only as general guidelines, being not unconditional, while they should be interpreted: for example, the principle of non-intervention may be disregarded in the case of "outlaw states" or in the presence of serious violations of human

rights.

In any case, those principles constitute, according to Rawls, "the basic charter of the right of peoples".

The project of a global society of free and "decent" peoples therefore stems from what Rawls calls a realistic utopia:

*"The idea of realistic Utopia reconciles us to our social world by showing us that a reasonably just constitutional democracy existing as a member of a reasonably just Society of Peoples is possible. It establishes that such a world can exist somewhere and at some time, but not that it must be, or will be."*¹⁰⁰

In fact, remarks Rawls, as long as we have good reason to believe in the possibility of a just political and social order, we can reasonably (and kantianly) hope that someone (maybe us), one day, somewhere, will realize it.

Jurgen Habermas, on the other hand, in his work *The post-national constellation*¹⁰¹, reads the Kantian script *Toward a Perpetual Peace* in light of those important events, which transformed the world in the Twentieth century.

In the first place, he strives to define the concept of "cosmopolitanism".

Is there any analogy between an internal or local conflict solution and an external or global solution?

Is the transnational expansion of the social contract supported by Rawls possible?

Though the Kantian arguments are not entirely anachronistic in this regard, their limitation, according to Habermas, consists in the insuperability of the notion of "Sovereign State", now outdated due to the recent historical events.

In other words, in the Kantian's vision, the subject of politics could only be the State, but in the age of globalization the economy and the same politics are managed rather by trans-national organisms.

In the new historical context, it is a matter of reviewing the points characterizing the Kantian project, recovering the control and action capacity lost by the national States

¹⁰⁰Rawls, J., (1999), *The law of Peoples*, with *The idea of public reason revisited* Cambridge, Mass. : Harvard University Press, p.127.

¹⁰¹ Habermas, J. (2001), *The Post-National Constellation: Political Essays*, Cambridge: MIT Press.

and transferring it to increasingly large trans-national bodies capable of enunciating global rules and of progressively establishing a world politics dimension.

Concretely, Habermas thinks of a trans-national democratic form of government, of which he sees a sort of partial prefiguration in the European Union.

Such a political community must be able to develop its unitary collective identity that goes beyond national borders, so that citizens are integrated into an ever-wider context without however having to renounce to their usual forms of life, their traditional values and their consolidated relationship with the institutions.

The "State of the World", the greatest extension of this perspective, is conceived by the philosopher as a real possibility, but without any certainty.

In other words, the idea of a just world is realistic, even if there is no guarantee that it may one day actually subsist.

The "post-national constellation" of Habermas is the best-known example of a series of proposals that, starting from the Kantian premise that some form of association among the peoples of the world is essential to safeguard human rights and to successfully resist their violation; arrive at the idea of a planetary democratic order.

Such an order is conceived as the most advanced and rationally desirable response to the erosion of the sovereignty of States and to the weakening of democratic practice, which characterizes the era of globalization, in which Freedom seems to proclaim itself at the expenses of Equality and economic power at the expenses of Justice.

In this horizon of thought, always in the framework of an European perspective aimed at safeguarding the primacy of politics on the economy, the proposal of a "cosmopolitan democracy" has taken on particular importance.

First elaborated by the British political scientist and sociologist David Held, and his Italian fellow, Daniele Archibugi, has therefore been considered as the most up-to-date postmodern and post-state version of democracy.¹⁰²

Held and Archibugi aim to create a global order that finds its political apex in a World Parliament directly elected by the citizens of all nations (as already happens in the

¹⁰² Cfr. Held, D., Archibugi, D. (eds), (1995), *Cosmopolitan Democracy: An Agenda for a New World Order*, Polity.

European Parliament).

Together with this Parliament, which should support the Assembly of the United Nations, in which the States are represented, they propose to establish also a Supranational Court with coercive power.

At the same time, the UN Security Council is transformed into an executive body with a civilian and military peace force available.

In this way, interpreting national sovereignty as an obstacle to trans-national cooperation and doubting whether democracy within states can be translated into effective democracy among states; cosmopolitan democracy theorists intend to create a new world citizenship capable of going already beyond states and their conflicts.

Welcomed by some, this project has aroused criticism and scepticism from others. If it is already so problematic to exercise effective control over politicians and "local" parliaments, it has been observed, how can one realistically imagine that this control works at world level?

III.1. Human Rights: Theoretical Foundations.

The analysis of how constitutional rights reasoning on fundamental rights is structured in the legal process of constitutional States is deeply linked with the very concept of democracy and of a democratic State.

A substantive, structural theory of fundamental rights is in fact essential in every contemporary democratic society, being crucial for the basic legal structure of any modern society.¹⁰³

Beyond any doubt, the dramatic facts with which we are actually confronted¹⁰⁴ prove that “the very survival of open democratic societies depends on taking fundamental rights seriously.”¹⁰⁵

Especially nowadays, when always more countries accede to international human rights treaties and agreements and adopt human rights legislations; a structural and applied conception of fundamental rights is essential.

The European Union itself, for instance, has recently introduced its own Bill of Rights: the *Charter of Fundamental Rights of the European Union* (hereafter “*The Charter*”), which shows how European Constitutional Law is the result of a progressive integration process, based on the progressive harmonization of core constitutional principles common to all Member States of the Union.

As underlined in the Preamble of the Charter itself:

“This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights”.

¹⁰³ Cfr. Jürgen Habermas’s theory of democracy as developed in Habermas, J., (1996), *Between Facts and Norms*, The MIT Press, which illustrates the systems of rights within democratic constitutional States in the framework of modern complex societies.

¹⁰⁴ Striking government’s violation of international human rights legal standards have been widely reported by activists and independent NGOs worldwide, and also legally challenged, as for example in the case of U.S “war on Terror”, the reported cases of torture in Abu Ghraib, detention and extraordinary rendition in Guantanamo, which gave place also to a debate in favor of the juridification of torture and the defense of such governments actions as a legitimate exercise of state sovereignty in name of public security’s protection. These are only some of the most burning contemporary issues on human rights nowadays.

¹⁰⁵ Menéndez, Agustín J., Eriksen, Erik O. (Eds.), (2006), *Arguing Fundamental Rights*, Springer, p.⁶

It must be furthermore recognized that, in particular, the German constitutional law, which is the Alexy's primary reference, is one of the national constitutions that has exerted the most pervasive influence upon the European constitutional asset and especially upon *The Charter* itself.

The Charter stands in fact as *the* catalogue of fundamental rights of the EU, and allows bearing on EU's institutions, providing citizens with effective means of enforcing their rights either in national courts or in the ECJ.

However, the coexistence of different European and international agreements and this plurality of sources of law (legal pluralism), determines in some cases the struggling of judges when it comes to the concrete and consistent implementation of rights, and sometimes the legal reasoning behind those judicial deliberations seems lost.

Judges as well as legislators are also often confronted with the challenge of conflicting rights¹⁰⁶, which in some cases can represent real constitutional and, I would say, ethical dilemmas.¹⁰⁷

The main problem is therefore how to address these conflicts of rights: if through 'balancing' and proportionality or otherwise, and also to establish whether balancing is a truly rational methodology or if it must be seen as a pure technical method of solving conflicts.

In his book *A Theory*, Robert Alexy makes a great effort in trying to characterize Constitutional courts decisions as a rational process, offering a well-developed structure of the concept of balancing, his central thesis being that constitutional rights are principles and not rules, "optimization requirements" necessarily open to balancing.

However, many scholars and philosophers reject such an approach contesting quantitative-like criteria such as those associated with 'proportionality', emphasizing other approaches to fundamental rights, which accentuate the moral foundation of rights.¹⁰⁸

¹⁰⁶ Situations in which two or more distinct human rights enter into conflict, in such a way that no rational solution seems to be possible.

¹⁰⁷ Cfr. Zucca, L., (2008), "Conflicts of Fundamental Rights as Constitutional Dilemmas", in: Brems, Eva, *Conflicts Between Fundamental Rights*, ed., Antwerp/Oxford/Portland, Intersentia, and Zucca, L., (2007), *Constitutional Dilemmas—Conflicts of Fundamental Legal Rights in Europe and the US*, Oxford: OUP, calling for a reform towards a more coherent, well-ordered architecture of European fundamental rights.

¹⁰⁸ Cfr. Möller, K., (2007), "Balancing and the Structure of Constitutional Rights", in: *International Journal of Constitutional Law*, Vol. 5, Issue 3, pp. 453-468, and Zucca, L., (2007), *Constitutional Dilemmas—Conflicts of Fundamental Legal Rights in Europe and the US*, Oxford: OUP.

In any case, Alexy's *A Theory* has managed to build up a substantial general theory of fundamental rights, the importance of which goes well beyond the interpretation of the theory of fundamental rights of the German Basic Law, providing a theory of general application which is relevant to most, if not all, European as well as non-continental legal orders.¹⁰⁹

The main aim is to delineate which are the limits of Alexy's approach, testing the reasonableness of the proportionality principle in legal decisions and the increasing use of balancing as an essential argumentation technique for solving legal disputes in Courts.

The main intention is to establish, through an analysis of the judicial practice of balancing fundamental rights, if the proportionality principle, sustained as a "rational practice" by Alexy in *A Theory*, can be classified as a moral and rational principle or if it must be considered just as a "purely pragmatic method", useful to justify judicial discretion in legal argumentation.

The key jurisprudential and philosophical issues at stake therefore concern: the definition and the concept of constitutional, human and fundamental rights; the definition of the structure and content of constitutional rights and the establishment of the limits and scope of fundamental rights.

In order to determine whether the proportionality test and the judicial practice of balancing actually correspond to a necessary and rational process, it is important to ascertain whether such a right exists which has a purely "deontological value" and cannot be limited in any case, even when in conflict with other fundamental rights.

Beyond purely philosophical and theoretical issues, there are also many ethical and key political questions at stake, which will be tackled in this study: the first political issue involved is the one of how to address problems in case of conflicts of rights, if not

¹⁰⁹ Also UK, Canada or New Zealand. Julian Rivers, for instance, editor and translator of *A Theory* and Lecturer at the University of Bristol, gives an interesting demonstration of how Alexy's *A Theory* can be fruitfully applied to legal systems other than the continental ones, in its interesting contribution "Fundamental Rights in the UK Human Rights Act", in Menéndez, Agustín J., Eriksen, Erik O. (Eds.), (2006), *Arguing Fundamental Rights*, Springer, p. 141-154, and in its preface to Robert Alexy's *A Theory of Constitutional Rights: "A Theory of Constitutional Rights and the British Constitution"*. In those articles Rivers applies the Alexy's theory of rights to the British fundamental rights practice, testing in particular, the impact of the UK Human Rights Act 1998 on the British legal system. However Alexy's theory of rights could also be applied to European Union's constitutional law in an interesting way (please refer to A.J. Menendez's article "Some Elements of a theory of European Fundamental Rights", in Menéndez, Agustín J., Eriksen, Erik O. (Eds.), (2006), *Arguing Fundamental Rights*, Springer, pp. 155-176.

through proportionality and balancing. Which alternatives can be found to the balancing approach?

A second political issue is: if balancing/proportionality is actually not a rational procedure, but just a pragmatic method, is it therefore correct to trust Judges to review or would it be better to find alternative methods of dispute resolution and rights adjudication? Should we trust democratically elected parliaments instead of Judges?

Third, if the discretionality and impartiality of Judges is in doubt (the so called “danger of irrational ruling”¹¹⁰), a subsequent risk could be the one of a “jurist-made law”, the supreme court becoming the final arbiter of constitutional law, including the potential use of political ideologies and personal beliefs and even personal prejudices to justify sentences, fundamental rights losing their strict “deontological character” and normative power.

Do Discourse Theory and the proceduralist legal method provide a better solution than Constitutionalism, as it seems to be suggested by Eriksen in his article?¹¹¹

An additional related implication would be the one which could lead to a relativistic and utilitarian conception of justice and law, having fundamental rights balanced for example against collective goods, public interests, policies.

This represents also a controversial issue, still open for discussion and at the centre of many theoretical debates. Is it in fact correct to balance subjective individual rights against public interests and collective goods?

Although the most common fundamental right is a subjective, individual and negative right, fundamental rights embrace for Alexy not only subjective fundamental rights, but also collective goods.

There is therefore the possibility of a conflict between an individual fundamental right and a public policy for example, aiming at safeguarding some collective interest.¹¹²

¹¹⁰ The danger of “irrational ruling” is one of Habermas’s main objections to Alexy’s theory of constitutional rights. For Habermas in fact “the weighing takes place either arbitrarily or unreflectively, according to customary standards and hierarchies”. See: Habermas, J., (2009), *Between Facts and Norms*, Cambridge: The MIT Press, pp.256-259.

¹¹¹ Erik Oddvar Eriksen, “Democratic or Jurist-made law?”, in Menéndez, Agustín J., Eriksen, Erik O. (Eds.), (2006), *Arguing Fundamental Rights*, Springer, p.69-94.

¹¹² As for example in a case of conflict between right to privacy and public security, or freedom of speech and freedom of religion, just to mention some examples.

This is a case in which we are confronted with a conflict of rights that requires balancing and weighing in order to find a solution: it is not just sufficient anymore to affirm that the individual, subjective right should prevail on the collective interest, as would be the case in a traditionally liberal or libertarian conception of fundamental rights.

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It is consequently essential to recognise as fundamental rights not only subjective rights but also collective goods and, at the same time, to make a further important distinction not only between principles and rules but also between principles and policies.¹¹⁴

It is furthermore essential to deal not only with a problem of constitutional rights adjudication but also with a problem of democratic representation and participation, to better highlight which is the *substructure* of balancing: the importance of legal culture and common values, the positions about the Constitution, the role of States and the very concept of Justice in a society.

Alexy might be read as holding Justice to be “a more important value than Democracy”, the direct application of law “reducing transactions costs and information problems” as “it establishes the right thing to do in practical contexts”.¹¹⁵

This gives rise, in the words of Eriksen, to a risk of “assimilating law and morality and of overburdening the legal medium itself”.¹¹⁶

An important point is whether it is possible or not to determinate which are the limits of fundamental rights and whether certain fundamental rights should or should not be limited, even when in conflict with other rights.

The risk here is an utilitaristic one, the one of balancing fundamental rights against collective goods, public interests, policies, losing fundamental rights their “absolute” rights whatever, their “deontological character”.¹¹⁷

¹¹³ The liberal conception of fundamental rights entails that only civic and political rights can access the status of fundamental rights.

¹¹⁴ Alexy establishes in *A Theory* a clear distinction between rules and principles but fails to establish a further distinction between principles and policies.

¹¹⁵ Menéndez, Agustín J., Eriksen, Erik O. (Eds.), (2006), *Arguing Fundamental Rights*, Springer, p.5.

¹¹⁶ Erik Oddvar Eriksen, “Democratic or Jurist-made law?”, in Menéndez, Agustín J., Eriksen, Erik O. (Eds.), (2006), *Arguing Fundamental Rights*, Springer, p.69-94.

¹¹⁷ In this respect particularly relevant are the two main objections of J.Habermas to Alexy’s approach (especially the “firewall” and “irrationality” allegations). Cfr: Habermas, J., (1996), *Between Facts and Norms*, Cambridge: The MIT Press, pp.256-259.

Beyond the distinction between principles and rules, a further important distinction must be made between principles and policies.¹¹⁸

But is it possible to determine what fundamental rights are, if they are or should be consequently limited and in which way?

In order to be able to define those limits and scope of rights it is essential first of all to clarify what fundamental rights are and in what way they should be distinguished from “constitutional” and “human rights” in its narrow sense, a differentiation that is very well analysed in Alexy’s work.

The discourse on the theoretical foundations and definition of “constitutional”, “human” and “fundamental” rights is still open, highly contested and actually at the centre of many theoretical debates.

It represents also a central theme in Alexy’s work and especially in *A Theory*, and a precondition for any further analysis concerning the meaning and functioning of constitutional rights and the role of proportionality principle in court-based adjudications.

It is certainly true that there is still “very little agreement about what rights are, about why we use rights in our moral or legal theories, or about what to do when there is a conflict between rights”.¹¹⁹

There is consequently a need for clarifying both the institutional, political and legal meaning of “fundamental” rights.

Such an understanding is essential in the application of law for both theoretical and practical reasons: a correct use of these definitions can be useful in order to “clear some theoretical misunderstandings, improve our critical analysis and help in explanation of real processes”.¹²⁰

A definition of the structure and concept of constitutional rights is in fact closely related to an attempted establishment of the limits and scope of fundamental rights.

¹¹⁸ Kaarlo Tuori, among others, in his article “Fundamental rights principles: disciplining the instrumentalism of policies” makes this further distinction contrasting Alexy’s and Dworkin’s theory of legal principles. Cf. Tuori, Kaarlo, “Fundamental rights principles: disciplining the instrumentalism of policies”, in Menéndez, Agustín J., Eriksen, Erik O. (Eds.), (2006), *Arguing Fundamental Rights*, Springer, pp. 33-50.

¹¹⁹ Rainbolt, W. George, (2006), “Rights Theory”, in: *Philosophy Compass* 1 ET 003, 1–11, Blackwell Publishing, p. 1.

¹²⁰ Palombella, G., (2007), “From Human Rights to Fundamental Rights. Consequences of a Conceptual Distinction”, in: *EUI Working Paper LAW* No. 2006/34, p.5.

It is essential for an understanding of the concept of “rights” itself as well as for a better comprehension of the functioning of rights and proportionality principle.

In his article “Discourse Theory and Fundamental Rights”, Alexy tries to shed some light on the issue of the origin and philosophical foundations of fundamental and human rights, sustaining that Discourse Theory can be useful in order to provide for a justification of human rights, contributing to a theory of their foundation.¹²¹

There is in fact, according to Alexy, a close relationship between discourse theory and fundamental rights, which comprises three dimensions: “philosophical”, “political” and “juridical”.

The philosophical dimension concerns “the foundation and the substantiation of fundamental rights”; the political dimension is related to the “institutionalization of fundamental rights”, while the last dimension, the juridical, concerns the “interpretation of fundamental rights”.

Rights in fact must for Alexy “be buttressed by reasons, transformed into reality and made vivid by way of interpretive practice”.¹²²

Discourse Theory represents one of the several attempts to provide a justification of human rights, essentially demanding their incorporation at the highest legal level (in the Constitution) and referring to a “deliberative” or “discursive” democratic organization, which expresses the ideal of discourse in reality.

There have been in history many other attempts to provide a justification and a theoretical foundation to fundamental rights (eight of those approaches are mentioned below).

However, according to Alexy, the discourse theory approach is the only one really centred on the concept of reasoning, and the universal validity of human rights cannot be explained in another way than through reasoning.

Generally speaking we can say that theories of justifiability of human rights can be distinguished in two main approaches: one which “denies the possibility of any justification”, such is the case of emotivism, subjectivism, relativism, naturalism or

¹²¹Alexy, R. “Discourse Theory and Fundamental Rights”, in: Menéndez, Agustín J., Eriksen, Erik O. (Eds.), (2006), *Arguing Fundamental Rights*, Springer., p.15-29. For an overview of Alexy’s conception of fundamental and human rights, please refer to the Summary of Annex II.

¹²² Ibidem, p. 15.

deconstructivism theories; and one which claims that “some kind of justification is possible”, through reasons that can assert objectivity, correctness or truth.

Discourse theory’s view, which is naturally and necessarily connected with reasoning, belongs to this last category and it is the only one which can provide a justification for rights which is based on their rationality and universal validity. Based on “reasoning”, Discourse theory adopts an explicative approach by “making explicit what is necessarily implicit in human practice”.¹²³

Going back to the philosophical dimension of rights, in order to define what fundamental rights are (foundation and substantiation), it is essential to elucidate the concept of fundamental rights: in Alexy’s words, “the question of what fundamental rights is the question of the concept of fundamental rights”.¹²⁴

On the other side, the problem of the foundation of fundamental rights is the problem of the foundation of human rights.

If fundamental rights can be substantiated, human rights can as well: in other words, there is no foundation of fundamental rights without a foundation of human rights.

Alexy therefore distinguishes three different conceptions of fundamental rights: “formal”, “substantial” and “procedural” and eight potential foundations of fundamental rights: religious, intuitionist, consensual, socio-biological, instrumental, cultural, explicative and existential.

The three conceptions of fundamental rights are closely related and “an adequate theory of fundamental rights should address not only the three concepts but also the relations in which they stand to each other”.¹²⁵

The formal conception of rights is employed “if fundamental rights are defined as rights contained in a Constitution or in a certain part of it” and if they are “endowed by the Constitution with special protection”:¹²⁶ Human rights become part of a positive constitutional law.

¹²³ Cfr. Alexy, R., “Discourse Theory and Fundamental Rights”, in: Menéndez, Agustín J., Eriksen, Erik O. (Eds.), (2006), *Arguing Fundamental Rights*, Springer, p. 21.

¹²⁴ Ibidem p.15.

¹²⁵ Ibidem. p.17.

¹²⁶ Ibidem p. 15.

However, the formal concept is considered as “important but not enough if we want to understand the nature of fundamental rights”.¹²⁷

If we want to understand the real nature of fundamental rights we have to refer to a substantial conception of rights, which must include “criteria that go above and beyond the fact that a right is mentioned, listed or guaranteed in a Constitution”.¹²⁸

The substantial concept of fundamental rights is finally corresponding with the concept of human rights: human rights in fact do not need to be enshrined in a formal Constitution to actually exist and be “substantive”.

In other words “it is not possible to raise the question of the substantiation or foundation of fundamental rights without raising the question of the foundation of human rights”.¹²⁹ The foundation of fundamental rights implies the foundation of human rights.

It seems then that the main difference between “fundamental” and “human” rights consists therefore in the fact that fundamental rights represent human rights transformed into positive law.

We can also add that the above-mentioned theory is based on a distinction between moral and legal rights, which consider fundamental rights as constitutional legal rights belonging to a determinate political system.

Following this theory, while human rights are considered as moral universal rights grounded on the notion of person and transcending any particular context, fundamental rights are considered as fundamental legal norms within a particular judicial and political system.¹³⁰

Catalogues of rights in different Constitutions can thus be considered as different attempts, more or less successful, to transform human rights into positive law.

The existence of different Constitutions and different legal rights is then the result of a selection of values to which a society should give priority.

¹²⁷ Ibidem.

¹²⁸ Ibidem p. 16.

¹²⁹ Ibidem p. 17.

¹³⁰ Cfr: Raz, Joseph, (2001), *Value, Respect and Attachment*, Cambridge: Cambridge University Press, and Raz, Joseph, (2003), *The Practice of Value*, Oxford University Press.

However there could be the case of human rights that are not included in a certain Constitution as well as Constitutions containing rights that cannot be really classified as human rights.¹³¹

This shows that “there is an intrinsic connection between the philosophical and the juridical problems”: if a Constitution does not contain human rights that should be constitutionally protected “a critique can lead to a constitutional reform or to a change in the Constitution through constitutional review”.¹³²

The third concept of fundamental rights is in fact procedural and it is related to the “institutional problem of transforming human rights into positive law”.¹³³

It is interesting to notice in this framework the affirmation made by Alexy, which says that “fundamental rights are an expression of distrust in the democratic process”.¹³⁴

Alexy is here referring to the fact that incorporating or changing rights in a Constitution is generally a power attributed to specific courts with judicial review power, which are able, as a matter of fact, to revoke any act of a State which they find incompatible with a higher authority, as is the case of a written Constitution.

