PART I

THE GENEALOGY OF HUMAN RIGHTS

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The Triumph of Human Rights

A new ideal has trumped in the global world stage: human rights. It unites left and right, the pulpit and the state, the minister and the rebel, the developing world and the liberals of Hampstead and Manhattan. Human rights have become the principle of liberation from oppression and domination, the rallying cry of the homeless and the dispossessed, the political programme of revolutionaries and dissidents. But their appeal is not confined to the wretched of the earth. Alternative lifestyles, greedy consumers of goods and culture, the pleasure-seekers and playboys of the Western world, the owner of Harrods, the former managing director of Guinness Plc as well as the former King of Greece have all glossed their claims in the language of human rights.[1] Human rights are the fate of postmodernity, the energy of our societies, the fulfilment of the Enlightenment promise of emancipation and self-realisation. We have been blessed – or condemned – to fight the twilight battles of the millennium of Western dominance and the opening skirmishes of the new period under the dual banners of humanity and right. Human rights are trumpeted as the noblest creation of our philosophy and jurisprudence and as the best proof of the universal aspirations of our modernity, which had to await our postmodern global culture for its justly deserved acknowledgement.

Human rights were initially linked with specific class interests and were the ideological and political weapons in the fight of the rising bourgeoisie against despotic political power and static social organisation. But their ontological presuppositions, the principles of human equality and freedom, and their political corollary, the claim that political power must be subjected to the demands of reason and law, have now become part of the staple ideology of most contemporary regimes and their partiality has been transcended. The collapse of

[1] *Fayed* v. *UK* (1994) 18 EHRR 393; *Saunders* v. *UK* (1997) 23 EHRR 242; *The Former King Constantine of Greece* v. *Greece* Appl. 25701/94. Declared admissible 21 April 1998.

communism and the elimination of apartheid marked the end of the last two world movements which challenged liberal democracy. Human rights have won the ideological battles of modernity. Their universal application and full triumph appears to be a matter of time and of adjustment between the spirit of the age and a few recalcitrant regimes. Its victory is none other that the completion of the promise of the Enlightenment, of emancipation through reason. Human rights are the ideology after the end, the defeat of ideologies, or to adopt a voguish term the ideology at the "end of history".

And yet many doubts persist.[2] The record of human rights violations since their ringing declarations at the end of the eighteenth century is quite appalling. "It is an undeniable fact" writes Gabriel Marcel "that human life has never been as universally treated as a vile and perishable commodity as during our own era".[3] If the twentieth century is the epoch of human rights, their triumph is, to say the least, something of a paradox. Our age has witnessed more violations of their principles than any of the previous and less "enlightened" epochs. The twentieth century is the century of massacre, genocide, ethnic cleansing, the age of the Holocaust. At no point in human history has there been a greater gap between the poor and the rich in the Western world and between the north and the south globally. "No degree of progress allows one to ignore that never before in absolute figures, have so many men, women, and children been subjugated, starved, or exterminated on earth".[4] No wonder then why the grandiose statements of concern by governments and international organisations are often treated with popular derision and scepticism. But should our experience of the huge gap between the theory and practice of human rights make us doubt their principle and question the promise of emancipation through reason and law when it seems to be close to its final victory?

[2] Despite the enormous amount of books on human rights, the jurisprudence of rights is dominated by neo-Kantian liberals. There are a few notable exceptions. Rolando Gaete's *Human Rights and the Limits of Critical Reason* (Aldershot, Dartmouth, 1993) is a powerful expression of the doubts about human rights demagoguery and the limitations of reason's emancipatory ability. From a legal and historical perspective, the most far-going criticism of human rights is the small classic by Michel Villey, *Le Droit et les droits de l'homme* (Paris, P.U.F., 1983). Bernard Bourgeois, *Philosophie et droits de l'homme: de Kant à Marx* (Paris, P.U.F., 1990), is the best critical introduction to the classical philosophy of human rights. In a more political vein, the recent collection *Human Rights: Fifty Years On* edited by Tony Evans (Manchester, Manchester University Press, 1998) explores some of the most widespread concerns about the state of international human rights law.

[3] Gabriel Marcel, *Creative Fidelity*, 94 (R. Rosthal trans.), New York: Farrar, Strauss, 1964.

[4] Jacques Derrida, *Spectres for Marx* (P. Kamuf trans.) (London, Routledge, 1994) 85.

Two preliminary points are in order. The first concerns the concept of critique. Critique today usually takes the form of the "critique of ideology", of an external attack on the provenance, premises or internal coherence of its target. But its original Kantian aim was to explore the philosophical presuppositions, the necessary and sufficient "conditions of existence" of a particular discourse or practice. This is the type of critique this book aims to exercise first before turning to the critique of ideology or criticism of human rights. What historical trajectory links classical natural law with human rights? Which historical circumstances led to the emergence of natural and later human rights? What are the philosophical premises of the discourse of rights? What is today the nature, function and action of human rights, according to liberalism and its many philosophical critics? Are human rights a form of politics? Are they the postmodern answer to the exhaustion of the grand theories and grandiose political utopias of modernity? Our aim is not to deny the predominantly liberal provenance and the many achievements of the tradition of rights. Whatever the reservations of communitarians, feminists or cultural relativists, rights have become a major component of our philosophical landscape, of our political environment and our imaginary aspirations and their significance cannot be easily dismissed. But while political liberalism was the progenitor of rights, its philosophy has been less successful in explaining their nature. The liberal jurisprudence of rights has been extremely voluminous but little has been added to the canonical texts of Hobbes and Kant. Despite the political triumph of rights, its jurisprudence has disappointedly veered between the celebratory and legitimatory and the repetitive and banal.

