This concept of nature would eventually combine with the idea of social utopia and provide the radical side of human rights.

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At the end of this historical journey, it is important to remember that classical natural law was built on the intrinsic connection between natural right and justice. The same terms, *dikaion* and *jus*, connoted both the just and the law, and the business of the classical lawyers was to discover the just solution to a conflict. This linguistic link survives today in the double meaning of the word justice, as the transcendent ideal of law and as the administration of the judicial system. But classical right was not a moral law that lurks in the human conscience as a universal superego and places all under the same moral commands. It was rather a methodological principle which allowed the philosopher to criticise sedimented tradition and the jurist to discover the just solution in the case in hand. Classical natural law contained a passion for justice but it did not coincide with it. Natural right enters the historical agenda, directly or in disguise, every time people struggle "to overthrow all relations in which man is a degraded, enslaved, abandoned or despised being".[63] Justice, on the other hand, has too often been associated with a moralistic, patriarchal attitude, in which distributions and commutation protect the established order and perpetuate the inequalities and oppression natural law tries to redress:

> Genuine natural law, which posits the free will in accord with reason, was the first to reclaim the justice that can only be obtained by struggle; it did not understand justice as something that descends from above and prescribes to each his share, distributing or retaliating, but rather as an active justice of below, one that would make justice itself unnecessary. Natural law never coincided with a mere sense of justice.[64]

For those fighting against injustice and for a society that transcends the present, natural right has been the method and natural law has defined the content of the new. This is the link between natural law, natural and human rights. But the voluntarism of modern natural law cannot provide a sufficient foundation for human rights. Its inevitable intertwining with legal positivism meant that the tradition which created natural and later human rights has also contributed to the repeated and brutal violations of dignity and equality which have accompanied modernity, like its inescapable shadow.

[63] Bloch, op.cit., supra n. 11, xxviii–xxix.
[64] ibid., xxx.

4

Natural Right in Hobbes and Locke

From Plato's *Republic* to early modernity, philosophy placed the search for the best polity at its centre. Thomas Hobbes continued this tradition which brought together political thought and legal concerns. His early works were general theories of law. The later *De Cive* and *Leviathan* and the posthumous *Dialogue* changed somehow their emphasis, in an attempt to create a science of politics which according to Arendt, "would make politics as exact a science as the clock did for time". For most commentators, the main achievement of Hobbes lies in his political theory, which has also been denounced by others for its authoritarianism and parochialism. If one could analytically distinguish between political and legal theory, a difficult task for that period, it is arguable that Hobbes made a more lasting contribution to the science of law: in his radically new method of analysing legal foundations, in his re-definition of the traditional juridical concepts of law, right and justice, finally, in his adjustment of traditional sources and ends of law to the concerns of modernity. The influence of Hobbes has waned in politics, with the rise of the purer liberalism of Locke and the democratic tradition of Rousseau. But his reinvention of the juridical world remains unsurpassed. We can summarise his contribution by saying that Hobbes is the founder of the modern tradition of individual rights, the first philosopher to replace fully the concept of justice with the idea of rights. If this aspect of his work is understood, legal positivism becomes the necessary accompaniment and partner of rights discourse and some of the liberal critiques of Hobbes lose much of their validity.

Hobbes' revolutionary contribution to jurisprudence is perfectly illustrated by the following statement from the beginning of the XIV Chapter of *Leviathan*, entitled "Of the first and second Naturall Lawes, and of Contracts", which is worth quoting at length:

> THE RIGHT OF NATURE, which Writers commonly call *Jus Naturale*, is the Liberty each man hath, to use his own power, as he

> will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgement, and Reason, hee shall conceive to be the uptest means thereunto.
>
> BY LIBERTY, is understood , according to the proper signification of the word, the absence of externall Impediments: which Impedimens may oft take away part of a mans power to do what hee would; but cannot hinder him from using the power left him, according as his judgement and reason shall dictate to him.
>
> A LAW OF NATURE, (*Lex Naturalis*) is a Precept, or generall Rule, found out be reason, by which a man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same; and to omit, that, by which he thinketh it may be best preserved. For though they that speak of this subject, use to confound *Jus*, and *Lex, Right* and *Law*; yet they ought to be distinguuished; because RIGHT, consisteth in liberty to do, or to forbeare; Whereas LAW, determineth, and bindeth to one of them: so that law, and Right, differ as much, as Obligation and Liberty; which in the same matter are inconsistent.[1]

This concise and epigrammatic statement, is a clear declaration and definition of the modern rights of man. It remains unsurpassed in clarity and precision in the early modern literature of natural rights and clearly indicates its ontology and theology. Like Leviathan himself, this striking statement is Janus-like. It is still in conversation with the Aristotelian tradition which distinguished between right (*dikaion, jus*) and law (*nomos, lex*) and attributed the dignity of nature to the former. But Janus' other face looks to the future. Natural right is not the just resolution of a dispute offered by a harmonious cosmos or God's commands. It derives exclusively from the nature of "each man". The source or basis of right is no longer the observation of natural relations, philosophical speculation about the "best polity" or the interpretation of divine commandments but human nature.

How did this change of source affect the relationship between law and right or justice, the structuring principle of legal activity in the pre-modern world? For the classics, the law *nomos* and the right *dikaion* coincide, and justice, another word for right, was law's object and end. The two concepts were so closely connected that they were often used as synonyms, something Hobbes wanted to avoid. Hobbes

[1] Thomas Hobbes, *Leviathan* (Richard Tuck ed.) (Cambridge University Press, 1996) Chapter 14, 91.

occasionally confused the two terms but he also presented the relationship as a clear evolution from the state of nature to civil society. The Hobbesian state of nature, has no organised community and law, except for the natural law of self-preservation. But this law is not "properly law". In a radical move, which will irreversibly change the concept of justice, Hobbes identified right with freedom from law and from all external and social imposition. Laws are not conducive to right because they restrain freedom. But the law of self-preservation is different: it derives from human nature and as such it does not impose external constraints or restrict liberty.

