

LEGAL UNIVERSALISM AND LAW OF NATION

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Abstract: this paper explores the law of nation, the relationship between nationalism and the rule of law, and the tension between legal universalism and the law of nation under the modern rule of law. The emergence of neo-nationalism causes in some political context the return to a political order in which one social group dominates over another. The equality of citizens and the political inclusion at the basis of modern institutions are denied in the face of legal particularism and political exclusion based on the primacy of the law of the nation and the primacy of one ethnicity over the others. The ‘illiberal democracies’ a blow to the liberal order which seems to be losing its drive to expand. Legal universalism therefore remains an unfinished project.

Keywords: universalism – ethnicity – liberalism – principle of equality – nation

Law of nation, equality and social order

As Harris Mylonas has pointed out, «Nation-building refers to the policies that core group governing elites pursue towards non-core groups in their effort to manage social order within State boundaries in ways that promotes a particular national narrative over any other. Such policies may vary widely ranging from assimilationist to exclusionary ones»¹. The process of nation-building is historically associated with the achievement of national independence and the strengthening of the State. The latter can take place by promoting a particular national narrative over any others, as argued Mylonas, or by means of policies that expand «the basis of the State» in ways based on the principle of equality. The expansion of the basis of the State can also be identified with national integration, connected primarily with individual loyalty to the nation. This process of national integration facilitates military recruitment, tax collection, law enforcement, provision of public services, and other forms of cooperation². The nation-building process necessarily involves the issue of inclusion and equality between individuals, and seems – in some cases – to be in contrast with the modern idea of social integration through

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¹ H. Mylonas, 2021.

² Ivi, 2.

equality between subjects, as asserted in the articles of «The Declaration of the Rights of Man and of the Citizen», authored and adopted in revolutionary France in 1789.

In the modern age, two perspectives on social order have come into conflict, the first historically constituted and organized around the principle of social hierarchy and the second in which a society is founded on the principle of equality³. In the first case, the political order is founded on the inequality of individuals. As described by Mylonas, in the process of nation building the policies of governmental elites are clearly discriminatory and founded on the prevalence of one group's laws over others⁴. The law of nation in this sense corresponds to a particular narrative, supported by the principle of inequality between social groups. The aim of such a national elite is reduced to creating and maintaining institutions that reflect the values, narratives and legal principles of a national community from which some subjects or groups are excluded. In the second case, individuals are considered equal by nature, and can contribute in the same ways to the shape the social order. The authority of the State is built around shared citizenship and on the principle of the equality of individuals before the law. The definitive beginning of the struggle between the two perspectives is the French Revolution and the affirmation of the principle of equality, which decapitated – not only figuratively – the hierarchy on which the old political order was erected⁵. The first article of «The Declaration of the Rights of Man» states «Men are born free and have equal rights. Social distinctions can only be founded on mutual convenience». After the upheaval of 1789, the nation was not represented by the highest social classes, but by the Third Estate, the mass of citizens who demanded equal rights. The thinkers of the French Revolution asserted a strong link between the nation itself and the Third Estate. In the first chapter of his famous 1789 work *What is the Third Estate?*, entitled «The Third Estate is a complete nation», the pro-Revolution clergyman and politician Abbé Sieyès wrote:

«Who then would dare to say that the Third Estate does not, within itself, contain everything needed to form a complete nation? It resembles a strong, robust man with one arm in chains. Subtract the privileged order and the Nation would not be something less, but something more. What then is the Third Estate? Everything; but an everything that is fettered and oppressed. What would it be without the privileged order? Everything, but an everything that would be free and flourishing. Nothing can go well without the Third Estate, but everything would go a great deal better without the two others»⁶.

Most arguments hostile to the legacy of the Revolution have focused on repudiating this link. In his 1790 *Reflections on the Revolution in France*, conservative Anglo-Irish

³ V. Cotesta, 2012, 151-164.

⁴ H. Mylonas, 2021, 1.

⁵ From the perspective of systems theory, the concept of inequality by status is replaced by the modern functional differentiation of systems, including political systems, to which the concept of equality is linked. N. Luhmann, 1995, 125-141.

