

Human Rights, Language and Law

Proceedings of the 24th World Congress of the
International Association for Philosophy of Law
and Social Philosophy, Beijing, 2009

Volume II

Edited by Thomas Bustamante and Oche Onazi



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TABLE OF CONTENTS

Thomas Bustamante / Oche Onazi

Introduction	7
------------------------	---

I HUMAN RIGHTS AND JUSTICE IN A GLOBAL PERSPECTIVE

Jacob Dahl Rendtorff

Cosmopolitanism and Politics:

Double edges and tensions between human rights and justice	11
--	----

Akibiko Morita

A Difference in the Conceptions of the Self as the Subject of

Human Rights between the West and Japan: Can Confucian Self

be strong enough to exercise positive liberty in an authoritarian society?	23
--	----

Carla Faralli / Sandra Pattaro

Frontiers of Genetics: Human Rights and the Right to Health	35
---	----

II PUBLIC POLICY, ECONOMICS AND SOCIAL RIGHTS

Álvaro Filipe Oxley da Rocha

Human Rights and Justice in Brazil	47
--	----

Klaus Mathis

Discounting the Future? Cost-Benefit Analysis and Sustainability	63
--	----

III LAW, LANGUAGE AND LITERATURE

Alberto Vespaziani

Towards a Hermeneutical Approach to Legal Metaphor	79
--	----

E. Irem Aki / Wojciech Zaluski

Pathologies of Legal Reasoning or Legal Reasoning as a Pathology?

Two Interpretations of The Stranger	93
---	----

Cheng Zhaoyang

Killing Me Softly with Your Words?

– An Analysis of Power Dynamics in Chinese Court Mediation Discourse	99
--	----

IV TRANSFORMATIONS IN LEGAL DOGMATICS AND PRIVATE LAW

Marcos Vinício Chein Feres / Denis Franco Silva
Public intervention in contracts:
Is it the end of private law as we know it? 131

Pompeu Casanovas / Marta Poblet / José Manuel López Cobo
Relational Justice: Mediation and ODR through the World Wide Web 145

Murray Raff / Anna Taitslin
Private Law in the Shadow of Public Law:
A Legacy of 20th Century Marxism and the Soviet Legal Model 157

Authors 189

INTRODUCTION

In this volume, which contains the 2nd issue of the Proceedings of the 24th IVR World Congress, held in Beijing in the year of 2009, the reader will find a selection of papers presented at that International Congress on the general theme of “Human Rights, Language and the Law.” Even though these papers share a general topic, each of them will approach it in very different ways. Under the first heading, “Human Rights and Justice in a Global Perspective,” the problems of the foundation of Human Rights and the legitimacy of the Political Power occupy the centre of the debate. The first two papers discuss the legitimacy of the Political Power in a more general way, either in the context of a Global Society – in case of Rendtorff’s paper – or in the case of states in which there is a tension between a liberal legal system and an authoritarian society – in case of Morita’s paper, which analyses the practice of the Japanese legal system. Still under the first section, the next paper, written by Carla Faralli and Sandra Tugnoli, views the Human Rights as a “historically shaped creation” and sheds light into some of the most controversial aspects of the right to Health in contemporary societies, which is heavily influenced by the development of new technologies in Genetics and Biological research.

The second section, in turn, comprises two papers and deals with Public Policy, Economics and Social Rights. Firstly, da Rocha’s paper explores the concept of citizenship in Brazilian law and analyses some of the social conditions necessary for its achievement. In particular, the author is concerned with the difficult task of balancing individual rights and collective interests both in legal dogmatics and in the practice of the Brazilian courts. Second, Mathis’ paper proposes a model to assess the value of public projects by means of a cost-benefit analysis of the sustainability of public policies.