With this move, Hobbes separated the individual from the social order and installed him at the centre, as the subject of modernity and the source of law. The classical tradition discovered the naturally right by observing relationships in human communities. For Aristotle and Aquinas, jurists could find the model of legal organisation and the answers to legal problems in the natural order of their world. This order fell well short of the ideal, but included sufficient elements of the perfect polity to give rise to direct philosophical and legal deliberations about the just solution. Individuals were naturally social and political and no useful conclusions could be reached without the observation of their communities and social interactions. The starting point of Hobbes, a student of Stoicism and nominalism, was precisely the opposite. The eye of the observer is no longer trained on society but on the isolated individual in a pre-social state of nature. Natural right is not to be sought in the harmonious order of the political community but in its opposite, the natural characteristics of a Crusoe-like figure. Human nature, Hobbes believed, has certain common traits, the observation of which will determine what is naturally right. Nature becomes therefore a scientific hypothesis, its law takes the form of observable regularities or common patterns present in all men. Because human nature is objectively given, reason can deduce from an observation of the way men actually behave, a series of natural laws that should be followed by the Commonwealth. Reason has been freed from the metaphysical claims of Stoicism and Christianity, it is no longer a spirit, does not reside in the soul and does not have much to say about the essence of things. "Reason is calculation" writes Hobbes and true reason is part of human nature.[2] In

[2] Hobbes, *De Corpore*, I, 2, at 3. Cf "by right reason in the natural state of men, I understand not, as many do, an infallible faculty, but the act of reasoning, that is, the peculiar and true ratiocinations of ecery man concerning these actions of his, which may either redound to the damage or benefit of his neighbours", *De Cive* II,1 at 16.

its new role, reason can discover the best means and co-ordinate their action towards a desired end. This is the calculative, instrumental reason of the moderns and its task in the field of morals and politics is not to guide the conscience but to build a science through the observation of the external world and human nature.

When reason comes to examine human nature and develop the science of politics, it discovers there desire, reason's negation and adversary. Indeed, while the first natural law is unrestricted freedom, the second is the duty to keep promises and the twenty-odd other laws offered from the observation of human nature refer to passions, such as gratitude, sociability, moderation and impartiality (the virtues) or revenge, lack of generosity and arrogance (the vices). The passions, desire, appetite and aversion, are the most powerful human force:

> But whatsoever is the object of any mans Appetite or Desire; that is it, which for his part calleth *Good:* And the object of his Hate and Aversion, Evill; And of his Contempt, *Vile and Inconsiderable* . . . For Morall philosophy is nothing else but the science of what is *Good*, and *Evill*, in the conversation, and Society of man-kind. *Good* and *Evill*, are names that signifie our Appetites, and Aversions; which in different tempers, customes, and doctrines of men, are different.[3]

Desire is stronger than reason. When reason confronts it, it must either acknowledge its impotence or try and recruit the passions to its own – always endangered – advantage. Desire and pleasure, presented as instinctual forces or "drives" in the psychoanalytical terminology, acquire central political and legal significance, and turn the theological nominalism of the medievals into a "scientific" individualism. This radically new concept will provide the idea of individual rights, struggling to emerge in the religiously inspired writings of the scholastics, with a secular and pragmatically fecund foundation. The centrality of the passions, both empirically observed and metaphysically asserted as natural, turns the moral philosophy of Hobbes into a political hedonism and prepares the ground for utilitarianism. The end of law is no longer virtue and justice, but individual pleasure, and reason is the main instrument to this end. This approach makes natural right no longer the fair share of a legal distribution, a state of things in the outside world, but an essential attribute of the subject. Right is a power that belongs to the individual, a subjective quality which logically excludes all duty. This is precisely the basis of the distinction between law and right: the law imposes duties and does not

[3] *Leviathan*, supra n. 1, Chapter 6, 39; Chapter 16, 110.

confer powers; this makes it the opposite of right. When right is a share of social goods, it is always part of relationships, it implies duties and is by definition limited. New natural right is the "power of doing any thing", an unlimited and undivided sovereignty of the self.

When we turn from source to form, natural right is defined as the "liberty [of man] of doing any thing as he wille himselfe" and liberty as "the absence of external Impediments".[4] Right means doing; it is an active state of bodily motion guided by will which, against the schools, is no longer defined as rational desire but as the "last appetite in deliberating",[5] desire's final state which puts the body and its appetites into motion and, through their action, realises its end in the world.[6] The Cartesian divide between spirit and body is absent here. Man is treated as a force of nature, an agent of action, motivated by desire and seeking pleasure. Liberty is negative; it is an infinite license, a freedom of motion that has no inherent limitations but only external, empirical constraints, most notably in the liberty of other men to pursue the same ends or to engage in motion that puts them on a collision course.

The natural anthropology of Hobbes is a concise statement of modernity. Following a felicitous and now classical presentation of the move from the ancients to the moderns, man is no longer conceived as a mirror of some superior and external reality but as the lamp, the source and centre of light illuminating the world. Being is no longer the creation of a divine first cause nor does it approach reality as a copy of a pre-existing original. Man is productive, his essence is to be found in his "doing" and "bodily motion", he becomes the creator and cause of actions and the bestower of meaning upon a profane reality. The self as agent recognises himself as the centre of decision making with a power that springs neither from pure emotions nor from pure intelligence. The power of will is unique. This power finds its perfect manifestation in decision. In ending deliberation and taking a decision, the desiring self projects itself in the world and becomes a sovereign agent for Hobbes or an autonomous and responsible subject for Kant. Imagination and art, too, are no longer conceived as resemblances of a transcendent reality of forms, nor is the artist a craftsman imitating the divine *demiourge*. The model of the modern artist is the inventor and

[4] ibid., Chapter 14, 91.

[5] ibid., Chapter 6, 44.

[6] Chris Tsaitourides, "Leviathan-Moby Dick: The Physics of Space", VIII/2 *Law and Critique*, 223–243, 1997.

imagination, in its ability to co-ordinate the faculties, becomes itself transcendental. Finally, in the practical realm, agency becomes central. The subject is enthroned as a free agent, as the immediate source of activity and the cause of actions that emanate from it. The modern self fulfils itself in what he does, our actions express our true existence, and as a result we can only know what we make.

But the unencumbered desire and action of natural right creates two difficulties. First, it is shared equally by all. "Nature hath made men so equall, in the faculties of body, and mind . . . the weakest has strength enough to kill the strongest . . . and as to the faculties of the mind, . . . I find yet a greater equality among men than that of strength".[7] This natural equality of desire and strength has nothing in common with the classical hierarchical conception of right and of justice. Traditional political philosophy had claimed that man can perfect himself in political society and had made duty the primary moral fact. From Aristotle to early modernity, the just outcome was determined according to a person's due in a community, *suum jus cuique tribuendum*. In the *polis* or the *civitas*, the natural hierarchy of the parts of the soul or amongst the various classes provided an order, a measure which was also the principle of justice. But when nature is emancipated from the harmonious and hierarchical order of the ancients, it becomes absolute equality, a terrible equivalence of force, which knows only the justice of desire and the constraint of force and law. Secondly, as a result of Hobbes's identification of pleasure with the good and of pain and death with evil, morality cannot distinguish between the different types of pleasures and pains and is unable to create a scheme of values. "The Desires and other Passions of man, are in themselves no Sin. No more are the Actions which proceed from these Passions, till they know a Law that forbids them". It is precisely this combination of unlimited liberty of action, of equality of powers and of the moral indifference of desire and its objects that leads to a "warre of every man against every man".

The political recognition of desire leads to the primacy of right over duty. When the individual becomes the centre of the world, when fear, hate and love[8] are the only ends of action, everyone is entitled to self-preservation and to the means to achieve it. Each man is the sole judge of the right means and every action in pursuit of

[7] Leviathan, supra n. 1, Chapter 13, 86.