Take the problem of human nature and of the subject, a central concern of this book, which could also be described as a long essay on the (legal) subject. The human nature assumed by liberal philosophy is pre-moral. According to Immanuel Kant, the transcendental self, the precondition of action and ground of meaning and value, is a creature of absolute moral duty and lacks any earthly attributes. The assumption of the autonomous and self-disciplining subject is shared by moral philosophy and jurisprudence, but has been turned in neo-Kantianism, from a transcendental presupposition into a heuristic device (Rawls) or a constructive assumption that appears to offer the best description of legal practice (Dworkin). As a result, we are left with "the notion of the human subject as a sovereign agent of choice, a creature whose ends are chosen rather then given, who comes by

his aims and purposes by acts of will, as opposed, say, to acts of cognition".[5] This atomocentric approach may offer a premium to liberal politics and law but it is cognitively limited and morally impoverished. Our strategy differs. We will examine from liberal and non-liberal perspectives the main building blocks of the concept of human rights: the human, the subject, the legal person, freedom and right among others. Burke, Hegel, Marx, Heidegger, Sartre, psychoanalytical, deconstructive, semiotic and ethical approaches will be used, first, to deepen our understanding of rights and then to criticise aspects of their operation. No grand synthesis can arise from such a cornucopia of philosophical thought and not much common ground exists between Hegel and Heidegger or Sartre and Lacan. And yet despite the absence of a final and definitive theory of rights a number of common themes emerge, one of which is precisely that there can be no general theory of human rights. The hope is that by following the philosophical critics of liberalism, Kant's original definition of "critique" can be revived and our understanding of human rights rescued from the boredom of analytical common-sense and its evacuation of political vision and moral purpose. This is a textbook for the critical mind and the fiery heart.

Human rights can be examined from two related but relatively distinct main perspectives, a subjective and an institutional. First, they help constitute the (legal) subject as both free and subjected to law. But human rights are also a powerful discourse and practice in domestic and international law. Our approach is predominantly theoretical but it will often be complemented by historical narrative and political and legal commentaries on the contemporary record of human rights. To be sure, criticisms based on the widespread violations of human rights are not easily reconcilable with philosophical critique. Philosophy explores the essence or the meaning of a theme or concept, it constructs indissoluble distinctions and seeks solid grounds,[6] while empirical evidence is soiled with the impurities of contingency, the peculiarities of context and the idiosyncrasies of the observer. On the other, empiricist, hand, human rights were from their inception the political experience of freedom, the expression of the battle to free individuals from external constraint and allow their self-realisation. In this sense, they do not depend on abstract concepts

[5] Gaete, op. cit., supra n.2, 125.

[6] For a general discussion of the relationship between continental and Anglo-American philosophy in relation to the concept of freedom, see Jean-Luc Nancy *The Experience of Freedom* (Stanford, Stanford University Press, 1993).

and grounds. For continental philosophy, freedom is, as Marx memorably put it, the "insight into necessity"; for Anglo-American civil libertarians, freedom is resistance against necessity. The theory of civil liberties has moved happily along a limited spectrum ranging from optimistic rationalism to unthinking empiricism. It may be, that the "posthistorical" character of human rights should be sought in this paradox of the triumph of their spirit which has been drowned in universal disbelief about their practice.

But, secondly, have we arrived at the end of history?[7] Over two centuries ago, Kant's *Critiques*, the early manifestos of the Enlightenment, launched philosophical modernity through reason's investigation of its own operation. From that point, Western self-understanding has been dominated by the idea of historical progress through reason. Emancipation means for the moderns the progressive abandonment of myth and prejudice in all areas of life and their replacement by reason. In terms of political organisation, liberation means the subjection of power to the reason of law. Kant's schema was excessively metaphysical and laboriously avoided direct confrontation with the "pathological" empirical reality or with active politics. But Hegel's announcement that the rational and the real coincide identified reason with world history and established a strong link between philosophy, history and politics. Hegel himself vacillated between his early belief that Napoleon personified the world spirit on horseback and his later identification of the end of history in the Prussian State. And while the Hegelian system remained fiercely metaphysical, it was used, most notably by Marx, to establish a (dialectical) link between concepts and abstract determinations and events in the world with the purpose of not just interpreting but changing it.

Hegelianism can easily mutate into a kind of intellectual journalism: the philosophical equivalent of a broadsheet column in which the requirements of reason are declared either to have been fulfilled historically (as in right-wing Hegelians and more recently the musings of Fukuyama) or to be still missing (as in messianic versions of Marxism). In both, the conflict between reason and myth, the two opposing principles of the Enlightenment, will come to an end when human rights, the principle of reason, becomes the realised myth of

[7] See Francis Fukuyama, *The End of History and the Last Man* (London, Penguin, 1992) and Derrida's critical comments in *Spectres for Marx*, op.cit., supra n. 4. The German debate is reviewed in Lutz Niethammer, *Posthistoire. Has History Come to an End?* (London, Verso, 1992).

postmodern societies. Myths of course belong to particular communities, traditions and histories; their operation validates through repetition and memory, a genealogical principle of legitimation and the narrative of belonging. Reason and human rights, on the other hand, are universal, they are supposed to transcend geographical and historical differences. If myth gets its legitimatory potential from stories of origin, reason's legitimation is found in the promise of progress expounded in philosophies of history. A forward direction is detected in history which inexorably leads to human emancipation. If myth looks to beginnings, the narrative of reason and human rights looks to *teloi* and ends.