The third section, whose title is “Law, Language and Literature” deals with some of the multiple ways by means of which Law can relate to Language. In this sense, Vespaziani’s paper furnishes a profound analysis of Legal Metaphors from the point of view of Hermeneutics and traditional Rhetorics. From a different perspective, in turn, Ari and Zaluski’s paper takes up Camus’ book *The Stranger* and offer two different interpretations of the critique that Camus addresses to the legal practice. As the authors point out, Mersaud’s case can be viewed either as a “pathological” form of legal reasoning (i.e. a “pathology in legal reasoning”) or, in a more radical interpretation of the case, as a way to show how pathological legal reasoning often is. Finally, Zhaoyang’s paper contains the result of an empirical research undertaken at Chinese Mediation courts with a view to demonstrate, as it in fact does, that the process of mediation is necessarily driven by power relations that influence any court’s mediation activities.

The fourth and final section, in turn, deals with some of the most important recent transformations in Legal Dogmatics and in Private Law. On the one hand, Feres and Silva’s paper analyses the theoretical implications of the public intervention of contracts from the point of view of the theories of law and society developed by Taylor, Habermas and Dworkin. In particular, the authors are concerned with the re-interpretation of the institutions of Private Law that are entailed by the recent

developments of legal dogmatics and constitutional law. On the other hand, from a different perspective, Murray and Taitlin's paper analyses how 20th Century Soviet Legal Culture has shaped Private Law and rearranged its norms, concepts and institutions. Finally, Casanovas, Poblet and López Cobo's contribution explains how novel techniques of legal development are being developed under the World Wide Web. In fact, it is claimed that Online Dispute Resolution (ODR) is now a new type of source of law which needs to be clarified both by legal theorists and legal practitioners.

The editors would like to thank the authors of the contributions compiled in this volume for the help in the revision of the manuscripts of their papers, as well as Prof. Zenon Bankowski and the dedicated members of the Chinese Law Society, who worked very hard to select the papers comprised in this volume amongst hundreds of papers received for this publication.

I HUMAN RIGHTS AND JUSTICE IN A GLOBAL PERSPECTIVE

JACOB DAHL RENDTORFF

COSMOPOLITANISM AND POLITICS:

DOUBLE EDGES AND TENSIONS BETWEEN HUMAN RIGHTS AND JUSTICE

INTRODUCTION

The concept of cosmopolitanism is one with many implied double edges, tensions, and possible contradictions, but traditional cosmopolitanism—the project of the law of the world citizen—involves overcoming these tensions and double edges through mediations. Indeed, the cosmopolitan project can be conceived as a philosophical project of mediations: one leading to developing norms based on a vision of the relation between individuals in a global civil society.

The double edges of cosmopolitanism can be seen in the ontological foundations of cosmopolitan norms. This project of cosmopolitanism can be seen already in the philosophy of Immanuel Kant—cosmopolitanism plays an important role in the natural right tradition—where an implied fundamental tension, or double edge, exists between the duty of hospitality (*Weltbürgerrecht*) on the one hand, and the right that governs the relation between nations on the other.¹ Kant argued for a law of world citizenship limited to conditions of “universal hospitality,” meaning that as national laws are developed, the conditions for a perpetually peaceful Westphalian legal order require protections for individuals.²

The tension implicit in the concept of cosmopolitan norms is that, as ethical norms, they go beyond the legal order of the state, while simultaneously being based on the positive norms of state sovereignty. One could conceive of cosmopolitan norms as “the right to have rights,” and at the same time they refer to the right of universal hospitality. In this sense, cosmopolitan norms shape the rights of the republican state, although they come from outside this republic and as such do not have any formal legitimacy. Thus, a perceptible tension exists between the rise of an international human rights regime and the fact that there is no sovereign to enforce these rights.

This tension between national sovereignty and universal human rights principles is evident in the limited right of the international community to intervene in local affairs. Moreover, there is a similar tension between sovereignty and hospitality in the sense that the norm of hospitality does not have any direct basis in the sovereignty of the state. As a consequence of these tensions, there are many iterations and transformations of traditional concepts of political community connected to the emergence of the vision and philosophy of cosmopolitanism in our international and globalized society.