⁶ E. J. Sieyès, [1789] 2003, 96.

thinker Edmund Burke asserted that men cannot change what derives from nature, writing:

«By a constitutional policy, working after the pattern of nature, we receive, we hold, we transmit our government and our privileges in the same manner in which we enjoy and transmit our property and our lives. [...] Our political system is placed in a just correspondence and symmetry with the order of the world and with the mode of existence decreed to a permanent body composed of transitory parts. [...] BELIEVE ME, SIR, those who attempt to level, never equalize. In all societies, consisting of various descriptions of citizens, some description must be uppermost. The levelers, therefore, only change and pervert the natural order of things; they load the edifice of society by setting up in the air what the solidity of the structure requires to be on the ground. The association of tailors and carpenters, of which the republic (of Paris, for instance) is composed, cannot be equal to the situation into which by the worst of usurpations – an usurpation on the prerogatives of nature – you attempt to force them»⁷.

In opposition to Burke's statement, the utilitarian philosopher Jeremy Bentham put forward a thesis on social hierarchy founded by law of nature: «There are no such things as [...] rights anterior to the establishment of government – no such things as natural rights opposed to, in contradistinction to, legal: that the expression is merely figurative; that when used, in the moment you attempt to give it a literal meaning it leads to error»⁸. Rights are thus the creation of political society, in which the differences between individuals are built in accordance with rules that do not derive from a sphere of law preceding and superior to positive law. The social differences are legitimate only from the point of view of collective utility, and not on the basis of differences concerning the nature of subjects⁹. The right is therefore functional to the achievement of collective profit.

The nation based on the primacy of one social group over others references, in a way, natural law in defining the rule of law. According to natural law legal theory, the authority of legal standards necessarily derives, at least in part, from considerations of moral merit. It could be argued that the legitimacy of the legal order derives from its correspondence with the law of the nation, that is, from the integration of the morality of the national community with positive law. According to Alexis de Tocqueville, the law is the same thing as human reason: «Law in general is human reason, inasmuch as it governs all the inhabitants of the earth: the political and civil laws of each nation ought to be only the particular cases in which human reason is applied»¹⁰. Civil institutions, like laws, must be adapted to the particular situation of each nation. An idea of public utility

⁷ E. Burke, [1790] 2005, 68-69.

⁸ J. Bentham, [1831] 2012, 275.

⁹ Differences considered natural by political traditionalists are considered unnatural by modern political thinkers. V. Cotesta, 2021, 155

¹⁰ C. de Secondat Montesquieu, [1748] 2001, 23.

from which to derive universally valid laws, in this view, obviously constitutes an error from a practical point of view:

«[Civil institutions] should be in relation to the nature and principle of each government; whether they form it, as may be said of politic laws; or whether they support it, as in the case of civil institutions. They should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen, or shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs»¹¹.

The legitimate authority of the State derives from societal custom and habits that emphasize the identity of national community. Nationalism is a movement that holds that the State should be in agreement with the nation, and the political institutions must be founded on the political identity of nation. The law of nation can correspond to the purpose of defending the identity of the nation, or the identity of the national community leads to the creation of laws, i.e. the result of positive law and civil institutions, free from reference to «status» or «natural law». In the first case, the law of nation precedes and is superior to the positive law; in the second case, the law of nation is identified with the legal system of a nation. However, only the latter case is in accordance with the principle of equality of citizens, which excludes discrimination resulting from belonging to a specific national community or certain social stratum. The idea of a nation that claims the superiority of one social group over others is at odds with two characteristics of liberal, democratic politics, namely the primacy of the principle of equality and the primacy of positive law over natural law.

The law of nation and the subject

In the early twentieth century, the German historian Friedrich Meinecke indicated two types of nation¹²: the «cultural nation», without a sovereign State, and the «political nation», provided with a sovereign power within a given territory. In the first case, the nation as a political subject could live even in the absence of a sovereign legal system, as long as it kept alive its cultural identity and the relationships between its members. In the second case, the nation represents the essential basis for legitimation of State order: the nation is the rightful source of political power¹³.