In postmodernity, the idea of history as a single unified process which moves towards the aim of human liberation is no longer credible,[8] and the discourse of rights has lost its earlier coherence and universalism.[9] The widespread popular cynicism about the claims of governments and international organisations about human rights was shared by some of the greatest political and legal philosophers of the twentieth century. Nietzsche's melancholic diagnosis that we have entered the twilight of reason, Adorno and Horkheimer's despair in the *Dialectics of the Enlightenment*[10] and Foucault's statement that modern "man" was a mere drawing on the sands of the ocean of history about to be swept away, appear more realistic than Fukuyama's triumphalism. The Frankfurt sages argued that the conflict between *logos* and *mythos* could not lead to the promised land of freedom, because instrumental reason, one facet of the reason of modernity, had turned into its destructive myth. The dialectic no longer represents the voyage of homecoming of the spirit. Reason's inexorable march and its attempt to pacify the three modern forms of conflict, conflict within self, conflict with others and conflict with nature, led to psychological manipulation and the Gulags, to political totalitarianism and Auschwitz, finally to the nuclear bomb and ecological catastrophe. As a new tragedy unfolds daily in east and west, in Kosovo and East Timor, in Turkey and Iraq, it looks as if mourning more than celebrations becomes the end of the millennium.

Unfortunately political philosophy has abandoned its classical vocation of exploring the theory and history of the good society and

[8] Gianni Vattimo, *The End of Modernity* (Cambridge, Cambridge University Press 1988) *passim*; *The Transparent Society* (Cambridge, Polity 1992) Chapter 1.

[9] Costas Douzinas and Ronnie Warrington with Shaun McVeigh, *Postmodern Jurisprudence. The law of text in the texts of law* (London, Routledge, 1991) Chapters 1 and 5.

[10] (London, Verso, 1979).

has gradually deteriorated into behavioural political science and the doctrinaire jurisprudence of rights. On the side of practice, it is arguable that Home Secretaries should come from the ranks of ex-prisoners or refugees, Social Security Secretaries should have some experience of homelessness and life on the dole, and that Finance Ministers should have suffered the infamy of bankruptcy. Despite the consistent privileging of experience over theory, this is unlikely to happen. Official thinking and action on human rights has been entrusted in the hands of triumphalist column writers, bored diplomats and rich international lawyers in New York and Geneva, people whose experience of human rights violations is confined to being served a bad bottle of wine. In the process, human rights have been turned from a discourse of rebellion and dissent into that of state legitimacy.

At this time of uncertainty and confusion between triumph and disaster, we should take stock of the tradition of human rights. But can we doubt the principle of human rights and question the promise of emancipation of humanity through reason and law, when it seems to be close to its final victory? It should be added immediately that the claim that power relations can be translated fully in the language of law and rights was never fully credible and is now more threadbare than ever. We are always caught in relations of force and answer to the demands of power which, as Foucault argued forcefully, are both carried out and disguised in legal forms. Recent military conflicts and financial upheavals have shown that relations of force and political, class and national struggles have acquired an even more pervasive importance in our globalised world, while democracy and the rule of law are increasingly used to ensure that economic and technological forces are subjected to no other end from that of their continuous expansion. Indeed, one of the reasons that gives normative jurisprudence the unreality, about which law students so often complain, is its total neglect of the role of law in sustaining relations of power and its descent into uninteresting exegesis and apologia for legal technique.

At the time of their birth, human rights, following the radical tradition of natural law, were a transcendent ground of critique against the oppressive and commonsensical. In the 1980s too, in Poland, Czechoslovakia, East Germany, Romania, Russia and elsewhere, the term "human rights" acquired again, for a brief moment, the tonality of dissent, rebellion and reform associated with Thomas Paine, the French revolutionaries, the reform and early socialist movements.

Soon, however, the popular re-definition of human rights was blanked out by diplomats, politicians and international lawyers meeting in Vienna, Beijing and other human rights jamborees to reclaim the discourse from the streets for treaties, conventions and experts. The energy released through the collapse of communism was bottled up again by the new governments and the new mafias in the East which look the same as the governments and mafias of the West.

Against this background, it is highly topical to ask whether the state of human rights is the outcome of intrinsic traits or whether it is a contingent development which will be overcome as the few rogue regimes around the world come to accept the principles of civilised life. To be sure, such enquiries are often treated with incredulity, if not outright hostility; for many, to question human rights is to side with the inhuman, the anti-human and the evil. But if human rights have become the realised myth of postmodern societies, their history demands that we re-assess their promise away from the self-satisfied arrogance of states and liberal apologists and attempt to discover political strategies and moral principles that do not depend exclusively on the universality of the law, the archaeology of myth or the imperialism of reason.

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The tradition of natural law was exhausted well before our century, although it has recently enjoyed something of a revival. Contemporary jurisprudence examines natural law as part of the history of ideas, as an intellectual movement and political doctrine that came to a deserved end in Enlightenment's assault on myth, religion and prejudice. Standard textbooks start the examination of natural law with Antigone's "unwritten laws" and move to the Stoics for whom natural law embodied the "elementary principles of justice which are apparent, they believed, to the 'eye of reason' alone".[11] Cicero enters briefly: "there is a true law, right reason, in accordance with nature; it is unalterable and eternal". He is accompanied, in cameo appearances, by Aquinas, Grotius and Blackstone, whose statement that "natural law is binding all over the globe; no human laws have any validity if contrary to it" is explained in a rather embarrassed fashion.[12] For all these writers, the right and the natural are united in some unclear fashion, although the definition of nature and

[11] Maurice Cranston, *What are Human Rights?* (London, Bodley Head, 1973) 10–11. H. McCoubrey, *The Development of Naturalist Legal Theory* (London, Croom Helm, 1987) is a good example of this whistle-tour style of jurisprudence.