1 Kant, Immanuel: *Zum Ewigen Frieden*, Otfried Höffe (Hg.), Berlin: Akad.-Verl. 2004.

2 Kant (note 1).

I WHAT IS COSMOPOLITANISM?

One simple concept of cosmopolitanism defines it as “the idea of the whole world as a frame of human life; the idea that it is more important to think in the name of humanity than in its parts: nationalities, ethnic groups, cultures.”³ This conception prioritizes the basic fact of being human over belonging to a specific community. Cosmopolitans say: “Human first and after this citizen”⁴ In this sense the concept of cosmopolitanism is both a moral and a political category related to human rights; to diverse moral, political, and religious systems; to the UN and EU; to globalization and multiculturalism; to a number of proposals to reform international relations; and to educational programs in states and in the international community.

The cosmopolitan is a citizen of the world society, evoking the Hellenic ideal of the cosmopolis in the world community. The cosmopolitan is supposed to mediate and transcend dialectical double edges in the creation of the norms of the international community, thus releasing herself from distinguishing between friend/enemy, them/us, outside/inside, or citizen/stranger.

Historically, there are two important origins of the concept of cosmopolitanism: 1) in Stoic philosophy as a culmination of the reflections of antiquity and 2) as a Roman justification for universal power. What is important and common in these ancient ideas is the universalization of the dignity of the human being beyond a specific national context.

Kant’s use of the concept can be found in his reflections on the international state system in *Zum Ewigen Frieden*.⁵ In fact, we must not forget that the Kantian concept of cosmopolitanism is double edged in the sense that it appears in the context of discussing the international law of sovereign states. Moreover, there might be a limitation to the Kantian concept of cosmopolitanism because he reduces the cosmopolitan right to the right of the individual to hospitality. At the same time, Kant mobilized the concept as a criticism of his contemporary society dominated by colonialism and the force of the strongest.

Today, Stoic and Kantian conceptions are very present in the debates about globalization, liberalization, and human rights. We may ask the question: What really is the relation between globalization and cosmopolitanism? In fact, sociologists such as Ulrich Beck and David Held emphasize that cosmopolitanism and globalization represent difficult challenges to the social sciences. For example, some version of the project of combining globalization with new political structures can be seen in the process of creating the European Union. Indeed, the formation of Europe contains all the problems of cosmopolitanism at what may be called a regional level.

A fundamental element of the concept of cosmopolitanism is the idea of tolerance. It can be argued that the concept of hospitality in the idea of cosmopolitanism implies the recognition of the “otherness of the other”:⁶ a fundamental right to be as one wants to be in a society with many forms of life. In an increasingly globalized

3 Thorup, Mikkel & Mads p. Sørensen: *Slagmark. Tidsskrift for idéhistorie, Kosmopolis*, Århus, Efterår 2004, 7.

4 Ibid, 7.

5 Kant (note 1).

6 Derrida, Jacques: *Cosmopolites de tous les pays, encore un effort!* Ed. Galilée, Paris 1997.

world that requires dealing with different cultures and nationalities, the importance of tolerance as a fundamental requirement for cosmopolitan society becomes apparent. Still, in the European context it is a double edge to talk about the cosmopolitan identity as a way to express a tolerant lifestyle. Is tolerance the only content of cosmopolitanism? Or is it meaningful to imagine cosmopolitan individuals who live in the world without a particular identity? According to a sociologist like Ulrich Beck it is a paradox that the European Union holds cosmopolitanism as a fundamental project while at the same time being constituted by nation-states that defend their values on nationalist grounds.