¹¹ *Ibidem*.

¹² F. Meinecke, 1908.

¹³ Following Meinecke, it can be said that nationalism promotes the transition from the cultural nation to a political nation, or in other words, from the homeland to the nation-State. This is the case, for instance, for Polish nationalism in the nineteenth century. D. Stasi, 2018.

Nationalism implies the identification of the State with the nation in order to defend national identity. The juridical order of the State should be congruent with the values and beliefs of the nation. The State is primarily concerned with the protection of identity. National identity can be defined either by shared characteristics related to ethnicity, or on the basis of a modern constitutional value system. In the first case, the defence of national identity is based on an «ethnic closure». The nation-State must maintain the close link between ethnic membership and political citizenship (which in fact identify each other), or, as argued by Mylonas, the primacy of a «core nation» over other national groups within a State. In the second case, citizenship is more inclusive as it does not refer to the pre-political or natural characteristics of each subject. Furthermore, there can be no hierarchy between ethnic groups within the nation-State.

The latter model of the nation-State is, from this perspective, more compatible with modern liberal norms than the first, for the reason that determinant factor in defining a nation is adherence to a model of political order, the principles of equality and loyalty to the laws of the nation-State, and not based on ethnic differences. The criterion of inclusion in the national community is granted in the first kind of State on the ground of birth (a kind of natural right), and in the second kind of State by reason of the political duty. In the first case, the ethnic community translates into the political community. In the second case, the political community levels the ethnic differences in the light of citizenship. Citizenship constitutes a political construction that allows maximum inclusion within procedures the result of which is the promulgation of laws and duties within the national community. Inclusion cannot be hindered in principle by «pre-political characteristics».

Nation-building and State-building, although related, are analytically distinct concepts¹⁴. The desired outcome of the modern democratic State is to reinforce itself, through the enlargement of its social base and therefore on the basis of the principle of inclusion and formal equality. Although ethnic nationalism – as with any other kind of nationalism – aims to reinforce the nation-State, the emphasis on ethnicity constitutes an obstacle to the principle of inclusion and to formal equality, from which could draw the broadening of the bases of political power. States can employ law either in order to construct citizenship frameworks that could produce forms of dominance of some groups and exclusion of others who do not belong to the nation, or elaborate form of inclusion opposed to any form of particularism that could undermine the equality of citizens or individual rights¹⁵. The increase of forms of inclusion in the rule of law can be defined as

¹⁴ H. Mylonas, 2021, 8.

¹⁵ As Sara Wallace Goodman observes: «Although citizenship is one of the most widely used concepts in political science, scholars often use it to refer to different things. Citizenship can be a status, a set of rights, an identity, and even a set of norms and competences for participating in systems of democratic governance [...] But citizenship *policy* specifically entails the legal rules and practices that establish formal belonging in a national political community. This usage of “citizenship” – as a nationality – dates to the eighteenth century and the consolidation of the modern nation-state. Distinguishable from the citizenship of the Greek *polis* or the city-states of the Renaissance, the emergence of nationalism as a prevailing

legal universalism¹⁶. Theories of nationalism are opposed to Enlightenment-based legal universalism founded on the principles of progressive universal inclusion in the sphere of rights and on formal (legal) equality of citizens. The form of legitimization of the source of law in modernity, the sovereign power, evolves in a direction inclusive of the whole population in the sphere of law. Legal universalism presents a set of institutions that make easier individual involvement in deliberative procedures, primarily concerning public law. It cut the link between ethnic identity and constitutional law which is deeply rooted in the concept of citizenship set free from «pre-political» attributes, such as belonging to a religion, particular social group or specific ethnicity. The identity of the nation-State therefore derives from its legislative constitution. National identity itself is defined according to the laws of the State and reflects the modern concept of citizenship and the principle of equality.