[8] Hobbes states that what "men Desire, they are also sayd to LOVE: and to HATE those things, for which they have Aversion. So that Desire, and Love, are the same thing", *Leviathan*, supra n. 1, Chapter 6, 38.

desire is by nature just. "To this war of every man against every man, this is also consequent: that nothing can be unjust. The notions of right and wrong, justice and injustice, have there no place. Where there is no common power, there is no law: where no law, no injustice".[9] The primacy of desire leads to the establishment of civil laws (*leges*). Classical and medieval cosmology, the source of natural right, assumed a natural hierarchy of spheres and being. Hobbes turns the cosmology into an anthropology and transfers the hierarchical model from the universe to human desires. Death, the denial of nature, is the most natural of all facts, and the fear of death the most powerful of all passions. Uncontrolled desire finds its limit in the desire and fear of the other and in death. The desire of self-preservation makes men abandon unrestricted freedom in return for the security offered by the commonwealth created through their contractual subjection to the Sovereign.[10] It is not nature therefore but death, as the negation of nature, which is the most natural and strongest of passions. Death is the basis of natural law and the target of civil laws. Because equality is unlimited, because desire is uncontrollable, death becomes the master and the power of the Sovereign must be total and illimitable. The Sovereign is a "Mortall God", its only limit is death, the "absolute master". The law is the outcome of desire and of a death drive which, well before Freud's discovery, linked law, desire and mortality. Unlimited passion creates unlimited sovereignty, violence and its fear are the ground of law. Both natural right and the state entrusted with its limited protection are deathbound. As Leo Strauss put it, in Hobbes "death takes the place of the *telos*".[11]

The impasse created by the free pursuit of desire by equals can only be broken through a covenant that "erects a Common Power" and transfers natural right to it. The object of agreement is to:

> conferre all their power and strength upon one Man, or upon one Assembly of Men, to beare their person; . . . and therein to submit their Wills, every one to his Will, and their Judgements, to his Judgement. This is more than Consent or Concord; it is a real Unitie of them all, in one and the same Person, made by Covenant of every man with every man, in such manner, as if every man should say to every man, *I authorise and give up my Right of Governing my selfe, to this Man, or to this Assembly of men, on this condition, that thy give up thy Right to him, and Authorise all his actions in like manner* . . . the Essence of the

[9] ibid., Chapter 13, 90.

[10] ibid.

[11] Strauss, *Natural Law and History* (Chicago, University of Chicago Press, 1965) 181.

> Common-Wealth . . . is *One Person of whose Acts a great Multitude, by mutuall Covenants one with another, have made themselves every one the Author, to the end he may use the strength and means of them all, as he shall think expedient, for their Peace and Common Defence.*[12]

The Sovereign created through the covenant takes the characteristics of natural man and his right. The Leviathan has unrestricted power, his sovereignty cannot be forfeited, he is the sole legislator, himself not subjected to the law[13] and, his rights are indivisible, absolute and incommunicable. Civil law is "to every subject, those Rules, which the Common-Wealth hath commanded him, by Word, Writing, or other sufficient Sign of the Will, to make use of, for the Distinction of Right, and Wrong; that is to say, of what is contrary, and what is not contrary to the Rule".[14] These laws, following consistently the earlier analysis, are commands and impositions: "the end of making Lawes, is no other, but such restraint . . . And Law was brought into the World for nothing else, but to limit the naturall liberty of particular men".[15] The creations of absolute legislative power are necessary even though they violate the first natural law of unrestricted freedom because of the uncertainty and insecurity of equal desires and forces. Civil laws are "properly laws".[16] They derive from nature, not as its spontaneous accretions, but as artifices: "we have derived civil rules from nature, which gives us natural laws, through the use of art, assisted by reason, itself natural but able to transform nature and adapt to the needs of a world of sin, adjust them to the circumstances of social life".[17] Civil laws are both natural and the outcome of the public reason of the Sovereign and, unlike unchangeable natural law, adapt to social need, evolve and vary. Natural law did not create property rights, because natural humanity enjoyed resources communally before the fall while, after the fall, uncertainty about goods dominated. Civil laws are necessary therefore for the creation of rights. They distribute riches and create proper property rights:

[12] *Leviathan*, supra n. 1, Chapter 18, 120–1.

[13] "For having the power to make, and repeal laws, he may when he pleaseth, free himself from that subjection", *De Cive*, VI, 14, at 83; *Leviathan*, Chapter 26. This is the reason why Hobbes is so hostile to the common law tradition, particularly the claim associated with Sir Edward Coke that common law is superior to the law of king and Parliament. See, *Dialogue between a Philosopher and a Student of the Common Law of England* (J. Crospey ed.) (Chicago, University of Chicago Press, 1997).

[14] *Leviathan*, supra n. 1, Chapter 26, 183.

[15] ibid., 185.

[16] ibid.

[17] ibid., 188.

> The distribution of the materials of this nourishment, is the constitution of mine and thine and his; that is in one word propriety; and belongeth in all kinds of commonwealths to the sovereign power . . . The introduction of propriety is an effect of commonwealth which can do nothing but by the person that represents it, it is the act only of the sovereign; and consisteth in the laws, which none can make that have not the sovereign power.[18]

Once the Commonwealth has been established, the natural right that led to its foundation is transferred to the "Ordinances of Souveraign Power". When civil laws, Leviathan's sole responsibility, are given the task of protecting the rights of individuals, natural law in a final feat of trans-substantiation becomes identical with civil law. "The law of Nature and Civill Law, contain each other, and are of equal extent . . . The Law of Nature therefore is a part of the Civill Law in all Common-wealths of the world . . . And therefore Obedience to the Civill Law is also part of the Law of Nature".[19] Civil law and rights are the secular version of natural law. Its source remains the same, a natural reason adapted only to the exigencies of the secular world; but the practical necessities of civil life often lead to commands which contradict natural law. As a result, after the identification of civil and natural law, justice was radically re-defined: First, and in keeping with natural law, "INJUSTICE is no other than *the not Performance of Covenant*. And whosoever is not Unjust, is *Just*".[20] But secondly, "Lawes are the Rules of Just, and Unjust; nothing being reputed Unjust, that is not contrary to some Law".[21] At the end of a long process, natural right was turned into state-given individual rights and justice became obedience to the law. The only principle of justice is conformity with state laws.

At first, contractual consent appears to be the foundation of Leviathan and the modern state. But this is a sleight of hand. The primacy of desire leads inexorably to the social contract, which presents society as the outcome of individual freedom and agreement. To be sure, a covenant based on those premises cannot work unless it is turned into the total subjection of all to the commands of the state. The violence that marked the beginning and the force necessitated by the fear of death, enters civil law and becomes its inescapable condition and supplement. The command of the Sovereign becomes the

[18] ibid., 187.

