

OBSERVATIONS ON SEYLA BENHABIB'S INTERPRETATIONS OF THE COSMOPOLITAN RIGHTS*

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Abstract: *My essay is dedicated to the analysis of aspects of Benhabib's interpretations of the birth of cosmopolitan rights. The expression "the right to have rights" is contained in different works of Seyla Benhabib: it refers, in the thought of Benhabib, to the birth of a new constellation of human rights. This new constellation of human rights consists in the claim, which every individual may raise, to be acknowledged and protected as a person by the world community. In Benhabib's view, rights and the interpretation of rights have profoundly changed after and thanks to the different covenants and conventions signed by the countries belonging to the world community for the protection of human rights: this process of transformation of the interpretation of human rights began with the Universal Declaration of Human Rights of 1948.*

*The new dimension of human rights is a cosmopolitan one: it is not merely a national dimension. This new dimension overcomes the dimension of particular countries; it promotes, and, at the same time, it calls for the creation of new juridical spaces. Through this new dimension, moreover, individuals are no longer seen as being only citizens of a particular country: individuals are elevated, thanks to the new dimension of the rights, to the condition of world citizens possessing rights which are independent of their belonging to a particular country. Cosmopolitan norms create a new universe of values, of juridical meanings and of social relationships that did not exist at all before the creation of these norms. Seyla Benhabib has expressed the birth of the new constellation of rights in many of her works such as, for instance, *The Rights of Others. Aliens, Residents and Citizens, Another Cosmopolitanism. With Commentaries by J. Waldron, B. Honig, W. Kymlicka, and Dignity in Adversity. Human Rights in Troubled Times.**

The new dimension of rights directly (that is, without the mediation of a particular country) connects every individual to the world community: the right dimension does not depend on a particular country and it is not limited to the

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validity it possesses within a particular country. The authority that corresponds to and is responsible for, at least, some rights of the individuals is the world community. The right of men qua men, that is, the rights independent of a determined citizenship and not coinciding with a determined citizenship emerge gradually, even though this process is steadily being affected by backlashes.

As covenants and conventions signed by the countries of the world community, Benhabib mentions the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (adopted by the United Nations General Assembly on 9 December 1948); the Convention Relating to the Status of Refugees (approved on 28 July 1951); the International Convention on the Elimination of All Forms of Racial Discrimination – ICERD – (adopted by the United Nations General Assembly on 21 December 1965); the International Covenant on Civil and Political Rights – ICCPR – (adopted by the United Nations General Assembly on 16 December 1966); the International Covenant on Economic, Social and Cultural Rights – ICESCR – (adopted by United Nations General Assembly on 16 December 1966); the Convention on the Elimination of all Forms of Discrimination Against Women – CEDAW – (adopted by the United Nations General Assembly in 1979); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – UNCAT – (adopted by the United Nations General Assembly on 10 December 1984).

Within the new constellation of human rights, particular countries are being surpassed by the world community: particular countries do not represent the first and last authority for the acknowledgement of rights. Correspondingly, individuals possess determined rights qua human beings: to have certain rights does not depend on the individuals' possession of a particular citizenship; to have rights depends on the fact that individuals belong to mankind. A new dimension of the individuals comes about: individuals are not only citizens of a country; they are, first of all, human beings, and they have to be recognised as human beings.

Benhabib sees a fundamental difference between the Westphalian and the post-Westphalian concept of country and rights. Within the Westphalian interpretation of rights, countries are the first and last authority for the acknowledgement of rights. Within the post-Westphalian interpretation of rights, countries depend on common values and on common principles which they have accepted: countries obligate themselves to the protection of definite rights and definite principles; this means that countries acknowledge these rights and these principles as being over the sovereignty of the countries themselves. A new dimension of countries, a new dimension of rights, and a new dimension of individuals arise at the same time.

An indispensable presupposition for the promotion of the integration between inhabitants of a country is, according to Benhabib, that citizenship does not depend on ethnos: to belong to a definite ethnos ought not to be the condition for possessing citizenship. If the condition for possessing a citizenship depends on belonging to a definite ethnos, all the inhabitants of a country not belonging to the definite ethnos are automatically excluded from citizenship. This kind of condition for possessing the citizenship of a country is steadily being used to bring about the exclusion of definite inhabitants and groups of inhabitants, for instance, the exclusion of all the inhabitants that have been compelled to or are compelled to migrate to a country.

Benhabib strongly differentiates between the concepts of ethnos and of demos as criteria for the possession of the citizenship: Whereas the concept of ethnos represents a closed concept, the concept demos represents a completely different conception as regards the conditions for membership: demos is a flexible concept, since demos can always be modified by political decisions. Benhabib is particularly firm when it comes to all the structures establishing the right to citizenship on belonging to an ethnos; she is likewise firm as to all the structures excluding certain inhabitants of a country from the right to citizenship because these inhabitants belong to a culture which is different from the culture of the majority of a country: a democratic institution may not afford to forever exclude inhabitants from acquiring citizenship; every kind of such an exclusion is, in the opinion of Benhabib, simply not compatible with a democratic order.

To conclude, I believe it should be noted that Benhabib endorses a kind of flexible, dynamic interpretation of the concept of culture: this means that cultures do not constitute unchangeable patterns; cultures are structures continuously changing: they are dynamic patterns. Moreover, Benhabib considers all individuals as not being prisoners of their own culture; Benhabib does not accept concepts like culture essentialism or culture reductions, as if individuals essentially belonged to only a culture and as if individuals could be reduced to only a culture: individuals possess cultures, they are not possessed by them. All individuals maintain, in the opinion of Benhabib, autonomy in relation to their own culture: individuals are more than just a culture.

Keywords: *Cosmopolitan rights, right to have rights, Westphalian, post-Westphalian, sovereignty, United Nations, ethnos, demos, citizenship.*

1) Introduction

This essay deals with aspects of the thought of Seyla Benhabib: Benhabib's reflections on the birth of a new dimension of the rights of individuals and on the birth of a new interpretation of the status of individuals as such will be the centre of my investigation. The new constellation of individuals and

of rights described in Benhabib's studies can be synthesised in the following points:

- All individuals, independently of their citizenship, have and ought to be accorded the right to have rights, which consists in being recognised as persons entitled to moral respect and legally protected human rights.
- Individuals transcend their citizenship and their belonging to a country.
- Individuals have a value as such, not because they are citizens of a particular country.
- The value of individuals as such finds recognition and a progressive extension in the United Nations Universal Declaration of Human Rights and in the different United Nations Covenants and United Nations Conventions.
- Dimension and extension of rights are not exhausted by rights recognised by the particular countries within countries' own sphere of power. The cosmopolitan rights, which correspond to the contents of the United Nations Universal Declaration of Human Rights, to the contents of the United Nations Covenants and to the contents of the United Nations Conventions, precede the particular rights due to individuals because they belong to a particular country.
- The value of individuals as such corresponds to the cosmopolitan rights: both dimensions go hand in hand.

The new constellation of individuals and of rights began, in Benhabib's view, with the Universal Declaration of Human Rights and with the different covenants and conventions successively adopted for the protection of human rights. I shall therefore concentrate my attention on Benhabib's concept of the right to have rights. Benhabib defines the concept of the right to have rights in the following way:

'The spread of human rights, as well as their defense and institutionalization, have become the uncontested language, though not the reality, of global politics. It is in terms of the language of human rights that I, too, wish to pose the question of universalism anew in this chapter. I will argue that there is one fundamental moral right, "the right to have rights" of every human being, that is, to be recognized by others, and to recognize others in turn, as persons entitled to moral respect and legally protected human rights in a human community. Human rights, I will maintain, articulate moral principles protecting the communicative free-

dom of individuals; while such moral principles are distinct from the legal specification of rights as justiciable claims, nevertheless, there is a necessary and not merely contingent connection between human rights as moral principles and their legal-juridical form.²

The concept of the right to have rights introduces a new juridical and a new moral dimension of individuals, it corresponds to the establishment of new rights for the individuals, it connects the new dimension of the individuals to the dimension of cosmopolitan rights, and it opens the way to the creation of the world community.

The concept of the right to have rights represents the due instrument for asserting and defending the basic rights of individuals: if individuals is accorded the right to have rights, individuals become – at least morally – inviolable. The new rights and the new measures for the protection of rights originating in the UN Covenants and UN Conventions include the prevention and punishment of genocide, the protection of refugees, political and civil rights, economic, social, and cultural rights, measures against the discrimination of women, measures for the elimination of racial discrimination, and measures against torture.