The legitimacy of the modern State derives from the procedures that allow inclusion and participation in order to take collective decisions. Modern public law refers to the social contract realized by individuals. The social contract potentially could extend to the whole of humanity. The particular foundation of political order, on the contrary, is limited to a specific social group¹⁷. The progressive improvement of rights connected with the principle of inclusion, that is equal dignity based on political citizenship, enlarges the basis of the State. Legal universalism based on inclusion in order to reinforce the authority of State has the consequence that public power is legitimated only by the will of «individuals who are subject to it»¹⁸. While the pre-modern order was (or is) linked to particular communities and to «pre-political» law, the modern political order originates from the will of individuals that translates into positive law.

For modern Western philosophy, the integrity of subjectivity was the guarantee for true knowledge and a well-ordered society. Postmodern criticism claims that a unitary subject is rather an abstraction which actually oppresses concrete individualities¹⁹. The deconstruction of the subjectivity perpetrated by postmodernism leads to a situation in which the task of defining the foundations of the political order is delegated to other collective subjects, other agencies and «other rationalities» superior to the subject. The

ideology in modern states meant citizenship did not merely designate obligations or rights but also group belonging». S. Wallace Goodman, 2023, 135-152: 137.

¹⁶ P. Carrozza, 1995, 151-154.

¹⁷ As pointed out by von Bagandy and Dellavalle, the particular foundation of political order has more to do with a historical-social period that can be defined as premodern: «In the history of the theories of order different paradigms have developed. The most ancient one asserts, with reference to the extension of a rule-based community, that this is necessarily limited to the boundaries of single polities: it cannot extend to humankind as a whole. As regards the foundation of order, this first paradigm asserts that the basic unit is a whole of humans be it a demos, a nation or a state, but not the individual as such. The theories which elaborate this paradigm tend towards firmly defending the polity's interests. Being only a "particular" view of order, and based as it is on a "holistic" understanding of society (the whole – the *holon* –, and in particular the good consisting in its homogeneity, is always more than its parts), this paradigm can be called *holistic particularism*». A. von Bogdandy and S. Dellavalle, 2009, 5-30: 7.

¹⁸ Ivi, 16.

¹⁹ J. Heartfield, 2002; M. Barcellona, 2023, 207-267.

deconstruction of the modern subject leads to the deconstruction of the modern liberal order. In this scenario, the particularism of nations, or more accurately the law of nation, can powerfully re-emerge. Only the nation is the rightful source of political power. The main subject of the political order is the nation, not the individual. The superiority of national law over individual law is one of the main features of new forms of nationalism. The defence of national identity linked, for example, to a traditional family model, implies a limitation of individual rights²⁰. The political order, in other words, is founded on the will of the nation.

There is no doubt that nationalism is based on two closely connected fundamental ideas, identity and sovereignty, in particular the identity of the national community on which the political order is based, and the sovereign power through which the national community exercises its authority over a given territory. The identity and sovereignty of the nation constitute, as in the case of «illiberal democracies»²¹, an evident brake on the development of individual rights. The law of nation favours forms of strengthening of State sovereignty that are opposed to those that have emerged in the context of the principles, doctrines, discourses, ideologies and narratives related to modernity. The law of nation is opposed to legal universalism, because it generates a double inequality: firstly, between those belonging to a given nation and those who do not belong to the nation within a State, and secondly between the law of the nation and individual rights, in both cases the latter being subordinate to the former. From the point of view of legal sources, individual rights will be hierarchically inferior to the law of nation. The national will and the defence of its identity must prevail over any other form of juridical-political legitimation. International law is in some ways incompatible with «legal nationalism». The law of nation translates in the ways in which the nation expresses its will and protects its identity. National identity, and not inclusion or equality, constitutes the principle of the legitimacy of law. The law is effective insofar as it corresponds to the law of nation. Nationalism considers legal universalism, that is the potentially universal recognition of rights, a substantial threat to the national identity and to its principles of political legitimacy. In this way, «the other» is not the bearer of common principles or rights, but of different interests, possibly conflicting with the national interest. The law of the nation stands in contrast both with international law, which could embody foreign interests and limit the will of the nation, and with individual rights, as individual claims could run counter to national identity. Such is the case, for example, of those nations whose identity is closely linked to a religion. Customs and sexual preferences that are not congruent with religious beliefs are to be considered incompatible with the national identity. The short circuit between national law and individual rights can occur in a multitude of situations.