[19] ibid., 185.

[20] ibid., Chapter 15, 100.

[21] ibid., Chapter 26, 184.

basis of all authority. Laws are laws because of their source and sanctions, not because of their reason. The supremacy of state authority mirrors the natural freedom of the individual; Leviathan, the perfect partner and necessary constraint of the individual, both shares and inaugurates the individual's attributes.[22]

The power of the Sovereign is therefore the result of individual desire and right. Liberalism, the political philosophy which treats rights as the fundamental political fact and eventually identifies the function of the state with their protection, finds its foundational document in Hobbes. Rights are natural while duties conventional; they arise from the contract and, as the contract means total subjection to the state, they ultimately derive from the will of the Sovereign. Legal positivism is the inevitable accompaniment of the individualism of rights. "The Liberty of a Subject, lyeth therefore only in those things, which in regulating their actions, the Sovereign hath praetermitted".[23] Burke complained that "the Parisian philosophers . . . explode or render odious or contemptible, that class of virtues which restrain the appetite . . . In the place of all this, they substitute a virtue which they call humanity or benevolence".[24] But the replacement of virtue and duty with a right deriving logically from human nature and politically from the will of the Sovereign had already been completed in Hobbes. All the elements of political and legal modernity are present in *Leviathan*: individual prior to society; natural and later human rights based on law's recognition of desire; the conventional Sovereign, made in the image of the free individual, whose right establishes individual right; legal positivism and the centrality of will and contract. Most of all, we find in Hobbes the internal link between desire, violence and law.

One could argue, therefore, that the doctrine of sovereignty is a legal doctrine, because all power and rights belongs to the Sovereign not through grant or custom but as of right. According to Strauss, natural public law, the discipline created in the seventeenth century by Macchiavelli and Hobbes, "lowered the goal of politics". Classical political philosophy had distinguished between the ideal of the best polity and that of the legitimate regime. The latter depended for its realisation on the practical wisdom of the statesman, who adjusted the ideal to the exigencies of time and place. Modern natural law answers the problem of the just social order once and for all.

[22] Strauss, op cit., supra n. 11, 186 ff.
[23] ibid., Chapter 21, 148.
[24] Burke quoted in Strauss, op.cit., supra n. 11, p. 188.

> Though nothing can be immortall, which mortals make; yet, if men had the use of reason they pretend to, their Common-wealths might be secured . . . for by the nature of their Institution, they are designed to live, as long as Mankind, or as the Lawes of Nature, or as Justice is selfe, which gives them life.[25]

The new science of politics, based on the dogmatism of state and rights, is almost identical to the legalisation of political life.[26] It "intends to give a universally valid solution to the political problem as is meant to be universally applicable in practice" and, by necessity, it replaces the idea of the best polity with that of efficient and legitimate government.[27] In legal terms, the study of ends is replaced by the study of means and techniques, while the rights of the Sovereign, as distinguished from their exercise, allow an exact definition without reference to the circumstances of their application; but "this kind of exactness is again inseparable from moral neutrality: right declares what is permitted, as distinguished from what is honourable".[28]

In the new climate, the main task of politics becomes the design of the right institutions. But modern constitution-building bears no relationship to the "best polity" of the classics. The institutions of modern politics should be so value-neutral that, according to Kant, they should be acceptable even to "a nation of devils", guided by reasoned desire and fear. "When commonwealth come to be dissolved, not by external violence, but intestine disorder, the fault is not in men, as they are the *matter*, but as they are the *makers*, and orderers of them".[29] When the business of politics is focused on the efficiency or legitimacy of power rather than its ends and prudent use, all the characteristics of the Sovereign will be visited on its notional progenitor, the individual and his human rights. Power can guarantee the social order by conquering human nature and manipulating its passions. The "mortall God", created in the imaginary image of man the "maker", must now shape man, the "matter", in its own image. An apparent contradiction seems to accompany therefore the creation of Leviathan. As soon as he is born, he destroys the natural rights of his progenitor, of the subjects who contracted to create him. The subjects who voluntarily entered into submission in order to safeguard their rights, must now lay them down and consent to their abolition.

[26] "Doctrinairism made its first appearance within political philosophy – for lawyers are altogether in a class by themselves – in the seventeenth century", Strauss, op.cit., supra n. 11, 192.
[27] ibid., 190,191.
[28] ibid., 195.
[29] *Leviathan*, supra n. 1, Chapter 29, 221.

The recognition and protection of natural right prepares its disappearance. To that extent, natural right is always deferred, a mirage or heuristic device which explains the creation of modern politics.

But this is not the whole picture. Even in Hobbes' authoritarian system, natural right survives in two forms. It survives, first, in the person of the Sovereign and in the construction of state power. Sovereign right retains all the characteristics of the individual natural right. Leviathan's unique and infinite right is the civil expression of the absolute right in the state of nature. The Sovereign retains absolute power both in relation to its subjects and the other Sovereigns in international law. The subjects do not give the Sovereign a right or power he does not possess; they simply forfeit their right of resistance. For the nominalist Hobbes, rights belong only to individuals. Communities, multitudes, the people as people can have no right. For sovereignty to become operative and offer its services, it must belong to a singular subject. This happens twice. First, in the fiction of the artificial personality, of Leviathan, the crown or the state. Secondly, in the demand that the real bearer or symbol of sovereignty should be a monarch, a natural person rather than Parliament or the people. Sovereignty is an attribute of individuality, its fictitious construction is necessary because collectivities have no rights.

But the subjects too retain rights. They do not forfeit the right to self-defence and to freedom of conscience. More importantly, they acquire those civil rights which were jeopardised in the state of nature and upon which the moral legitimacy of the state rests. In particular, they acquire the right to property. Hobbes inaugurates a legal system based on the realisation and safeguarding of individual rights. An individual natural right is both the foundation and the outcome of the edifice. Conflicting natural rights lead to the pact, which gives birth to Leviathan, who lays down the law in order to protect and secure individual rights. Civil law is created through the unstoppable advance of individual rights, law's end is the creation of rights. But these are private rights only. Public rights, rights against the state, are totally excluded. The creation and enjoyment of private rights is accompanied by an absence of what we now call human rights. The price for the protection against others is minimal protection against the state. Private rights are the end and value of the system of law, which becomes a system of subjective rights, of their preconditions and consequences: contracts, a strong state and an absolute law.

In this transition from natural right to individual rights, the old link with justice was severed. Hobbes defined justice as the obligations to keep promises and to obey the law. The former is necessary in order to keep the fragile social peace of a society based largely on private agreements, while the latter is the logical consequence of the lack of any rights against the Sovereign. Public and private rights, while formally similar, are clearly distinct. The precondition of individual property rights is the absence of political and human rights, subjection the precondition of freedom. This is the tragedy of individualism, mitigated by the introduction of democracy but still present in the various forms of neo-liberalism. Its attempt to establish law and a system of social relations on their denial, the isolated individual and his rights, can easily end up with their frightening mirror image, an omnipotent state, which destroys rights in their name. Despite jurisprudential claims to the contrary, individual and human are often bitter enemies.