[12] Cranston ibid., 11.

the identity of its author differ widely, changing from the purposive cosmos to God, reason, human nature and individual self-interest. The mutation of natural law into natural rights in the seventeenth century is hailed as the first victory of modern reason over the medieval witches and Locke and Bentham, the English contributors to the debate, are acknowledged as the early precursors of human rights. Locke is the modern revitaliser of the moribund tradition, while Bentham is the definitive debunker of any remaining "nonsense on stilts". The potted history of natural law ends with the introduction of the Universal Declaration of Human Rights in 1948, which turned naturalistic "nonsense" into hard-nosed positive rights. For the first time in history, those unwritten, unalterable, eternal, God-given or rational fictions can stop being embarrassed. They have been fully recognised and legislated and enjoy the dignity of law, albeit of a somewhat soft kind. God may have died, according to Nietszche, but at least we have international law. More recently, a new jurisprudence of rights, the explicit purpose of which is to mitigate the moral poverty of legal positivism, has quietly acknowledged the natural law as part of its genealogy.[13]

Like all simplified history, this standard presentation of natural law has some elements of truth, but suffers also from a number of crippling philosophical and historical defects. Its overall perspective is that of evolutionary progressivism: the present is always and necessarily superior over the past, history is the forward march of all-conquering reason, which erases mistakes and combats the prejudices of intellectual positions and political movements. The history of natural law is a typical example of Whig historiography, in which every idea or epoch is inexorably moving towards the present. In this version, the international recognition of human rights marks the end of the ignorant past while retaining and realising, at the same time, its potential for individual freedom and equality. There is an obvious empirical difficulty with this approach: more human rights violations have been committed in this rights-obsessed century than at any other point in history. But it is the philosophical question of historicism that concerns us here.

The problem with historicism can be stated simply: if all historical movement is relentlessly progressive and all thought inescapably historical, in that it can only arise or acquire validity if it becomes

[13] Anthony Lisska, *Aquinas's Theory of Natural Law* (Oxford, Clarendon, 1996) Chapters 1, 2 and 3 offer a comprehensive review of the recent return of naturalism in legal and political philosophy.

generally accepted at a particular historical period, no ideals or standards exist outside the historical process and no principle can judge history and its terror. According to the political philosopher Leo Strauss, historicism argues that "all human thought is historical and hence unable to grasp anything eternal".[14] Strauss has argued forcefully that, political philosophy since Macchiavelli, has suffered from an extreme historicism, in which the ideal has been consistently and perilously identified with the real and has lost its critical purchase. Historicism is exemplified by the Hegelian claim that the real and the rational coincide and, in jurisprudence, by the rise of positivism.[15]

For the classical legal tradition, nature was a quasi-objective standard against which law and convention could be criticised. But the cognitive and normative positivisation of modernity has expelled historical transcendence or exteriority. The ceaseless demand that all tradition, order or rule be in accord with human freedom has led to the total demystification not just of the mythical and religious aspects of the world, but of all attempts to judge history from a non-immanent position. In law, this trend is apparent in a number of developments which undermined and eventually destroyed the pre-modern legal cosmos: the abandonment of substantive concepts of justice and their replacement with proceduralist and formal ones; the identification of law with rules posited by the state and the destruction of the older tradition according to which law (*dikaion* or *jus*) is what leads to a just outcome in the relations amongst citizens; the replacement of the idea of a right according to nature by natural and human rights which, as attributes of the subject, are individual and subjective and can hardly establish a strong community. A society based on rights does not recognise duties; it acknowledges only responsibilities arising from the reciprocal nature of rights in the form of limits on rights for the protection of the rights of others.

If the value of human thought is relative to its context and all is doomed to pass with historical progress, human rights too are infected with transience and cannot be protected from change. Only those rights adopted by law (domestic or international) have been introduced into the history of the political institution and can be used, for as long as they last, to defend individuals. The legalism of rights goes hand in hand with the voluntarism of positivism and becomes a very restricted protection against the all-devouring state

[14] Leo Strauss, *Natural Law and History* (Chicago, University of Chicago Press, 1965) Chapters 1 and 2 and at 12.

[15] ibid., 319.

legislative and administrative power. Claims about the existence of non-legislated rights are "nonsense upon stilts" and fictions like the "belief in witches and unicorns."[16] As a result, "far from the historical having to be judged by the criteria of rights and of the law, history itself, as we know, becomes the 'tribunal of the world', and right itself must be thought of as based on its insertion in historicity".[17] The symptom of the disease is homoeopathetically declared to also be its cure but, like many less respectable therapies, it leads to an even greater malady.

When nature is no longer the standard of right, all individual desires can be turned into rights. From a subjective perspective, rights in postmodernity have become predications or extensions of self, an elaborate collection of masks the subject places on the face under the imperative to be authentic, "to be herself", to follow her chosen version of identity. Rights are the legal recognition of individual will. People acquire their concrete nature, their humanity and subjectivity by having rights. From the legal point of view, the general agreement that a desire or interest is constitutive of "humanity" suffices for the creation of a new right. In this way, is and ought are collapsed, rights are reduced to the facts and agreements expressed in legislation or, in a more critical vein, to the disciplinary priorities of power and domination.[18] As Strauss puts it starkly, criticising the replacement of transcendent natural right by the socially immanent general will, "if the ultimate criterion of justice becomes the general will, i.e. the will of a free society, cannibalism is as just as its opposite. Every institution hallowed by a folk-mind has to be regarded as sacred".[19]

Legal humanism by uniting right and fact on the terrain of human nature has undoubtedly contributed to the rise of legal positivism and historicism. Historicism is the indispensable companion of individualism and, the fascination with history, the paradoxical result of our obsession with the present. We are interested in history, because we want to understand and control our age and because we believe that history can make humanity transparent to its self-reflection. History is an – inadequate – antidote for those philosophies of suspicion which declared the human finitude and opaqueness. Today, it is

[16] Jeremy Bentham, *Anarchical Fallacies* in J. Waldron (ed.), *Nonsense upon Stilts* (London, Methuen, 1987) 53.