Perhaps the European Union is, after all, very far from cosmopolitanism. Even though cosmopolitanism is a part of the European project, arguably little has been done to integrate and develop Europe in cosmopolitan terms. Denmark provides an example of the contemporary importance of the nation-state within the EU. The Danish nationalist political movement is so strong that many Danes vote for movements and parties that are against the European community when electing members for European Parliament. For Beck and others, the challenge becomes how to conceive Europe, not from the point of view of a federation, or a community of nations, but in terms of cosmopolitan principles.

David Held approaches the double edge of cosmopolitanism more globally. He argues for a political transformation towards a political cosmopolitanism in the global community. According to Held, the current world is not constituted by “national communities of destiny” alone, but rather “overlapping communities of destiny” with shared concerns for issues like climate change, economy, culture, communication, war, et cetera.⁷ At the international level, these shared concerns increasingly connect people into a cosmopolitan community, which transcends the limits of hospitality and necessitates international political structures.

Held argues that the global community requires governance and decision-making that are appropriate from a cosmopolitan point of view. From this perspective, the fundamental questions of cosmopolitanism become: What kind of governance do we need in the international community? How do we formulate an alternative to the neoliberal idea of total pluralism and freedom? How can we define an integrated and more just international world order? What is world governance: federation or international civil cooperation? What is the role of civil society in this new community of international world governance? Does it really give meaning to talk about a cosmopolitical democracy? And what does such a democracy contain?

Moving the political interpretation of cosmopolitanism beyond the ethical idea of hospitality, civil society—where many forms of non-state actors contribute to creating the cosmopolitan sphere between the states—becomes a very important element in the development of the global cosmopolitan order. International nongovernmental organizations, such as Amnesty International or Human Rights Watch, as well as corporations—despite their bad reputation—are important actors in the formation of international civil society. Indeed, non-state actors are essential for forming and developing the cosmopolitan agenda for an international political community beyond nation-states.

7 Held, David. *Cosmopolitanism: A Defence*. Polity Press, Cambridge 2003.

II HISTORICAL DOUBLE EDGES IN THE CONCEPT OF COSMOPOLITANISM

As alluded to above, the historical dimensions and double edges of cosmopolitanism can already be seen in ancient Greek thought. Indeed, Ulysses can be said to be a cosmopolitan, with his travel around the known world of the time. Diogenes's declaration, "I am a world citizen," is a clear statement of cosmopolitan values. We see that it is essential for the concept of cosmopolitanism to demonstrate that the self does not belong to a particular community in order to show the consequences of the international approach to citizenship.

In ancient Greek society, the order of the known world was expressed by the term *cosmos* (*kosmos*). *Polis* is the concept combining the city and the state; therefore, the *cosmopolis* is the global state or city. The Greek city-state was local, and one could argue that human beings belong to the *polis*, as sociable "political animals." On the other hand, according to later Stoic interpretations, Socrates conceived himself as world citizen: a member of the world community. The search for wisdom and the intellectual virtues of the educated philosopher go beyond the participation in the city-state. Accordingly, Socrates argued from the perspective of cosmopolitanism, that is, from the point of view of universality and universal reason. Here is evidence of the beginning of a double edge.

This conception of the *cosmopolis* was present all through the development of Stoicism, culminating with the works of Seneca and Cicero. Fundamentally, the Stoic argument for cosmopolitanism was a moral one based on reason. In particular, rationality and nature expressed universal dimensions of human dignity, which in Stoic philosophy were given a foundation in the cosmological participation of human beings in the totality of the world. The Stoics argued that there is a fundamental order of humanity that goes beyond participation in the political community of the state. According to Stoic natural law theory, humanity is searching to conform to the cosmic order of reason and striving towards cosmic unity. Humanity is thus defined by the fact that human beings are intersubjectively related to the *logos* of *cosmos* and the world. One could say that human beings belong to the common universal *cosmos* of reason and dignity.