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John Locke's political writings are commonly presented as the early manifesto of liberalism and as the opposite of Hobbes' "totalitarianism". Yet the main assumptions of Locke did not differ radically from his predecessor. The state of nature hypothesis was again at the basis of the political constitution. But the status of natural law is ambiguous. Its rules are not "imprinted on the mind as a duty".[30] On the contrary, conscience is "nothing else but our own opinion or judgement of the moral rectitude or pravity of our own actions".[31] Like Hobbes, however, desire is the mainspring of human nature. "Nature . . . has put into man a desire of happiness, and an aversion to misery; these, indeed, are innate practical principles".[32] The right to pursue happiness is the only innate right, it comes before and founds the law of nature. Men "must be allowed to pursue their happiness, nay, cannot be hindered".[33]

Happiness depends on life and the desire for self-preservation takes precedence over the pursuit of happiness when the two come into conflict. In the state of nature, man is the sole judge of his actions and "may do what he thinks fit". It follows that the natural state is full of fear and danger. Reason wills peace and teaches man what is necessary to that end. The only remedy to the constant conflict of the state of nature is the establishment of civil society or government, and natural law is the sum of its dictates as regards peace and mutual security.

[30] John Locke, *An Essay Concerning Human Understanding* P. H. Nidditch (ed.) (Oxford, Clarendon, 1975), I, 3, 3.
[31] ibid., I, 3, 6–9.
[32] ibid., I, 3, 12.
[33] ibid.

But if reason compels the abandonment of the state of nature, it dictates also the powers of the government. Its supreme principle is that all power should emanate from the natural rights of individuals. Locke's social contract was as much one of subjection as that of Hobbes. Every man "puts himself under an obligation to everyone of that society to submit to the determination of the majority, and to be concluded by it". Their "supreme power to remove or alter" the established government does not extend to the contract of subjection of the individual to the community and, while the right of resistance survives the contract, it is dormant and qualified. But while the state of nature appears very similar in Hobbes and Locke, Locke concluded that the right of self-preservation leads to limited government. The best way for safeguarding individual rights is to subordinate the executive to the law, through the medium of the legislature. The pursuit of happiness and self-preservation requires property and, the main purpose of civil society should be the protection of property. As a result, the legislative body should be elected by the wealthy classes solely to ensure that the rights of property were not jeopardised.

The status of property differentiated Hobbes from Locke. While Hobbes inferred the fundaments of the state of nature from an examination of the public law of his time, Locke reconstructed human nature from an observation of the law and the rights of property. The natural right to property follows from the right of self-preservation and is not just the right of motion and "doing". Human nature and desire are directed at objects, at the things which meet man's desires. Meat and drink can be used only if eaten, only if they become appropriated by the individual. Similarly, all other essentials for self-preservation and happiness can be appropriated in order to satisfy man's devouring right. The right to property is based on the natural property each man has over his body and skills, his work and produce. Whenever he makes something with his own labour, he adds to the object a part of himself and acquires property rights over it. "Man, by being master of himself and proprietor of his own person and the actions of labour over it, has in himself the great foundations of property".[34] Admittedly, this natural property right is limited; in the natural state, man can appropriate with his labour only what is useful and necessary for his self-preservation and happiness and must avoid needless waste. After the social contract, however, and the introduction of money, all restrictions upon the right of property are

[34] *Second Treatise of Government* (P. Laslett ed.) (Cambridge Univerity Press, 1960) sec. 44.

relaxed. Man can now rightfully and without injury possess more than he can make use of. The introduction of money makes it plain that "men have agreed to disproportionate and unequal possession of the earth, they having by a tacit and voluntary consent found out a way, how a man may fairly possess more land than he himself can use the product of".[35] Civil law allows the possessive individual to amass as much property and money as he wishes because capital accumulation works for the common good. The day-labourer of England, Locke remarks, although divested of his natural right to the fruit of his labour, is better off (feeds, lodges and is clad better) than "the king of a large and fruitful territory" in America.[36] It follows that "the great and chief end therefore of men's uniting in commonwealths and putting themselves under government is the preservation of their property".[37] Capitalism is right and just because natural man is the "absolute lord of his own person and possessions".

Locke's teaching on property was much more revolutionary than his political and constitutional doctrines and had important and unforeseen effects. The individual becomes the centre and origin of the moral and political world because he creates and owes value through his own efforts and is thus emancipated from nature and all social bonds which predated the contract. Self-reliance and creativity become the marks of human achievement, acquisitiveness the mark of self-realisation and dignity. "Understanding and science stand in the same relation to the 'given' in which human labour, called forth to its supreme effort by money, stands to the raw material . . . all knowledge is acquired; all knowledge depends on labour and is labour".[38] Labour is the natural means of escape from nature. This departure from nature through human endeavour leads to happiness and "the greatest happiness [lies] in having those things which produce the greatest pleasures". But since nature cannot be known, no distinctions can be made either between higher and lower pleasures. The only guidance in the absence of the *summum bonum* is the avoidance of the *summum malum*. "Desire is always moved by evil, to fly it" and the highest evil is death. The object of desire and fear coincide. Nature creates the desire of what it fears most. Labour, the art imitating nature, shows that the way to happiness is to turn away and negate nature. And as labour adds value to all things and beings, every

[35] John Locke, sec. 50.
[36] ibid., sec. 41.
[37] ibid., 124.
[38] Strauss, op. cit., supra n. 11, 249.

self or thing is malleable and can become the target of conscious intervention and investment. Man can fashion himself through his endeavour as much as he can fashion the physical world. The greatest happiness turns out to be the greatest power to shape and acquire things. Nature, including human nature, which started as the measure of all things, ends up being just matter, to be controlled, exploited and shaped either by the self-fashioning individual or by the all-powerful Sovereign. The fear and desire of the other are united in a new social and political system which makes the desiring individual and the desiring Leviathan the mirror image of each other.