²⁰ A. Gniazdowski, 2022, 93-112. On the differences between Western and Eastern nationalism, see K. Jaskułowski, 2010, 289-303.

²¹ J. Rupnik, 2023, 9-16: 11.

The rule-based system and the law of nation

The conflict between the law of nation and the legal universalism, or in short between liberal policies and authoritarianism, is a subject of debate about the probable failure of the contemporary liberal political order²². The liberal political order, also known as the rules-based international order, is a set of global, structured relationships based on political liberalism, economic liberalism and liberal internationalism. According to John Mearsheimer, this international rule-based system of governance was born with the end of the Cold War, heralding a unipolar world where the dominant State, the United States of America, was a liberal democracy, which sought to remake the world in its own image²³. Two key factors have shaped the international order, one being the number of great powers in the system, and the other being the political ideology of the dominant State. More specifically, the liberal political order entails international cooperation and is constituted by human rights, promotion of liberal democracy and monetary cooperation²⁴. The promotion of human rights could be connected to legal universalism, i.e. rules, norms and decision-making procedures based on inclusion and the principle of equality of citizens under the law. In recent years, it has seemed that the liberal international order is crumbling²⁵. The spread of liberal democracy around the globe has faced strong resistance from nationalism, which emphasizes self-determination and the law of nation over any project of international legislative and political integration²⁶. A liberal order calls for States to delegate substantial decision-making authority to international institutions, and to allow refugees and immigrants to move easily across borders; the promise of well-being and enrichment that Uncle Sam's liberal order sought to sell to the world has been limited to within certain hard borders that are those of the richest Western countries²⁷. In addition, the hyperglobalization that is integral to the liberal order has created economic problems for the lower and middle classes within the liberal democracies, fueling a backlash against that order²⁸. Finally, the liberal order itself has accelerated China's rise from the late 1980s onwards, which in the twenty-first

²² V. E. Parsi, 2022.

²³ J. Mearsheimer, 2019, 7-50: 15.

²⁴ *Ibidem*.

²⁵ A. Graziosi, 2023.

²⁶ F. Fukuyama, 2018, 90-114; F. Fukuyama, 2018b. As pointed out by the former British Prime Minister Gordon Brown: «Most important of all, nationalism has replaced neoliberalism as the dominant ideology of the age. If, for the past 30 years, economics drove political decision-making, now politics is determining economic decisions, with country after country weaponising their trade, technology, industry and competition policies. The win-win economics of mutually beneficial commerce is being replaced by the zero-sum rivalries of "I win, you lose", as movements such as "America first", "China first", "India first" and "Russia first", "my tribe first", threaten to descend into an us versus them geopolitics of "my country first and only". And with national security establishments now freezing the central bank reserves of hostile regimes and limiting access to global payments systems, trade, technology, and capital wars are set to intensify». G. Brown, 2022.

²⁷ S. G. Azzarà, 2020, 41-44.

²⁸ J. Mearsheimer, 2019, 17.

century has transformed the system from unipolar to multipolar. The ongoing war in Ukraine, marked by nationalism and the claims of the right of the nation, reflects a narrowing of rights around Europe, and constitutes a blow to the liberal order which seems to be losing its drive to expand. Legal universalism therefore remains an unfinished project. The liberal international order – de facto Western political civilization – built on legal universalism and the spread of democracy, faces two seemingly insurmountable issues: the global division of wealth that creates inequality, constituting the background against which particularism, nationalism and resentment towards Western culture has arisen. A liberal international order seems to be possible only in a unipolarity, that is the domination of one State over others, a system in which both the law of the nation and legal universalism have emerged. The order founded on the principle of equality is connected ultimately with the political, cultural and economic inequality. The order needs this other side of the coin, its alter ego, to constitute and to represent itself. The separation of West and East remains indispensable for the affirmation of an order which, despite its claims to universalism, remains partial.

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