In this way the judicial power is actually limiting the democratic power of national elected parliaments by subjecting both Legislative and Executive powers to review (and potential invalidation) by the Judiciary.

Fundamental rights represent then for Alexy both “the basis and the boundary of democracy” because the procedural concept “holds that fundamental rights are rights which are so important that the decision to protect them cannot be left to simple parliamentary majorities”.¹³⁵

An analysis of the consequences of such an affirmation will be tackled more specifically in the last paragraph of this section.

¹³¹ Alexy, R., “Discourse Theory and Fundamental Rights”, in: Menéndez, Agustín J., Eriksen, Erik O. (Eds.), (2006), *Arguing Fundamental Rights*, Springer, p.17.

¹³² Ibidem.

¹³³ Ibidem.

¹³⁴ Ibidem.

¹³⁵ Ibidem

III.2 Principles and Policies: Bargaining Rights Against Collective Goods?

The second important question, which will be tackled in this section, is the risk of balancing fundamental/constitutional rights against policies, collective goods, public interests; a risk which could lead to a relativistic and utilitarian conception of justice and law.

Is it correct to balance subjective individual rights against public interests and collective goods? What are the theoretical foundations of rights, their limits and how should we address problems in case of conflict?

Although Alexy recognises that the most typical fundamental right is a subjective, negative and individual right, he sustains that fundamental rights must embrace not only individual, negative rights, but also positive rights and collective goods.¹³⁶

Historically, the traditional liberal or libertarian conception of rights holds the most common connotation of fundamental rights.¹³⁷

Following this conception, the only authentic rights are the ones that are capable of immediate enforcement and full justiciability. Those rights should have the value of rules: they should be guaranteed at any time without limitations and without any exception.

This idea is usually associated with civil and political rights (CPR) which are considered as negative, defensive rights, rights of the “first generation”, because they were the first to be historically expressed in the French Declaration of the Rights of Man and the Citizen as well as in the American Bill of Rights of 1789.

This class of rights is bound to protect individual freedom from unwanted interference by the States, private organizations or other individuals, ensuring individual’s personal freedom and the opportunity of freely participating to the civil and political life of their country.¹³⁸

¹³⁶ Alexy, R, (2002) *A Theory of Constitutional Rights*, Oxford: Oxford University Press, p. 62.

¹³⁷ In modern philosophy the analysis of Immanuel Kant was of primary importance and it is fundamental for the speculation of many contemporary prominent philosophers. (Among others: Jeremy Bentham, Robert Nozick, Joseph Raz, Ronald Dworkin, John Rawls and Thomas Pogge).

¹³⁸ Negative civil and political rights include rights such as freedom of speech and freedom of assembly, freedom of thought and conscience, private propriety right, right to privacy, freedom of religion, right to a fair trial and due process.

Negative rights such as civil and political rights are also the most easily enforceable as they only require the State to refrain from action, to refrain from interfering with individual liberties.

On the other side, the term ‘principles’ could traditionally more properly be used to define economic, social and cultural rights (ESR).

These rights have been called also ‘second generation’ rights because even though they may have an influence on the law and decision-making process; they do not create any directly enforceable right: they are considered as not capable of specific legal determination before a court. They can just provide a basis upon which to found more specific rights which could then become directly enforceable.

Socio-economic rights should be considered as protective, positive rights (differing from civil and political rights which are considered defensive and negative rights).

They require in fact a positive action from the State, and are also depending on the resources of the State in question, because guaranteeing them to everyone involves a consistent expenditure of resources.

Rights such as the right to housing, to education, health, to an adequate standard of living must be respected, protected and fulfilled by the States which should take “progressive, gradual action” towards their fulfilment, but they are in practice not easily and not always enforceable everywhere. They depend on the adoption of social and political policies adopted by the States to ensure their implementation and protection.

The distinction between positive and negative rights is then a distinction between ‘programmatic’ (ESR) and ‘justiciable’ rights (CPR).

This is the reason why many national Constitutions or Bill of Rights do not even include economic and social rights, containing instead only civil and political rights, considered the only capable of specific legal determination before the Courts.

Liberals have therefore been “traditionally anxious to protect individuals from the tyranny of democratic authority by granting rights that can be used as “moral trumps” against the process of majority rule, while democratic theorists always defended the

application of rights in view of the realization of some common good and social objective.¹³⁹

To summarize in a few words the polemic of democratic theorists against liberal theories of rights, without entering into further details, we can assume that the main criticism moved against liberal rights is that they “cannot be rationally defended”. Many democratic theorists are in fact “skeptical about the possibility of articulating and rationally supporting a theory of fundamental rights”.¹⁴⁰

Going back to Alexy’s theory of rights, the legal philosopher considers essential to recognise as fundamental rights not only individual rights but also collective goods: both socio-economic rights and civil-political rights need protective and defensive actions, a conception which reunites the two categories of rights under an equal footing.

Assuming that civil and political rights and socio-economic rights have to be considered on the same footing, means also assuming the possibility of a conflict between an individual fundamental right and a public policy aiming at safeguarding some collective interest.

This could be the case for example in a conflict between the right to privacy and the protection of public security, or the right to privacy and the freedom of expression, just to mention some examples.

It generally entails a conflict between classical individual rights and some collective interests, an opposition between individual rights and what is defined as a common good or public policy.

If also collective goods have a fundamental status we are then confronted with a conflict of rights that requires balancing and weighing the conflicting positions at stake: it is in fact not possible anymore to affirm, as the liberal tradition does, that the individual subjective right should prevail on the collective interest in any case.

This is however a controversial issue, still open for discussion. The main risk here, as previously stated in this study, would be the one of fundamental rights losing their “absolute”, rational and “deontological character”, their priority as “moral trumps” against the process of majority rule.

¹³⁹ McGregor J. (1988), “Liberalism and Democracy”, in: *Philosophy East and West*, Vol. 38, No. 3, Fiftieth Anniversary, Department of Philosophy, University of Hawaii, Jul., p. 334.

¹⁴⁰ *Ibidem*.

I am referring here to the Dworkin's famous metaphor of rights as "political trumps held by individuals" which cannot be altered, not even by consensus.

Rights have for Dworkin a special normative power: "the reasons which they provide are particularly powerful or weighty reasons, which override reasons of other sorts: rights give reasons to treat their holders in certain ways or permit their holders to act in certain ways, even if some social aim would be served by doing otherwise".¹⁴¹

Dworkin considers in fact that there can be only very few cases of exemption which can 'trump' rights.

The main concern is therefore to establish whether and how would be possible to overcome this conflict, typical of the liberal tradition, between human rights and common good, this conception by which individual fundamental rights should always have priority over any other social concern or political objective.

In order to overcome this conflict it is important to understand the two different concepts. However this is in itself problematic because the general consensus on their meaning differs in different ideologies and cultures.

A possible solution, suggested for example by Joseph Raz, could be the adoption of a so-called interest-based theory of right as opposed to a classic will theory of rights.¹⁴²

Will-theorists like for example H.L.A.Hart believe that a right makes the right holder "a small scale sovereign"¹⁴³, considering that "the function of a right is to give its holder control over another's duty" to act in a particular way.

To have a right is for a will theorist to have the normative power "to determine what others may and may not do, and so to exercise authority over a certain domain of affairs".¹⁴⁴

¹⁴¹ Cfr: Wenar, L., "Rights", *The Stanford Encyclopedia of Philosophy (Fall 2011 Edition)*, Edward N. Zalta (ed.). See also: Dworkin, R., (1978), *Taking Rights Seriously*, Harvard University Press, and Dworkin, R. (1984), 'Rights as trumps' in Waldron, J. (ed.) *Theories of Rights*, Oxford University Press.

¹⁴² Will-based and interest-based theories are the two main theories of the function of rights. Each one of them presents itself as capturing the understanding of *what rights do for those who hold them*. Which theory offers the better account of the functions of rights has been the subject of spirited dispute, literally for ages (...). Influential will theorists include Kant, Savigny, Hart, Kelsen, Wellman, and Steiner. Important interest theorists include Bentham, Ihering, Austin, Lyons, MacCormick, Raz, and Kramer. Each theory has stronger and weaker aspects as an account of what rights do for right holders. Cfr: Wenar, L., "Rights", *The Stanford Encyclopedia of Philosophy (Fall 2011 Edition)*, Edward N. Zalta (ed.).

¹⁴³ See: Hart, H., (1982), *Essays on Bentham: Studies in Jurisprudence and Political Theory*, Oxford: Clarendon Press, p.183.

¹⁴⁴ Cfr: Wenar, L., "Rights", *The Stanford Encyclopedia of Philosophy (Fall 2011 Edition)*, Edward N. Zalta (ed.).

However, the will theory of right seems to be unable to give an explanation of some rights that nevertheless exist such as the rights of “incompetents” like animals, children, or handicapped people which possess rights (for example the right not to be tortured) even though they do not exercise power over them because incapable of exerting their will and sovereignty.

An interest-based theory, on the other side, seems to be more capacious than the will theory, considering instead that “the function of a right is to further the right-holder's interests”.

It can therefore accept as rights “both unwaivable rights (the possession of which may be good for their holders) and the rights of incompetents (who have interests that rights can protect).”¹⁴⁵

In the specific case of a conflict between fundamental individual rights and common goods, interest-based theories can shed some light by giving a different definition of rights.

Following this conception, rights are based on the interest and wellbeing of single individuals even though they are not limited to the interest of individuals alone but extend their interest to the general wellbeing of the community.

Rights will be then characterized as common decisions regarding fundamental interests of individuals, which however will not be separate from concerns of collective interests and goals in a society.

As illustrated by J. Raz in his article “Rights and Politics”:

“the weight given to the interests of the right-holder in determining whether his interest is protected by a right, and how extensive that protection is, reflects *not only our concern for the individual, but also our concern for the public interest that will be served by protecting the interest of the right holder* (...), the right's holder's interests are only part of the justifying reason for many rights. The interests of others matter too. They matter; however, only when they are served by serving the right holder's interests, only when *helping the right-holder is the proper way to help others*.”¹⁴⁶

In Raz's opinion, collective interests and individual rights should exist in harmony and cooperate with each other: there is no tension or conflict between them.

¹⁴⁵ Ibidem.

¹⁴⁶ Raz, Joseph, “Rights and Politics”, in: Tasioulas J. (ed.), (1997), *Law, Values and Social Practices*, Aldershot., p.89.

In order to achieve a comprehensive conception of human rights it is in fact essential not to underestimate the importance of common good and its influence on values such as social justice, equality and freedom.

Both individual human rights and collective interests are an essential part of the human dimension and the right held by an individual always entails a duty on others.

What is important for an individual cannot be considered independently of the consequences upon other individuals in a society and the individual autonomy should promote the wellbeing of the entire society. Individuals have not only rights but also responsibilities *vis á vis* the society in which they live.

Raz concludes by affirming that human rights are political and that human right theory should only focus on constitutional rights in specific political contexts.

Going back to Alexy's *Theory*, we should finally notice, together with Kaarlo Tuori in his article, "Fundamental rights principles: disciplining the instrumentalism of policies" that Alexy fails to establish a further important distinction between principles and policies, collective interests.¹⁴⁷

The last political issue, which will be tackled in this second section, concerns the question of whether in human rights adjudication the legal liberty and legal equality principle (*in dubio pro libertate*)¹⁴⁸ should prevail over the democratic principle or vice versa.

Should judicial activism and judge's discretion become the final arbiter of fundamental rights adjudication at Constitutional level, or should the democratic principle prevail?

It seems important to deal not only with a problem of constitutional rights adjudication in Courts but also with a problem of democratic representation and participation, better underlining what the *sub-structure* of balancing is, the importance of legal culture and common values, the positions about the Constitution, the role of states and the very concept of justice in a given society.

In his article "Balancing, Constitutional Review and Representation" (2005),

¹⁴⁷ See: Tuori, K., "Fundamental rights principles: disciplining the instrumentalism of policies", in: Menéndez, Agustín J., Eriksen, Erik O. (Eds.), (2006), *Arguing Fundamental Rights*, Springer, pp. 33-50.

¹⁴⁸ "Where there is doubt, Liberty should prevail". According to this principle no principle opposite to legal liberty should prevail unless stronger reasons are put forward.

Robert Alexy affirms:

*“Balancing is one of the main issues in current debates on the interpretation of constitutional rights. Numerous authors have raised the objection that balancing is both irrational and subjective. Here it is argued that this objection is unjustified. To show this, balancing is grounded in a theory of discursive constitutionalism that connects the concept of balancing with the concepts of constitutional rights, of discourse, of constitutional review, and of representation. The main theses are these: first, balancing is based on a rational form of argument that can be made explicit by means of a ‘Weight Formula’ and second, constitutional review complies with the requirements of democratic legitimation to the extent that it succeeds in becoming an argumentative representation of the people in supplying this formula with arguments”.*¹⁴⁹

It appears from the above that in Alexy’s opinion there is not necessarily a conflict between the rationality of balancing (and its concretization through the “Weight Formula” adopted by Judges) and the “democratic legitimation” principle: namely there is not conflict between the rational method used by Judges in Court adjudications and the democratic principle, which foresees a public argumentation and democratic representation of people.

Judges are using for Alexy a rational method of adjudication through the balancing process and the recourse to the weight formula and, at the same time, an argumentative and democratic method of discussion and argumentation when supplying this formula with arguments.

Such an understanding would also contradict O.E. Eriksen’s affirmation, which in his article “Democratic or Jurist-made law?” defines Alexy’s theory as “descriptively correct but normatively unacceptable”.¹⁵⁰

Eriksen distinguishes between a “jurist-made law” in which the Supreme Court becomes the final arbiter of constitutional law and a “democratic-made law”, of which “substantial factors can be tested democratically”.¹⁵¹

He sustains that through his *Theory* Alexy is obliged to transfer the authorship of legal norms from democratic legislatures to judges and courts, with the consequent danger of “assimilating law and morality overburdening the legal medium itself”.¹⁵²

¹⁴⁹ Alexy, R., (2005) “Balancing, Constitutional Review and Representation”, in: *International Journal of Constitutional Law*, 3(4), p. 572.

¹⁵⁰ Eriksen, Oddvar Erik, “Democratic or Jurist-made law?”, in: Menéndez, Agustín J., Eriksen, Erik O. (Eds.), (2006), *Arguing Fundamental Rights*, Springer, pp.69-99.

¹⁵¹ *Ibidem* p.70.

¹⁵² *Ibidem*. p.83

Eriksen's critique is therefore based on the assumption that "in democratic societies legal procedures are to ensure legally correct and rationally acceptable decisions that can be defended both in relation to legal statutes and in relation to public criticism".¹⁵³

Eriksen doubts about the efficiency of a legal system in which normative questions are solved only by reference to the discretion of Judges. The real problem is in fact to ascertain "whether the judge's interpretations of situations is correct".¹⁵⁴

The main concern at stake here is that if both the rationality of balancing and the impartiality of Judges are put in doubt, implicitly acknowledging the objection that balancing is both irrational and subjective, a subsequent danger could be, beyond fundamental rights losing their strict normative power, the potential use of political ideologies, personal beliefs and even prejudices in order to justify sentences in Courts.

Such a criticism could in my opinion be connected also with another substantial perplexity put forward by Kaarlo Tuori in his article "Fundamental rights principles: disciplining the instrumentalism of policies".

In Tuori's view Alexy's *Theory* results in a blind approach to the "central paradox of the modern conception of fundamental rights as limits to state power which are established by State power and limits to law there are legal in themselves".¹⁵⁵

This "paradox of fundamental rights" is linked to the essential positivism of modern law, which is "based on conscious human actions and which is continuously amendable".¹⁵⁶

It should be therefore recognized at least "an implicit danger of totalitarianism entailed by the positivisation of law".¹⁵⁷

What "engenders this threat is not illegal or extra-illegal power, but power exercised through positive law: power in a legal guise".¹⁵⁸

Therefore, protecting fundamental rights in our modern positive era also means "protecting the limits of law", and such a protection system still lies mainly at the level

153 Menéndez, Agustín J., Eriksen, Erik O. (Eds.), (2006), *Arguing Fundamental Rights*, Springer, p. 7.

154 Ibidem.

155 Ibidem, pp.7, 8.

156 Tuori, K., "Fundamental rights principles: disciplining the instrumentalism of policies", in: Menéndez, Agustín J., Eriksen, Erik O. (Eds.), (2006), *Arguing Fundamental Rights*, Springer, p. 40.

157 Ibidem. Please refer also to: Hayek, F. (1982), *Law, Legislation and Liberty*, London: Routledge & Kegan Paul.

158 Ibidem p.42.

of nation-states while international monitoring mechanisms still play only a complementary role.

Tuori considers possible to solve this central paradox of fundamental rights through a “deconstruction of the concept of Law”.

He distinguishes then three levels of law: the surface level, the legal culture, and the deep structure of law and sustains that fundamental rights can only act as limits of State power if they are sufficiently sedimented in the deep sub-surface of law.¹⁵⁹

Going back to Alexy’s *Theory*, Alexy himself seems to recognize two different principles in balancing: the principle of legal liberty and legal equality (*in dubio pro libertate*) and the democratic principle (*in dubio pro legislatore*).

In fact, talking about “burdens of argumentation”¹⁶⁰, while in *A Theory* Alexy seems to support the principle of legal liberty and legal equality, in the *Postscript to A Theory* he aligns himself with the democratic principle affirming that an act of interference by the Parliament would not be considered as disproportionate or contrary to the Constitution.

Even though this “double solution” seems to be contradictory, Alexy considers that it does not entail necessarily a conflict between the two principles, because there is no conflict between the legal liberty of Judges in Courts and the democratic principle, which foresees a public argumentation and democratic representation of people.

Nevertheless, elsewhere Alexy affirms that “fundamental rights are an expression of distrust in the democratic process”, that they represent both “the basis and the boundary of democracy” and that they are “so important that the decision to protect them cannot be left to simple parliamentary majorities”.¹⁶¹

Such affirmations do not seem to solve the contradictory character of his propositions. As underlined by Judge Robert Bork in his book “Coercing Virtue: The Worldwide Rule of Judges”, if judicial power can lead to the abolition of majorities

¹⁵⁹ Ibidem.

¹⁶⁰ The burden of argumentation represents for Alexy the third stage of the Law of balancing and operates “only in cases in which the weight formula results in a stalemate, the weight of principles being identical”. Please refer to Annex I.

¹⁶¹ Alexy, R., “Discourse Theory and Fundamental Rights”, in: Menéndez, Agustín J., Eriksen, Erik O. (Eds.), (2006), *Arguing Fundamental Rights*, Springer, p.17.

decisions of the people's representatives, the question arise if judicial discretion does not entails a corrosion of democratic governance.¹⁶²

Nevertheless, the importance of the judicial control in protecting citizens against unjustified interventions of the legislative power should also be recognized: Constitutional Courts can in fact exercise an important role in protecting citizens against unjust laws which are not excluded even in democratic parliaments.

Particular efforts have been made so far in order to establish if the balancing method should be recognized as a “truly rational method”, as defended by Alexy in his *Theory*, or just as “a pure practical and rhetorical method of solving conflicts”, as sustained by some of his main critics.

The possibility of taking into account other approaches that accentuate the moral foundation of rights and sustain a more democratic principle have been taken into consideration while contextualizing “quantitative-like” criteria such as those associated with proportionality and the positivisation of law.

The importance of Alexy's *Theory of Constitutional Rights* has been anyways recognized as relevant to most, if not all, European and international legal orders; first of all the European Union Constitutional order.

Establishing whether and to what extent Alexy's *Theory* can be useful in interpreting and applying fundamental rights provisions of the European Union law and especially, the now legally binding “Charter of Fundamental Rights of the European Union”, is in my opinion of primary importance and deserves further investigations.

Main aim of this section was also testing the limits of Alexy's approach, the reasonableness of the proportionality principle in legal decisions and the effective use of balancing in Courts as an essential methodological tool for adjudication.

More general philosophical considerations concerned a clarification of the concepts of “constitutional rights”, “human rights” and “fundamental rights”, trying at the same time to shed some light on the structure and content of rights and therefore on what can define their limits and scope.

¹⁶² Cfr. Bork, R. H., (2003), *Coercing Virtue: The Worldwide Rule of Judges*, Aei Press.

That means to ascertain the “deontological and normative value” of rights, establishing whether such an inalienable core of fundamental, “non-derogable” rights exists, to which weighing and balancing should not apply because of their absolute and universal value (i.e. principles that are not subject to proportionality review).

Contrary to most philosophical conceptions of moral rights, one central characteristic of most constitutional rights nowadays seems to be the possibility of being “normally” and usually subjected to a balancing approach.

On the other side, important political questions have been raised such as the legitimization and the extent of Court’s judicial power in applying the proportionality principle, balancing rights and constitutional review.

Is this power limited or unlimited? Courts can in fact use the principle of proportionality in order to reach important public interest decisions interfering with the legislative functions and enhancing their discretionary power.

The main issue at stake lies in a political resolution: whether to trust Judges to review, leave adjudication to democratically elected parliaments or find alternative ways of rights adjudication.

It was then considered necessary to better highlight the *substructure* of balancing: the importance of legal culture and common values, the positions about the Constitution, the role of states and of international monitoring bodies, the very concept of justice in a given society.

Different legal systems can reflect a different legal hierarchy and different social values.

One primary conclusion that has been reached is that even when a measure respects all proportionality’s criteria (necessary in a democratic society, in accordance with law and pursuing a legitimate aim), it should be nevertheless declared unacceptable and unconstitutional in case it is found in violation of a basic human right, which means violating the essential value and content of a human right.

It is not possible to accept the proportionality of a norm in every case, even when it is in violation of a basic human right.

It follows that a norm can be considered as proportional if and only if it does not influence or change the essential content of a human right.

In no case the evaluation of costs and benefits can be done without taking into consideration the essential content of rights. A norm should be considered as disproportionate and unconstitutional in case it alters the essential content of a human right or in case it lacks the sufficient justification for an eventual restriction of this right.

This is the reason why it becomes fundamental to be aware of the limits, content and characteristics of human rights, analysing first of all the degree of alteration of a right in every single case.

Another important political issue that has been raised in this analysis is the risk associated with a relativistic conception of justice and law, of having fundamental individual rights balanced against collective goods, public interests and policies.

It has been shown as this fundamental rights conception of public good goes against all fundamental principles of a traditional liberal theory of rights.

It has been therefore recognized that Alexy's *Theory* lacks a further important distinction, which must be made, between principles and policies.

It is in fact necessary to analyse and clarify not only the content and characteristics of each fundamental right, but also their relationship towards each other and towards fundamental rights "*of the others*", meaning also the relationship between human rights and the "common good" of a community, considering also the degree of public interest involved in every case.

The evaluation of such public interest should however be done always by referring first of all to the essential content of rights, in order to avoid the utilitarian risk.