With Locke, the transition from natural law to natural rights and from the purposeful cosmos to human nature was completed. The law's end is no longer to deliver justice as an objective relation amongst people, nor is natural right a warning against sedimented laws and common opinions. Their aim is to serve the individual and promote his "happiness", in other words his desire expressed through his free will. But that means that individuals no longer pursue virtue or strive for the good and politics are not interested in pragmatic approximations and prudent judgments but in the application of truths. The proliferation of many desires destroyed the good, as it had done with the one truth. The emptied place of the good was filled by the (fear of) evil, symbolised by death and broadly interpreted as the non-achievement or frustration of desire. Avoiding the bad has become the end of modern societies: it is the outcome of the enthronement of desire as the principle of individual and social action. The only distant reminders of the old "best polity" are the various utopias, memories of a communal past and promises of a future good society, most of them self-conscious about their impossibility. The human rights announced by the great revolutions of the eighteenth century shared briefly the utopian aspiration. They extended freedom from the private to the public, unlike Hobbes, and they supplemented it with equality, unlike Locke. But these moves were not final or irreversible. The road from the natural rights of the revolutions to the human rights of our age has witnessed the triumph of both individualistic humanism and of the cannibalism of (state and individual) desire. The dialectics of desire inaugurated by Hobbes and Locke, and sanctified by Hegel and Freud, have turned evil and death into the greatest fear and desire. But evil and its fear cannot replace the (pursuit of the) good. Human rights are caught in this continuous see-saw between the best and the worst, between hope for the future and the many oppressions of the present.

5

Revolutions and Declarations: The Rights of Men, Citizens and a Few Others

The symbolic foundation and starting point of modernity can be timed at the passing of the great revolutionary documents of the eighteenth century: the American Declaration of Independence (1776), the Bill of Rights (1791), the French *Déclaration des Droits de l'Homme et du Citoyen* (1789).[1] Its symbolic closure has been placed at the fall of the Berlin Wall in 1989. In between, the natural rights proclaimed by the eighteenth century declarations mutated into human rights, their scope and jurisdiction expanded from France and the States of the Union to the whole humanity and, their legislators were enlarged from the revolutionary assemblies to the international community and its plenipotentiaries and diplomats in New York, Geneva and Strasbourg. In these two long centuries, the revolutionary ideas both triumphed in the world scene and were violated in the most atrocious and unprecedented ways.

The principles of the declarations were as revolutionary in the history of ideas as were the revolutions in the history of politics. We can follow the themes, concerns and fears of modernity in the trajectory of the rights of man. If modernity is the epoch of the subject, human rights have painted the world in the image and likeness of the individual. The impact of the French Declaration, in particular, has been profound. The Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations in 1948, followed closely the French Declaration, both in substance and form.[2] As a contemporary commentator put it, "the framers of the UN declaration of

[1] For a history of the French Declaration, see Lynn Hunt (ed.), *The French Revolution and Human Rights: A Brief Documentary History* (Boston, Bedford Books, 1996); Gail Schwab and John Jeanneney (eds), *The French Revolution of 1789 and its Impact* (Westport, Greenwood Press, 1995).

[2] See Stephen Marks, "From the 'Single Confused Page' to the 'Decalogue for Six Billion Persons': The Roots of the Universal Declaration of Human Rights in the French Revolution", 20 *Human Rights Quarterly* 459–514, at 461 (1998).

1948 followed the model established by the French Declaration of the Rights of Man and Citizen of 1789, while substituting 'man' for the more ambiguous 'human' throughout".[3]

This Chapter will discuss briefly the eighteenth century revolutionary documents with special emphasis on France. Its main concern is not with the substance of rights but with their philosophical presuppositions, paradoxes and ambiguities, which were enunciated first in these documents and eventually came to dominate the world.

The French Declaration starts as follows:

> The representatives of the French People constituted in National Assembly, Considering that ignorance, forgetfulness or contempt for the rights of man are the sole causes of public misfortune and governmental depravity, Have resolved to expound in a solemn declaration the natural, inalienable and sacred rights of man . . .
> 1. In respect of their rights men are born and remain free and equal. The only permissible basis for social distinctions is public utility.
> 2. The aim of every political association is to preserve the natural and inalienable rights of man. These rights are those of liberty, property, security and resistance to oppression.[4]

The Preamble to the American Declaration of Independence, drafted by Jefferson in 1776, is blunter:

> All men are created equal and are endowed by their creator certain inalienable rights, that among these are Life, Liberty and the pursuit of Happiness. To secure these rights Governments are instituted among Men deriving their just powers from the consent of the governed.

The French Declaration and the American Bill of Rights have many similarities, which can be attributed to the common philosophical influences on the two sides of the Atlantic. Both documents proclaim their rights to be universal and inalienable. They both state that limitations and restrictions on the exercise of rights must be introduced by means of laws legislated by democratically elected bodies. Finally, they both protect similar rights: religious freedom and freedom of expression, the security of the person, due process of law and the presumption of innocence in criminal proceedings. The revolutions were united in their rhetorical (at least) commitment to a political system which guarantees freedom and equality. But the two revolutions and their documents had also a number of differences and idiosyncrasies. Both similarities and divergences influenced the future course of human rights.

[3] Lynn Hunt, "The Revolutionary Origins of Human Rights" op.cit., supra n. 1, 3.

[4] "Declaration of the Rights of Man and the Citizen" in S. Finer, V. Bogdanor and B. Rudden, *Comparing Constitutions* (Oxford: Clarendon, 1995) 208–10.

1. A BRIEF HISTORICAL COMPARISON OF FRANCE AND AMERICA

The differences between the political aspirations of the American War of Independence and the social aims of the French social revolution have been extensively discussed. The aim of the American documents was to legitimise political independence from Britain, while that of the French, the overthrow of the social order of the *ancien régime*. The Americans used both historical and philosophical arguments to support their newly established rights. They claimed, first, that the natural rights of the declarations were expressions of divine will and a re-statement only of the traditional liberties of the "freeborn Englishman". According to an influential essay by the German jurist Georg Jellinek, the American Declaration and the Bill of Rights, despite their apparent novelty, were inspired by the English charters of right: the Magna Carta, the Habeas Corpus Act of 1679, the Bill of Rights of 1689 and the legal rights to freedom of conscience and religion recognised in the Colonies since the end of the seventeenth century.[5] These historical texts, however, did not constitute general declarations about the relations between subjects and political power. Instead, they had established remedies and procedures for the protection of predominantly feudal and private rights.

History was complemented by a second naturalist argument, evident in the Declarations of Virginia of 12 June 1776 and Independence of 4 July 1776: the rights of man would be established and best protected, if society is left largely free from state intervention. This was typical modern naturalism. Thomas Paine had argued, in the *Rights of Man*,[6] that the revolutionaries must restrict the government to a minimum and allow the natural laws of commodity exchange and social labour to operate without regulation or hindrance. Men obey these laws, whose action coincides with natural rights, because it is in their interest; left free, they would lead to a state

[5] Georg Jellinek, *La Déclaration des droits de l'homme et du citoyen* (G. Fardis trans.) (Paris, 1902).

[6] Thomas Paine, *The Rights of Man, Being an Answer to Mr. Burke's Attack on the French Revolution* (H. Collins ed.) (London, Penguin, 1969).

of social harmony, in which governmental intervention would be all but redundant. The Americans, already pragmatist in outlook, believed that their declarations were both a restatement and clarification of the legal position of their English ancestors and the "common sense" of the matter. Independence from England would allow society to develop its immanent laws, whose workings coincided with the enlightened self-interest of individuals.