[17] Luc Ferry and Alain Renaut, *From the Rights of Man to the Republican Idea* (F. Philip trans.) (Chicago, University of Chicago Press, 1992) 31.

[18] See, Villey, op.cit., supra n. 2, Chapters 1 and 2 *passim*.

[19] Leo Strauss, *What is Political Philosophy* (Chicago, University of Chicago Press, 1959) 51.

impossible not to be historicist, not to believe that everything happens and is validated in history; it is almost impossible not to believe that right is coeval with legal rights. These objections have led to the recent proliferation of theories, which try to rescue the realm of rights from the relativism of historicism by presenting them as the immanent structure of Western societies, the inescapable demands of moral reason or both.[20] Yet a theory of human rights which places all trust in governments, international institutions, judges and other centres of public or private power, including the inchoate values of a society, defies their *raison d'être*, which was precisely to defend people from those institutions and powers. But is a strong theory of rights possible in our highly historicised world? The claim that human rights are universal, transcultural and absolute is counter-intuitive and vulnerable to accusations of cultural imperialism; on the other hand, the assertion that they are the creations of European culture, while historically accurate, deprives them of any transcendent value. From the perspective of late modernity, one can be neither a universalist nor a cultural relativist.

Here we reach the greatest political and ethical problem of our era: if the critique of reason has destroyed the belief in the inexorable march of progress, if the critique of ideology has swept away most remnants of metaphysical credulity, does the necessary survival of transcendence depend on the non-convincing absolutisation of the liberal concept of rights through its immunisation from history? Or, are we condemned to eternal cynicism, in the face of imperial universals and murderous particulars? Sloterdijk has argued that the dominant ideology of postmodernity is cynicism, an "*enlightened false consciousness*. It is that modernised, unhappy consciousness, on which enlightenment has laboured both successfully and in vain. . .Well-off and miserable at the same time, this consciousness no longer feels affected by any critique of ideology; its falseness is already reflexively buffered".[21] The gap between the triumph of human rights ideology and the disaster of their practice is the best expression of postmodern cynicism, the combination of enlightenment with resignation and apathy and, with a strong feeling of political impasse and existential claustrophobia, of an exitlessness in the midst of the most mobile society. The only recommendation offered by a critic of human rights is to adopt ironical distance towards those who ask us to take

[20] See Chapter 9 below.

[21] Peter Sloterdijk, *Critique of Cynical Reason* (M. Eldred trans.) (London, Verso, 1988) 5.

rights seriously and to accept the "contingency, uncertainty and painful responsibility" for forms of "civil life and civilisation that will eventually perish".[22] Irony of course is one of the most potent weapons of the cynicism and self-serving nihilism of power and power-holders and can hardly be used on its own as a political programme of resistance to cynicism. But can there be an ethics that respects the pluralism of values and communities? Can we discover in history a non-absolute conception of the good, that could be used as a quasi-transcendent principle of critique? The last part of this book begins this most difficult and pressing of tasks, of seeking in history a standpoint critical of historicism.

The meaning of history and of historical determination frames a second and subsidiary question. What is the link, if any, between the classical tradition of natural law and the modern tradition of natural and human rights?[23] The French Declaration of Rights started a trend by proclaiming these rights as "natural, inalienable and sacred". It was followed by the American Declaration of Independence, according to which "all men are created equal, [and] are endowed by their Creator with unalienable Rights", a statement repeated verbatim by Article 1 of the 1948 Universal Declaration of Human Rights. These rather extreme statements present natural and human rights as a direct continuation of the classical law tradition. They have received wide support from liberal philosophers. John Finnis claims that rights are extrapolations from "principles always inherent in the natural law tradition".[24] Alan Gewirth believes that all human beings, by virtue of their humanity, recognise in themselves and others, rights to freedom and well-being. He goes on to argue that rights exist even if they do not receive "clear or explicit recognition or elucidation".[25] Jack Donnelly argues that while human rights were conceived in the seventeenth and eighteenth centuries, they enjoy a universal character

[22] Gaete, *op. cit.*, supra n. 2, 172

[23] V. Black, "On connecting natural rights with natural law", *Persona y Derecho* 1990, 183–209. Fred Miller has recently argued that Aristotle's theory of justice has an implicit doctrine of natural rights, in F. Miller, *Nature, Justice, and Right in Aristotle's Politics* (Oxford University Press, 1995). Brian Tierney has also argued that a natural rights theory could be formulated in Aristotelian language but it was not. Tierney claims that natural rights theories developed, first in the early Middle Age well before the generally accepted opinion that they hail from the seventeenth century. Brian Tierney, *The Idea of Natural Rights* (Atlanta Georgia, Scholars Press, 1997) Chapters 1 and 11. See Chapters 2,3 and 4 below.

[24] John Finnis, *Natural Law and Natural Rights* (Oxford, Clarendon, 1980) *passim*.