In a few words, the most important action that has to be taken in order to evaluate a norm is to determinate which the "*inalienable*" content of a right is. Only once determined this, would be it possible to proceed with further analysis and consideration of collective good, public interest or policy objectives, determining the level of interference of the measure taken into account.

Judges with constitutional competence should be the ones performing this task through a faithful interpretation of the Constitution and an understanding of each human right in relation to his concept and essential content.

It is therefore suggested a possible solution to overcome the conflict, typical of the liberal tradition, between human rights and common goods, by adopting a so-called

interest-based theory of right, as suggested by Joseph Raz in his works, and as opposed to a classic will-theory of rights.

Such a theory is based on the recognition, on the one side, of core fundamental rights which should preserve their deontological and normative power and, on the other side, the exigency of recognizing and preserving cultural and collective rights and social policies aiming at safeguard collective interests and goods.

Following this conception, rights are based on the interest and wellbeing of single individuals but are not limited to the interest of those individuals, extending instead their relevance to the general wellbeing of the community.

Rights will be then characterized as common decisions regarding fundamental interests of individuals, which however will not be separate from concerns of collective interests and goals in a society.

Following this theory, collective interests and individual rights should coexist in harmony and cooperate with each other avoiding conflicts (what is good for the single individuals is good also for the society as a whole).

Both individual human rights and collective interests should be considered as an essential part of the human dimension and the right held by an individual always entails a duty and a responsibility on *others*.

Lastly, I agree with what recognized by C.B. Pulido in his above-mentioned article:

“The weight formula should not be regarded as an algorithmic procedure which produces the right answer in all cases. On the contrary there are diverse rationality limits that leave a margin of discretion to judges. In this regard, his ideology matters and plays an important role. This does not impair the analytical value of the weight formula. Despite its limits, the weight formula provides a clear argumentative structure that helps clarifying the different relevant variables when balancing conflicting principles. Therefore, it renders explicit all the elements the judge should take into account and all decisions that need to be justified”.¹⁶³

¹⁶³ Bernal Pulido, Carlos , “On Alexy’s Weight Formula”, in: Menéndez, Agustín J., Eriksen, Erik O. (Eds.), (2006), *Arguing Fundamental Rights*, Springer, p.109.

PART IV

Chapter 3 Multiculturalism and Human Rights: Anthropological Perspectives.

IV. Reconstituting the Universal: Human Rights in a Globalized Era.

This chapter aims at analyzing theoretical problems related to multiculturalism and human rights in Europe, understood in their broadest philosophical and anthropological dimension.

Culture is without any doubt essential in the determination of the identity and singularity of every human being as an individual and as a member of a community as a whole.

The concept of "culture" was born with modernity, with the age of geographic discoveries and of colonial conquests. It indicates the collective system of ways of life and beliefs proper to a group or a people, which gives meaning to its existence and differentiates it from the systems of other groups or peoples.

Modern philosophy, especially since the Eighteenth century, developed a rational reflection on the diversity of cultures. In the framework of this reflection, however, were operating more or less consciously, ethnocentric assumptions, which had the function of "scientifically" endorse the belief on the superiority of European cultures over those of other peoples, for centuries defined as barbarians or savages.

The progressive influence of the Enlightenment principle of tolerance and of a more general critical spirit, favored eventually the idea of cultural comparison, but we must wait until the Twentieth century to develop a real critique of ethnocentrism, defined as the widespread tendency in all human populations to consider the behaviors and values of their own group and culture, better than those of other groups.

The questioning of ethnocentrism has in turn involved the radical unmasking of Eurocentrism and social sciences imperialism, that is, the prejudice that makes European culture feel superior to all other cultures.¹⁶⁴

¹⁶⁴ Cfr. Mentan, T.. (2015), *Unmasking Social Science Imperialism: Globalization Theory As A Phase Of Academic Colonialism*, Oxford: African Books Collective.

Still during the Nineteenth century, the affirmation of the evolutionary approach gave birth to an evolutionary conception of cultures, according to which European culture represents the most advanced point of human evolution, while non-European cultures constitute inferior degrees of development.¹⁶⁵

Certainly an important difference compared to the past, lies in the scholars' conviction that every human group possesses a more or less evolved form of culture.

This is possible because the very idea of culture changed and was no longer coinciding only with the highest artistic and thought forms, but also extended to the everyday and less sophisticated human activities.

The affirmation of the evolutionary approach also marked the birth of cultural anthropology as an autonomous discipline, which also becomes a teaching subject in the main European and North American universities. Anthropology was therefore configured as a scientific study of pre-modern cultures and communities.

We must wait until late *1930s and '40s* of the Twentieth century to have this model definitely questioned thanks to the new methodological perspective of Relativism, introduced by the German anthropologist Franz Boas (1858-1942).

According to Boas, every historical product is understandable only in relation to the space-time context in which it is conceived and therefore it is meaningless to establish hierarchies between the different cultural systems.

Equally incorrect, according to Boas, is to think of such systems according to a linear historical development, since they possess peculiar characteristics that make them different from one another (theory of historical particularism).

In order to set cultures and their products according to a hierarchical scale, it would be necessary, according to Boas, to possess a criterion of universal evaluation which we actually don't have, since the criterion available to the anthropologist is always dependent on the cultural context in which he operates, hence on a particular perspective.

¹⁶⁵ One example for all is: Frazer, J. G. (1890), *The Golden Bough; a Study in Magic and Religion*. Macmillan, London. The impact of *The Golden Bough* on contemporary European literature was *substantial*. It came however under tough critical scrutiny in the following decades, with many of its descriptions of regional folklore and legends considered less than reliable, having been recognized that much of its tone was embedded in the philosophy of social Darwinism and cultural imperialism.

The processes of decolonization and globalization highlighted in an ever urgent way the problem of the representation of peoples and of non-western cultures, representations which were so far produced exclusively by scholars of European and North American origin.

The number of scholars born in former colonies and having their intellectual formation partly matured in the former colonial countries, became more and more relevant, imposing the so-called "postcolonial question".

At the center of this question are the representation of *Otherness* and *Alterity* and the complex relationship with European culture held by those who have a double cultural affiliation, which allows them to unmask the ethnocentric gaze with which the Western observes his own culture of origin.

Some of these scholars, such as the aforementioned Palestinian-born American Edward W. Said (1935-2003), have highlighted the relation between the imperialist policy and the distorted interpretation that the West has given of other cultures: assuming the superiority of the Western culture, they both silence the other, preventing him from describing his own culture and history.

The work of scholars coming from cultures which were traditionally the subject of anthropological research, has raised awareness of the arbitrariness and partiality with which Western anthropology has so far worked in the description of the other.

Anthropologists such as the Swiss-Tunisian Mondher Kilani, have contributed to advancing both the reconstruction of the history of anthropology (including the history of "other ethnographies", in particular of Arab-Muslim culture), and the methodology of the discipline; conceiving the results of ethnographic research as the fruits of a negotiation between the anthropologist's point of view and that of his representatives in the field.

The contribution of Kilani's work, as well as other contemporary anthropologists, also aims to de-essentialize key concepts of the anthropological lexicon such as "ethnicity" and "culture".

In other words, showing the dynamic and non-static character of cultures, the constant biological and cultural interconnection of human groups; cultural anthropology emphasizes how ethnic groups and cultures cannot be considered as things, substantial entities with stable and permanent characters, separated by clear boundaries and impermeable barriers.

On the contrary, they are "cultural inventions" and therefore must be conceived as the product of a classification and not as their foundation.

Likewise, individuals can entertain complex, plural and not univocal relationships with cultures: each of us can feel a sense of belonging to more than one culture and can possibly integrate and change his cultural identity in the course of his life.

According to the already mentioned *Nobel Prize*-winning economist Amartya Sen, the attempt to understand the multicultural components of our world entails a risk of "miniaturization of the individuals": trying to attribute to a person or a group a determined and unmovable social identity, means to tighten it in a unilateral definition, that is to classify it according to a single criterion.

This is the so-called "solitarist approach" to human identity, which Sen sharply criticizes, observing with humorous sagacity that:

*"the same person can be, without any contradiction, an American citizenship, of Caribbean origin, with African ancestry, a Christian, a liberal, a woman, a vegetarian, a long-distance runner, a historian, a schoolteacher, a novelist, a feminist, a heterosexual, a believer in gay and lesbian rights (...) Each of these collectivities, to all of which this person simultaneously belongs, gives her a particular identity. None of them can be taken to be the person's only identity or singular membership category."*¹⁶⁶

The problem of multiculturalism must be therefore faced in a perspective that values pluralism and the multiple identities of the human being.

The same relationship between global identity and local identity must be conceived in an open way, so that the feeling of global belonging does not replace our national allegiances (and viceversa).

As already highlighted elsewhere in this study, many attempts have already been made in order to re-conciliate the two concepts, many authors sustaining the potentiality of human beings to reconcile the loyalty to their own nation and relatively closed collectivity with a feeling of global and multilayered citizenship and belonging.¹⁶⁷

As remarked by Federico Lenzerini in his article "Multiculturalism and International Human Rights Law":

¹⁶⁶ Sen, A. (2006). *Identity and Violence: The Illusion of Destiny*. Issues of our time. New York: W.W. Norton & Co, p. 9-10.

¹⁶⁷ Ibidem, cfr. also Voronkova, A. (2010), "Are nationalism and cosmopolitanism compatible?", in *E-International relations*. Cfr Chapter 1.

“Since human rights are one of the main “tools” available to human beings to pursue their life expectations and dreams, their strict interconnection with culture is beyond question. Therefore, conceiving human rights in terms of a monolithic system of inflexible rules destined to be applied according to pre-determined and standardized criteria wouldn’t help much in ensuring their effectiveness in pursuing the well-being and happiness of human beings. On the contrary, the correct approach to international human rights law—in terms of understanding, interpretation, adjudication and redress for breaches—should be centered on the idea of multiculturalism, so as that in each concrete case the specific needs of the people specifically concerned should be taken into primary account”.¹⁶⁸

The issue of multiculturalism and human rights must be therefore analyzed from an anthropology of law’s perspective.

Indeed multiculturalism and relativism are often perceived as a threat for the liberal democratic understanding of universally recognized human rights, dealing to a clash between Western and non-Western cultural beliefs and legal systems.

Following the general theoretical lines of the French anthropology of law (Alliot 1983; Rouland 1994), a non-ethnocentric definition of human rights will be pursued in parallel with a non-ethnocentric definition of law, concentrating on the fundamental distinction between theory and practice of human rights.

The main aim will be to demonstrate that the concept of law is not an abstract one but needs to be situated in a specific context and in the concrete structure of given societies.

Potentials and limits of the concept of intercultural dialogue will be therefore explored, in its role as a possible solution to the dichotomy of universalism and cultural relativism.

The question if a healthy pluralism is possible in a multicultural society, move towards a recognition of the *Other*, which opens the doors to a real dialogue and is not just assimilation or reduction to the unity.

The concept of *Otherness* and *Alterity*, assumes a basic importance also when considering the thought of many contemporary philosophers, including what we may call the Wittgensteinian “intercultural perspective”.

¹⁶⁸ Lenzerini, F., (2014), “Multiculturalism and International Human Rights Law”, in *OUP Blog*, Oxford University Press.

Wittgenstein's concepts of *Lebensform(en)* (forms of life), *Familienähnlichkeit* (family resemblance), *Sprachspiel* (language-games), *Übersichtliche Darstellung* (perspicuous representation); his ethnological approach to philosophy, result all essential for understanding the influence of *our own* language and culture on the explanation and perception of other cultures and the fundamental value of dialogue for an authentic recognition of the *Other*.

The relation between human rights and intercultural dialogue will be analyzed considering the following structure:

First of all the question of the Western conception of human rights will be addressed. The debates about universalism and cultural relativism, still at the central core of many contemporary discourses on human rights, will be analyzed with due consideration given to the criticism of both theories, including a short analysis of the main critics addressed to the "Western" conception of the UN Universal Declaration of Human Rights of 1948 more specifically.

Following the general theoretical lesson of the French anthropology of law (Alliot 1983; Rouland 1994; Eberhard 2002), the second part will put emphasis on the relationship between different philosophical and religious conceptions of the world and the related clash between Western and non-Western cultural beliefs, legal systems and structure in Western and non-Western societies.

It will therefore concentrate on the fundamental distinction between theory and practice of human rights, demonstrating that the concrete application of the law cannot prescind from the historical, social and cultural context of a given society.

In theory human rights are universal and universally applicable everywhere. In practice different cultures can have different ways to apply and interpret the law in different contexts.

Nevertheless this will not prejudice the universality and indivisibility of human rights, which will not be disdained.

Can intercultural dialogue mediate conflicts arising from a too narrow or rigid definition of human rights meanings and perceptions?

What does intercultural dialogue mean and how can it be useful in solving the dichotomy posed by universalism and relativism of human rights? Is a healthy pluralism possible in a multicultural society?

The moral status of rights, can be attributed to the fact that human rights can be considered as judicial practices that go beyond the classical juridical border of states and therefore beyond nation-states boundaries. But human rights have *de facto* an original juridical nature.¹⁶⁹

James Silk affirms that “*to have human rights at all is to say that there are certain standards below which no state or society can go regardless of its own cultural values.*”¹⁷⁰

Such minimum standards can be considered as universal values, because they include the respect for the ontological human dignity of every individual.

Intercultural dialogue must however mediate as an *interplay* among cultures to set juridical and not simply moral standards.

The effective implementation of these standards presuppose that there must be a cultural recognition by the nation states which are going to settle such juridical norms.

As sustained by Abdullahi An-Na'im:

*“culture, broadly defined, are the context within which human rights have to be specified and realized [...] Each culture has its share of problems with human rights as well as the potential to resolve these problems. Working within the culture, and receiving guidance and support from without, external standards should not be imposed to enhance cultural legitimacy. The inherent dignity and integrity of the human person, taken as the fundamental underlying value of all human rights, can be extended beyond barriers of sex, race, religion and so on, through the principle of reciprocity, namely that one should concede to others what one claims for oneself. Thus, the full range of human rights can gain cultural legitimacy everywhere in the world”*¹⁷¹

An intercultural dialogue should be useful in order to put in place and foster international mechanisms and instruments, in order to strongly legitimate the protection of universal human rights standards.

¹⁶⁹ Cfr. Habermas, J., (1996), *La pax perpétuelle. Le bicentenaire d'une idée kantienne*, Translated by Rainer Rochlitz, Paris, les Editions do Cerf, p. 86.

¹⁷⁰ Silk, J.(1990), “Traditional Culture and the Prospect for Human Rights in Africa”, pp. 290-3238, in Abdullahi Ahmed An-Na'im and Francis. M. Deng (eds), *Human Rights in Africa: Cross-Cultural Perspectives*, Brookings Institution Press, p. 316.

¹⁷¹ An-Na'im, A. (1990), “Problems of Universal Cultural Legitimacy for Huma Rights”, in Abdullahi Ahmed An-Na'im and Francis. M. Deng (eds), *Human Rights in Africa: Cross-Cultural Perspectives*, Brookings Institution Press pp. 366-367.

Human rights can be furthermore considered as dynamic cosmopolitan entities because they are subject to change, changing their effective validity too.

Human rights emerged “*from the concrete expectations, especially the suffering, of real human beings and their political struggles to defend or realize their dignity. Internationally recognized human rights reflect a politically driven process of social learning.*”¹⁷²

Even if we agree with the fact that human rights have mainly western origins, this does not mean to affirm that they have not value for the rest of the world.

As highlighted by Onuma, in his article, “*when ideas or institutions are expanded from their place of origin to other regions, their original nature or characteristic features are inevitably transformed in order to be accepted by the inhabitants of the regions to which they have spread.*”¹⁷³

We can therefore assume that the same general principles can be institutionalized in different specific rules, which represent the cultural homeomorphic perspective of the general principles.

Cultures can be considered as dynamic entities as well: they are active, evolving entities. They share some characteristics with other cultures but the role played by values, traditions, religions, politics, social practices, vary from one culture to another.

Globalization has had an influence on cultures in a very innovative way: the mass consumption of goods, media and markets have been putting pressure on all cultures to use some common standards all around the world, creating a sort of homogenization.

Human rights can be considered as a response to this process, safeguarding human beings in this process.

As underlined by Anna-Belinda Preis in her famous article in 1996:

“(human rights) increasingly form part of a wider network of perspectives which are shared and exchanged between the North and the South, centers and peripheries, in multiple, creative, and sometimes conflict-ridden ways. Human rights have become “universalized” as a valued subject of interpretation, negotiation and accommodation. They have become “culture.””¹⁷⁴

¹⁷² Donnelly, J., (2003), *Universal Human Rights in Theory and Practice*, 2nd ED., New York: Cornell University Press, p. 58.

¹⁷³ Onuma, Y.(2001), “Toward an Intercivilizational Approach to Human Rights: for Universalization of Human Rights through Overcoming of a Westcentric Notion of Human Right”, pp. 21-81, in *Asian Yearbook of International Law*, vol. 7, p. 47.

¹⁷⁴ Preis, Anna-Belinda S. (1996), “Human Rights as Cultural Practice: an Anthropological Critique”, pp. 286-315, in *Human Rights Quarterly*, vol. 18, n.2, p. 290.

Nonetheless, culture cannot be considered as a mere imposition, because “*human rights are not simply a matter of constant “pressure” from the center towards the periphery, but of a much more creative interplay.*”¹⁷⁵

As in any culture, also the concept of human rights is made by contrasts and disagreements and “*human rights are continuously in the process of reconstituting and reformulating themselves, They are always “at work.*”¹⁷⁶

There is however, at the center of the human rights perspective a core concern for the dignity of human beings which cannot be eradicated.

An-Na'im extends this concept noting that human rights need a “*bottom up approach*” which “*seeks to initiate a global process of internal discourse and cross-cultural dialogue to promote the universal legitimacy of human rights [...] by broadening and deepening global consensus on human rights.*”¹⁷⁷

Certainly human rights standards would remain an empty list of formal rules far away from a real applicability if they were not to be realized and fostered by consensus and contextual sensitiveness.

The “*openness of cultural communication*” is in fact “*one of the most fundamental objectives of cosmopolitan right as well as an objective of specific human rights declarations.*”¹⁷⁸

¹⁷⁵ Ibidem, p. 306.

¹⁷⁶ Ibidem, p. 309.

¹⁷⁷ An-Na'im, A (1992), “Introduction”, in Abdullahi Ahmed An-Na'im (ed.), *Human Rights in Cross-Cultural Perspectives: a Quest for Consensus*. Philadelphia. University of Pennsylvania Press, p. 7.

¹⁷⁸ Anderson-Gold, S., (2001), *Cosmopolitanism and Human Rights*. Cardiff: University of Wales Press, p. 39.

IV.1 Universalism or Cultural Relativism? A Speculative Debate.

The dichotomy between universalism and cultural relativism in the human rights discourse has been present in legal scholarship and philosophy for decades.

It was already present in 1948 when the UN General Assembly approved the Universal Declaration of Human Rights (UDHR), and is now gradually entering public discourse on international law and human rights.

Universalism supporters suggest that the notion of human rights is universal because human beings are ontologically equals, and therefore it should universally apply to every individual, regardless of their culture or society. Human rights are considered invariable and not amendable.

Cultural relativists, on the other side, sustain that human rights are culturally dependent and that there are no moral principles which can apply to all cultures, because each society has developed its own moral code and morality has its origins only in our own society and culture.¹⁷⁹

These are the two poles of discussion, between them there is a wide range of other interpretations and opinions. According to Wilson for example, two are the main issues at stake:

*“First, what concept of human ontology must be used, and what rights naturally extend from that view of human nature; and second, what significance should be given to the notion of “culture” in the construction of a normative moral order, and to what degree does global diversity in systems of justice undermine any basis for the universality of human rights-”*¹⁸⁰

We must say that both Universalism and Cultural Relativism can be defined as metaethical schemes, because they are not pretending to define what is wrong and what is right but to better explain the nature of morality and how it actually works, and if human beings should follow a single moral code or a variety of moral codes, each one corresponding to a different culture.

¹⁷⁹ For a more accurate definition of cultural relativism cfr Donnelly, J. (2003), pp. 89-90.

¹⁸⁰ Wilson R. A. (1997), “Human Rights, Culture and Context: An Introduction”, in Wilson Richard A, (ed), *Human Rights, Culture and Context: Anthropological Perspectives*, pp 1-27, London, Chicago: Pluto Press, p.3.

According to cultural relativists, the principles embedded in the Universal Declaration of Human Rights (1948) are only the product of Western cultural imperialism, attempting to extend the Western ideal to the rest of the world.

The formulations of human rights can be dated back to 539 BC when Cyrus the Great conquered Babylon,¹⁸¹ but a positive formulation of human rights and dignity was concretized only with the Universal Declaration of Human Rights.

Certainly, the origins of the Universal Declaration are deep-rooted in Western political history and in documents such as the Magna Carta (1215), the Petition of Right (1628), the US Constitution (1787), the French Declaration of the Rights of Man and of the Citizen (1789), and the American Bill of Rights (1791), but it was only with the UDHR that the inviolability of every human being was definitely stated.

The Universal Declaration was approved with no one single vote against but with eight abstentions. The majority of oppositions came from the Socialist bloc countries, due to the fact that they did not agree with certain parts of the Declaration.

The main problem at that time was the “*huge ideological-political East–West conflict between the United States and its Western allies on the one hand and the Socialist bloc led by the Soviet Union*” on the other hand.¹⁸²

Each side tried to express his own idea of human rights reflecting two different models of conception of the society: the capitalist model (great emphasis on individual freedoms, political and civil rights), and the socialist model (emphasis on the role of the State and on economic, social and cultural rights).

A group of non-socialist countries as well, such as Saudi Arabia and South Africa “*expressed certain doubts based on its religious and family traditions*” while South Africa “*was completely against the inclusion of economic, social and cultural rights in the Declaration.*”¹⁸³

Many articles of the Universal Declaration, especially Art.16 and Art.18, were deeply questioned by these non-Western countries, mainly because of the different role

¹⁸¹ The Cyrus Cylinder has been recognized as the world’s first Charter of human rights.

¹⁸² Oraa Oraa, J., (2009), *The Universal Declaration of Human Rights*. In Gomez Isa, F. and De Feyter, K., (eds): *International Human Rights Law in a Global Context* (pp 163-235). Deusto University Press, Bilbao, p.165.

¹⁸³ *Ibidem*.

played by religion in their society (a different vision of the role of man and women in society, a different conception of the family, of the property and so on...).¹⁸⁴

Islamic countries for example could not recognize the right to marry between a Muslim and someone of another religion, the right to change one's religion or belief, the right for women to ask for dissolution of marriage, the fundamental equality between man and women in society.

On the other side, African countries were sustaining a completely different concept of family, which did not correspond at all to the Western concept of nuclear family.¹⁸⁵

The issue was clearly evident also in the Second World Conference on Human Rights, which was held in Vienna in 1993.

One of the main objectives of this conference was to declare the universality, indivisibility and interdependence of all human rights, civil and political as well as economic, social and cultural rights.

Despite this willingness, the issue of universality of human rights was again questioned by a group of non-aligned, non-Western countries.

Islamic countries as well as a significant proportion of “third world” countries contested the theory of universality of human rights considering the UDHR of 1948 as having an exclusive Western character and wondering if it was to be considered as a new form of cultural imperialism and hegemony of the Western countries.