The weight of history was made to support the self-evident nature of the laws of free market and the potential conflict between historicism and naturalism was resolved, Gordian knot-like: the contradiction between the two approaches was denied and their results were declared identical. The revolution was not a supreme act of will and its aim was not to construct theoretically and legislate novel rights. It simply cleared the ground for the full implementation of existing laws. These were basically sound and could lead to individual and social happiness, if the influences distorting them were removed. Thus, while the declaration of rights changed the basis of legitimacy of state power, their substance remained largely unaltered. American rights were natural, they already existed and were well-known and the government's job was to apply prudently pre-existing laws to new situations.

In France, the American influence was acknowledged in the parliamentary debates of July and August 1789 but a sharp distinction was drawn between the two Declarations. As Rabaud Saint-Etienne stated in the National Assembly, the first priority for a nation in the process of being born is to destroy the old order and start afresh by establishing a new legislative power. As a result, the need to start with a general declaration of rights was not pressing for the Americans. But for the French nation, which already existed, the first priority was to "constitute rather than just declare the rights since they are an integral part of the Constitution".[7] The different priorities dictated different forms for the two lists of rights: the French prefaced their Constitution with the Declaration making it the ground and legitimation of constitutional reform, while the Bill of Rights was introduced as a series of amendments to the American Constitution.[8]

[7] Quoted in Blandine Barret-Kriegel, *Les droits de l'homme et le droit naturel* (Paris, P.U.F., 1989) 35.

[8] According to Barret-Kriegel, a historian of the French Revolution, "in France the declaration of rights provided the basis for government itself and was consequently drafted before the constitution", ibid., 35. Cf Hunt, op.cit., supra n. 1, 15.

The central provision of the French Declaration was the right of resistance to oppression, an expression of the deeply political and social character of the revolution. As Mirabeau declared in the Constituent Assembly, the Declaration was not a list of abstract declarations but "an act of war against tyrants".[9] For the French, the Revolution was an act of supreme popular will, aimed at radically reconstructing the relationship between society and state according to the principles of natural rights. Unlike the Americans, there is nothing obvious or common-sensical about this act and its consequences. The *ancien régime* had degraded nature and corrupted the constitution and it was the task of philosophy to assist in drawing up a rational scheme for the new state, based on the protection of rights. As Habermas put it, the French believed that when philosophical insight and public opinion are separated, "the practical task falls to the *philosophe* to secure political recognition for reason itself by means of his influence on the power of public opinion. The philosophers must propagate the truth, must propagate their unabridged insights publicly".[10] The Revolution took philosophy to the barricades and, once victorious, appointed it its chief adviser.

The public and political nature of the Revolution is evident at all levels. The rights belong to "man" and "citizen" marking a close relationship between humanity and politics; the difference between the natural rights of man and the political rights of the citizen is left unclear; the "Supreme Being" witnesses only and does not legislate or guide the Declaration, which is the act of the representatives of the people acting as the mouthpiece of Rousseau's *volonté générale*. Finally, the proclaimed rights were not an end in themselves but the means used by the Assembly to reconstruct the body politic. Habermas concludes that in America, "it is a matter of setting free the spontaneous forces of self-regulation in harmony with Natural Law, while in [France, the Revolution] seeks to assert for the first time a total constitution in accordance with Natural Law against a depraved society and a human nature which has been corrupted".[11]

[9] Quoted in Norberto Bobbio, *The Age of Rights* (Cambridge, Polity, 1996) 87. Cf. "The tone of the Declaration is apparently abstract, but whoever examines the individual liberties listed with a historian's eye, soon realizes that each one represents a polemical antithesis of a specific aspect of society and the state at the time", De Ruggiero, *Storia del Liberalismo Europeo*, quoted in Bobbio, 97, fn. 34.

[10] Jurgen Habermas, *Theory and Practice* (London, Heinemann, 1974) 88.

[11] ibid., 105.

We can detect, in these formulations, the legal expression of the project of the Enlightenment.[12] The new era promised the emancipation of the individual from all forms of political oppression primarily and, potentially, from class or social tutelage. More generally, emancipation meant the progressive abandonment of myth and prejudice in all areas of life and their replacement by reason. Kant's *Critiques*, which launched philosophical modernity through reason's investigation of its own operation, defined the Western world-view as historical progress through reason. Emancipation extends to all aspects of falsity and oppression, from beliefs and superstitions to physical, social and economic needs and insecurities. In political terms, liberation means the subjection of power to the reason of law. The American Declaration adds to emancipation the right to happiness. The "American dream" was already implicit in the foundation of the American State. This second aim, muted at its inception but today as important in the West as emancipation, is the quest for the good life, in the form of self-realisation or self-fulfilment. It is based on the belief that individuals are able to develop their innate imaginative and creative powers through economic improvement and participation in scientific, literary and cultural life. Emancipation enters the world stage as a negative principle or defensive weapon against political oppression and is associated with the value of dignity. Self-fulfilment is a positive force, based on the presumed human potential for improvement and happiness. It soon became associated with the value of equality which aspires to stop domination and enable individuals to shape themselves and the world. "Liberation and dignity are not automatically born of the same act; rather they refer to each other reciprocally" writes Ernst Bloch. "With economic *priority* we find humanistic *primacy*".[13] Both, however, are underpinned by "the massive subjective turn of modern culture, a new form of inwardness in which we come to think of ourselves as beings with inner depths".[14] If emancipation is grounded on the belief in an essential, innate human nature, concealed and overlaid by tradition and custom, self-realisation makes nature the target of conscious intervention. An inherent tension between the two aims is evident from the beginning.

[12] See generally Ernst Cassirer, *The Philosophy of the Enlightenment* (F.C.A. Koelln and J.P. Pettegrove trans.) (Princeton NJ, Princeton University Press, 1968) especially Chapter VI; Lucien Goldmann, *The Philosophy of the Enlightenment* (H. Maas trans.) (London, Routledge and Kegan Paul, 1973).

[13] Ernst Bloch, *Natural Law and Human Dignity* (D. J. Schmidt trans.), Cambridge, Mass., MIT Press, 1988) xi.

[14] Charles Taylor, *Multiculturalism: Examining the Politics of Recognition* (Princeton NJ, Princeton University Press, 1994) 29; David Harvey, *Justice, Nature and the Geography of Difference* (Oxford, Blackwell, 1996) 120–50.