Throughout the analysis we shall see that the birth of cosmopolitan norms is connected to the birth of new moral facts. The moral universe, in the view of Benhabib, is not given once and for all. On the contrary, it is enlarged through the emergence of new rights; the moral universe has been extended and is being extended through new norms and new rights. The birth and the origin of cosmopolitan norms, which enable the protection of every individual as such, depend on a different interpretation, conception, evaluation, and vision of individuals: the new vision of the individuals is that individuals as individuals have determined rights which transcend the particular dimension of the countries to which they belong.

In Benhabib's view, a completely new vision of individuals has appeared in history: individuals have rights not only as citizens, but as individuals too. If individuals have rights only inasmuch as they are citizens of a country, this condition limits their having rights to the sphere of the countries of which they are citizens and, most of all, limits the value as such of these rights. Rights have a value only insofar as individuals belong to a

² See the essay *Another Universalism* contained in the volume *Dignity in Adversity: Human Rights in Troubled Times*, pp. 57–76. For the quoted passage see pp. 59–60.

country. Individuals are only citizens; rights are only rights of a particular country, having value only within the bounds of the country. Beyond country and citizenship there is nothing.

The birth of cosmopolitan rights has produced, in Benhabib's view, a completely different situation. The recognition of the existence of rights which transcend the borders of countries implies that individuals are not completely under the power of the country to which they belong as citizens. Individuals as such are not only citizens of a particular country. The dimension and the value of individuals do not end at citizenship. Furthermore, individuals do not need to be citizens of a particular country in order to have at least some of their rights recognised. Furthermore, rights are not only those which have value and recognition within particular countries. There is a dimension of individuals beyond the particular countries, and there are new rights beyond the rights conferred by particular countries.

Through the new dimension of rights, the dignity of individuals as individuals is affirmed. This is, in my opinion, the basic aspect which underlies Benhabib's work on the contemporary condition of rights; this is the aspect which can give instruments to establish forms of protection against the oppression of individuals³. Benhabib is aware that the new dimension of individuals and of rights has been emerging only in recent decades, since these new dimensions are a consequence of the 1948 Universal Declaration of Human Rights. Moreover, these dimensions are not equally respected in all countries and in all parts of the world. The new dimension of individuals is always at risk of being destroyed, and the new rights of individuals are likewise exposed to the risk of being destroyed. New rights are to be realised and defended; they are not a conquest which has been won once and for all.

³ The main texts of Benhabib which I base my analysis on are, in order of publication date: *The Claims of Culture: Equality and Diversity in the Global Era*; *The Rights of Others: Aliens, Residents and Citizens*; *Transformations of Citizenships: The Case of Contemporary Europe*; *Another Cosmopolitanism. With Commentaries by J. Waldron, B. Honig, W. Kymlicka*; *The legitimacy of human rights*; *Democracy, Demography, and Sovereignty*; *Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking Citizenship in Volatile Time*; *Dignity in Adversity: Human Rights in Troubled Times*; *Reason-Giving and Rights-Bearing: Constructing the Subject of Rights*; *Transnational legal sites and democracy-building: Reconfiguring political geographies*; *Defending a cosmopolitanism without illusions. Reply to my critics*.

2) Summary

I would like to present a summary of the topics I shall deal with in this essay:

a) Rights and interpretation of rights have had, in Benhabib's opinion, a complete modification thanks to the Universal Declaration of Human Rights – UDHR –, which was adopted on 10 December 1948, and thanks to the different covenants and conventions designed and adopted for the protection of Human Rights.

b) As a result of the 1948 Universal Declaration of Human Rights, and as a result of the subsequent United Nations Covenants and United Nations Conventions that have been signed by countries to protect human rights, countries are no longer the first and last authority when it comes to recognising and validating the rights of individuals. By accepting the Universal Declaration, the UN Covenants and the UN Conventions, countries have subjected themselves to the authority of international organisations.

c) A new dimension of rights, i.e. the dimension of the rights of man qua man comes about through and thanks to this new constellation. A new dimension of rights belonging to mankind as such is emerging in history. There are no longer just rights belonging to people qua citizens of a particular country.

d) The new rights belong to every human being as such, not because human beings are citizens of a particular country. The position of the countries is trumped by a new moral and juridical subject, the world community⁴. Individuals are first of all people and only thereafter citizens of a par-

⁴ As regards Benhabib's analysis of the foundation of cosmopolitan norms, I refer, for example, to the essay *The Philosophical Foundations of Cosmopolitan Norms* contained in *Another Cosmopolitanism*, pp. 13–44. Particularly deserving of mention, in my opinion, within the mentioned essay is the paragraph *The Rise of an International Human Rights Regime*, pp. 27–31, in which Benhabib analyses some aspects of the evolution of the concepts of crimes against humanity, genocide, and war crimes; she also investigates the emergence of new moral facts connected to the recognition of the emergence of new rights. As regards Benhabib's analysis of the evolution of norms of justice from an international to a cosmopolitan dimension, I recommend the chapter *Claiming Rights Across Borders: International Human Rights and Democratic Sovereignty*, contained in the volume *Dignity in Adversity: Human Rights in Troubled Times*, pp. 117–137.

ticular country; the dimension of mankind is not exhausted by being a citizen of a particular country.

e) The new dimension of rights (i.e. cosmopolitan rights) corresponds to a new dimension of the person (i.e. man and not only citizen) and to a new dimension of the authorities that ought to protect rights (i.e. world community over and above the particular countries).

f) There are rights transcending power and authority of the particular countries. Countries ought to respect them, provided that they want to belong to the world community.

g) The emergence of cosmopolitan rights corresponds to the recognition of the communicative freedom of every person⁵; the acknowledgement of the communicative freedom of individuals hinges on the fact that every

⁵ Communicative freedom presupposes equality, liberty of agency, presence of rights and recognition of rights. Without these conditions, there is no ethics of discourse. The dimension of the discourse ethics is, as such, a basic point. Within the discourse ethics no individual making part of a group may be left out of attention. Everybody is a moral subject; everybody has determined rights; everybody ought to have the right to be heard in the public dimension. Within discourse ethics, there are primarily individuals, and not primarily citizens: borders between countries do not play a role. The dimension of discourse ethics is connected to the dimension of the pure individuals – i.e. considered independently of their belonging to a culture – whose value does not depend on their belonging to a country. On this subject see, for instance, *The Claims of Culture: Equality and Diversity in the Global Era*, p. 107:

‘The basic premise of discourse ethics, states that “only those norms and normative institutional arrangements are valid which can be agreed to by all concerned under special argumentation situations named discourses” [...] I call this principle a metanorm in that more specific norms that can be deemed valid will be tested or established through procedures that can meet this criterion. This metanorm in turn presupposes the principles of *universal moral respect* and *egalitarian reciprocity*.’

If there is no moral respect and no egalitarian reciprocity, there cannot be any discourse ethics. Within discourse ethics, the different individuals receive consideration not because they are citizens of a country. They receive consideration since they are rational subjects, independently of their origin, culture, traditions, and so on. Benhabib analyses in an articulate way discourse ethics in the chapter *In the Shadow of Aristotle and Hegel. Communicative Ethics and Current Controversies in Practical Philosophy* of her book *Situating the Self. Gender, Community and Postmodernism in Contemporary Ethics* (pp. 23–67).

person possesses the right to have rights⁶. The right to have rights proves therefore to be the very basis of any moral consideration of the individuals.

h) An indispensable presupposition for the foundation of a just membership in a country of the inhabitants of a country is, in Benhabib's view, that the right to citizenship does not depend on one's belonging to an ethnos. The difference between demos and ethnos in relation to the criterion through which the right to citizenship is going to be decided is fundamental. If belonging to an ethnos is chosen in order to determine who may possess citizenship and who may not possess citizenship, the result will be the exclusion from the right to citizenship of many layers of inhabitants of a country. The choice in favour of belonging to the ethnos as a criterion for the acquisition of citizenship of the country proves to be a choice for exclusion: the criterium of belonging to the ethnos is a means for exclusion⁷.

i) Benhabib expresses her refusal of any cultural essentialism. Individuals have a culture; they are, however, not essentially only one culture. Moreover, cultures are not rigid formations; they are lived in different ways by the people having them. There is no pure culture without influence from other cultures.

j) Even though norms regarding the concession of citizenship can vary from country to country and can be adapted to the different conditions of the countries, a real democracy cannot afford, in Benhabib's opinion, that individuals or groups within the country are forever denied citizenship. The condition of permanent alienage for individuals or for groups may not be accepted in a democratic society. Membership and citizenship may not be refused forever.