They were, on the contrary, staunch supporters of cultural relativism, which should consider all the different circumstances of a given society, whether religious, cultural or historical.

Cultural relativists' criticism of the universalistic approach is that it fails to take into account of social, cultural and political diversity.

¹⁸⁴ Art 16 states “the right of all men and women of full age to marry and to found a family without any limitation due to race, nationality or religion. They are entitled to equal rights as to marriage, during marriage and at its dissolution”. Art 18 states “the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance” (UDHR, 1948).

¹⁸⁵ Oraa Oraa, (2009), pp. 193-196.

The debate about universalism and cultural relativism of human rights is still quite alive and many authors nowadays consider the concept of universalism as a Western-ethnocentric concept.

Cultural relativists sustains that there is no universal moral code which applies to all cultures, because what is moral for a society must not be necessarily moral for another society. What is right in one place could be wrong in another place because morality has its origins exclusively in society and culture.

Each person is obliged to follow exclusively the rules of his own society and people from one culture should not try to import their own way of acting into another culture, because there is not such an objective criteria to judge the actions of people in a different culture.

Cultural relativists state that morality is decided only on a group level and that it is therefore an inter-subjective matter. The right moral action is what is more traditional to do in our own society and such rules only apply to the people of that society, not to everyone else. There are not universal rules as cultural relativism accept moral discrepancy between different societies, which cannot be obliged to follow our rules.

All different moral systems are equally worth, while a universal moral standard simply does not exist. It is not possible to sustain that the moral principles of a society are better or worse of those of any other society.

Universalism, on the other side, appears exactly as the opposite view because it is affirming that moral actions are not based on society or cultural diversity at all.

In the universalistic approach, moral rules transcend cultural boundaries and universally apply to everyone regardless of their society or cultural background.

In this view, when a society is following a wrong moral code, disrespecting human rights and basic dignities of people, it must be judged and necessarily needs to be changed.

In the universalistic view, like in the scientific field, there are not such subjective factors linked to culture or traditions, while morality is objective for everyone, equally applying to all traditions and all people everywhere and in every space and time.

Moral laws should apply everywhere in the same way, should be equal for everyone.

This does not mean that universalists are against cultural differences: while they may tolerate moral variations and different traditions of different cultures, they cannot deny in any case the basic fundamental rights of each individual, (such not to be killed or reduced to slavery for example), defending the liberal view by which a conception of human rights should not remain neutral on controversial questions of legitimacy and justice.

The universalistic perspective is supported by a wide range of different schools of thought, claiming that morality must be objective, and therefore universal.

For example, in the ancient Greece, Plato made a distinction between the material things, which are all imperfect and variable, and the non-material realm of the Forms, which are instead perfect and invariable. He assumed that moral truths came from the changeless Forms, which are resistant to change and human opinions.

For Plato moral truths are mathematical truths, real and objective, defining what is good and what is not, and we can judge how good is a thing by how closely it is resembling to the original Form.

The supreme form is the form of the Good, which defines goodness itself and permits impartial judgements about what is good and what is not.

In modern philosophy, Immanuel Kant sustained an universalistic conception by affirming that something can be defined as morally correct if and only if we can allow everyone in the world to do it.

Kant based essentially his morality on rationality: whatever is right must be universally right, leading to a universal morality that is the same for everyone.

We are furthermore all equal in being rational agents, and each person deserves the same treatment no matter who they are or where they live.

The religious ethics also use to share a universalistic view, firmly believing that, having God created all of us, he was also giving us the rules which all humankind must be following, independently if belonging or not to a particular religion.

Christians for example, will claim that there is a God who gave us rules, in the form of Commandments, which we are obliged to follow, whether we recognize it or not, because those commandments simply apply to all mankind, independently of their beliefs.

Religious ethics share in fact the idea of a common human nature as the basis of their universalistic view: if we have a common human nature, sharing all similar hopes, we should also act in a similar way, admitting that everyone want to be happy, respected and educated, having the fundamental right not to be killed, abused or enslaved.

Societal laws must conform everywhere in the world, to ensure collaboration and to avoid social conflict and chaos.

Human rights are actually considered as a good reason for people to justify universalism, because every human being deserve respect just for being human, having right not to be imprisoned, killed or tortured, and not be denied education or free speech, receiving appropriate help, when possible, in case of basic needs such as shelter, food or healthcare.

The presence of trans-cultural moral principles which can be found everywhere is an additional point in favor of universalism. For example, rules such as ‘do not kill’, even with differences, can be found in all societies, indicating a shared basic morality and a similar approach about the value of life.

However, universalists are usually confronted with two main difficulties which seems particularly hard to tackle: the ontological problem, referring to where do these objective moral principles come from and the epistemological one, referring to how can we have knowledge of them.

Universalists relies on the existence of a universal moral code, but they do not seem able to indicate a definitive source of objective morality.

A potential source of morality could be God, but we cannot be sure about his existence, and even if he does exist, serious problems could be raised with the idea of holding him responsible for morality. The same problems can arise with other potential sources of an objective moral code.

Since it seems not possible to definitely determine their foundation or origin, we may well assume that moral objective principles do not exist, or that they come from the society itself.

Such an assumption would give empirical support to the cultural relativism’s theory while discrediting universalism.

Another major issue with universalism is the epistemological one, which is related to our knowledge: it is in fact possible to be confronted with two or more perspectives, which appear to be all perfectly valuable.

In this case it could be difficult to determine which one of them should be the correct one. It seems in this case that we do not have such an objective standard of morality, as we only have access to opinions and points of view which are largely determined by society and culture, and therefore relative.

Even if it is challenging to precisely define what a culture is, being a complex patterns of laws, lifestyles, religions and traditions; the position of cultural relativists seems to be the one more tolerant and based on the appreciation of other cultures.

Many people furthermore support cultural relativism because of his standing against ethnocentrism and cultural imperialism, the idea that one culture can be superior to another one, and that one culture's principles can be forcibly imposed on another one.

As a matter of fact, under cultural relativism each culture can follow its own moral code, which is leading to the right rules, equally valuable and valid, while outsiders have no right to interfere and no reason to think that other cultures must be "improved" or "changed".

Such authors see the Western human rights discourse not as a dialogue but as a sort of "*monologue*"¹⁸⁶, not able to consider at the same time the complexity of our society and to recognize its alterity and plurality, without falling into a reduction to the unity, not recognizing the complementary role of *Logos* (Reason) and *Mhytos*, abstract and concrete.

This monologue is considered as "*potentially oppressive to those who do not share our values and conceptions*" and the universalistic position is criticized as leading to a "*globalized Western localism*" which "*does not permit the mutual enrichment of our culture (...) and "takes us from a logic of complementarity and of exchange to a logic of exclusion and of power."*"¹⁸⁷

¹⁸⁶ Eberhard C., (2002b), Human Rights and Intercultural Dialogue. An Anthropological Perspective. *Indian Socio-Legal Journal* 27, p.101.

¹⁸⁷ *Ibidem*.

However, the relativistic approach is not less criticized. In its absolutization of differences it leads to the same result: the impossibility of a real dialogue, the non-recognition of the *Other* and the final imposition of one's own values on the others.

Both positions can be seen as part of purely speculative debate, ending with the same negative result. For this reason, universalism and relativism can be finally considered as two sides of the same coin.

In their extreme version, they lead to the same negative result, namely the non-recognition of the *Other* and the negation of dialogue.

The “*Third Way*” proposed by some authors (Eberhard as well as Panikkar), is an alternative to both universalism and cultural relativism, is the way of a “*Dialogical Dialogue*”, a pluralistic, intercultural and interdisciplinary way, which does not mean neither a depreciation of the universal value of human rights as universal principles nor a total deconstruction of the Western approach but rather “*an enrichment of this approach through different cultural perspectives*” and the movement from “*a logic of exclusion of the contraries to a logic of complementarity of differences.*”¹⁸⁸

In the language of Raimon Panikkar, the main interdisciplinary and intercultural methodology is conceived as a “*Diatopical Heremeneutic*” based on “*Homeomorphic Equivalents*”.

To exemplify this concept Panikkar is using the metaphor of the windows. In this paradigm cultures are seen as windows: it is only through another window (another culture) that we are able to identify, recognize our own window (our own culture).

In this sense the *Other* (other cultures) is essential in order to recognize ourselves (our own culture). If then we want to communicate we need a common language, a “*mutually understandable language*”, which does not mean exactly the same language but an “*Homeomorphic Equivalent*”. This means not just a mere analogy but “*a peculiar functional equivalence discovered through a topological transformation.*”¹⁸⁹

Following this perspective, different philosophical and religious conceptions of the world can be translated into different languages, legal systems and social structures.

¹⁸⁸ Ibidem, p.116.

¹⁸⁹ Panikkar, R., (1984), Is the notion of Human Rights a Western Concept? *Interculture*, Vol.XVII, n° 1, Cahier 82, p. 164.

However, if we are willing to, we will always be able to share a common language without reducing one culture to the other, without falling into the trap of ethnocentrism and of the “*encompassing of the contrary*”¹⁹⁰, recognizing other cultures as deserving the same value of our own.

This idea of the necessity to share a mutually understandable language *has been strongly supported also by Ken Tsutsumibayashi* in his article “Fusion of Horizons or Confusion of Horizons?” where the issue of intercultural dialogue has been reformulated in terms of “*global ethic*”, “*shared moral consciousness*” and “*intercivilizational dialogue*” and the positive potential of intercultural dialogue has been discussed together with the implicit limits and risks that can be caused by an unreflective and unconscious way to approach cultural diversity and dialogue of civilizations.

First of all intercivilizational dialogue is considered as essential not only in order to prevent conflicts and the risk of a “*civilizational clash*”, but also as a fundamental tool in order to address pressing global and regional problems.¹⁹¹

The ever-increasing number of global problems highlights the ever-increasing need to find common solutions to these problems and this is a scope that can be achieved only through an enhanced global cooperation of states and non-state actors.

By “global problems” we mean problems that affect the whole of the planet, and potentially all of the people who live on it, universal problems with universal consequences.

Typical examples of global problems are the climate change and environmental degradation of the planet as well as terrorism and weapons of mass-destruction that affect the security of all human beings.

“Bottom-up approaches” and civil society participation are fundamental in the achievement of these common objectives as well as voluntary collective will. Action of actors at the civil society level seems to be much more effective than the introduction of coercive measures from above.

¹⁹⁰ Principle formulated by Louis Dumont explaining how the reference being our own values and conceptions make us to consider other’s values and conceptions as hierarchically inferior. See Eberhard, (2002), p. 108.

¹⁹¹ Tsutsumibayashi, K., (2005), Fusion of Horizons or Confusion of Horizons? Intercultural Dialogue and its risks. *Global Governance 11*, p.103.

Along the same line of Panikkar and Eberhard, Tsutsumibayashi criticizes the “*logo-centric approach*” of our Western vision for which human rights discourse is centrally related with a “*rational discourse aimed at articulating shared rational beliefs*” and is sustaining on the other side a “*fusion of horizons*” centered on a “*dialogical approach by which the interlocutors gradually come to achieve mutual understanding through the transformation or extension of their value criteria.*”¹⁹²

A fusion of horizons is therefore necessary in order for cultures and individuals to understand and better appreciate their reciprocal value and engage in a constructive dialogue.

The main scope of the dialogue would be not an assimilation or reduction of one culture to another because a constructive dialogue does not mean that the two interlocutors will become identical or that they will lose part of their identities; but only that they will be finally able to understand each other and to share a “*common ethos, a new moral vocabulary that is comprehensible by and attributable to both*”.

The main idea sustained by Tsutsumibayashi in his article is that the tension between Western and non-Western theories as regarding the universalist or relativist conception of human rights is caused not so much by the incompatibility of value systems as by “*the lack of mutual recognition and understanding of how the various moral idioms are differently organized and expressed in different cultures.*”¹⁹³

Only through this recognition of a mutual understandable language, a healthy pluralism will be possible in our multicultural society, one which will be able to preserve the universality, indivisibility and interdependence of human rights for every human being, with due respect to cultural differences.

As has been already underlined in this section, although there are many reasons to support cultural relativism, we must recognize that there are also many problems with that. From different points of view, cultural relativism can be in fact considered as a worrying moral perspective.

It is not a case in fact if the cultural perspectives towards human rights have often been used by authoritarian regimes to evade criticism of their oppressive policies, and

¹⁹² Ibidem, p. 105.

¹⁹³ Ibidem.

also as a vehicle of economic exploitation or military intervention in the name of cultural values, in order to justify or hide human rights violations.

The Dalai Lama affirms that “*it is mainly the authoritarian and totalitarian regimes who are opposed to the universality of human rights.*”¹⁹⁴

On the one side, one of the most common argument against relativism is that it can judge as good and acceptable actions and criteria which are actually evil and unacceptable.

Cultural relativists sustain in fact that what can be defined as good and correct is just what has been established and considered acceptable by our own society, while universalists will object that some actions are intrinsically evil and that cannot be considered as good, no matter if a society approves them or not.

However, even if this is the most common objection against relativism, it appears to be also the weakest, as it simply presumes that there is an objective and universal standard or moral code, presuming to define what is right and what is wrong, without being able to indicate a definitive source of objective morality.

Cultural relativists, on the other side, simply refuse any other standards and rules than the ones established by society.

A stronger objection that can be made against cultural relativism is that it eventually leads morality to become inconsistent: if moral principles are not established once for all, they are just unpredictable and they can change every moment as public opinion changes too.

This means, for example, that if a culture or society approves torture, murders or honor crimes, then such actions, which are evidently wrong, would become right and good, and it will not be possible to challenge them, just because this would be against the accepted morality. Therefore morals standards in that society would became fickle and inconsistent.

Again relativists would object that such an assumption only presumes that universal moral standards actually exist and are the same for everyone, while this has not been demonstrated and moral principles remain subject to human feelings and opinions,

¹⁹⁴ Dalai Lama (2001), “Human Rights and Universal Responsibilities”, in Patrick Hayden (ed.) pp 291-297, *The Philosophy of Human Rights*, St. Paul, Paragon House, p. 294.

which actually represents for relativists the very foundation of morality, and are changing from place to place over time.

Nonetheless, cultural relativists invoke always tolerance towards other cultures and societies as if it was an universal moral rule that everyone should follow, even when they assume that universal moral rules do not exist, and certainly this sounds as a contradiction.

They sustain that we must be tolerant and not interfere with other cultures, or try to change them, endorsing tolerance as an universal principle to be respected, but at the same time they do not admit the existence of any trans-cultural or universal principle.

However, even if relativists sustain that morality is based upon culture, they do not intend to define as morality works within a society or among different societies: they are not able to define as a society should interact with another one or what we should impose to a society to be tolerant towards another one.

In a few words cultural relativism is never pretending to dictate how a society should act, but just affirming that morality is in fact a product of culture and society, and that we should not judge other societies, based on our cultural principles and morality.

We must admit however that we are living in multicultural societies, where each society is not a single entity with a single culture: mass migration has meant that in one single city it is possible to find people from every continent, every race and every religion. There are various indigenous cultures inside one single society and we struggle indeed to find uniformity.

Cultural relativists can define as moral principles work within a society or a specific group but they are not providing any suggestions on how different groups and different cultures should behave and interact in a single society; not any concrete indications on how people from other cultures should be treated when they move from one society to another, if through assimilation or in another manner.

The main problem is that cultural relativists probably assume that all cultures are homogeneous and uniform, while this is not the case. People can belong to the same country, ethnicity and society and still share very different opinions on different arguments.

In every democratic society, they can never be forced to blindly obey and follow the customs they were raised with, while they can make their own mind based on personal beliefs, emotions and point of views.

In a few words, we could assume that, in its extreme perspective, cultural relativism could finally lead us toward subjectivism and anti-realism, basing moral principles only on personal opinions and feelings, whereby there are not real reason to follow a specific moral perspective except the one of enjoying some personal benefits in following it.

It must also be said that often the moral principles of a community do not really correspond to the public opinion of that community but to the opinions of a privileged, dominant caste (public or religious leaders for example).

Society is actually composed of many different elements such as policies, culture, religion and traditions which are difficult to balance and the only way to make a society “homogeneous” would be to impose a specific way of life.

According to Cultural Relativism the right moral principles are the ones which are approved by the tradition of own our society, while the wrong ones are the ones which are disapproved by the same society.

But for what reason should we be obliged to follow the rules of our own society, independently if we agree or not with that? Where does this obligation come from?

A possible justification could be that we are obeying the rules out of gratefulness for our home country and traditions. Another possible justification can be identified on the Social Contract Theory.

According to Thomas Hobbes, for example, we need to follow specific rules in our society because we have tacitly signed a social contract and because with no rules life in society would simply be impossible. Therefore we must follow rules because it is actually in our interest to do so: following rules in our society allows us to keep our lives safe and be granted protection.

Still there is no reason why a person should be obliged to follow a rule imposed by society, even when he does not want to.

We should therefore try to understand whether it is possible to find a compromise in a medium position which could be the pluralistic one.

In a pluralistic system in fact, many different moral codes and rules can coexist, as far as there is a core of minimum moral standards which must be met.

Such minimum moral standards, we may call them fundamental human rights, must be common to all cultures and societies, eventually reinforcing the idea of a number of trans-cultural moral principles which are directly linked with the notion of an universal human nature, no matter which society or culture does human individuals come from.

IV.2 Multiculturalism and Human Rights: an Anthropology of Law's Perspective.

"Tell me how you conceive the world and I will tell you how you conceive Law" (*"Dis-moi comment tu penses le monde, et je te dirai comment tu penses le Droit"*), said one of founding fathers and main representatives of French legal anthropology, Michel Alliot.¹⁹⁵

What questions does this statement raise about the theory and practice of human rights? What are the limits and the potentials of intercultural dialogue in addressing these questions?

At least since 1960, French legal anthropologists are looking for a “non-ethnocentric”, intercultural definition of law which can eventually break with the “*evolutionist and ethnocentric prejudices of the preceding era*”, allowing for a considerable progress in anthropological and epistemological research.

Colonialism had indeed brought in the past century “*a period of considerable ethnocentrism in law*” where “*the principle of assimilation went hand in hand with a lack of understanding of indigenous legal practices, and with the emphasis on Western law in general, and Napoleonic law in particular.*”¹⁹⁶

It seems to be paramount in our “globalised society” to re-think a concept of modernity and law, which does not exclusively correspond to our own Western idea of law, state, and modernity.

In this respect the contribution of anthropology of law can be considered as essential, especially if we are considering the phenomenon of globalisation as not only an economic one but as a multi-dimensional and multifaceted process that encompass the political, economic, social and cultural dimensions.

In his article “Human Rights and Intercultural Dialogue. An Anthropological Perspective”, Eberhard defines the role of the anthropologist of law as “*in between*” and denounces the failure of the Western tendency to promote and transfer a Western model of law, state, sovereignty and democracy, worldwide.

¹⁹⁵ Alliot, M., (1989), *La Méditerranée et le Droit. Bulletin de Liaison du Laboratoire d'Anthropologie Juridique de Paris*, n° 15, p.31.

¹⁹⁶ Rouland, N., (1994), *Legal Anthropology*, Continuum International Publishing Group, p.88-90.

The anthropologist of law can be considered for Eberhard as “*in between*”, meaning between the “*top-down approach*” of law considered as a “*modern tradition associated with reason*” which categories and solutions “*seem universal and ready to be applied everywhere*”; and the “*bottom-up*” perspective of the anthropologist of law, which tries to understand “*how things are*”, starting from the “*grass roots perspectives*” and the indigenous experiences and thus avoiding an “*exotic construction of the other, freezing him/her in a faraway space or time.*”¹⁹⁷

Alliot’s definition of law as the “*the struggling and the consensus on the outcomes of the struggling in the domains a society consider as being vital*”¹⁹⁸, as well as other anthropologic definitions of law, are all trying to avoid an abstract conception of law as a general set of rules universally applicable everywhere.

Law, for French anthropologists, must be rethought in more pluralistic and complex terms, taking into account not only theories but also practices of actors, especially in non-Western contexts.

Taking into account this perspective and the fact that different societies have and have the right to have different cosmovisions, Alliot elaborates his theory of “*legal archetypes*”.

Three different archetypes are identified: the Chinese archetype or the “*Archetype of Identification*”, the African archetype or the “*Archetype of Differentiation/Manipulation*”, and finally the Western archetype or the “*Archetype of Submission.*”¹⁹⁹

The latter archetype reflects the general cosmovision of our Western, especially Christian society, in which the world is seen as being created by an external power imposing universal norms and rules from the outside.

The external power in this case is God but it can be considered also as his “*secularized avatar, the State.*”²⁰⁰ The State is in this model represented as a rationalized version of God.

¹⁹⁷ Eberhard C., (2002b), Human Rights and Intercultural Dialogue. An Anthropological Perspective. *Indian Socio-Legal Journal* 27, pp. 104-105.

¹⁹⁸ Alliot, Michel, (1983), Anthropologie et Juristique. Sur les conditions de l’élaboration d’une science du droit. *Bulletin de Liaison du Laboratoire d’Anthropologie Juridique de Paris n° 6*, 83-117.

¹⁹⁹ Ibidem, pp. 83-117.

²⁰⁰ Eberhard C., (2002b), Human Rights and Intercultural Dialogue. An Anthropological Perspective. *Indian Socio-Legal Journal* 27, p.115.

In any case the emphasis is on the fact that our rules and laws are “universal” just because they come from a superior order and authority. The negative results of this archetype are for Alliot the consequent reduction of responsibilities of the society, the exclusion of the differences and the complete submission of the citizens to the laws of the State (or to the laws of God).

The second archetype, the African one, is centered in the concept of differentiation/manipulation and reflects the African vision of the world and of a society based mainly on “*animist*” traditions. The African concept of the world results, following Alliot’s discourse, as completely opposite to the Western/submission one.

Whereas in the Western tradition the origin of the world is to be found in the original God’s creation of the world, for the animist African societies there is not such a God creator because everything in the world basically derives from Chaos and from a circulation of different vital energies (*anima*). These energies in their corresponding interactions move towards the harmony and the equilibrium of the whole.

Therefore as the Western archetype finally leads to a reduction in responsibilities for the society and to an attribution of the total responsibility and superiority to the State/God; the African people are perceived as totally responsible for the harmony of the society and of the whole. General immutable rules are rejected and people consider themselves responsible for their future.

Finally the Chinese Archetype is the “*Archetype of Identification*”, illustrating another cosmovision with different consequences for the society that belongs to it.

Also in this case the world seems not to be limited by any rule or external law coming from the outside. Neither can the world be defined as dominated by the chaos, the unstable and the unorganized as in the African case.

In the case of the Chinese cosmovision the world is regulated spontaneously by itself and the individual has to self-regulate him/herself as a part of this world and of this cosmic harmony. The Chinese and especially the Confucian ideal is “*an ideal of self-improvement possible through education and self-discipline guided by the observance of the rites.*”²⁰¹

²⁰¹ Eberhard C., (2002b), Human Rights and Intercultural Dialogue. An Anthropological Perspective. *Indian Socio-Legal Journal* 27, p.113.