Stoic natural law stands as a correction to the Aristotelian philosophy of practical wisdom and judgment, where morality and politics are based on ethics and practical reason within a particular society. It is in the cosmic dimension of natural law that one finds the basis of its universality, whereby the particular becomes the universal. In this sense, the Stoics wanted to solve the double edge and tension between the particular and the universal by arguing for a convergence between the laws of the *polis*, the political community, and of the universal law of *cosmos*.

In order to solve the double edge of the universal and the particular the Stoics argued that the universal natural law is incarnated in the customs and ethics of each human culture, which are an expression of common humanity. As both citizens and individuals, human beings have a universal significance that points to their position in the cosmopolitical order beyond the particular state. It is a basic moral principle (according to the Stoics) that particular human beings should, in all their actions, see themselves as inscribed within a larger social order. The idea of world citizenship expresses this moral responsibility of individuals to transcend their particular point of view and see the world from the perspective of common humanity.

The Romans conceived an early manifestation of the idea of a global community as a common world state, world institutions, and governance. Emperor Marcus Aurelius, for example, wanted to create such a Stoic world community, arguing that human beings belong to two cities: 1) the community within the state, and 2) the community within the world. Seneca saw cosmopolitanism as a unity of the duties of citizenship with the duties of membership in the world community. In other words, if you have no duties as a citizen you nevertheless have duties as a human being.

The Stoics were also aware of the potential solitude of cosmopolitan human beings. This is perhaps an existentialist double edge of cosmopolitanism. There is the danger of a rootless loneliness where no locality remains. Further, there is the danger that this feeling of belonging nowhere can lead to the nostalgic search for a group or a state as a means of escaping loneliness.

As a development of the Stoic approach, Christianity provides a continuation of this connection between humanity, society, and the fraternity of community, by emphasizing the universality of human dignity beyond participation and belonging to a particular community. The Christian approach was very important to establish the concept of cosmopolitanism as an important concept for the modern world.

The potential tension between the universal and particular, which was present in Stoic philosophy, is repeated in the Kantian concept of cosmopolitanism. Still, Kant went beyond the somewhat superficial cultural cosmopolitanism popular during his time and extended earlier philosophical approaches toward a more fully developed theory of world citizenship.

Kant was critical of this cultural cosmopolitanism because it did not go deeply enough into its moral and political consequences. The European cultural cosmopolitans saw (and still see) cosmopolitanism as a way of life. They travel, they read, and are interested in other cultures. This concept of cosmopolitanism can be linked to tolerance and humanism in the French Enlightenment tradition from the seventeenth century, when travel around the world appeared as an aristocratic ideal. This cosmopolitanism expresses the double edge of the concept because there is a potential tension between cosmopolitanism and patriotism. Many people at the time (indeed of today) were worried that cosmopolitanism would destroy patriotism. Many people also argued—harkening to the concerns of the Stoics—that cosmopolitanism destroyed the sense of belonging to a community such that the human being becomes a detached individual lost in relation to history and culture.

Kant's moral and political cosmopolitanism is a fundamental argument against this double edge of cultural cosmopolitanism. In *Zum Ewigen Frieden* Kant argues for a cosmopolitan political and legal order and he argues for cosmopolitan citizenship. The basis for this law of world citizenship is universal human rights, where the rights of individuals in the international community should be protected because of universal values and the dignity of common humanity. According to Kant, it is very important to recognize respect for public human rights as a fundamental step towards perpetual peace in the world community.

In his formulation of such universal human rights, Kant argues for the right of world citizenship but also restricts this right to the right of hospitality. In this sense, due to his submission to state sovereignty, he is still marked by the double edge of cosmopolitanism. The right to visit and to be recognized as a visitor and respected

as a stranger is a central dimension to the cosmopolitan vision of citizenship. Accordingly, Kant argues that the laws of peoples must be based on hospitality and the right to visit a foreign country. From the Kantian perspective, international law and the law of world citizenship are not the same. State citizenship is not a condition for world citizenship. The fundamental moral rights of human beings go beyond the rights of citizens as members of the nation-state. So the Kantian concept of cosmopolitan rights is potentially very weak. It seems like it is nothing more than some version of respect for international humanitarian rights. It is characteristic of the Kantian notion of the laws of peoples that despite arguing for a global political and legal order with peace among states, it is limited to the right to moral humanitarian rights. Kant's conception does not encompass a vision of total legal and political rights of individuals in the international community as a world state. Maybe Kant proposes this limitation as a critique of the Western concept of colonialism where states became so powerful in ruling over the world.