3) About the meaning and origin of the title of my contribution "the right to have rights"

First of all, I would like to further explain the meaning of the title of my contribution. The title is connected to some assertions which Benhabib ex-

⁶ This subject is exposed in different ways by Benhabib in her works: the common point of the different expositions is that the basis of morality is the recognition of the subject as possessing the right to have rights. See, for example, *Dignity in Adversity: Human rights in Troubled Times*, p. 9.

⁷ Benhabib interprets the concepts of ethnos and demos in many of her works: see, for example, *The Rights of Others: Aliens, Residents and Citizens*, pp. 206, 207, 208.

presses in the paragraph *Introduction: Cosmopolitanism without Illusions* belonging to the book *Dignity in Adversity: Human rights in Troubled Times*⁸:

[...] I argue that it is necessary to shift both the *justification* strategy and the *content* of human rights away from minimalist concerns toward a more robust understanding of human rights in terms of the “right to have rights.” While I owe the phrase “the right to have rights” to Hannah Arendt⁹, I maintain that in her work, this right is viewed principally as a *political* right and is narrowly identified with the “right to membership in a political community.” I propose that the “right to have rights” needs to be understood more broadly as the claim of each human person to be recognized and to be protected as a legal personality by the world community. This reconceptualization of the “right to have rights” in non-state-centric terms is crucial in the period since the 1948 Declaration of Human Rights, in which we have moved away from strictly international toward thicker cosmopolitanism norms of justice.

For me, cosmopolitanism involves the recognition that human beings are moral persons equally entitled to legal protection in virtue of rights that accrue to them not as nationals, or members of an ethnic group, but as human beings as such.’

Many points in this passage are relevant. In Benhabib’s view, from the 1948 Universal Declaration of Human Rights a new vision of individuals has been affirmed. Individuals are moral persons equally entitled to legal protection in virtue of rights that belong to the individuals as such, not to the individuals as members of a particular nation or as members of a particular ethnic group. Cosmopolitanism entails a new vision and dimension of individuals and, correspondingly, a new dimension of the rights acknowledged to every individual as such. It represents a complete change of perspective as regards the position of individuals and the sense of rights.

The right to have rights belongs to every human being. This entails that individuals are recognised as moral persons by the world community. There is, therefore, a dimension of the individuals which has as its own referent the world community. Individuals no longer just have their own

⁸ See p. 9.

⁹ The sense in which Benhabib uses the formula of Arendt is completely different from the way in which Arendt uses the formula. Arendt uses the formula in order to describe the situation of those who, expelled from their own countries, have lost any right. Benhabib uses the formula to express the very foundation of a cosmopolitan morality (for Benhabib’s mentioning and commenting on Arendt’s statements, see, for instance, *The Rights of Others: Aliens, Residents and Citizens*, pp. 50–51).

country as a referent. Not all rights belong to human beings because they are citizens of a country. Certain rights, i.e. the cosmopolitan rights affirmed in the Universal Declaration of Human Rights and in the following UN Conventions and UN Covenants belong to them as human beings.

Benhabib specifies that the right to have rights is interpreted in not-state-centric terms; it is not connected to states, to their authorities, or to the belonging of individuals to states. Correspondingly, the authority which is connected to the right to have rights is the world community. The referent of this domain of rights is the world community.

These rights belong to human beings qua human beings. Therefore, these rights do not separate human beings from other human beings, as it happens in the case of rights possessed by particular human beings because they belong to a particular group. Cosmopolitan rights unite human beings with each other since they are rights regarding human beings as such, independently of their belonging to a particular country. The interpretation of the value of individuals has changed since individuals are considered as such. New rights have correspondingly emerged since the existence of rights has been recognised which belong to human beings as such, not because they are citizens of a country¹⁰.

The following points of this passage should be underlined:

- There is a world community which originates with and through the adherence of countries to the cosmopolitan treaties. The world community is the new subject corresponding to the rights of human beings qua human beings. The new aspect, i.e. the emerging characteristic accompanying the Universal Declaration of Human Rights consists in the birth of a new authority, the world community, by which human rights should be protected.

¹⁰ It seems that rights first are affirmed in particular dimensions; they are then progressively extended. The development of rights goes from a limited to a larger interpretation of rights. In the same way, the perspectives from which the individuals are considered as subjects of rights are gradually extended. A conception of individuals seen in a universal dimension as possessing universal, cosmopolitan rights comes only after a long evolution and development in the affirmation of human rights. Certain rights are rights of individuals living in a country; these rights have value in the country and depend on the authority of the country. These rights are national rights since the extension of their value is limited to the country. Certain rights, on the contrary, have a value which transcends limits and borders of particular countries. The spheres of the validity of rights are different from each other.

- The presence of a connection between birth and development of the rights of human beings qua human beings and birth and development of the world community ought to be considered; both aspects are interrelated and grow together.

- The right to have rights means that every person has the right to be recognised and to be protected as a legal person by the world community; individuals possess claims before the world community.

- There are rights which are rooted in man as such, not in man as a citizen of a particular country. At least some rights possess a world dimension; they are not limited by and to the national dimension. Individuals are multi-dimensional: they possess a national dimension and they possess a cosmopolitan dimension.

- There are rights which are not limited to particular countries. A dimension of rights is emerging which does not depend on the particular country. This dimension of rights is not conceived within the limits of the particular country. The referent of at least certain rights of the persons is the world community. Individuals are immediately connected to the world community.

- The particular country is no longer the first and last authority in relation to the rights of the person.

- Through the Universal Declaration of Human Rights of 1948, a passage from international to cosmopolitan norms of justice came about. According to Benhabib, the Universal Declaration of Human Rights represents the turning point of the evolution of rights as such whereby a passage from national to cosmopolitan rights has occurred.

The horizon of rights is not limited by countries, it goes beyond them. Due attention should be paid to the implications of cosmopolitanism as they are described within the quotations. Cosmopolitanism implies the acknowledgement that human beings possess certain rights not because they belong to a nation or because they belong to an ethnos; these rights accrue to human beings as such.

The dimension of cosmopolitanism lies above the particular countries and, correspondingly, the dimension of human beings qua human beings lies above their particular belonging to a particular country¹¹. Now there is

¹¹ The diminution of the degree of sovereignty can also present problems. The twilight of citizenship can lead to new instruments for the protection of resident aliens, but it can also lead to a diminution of rights. In other words, the twilight of

a new dimension of rights and a new dimension of individuals: individuals and rights have changed. Individuals are considered as individuals, cosmopolitan rights as rights not circumscribed to a country are emerging in history. The moral universe is not fixed, it is dynamic, it is expanding, it is not given once for all. Individuals possess rights since they are persons; they have value since they are persons. No further dimension and condition are needed.

Benhabib's opinion that at least certain rights accrue to human beings qua human beings means a refusal of all the positivistic interpretation of rights. While positivistic interpretations of rights plead for the emergence of rights and for the validity of the same rights only within the particular countries and only within the specific legislation of the particular countries¹², Benhabib expresses the strong conviction that human beings possess certain rights because they are human beings. The status of human beings precedes the authority of the particular countries. Benhabib adopts a conception of moral rights: the right to have rights implies that individuals

sovereignty has more than one aspect. See, for instance, Benhabib's *Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking Citizenship in Volatile Times*, contained in the volume *Dignity in Adversity: Human Rights in Troubled Times*. The emergence of an international human rights regime and the spread of cosmopolitan norms are positive points in the evolution of rights. At the same time, the diminution of internal power of countries can lead to a diminution of the power of the countries to protect the citizens: global capitalism brings about new forms of exploitation against which a less powerful state can do little. In this contribution I insist on the positive aspects of the contemporaneous evolution of rights: the new dimension of the individual and of individual rights, the reception of new moral facts, the extension of rights, the creation of covenants and conventions for human rights. It should not be forgotten, though, that Benhabib also insists on the negative aspects of the contemporary evolution of sovereignty: the diminution of sovereignty of the countries can lead to a diminution of the protection and of the instruments of protection possessed by the countries against forms of exploitation.