Anthropology of law therefore explicitly invites us to rethink the law from a pluralist and multilegal perspective and to open up the Western anthropocentric view.

We are eventually invited to “*recognize that our questions on human rights and the rule of law take a very different turn when it is not the Man, but the Cosmic or the Divine that plays the central structuring principle of worldview.*”²⁰²

In contemporary philosophy, Ludwig Wittgenstein, and especially the “later Wittgenstein”, can be considered as one of the main sources of inspiration as concerning the discourse on the cultural value of communication and language.²⁰³

His ideas of “form/s of life” (*Lebensform/en*), “language-games” (*Sprachspiel*), “family resemblance” (*Familienähnlichkeit*), “perspicuous representation” (*Übersichtliche Darstellung*), represent an important contribution to the current debate on language use and inter-cultural communication.

Wittgenstein’s thought assumes indeed an important significance in the *querelle* concerning the dichotomy between universalism and cultural relativism, when talking about the possibility (or impossibility) of cross-cultural understanding and dialogue, about the singularity or plurality of form(s) of life.²⁰⁴

Even though Wittgenstein does not seem to provide any straightforward and consistent definition of the term “form(s) of life”²⁰⁵, the interest demonstrated in his writings concerning the issue of Alterity and *Fremdheit* (foreignness) is clear and unmistakable.

Even if Wittgenstein is not trying to develop any specific theory or model for anthropologists and ethnologists, what we may call the Wittgensteinian intercultural, anthropological perspective, his “ethnological approach” to philosophy and in particular his harsh criticism on Frazer’s causal approach to ethnology, has an essential role in

²⁰² Ibidem, p.116.

²⁰³ Cfr. Nordby, H. (2008), Values, Cultural Identity and Communication: A Perspective From Philosophy of Language, *Journal of Intercultural Communication*, ISSN 1404-1634, issue 17.

²⁰⁴ Thompson J. M., (2010), Form(s)-of-Life and the Possibility of the Other: Remarks on the Encounter of Alterity” in Form(s) of Life and the Nature of Experience, in Marques, A. / Venturinha, N. (eds), *Wittgenstein on Forms of Life and the Nature of Experience* (Lisbon Philosophical Studies), Peter Lang; 1 edition, p. 98.

²⁰⁵ Indeed the absence of a clear and positive definition of terms and concepts is something common in Wittgenstein’s philosophical thought and an important aspect characterizing his approach to philosophical problems.

understanding the influence of *our own* language and culture on the explanation and perception of other cultures and values.²⁰⁶

In his *Remarks on Frazer's Golden Bough* (hereafter RFGB), Wittgenstein wrote:

"Frazer is much more savage than most of his 'savages' [since] his explanations of [their] observances are much cruder than the sense of the observances themselves".²⁰⁷

According to him, the main mistake committed by Frazer, in his classic anthropological work *The Golden Bough*, was the one of considering ritual practices in scientific or rationalistic terms, disregarding their profound and symbolic dimension.

It is a mistake, according to Wittgenstein, trying to give an explanation to the potent emotions evoked by traditional rituals by searching for their causal origins in history or prehistory.

We should instead try to understand the troubling nature of such practices by referring to the inner meaning they already have in our lives. Scientific and causal justifications are necessarily limited when it comes to lightening many of our fundamental perplexities in the area of philosophy and of anthropology as well.

The Wittgensteinian intercultural perspective is considered essential also in the perspective of recognizing the fundamental value of dialogue for an authentic recognition of the *Other*.

Such recognition is not an assimilation or reduction of one culture to another, but a recognition of the fact that there is actually no cultural identity completely isolated, but rather an interconnection of different identities showing "family resemblances" (*Familienähnlichkeit*), allowing for a comparison and an understanding of other cultures which is not dissolving but respecting the differences.²⁰⁸

²⁰⁶ Cfr. Marques A. (2010), *Forms of life: Between the Given and the Thought Experiment*, in Marques, A. / Venturinha, N. (eds), *Wittgenstein on Forms of Life and the Nature of Experience* (Lisbon Philosophical Studies), (pp. 143-154) Peter Lang, p. 147. See also Durt, C., (2007), *Wittgenstein's Ethnological Approach to Philosophy*. In Kanzian, C. and Runggaldier E., *Cultures - Conflict - Analysis - Dialogue: Proceedings of the 29th International Ludwig Wittgenstein-Symposium in Kirchberg*.

²⁰⁷ Wittgenstein, L., (1987), *Remarks on Frazer's Golden Bough*, Brynmill Press Ltd. (first published 1967).

²⁰⁸ Sbisà M., (2006), *Against cultural identity: a family resemblance perspective on intercultural relations*, in Kanzian, C. and Runggaldier E., *Cultures - Conflict - Analysis - Dialogue: Proceedings of the 29th International Ludwig Wittgenstein-Symposium in Kirchberg*, pp. 295-297, and Durt, C., (2007), *Wittgenstein's Ethnological Approach to Philosophy*. In Kanzian, C. and Runggaldier E., *Cultures - Conflict - Analysis - Dialogue: Proceedings of the 29th International Ludwig Wittgenstein-Symposium in Kirchberg*, p. 53.

More than learning or pretending to teach something about other cultures' customs and rites, Wittgenstein appears interested in methodological clarity (cfr. *Übersichtliche Darstellung*), understanding the influence of *our own* language and culture on the comprehension of other cultures and languages, of other "forms of life".

Understanding other cultures and concepts can be in fact first of all useful in order to enhance the clarity on *our own* culture and concepts, even when this process is not a simple one, even if does not mean an elimination of the *tension* in the relationship with the Other.

Our experience of the *Other* is not in fact "*neither an object to be described, nor a static situation involving distinct elements, but rather a relational disruption.*"²⁰⁹

The *intransparency* of another person's thoughts reflects as in a mirror the foreignness of another peoples' culture and tradition.²¹⁰

The task of philosophy is however for Wittgenstein not to solve scientific, empirical problems but to clarify concepts, to "*do away with all explanation*", for "*description alone to take place*" (PI § 109).

In order to better clarify our culture and concepts it is furthermore essential to clarify the way they are used in specific contexts, their significance and function.

To understand the meaning and function of a specific custom or belief we must situate it in the specific context where it is practised, in the same way as, in order to understand the meaning and function of words and sentences, it is necessary to see how they are ordinarily used.

The Wittgensteinian critique of the causal approach in ethnology appears therefore "*mirrored in his critique of positivistic approaches to philosophy.*"²¹¹

As highlighted by Wittgenstein himself in his *Philosophical Investigations*:

"*A main source of our failure to understand is that we do not command a clear*

²⁰⁹ Thompson J. M., (2010), Form(s)-of-Life and the Possibility of the Other: Remarks on the Encounter of Alterity" in Form(s) of Life and the Nature of Experience, in Marques, A. / Venturinha, N. (eds), *Wittgenstein on Forms of Life and the Nature of Experience* (Lisbon Philosophical Studies), Peter Lang, p. 109.

²¹⁰ Thompson J. M., (2006), The Significance of Interculturality for the Problem of (In)Transparency, in Kanzian, C. and Runggaldier E., *Cultures - Conflict - Analysis - Dialogue: Proceedings of the 29th International Ludwig Wittgenstein-Symposium in Kirchberg*, p.351.

²¹¹ Durt, C., (2007), Wittgenstein's Ethnological Approach to Philosophy. In Kanzian, C. and Runggaldier E., *Cultures - Conflict - Analysis - Dialogue: Proceedings of the 29th International Ludwig Wittgenstein-Symposium in Kirchberg*, p.50.

view of the use of our words —Our grammar is lacking in this sort of perspicuity. A perspicuous representation produces just that understanding which consists in "seeing the connections." Hence the importance of finding and inventing intermediate cases. The concept of a perspicuous representation is of fundamental significance for us. It earmarks the form of account we give, the way we look at things. (Is this a "Weltanschauung"?)"(PI §122)

The same concept is reaffirmed in his *Remarks on Frazer's Golden Bough*:

"The concept of perspicuous representation is of fundamental importance for us. It denotes the form of our representation, the way we see things. (A kind of 'World-view' as it is apparently typical of our time. Spengler.)" (RFGB, *Philosophical Occasions*: 133)

"This perspicuous representation brings about the understanding, which consists precisely in the fact that we "see the connections". Hence the importance of finding connecting links. But an hypothetical connecting link should in this case do nothing but direct the attention to the similarity, the relatedness, of the facts. As one might illustrate an internal relation of a circle to an ellipse by gradually converting an ellipse into a circle; but not in order to assert that a certain ellipse actually, historically, had originated from a circle (evolutionary hypothesis), but only in order to sharpen our eye for a formal connection. But I can also see the evolutionary hypothesis as nothing more, as the clothing of a formal connection." (RFGB, *Philosophical Occasions*: 133)

Wittgenstein's criticism is harsh: he describes Frazer as owing a "narrow spiritual life" in his impossibility to "conceive of a life different from that of the England of his time" (RFGB, 125), he accuses him of basing his reasoning not on scientific proves and explanations as he sustains, but rather on subjective biases and simple prejudices (RFGB, 125), revealing himself "much more savage than most of his savages, for they are not as far removed from the understanding of a spiritual matter as a twenty-century English man" (RFGB, 131).

In his *Remarks on Frazer's Golden Bough*, Wittgenstein criticizes Frazer's causal, evolutionary, positivistic approach to ethnology, his failed attempt to explain certain human practices and *facts* by means of causal hypotheses regarding their origin.

Wittgenstein does not believe in substance that an empirical approach or an evolutionary theory (from the most primitive habits to the most developed ones) can be applied to ethnology.

Frazer's explanations of human practices are not really satisfying in Wittgenstein's view because their meaning and function, as well as the impression they cause on us, is not due to any hypothesis about their origins and do not follow any evolutionary scheme

of progress (from “magic” to “science”, for example).

The ethnological approach is seen by Wittgenstein as in open contrast and contradiction with the causal approach adopted by Frazer, which is considered as misleading because it suggests a description as it was the only possible one, while excluding in principle the possibility of other descriptions²¹², analysing facts as they *should* or *are supposed to be* and not as they actually *are*.

This does not mean that the origin is irrelevant but only that the customs might respond to different purposes in different times, or might not even have any special purpose at all, and that the individuation of their original cause may not help in understanding their effective meaning and function.²¹³

Wittgenstein seems therefore to suggest that an ethnological approach would be more essential to philosophy than a causal one, allowing for seeing things more objectively, defending “*the possibility of a human form of life that is against any mythology whatsoever.*”²¹⁴

In Wittgenstein’s opinion it is eventually possible to achieve a better comprehension of human practices and customs through a “perspicuous representation” (*Übersichtliche Darstellung*): an understanding of facts, which does not aim to explain phenomena via hypotheses and causal explanations but offers a methodology of comparisons, allowing “*to see the connections*” between the facts of different phenomena.

Perspicuous representation would then represent a method allowing for seeing “family resemblances”, not as just simple, superficial enumerations of connections, but as connections that are meaningful to us (cfr. Panikkar’s concept of “*Homeomorphic Equivalent*”).

Such a method will not allow for a definitive explanation of phenomena and practices but will enable us to better see how they relate to each other.

I consider this understanding of *forms of life*, which can be comprehended only by “seeing connections”, “family resemblances”, individuating specific “language

²¹² Durt, C., (2007), Wittgenstein’s Ethnological Approach to Philosophy. In Kanzian, C. and Runggaldier E., *Cultures - Conflict - Analysis - Dialogue: Proceedings of the 29th International Ludwig Wittgenstein-Symposium in Kirchberg*, p.43.

²¹³ Ibidem, p.46

²¹⁴ Marques A. (2010), Forms of life: Between the Given and the Thought Experiment, in Marques, A. / Venturinha, N. (eds), *Wittgenstein on Forms of Life and the Nature of Experience* (Lisbon Philosophical Studies), (pp. 143-154) Peter Lang, p. 146.

games” through a “perspicuous representation”, as very close to the view of the authors previously considered, as well as denoting a positive attitude towards a concept of intercultural dialogue which is not based neither in misinterpretations nor on a logocentric, ethnocentric approach to other cultures and believes; representing in the last instance an “*implied critique of the relentless pursuit of the final or ultimate ground in Reason.*”²¹⁵

The experience of the *Other*, which is always an experience of tension and disruption, is finally not necessarily to be found outside, in exotic and faraway lands but inside our own culture and “*even within ourselves*”²¹⁶ and does not allow for definitive solutions, being a permanent paradox, a tension with which we must simply coexist in an always renewing effort to understand the *Other*.

As it has been underlined throughout this chapter, only an interdisciplinary approach to societies and cultures should be considered as a truly intercultural approach and should be the general perspective to follow when approaching different kinds of societies, mentalities and legal systems.

It is very important to be aware of the possible risks involved in certain attempts, especially from certain groups, to politically manipulate cultural contents of a nation or society, as for example in the case of a strong nationalism, when cultural comparison is only used to enhance a national sense of cultural superiority, setting criteria for inclusion and for exclusion which finally lead to a clear discrimination of certain groups of the society.

In this era of globalization, economic as well as social, political and cultural globalization, Western societies are experiencing major economic, social and cultural challenges.

One of the biggest challenges to face is a new multiethnic and pluralistic society and the main purpose of intercultural dialogue should be promoting a model of integration that does not include assimilation and permits a mutual cooperation, understanding and enrichment of different cultures in the same environment.

²¹⁵ Thompson J. M., (2010), Form(s)-of-Life and the Possibility of the Other: Remarks on the Encounter of Alterity" in Form(s) of Life and the Nature of Experience, in Marques, A. / Venturinha, N. (eds), *Wittgenstein on Forms of Life and the Nature of Experience* (Lisbon Philosophical Studies), Peter Lang, p. 111.

²¹⁶ *Ibidem*.

This is nowadays essential for a pacific cohabitation of people and cultures and for the realization of a real mutual enrichment through the dialogue between different cultures and traditions. The anthropological perspective of the authors here analyzed may be useful for a clearer understanding of these issues.

PART V

Chapter 4 Universal Rights and/or Minority Rights? Towards a New Model of Integration.

V. Universal Rights and/or Minority Rights? Individual Rights vs Group's Rights.

The period immediately after the First World War in Europe was characterised by a strong interest of the states in the protection of minorities rights, especially considered in their link with the maintenance of global peace and security and in the framework of a strategy aiming at preventing conflicts.²¹⁷

The main area of activity of the League of Nations, together with the Permanent Court of International Justice, was in fact the protection of minorities in certain countries. It consisted of a system of special minorities provisions and/or bilateral treaties, which the defeated states were compelled to sign.²¹⁸

The League of Nations was therefore trying to protect not only the individual rights of the members of minorities but also their group rights to exist as cultural, religious and linguistic entities against assimilation tendencies.²¹⁹

The protection of minority rights then led directly to the development of the universal system of protection of human rights.

As underlined by Paul Sieghart in his book *The Lawful Rights of Mankind* “*all human rights exist for the protection of minorities*”²²⁰, and history highlights how

²¹⁷ In 1914, in fact, the problems of minorities in South-East Europe proved to be one of the major triggers of the First World War, the immediate cause of which having been the assassination of the Archduke Franz Ferdinand and Austria–Hungary’s declaration of war on Serbia, linked to Austria’s inability to address the claims of the Serbian minority in Bosnia. Cfr. Minority Rights Group International (MRGI), (2007), *Minority Rights: The Key to Conflict Prevention*, by Clive Baldwin, Chris Chapman and Zoë Gray., p.4.

²¹⁸ The League of Nations (LON) was an inter-governmental organisation founded as a result of the Treaty of Versailles in 1919–1920, and the precursor to the United Nations. The League's primary goals as stated in its Covenant included preventing war through collective security, disarmament, and settling international disputes through negotiation and arbitration. Other goals in this and related treaties included labour conditions, just treatment of native inhabitants, trafficking in persons and drugs, arms trade, global health, prisoners of war, and *protection of minorities in Europe*. See Article 23, The Covenant of the League of Nations.

²¹⁹ Schechtman, J. B. (1951), “Decline of the International Protection of Minority Rights”, in *The Western Political Quarterly*, Vol. 4, No. 1, p. 2.

²²⁰ Cfr. Sieghart, P., (1986), *The Lawful Rights of Mankind—An Introduction to the International Legal Code of Human Rights*. Oxford University Press.

minority rights are not a marginal human rights question, solely of concern of the individual or group involved, but a question of concern for the society as a whole.

The post-Second World War period however, has been characterised by a general more “*cautious approach to minority rights*” and by “*a reluctance to agree on a definition of minorities.*”²²¹

It was a period characterised by the failure of the League system, which demonstrates inadequate in solving the issue of minorities in Europe; due to the rise of the universal system of protection of human rights and to the triumph of the concept of Nation-State.

The international human rights system appeared therefore with the establishment of the UN in 1945. At that time the general approach that prevailed was essentially against the recognition of minority rights, even though UN proclaimed the rights of minorities as a matter of international concern.

The dominant view was that individual human rights were enough to provide for the interests of minorities as well. It was assumed that through the general non-discrimination principle and the principle of equality before the law, individuals belonging to a minority could be sufficiently protected.

Minority rights were considered as “*running counter to the aspiration of international human rights law to protect universal, not contingent, features of human identity.*”²²²

While considering the assumption that linguistic, religious and cultural affiliations are essential features of what it means to be a human being, they were also believed to “*possess the capacity to divide people into different communities, create insiders and outsiders, put ethnicity against ethnicity, and threaten the universal aspirations.*”²²³

The attention was therefore focused on policies of equality for all citizens indifferent to any specific group’s membership.

The apprehension of state actors as well as the resentment of majorities in regard to minorities allegedly having a privileged position, was in this way overcome by

²²¹ Vijapur, A. P. (2006), “International Protection of Minority Rights”, in *International Studies*, vol. 43, p.367.

²²² Macklem, P., (2008), “Minority rights in international law”, in *International Journal of Constitutional Law*, Oxford Journals, Oxford University Press, Vol. 6, n° 3-4, p.533.

²²³ Ibidem, p. 532.

conferring equal human rights to each individual regardless of his/her affiliation to a specific group.

Consequently, during the post-World War II period, the emphasis was almost exclusively on individual rights and only by the end of the cold war in the late 1980s, the need for a more tailored approach to minorities, in addition to the recognition of individual human rights, was recognized under international human rights law.

This acknowledgment was mainly driven by a series of violent and serious ethnic conflicts, which have been dramatically characterizing the post-cold War period, and have prompted international law to develop mechanisms to respond to these issues, reconsidering the international law's position on minority rights and the urgency of developing the necessary framework for resolving such conflicts.²²⁴

It became obvious that one of the main reasons for present and past ethnic conflicts worldwide was the low participation level of minorities in the power-sharing and decision-making process of their countries and that “*besides according them legal protection and practicing tolerance towards them, peace is not possible in these multi-ethnic states.*”²²⁵

As underlined by Vijapur, among others, in its article *International Protection of Minority Rights*, shortcomings in the international protection of minority rights are mainly due to “*the apprehension of state actors fearing that the abuse of the right to self-determination and the rights of indigenous people will endanger the existing socio-political order.*”²²⁶

Various scholars recognize that States are refusing to take minority rights seriously because they are afraid that it would encourage outside interference, threaten the cohesion of the State and discriminate against majorities and the rights of individuals.

²²⁴ Ethnic based conflicts in the 20th century ranged from those involving Jews as well as Roma people with their attempted extermination by the Nazi regime during World War II, to the diverse racial groups in South Africa and Namibia, longstanding tensions between Catholics and Protestants in Northern Ireland, genocidal fighting between Hutus and Tutsis in Rwanda and Burundi, violence in Basque region and Algeria, separatist movements in Quebec, Senegal, Kurd and East Timor and civil wars in the Balkans, Sudan, DRC and Cote d'Ivoire. UN reported that in the first half of the 1990s alone, nearly five millions of people died as a result of civil wars and ethnic conflicts. For a detailed analysis of ethnic based conflicts in the 20th century see: Gurr, T.R (2000), *People versus States: Minorities at Risk in the New Century*, Washington, D.C.: United States Institute of Peace.

²²⁵ Vijapur, A. P. (2006), p.368.

²²⁶ Ibidem, p. 367.

The last two hundred years of European political history, have in fact witnessed the formation and the legitimization of Nation-States which have “*a tendency to become “ethnic states”*”, that is to say “*States which belong to an ethnic majority*”.²²⁷

The process of nation building and legitimization of Nation-States went through the idea of “state unity”, which was often put into practice through a policy of socio-cultural homogenization and forced integration of the population of a state.

Such policy has been frequently imposed by hegemonic political elites in order to subordinate social groups which were considered as “dangerous” or socially marginal.

The tension between the homogenisation processes of the nation-state and the reality of ethnic diversity was then expressed in terms of the problem of minorities.

Thus the new international system created after 1945, even providing a good framework for democratic changes in many parts of the world, “*by denying any legitimate space to group claims, simultaneously offered a framework legitimating the pursuit of homogeneity and suppression of diversity.*”²²⁸

Diversity has been perceived as “*an obstacle and a threat not only to achieve homogeneity but also to the achievement of equal rights by all without regard to their group membership*”.²²⁹

This “national culture” appears in contrast and sometimes violent competition with “aliens” and “strangers” and eventually “*those people and groups who are less successful in creating their own nation-state and who are incorporated into the nation-states of other people become “ethnic” or “national minorities.*”²³⁰

Groups which are not able, not successful or maybe not willing, to create their own nation-state are subjected to rejection or assimilation policies which mainly result in a complete denial of their identity.

Roma people, for example, as well as other marginalized people, could be considered as one of these groups, not able, not successful or maybe not willing, to create

²²⁷ Gheorghe N and Acton T. (1994), “Dealing with Multiculturalism: Minority, Ethnic, National and Human Rights”, in *ODIHR Bulletin* no.2 , vol.3, p.29

²²⁸ Dersso, S. (2007), “Minority Rights under International Human Rights Law: From Liberal Individualism to Multiculturalism and Beyond”, Paper presented at the annual meeting of the *The Law and Society Association*, TBA, Berlin, Germany, p.10.

²²⁹ Ibidem.

²³⁰ Gheorghe N and Acton T. (1994), p.29.

their own nation-state and, for this reason, subjected in different times in history to rejection or assimilation policies throughout all of Europe.

Such policies mainly resulted in a complete denial of those people's identity, as a group and as individuals as well, an almost complete denial of their human rights as well as the rejection of their culture, language and lifestyle, of their specific ethnic, linguistic and cultural roots and values.

As concerning the official definition of minority, although individual scholars have attempted a number of definitions, "*a universally agreed-upon definition of "minority" still does not exist today.*"²³¹

As underlined by Schechtman in his article *Decline of the International Protection of Minority Rights*:

*"This lack of progress is, however, hardly the result of lack of good will on the part of the Sub-Commission. It reflects the general deep reluctance on the part of the United Nations to revive, even in a revised and "softened" form, any positive system destined to perpetuate the distinctive group existence of the minorities and to establish an international legal machinery for enforcing this system. While willing and ready to take measures securing prevention of discrimination against individual members of minority groups and even paying lip service to the principle of collective minority rights, the major powers in the United Nations have consistently avoided any definite commitments in this field."*²³²

However, of all the definitions suggested the one given by Francesco Capotorti in the UN Study on Minorities in 1991, is the more cited and accepted:

*"A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language."*²³³

Notwithstanding the absence of a universally agreed-upon definition of "minority" and of an international legally binding treaty on minorities' protection, the international community now recognizes that:

²³¹ Vijapur A. P., (2006), p. 371.