[25] Alan Gewirth, *Reason and Morality* (University of Chicago Press, 1978) 99; and *Human Rights* (University of Chicago Press, 1982) Introduction and Chapter 1.

that makes them applicable to all societies.[26] For Michael Perry, finally, the idea of human rights is "ineliminably religious" and indissolubly linked with Catholic and scholastic versions of natural law.[27]

Leo Strauss, Michel Villey and Alasdair MacIntyre deny the connection. For the neo-Aristotelians, the political philosophers of the seventeenth century created a radically new moral and political discourse based on individual rights which destroyed the classical tradition of natural law. Natural rights are creations of modernity and their origins are successively placed in the early Middle Ages (Tierney), the fourteenth century (Villey), or the seventeenth (MacPherson, MacIntyre, Shapiro and pretty much everyone else).[28] Again, the philosopher credited with the crucial step in the transformation from natural law to natural rights varies from William of Ockham to Grotius, Hobbes or Locke. Behind this periodisation and accreditation lies the famous quarrel between the "ancients and moderns". Strauss, Villey and MacIntyre believe that the passage from the ancients to the moderns was catastrophic. For MacIntyre, "natural or human rights are fictions" inventions of modern individualism and should be discarded.[29] Kenneth Minogue, Maurice Cranston and John Finnis, on the other hand, see this radical change as a necessary stage in the process of human emancipation.

Throughout this book, it will be argued that perhaps both the relativism of historicism and the ahistorical universalism of liberal theorists, for whom all societies and cultures have been or must be subjected to the discipline of rights, are wrong. Historicism does not accept that history can be judged; for the rights fanatics, history ends in the universal acceptance of human rights which turn political conflict into technical litigation. For the former, the hope of transcendence of the present has been banned while, for the latter, transcendence still survives in the outposts of empire in the form of the aspiration to achieve a Western-type individualist consumer society. To defend the idea of transcendence without abandoning the discipline of history, we need to re-examine the origin and trajectory of natural law.

[26] Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, Cornell University Press, 1989) 88–106; Louis Henkin, *The Age of Rights* (New York, Columbia University Press, 1990) Introduction and Chapter 1.

[27] Michael Perry, *The Idea of Human Rights* (New York, Oxford University Press, 1998) Chapter 1.

[28] See below Chapters 3 and 4.

[29] Alasdair MacIntyre, *After Virtue* (London, Duckworth, 1980) 70.

From this perspective, the next four chapters offer a genealogy of human rights, in the form of an alternative history of natural law, for which the promise of human dignity and social justice has not been met and can never be fully realised. Our main guides will be the conservative political philosopher Leo Strauss, the Catholic legal philosopher and historian Michel Villey, and the Marxist philosopher Ernst Bloch. Natural law represents a constant in the history of ideas, namely the struggle for human dignity in freedom against the infamies, degradations and humiliations visited on people by established powers, institutions and laws. The political philosophers Luc Ferry and Alain Renaut have accused Strauss and Villey of extreme anti-modernism and have claimed that their work amounts to a call for a return to a pre-modern Aristotelian universe.[30] The idea of a return to the ancients is meaningless and cannot be imputed, I believe, to our authors. In any case, the premise behind our brief history is neither the superiority of the past nor the inevitably progressive present, but the promise of the future. Young Marx wrote that the task of philosophy is to achieve "a humanised nature and a naturalised humanity". This is also the unfulfilled potential of natural law and human rights which, to use Ernst Bloch's evocative phrase, expresses the "forward-pressing, not-yet-determined nature of human being".[31] The re-telling of the history of natural law tries to follow Bloch's impulse and tease out of the tradition its often concealed concern for the unfinished person of the future for whom justice matters. Natural right was written out of modern law because of its critical potential. Its tradition unites critics and dissidents more than any other philosophy or political programme. Natural law is too important to leave to theologians and historians of ideas and the narrative in the first part aims to rescue from the tradition those elements, often suppressed in the "official" histories, which link natural law and contemporary human rights struggles. The substantive and methodological stakes are high: is there a place for transcendence in a disenchanted world? What type of rights and by extension of social bond can a critical attitude adopt after the exhaustion of the great modern narratives of liberation?

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The triumph of human rights was declared after the collapse of communism. Paradoxically however this coincided with the "death of

[30] Ferry and Renaut, op.cit., supra n. 17, Chapter 1.

[31] Ernst Bloch, *Natural Law and Human Dignity* (Dennis J. Schmidt trans.) (Cambridge Mass, MIT Press, 1988) xviii.

man" as the sovereign centre of the world announced, in the seventies and early 1980s, by social theory and philosophy. In that period, the highly influential thought of Marx, Nietzsche and Freud and their followers, the great philosophers of "suspicion" according to Paul Ricoeur, successfully challenged the assumptions of liberal humanism, "the philosophy of the progressive realisation of the 'whole man' throughout history".[32] Humanism explores what is right according to human nature, in its natural dignity or scientific objectivity and turns "man" into the end of historical evolution, the standard of right reason and the principle of political and social institutions. According to humanism, humanity has two unique characteristics: it can determine its own destiny and, secondly, it is fully conscious of itself, transparent to itself through self-observation and reflection. Both premises were seriously undermined by the great critics of modernity. Marx debunked the belief, always a little suspect to European ears, that irrespective of social and economic background, people can acquire riches and control their destiny through the operations of the market. Nietzsche and his disciples Heidegger and Foucault, destroyed the claim that the enlightenment values of rigorous method, bourgeois self-reliance and Christian piety could lead to endless progress, harmonise humanity and its environment and make knowledge a universal human good. Finally, the psychoanalysis of Freud and his epigones fatally undermined the belief that we have mastery and control over our selves. If anything, the "self is split" and lacking, the creation of forces and influences beyond our control and even comprehension. From the social and economic environment to the structures of language and communication to the unconscious, our century has re-discovered fate in the form of finitude and opaqueness: destiny has been re-interpreted as social determination or individual necessity and, individual freedom has been placed in a permanent state of siege, threatened not so much by dictators of left or right but by elements and forces which either have a constitutive role in the creation of individuals or lurk in the recesses of self, making themselves known when reason sleeps, in dreams, jokes and linguistic slips. "Opaque with regard to itself, and finding itself thrown into a world founded on other principles, the subject – thought by early modern philosophy to be the foundation both of itself and of reality – was shattered. With it were undermined the val-