¹² In order to give some examples of positivistic interpretation of rights, Benhabib mentions in the essay *Another Universalism*, p. 66, contained in the volume *Dignity in Adversity: Human Rights in Troubled Times*, the opinions of Jeremy Bentham and of Alasdair MacIntyre, who decidedly refuses the existence of laws of nature and of rights preceding the concrete legislations. Against these positions Benhabib aims at the affirmation and defence of moral rights: moral rights exist before their transcription through positive legislations.

have rights before the statements of the particular legislation and constitutions. There is not a void of rights before the birth of the particular constitutions. The right to have rights exists before the concrete legislation.

Due attention should be paid to the transition from international to cosmopolitan covenants and conventions. Covenants and conventions that can be seen as cosmopolitan are those covenants and conventions referring to the rights of human beings qua human beings. These covenants and these conventions determine the beginning of a new orientation in the rights order. There is a development of rights and of the conditions of individuals in history; a development has taken place as regards individual rights and as regards the interpretation of the individual dimension.

The new cosmopolitan covenants and conventions bring about a new interpretation of individuals qua subjects possessing rights. This means that the dimension of human beings qua human beings is coming to the fore in history. The new covenants and conventions influence the rights order of the particular countries, since all the laws belonging to the rights order of the particular countries which are incompatible with the new covenants and conventions should be eliminated from the rights order of the particular countries themselves¹³. The dimension of rights and the dimension of the individual are mutually related. The dimension of individual qua individual transcending the belonging to a particular country is connected to cosmopolitan rights transcending the particular rights of a country.

New instruments are given in order to recognise a dimension of the persons transcending the belonging to the particular countries. The different covenants emerge from the awareness that there is a dimension of individuals which transcends the countries. Corresponding to a dimension of the individuals which transcends their belonging to a particular country is a dimension of rights and of institutions transcending the particular validity conferred by the countries. A moral dimension of individuals corresponds to a moral validity of certain rights.

¹³ The two dimensions, the cosmopolitan rights and the dimension of man grow together:

- If there is no consideration of man qua man, there cannot be a view of rights detached from a particular country.
- If there is no view of right of man qua man, there cannot be a view of man qua man and not of man as citizen.

4) A new moral dimension

A new moral dimension is emerging. Benhabib underlines that new rights, new authorities, new interpretations of rights, and a new interpretation of individuals are coming to the fore in history. A new universe of values, of senses, and of social relationships is coming about through the cosmopolitan norms. A new foundation for ethics is announcing itself in history. Benhabib states these ideas in her essay *Democratic Iteration: The Local, the National, the Global*, contained in the volume *Another Cosmopolitanism*.

The moral universe is not given once and for all, is not complete. The moral universe and the domain of rights can change, and it is changed by the new norms. These norms were stated and adopted by the different countries through the Universal Declaration of Human Rights and through the successive UN Covenants and UN Conventions. Benhabib says on pp. 72, 73, 74 of *Another Cosmopolitanism*:

[...] what is the ontological status of cosmopolitan norms in a postmetaphysical universe? Briefly, such norms and principles are morally constructive: they create a universe of meaning, values, and social relations that had not existed before by changing the normative constituents and evaluative principles of the world of “objective spirit”, to use Hegelian language. They found a new order – a *novus ordo saeculorum*. They are thus subject to all the paradoxes of revolutionary beginnings. Their legitimacy cannot be justified through appeal to antecedents or to consequents: it is the fact that there was no precedent for them that makes them unprecedented; equally, we can only know their consequences once they have been adopted and enacted. The act that ‘crimes against humanity’ has come to name and to interdict was itself unprecedented in human history, that is, the mass murder of a human group on account of their race through an organized state power with all the legal and technological means at its disposal. Certainly, massacres, group murders, and tribal atrocities were known and practiced throughout human history. The full mobilization of state power, with all the means of a scientific-technological civilization at its disposal, in order to extinguish a human group on account of their claimed racial characteristics, was wholly novel. Once we name ‘genocide’ as the supreme crime against humanity, we move in a new normative universe. I would even dare say that we move into a universe which now contains a new moral fact – “Thou shalt not commit genocide and perpetrate crimes against humanity.” I do not mean by this that the murder of innocent children, women, and civilians was never before considered a crime. That would be absurd. The taking of innocent life is one of the deepest taboos of many of the world’s moral and religious systems. It is precisely because we as humankind have learned from the memories of gen-

ocide, extending from the African slave trade to the Holocaust of the European Jews, that we can name it as the supreme crime. Cosmopolitan norms, of which 'crimes against humanity' is the most significant, create such new moral facts by opening novel spaces for signification, meaning, and rearticulation in human relations. [...] The spread of cosmopolitan norms, from interdiction of war crimes, crimes against humanity and genocide to the increasing regulations of cross-border movements through the Geneva Conventions and other accords, has yielded a new political condition: the local, the national and the global are all imbricated in one another.'

Local, national, and global dimensions are no more separated from each other: cosmopolitan norms are integrated into the national dimension. The new order of norms entails new moral facts. Many interesting ideas are expressed by Benhabib in this passage:

- The new norms, the cosmopolitan norms, are morally constructive. The moral universe is being extended through the new norms. The moral dimension as such is not given once and for all: the moral dimension can be extended.

- Cosmopolitan norms create a universe of values of senses and of social relationships that did not exist before these cosmopolitan norms themselves. New moral spaces are being opened.

- The universe of values and social relationships is being steadily modified.

- The problems and the difficulties connected to the new norms is that the new norms, as with every revolutionary beginning, do not have precedents they can refer to. Legitimation cannot be found, in this dimension, through the connection with antecedents or to precedents: the new norms create a new juridical space.

New moral spaces, new juridical spaces, and new political conditions have been opened through the cosmopolitan norms. New moral facts are created by cosmopolitan norms: crime against humanity is an example of the codification of a new norm and of a new moral fact created by the new cosmopolitan order¹⁴.

¹⁴ On the question of the codification of the crime of genocide, Raphael Lemkin's works seem to me to have exercised a relevant influence on Benhabib. Benhabib deals with Lemkin's work in her study: *International Law and Human Plurality in the Shadow of Totalitarianism: Hannah Arendt and Raphael Lemkin* contained in *Dignity in Adversity: Human Rights in Troubled Times*, pp. 41–56. The codification and the cov-

5) On the distinction between the conception of “Westphalian regime of sovereignty” and of “post-Westphalian regime of sovereignty”

In relation to the emergence of the new cosmopolitan norms and to the consequences which this introduction has for the particular countries, Benhabib speaks of the transition from the Westphalian regime of sovereignty to the post-Westphalian regime of sovereignty.

- In the Westphalian condition, countries have absolute sovereignty.
- In the post-Westphalian condition, which corresponds to the situation in which countries find themselves after the adhesion to the different

enant against genocide give instruments in order to interpret crimes and in order to prevent crimes. Through the analysis of Lemkin’s works we can see the evolution and the modification of the crimes of barbarism and vandalism up to the definition of genocide as such. Correspondingly, it is interesting to see that, before the juridical meditation on the crime, there was not even a name for the crime itself (see Lemkin’s remarks in the paragraph *The term “Genocide”* of his article *Genocide as a Crime under International Law*). The meditation on the specificity and particularity of the crime leads to the codification and definition of the crime itself, enlarges the sphere of justice and of rights and endows courts with new instruments. For my analysis I consulted the following works by Lemkin: *Les actes constituant un danger general (interétatique) consideres comme delites des droit des gens*; *Explications additionnelles au Rapport spécial présenté à la V-me Conférence pour l’Unification du Droit Penal à Madrid (14-20.X.1933)*; *Akte der Barbarei und des Vandalismus als delicta juris gentium*; *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress*; *Genocide – A Modern Crime, Genocide, and Genocide as a Crime under International Law*. The definition of genocide outlined in the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (1948) is as follows:

‘In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.”

For a commentary on the Convention, see the article *Genocide: A Commentary on the Convention*, in: *The Yale Law Journal*, Vol. 58, No. 7 (Jun., 1949), pp. 1142–1160 (the definition of genocide is contained on p. 1157).

rights covenants, countries no longer possess the absolute sovereignty. They have acknowledged the existence of principles and norms which are above their own sovereignty.