²³² Schechtman, J. B. (1951), p.8.

²³³ Capotorti, F.,(1991), *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, Geneva: United Nations Centre for Human Rights, p.96.

*“It is not sufficient merely to ensure that there is no discrimination against minorities. Special measures are essential to protect and promote the rights of minorities, particularly those necessary for minorities to preserve their identity and culture. Only over the past decade has the international community taken such measures. These include the adoption of the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Minorities Declaration) in 1992, and the subsequent creation of the UN Sub-Commission Working Group on Minorities.”*²³⁴

The importance of supplementing individual human rights mechanisms with minority rights has been recognised to some extent also by the European system of protection of human rights.

It has been proven in fact that individual rights violations have arisen from the rejection of collective rights,²³⁵ that is why the latter should be regarded as a supplement.

The protection of human rights in general and of minority rights in particular is necessary to promote international and regional security and to prevent ethnic conflicts and tensions and the terms “minority rights” and “human rights” should be considered as complementary and not contradictory.

Positive obligations of the states along with negative obligations, non-interference, protection of individual as well as collective rights, should be considered for the safeguard of minorities.

This is even more necessary nowadays when we are experiencing a change in model of our society switching from the old concept of Nation-State to societies that are always more multi-ethnic.

The issue of minority rights becomes fundamental to preserve the stability and prosperity of the multi-religious/multicultural modern nation-states system.

That is the reason why, as underlined by Dersso in its article *Minority Rights under International Human Rights Law: From Liberal Individualism to Multiculturalism and Beyond*, a new “multicultural conception of minority rights” is now necessary, namely a

²³⁴ UN Guide for Minorities, Pamphlet No. 2, “Minorities and the United Nations: the UN Working Group on Minorities”, p.1.

²³⁵ O’Nions, Helen, (2007), *Minority Rights Protection in International Law: The Roma of Europe*, (Research in Migration and Ethnic Relations), Hampshire: Ashgate Publishing Limited, p. 33.

new conception of a modern multi-ethnic state composed of different overlapping ethnic groups and opposite to the classical concept of nation-state.²³⁶

Collective rights as well as liberal individual rights and entitlements are necessary, that is to say not only a general negative principle of non-discrimination against minorities but also positive actions in order to guarantee them with full participation in social life and political decision-making, a recognition of minority cultures through institutions and symbols of the state and a more equilibrate distribution of resources.

The thesis is that, since we are living in a time of multiculturalism and globalization where largely homogenous societies are becoming ethnically diverse; a new, inclusive definition of national identity is required, which recognise this change in Western states and the diversity of multi-ethnic societies, which recognises members of minorities as an integral part of the whole and not as simply “others” or inside-outsiders.

Such measures are necessary for the benefit of the whole society in order to effectively resolve ethnonational conflicts and issues of political power distribution.

²³⁶Dersso, (2007), p. 10.

V.1 The International System of Protection of Minorities Rights. The Example of Roma/Gypsies' People.

V.1.1 Minority Rights Protection at UN level.

The UN Commission on Human Rights²³⁷ at its first session appointed a special “Sub Commission on Prevention of Discrimination and the Protection of Minorities”.²³⁸

The Sub Commission was working on a formulation of a definition of minorities while considering a draft Declaration on Minorities, but after fifteen years of discussions the Members decided not to include any definition and up to now no effort has been made towards a comprehensive legally binding minority convention at the UN level.

Notwithstanding the issue of minorities protection was significantly discussed during the drafting process, the draft text for Article 31 of the Universal Declaration of Human Rights (UDHR), was not included in the declaration.²³⁹

All that the General Assembly of the UN managed to do at that time was to transfer the matter of minorities to the Sub Commission on Prevention of Discrimination and Protection of Minorities in order to undertake “*a thorough study of the problem of minorities.*”²⁴⁰

Even though the proposed draft of the declaration enshrined rights of minorities to their own religious, educational and cultural institutions as well as minority language protection, these provisions were omitted from the final version adopted by the General Assembly.

²³⁷ Known as Human Rights Council since 2006.

²³⁸ The “Sub-Commission on Prevention of Discrimination and Protection of Minorities” was first formed in 1947. It was the main subsidiary body of the Commission on Human Rights. It was composed of twenty-six experts whose responsibility was “to undertake studies, particularly in light of the Universal Declaration of Human Rights, and make recommendations to the Commission concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms and the protection of racial, national, religious and linguistic minorities”. It was renamed, after 1999, “Sub Commission on the Promotion and Protection of Human Rights”. A brief history of the Sub-Commission is contained in U.N. Doc. E/CN.4/Sub.2/2, September 1947; also United Nations Yearbook of Human Rights, Lake Success, 1947, p. 425.

²³⁹ Draft Article 31: “In States inhabited by well-defined ethnic, linguistic or religious groups which are clearly distinguished from the rest of the population, and which want to be accorded differential treatment, persons belonging to such groups shall have the right, as far as is compatible with public order and security, to establish and maintain their schools and cultural or religious institutions, and to use their own language in script, in the press, in public assembly and before the courts and other authorities of the State, if they so choose”. (E/CN.4/52).

²⁴⁰UN, G.A. Res.217C (III), U.N. Doc. A/810 (Dec. 12, 1948), “The Fate of Minorities”.

In the end all its thirty articles do not contain any special mention of minorities and their rights. Almost every right in the UDHR is in fact expressed as an individual right even though the Declaration does have some collective features and individuals have the right to participate in some collective activities: Article 16 gives families the right to protection by society and the State, Article 20 states the right to freedom of assembly and association, Article 21 establishes the “will of the people” as the basis of authority of government, Article 26 gives parents the right to choose the kind of education that shall be given to their children while Article 27 affirms the right to participate in the cultural life of a community.

The UDHR furthermore expanded the principle of non-discrimination enunciated under the Charter of the UN. Accordingly, its Article 2 proclaims:

*“Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty”.*²⁴¹

Prior to the proclamation of the UDHR in 1948, the Convention on the Prevention and Punishment of Genocide was adopted during the same year. Article 2 of this Convention defines “genocide” as “acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such.”²⁴²

The Convention can be said to cover physical, biological and cultural genocide but does not, though, states categorically that a group has the right to exist, as it formulates the norm in negative connotation, *i.e.*, the prohibition of the destruction of a group.

However, in international law the “right to exist as a group” is generally inferred from this “prohibition of genocide.”²⁴³ Furthermore, the term “genocide” does not encompass only the total destruction of a group but extends to the infliction of “serious bodily or mental harm” and “the deliberate infliction of conditions of life calculated to bring about the physical destruction of all or part of a group.”²⁴⁴

²⁴¹UN General Assembly, *The Universal Declaration of Human Rights* (UDHR), 1948.

²⁴² UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 1948, United Nations, Treaty Series, vol. 78,, Art. 2.

²⁴³ Galenkamp, M., (1991), “Collective Rights: Much Ado about Nothing”, in *NQHR*, no.3, pp.53-55.

²⁴⁴ Measures such as “preventing births within a group and the forcible deportation of a group’s children” also fall under this definition. See Galenkamp, (1991), p. 55.

The greatest weakness of the Genocide Convention, however, is the complete absence of any enforcement provision.²⁴⁵

On the other side Article 27 of the International Covenant on Civil and political Rights (ICCPR) reads:

*“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language”.*²⁴⁶

This is the first international norm and the only legally binding on the ratifying states, on the rights and protection of minorities under international law.²⁴⁷

It is the first one explicitly referring to minorities, even though it frames minority rights in mainly individualistic terms. At the time of the drafting process of the Covenant an Indian member of the Sub Commission, suggested to attach a draft convention or a draft protocol to the Covenant specific for the protection of minorities, but this proposal was rejected.²⁴⁸

In any case, minority rights in this Covenant are considered “not as minority rights qua minorities, but only as entitlements to *persons belonging to minorities*, and hence as individual rights.”²⁴⁹

The choice concerning the utilization of this terminology in the ICCPR underlines a “*deliberate decision designed to avoid giving to these groups an international personality. Such international personality, it was feared, might have given a minority the capacity to secure enforcement of its rights before the Human Rights Committee*”,²⁵⁰ and, in fact, the first Protocol to this Covenant gives the right to submit petitions only to individuals and not to groups.²⁵¹

Furthermore it applies only to those states in which minorities exist, encouraging the states to deny the existence of minorities in their territory²⁵² and imposing on states

²⁴⁵ Vijapur, (2006), p. 374.

²⁴⁶ UN General Assembly, *International Covenant on Civil and Political Rights* (ICCPR).

²⁴⁷ Dersso, (2007), p. 13.

²⁴⁸ Vijapur, (2006), p. 372.

²⁴⁹ Dersso, (2007), p. 13-14.

²⁵⁰ Vijapur, (2006), p. 375.

²⁵¹ In contrast with Article 1 of the ICCPR, which guarantees a right of self-determination to all “peoples”: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development” (Art 1.1 ICCPR).

²⁵² For example in the case of France, which at the time of its accession to the ICCPR, declared that “in the

only “negative” duties of non-interference while not requiring them to assist, through positive actions, the members of minorities living in their jurisdiction.

However it must be noted that the General Comment n.23 of the Human Rights Committee on Article 27, attempts to conceptualise this provision constructively as imposing positive obligations on States, stating that:

*“Although article 27 is expressed in negative terms, that article, nevertheless, does recognise the existence of a "right" and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party”.*²⁵³

Articles 18, 25 and 20.2 of ICCPR are also related with group rights, in particular concerning the freedom to profess a religion, the right to worship and the right to live in accordance with religious beliefs (Art. 18), safeguard against acts of violence or persecution directed towards religious minorities (Art. 20.2), and groups rights participation in public life (Art. 25).²⁵⁴

The International Covenant on Economic, Social and Cultural Rights (ICESCR) also contains several provisions related to the protection of persons belonging to minorities, mainly Article 13, 14 and 15 concerning the right to education and the right of everyone to take part in cultural life.²⁵⁵

Nevertheless the most UN representative document for the protection of minorities is the “Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities”, proclaimed by the UN General Assembly on 18 December 1992, as it represents the first international human rights instrument

light of Article 2 of the Constitution of French Republic, Article 27 of the Covenant is not applicable so far as the Republic is concerned”, denying in fact the existence of minorities in their own territory.

²⁵³UN Human Rights Committee (HRC), *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*.

²⁵⁴ ICCPR, 1966, Art. 18, Art. 20.2, Art. 25.

²⁵⁵UN General Assembly, *International Covenant on Economic, Social and Cultural Rights (ICESCR)*. In particular Article 13 establishes a scale of state obligations in the sense that primary education shall be compulsory and free for all, secondary education available and accessible, and higher education equally accessible to all (Art. 13.2). Paragraphs 3 and 4 of this Article recognise the right of persons to choose for their children schools other than those established by the public authorities according to their religious or moral convictions.

exclusively devoted to minority rights and the recognition of the need to deal with minority rights through specific instruments.

As underlined by S. Dersso:

*“it can be said that the adoption of the Declaration ushered in the beginning of a new period in the development of international norms on minority issues, although the instrument still reflects the individualist orientation of the UN. As the first human rights instrument of the UN on minorities, the Declaration reflects, although not fully, an acknowledgement by the international community of the need to recognize the rights of minorities and provide for normative frameworks that respond to ethnic tensions that threatened peace and stability within states.”*²⁵⁶

The Declaration restates the rights under Article 27 (ICCPR) but it also provides for additional special rights, underlying which measures States should take for the protection and promotion of minority rights, as for example the promotion of knowledge concerning minority cultures amongst the majority population, provisions for minority language instruction and more specifically states in Article 2:

1. [...] *the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.*
2. [...] *the right to participate effectively in cultural, religious, social, economic and public life.*
3. [...] *the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.*
4. [...] *the right to establish and maintain their own associations.*
5. [...] *the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties.”*²⁵⁷

Although the declaration marked a significant advancement in the elaboration of norms on minority rights, it must be recognised that minority representatives did not have a role in the drafting process and that, as with article 27 of the ICCPR, the declaration casts these rights still in individualistic terms.

²⁵⁶ Dersso, 2007, p. 16-17.

²⁵⁷ UN General Assembly, *Declaration of the Rights of Persons Belonging to National or Ethnic and Linguistic Minorities*, 1992, Art.2.

Furthermore and most importantly, the declaration as such is not legally binding and it does not have any serious monitoring mechanism attached. The provisions of the declaration are replete with vague or negative phrases like “*encourage conditions*”, “*appropriate*”, and “*in a manner not incompatible with national legislation.*”

The questions relating to collective rights are finally left unresolved except for the phrase about enjoyment “*in community with other members*” of the group.²⁵⁸

Finally, what the declaration requires in terms of positive measures of the states is far from clear, requiring states simply to “*adopt appropriate legislative and other measures to achieve those ends.*”²⁵⁹

It is worth noting however the establishment by the UN Sub Commission on Human Rights of a “UN Working Group on Minorities” with the task of promoting dialogue between minority groups in society and between those groups and governments, examining peaceful and constructive solutions to situations involving minorities and to provide recommendations to the Sub-Commission and to the UN High Commissioner for Human Rights.²⁶⁰

The UN International Convention on the Elimination of All Forms of Racial Discrimination of 1965 also contains an implicit acknowledgment of minority rights by prohibiting discrimination on the basis of “*race, colour, descent, national or ethnic origin.*”²⁶¹

Article 14 (1) of the Convention provides an optional procedure for an individual petition system under which any individual or groups of individuals can petition the Committee on the Elimination of Racial Discrimination claiming to be victims of a violation by the State party of the human rights included in the Convention.

Similarly, religious minorities benefit from the provisions of the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981), and children of minorities and indigenous populations are the subject of Article 30 of the Convention on the Rights of the Child (1989), which states that their

²⁵⁸ Vijapur, (2006), p. 381.

²⁵⁹ UN General Assembly, *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, 1992.

²⁶⁰ Vijapur, (2006), p. 381.

²⁶¹ UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 1965.

children shall not be denied rights to enjoy their culture, to profess and practice their religion or to use their own language.

Furthermore the “1503 procedure”, established in 1970, is still likely to be useful to minorities in certain situations. It is possible in this way for individuals and NGOs to make complaints to the United Nations about widespread human rights abuses in any country.²⁶²

It must be however acknowledged that despite a considerable advance in the cause of minority rights by international organizations, in reality states, as recognized in Part II of the Covenants, remain the guarantors and protectors of human/minority rights of the individuals residing in their territory.

As concerning the case of Roma/Gypsies, which we are taking into consideration, they are mentioned for the first time in a UN document in 1977 when the Sub-Commission on the Prevention of Discrimination and Protection of Minorities through a resolution adopted on 31 August appealed “*to those countries having Roma (Gypsies) living within their borders to accord them, if they have not yet done so, all the rights enjoyed by the rest of the population*”.²⁶³

The Economic and Social Council of the United Nations (ECOSOC) took also a very important step in March 1979, by recognising the International Romani Union (IRU)²⁶⁴ as an NGO representing Roma/Gypsies. The IRU acquired then Consultative Status in 1993, thus recognising greater weight to its contributions.

In 1991 then the Sub-Commission, recalling its resolution of 1977, drew attention to the fact that, in many countries, various obstacles exist “*to the full realisation of persons belonging to the Roma community of their civil, political, economic, social and cultural rights, and that such obstacles constitute discrimination directed specifically against that community, rendering it particularly vulnerable*”.²⁶⁵

It also recommended a draft resolution for adoption by the Commission on Human Rights.

Finally, the Commission on Human Rights, during its session on 4 March 1992,

²⁶² Vijapur, (2006), p. 381-382.

²⁶³ Resolution adopted on 31 August 1977, document E/CN4/Sub2/399, p.47.

²⁶⁴ The International Romani Union (IRU) is an organization active for the rights of the Roma people. The IRU was officially established at the second World Romani Congress in 1978.

²⁶⁵ 33rd Session, 28 August 1991, 1991/21, Protection of Minorities.

adopted Resolution 1992/65, entitled “On the Protection of Roma (Gypsies)”.

The problems faced by Roma/Gypsies in different states are considered in the activities carried out by specialised UN departments: in particular the Office of the United Nations High Commissioner for Refugees (UNHCR), UNESCO and UNICEF.

UNHCR published a report in 1993 on the situation of Roma/Gypsy communities in some Central and Eastern European states, aiming at protecting Roma/Gypsies from persecution; ensure equal treatment for those seeking asylum; engage the attention of NGOs; particularly those of a humanitarian nature, in order to be able to understand and improve the situation.

UNESCO has mainly been involved in literacy and education related projects in a number of states, as well as a pilot project focusing on Roma/Gypsy culture. It has given support to a number of short-term projects related to research, teaching, and/or publication, especially in connection with the Romani language. It has also provided financial support for two summer schools organised by the IRU.

Finally UNICEF has turned his attentions to the situation of Roma/Gypsies children, particularly with regard to education, in several states. The situation of Roma/Gypsies in different states has also been highlighted by special *rapporteurs* of the Commission and Sub-Commission on Human Rights.²⁶⁶

V.1.2 Minority Rights Protection at European Level.

Since the East-West divide in 1989 an increased concern has arisen with the treatment and protection of minorities in Europe, whether they be national, ethnic, religious or cultural.

The main reason for this increased concern was the integration of former communist States into a wider “Europe” and the focus on possible security threats coming from the East.²⁶⁷

²⁶⁶ MRGI, (1995), p.25.

²⁶⁷ Swimelar S. and Schneider J. (2004), “Evaluating the Minority Rights Regime in the Context of European Enlargement”, Paper prepared for the *International Studies Association Meeting*, Montreal Canada.

The minorities' interests, cultural and political claims, are now officially recognised not only by the most important European organisations, but also by the legislative bodies and governments of most European States.

While the issue of protection of minorities at international level (UN level), has been discussed in details in the previous paragraph, the European system of protection of minorities will be now taken into consideration.

V.1.3 The Council of Europe (COE)

Like their UN counterparts (e.g Article 27 of ICCPR), European human rights instruments and institutions, include minority rights protection “*primarily in universal and individualistic terms.*”²⁶⁸

Minority protection is recognised especially for security concerns and for communities that are “*historically and territorially concentrated both within and across adjacent state boundaries.*” As with international initiatives, “*what European minority protection requires of states in terms of positive measures is ambiguous at best.*”²⁶⁹

Like in the UN system, almost all the international instruments on human rights at European level, promote minority rights indirectly through general provisions on equality and non-discrimination.

For example, as with the UDHR at UN level, the European Convention on Human Rights (ECHR) does not contain any special mention of minorities and their rights. Drafted in 1950 by the then newly formed Council of Europe, the convention entered into force on 3 September 1953. All Council of Europe member states are party to the Convention and applications for redress under the Convention are heard by the Court and may result in a legally binding judgment.

However “*its text is thoroughly individualistic in nature and devoted overwhelmingly to the protection of civil and political rights.*”²⁷⁰

The Convention includes only a general anti-discrimination article (Article 14).

²⁶⁸ Macklem,P., (2008), p. 541.

²⁶⁹ Ibidem.

²⁷⁰ Ibidem.

Article 14 of the ECHR states that:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

It *“does not prohibit discrimination against the membership of a national minority ‘per se’; but it “prohibit discrimination as regards the enjoyment of the rights and freedoms set out in the Convention”*.²⁷¹

However, even in case of absence of a violation of one of the right contained in the Convention, Article 14 applies in case it is possible to demonstrate *“the existence of a real and unjustified discrimination in the way certain individuals are permitted to enjoy that right.”*²⁷²

There was also a proposal involving the promotion of a separate protocol specifically dealing with national minorities issues but advancement in this respect has been disappointing. The creation of a Sub-Committee on Minorities in 1957 led in fact to a proposal in 1959 for an additional Protocol on Minorities.

The text of the proposed Protocol contained many specific principles for minorities, including the principle of equality before the law, the right to use the minority language in relation with public authorities and in education, the right to express, preserve and develop the group’s own identity.

Nonetheless, since that time there were no further developments on the adoption of this Protocol even if the Parliamentary Assembly became ever more insistent about the need for its adoption.²⁷³

On the other hand, even if the Convention does not expressly enshrine minority rights, rights to equal treatment and non-discrimination may reflect many minority concerns and *“several if not all civil and political rights, such as freedom of religion, expression, association, as well as the right to a family life, the equality guarantee and*

²⁷¹ Clements, L., Thomas P. and Thomas R., (1996), “The Rights of Minorities-A Romany Perspective”, in *ODIHR Bulletin* no. 4 , vol.4, p.5.

²⁷² *Ibidem*, p.10.

²⁷³ See: COE, Recommendation 1201 (1993) on an Additional Protocol on the Rights of National Minorities to the European Convention on Human Rights.

*the right to free elections, are all textually capable of protecting various interest of a minority community.”*²⁷⁴

Numerous decisions of the European Court of Human Rights in fact suggest an attempt to develop the ECHR to a point where it effectively protects the rights of minorities.

Furthermore, as underlined in Pamphlet No.7 of the UN Guide for Minorities, “*Minority Rights under the European Convention on Human Rights*”:

*“discrimination is not limited only to those cases in which a person or group is treated worse than another similar group. It may also be discrimination to treat different groups alike: to treat a minority and a majority alike may amount to discrimination against the minority. Moreover, the European Court of Human Rights has held that if a State takes positive measures to enhance the status of a minority group (for example, with respect to their participation in the democratic process), the majority cannot claim discrimination based on such measures. In general, a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.”*²⁷⁵

The ECHR together with the 1st, 4th and 12th Protocols, may protect many of the rights and freedoms of importance to minorities. In particular, Article 3 concerns the prohibition of degrading treatment and, as the East African case (3E.H.R.R.76) demonstrated, a degrading treatment can occur when a group of persons is publicly singled out for different treatment.²⁷⁶

Article 8 concerns the “*right to respect for private and family life, home and correspondence*”. It has been invoked in many cases involving Roma, seeking respect for their existing home, caravan or other vehicle. In fact, according to the Court, “*a minority group is in principle entitled to claim the right to respect for the particular lifestyle it may lead as being ‘private life’, ‘family life’ or ‘home.’*”

²⁷⁴ Macklem, P., (2008), p. 542.

²⁷⁵ UN Guide for Minorities, Pamphlet No. 7 “*Minority Rights under the European convention on Human rights*”, p.2.

²⁷⁶ The European Commission on Human Rights has recognised that, under certain circumstances, racially discriminatory policies may amount to degrading treatment in violation of Article 3. In the East African Asians, for example, the Commission affirmed that “special importance should be attached to discrimination based on race,” and that “differential treatment of a group of persons on the basis of race might therefore be capable of constituting degrading treatment when different treatment on some other ground would raise no such question.” See: East African Asians v. UK where British immigration legislation singled out U.K. passport holders of Asian origin resident in E. Africa and denied them admission to the UK. Commission held this as a violation of Article 3.