[32] Lucien Seve, *Man in Marxist Theory* (Sussex, Harvester Press, 1978) 65.

ues of humanism: self-foundation, consciousness, mastery, free will, autonomy."[33]

But the announcement of the "death of man" has been accompanied by the most protracted campaign to re-claim the individual, as the triumphant centre of our postmodern world and to declare freedom, in the form of autonomy or self-determination, as the organising ideal of our legal and political systems. We have seen this in the endlessly proclaimed return of (to) the subject, in the importance of identity and identity-related politics, in the return of morality to politics and of humanism to law. In liberal jurisprudence, the return to the subject is evident, on the right, in the recent domination of rights theories and, on the left, in the moralism of political correctness. While philosophy and social theory insist on the social construction of self and on the role of structure, system and language in the organisation of the world, the desire to return to a pristine condition of selfhood and to re-instate its freedom and propriety, deconstructed and demystified by the philosophies of suspicion, returned dramatically to law. But can the sovereign subject of rights be squared with the deconstruction of subjectivity?

This is not an idle question. Rights were the first public acknowledgement of the sovereignty of the subject and influenced strongly the modern "metaphysics of subjectivity".[34] The "anti-humanist" philosophers did not discuss human rights at great length, with a few exceptions.[35] On the other hand, from Adorno to Arendt and from Lyotard to Levinas, they all commented on the way in which humanism can be turned into the inhuman, its dream of a rationally emancipated society transformed into the nightmare of totalitarian administration or bureaucratic technocracy. Foucault, Lyotard and Derrida became repeatedly involved with political and human rights

[33] Alain Renaut, *The Era of the Individual: A Contribution to a History of Subjectivity* (M.B. DeBeviose and F. Philip trans.) (Princeton NJ, Princeton University Press, 1997) xxvii.

[34] See Chapters 7 and 8.

[35] Michel Foucault is the most obvious. He was equally critical of the philosophy of subjectivity and of the legal and contractual presentation of power. Foucault argued that the theory of right disguised disciplinary practices and domination and hoped to show "how right is, in a general way, the instrument of this domination – which scarcely needs saying – but also to show the extent to which and the forms on which right . . . transmits and brings into play not relations of sovereignty but of domination. My general project has been, in essence, to reverse the mode of analysis followed by the entire discourse of right . . . to invert it, to show . . . how force relations have been naturalised in the name of right". Michel Foucault, "Two Lectures: Lecture Two: 14 January 1976" in *Power/Knowledge* C. Gordon ed. (K. Soper trans.) New York: Pantheon, 1980, 95–6. On the other hand, Foucault more than many a philosopher was closely and continuously involved with diverse rights struggles.

campaigns. It looks as if philosophical anti-humanism and the defence of the human are natural allies. But this linkage of the most severe critique of humanism with the intellectual and political struggles for dignity and equality infuriated liberals. Alain Renaut, a French liberal political philosopher who, with Luc Ferry, spearheaded a number of ill-mannered political attacks on poststructuralist philosophers, admitted light-heartedly about his accusations that "though we have often insisted on rigorously examining the problem of subjectivity with reference to human rights, we did not mean to judge all possible philosophies by a sort of 'litmus test' that would measure their compatibility with the 1789 Declaration of the Rights of Man – posing, as it were, as intellectual magistrates awarding certificates of civic responsibility".[36]

And yet these paradoxical links and superficially unnatural alliances could perhaps be explained. This is a main task of this book. "Human rights" is a combined term. They refer to the human, to humanity or human nature and are indissolubly linked with the movement of humanism and its legal form. But the reference to "rights" indicates their implication with the discipline of law, with its archaic traditions and quaint procedures. Legal institutions occasionally move in tandem with the aspirations of political philosophy or the plans of political science but more often the two diverge. The "rights of man" entered the world scene when the two traditions came together for a brief symbolic moment in early modernity, represented by the writings of Hobbes, Locke and Rousseau, by the French Declaration of the Rights of Man and Citizen and by the American Declaration of Independence and Bill of Rights. The convergence of political philosophy and constitution-making established political and legal modernity, but it was short-lived. Philosophy, law and science soon diverged and moved in different directions to re-combine again, after the Second World War, in the new configuration of human rights.

Legal systems are obsessed with the story of their origins, the foundational moment which endows them with validity and consistency. Peter Goodrich has distinguished between "ideational" and institutional sources of law. Ideational sources refer to the claims a legal system makes to "an external and absolute justification for legal regulation".[37] Institutional sources, on the other hand, are empirically verifiable institutions, such as custom, statute, constitution and precedent. The introduction of human nature and its rights in the legal discourse of the eighteenth century marked a new ideational source. The legal institution with its history, tradition and logic had to accommodate the extravagant claims of this revolutionary idea. An important consequence of this new combination of philosophy, history and legal practice was that the concept of human nature is pulled towards two contradictory positions. It is asked to form the principle of law and politics, in other words, to become the new ideational source of law, to come before and found the law. But the entitlements of empirical people remain the grant and their concrete nature the creation of the legal system. Hobbes remarked in the *Leviathan* that "*Persona* in latine signifies the *disguise, or outward appearance of* a man, counterfeited on the Stage; and sometimes more particularly that part of it, which disguiseth the face, a mask or Visard: And from the Stage, hath been translated to any Representer of speech and action, as well in Tribunalls, as Theaters . . . in which sense Cicero useth it where he saies, *Unus sustineo tres Personas; Mei, Adversarii & Judicis*".[38] People must be brought before the law in order to acquire rights, duties, powers and competencies which give the subject legal personality. The legal person is the creation of legal or theatrical artifice, the product of an institutional performance. In the discourse of human rights, this *persona* or mask, the creation of law, must be transformed into law's progenitor or principle, the subject who comes to life on the stage of law must also come before the law and support its maker. The three persons of Cicero, the "me" or ego, the legal subject and the judge are the three facets who, fused in one, will form the holy trinity of the human, the law and its subjects, and create the ground principle of modern man, father and son, *devant la loi*, both before and after the law.[39]