Post-Westphalian politics corresponds, therefore, to the birth of the cosmopolitan norms; it corresponds to the existence of a world society. In order to expand on this subject, I am going to quote some statements of Benhabib taken from the text *The philosophical Foundations of Cosmopolitan Norms*, contained in the volume *Another Cosmopolitanism*¹⁵:

‘In the classical Westphalian regime of sovereignty states are free and equal; they enjoy ultimate authority over all objects and subjects within a circumscribed territory; relations with other sovereigns are voluntary and contingent; these relations are limited in kind and scope to transitory military and economic alliances as well as cultural and religious affinities [...]. By contrast, according to conceptions of liberal international sovereignty the formal equality of states increasingly is dependent on their subscribing to common values and principles, such as the observance of human rights, the rule of law, and respect for democratic self-determination. Sovereignty no longer means ultimate and arbitrary authority over a circumscribed territory; states which treat their citizens in violation of certain norms, close their borders, prevent freedoms of market, speech, and association and the like are thought not to belong within a specific society of states or alliances [...].’

There is a fundamental difference between the Westphalian and the post-Westphalian concept of country and of right: the transition from a Westphalian to a post-Westphalian order brings about a complete change in the notion of sovereignty and in the spheres affected by the sovereignty of states. Westphalian politics is, among other things, characterised by the mutual extraneity between countries, since there is no authority over the countries themselves. In post-Westphalian politics, countries are not mutually extraneous, since they have recognised the existence of an authority and of principles above them.

Through the analysis of the contents of the United Nations Covenants and Conventions, we can observe the development of a new system of norms. Countries are no longer isolated systems when it comes to their sovereignty. The diminution of sovereignty takes place to the advantage of

¹⁵ See pp. 23–24.

the individuals: states recognise that a system of norms protecting fundamental human rights is above them.

- Within the Westphalian condition:

o Countries are free and equal: they are the first and ultimate authority.

They have absolute power concerning objects and subjects present in their territory.

o There is no authority which can overcome the authority of particular states; states are the only authority over their territory. There is nothing beyond them to which individuals living in the countries can refer.

o There are no common values and no common principles to which states have subjected themselves.

o Relations between states are contingent, since they are limited to transitory military and economic alliances.

o Countries represent the last authority in relation to the acknowledgement of rights.

- Within the post-Westphalian condition:

o There are common principles and values above countries like the observance of human rights, the rule of law, and the respect for democratic self-determination.

o These principles and values are contained in the covenants and in the conventions approved by the United Nations General Assembly and signed by the particular countries.

o By signing covenants and conventions, countries subject themselves to the accomplishment of duties for the protection of certain rights and of certain principles. Countries recognise that these rights and these principles are over and above their own sovereignty.

o A complete change of the concept of sovereignty takes place through the adherence to the UN Covenants and UN Conventions: sovereignty no longer implies total power over a territory or over individuals. The dimension of the world community is born through the cosmopolitan treaties and is over the dimension of the particular countries.

o Countries which accept their duties towards human rights are considered as belonging to the world community.

o Countries which do not accept human rights are not considered as members of the world community.

The recognition that individuals as such have rights come about through the creation of a cosmopolitan order and through the creation of a world community. Something new is emerging: a new interpretation of individu-

als as subjects who have rights as such, a new dimension of the world order, and a new dimension of the relationships between countries.

6) The foundation of the new dimension of rights

As anticipated at the beginning of my exposition, Benhabib considers the Universal Declaration of Human Rights as the beginning point of the new dimension of rights. I would like to quote a passage from the text *Claiming Rights across Borders* contained in the book *Dignity in Adversity: Human Rights in Troubled Times*, on p. 124:

'It is now widely accepted that since the Universal Declaration of Human Rights (UDHR), we have entered a phase in the evolution of global civil society which is characterized by a transition from *international* to *cosmopolitan* norms of justice. This is not merely a semantic change. While norms of international law emerge through treaty obligations to which states and their representatives are signatories, cosmopolitan norms accrue to individuals considered as moral and legal persons in a worldwide civil society. Even if cosmopolitan norms also originate through treaty-like obligations, such as the UN Charter and the various human rights covenants can be considered for their member-states, their peculiarity is that they limit the sovereignty of states and their representatives and oblige them to treat their citizens and residents in accordance with certain human rights standards. States have now engaged in a process of "self-limiting" or "self-binding" their own sovereignty, as evidenced by the very large number of signatories to the various human rights covenants which have come into existence since the Universal Declaration of Human Rights of 1948.'

The referents of cosmopolitan norms are individuals and individuals' rights. The central aim of the UN Covenants and of the UN Conventions is directed to individuals and to individuals' rights. The following points of Benhabib's reflections deserve particular attention:

- Individuals are considered to be moral and legal persons in a worldwide civil society; they are not simply and not only citizens. There is something which comes before and overcomes their being subjects of a particular country.
- A worldwide civil society exists. There are not only countries: a civil society transcending the particular countries has come about.

- The starting point of the transition from international to cosmopolitan norms of justice is represented by the Universal Declaration of Human Rights of 1948¹⁶.

- International norms are, generically, treaties between states; they do not have, as their own subject, rights of individuals and protection of the rights of individuals.

- Cosmopolitan norms regard individuals in so far as they are considered moral and legal persons. Cosmopolitan norms have both individuals and individuals' rights as their own subjects. Cosmopolitan norms and, correspondingly, cosmopolitan treaties are concentrated on individual rights.

- The peculiarity of cosmopolitan treaties is that they limit the sovereignty of states in favour of individual rights: states have subjected themselves, by accepting and signing cosmopolitan treaties, to respect individual rights.

The transition from international to cosmopolitan norms of justice represents a basic aspect of Benhabib's interpretation of the contemporary state of rights. Benhabib underlines that the change from international norms to cosmopolitan norms does not amount to a simple change of words. The change from international norms to cosmopolitan norms corresponds to a complete modification regarding the conception of rights. "Cosmopolitan" may be applied, in the opinion of Benhabib, only to norms of justice regarding individuals in so far as individuals are considered as moral persons belonging to the world community. Benhabib considers as the particular characteristic of the Universal Declaration of Human Rights and of the fol-

¹⁶ For a study analysing the process which led to the UN Declaration of Human Rights, see the study of Mark Mazower, *The Strange Triumph of Human Rights, 1933–1950*. The study is mentioned by Benhabib (see *Dignity in Adversity: Human Rights in Troubled Times*, pp. 258–259). Mazower points out the different influences and interests out of which the Universal Declaration of Human Rights emerged. He notes that the countries which worked on the draft of the UN Declaration of Human Rights were very careful not to have conflicting issues with the UN Declaration of Human Rights: countries made sure that the formulas of the UN Declaration could not be used against their own interests. Moreover, the rights of individuals were affirmed also in order not to recognise rights for groups. In spite of all the limitations, Mazower admits in his study that the foundation of the United Nations and the UN Declaration of Human Rights brought about a public scene of discussion on human rights which had been absent before.

lowing UN Covenants and UN Conventions their limiting power on the sovereignty of states: UN Covenants and UN Conventions are signed by countries, but their contents are directed to individuals and their own rights. A new authority comes, therefore, to the fore, the world community. The individual is not only a citizen of a state, but is a citizen of the world. In other words, individuals have a precise place in the world community and not only in their own countries.

Benhabib mentions as examples of cosmopolitan covenants and conventions, besides the Universal Declaration of Human Rights, the following covenants and conventions:

✓ The United Nations Convention on the Prevention and Punishment of the Crime of Genocide (adopted by the United Nations General Assembly on 9 December 1948).

✓ The Convention Relating to the Status of Refugees (approved on 28 July 1951).

✓ The International Convention on the Elimination of All Forms of Racial Discrimination – ICERD – (adopted by the United Nations General Assembly on 21 December 1965).

✓ The International Covenant on Civil and Political Rights – ICCPR – (adopted by the United Nations General Assembly on 16 December 1966).

✓ The International Covenant on Economic, Social and Cultural Rights – ICESCR – (adopted by United Nations General Assembly on 16 December 1966).

✓ The Convention on the Elimination of all Forms of Discrimination Against Women – CEDAW – (adopted by the United Nations General Assembly in 1979)¹⁷.

✓ The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – UNCAT – (adopted by the United Nations General Assembly on 10 December 1984).