The Kantian concept of cosmopolitan rights does, however, go beyond the legal right of hospitality, arguing for human belonging to the realm of freedom, which goes beyond the limitations by the state. Indeed, both Kantian and Stoic cosmopolitanism justify human dignity and rationality beyond the limits of the nation-state. Kant and the Stoics both understood the separation of human beings into particular communities, but were equally aware of the importance of uniting human beings in a common vision. Stoic cosmopolitanism arguably requires adults with strong capacities to be themselves, which is an idea also present in Kantian cosmopolitanism. One could say that the Kantian search for eternal peace was inspired by the Stoic conception of cosmopolitanism. In both philosophies dignity and freedom are universal ideas for the development of humanity that go beyond the politics of the identity and culture of a particular community.

III DOUBLE EDGES AND THE NEW COSMOPOLITANISM

The new cosmopolitanism of today, and its attendant double edges, is inspired by the Stoics and Kant. Today, we combine individual dignity and rights with political concern for the global community. In this sense the new cosmopolitanism is a search for global responsibility. There is a search for universality and "one single humanity" with a common goal, problems, and challenges.⁸ The world citizen lives in the cosmopolis, seeing the world as her home. Further, she is responsible for the world and engaged in world affairs. The world citizen sees common problems of humanity at the world level as our basic social and political problems.

Highlighting common political challenges on a global level is seen by some as an unrealistic solution to overcoming the tensions inherent in the concept of cosmopolitanism. One oft-repeated criticism is that the idea of moral world citizenship is less about feeling *at home* everywhere but rather feeling *superior* everywhere. It is a lonely and arrogant person who no longer belongs to or is engaged by a particular community. The old concerns about solitude and rootlessness are recast as a kind of

8 Held (note 7).

new nihilism: Cosmopolitans are egoistic individuals or lonely wanderers who find no real meaning in their lives.

This criticism originates from a critique proposed by the political cosmopolitans of the cultural cosmopolitans, who can be divided into groups: free travelers (i.e., voluntary migrants and tourists) and forced travelers (i.e., refugees and vagabonds).⁹ Only the voluntary cosmopolitan—who has the ability and freedom to make a conscious choice about how to engage with the world—seems to be a fair object for this criticism. Tourism has the potential to destroy the cultures of the world rather than opening to new insights, and in many ways the tourist may be blind on her travels. The forced traveler cannot properly be conceived as a cosmopolitan precisely because their migration is forced.

A further criticism of the new cosmopolitanism is that it is a betrayal of national culture. In turning toward the international community one necessarily turns away from a home country, thus destroying the unity of national culture. The Marxist critique argues this point by claiming that cosmopolitanism is an expression of bourgeois ideology. It is the attempt of the ruling classes to justify imperialist destruction of nation-states. From this perspective, liberalism and globalization express a movement of cosmopolitanism, which contributes to the destruction of national cultures.

In *Cosmopolites de tous les pays, encore un effort!* Jacques Derrida (1997) stakes a theoretical position that takes these criticisms into account.¹⁰ He points to the problems of new cosmopolitanism through his development of the idea of hospitality, by suggesting that there is an element of totalitarianism in the idea of “one humanity.”