In this sense, human rights are both creations and creators of modernity, the greatest political and legal invention of modern political philosophy and jurisprudence. Their modern character can be traced in all the essential characteristics. First, they mark a profound turn in political thought from duty to right, from *civitas* and communitas to civilisation and humanity. Secondly, they reverse the traditional priority between the individual and society. While classical and medieval natural law expressed the right order of the *cosmos*

[36] Renaut, op. cit., supra n. 33, xxviii.

[37] Peter Goodrich, *Reading the Law* (Oxford, Blackwell, 1988) Chapter 1.

[38] Hobbes, *Leviathan* (Richard Tuck ed.) (Cambridge University Press, 1996) Chapter 16, 112.

[39] Jacques Derrida, "Devant la Loi", in A. Edoff (ed.), *Kafka and the Contemporary Critical Performance: Centenary Readings* (Bloomington, Indiana University Press) 1989.

and of human communities within it, an order that gave the citizen his place, time and dignity, modernity emancipates the human person, turns him from citizen to individual and establishes him at the centre of social and political organisation and activity. The citizen comes of age when he is released from traditional bonds and commitments to act as an individual, who follows his desires and applies his will to the natural and social world. This release of human will and its enthronement as the organising principle of the world had a number of important political implications. Unconstrained freedom can destroy itself. Freed will must be restrained by laws and sanctions, the only limits it understands. These are not intrinsic or integral to it but empirical and external. Freedom and coercion, law and violence are born in the same act. It was the great achievement of Hobbes, the first and probably the best theorist of liberalism and modern natural rights, to realise that when human nature becomes sovereign and unfettered, it needs as its counterpoint a public power which shares in all particulars the characteristics of the undivided and singular free will of the individual and literalises his metaphorical unlimited power. The sovereignty of unshackled will finds its perfect complement and mirror image in the sovereignty of the state. The Leviathan is the mirror image and the perfect, all too perfect partner of emancipated man.

The road from classical natural law to contemporary human rights is therefore marked by two analytically independent but historically linked developments. The first transferred the standard of right from nature to history and eventually to humanity or civilisation. This process can be called the positivisation of nature. Its reverse side is the – incomplete – legalisation of politics which made positive law the terrain of both power and its critique. The second trend, closely linked with the first, was the legalisation of desire. Man was made the centre of the world, his free will became the principle of social organisation, his infinite and unstoppable desire was given public recognition. This twin process determined the trajectory which linked historically but separated politically the classical discourse of nature and the contemporary practice of human rights. But human rights are also the weapon of resistance to state omnipotence and an important antidote to the inherent ability of sovereign power to negate the autonomy of the individuals in whose name it came into existence. Human rights are internally fissured: they are used as the defence of the individual against a state power built in the image of an individual with absolute rights. It is this paradox at the heart of human rights

which both moves their history and makes their realisation impossible. Human Rights have "only paradoxes to offer"; their energy comes from their aporetic nature.[40]

[40] The phrase comes from a letter of Olympe de Gouges, the author of the 1791 Declaration of the Rights of Woman and Citizen. Joanne Scott in *Only Paradoxes to Offer: French Feminists and the Rights of Man* (Cambridge, Mass., Harvard University Press, 1996) at 4, uses the expression to describe the position of women in revolutionary France. Our point is more general: the whole field of human rights is characterised by paradoxes and aporias.

2

A Brief History of Natural Law: I. The Classical Beginnings

Despite wars, genocides, holocausts, the ever more atrocious and imaginative ways oppression and exploitation discover, humanity still believes that a state of individual and social grace exists, even when, particularly when, the wolfish part of man is at its worse. This quest for the just society has been associated from classical times with natural law, the "unwritten laws" of Antigone.

Natural law is a notoriously open-ended concept and its understanding is clouded in historical and moral uncertainty. According to Erik Wolf, there have been some seventeen meanings of the word *naturale* and fifteen of *jus* and their permutations lead to some 255 definitions of natural law.[1] But whatever its different meanings, natural law was for many centuries the capital city of the province of jurisprudence and political philosophy. Its thinking was profoundly hermeneutical, it attended to ends and purposes, meanings and values, virtue and duty. Today nature and law, concepts inextricably twinned for most of the Western tradition, have been radically separated and assigned to different even opposing fields. Classical nature has been replaced by a meaningless natural world which has been draped with the "dignity" of objectivity and the stubbornness of facts. Its study by the natural sciences enjoys a status and legitimacy which eludes the social sciences, philosophy or jurisprudence. Nature itself, however, has been reduced to inert matter, the unresponsive target for human intervention and control.

The modern laws of nature are universal, immutable and eternal, a set of regularities or of repeated patterns. The law of gravity or the second law of thermodynamics are followed in practice, in the sense that one cannot choose to disobey them. They are there, brute facts, verifiable or falsifiable logical abstractions deriving from common observations of natural phenomena. If natural law is of the same

[1] Brian Tierney, *The Idea of Natural Rights* (Atlanta, Scholars Press, 1997) 48.