Benhabib makes an interesting observation about the status of the covenants and conventions on p. 13 of the text *Introduction: Cosmopolitanism without Illusions* contained in the volume *Dignity in Adversity: Human Rights in Troubled Times*:

¹⁷ Benhabib mentions the different covenants and conventions in her study *Transnational legal sites and democracy-building: Reconfiguring political geographies* (see pp. 473–474); see also Benhabib's *Claiming Rights Across Borders: International Human Rights and Democratic Sovereignty* (pp. 124–125).

[...] it is now widely accepted that since the UDHR of 1948, the evolution of global civil society is moving from *international* to *cosmopolitan* norms of justice. The Universal Declaration's Preamble states that the "peoples" of the United Nations' Charter affirm their faith in "the dignity and worth of the human person and in the equal rights of men and women." All persons "without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" are entitled to dignified treatment regardless of "the political, jurisdictional or international status of the country or territory to which a person belongs."

These public law documents have introduced crucial transformations into international law. While it may be too utopian to name them as steps toward a "world constitution," they are certainly more than mere treaties among states. They are constituent elements of a global civil society.'

There is a nascent global society, and there are documents corresponding to the beginning of this global civil society. A completely new dimension is emerging: the different covenants and conventions do not correspond, in Benhabib's view, to a world constitution, but they are something more than mere treaties which are signed between states. These covenants and conventions build a global civil society; they build a new order of society which is not limited to the particular states. Individuals as right bearers have their correspondence in a global civil society. There is a modification of the conception of the individuals, of the individual rights, and of the society: individual rights are rights which have a cosmopolitan validity, individuals assume a cosmopolitan dimension¹⁸.

¹⁸ Benhabib exposes the question of the contrast between internationalist positions and sovereigntist positions on rights in her study *Claiming Rights Across Borders: International Human Rights and Democratic Sovereignty*, contained in *Dignity in Adversity: Human Rights in Troubled Times*, pp. 117–137. For studies discussing the question of the relations between international law and sovereigntism from the point of view of anti-sovereigntism within the US Constitution, I deeply recommend, for instance, the following texts: J. Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*; J. Resnik, *Law as affiliation: "Foreign" law, democratic federalism, and the sovereigntism of the nation-state*; J. Resnik, *Ratifying Kyoto at the Local Level: Sovereigntism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*; H. H. Koh, *International Law as Part of our Law*. In spite of the fact that these studies share an anti-sovereigntist point of

7) The concept of individuals as rights-bearing persons

How individuals are considered as being rights-bearing is profoundly modified within the new constellation of rights. Individuals possess rights not exclusively because of their citizenship, but because they are human beings: there are new rights which regard the dimension of man as such. Benhabib states the following in her essay *Another Universalism* contained in the volume *Dignity in Adversity: Human Rights in Troubled Times* on p. 75:

'In this global civil society, individuals are rights-bearing not only in virtue of their citizenship within states but in virtue of their humanity *simpliciter*. Although states remain the most powerful actors, the range of their legitimate and lawful activity is increasingly limited. We need to rethink the law of people against the background of this newly emergent and fragile global civil society, which is always being threatened by war, violence, and military intervention.'

The following points of this passage are relevant:

- Individuals have determined rights because they are human beings, not because they are citizens of a particular country.
- States remain the most powerful subjects within the rights order; the free space of the activity of the states is being progressively limited.
- A global society comes about through the new norms.
- The global society is steadily menaced by wars and violence. The global society needs protection.

Individuals possess rights not only because of their citizenship. New rights come about, and a new dimension of individuals comes about: individuals are no longer considered as being only citizens, they are primarily considered as human beings, and they possess rights as human beings. Particular countries have limited power. The legislations of the particular countries find their limits in the cosmopolitan norms. Persons deprived of citizenship, too, can find rights in the new constellation since there are rights transcending the citizenship.

Thanks to the fact that the validity of human rights supersedes the limits of the state, the oppressed can call for protection before the world community. These rights are the instruments of protection of individuals before the world community. Benhabib makes the following observations on hu-

view, they reconstruct the thought of sovereigntist authors and their argumentations.

man rights in the volume *The Rights of Others: Aliens, Residents and Citizens* on pp. 123–124:

‘The democratic people constitute themselves as sovereign because they uphold certain principles of human rights and because the terms of their association interpret as well as flesh out these rights. Of course, the precise interpretation of human rights and the content of citizens’ rights must be spelled out and articulated in light of the concrete historical traditions and practices of a given society. Yet these principles are not exhausted, either in their validity or in their content, through their embodiment in specific cultural and legal traditions alone. They have a context-transcending validity claim, in the name of which the excluded and the downtrodden, the marginalized and the despised, mobilize and claim political agency and membership.’

Benhabib concedes that human rights can find different interpretations depending on the traditions which particular states have; the realisation of human rights is influenced by cultural components. Nevertheless, contents and aims of human rights remain valid despite any form of influence. The fact that human rights are influenced by particular traditions of the states in which human rights are realised does not mean that human rights lose their general validity: human rights transcend particular cultures and particular traditions of the different countries. There is a determined content of human rights which is concretised in different traditions: particular traditions have an influence, but the kernel of human rights remains valid¹⁹.

The possibility that the weaker layers of a society find protection in the human rights is due to the transcending value of human rights. Benhabib’s interpretation of the status of rights and of universalism is outlined in the volume *Dignity in Adversity. Human Rights in Troubled Times*, p. 70:

‘Such reciprocal recognition of each other as beings who have the right to have rights involves political struggles, social movements, and learning processes within and across classes, genders, nations, ethnic groups, and religious faiths. Universalism does not consist in an essence or a human nature that we are all said to have or to possess, but rather in experiences of establishing com-

¹⁹ Benhabib strongly refuses the idea that human rights are context-relative and do not possess a universal validity. She does not accept, in other words, that human rights are relegated to a particular validity limited and circumscribed to the particular country. The fact that human rights were born in particular countries does not mean that their validity is limited to the country in which they are born.

monality across diversity, conflict, divide, and struggle. Universalism is an aspiration, a moral goal to strive for; it is not a fact, a description of the way the world is.'

The reciprocal acknowledgement calls for a mediation between classes, genders, nations, ethnic groups, and religious faiths. This acknowledgement proves to be a steady and continuous process of communication among the different groups of a society.

Benhabib does not consider universalism as a fact: universalism does not correspond to a condition in which the world already is. Universalism does not represent a condition which has been reached. Universalism is, in Benhabib's opinion, an aspiration, a goal, an end to be reached: universalism is a process through which common principles are established over and above conflicts, divisions, and contrasts being present in the different components of a society. Rights are to be realised.

8) On the justification of human rights

For Benhabib the recognition that an individual has the right to have rights is the foundation of the ethical dimension. Human rights are the foundation of morality. Benhabib expresses herself in the essay *Another Universalism: On the Unity and Diversity of Human Rights* of the volume *Dignity in Adversity: Human Rights in Troubled Times* in the following way (see pp. 67–69):

'[...] "In order to be able to justify to you why you and I ought to act in certain ways, I must respect your capacity to agree or disagree with me on the basis of reasons the validity of which you accept or reject. But to respect your capacity to accept or reject reasons the validity of which you may accept or reject means for me to respect your capacity for communicative freedom." I am assuming that *all* human beings who are potential or actual speakers of a natural or symbolic language are capable of communicative freedom, that is, of saying "yes" or "no" to an utterance whose validity claims they comprehend and according to which they can act. Human rights are moral principles that protect the exercise of your communicative freedom and that require embodiment in legal form. [...] First and foremost, as a moral being capable of communicative freedom you have a fundamental *right to have rights*. In order to exercise communicative freedom, your capacity for embedded agency needs to be respected. You need to be recognized as a member of an organized human community in which your words and acts situate you within a social space of interaction and communication. You have a "right," that is, a moral claim to be recognized by others as "a rights-bearing person," entitled to a legally instituted schedule of

rights. Others can only constrain your freedom as a moral being through reasons that satisfy the conditions of formality, generality, and reciprocity for all.'

The basis of the reasoning of the right to have rights seems to me to function in the following way:

- The principle of morality consists in considering the person as capable of communicative freedom.
- At the basis of this consideration there is the consideration of the person as having the right to have rights.
- To consider the person as having the right to have rights is the basis for any further recognition of rights and for every moral domain.