Article 9 concerns the right to freedom of religion, which allows a minority the necessary degree of control over community religious matters. Article 10 protects the right to freedom of expression for which minorities have the right to use their own language, publish their own newspapers or other media without interference from the State or others.

Article 11 safeguards the right to freedom of association and of assembly against unjustified State's interference. This Article is also of special interest for Roma people used to have reunions and assemblies at fairs, family weddings, funerals and other occasions characteristic of Roma culture.

Protocol 1 with its Articles 1, 2, 3, is of specific interest for minorities and especially for Roma people. In particular, Article 1 concern protection of property, the right to peaceful enjoyment of possessions, prohibiting arbitrary confiscation or other deprivation of possessions.²⁷⁷

Article 2, protect the right to education against unjustifiable interference of the State in parental choice and unreasonable discriminatory provisions. For example, in the case of the traveling Roma children a difference must be recognised between parental choice over when to move on and precipitous moves resulting from forced evictions.

Furthermore unduly restrictive state attendance at schools that interfere with traditional Roma traveling could also amount to a violation of Article 8, as well as *“refusing to approve schoolbooks written in the minority's kin-State might be a breach of the right to freedom of expression (Article 10)”*.²⁷⁸

However, there is no right to mother tongue education under the ECHR, unless it previously existed and the state then tries to withdraw it. Protocol 4 (Articles 2 and 3), protect the right to freedom of movement within a State (Article 2) and the right not to be refused entry (or expelled) from a state of which the person is a national.

As underlined by Clements, L., Thomas P. and Thomas R. in their article *The Rights of Minorities-A Romany Perspective*:

“These two rights are of importance, not only to traditional traveling Roma, but also in relation to inter-state Roma movements (forced or otherwise). Roma who are

²⁷⁷ In the case of Roma people this includes for examples the mobile home and equipments.

²⁷⁸UN Guide for Minorities, Pamphlet No. 7 “Minority Rights under the European convention on Human rights”, p.2.

citizens of a European Union state have separate rights of free movement within the EU.²⁷⁹

The very limited impact of Article 14 in the race discrimination field has been criticised and determined the entering into force of Protocol 12 in 2005 after the 10th required ratification was fulfilled.

Protocol 12 removed the demand for the discrimination to be “within the ambit” of a substantive convention right. Nonetheless it only applies to the activity of public authorities and according to Article 1 it does not require a positive obligation on the parties to take actions to prevent or remedy all situations of discrimination among private persons. This protocol was perceived by states to be too vague and broad to be justifiable. Hence, the number of ratifications remains low.²⁸⁰

What is more, indirect discrimination is not covered under article 14, as still the Court gives to the states a wide margin of appreciation, reaching an important limitation on the effectiveness of the anti-discrimination provision (by which a particular policy or law has disproportionately negative effect on members of a particular group).²⁸¹

The centrality of language as a minority right is expressed in the European Charter for Regional or Minority Languages (ECRML), approved by the Council of Europe in 1992. The preamble of the Charter consider necessary and legitimate to take special steps to preserve and develop languages that in Europe “*are in danger of eventual extinction, to the detriment of Europe’s cultural wealth and traditions*”.²⁸²

The preamble further declares the use of a regional or minority language in private and public life an “*inalienable right*” and lists a wide range of measures to promote the use of regional or minority languages in different spheres of public life: education, the judicial process, public services, the media, cultural activities and facilities, and economic and social life.

By identifying different options, the Charter leaves governments with

²⁷⁹ Clements, L., Thomas P. and Thomas R., (1996), p.11.

²⁸⁰ O’Nions, (2007), p. 79.

²⁸¹ Ibidem, pp. 78-79.

²⁸² Council of Europe, *European Charter for Regional or Minority Languages*, 4 November 1992, ETS 148.

considerable discretion in implementing the right to use regional or minority languages in public. Nonetheless, the document unequivocally recognises the need for special measures to preserve and develop minority languages in Europe and charges governments with the responsibility for doing so.

Nonetheless, at the regional level, the most comprehensive instrument devoted to minorities rights in Europe, after the European Convention on Human Rights, is the Framework Convention for the Protection of National Minorities (FCNM), which is the first multilateral treaty and the only legally binding instrument for the protection of minority rights within the European region. It was adopted by the Council of Europe on 1994 and entered into force on 1998.²⁸³

The FCNM was designed to create a legally binding instrument to promote tolerance throughout societies by protecting national minorities for the construction of a stable and inclusive Europe.

The protection of minorities was considered as an essential tool for the security, peace and stability of a pluralistic and truly democratic society, contributing in fostering dialogue and tolerance among its members and in promoting intercommunity harmony.²⁸⁴

The Convention, however, does not give an explicit definition of “minority” and applies only to “national minorities”, deliberately narrowing the scope of protection compared with the 1992 UN Declaration.²⁸⁵

Furthermore, it contains many limitation clauses and has been criticised for the lack of an effective control mechanism and for its weak and vague wording.

Many states for example have introduced Declarations to the Convention allowing them to identify the specific groups to whom the Convention will apply, arbitrarily identifying minorities that are entitled to protection, thus implying the rejection of other groups. For example Germany and particularly Denmark have entered Declarations

²⁸³ The treaty is applicable only to European States, which have ratified the Convention. As of 5 May 2010, 39 States have ratified it. All the CoE applicant States are obliged to ratify the FCNM, while the EU considers States’ implementation of the FCNM as an important factor in its accession criteria on minority rights (1993 Copenhagen criteria). Belgium, Luxembourg, Greece and Iceland have signed but not ratified the treaty and, as of today, France, Andorra, Monaco and Turkey had neither signed nor ratified the Convention. See: Council of Europe, *Framework Convention for the Protection of National Minorities* (FCNM), 1 February 1995, ETS 157.

²⁸⁴ See: Minority Rights Group International (MRGI), *The Framework Convention for the Protection of National Minorities: A Policy Analysis*, Minority Rights Group International, p. 3.

²⁸⁵ The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities applies in fact to both “national” and “ethnic, religious and linguistic minorities”.

attempting to limit the potential beneficiaries of the Convention (excluding non-citizens and migrants).

The aim of the FCNM is “*to specify the principles which States undertake to respect and ensure the protection of national minorities*”, setting out objectives that states must fulfil. Many substantive provisions of the Convention cover a wide range of issues, many of which may require that states adopt special measures not to be considered as discrimination themselves.²⁸⁶

However states possess a measure of discretion in the implementation of the objectives that could be used by them in order to escape their obligations. This is the reason why the FCNM is called “Framework Convention” containing a series of “programmatically” principles worded in general terms.²⁸⁷

Furthermore, like the ICCPR, the FCNM refers to the rights of *persons belonging to minorities*, suggesting “*an emphasis on individual as opposed to collective interests*”²⁸⁸ and the Explanatory report makes it clear that “*no collective rights of minorities are envisaged.*”

In fact as stated in the Explanatory Report, Section I, Article 1(31):

“the article refers to the protection of national minorities as such and of the rights and freedoms of persons belonging to such minorities. This distinction and the difference in wording make it clear that no collective rights of national minorities are envisaged (see also the commentary to Article 3). The Parties do however recognize that protection of a national minority can be achieved through protection of the rights of individuals belonging to such a minority”.

What is more, being only a “framework convention”, the instrument “*is not directly applicable in the domestic legal orders but requires implementation by legislation and appropriate government policies*”.²⁸⁹ In this way, “*the prospect of the FCNM being accepted as part of EU law or *acquis communautaire* is far away*”.²⁹⁰

The FCNM has been criticised also because it does not have any hard enforcement mechanism attached, not being subject to the review of the European Court of Human

²⁸⁶ UN Guide for Minorities, Pamphlet No. 8, “The Council of Europe Framework Convention for the Protection of National Minorities”, p.3.

²⁸⁷Ibidem, p.2.

²⁸⁸ Macklem,P., (2008), p. 544.

²⁸⁹ Macklem,P., (200), p. 545.

²⁹⁰ MRGI, (2002), p. 4.

Rights and not allowing individual complaints.

The Convention is primarily monitored on the basis of state reporting one year after the entering into force and every five years thereafter. Article 26 establishes the Advisory Committee, which will draft a public report every five years on the implementation of the Convention by the ratifying countries followed by a Committee of Minister's Resolution.

The FCNM has eventually been defined as “*a frame of an incomplete painting*”²⁹¹, “*intentionally blurred since the beginning since the word ‘framework’ is intended to indicate flexibility in national implementation*”.²⁹²

The Committee of Ministers, in particular, as a political body, should not be able to have a final say on monitoring by the Advisory Committee²⁹³ and the states should not be able, through unilateral declarations or reservations, “*to withhold protection by denying the existence of a minority through the use of different labels or through additional criteria*”, as for example the criteria of citizenship.²⁹⁴

For these reasons Alfredsson underlines in his article the importance of an independent and strong Advisory Committee, while the Committee of Ministers “*should scrupulously respect and follow up on the Advisory Committee’s recommendations.*”

Only in this way in Alfredsson’s opinion, the Council of Europe will be able to play a meaningful role in the field of minority rights, even though the best solution would be the adoption of an additional Protocol to the European Convention, including special measures and group rights, currently omitted, for the realisation of minority rights in Europe in both law and fact.²⁹⁵

Furthermore, minorities should not be treated only as objects for observation but consulted and included as active members in the Advisory Committee meetings.

In spite of this, it seems that, in general, “*a constructive, trusting relationship has*

²⁹¹Alfredsson, G., (2000) “A Frame an Incomplete Painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures”, in *International Journal of Minority and Group Rights*, Vol. 7, No. 4., p. 291.

²⁹² Ibidem, p. 294.

²⁹³ Considerable concern was expressed over the CoM’s role in the implementation of the FCNM; as the CoM is a political body composed of Foreign Ministers of each of the Member States, often taking instructions from capitals. The CoM in fact “*has the power under the Convention to control and politicize the monitoring process and restrict the independent role of the AC*”. See: MRGI, (2002), p. 5.

²⁹⁴ Alfredsson, (2000), p. 294.

²⁹⁵ Ibidem, p. 291-292.

*developed between the AC and CoM. This can be seen by the way the CoM has endorsed without amendment several AC's proposals".*²⁹⁶

Minorities and non-governmental organisations have also been able to present, in writing and orally, pertinent information and points of view,²⁹⁷ and “*country visits had become one of the most valuable parts of monitoring the implementation of the FCNM*”.²⁹⁸

However it has been noticed in the last years a tendency to use a “double standard” focusing more on Central and Eastern European States while ignoring minority problems in Western Europe and this tendency should also be corrected, as well as transparency and availability of documents should be further encouraged.

One of the most important point finally is the “*arbitrary identification by States of minorities entitled to protection under the Convention*”: the Advisory Committee “*should take a strong stand against these practices and stipulate instead that the existence of a minority is a question of facts, not law or government recognition.*”²⁹⁹

This is even more important in the case of Roma people, which, as highlighted by Francesco Capotorti in his study³⁰⁰, are seldom recognised by states as a legal minority.

For this reason they are rarely protected by the states through special measures targeting equality and non-discrimination. In fact, although in what concerns the Roma their minority status is problematic as do not have a specific territory, they should still be seen as a minority in International law.³⁰¹

²⁹⁶ MRGI, (2002), p. 5.

²⁹⁷ Ibidem, p. 6.

²⁹⁸ Ibidem.

²⁹⁹ Alfredsson, (2000), p. 301.

³⁰⁰ Capotorti, F., (1991), pp. 373-377.

³⁰¹ O’Nions, (2007), p. 185.

V.1.4 The Organisation for Security and Cooperation in Europe (OSCE).

The Organisation for Security and Cooperation in Europe (OSCE)³⁰² has played since the beginning an important role especially addressing the main problems faced by Roma. Since its first meeting in 1975, CSCE (then OSCE), focused on questions of minority rights linked to human rights and military security.

The first document where Roma were specifically mentioned was the document of the Copenhagen Meeting (1990), in which rights of persons belonging to minorities were recognised and the specific situation of Roma was highlighted.

Participating States declared their firm intention to take affective measures against Roma's discrimination and, in particular, in Article 40, Chapter IV, Roma were the only minority explicitly mentioned:

*“The participating States clearly and unequivocally condemn totalitarianism, racial and ethnic hatred, anti-Semitism, xenophobia and discrimination against anyone as well as persecution on religious and ideological grounds. In this context, they also recognise the particular problems of Roma (gypsies). They declare their firm intention to intensify the efforts to combat these phenomena in all their forms and therefore will.”*³⁰³

Roma continued to be an issue of interest being reiterated in paragraph 40 of 1991 Geneva Meeting Experts, 1992 Helsinki Follow-up Meeting and at the Human Dimension Seminars in Warsaw in 1993 and 1994.

A decisive step was taken at the Budapest summit in December 1994, when, with the Budapest Declaration, participating states decided to appoint within the Office for Democratic Institutions and Human Rights (hereafter ODIHR), a Contact Point for Roma and Sinti issues, facilitating contact between states and non-governmental organisations on Roma issues and providing information on the initiatives and programmes concerning them.³⁰⁴

In 1999 an important step was the appointment of Nicolae Gheorge³⁰⁵, a Rom and

³⁰² Previously *Conference on Security and Cooperation in Europe (CSCE)*.

³⁰³ CSCE, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Copenhagen Document), 1990, p.21.

³⁰⁴ CSCE, 1994 Summit Budapest, 5-6 December 1994, Budapest Document 1994 “Towards a genuine Partnership in a new era”, p.33.

³⁰⁵ Coordinator of the Roma Center for Social Intervention and Studies (Romani CRISS) in Romania and member of the Project on Ethnic Relations Council for Ethnic Accord, Mr. Gheorghe is also the vice-president of the International Romani Union.

a sociologist, as adviser on Romani issues and head of the Contact Point for Roma and Sinti issues. One of the main tasks undertaken by the Contact Point for Roma and Sinti issues was the launch in 2003 of a broad exercise in consultation involving Roma/Gypsies organisations and experts in the preparation of an “Action Plan on Improving the Situation of Roma Within the OSCE Area”, addressing racism and discrimination, socio-economic issues, questions of access to education and participation by Roma in public and political life.

A ODIHR Status Report in 2008, marked the initial effort to provide information and analysis on the state of implementation of the Action Plan, highlighting the actions undertaken by participating states and the structures of the OSCE, especially ODIHR’s Contact Point for Roma and Sinti Issues, to implement the tasks assigned by the Action Plan.

As underlined by Ambassador Janez Lenarcic, ODIHR Director, in this Report:

*“While many governments have succeeded in developing and adopting national strategies for improving the situation of Roma and Sinti, there are substantive shortcomings with regard to their effective implementation, in particular at the local level. One area of particular concern is the absence of institutional mechanisms to provide sustainable support for Roma and Sinti integration programmes. This includes insufficient funding, lack of political will at the national level, and apathy or neglect to implement policies at the municipal or local levels through targeted and coherent programmes”.*³⁰⁶

The Report highlight as well as *“in spite of the rather large number of international and national Roma-related initiatives, these have not alleviated, in proportion to the resources invested, the continuing social and economic inequalities, marginalisation, racism, and discrimination experienced by Roma and Sinti”.*³⁰⁷

It must be noticed as well that a “High Commissioner on National Minorities” was established by OSCE since 1992, focusing on disputes involving national minorities that have an international character and pretension to cause inter-states tension, providing early warning and, as appropriate, early action as soon as possible with regard to tensions involving national minority issues which have not yet developed beyond an early warning

³⁰⁶ Osce, ODIHR, Office for Democratic Institutions and Human Rights, *Implementation of the Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area*, Status Report 2008, p.7.

³⁰⁷ Ibidem, p.7.

stage but, in the judgment of the High Commissioner, have the potential to develop into a conflict within the OSCE area.³⁰⁸

The High Commissioner acts essentially through a confidential dialogue with the governments involved, has wide latitude of discretion as to procedures and his approach is mainly one of “quiet diplomacy”.

The reports and recommendations made by the High Commissioner are not legally binding but “*have a strong political influence and may prove more use than the Framework Convention*”.³⁰⁹

A special report on Roma was published by the High Commissioner in 1993, advocating special measures for Roma, including special government policies for addressing Roma-related issues in such areas as employment, education, health care and general welfare.³¹⁰

V.1.5 The European Union (EU).

The genesis and development of attention and concrete support on the part of the institutions of the European Union can be summarised in different stages.

As from 1993, the EU considers the improvement of minority conditions, and especially Roma minorities, as a key condition for accession to the European Union and for example the “Gypsy question” became a question of importance at national and transnational level and in connection with the candidacies of Central and Eastern European states applying for EU membership.

The accession criteria, known as well as “Copenhagen criteria”, were established by the Copenhagen European Council in 1993 and strengthened by the Madrid European Council in 1995.

They established that “*any country seeking membership of the European Union (EU) must conform to the conditions set out by Article 49 and the principles laid down in*

³⁰⁸ Vijapur, (2006), p. 382.

³⁰⁹ O’Nions, (2007), p. 208.

³¹⁰ CSCE, Roma (Gypsies) in the CSCE Region Report of the High Commissioner on National Minorities, 21 September 1993.

Article 6(1) of the Treaty on European Union”.

To join the EU, a new Member State must meet in particular three criteria:

1. Political: stability of institutions guaranteeing democracy, the rule of law, human rights and *respect for and protection of minorities* (emphasis added);

2. Economic: existence of a functioning market economy and the capacity to cope with competitive pressure and market forces within the Union;

3. Acceptance of the Community *acquis*: ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.

In order to access the European Union, the future member states will have to put into practice all the measures on non-discrimination provided by the EU, improving laws and policies: bilateral agreements and initiatives with strong political voices.³¹¹

At the EU level in fact, each country within its legislative borders regulates minority rights always in compliance with the related EU guidelines.

Discrimination and racism, including discrimination against the Roma minority, are dealt with through Article 13 of the “Treaty Establishing the European Community (TEC)” and the following 2000’s directives: the “Racial Equality Directive”³¹² and the “Employment Equality Directive”³¹³, legally binding on all Member States.

Recently, with the entering into force of the “Lisbon Treaty” on the 1st December 2009, the “Charter of Fundamental Rights of the European Union (EU)”, became legally binding although it was already a reference document for the European Court of Justice (ECJ) when interpreting Community law.

The principles set out in the Charter guides the development of policy in the EU and the policy implementation by national authorities.

According to the Charter of Fundamental Rights, reaffirmed by the proclamation in December 2000, Europe, as a multicultural society, advocates and guarantees the protection of minorities and emphasises the establishment of the conditions for preserving cultural diversity, strengthening the commitment to the principle of non-discrimination.

³¹¹ O’Nions, (2007), p. 89.

³¹² Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

³¹³ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

Article 21 of the Charter bans discrimination on the six grounds listed in Article 13 of the EC Treaty, as well as seven additional grounds (social origin, genetic features, language, political or other opinion, *membership of a national minority*, property and birth). Like Article 12 TEC, Article 21 of the Charter also prohibits discrimination on grounds of nationality and Article 20 sets out the general principle of equality before the law.³¹⁴

Among the many programs developed, the most conspicuously successful has been the education program, with a specific Roma element.³¹⁵

The European Parliament in particular, since 1975, has always been sensitive to the difficult situation of Roma/Gypsies, showing a concern to improve their situation through several questions and recommendations to the European Commission as well as to the Member States.

One of the most important Resolution was adopted in March 1984 concerning the education of children of parents of no fixed abode, together with another on the situation of Roma/Gypsies, in which it suggested to the governments of the member states to coordinate their actions, and called on the Commission to develop Community-funded programs aimed at improving Roma/Gypsies' situation without negating their cultural values.³¹⁶

The Commission then appointed the Gypsy Research Centre of the René Descartes University in Paris, to undertake a critical analysis of the situation regarding school provisions for Roma children within the Community.

Different meetings were set up with experts to coordinate the study and to discuss recommendations. Eventually, a final report, *School Provision for Gypsy and Traveller Children*, was published at the end of 1986, culminating on 1989 with the adoption by the Council and the Ministers of Education of a Resolution on school provision for Roma/Gypsy children.

This text became one of the most basic gains made for the Roma's communities, outlining a set of measures adopted by the ministers to be developed by the Member States at national level and recognising how Roma/Gypsies' culture and language have formed

³¹⁴ EU, *Charter of Fundamental Rights of the European Union*, 2000/C 364/01

³¹⁵ Clements, L., Thomas P. and Thomas R., (1996), p.7.

³¹⁶ Liégeois, J. P., (2007), *Roma in Europe*, Council of Europe, Strasbourg, p. 229-230.

a part of the Community's cultural and linguistic heritage for over 500 years.

This research and the interest generated in the issue led in turn to a wide range of initiatives and actions both at European Union and Member States' level: networking of pilot projects, meetings, support for publications, newsletters in several languages, inter-school exchanges, assistance to enable Roma organisations to hold meetings on school-related questions, etc.

The European Parliament remained always attentive to the Commission's work and progress and gave an active support in the field of education also through the adoption of a budgetary line enabling the implementation of the Resolution of 1989.

Education-related questions were the first to engage the interest of the Commission's services, but subsequently more and more actions have been undertaken also in other fields: many ongoing programs include actions of relevance to Roma/Gypsies. For example, the "Second Combat Poverty Program" assisted teams in Ireland, Spain, and Portugal. The third program, "Poverty 3", also entails action for Roma communities: of its 39 projects, four directly involve Roma.

Other actions have been developed within the framework of the European Social Fund and the "Horizon" and "Equal" programs, enabling numerous associations working with Roma to develop projects of their own. Other activities are being expanded, notably in connection with aid programs for Central and Eastern Europe, as for example the "Phare" Program.³¹⁷

Interest in issues of relevance for Roma broadened during the 1990s with a growing number of measures and texts adopted. In 1991 a hearing was held on request of Roma organisations reuniting a large number of Roma representatives, giving the commission an opportunity to familiarise itself with the proposals and view of Gypsy organisations.

In 2003, the European Commission's Directorate for Employment, Social Affairs and Equal Opportunities, jointly with the EU anti-discrimination program, carried out a study on *The situation of Roma in an Enlarged European Union*.

The study served as a basis for discussion by the European Commission, Member States and their partners on how EU measures should best target Roma inclusion. It

³¹⁷ Liégeois, J. P., (2007), p. 234.

examined the conditions that Roma, Gypsies and Travellers face in a range of fields, including education, employment, housing and healthcare, setting out both good and bad practices in policies and programs for Roma, as well as recommendations on how to improve existing policies in order to tackle the widespread discrimination and social exclusion which Roma, Gypsies and Travellers face.

On 28 April 2005 the European Parliament adopted another resolution on the situation of Roma in the European Union and recommended a series of measures aiming at ending all types of discrimination and facilitating the involvement of Roma in decisions concerning them.

As concerning the most recent events focusing on the “Gypsy question” in Europe, the European Commission hosted a first “EU Roma Summit”, which took place in Brussels on 16 September 2008, under the joint patronage of the Commission President José Manuel Barroso and the French Presidency of the Council of the European Union.