So there is an implicit tension between ownership and generosity in the concept of hospitality. We may translate this into the double edge between sovereignty and openness to the other in the cosmopolitan vision. In order to have hospitality one needs to be the master of the house, country, or nation. This power is necessary in order to be able to give hospitality to the other. So hospitality, like generosity, presupposes power and self-identity. Moreover, in order to demonstrate hospitality the host may be able to have power over the person that he or she receives in society. Thus, closed boundaries, nationalist sentiment, and the like may be a condition for the ability to show hospitality. Without such boundaries there would be no hospitality and we could not open our society to refugees. This hospitality based on residence in a house, country, or nation can be called unconditional hospitality. But we can also perceive that hospitality sometimes must be based on the ability to give up power, thus there is a tension between the need for and a desire to relinquish ownership and control. In order to avoid an imperialist politics of identity only a philosophy of hospitality, with respect for the other, can solve this double edge of new cosmopolitanism. There is an *aporia* in hospitality because genuine hospitality presupposes that we can invite the other into something that we can call our own.

Derrida addresses the issue of international justice and nationalism in light of this concept of hospitality. He takes into account Kant's concept of hospitality—the

9 Zygmunt Bauman, *Globalization: The Human Consequences*, Columbia University Press, New York 1998.

10 Derrida (note 6).

right of the stranger not to be treated as an enemy, as well as not to be destroyed. The hospitality to strangers is, according to Derrida, the most important manifestation of cosmopolitanism. The openness of cosmopolitan hospitality is not based on calculation but on a genuine willingness to suspend power and open oneself unconditionally to the other. The fundamental cosmopolitan openness of meeting the other implies that I welcome the other without asking for any documentation. I open myself to the other in my home, my house, my language, my culture, and my nation. Such unconditional hospitality is a transgression that seems to go beyond even the Kantian concept of hospitality. Hospitality as the openness to the other becomes a fundamental ethical principle.

If we link Derrida's concept of cosmopolitanism and hospitality with Giorgio Agamben's concept of the relation between humanity and sovereignty we gain a deeper understanding of the double edges of cosmopolitanism. While Derrida investigates the role of the person who receives, in *Homo sacer: Sovereign power and bare life*, Agamben investigates the role of the person who is to be received.¹¹ From Agamben's perspective, the Kantian concept is a limited way of understanding the reality of the cosmopolitan demand. He requires going beyond Kant to search for concepts of hospitality and world citizenship that are not marked by contradictions between sovereignty and unconditional openness to the other.

Agamben proposes a deconstructive reading of human rights and the possibility of perpetual peace, and cosmopolitanism with respect for naked human life beyond biopolitical condition. Agamben is inspired by Derrida, but his philosophy also implies a critical reply to both Kant and Derrida. A human being is characterized by nudity, in other words in a condition that exists as pure humanity not belonging to any particular community (*homo sacer*), which is opposed to the utopia of strong rationality in the Kantian vision of cosmopolitanism.

In Agamben's thought, one can perceive how the double edges of cosmopolitanism seem to be even more radicalized than in the work of Derrida. Agamben draws attention to the concept of the refugee and emphasizes how the refugee expresses the nudity of the human being that needs to be protected in the cosmopolitan condition. Agamben argues that we could never build a political philosophy based on citizenship rights in relation to sovereignty because this reduces the individual, and their right to have rights, to belonging to a particular nation-state. In order to build his radical cosmopolitan foundation for political philosophy, Agamben argues that we must instead go beyond the nation-state towards the nudity of the human being that does not belong to the political community. It is from this position that we can build a new political philosophy.

IV OVERCOMING DOUBLE EDGES: TOWARDS A SITUATED COSMOPOLITANISM

How tenable is this radicalized cosmopolitanism, which does not accept that sovereign states are important for world community? There is a problem with Agamben's position that naked human beings are isolated from the sphere of the biopolitical sovereignty of the state. The naked human being seems to live in isolation from

11 Agamben, Giorgio *Homo Sacer: sovereign power and bare life*, Stanford, 1998.