Benhabib uses in this context the conception and the principle of discourse ethics and of communicative freedom in order to ground the existence of human rights²⁰. Communicative freedom presupposes that the person has rights: human rights are the condition for the existence of communicative freedom. The justification of acts needs discussion. Discussion needs communicative freedom. Communicative freedom needs rights, it needs the recognition that every individual has the right to have rights. The basis of morality is the capacity and possibility of communicative freedom, of discourse: if the capacity for communicative freedom is not accorded to an individual, the individual is denied the belonging to the moral universe. Either there are equality and commonality of communicative freedom and of acknowledgement of communicative freedom, or there is no authentic moral dimension. Therefore, communicative freedom is the basis of morality. At the same time, the basis of communicative freedom is the recognition that an individual is a person who has the right to have rights²¹. The right to have rights proves to be the basis of morality.

²⁰ As regards the basic premise of the discourse ethics, Benhabib tells in *Situating the Self*, p. 37 as regards the premise "D", which constitutes the basic premise of the discourse ethics: "'D' states that only those norms can claim to be valid that meet (or could meet) with the approval of all concerned in their capacity as participants in a practical discourse.'

The principle is essential since it shows that the approval of a norm ought to be expressed by every participant. Nobody should be excluded.

²¹ Benhabib sees in connection with Roland Dworkin the existence of a moral basis, of a moral background, and of moral rights which are then codified in the particular legislations (see in the book *Dignity in Adversity: Human Rights in Troubled Times* the essay *Another Universalism*, pp. 73–74). The right to have rights is a moral right

9) Models for citizenship and for membership: the concepts of *ethnos* and of *demos*

The concept of membership and of citizenship and the conditions for membership and citizenship are part of Benhabib's area of interest. In particular, Benhabib analyses the concepts of *demos* and of *ethnos* as criteria for the determination of citizenship. The concept of *demos* and of *ethnos* and their reciprocal difference are analysed by Benhabib in different texts. I am going to quote a passage from Benhabib's volume *The Rights of Others: Aliens, Residents and Citizens*, on pp. 211–212; in this passage Benhabib reveals the difference between *ethnos* and *demos*:

'[...] the dual identity of a people as an *ethnos*, as a community of shared fate, memories, and moral sympathies on the one hand, and as the *demos*, as the democratically enfranchised totality of all citizens, who may or may not belong to the same *ethnos*. All liberal democracies that are modern nation-states exhibit these two dimensions. The politics of peoplehood consists in their negotiation. The people is not a self-enclosed and self-sufficient entity. [...] Peoplehood is dynamic and not a static reality.'

Ethnos and *demos* are characterised by the following properties:

- An *ethnos* is a community having shared fates, traditions, language, and memories. Hence, to be part of an *ethnos* is as such not immediately accessible for the inhabitants of a country independently of their culture; it depends on the particular cultural environment in which a person grows up.
- A *demos* is the community of all inhabitants of a country, which can and cannot belong to the *ethnos*. To belong to a *demos* is not a question of culture: to belong to the *demos* is not connected to having shared fates and

which ought to inspire positive legislation. This basic right precedes the particular legislations, and ought to be the principle of positive legislation. It is the presupposition, the condition, the basis for every moral consideration of mankind. It is a moral right which should be instantiated, realised, transformed into the particular legislation. There is therefore, for Benhabib, a moral basis which ought to be realised through the particular legislation. Although particular legislations are different from each other due to the traditions which belong to a country, a common root of moral contents nevertheless remains in spite of all the differences which can be present in the concretisations of the moral rights.

memories and is not connected to being a community of destiny. The conditions for belonging to the demos is independent of having a determined culture: they are the results of democratic discussions and democratic decisions. Furthermore, they can be changed. Hence, to be part of a culture is something completely different from being part of a demos.

It is clear that demos and ethnos do not coincide with each other: they are completely different interpretations of the concept of people and of the conditions for belonging to a people. An ethnos is a closed formation: if the concept of ethnos is used as a criterion in order to determine who is a citizen and who is not a citizen, who can have the right to be or become a citizen and who cannot have this right, the result is the exclusion of individuals or of groups from the right to citizenship.

The concept of ethnos is connected to values, ideas, religions, languages which include determined groups and exclude other groups. To determine the belonging to a country on the basis of these criteria means to exclude determined groups. Since only persons who possess determinate ideas, traditions, values, religion, and languages are part of the ethnos, all those who do not have this heritage are excluded from the ethnos.

The fundamental perspective of ethnos is based on the concept of cultural identity: there is a determined cultural identity which corresponds to the nation as such. Those who have this cultural identity are part of the nation and of the country; those who are not part of this cultural identity are not members of the country. Ethnos as such is an exclusive model for identity and, if applied to the determination of citizenship, is an exclusive model for citizenship²².

Conversely, the model of demos is not founded on the presupposition of belonging to a culture, is not based on a rigid model of culture, is always open to rethinking and to new determinations. Demos is not connected to a heritage of ideas, traditions, culture. Demos is, therefore, a flexible model for membership: the conditions for belonging to a citizenship are determined, but they are not fixed once and for all: they can be re-discussed and modified. Ethnos is a rigid model for citizenship, demos is an open model for citizenship.

²² For instance, within countries having linguistic majorities and minorities, individuals belonging to the majority do not belong to the culture of the minority and vice versa individuals belonging to the minority do not belong to the culture of the majority.

If the belonging to the ethnos is the criterion in order to possess the right to citizenship, the exclusion of a certain group from citizenship is the unavoidable consequence: all those who apply the concept of ethnos in order to establish the right to citizenship aim to exclude some particular persons or some particular groups.

The concept of demos belongs to a different conception, since the borders of a demos can be always changed within the political discourse, within the political discussion: the concept and the borders of demos are open for discussion: its borders can always be modified. Demos as such is a flexible concept²³. Benhabib's proposal as regards integration and inclusion within democracies is the following one (see *The Right of Others: Aliens, Residents and Citizens*, pp. 3–4):

I argue that a cosmopolitan theory of justice cannot be restricted to schemes of *just distribution* on a global scale, but must also incorporate a vision of *just membership*. Such just membership entails: recognizing the moral claim of refugees and asylees to *first admittance*; a regime of *porous* borders for immigrants; an injunction against denationalization and the loss of citizenship rights; and the vindication of the right of every human being "to have rights," that is, to be a *legal person*, entitled to certain inalienable rights, regardless of the status of their political membership. The status of alienage ought not to denude one of fundamental rights. Furthermore, just membership also entails the right to citizenship on the part of the alien who has fulfilled certain conditions. Permanent alienage is not only incompatible with a liberal-democratic understanding of human community; it is also a violation of fundamental human rights. The right to political membership must be accommodated by practices that are non-discriminatory in scope, transparent in formulation and execution, and justicia-

²³ For Benhabib's concept of inclusion I refer to the article *Democratic Exclusions and Democratic Iterations: Dilemmas of Just Membership and Prospects of Cosmopolitan Federalism*, contained in the volume *Dignity in Adversity: Human rights in Troubled Times*, pp. 138–165: '[...] I argued that "the human right to membership" follows from the application of discourse-ethical principles to practices of citizenship and naturalization. In my formulation, this right entails that no democratic polity *ought* to stipulate conditions of naturalization such that the "other(s)" would be permanently barred from membership. Reasons that barred you from membership because of the *kind* of being you were, your ascriptive and non-elective attributes such as your race, gender, religion, ethnicity, language community, or sexuality, would not be acceptable from a discourse-ethical point of view [...]' (p. 139).

The discourse ethics cannot accept permanent alienage. Discourse ethics is as such open for inclusion.

ble when violated by states and other state-like organs. The doctrine of state sovereignty, which has so far shielded naturalization, citizenship, and denationalization decision from scrutiny by international as well as constitutional courts, must be challenged.'

Benhabib's positions are clear: a cosmopolitan theory of justice ought to include the concept of just membership. Just membership entails:

- first admittance for the refugees,
- porous borders for immigrants (i.e. countries cannot act as isolated systems),
- instruments against denationalisation and the loss of citizenship rights,
- the vindication of the right of every human being to have rights, i.e. to be and to be considered as a legal person that possesses inalienable rights,
- the right to become a citizen of a country and, correspondingly, the refusal of the condition of permanent alienage,
- the consideration of permanent alienage as a violation of fundamental human rights.

In particular, the refusal of permanent alienage is connected to the establishment of conditions for the acquisition of citizenship: these conditions ought to be non-discriminatory and transparent; they ought to be justiciable if countries violate them. If the conditions prescribed for obtaining the citizenship are fulfilled, citizenship ought to be conceded.