The Summit promoted “*a firm commitment to tackling concrete problems and to creating a better understanding of the situation of Roma across Europe, helping to identify ‘policies that work’ in promoting inclusion and highlighting the plight of Roma communities*”.³¹⁸

The event brought together more than 400 representatives of EU institutions, national governments and parliaments and civil society including Roma organisations, recognising that the integration of Roma communities is a joint responsibility of Member States and the European Union.³¹⁹

This first Summit, however, “*produced neither conclusions nor concrete proposals*”.³²⁰

The conditions of Roma were even worsening in some parts of Europe: the past years have seen “*an increasing in racist attacks - shootings of families, homes set on fire - as well as forced evictions and the building of walls around settlements*”.³²¹ Millions of Roma are still living today in shanty-towns on the margins of the European society.

Following this first Summit in 2008, in the framework of the “2010 European

³¹⁸ EC, Employment, Social affairs and Equal Opportunities, Events., First EU Roma Summit.

³¹⁹ Ibidem.

³²⁰ Beger, N., Grabbe H., (2010), “Ending Europe's Exclusion of Roma”, in *European Voice*.

³²¹ Ibidem.

Year for Combating Poverty and Social Exclusion” and as a key event of the Spanish Presidency of the Council, a “Second European Summit on Roma inclusion” took place in Córdoba (Spain) on April 2010, on the occasion of the International Roma Day.³²²

The aim of the Summit was to take stock of the achievements undertaken at EU level for Roma inclusion, over the past two years, and to renew the commitments. Approximately 400 representatives of EU institutions, national governments, regional and local public authorities and civil society (including Roma organisations), took part again in the Summit.

The Summit placed a particular focus on the 10 Common Basic Principles for Roma inclusion, annexed on 8 June 2009 to the Council of Ministers in charge of Social Affairs’ conclusions, inviting Member States and the Commission to take them into account when they design, implement and evaluate policies.

Four workshops were run in parallel in order to debate on the principles of "explicit but not exclusive targeting", "awareness of the gender dimension", "use of community instruments" and "involvement of civil society".

Particular attention was devoted to the issue of Roma health, to which a plenary discussion was fully dedicated on the second day of the Summit: Roma health was considered as one of the most important issues for Roma inclusion.

Eventually, the Spanish, Belgian and Hungarian Presidencies adopted a declaration affirming the “*joint commitment for the mainstreaming of Roma issues into all relevant policies, a roadmap for the actions of the European Platform for Roma inclusion, the effective use of the EU Structural Funds to this end and the follow up of the Summit in Council*”.³²³

One of the main achievements of the Summit has been the publication of two very important and far-reaching policy documents: the Communication on the social and economic integration of the Roma in Europe, and a Progress Report on the Implementation of the EU instruments and policies for Roma inclusion 2008-2010.

The Policy Communication (COM(2010)133) outlines “*an ambitious mid-term program to meet the biggest challenges for Roma inclusion*”, including three main

³²² The International Roma day (celebrated since 1971), acknowledges that Roma are an integral part of the history and civilisation of Europe.

³²³ EC, Employment, Social affairs and Equal Opportunities, Events, Second Roma Summit.

objectives: “mobilising the Structural Funds, including the European Social Fund, to support Roma inclusion”, “taking Roma issues into account in all relevant policy areas at national and EU level, from employment to urban development and from public health to EU expansion”, and “harnessing the potential of Roma communities to support inclusive growth as part of the Europe 2020 strategy”.³²⁴

The second document, the Progress Report 2008-2010, evaluates the progress achieved in integration over the past two years. Following the results of this Report:

*“Although the situation of many of Europe's Roma people remains difficult, important progress has been made at EU and national levels. In the last two years, the EU and Member States have focused on making anti-discrimination laws and EU funding more effective in promoting Roma inclusion. This includes fighting discrimination, segregation and racist violence as well as supporting programs to address the vicious circle of poverty, social marginalisation, low school achievement and poor housing and health. For example, the Commission launched legal proceedings against 24 Member States to make sure that EU anti-discrimination law on the grounds of race is correctly transposed into national legislation. Out of these cases, 12 are still open while 12 were successfully”*³²⁵

As underlined by Heather Grabbe, director of the Open Society Institute in Brussels; and by Nicolas Beger, director of Amnesty International's EU office, in their recent article *Ending Europe's Exclusion of Roma*, the EU can play a critical role in the process of full inclusion of Roma people into European societies.

The Commission has developed a range of useful tools, even though they are still scattered across policy areas and their effect is hard to measure.

The policy of “explicit but not exclusive targeting of the Roma” is a sound action because “it obliges municipal authorities to provide matching sums and to take measures such as providing school buses for Roma children from isolated communities”, but “more money should be earmarked and the approach should be extended to deliver similarly practical results for the Roma in terms of education, health, housing and jobs”.³²⁶

Progresses for the Roma communities in Europe could be done only through “a

³²⁴ EC, Communication from the Commission to the Council, the European Parliament, The European Economic and Social Committee and the Committee of the Regions, The social and economic integration of the Roma in Europe, Brussels, 7.4.2010 COM(2010)133 final,.

³²⁵ EC, Commission Staff Working Document, Roma in Europe: The Implementation of European Union Instruments and Policies for Roma Inclusion, (Progress Report 2008-2010), Brussels, 7.4.2010, SEC(2010) 400 final.

³²⁶ Beger, N., Grabbe H., (2010).

*comprehensive framework strategy for the Roma at the EU level, a proposal made by the European Parliament that has yet to elicit a response from the Commission”.*³²⁷

The EU should also help at the strategic level: *“it should develop benchmarks, spread best practice and persuade member states to join up their strategies. It also needs to make its own efforts more cohesive”.*

Without a concerted policy response, concludes the article, *“the challenges posed by such exclusion will not go away”.*³²⁸

³²⁷ Ibidem.

³²⁸ Ibidem.

V.2 Roma/Gypsies: a true European Minority?

Following a general introduction to the main political approaches and to the main legal instruments and mechanisms, at European and international level, for the safeguard of minority rights; this paragraph will analyse the example of Roma's minority, concentrating on the definition of Roma as a minority and their current legal status in Europe, trying to define which concept of minority is being applied to them.

It has been already clarified, in fact, in the previous paragraphs, which are the main legal texts adopted for the international protection of minority rights as well as the specific ones concerning Roma rights, elaborated by the most important international and regional organisations: the United Nations (UN), the European Union (EU), the Council of Europe (COE) and the Organisation for Security and Cooperation in Europe (OSCE). It has been analysed until which extent they result effective in protecting the rights of minorities in general and the ones of Roma people, in particular.

Roma will be eventually defined as a cultural, linguistic, transnational minority; a non-territorial people whose members are linked by culture and language and deserve international acknowledgment, respect and protection on the same foot as other well-recognised minorities in Europe.

As previously underlined in this study, since the early 1990s, Roma people have been the subject of an intense debate, as a consequence of the rapid social, political and economic changes taking place in Central and Eastern Europe following the collapse of Communism, the recent wars in Yugoslav and especially in Kosovo, and the enlargement first of the Council of Europe in the early 1990's, and then of the EU, having been Romania, Bulgaria and Croatia the last countries of the former East Bloc acceding the European Union.

Roma represents in fact the largest minority in Europe, therefore the issue of their social inclusion came into focus as a primary concern for both the UN human rights institutions and the major European regional organisations.

European organisations as well as non-governmental organisations have started to put pressure upon East European States to first recognise the Roma as a distinct ethnic minority and more importantly to implement policies and action plans to reduce discrimination, promote tolerance and to protect their culture.

However, the legal status of Roma people appears to be different in the different States of the European Union and their position depends both on the states ratification of international conventions and on the adoption of domestic and intrastate legislations.

Although according to documents Roma should be considered as a true minority group with specific rights, in some countries they are still not recognized as a national or linguistic minority, even though all European countries recognize and guarantee the protection of individual rights against discrimination and racism.

In the majority of new Member States of the European Union, from Central and Eastern Europe (e.g.: in Czech Republic, Slovak Republic, Hungary, Slovenia), Roma people officially enjoy a legal status of “*national or ethnical minority*” but “*confession of this status does not guarantee real equality and does not improve their social status. Many Roma people don’t declare their own nationality (on the basis of negative historical experiences and present social prejudices) and many of them even deny their origin and don’t want to identify with in some situation*”.³²⁹

The official status of “national minority” for Roma people is recognized in some other Member States of the European Union as well, like Austria, Germany, Finland and Netherlands.

In some other countries instead (e.g.: France, Greece and part of Spain) the presence of ethnical minorities is simply *de jure* not recognised.³³⁰ Finally, in some other States, the existence of minority groups is legally accepted but does not include Roma people, which tend to be considered more as a “socially excluded community”.

The historical events of the last 20 years witnessed a considerably increase of the number of Roma who moved from the Balkans to Western Europe in search of relief, asylum, temporary or permanent residence in Western Europe.

³²⁹ Vojtová P., Davidová E., Lhotka P., “The Roma Minority in some countries of the European Union in connection with their international provisions”, in: *Journal of Health Sciences Management and Public Health*, p.167.

³³⁰ France, for example, denies the existence of national or ethnical minorities in its territory declaring that “since the basic principles of public law prohibit distinctions between citizens on grounds of origin, race or religion, France is a country in which there are no minorities”(UN Documents CCPR/C22/Add.2 and CCPR/C/46/Add.2). Consequently Article 27 of the ICCPR, for example, is considered as not applicable, offensive to the principle enshrined in Article 2 of the French Constitution. For the same reason France, together with other States (as for example Greece, Belgium, Andorra, Luxembourg) did not ratify the European Council of Europe’s Framework Convention for the Protection of National Minorities.

As underlined by Zoltan D. Barany in its article *Orphans of Transition: Gypsies in Eastern Europe*:

*“For the approximately six million Roma (Gypsies) who live in Eastern Europe, the transition from communism has been an altogether deplorable experience. Though entire sections of society (unskilled laborers, pensioners, and so on) have been hurt by the marketization processes that began nearly a decade ago, none has been more adversely affected than the Roma. A wide variety of long-marginalised groups whose exclusion had been based on ethnicity, gender, sexual orientation, or other grounds had greeted the fall of the ancient regime enthusiastically, expecting an end to state-sanctioned discrimination and societal prejudices. On the whole, marginal groups -- and especially ethnic minorities -- have been more successful in acquiring rights and stopping discriminatory practices in countries where democratisation has advanced rapidly than in countries where the process has been sluggish. One feature common to all East European states, however, is the desperate situation of the Gypsies.”*³³¹

A new preoccupation with immigration in general, and a fear of “Roma/Gypsies invasion from the East” in particular, have given rise to the realisation of many studies commissioned by the major European organisations in response to the sudden increase of Roma in Europe.

However, as underlined by Liegeois J-P and Nicolae Gheorghe in their report, the deterioration of the situation in which Gypsy communities live in Central and Eastern Europe after the fall of Communism and the consequent increase of migration in Western Europe, is perceived by the European organisations “*primarily from the angle of real or potential migration, as a “problem” which may give rise to difficulties, a problem with an “international dimension”*”.³³²

This situation has at the same time given rise to much discussion and the involvement of the media in this sense was particularly high: the issue of massive migration of Roma/Gypsies in Europe and the relative consequences for local populations has often been exaggerated and little or no accurate information has been provided for understanding the real reasons of these movements.

³³¹Barany, Zoltan D., (1998), “Orphans of Transition: Gypsies in Eastern Europe”, in: *Journal of Democracy* - Volume 9, Number 3, p. 142.

³³²MRGI, (1995,) p.17. The persecution of the Roma (or Gypsies) in Eastern Europe did not end with the fall of Communism. In fact, their conditions had improved somewhat under regimes whose Marxist-Leninist ideologies required that the Roma be treated as a socioeconomic group rather than a race. But when free-market economies replaced state socialism, the Roma were once again viewed as foreigners. For further detailed information regarding the situation of Roma people in countries of Central and Eastern Europe after the fall of Communism, please refer to: Guy, Will, (ed.), (2001), *Between past and future. The Roma of Central and Eastern Europe*, University of Hertfordshire Press .

As underlined by Nicolae Gheorghe and Thomas Acton in their article *Dealing with Multiculturalism: Minority, Ethnic, National and Human Rights*:

“ (...) *the former communist countries of Eastern European (...) are countries where the discussions on ethnic specificity and ethnic rights have more than an academic interest. The geopolitics of the region are closely tied to ethnic politics which are fiercely promoted through persistent, and even bloody, group conflicts. This is the region of the world where the majority of the Roma population is concentrated and where the prejudiced perceptions of Gypsies tend to voice themselves violently, resulting in pogrom-like attacks on Roma communities, the expulsion of Roma groups from localities of legal residence, the waves of refugees towards the West and a policy of forced repatriation from Western countries and "reintegration" in their countries of origin where Gypsies are rejected as foreigners*”.³³³

This policy of forced repatriation from Western countries and "reintegration" in the countries of origin, as well as the general mistrustful attitude of European Governments towards the increase of Gypsies migration in Western Europe; has been highlighted by Thomas Hammarberg, Council of Europe's Commissioner for Human Rights, in his *Viewpoint on Roma European migration policies*.

As stated by T. Hammarberg in his article:

“*European governments are not giving Roma migrants the same treatment as others who are in similar need of protection. Roma migrants are returned by force to places where they are at risk of human rights violations.*”³³⁴

Discriminatory practices against Roma migrants have been examined also in a recent study published in April 2009 by Thomas Hammarberg and Knut Vollebeck, the OSCE High Commissioner on National Minorities.³³⁵ The study provided a set of recommendations for action in order to enhance effective protection of the human rights of Roma migrants in Europe.

In some European countries in fact, as underlined by Hammarberg, Roma migrants have been given “tolerated status”, a form of temporary protection against expulsion which however does not confer residence or social rights. There are also “*credible allegations that Roma from outside the EU are more likely to be provided with tolerated status rather than a more durable status, compared with non-Roma third*

³³³ Gheorghe N and Acton T., (1994), p. 30.

³³⁴ Hammarberg, Thomas, Council of Europe, Commissioner for Human Rights, “European migration policies discriminate against Roma people”.

³³⁵ Osce HCNM, *Recent migration of Roma in Europe*, December 2008.

country nationals”.³³⁶

The issue of forced returns of Roma, Askhali and Egyptians to Kosovo in particular, was considered by the Commissioner during its visit in Kosovo in March 2009. The result was a report in which Hammarberg concluded that “*Kosovo does not have the infrastructure that would allow a sustainable reintegration of the returnees and that “this went all the more for the Roma”*”.³³⁷

As reported by Hammarberg in the already mentioned Viewpoint:

“In Kosovo itself there are still about 20.000 internally displaced persons since 1999 who have not been able to return to their original habitats since 1999. The unemployment rate in Kosovo is about fifty per cent and there is just not sufficient capacity now to give a further number of returnees humane living conditions. The reintegration strategy endorsed by the authorities in Pristina is not being implemented, the responsible actors at the municipal level are not aware of their responsibilities and there is not even a budget allocated for the strategy (...) The offer to them must also respond to their fear for their own safety – they have not forgotten the events of 1999 when they were chased away – and to their concern about schooling for their children in a language they understand. Also, there should be a possibility to find jobs. This should be the priority, also for the international community, which has part of the responsibility for the present crisis. The relationship between the Kosovo authorities and the European governments is not one between equal partners, it is in fact widely asymmetric. When the reception of returnees is made a condition for talks about visa liberalization or opening for other privileges, the authorities in Pristina have to give in and the fate of the refugees becomes secondary”.³³⁸

Commissioner Hammarberg concludes that for the time being and for the reasons explained above, “only *voluntary* returns – genuinely voluntary – should be pursued”.

Proposals of “readmission agreements” now largely requested by European governments, should, in the Commissioner’s view, foreseen individual assessments of the protection needs, considering the particularly vulnerable situation of Roma.

European governments, continues Hammarberg, seem not to accept that Roma could have protection needs and expulsions of Roma have been carried out in contravention of EU law.

Destruction of Roma dwellings has also been used as a method to persuade Roma to leave “voluntarily” and discrimination of Roma in migration policies has met with little

³³⁶ Hammarberg, Thomas, Council of Europe, Commissioner for Human Rights, “European migration policies discriminate against Roma people”.

³³⁷ Ibidem.

³³⁸ Ibidem.

or no opposition in almost every country.

The return policy pursued by European Governments is eventually defined as ineffective: *“of those forcibly returned to Kosovo no less than 70-75 per cent could not reintegrate there and moved to secondary replacement or went back to the deporting countries through illegal channels”* as well as *“expulsions between EU countries have also failed in a great number of cases as the Roma have used their right as EU citizens to move within the European Union area”*.

As concluded by Hammarberg:

“States now spending considerable amounts to return Roma to their countries of origin, would make better use of this money by investing in measures to facilitate these persons’ social inclusion in their own societies”.³³⁹

As highlighted by Harold J. Laski in its classic work in 1925, *“A Grammar of Politics”*: *“every state is known by the rights that it maintains”* and European democratic societies will never be considered truly democratic as far as their minorities, and especially their biggest one, live at the borders of these societies.

³³⁹ Ibidem.

Conclusions

The main purpose of this research was to pinpoint the key advancements in promoting social cohesion and integration both at European and international level, supporting a philosophical model of integration of diversity and minorities, which does not forcibly involve homogenization or hegemonization, taking into account the multicultural transformation of our reality in a globalized world.

The main purpose has been the one of founding out whether is possible to allow universal protection of human rights, while preserving cultural values and different identities; whether the values and principles enshrined in the UDHR in the first place and in other important treaties and declarations of the post-World War II period, can be considered as really universally applicable, besides all relativisms and cultural differences.

The first chapter analyzed three concepts which are crucial to the development of a human rights theory sensible to differences and cultural values: the concept of cosmopolitanism, multiculturalism and sovereignty.

I find out that the classical Westphalian sovereignty model still represents the dominant governance model of international law and relations, notwithstanding the recent rise of international global institutions and non-governmental actors, proposing an alternative model of “global governance”.

The role of a supranational institutions like the European Union has been analyzed and considered as essential in this respect, representing the EU a real alternative to the classical Westphalian sovereignty model, even though EU policy is nowadays based essentially on policies of “soft coordination” and there is a concrete risk to remain subjected to national egoism and particularisms.

The second chapter addressed possible interconnections and affinities between the human rights theory, the cosmopolitan theories and the diffusion of global justice’s theories.

I did find connections and affinities between cosmopolitanism and human rights theories and I do believe that they might and should complement each other, also in order to reach some of the main objectives defined by global justice' theorists.

In order to do so it is however of foremost importance to find out which are the theoretical foundations of fundamental rights and how those fundamental rights are actually applied in the main constitutional States where there is a presence of a Bill of Rights and Constitution, even in different legal systems.

The work of the jurist and legal philosopher Robert Alexy has been analysed as essential in this respect, highlighting a substantive, structural theory of fundamental rights which is intimately connected to the very foundation of democracy.

The third chapter analysed the conflict between two famously conflicting ideologies of human rights: universalism and cultural relativism, also to find out whether is possible to find affinities between them.

Interculturality and pluralism will be finally recognized as the key concepts in order to overcome this opposition and to realize a human rights dimension closer to the multiethnic reality of post-Westphalian nation States. Final aim of this section was an effort to reconcile universalism and cultural relativism by taking inspiration from both ideologies.

Thanks to the anthropology of law's perspective and to the clever analysis and investigations of a fine philosopher and observer as Ludwig Wittgenstein, the universality and indivisibility of human rights will be finally reinforced and not diminished.

The fourth and final chapter eventually connected these issues to the actual issue of the international and European system of protection of minorities and cultural diversity, which developed on a parallel although different line.

Merits and faults of this system have been explored, analyzing different models and mechanisms of protection of minority rights in the European and international context.

The main intention here has been the one of analyzing the new concept and definition of minorities in the European Union context, the European Union competences in this field and the possible mutual cooperation between the EU and other international actors acting for the protection of minority rights.

Even if there is still no internationally agreed definition as to which groups constitute a minority, it is always stressed the fact that the existence of a minority should be recognized as a matter of fact and that any definition must include both objective and subjective aspects (race, ethnicity, language or religion but also identity and sense of belonging). T

This has been demonstrated also in the case-study taken into consideration in this study, the one of Roma people in the European context, which represent one of the most neglected minority in Europe.

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Annexes

Annex I

THE STRUCTURE OF BALANCING

1. Law of Balancing: “The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other”.

It is divided in 3 stages:

1.1 Intensity of interference of the 1st principle (degree of non-satisfaction or detriment to the first principle).

1.2 Degree of importance of the 2nd principle (importance of satisfying the competing principle).

1.3 Their relationship to each other (whether the importance of satisfying the latter principle justifies the detriment to or non-satisfaction of the former).

2. Weight Formula: Rational procedure to determine the concrete weight of principle P_i in relation to principle P_j in the light of the circumstances of a specific case. WF is a complement to the law of balancing.

It contains 3 variables:

2.1 Importance of the principles at stake.

2.2 Abstract weight of the principles (derives from the different legal hierarchy of the legal body from which stems the principle or might be established by reference to positive social values).

2.3 Reliability of the empirical assumptions (factual premises under the circumstances of the specific case).

3. Burden of Argumentation: it “operates only in cases in which the weight formula results in a stalemate, the weight of principles being identical”.

Two different solutions:

3.1 Stalemate cases to be solved in favour of the legal liberty and legal equality principle (*in dubio pro libertate*), (in *A Theory*).

3.2 Stalemates cases to be solved by resorting to the democratic principle (in the *Postscript to A Theory*).

Triadic Scale of interference

- 1. Light = 1**
- 2. Moderate = 2**
- 3. Serious = 4**

Triadic Scale of Reliability of Empirical Assumptions

- Reliable = 1**
Plausible = $\frac{1}{2}$
Not evidently/false = $\frac{1}{4}$.

Annex II

DISCOURSE THEORY AND FUNDAMENTAL RIGHTS

Comprise three dimensions:

1. “**Philosophical**”: the foundation and the substantiation of fundamental rights.
2. “**Political**”: the institutionalization of fundamental rights.
3. “**Juridical**”: the interpretation of fundamental rights.

Three different conceptions of fundamental rights:

1. “**Formal**”: if fundamental rights are defined as rights contained in a Constitution or in a certain part of it.
2. “**Substantial**”: include criteria that go above and beyond the fact that a right is mentioned, listed or guaranteed in a Constitution. The substantial concept of fundamental rights corresponds with the concept of Human Rights. Human Rights are substantive even when not included in a formal Constitution. Fundamental rights represent human rights transformed into positive law.
3. “**Procedural**”: institutional problem of transforming human rights into positive law.

Fundamental rights = Human rights transformed into positive law.

Eight potential foundations of fundamental rights:

1. **Religious**: God creates Human Rights in his own image.
2. **Intuitionist**: Human Rights are self-evident.
3. **Consensual**: congruence of beliefs, collective intuitionism.
4. **Socio-biological**: human rights derive from altruism, altruistic behaviour for the survival of the genetic pool of individuals.
5. **Instrumental**: acceptance of Human Rights is indispensable to the maximization of individual utility.
6. **Cultural**: Human Rights as an achievement of the history of human culture, the work of centuries has established a solid core of human rights.
7. **Explicative**: discourse-theoretical approach, makes explicit what is necessarily implicit in human practice.
8. **Existential**: necessity of discursive practice: human beings are “discursive creatures”.