Benhabib strongly criticises, at the same time, all interpretations considering individuals as being imprisoned by only an identity; she does not accept enclosing individuals in cultural deposits isolated from each other. Therefore, Benhabib opposes every kind of interpretation of the relationships between individuals and cultures which aims at the reduction of individuals to one and only one cultural formation: she calls this kind of interpretation the reductionist sociology of culture. Benhabib describes the principles of the reductionist sociology of culture in the following way in the volume *The Claims of Culture: Equality and Diversity in the Global Era*, chapter 1, *On the Use and Abuse of Culture*, p. 4:

'(1) [...] cultures are clearly delineable wholes; (2) [...] cultures are congruent with population groups and [...] a noncontroversial description of the culture of a human group is possible; and (3) [...] even if cultures and groups do not stand in one-to-one correspondence, even if there is more than one culture within a

human group and more than one human group that may possess the same cultural traits, this poses no important problems for politics or policy.'

Benhabib individuates the following characteristics as the basic ideas of the reductionist sociology of culture:

- cultures are formations which can be clearly defined,
- cultures correspond to determined groups of population,
- the presence of an imperfect correspondence between groups and cultures, the presence of more than one culture within a human group, and the existence of more than one human group which possesses the same cultural traits is not relevant.

The strategy of the reductionist sociology of culture is to contend that, since cultures are clear wholes, cultures are delimited from each other; they can be considered as systems which are autonomous from each other. Hence, individuals can be assigned to a precise culture. Benhabib does not agree with the positions represented by the reductionist sociology of culture: individuals cannot be closed into one culture; cultures are not reciprocally isolated boxes. Her own position is expressed in the following way (see *The Claims of Culture: Equality and Diversity in the Global Era*, p. ix):

'Philosophically, I do not believe in the purity of cultures, or even in the possibility of identifying them as meaningfully discrete wholes. I think of cultures as complex human practices of signification and representation, of organization and attribution, which are internally riven by conflicting narratives. Cultures are formed through complex dialogues with other cultures. In most cultures that have attained some degree of internal differentiation, the dialogue with the other(s) is internal rather than extrinsic to the culture itself.'

Benhabib's positions as regards the structure of cultures are the following ones:

- There is no purity of cultures, i.e. cultures influence each other.
- There is no possibility of identifying cultures as formations which are completely separated by other formations.
- Cultures are always formed with exchanges coming from other cultures. There are no autonomous cultures.

Individuals cannot be assigned to only one culture: they cannot be reduced to a precise and determined culture. Refusal of cultural essentialism and of a unique interpretation of a culture are fundamental for Benhabib. The refusal of cultural essentialism is indispensable for the refusal of reducing persons to a culture. Individuals are, or can at least be, multi-

dimensional: to be born in a culture and to have grown up in a culture does not mean that an individual is imprisoned in a culture, or that an individual represents a kind of isolated system in comparison with and in relation to all individuals of another culture. Cultures are lived in different ways by the individuals having them.

Cultures are complex systems. There are always dialogues and interchanges among cultures. Cultures are lived and experienced in different ways: therefore, those who grow up in a culture are not mere automatic replicants of a culture. The question of the purity of a culture cannot be posed because there is not a unique model of a culture.

Culture, therefore, may not be used in order to exclude individuals or groups from citizenships or from integration in the society. Moreover, Benhabib strongly refuses that a person can be considered as being the property of a group or of a culture. On the subject of culture, Benhabib presupposes that the following norms should be accomplished by a democratic society (see *The Claims of Culture: Equality and Diversity in the Global Era*, pp. 19-20):

‘Focusing on the dilemmas of multiculturalism and women’s issues in countries with pluralist traditions, I will argue that as long as these pluralist structures do not violate three normative conditions, they can be quite compatible with a universalist deliberative democracy model. I call these the conditions of *egalitarian reciprocity*, *voluntary self-ascription*, and *freedom of exit and association* [...]:

1. *egalitarian reciprocity*. Members of cultural, religious, linguistic, and other minorities must not, in virtue of their membership status, be entitled to lesser degrees of civil, political, economic, and cultural rights than the majority.

2. *voluntary self-ascription*. In consociationalist or federative multicultural societies, an individual must not be automatically assigned to a cultural, religious, or linguistic group by virtue of his or her birth. An individual’s group membership must permit the most extensive form of self-ascription and self-identification possible. There will be many cases when such self-identifications may be contested, but the state should not simply grant the right to define and control membership to the group at the expense of the individual; it is desirable that at some point in their adult lives individuals be asked whether they accept their continuing membership in their communities of origin.

3. *freedom of exit and association*. The freedom of the individual to exit the ascriptive group must be unrestricted, although exit may be accompanied by the loss of certain kinds of formal and informal privileges. However, the wish of individuals to remain group members, even while outmarrying, must not be re-

jected; accommodations must be found for intergroup marriages and the children of such marriages.'

Benhabib pleads for a kind of flexible interpretation of concepts like culture: this means that cultures do not represent unchangeable, rigid formations. Cultures possess a dynamic condition and are continuously modified.

Furthermore, Benhabib regards these concepts as ones that do not absorb the individual: individuals maintain a certain degree of independence of their culture(s). No individual is a hostage, no individual is a prisoner of a culture: a culture belongs to an individual, the individual does not belong to a culture. Individuals always maintain autonomy, independence in relation to their cultures²⁴. There is no rigid, unchangeable realisation of a culture: any culture is lived in different ways, has different interpretations. Moreover, any culture is influenced by other cultures: there is no isolated culture²⁵. Hence, individuals may not be automatically assigned to a determined group because of their birth; individuals ought to possess the freedom of leaving a group to which they belong.

10) Conclusions

To recapitulate my analysis, I concentrated my attention on the following points made by Seyla Benhabib:

²⁴ As regards the question of liberalism, tolerance and compatibilities between cultures I refer, for example, to the following studies of Benhabib: *Multiculturalism, Laïcité, and the Scarf Affair in France*, contained in chapter 4, *Gendered Citizenship*, of the volume *The Claims of Culture: Equality and Diversity in the Global Era*, pp. 94–100; *L’Affaire du Foulard (the Scarf Affair)*, contained in the chapter *Democratic Iterations. The local, the national, and the global* of the volume *The Rights of Others: Aliens, Residents and Citizens*, pp. 183–198, and contained in the chapter *Democratic Iteration: The Local, the National, the Global*, of the volume *Another Cosmopolitanism*, pp. 51–61; *The Return of Political Theology: The Scarf Affair in Comparative Constitutional Perspective in France, Germany and Turkey*.

²⁵ For problems connected to the possibility of coexistence of different groups within contemporary societies, I refer, for instance, to the study of D. L. Coleman *Individualizing Justice through Multiculturalism: The Liberals’ Dilemma* and of D. Jacobson, *Multiculturalism, Gender, and Rights*. Both Coleman and Jacobson deal with the dangers of insertions of external elements into a system of law and with problems originating from the influence of external juridical elements in a law system.

- A new dimension of individuals and of rights comes about: individuals are recognised in their being, first of all, human beings. The new rights are the cosmopolitan rights.
- Cosmopolitan rights regard human beings qua human beings: they promote the protection of the rights of the individuals as persons and limit the power of particular countries. Cosmopolitan rights limit the particular dimension of the countries.
- There are individual rights which are valid exclusively in the particular countries and there are cosmopolitan rights. There are countries and there is the world community.
- Countries are limited in their own authority. Their sovereignty is not absolute. The world community is above the countries.
- A new authority, the world community, emerges in addition to the particular states.
- Human beings have rights as citizens of a particular state and have rights as members of the world community.
- Individuals are not only citizens of a particular country; they are members of the world community. The aspect of the rights due to the citizenship does not exhaust the rights of individuals. The fact that they have cosmopolitan rights is connected to their being considered as individuals, independently of their being citizens and of their belonging to a country.
- A new authority, the world community, emerges besides the particular states.
- The new dimension of persons as rights bearers qua human being corresponds to the new dimension of the cosmopolitan rights: There are rights belonging to men as such.
- The new dimension of rights is connected to the new world institutions, to the new covenants and conventions and to the new dimension of individuals.
- A new dimension of reality comes about: the awareness that individuals have a dimension of dignity transcending their belonging to a country, the consideration of individuals as possessing rights due to their being persons is connected to rights which hold for them since they are persons.

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