But the two revolutions and their documents were also witness to two alternative strategies for the achievement of their ends. The French is predominantly moral and voluntarist. Human rights are a form of politics committed to a moral sense of history and a proactive belief that collective action can overthrow domination, oppression, and suffering. We make our history and we can therefore judge it, when we come across flagrant instances of persistent historical immorality. The agent of history and the definition of oppression have differed wildly since the eighteenth century: at the collective end, social revolutionaries, anti-colonial rebels and the NATO bombers of Yugoslavia were all involved in political crusades of a moral character. They are accompanied, at the private end, by charity donors, aid contributors and letter writers to The Guardian and, in-between, by human rights campaigns and NGOs. The great political movements of our era which appealed to natural or human rights are the descendants of the French revolutionaries: they include the anti-slavery and decolonisation campaigns, the popular fight against communism, the anti-apartheid movement, protest movements from the suffragettes to the civil rights and from the syndicalist and workers' movements to the various resistances against foreign occupation and domestic oppression.

The American strategy was initially more passive and optimistic. Certain social traits and laws, allowed free action and with some gentle encouragement, will lead inexorably to the establishment and promotion of human rights and the almost natural adjustment between moral demands and empirical realities. Free markets, legal procedures and the rule of national or international law can rectify human rights abuses through their normal operation and impose the principles of dignity and equality on tyrannical as much as on democratic regimes. The huge standard-setting enterprise in the United Nations and other international and regional institutions and the various courts, commissions and human rights procedures for supervising compliance and implementation belong to this second strategy. If, according to Lenin, socialism was the combination of Soviet democracy and electricity, for President Carter, the first great exponent of a moral foreign policy, human rights are the combination of capitalism and the rule of law. Their success depends on barristers not barricades, on reports not rebellions and on protocols and conventions not protests.

From the morality of history to the morality of law, and from the significance of local culture to the predominance of ahistorical values, all the main human rights strategies and arguments were pre-figured in the classical declarations. This radical re-conceptualisation of politics, law and morality had a number of philosophical presuppositions and important consequences, to which we now turn.

II. THE PROCLAMATION OF GROUNDLESS FREEDOM

After the revolutions, every aspect of life was reconstructed in accordance with the principle of free will. The early declarations were the first public expression of the principle and, despite other differences, the American and French Revolutions were united in their declaratory intent. But there is a paradox at the heart of the declarations: they pronounced the rights of "man" in order to rescue them from "ignorance" and "forgetfulness" but, it was the act of declaration itself which established the rights as the ground of the new polity. How can we explain this paradox?

The political philosophy which paved the way to the revolutions believed that natural rights express the immanent laws of society which had been distorted, through lack of representation in America and the unenlightened attitudes of the *ancien régime* in France. These rights promote individual freedom by freeing people to pursue their interests without consideration for substantive moral values. Society should be separated from the state and turn into a morally neutral terrain in which free private activity, commerce, trade and economic transactions take place. The only restrictions placed upon these interest-maximising individuals should be external: positive law divorced from virtue both creates the preconditions of freedom, mainly in contract, and imposes constraints upon individual activity, paradigmatically in criminal law, to allow the reconciliation of conflicting interests. The law of freedom is at the same time the law of coercion, legality may have been separated from morality but has as indispensable companion the police, the prison and the gallows.

Here we may discern a first answer to the paradox. The constitutional assemblies introduced a new type of legislative power and of positive law which, while coercive, was grounded on the assertion that it originated from and established individual freedom. The revolution was legitimised by referring back to the natural autonomy of individuals: their rights are discovered by the rational insight of the

French *philosophe* or the common-sense of the American man of affairs; this way, they both precede the new order and are its legislative creations. Whether through the fictitious original social contract or through the divine derivation and self-evident character of rights, the coercive power of the state is justified by freely entered agreements or the freely arrived insights of autonomous individuals. The declarations construct therefore a new polity under pretext of uncovering or describing it. In linguistic or "speech act" terms, they are performative statements disguised as constative. The text, the supreme expression of revolutionary will, acts on the world and changes it.

The classical declarations claim that human rights belong to "man". They therefore presuppose logically a substratum or *subjectum*, "man", to whom they are given. But the only ontological or methodological precondition of modern philosophy is the equally shared freedom of will, which exists in a pristine form before any predicate or determination. The self-grounding nature of modern man means that his empirical reality is constructed out of the proclaimed rights on condition that they are presented as his eternal entitlements. "Man" in the abstract, legal personhood at large, needs these extravagant assertions in order to ascend to the historical stage and succeed God as the new ground of being and meaning, and human nature is invented as a retrospective justification for the unprecedented rights created by the declarations. As Lyotard put it, "man should have signed the Preamble of the Declaration".[15]

But the reverse seems equally valid: it was the National Assembly, as representative of the French nation, which proclaimed the right of "man" and, in so doing, ushered "man" onto the world scene. The essence of "man" lies in this act of proclamation in which he linguistically asserts and politically legislates without any ground or authority other than himself. Language performs its world-making power and establishes a political system based on a self-referential, groundless freedom. It is in the nature of human rights to be proclaimed, because there is no one outside historical humanity to guarantee them. In the act of proclamation, "man" both recognises and asserts his nature as free will. The revolution is an act of self-foundation, which simultaneously establishes the bearer of right and the power of the legislator, as the historical representative of its own construct, to create all human right *ex nihilo*. From that moment, a new declara-

[15] Jean-François Lyotard, *The Differend* (G. van den Abbeele trans.) (Manchester, Manchester University Press, 1988) 145.

tion of rights has a common and immutable element that refers to "man" or human nature and legitimises the legislator and variable contents which open new areas of entitlement and free action.

The paradox we encountered is not unique to the revolutionary documents. It will accompany many new constitutions and human rights enactments which depart from the pre-existing constitutional order. A bill of rights or constitution has two aspects: the enunciation, the act of declaring (performative) and, secondly, the statement, the content of the enunciation (constative). The performative dimension acts out the assertion of the legislators that they are authorised to pronounce rights and, in doing so, it introduces them. The specific claims to "life, liberty and the pursuit of happiness", on the other hand, state these rights and give them substance. The first paradox quickly proliferates into others which will prevent declarations and Bills from ever being fully implemented or from grounding a stable social order. The internal tensions of the original French text are evident everywhere: in the contrast between man and citizen, between principle and exception, between citizen and alien and between men and women, slaves, blacks, colonials, all those excluded from political rights. As a result, contradictions develop "in the instability of the relation between the aporetical character of the text and the conflictual character of the situation in which it arises and which serves as its referent".[16] Similarly, the point of application of the text is also conflictual. As performatives, the declarations carry out their work by being put into effect in the future, in a myriad of situations and circumstances, many unforeseen by the constitutional legislator, many in conflict with its original intentions.[17] Human rights are future looking and indeterminate, they become actual when the act of enunciation performs its effects in various settings which, legitimised by the declaration, put its specifics into practice. As a statement of entitlements, a Bill of Rights creates a forward-looking grammar of action and its applications often differ from the always contested meaning of its sentences.

We will examine below how the performative character of the enunciation anchors a series of claims by groups, initially excluded

[16] Etienne Balibar, "The Rights of the Man and the Rights of the Citizen", in *Masses, Classes, Ideas: Studies on Politics and Philosophy before and after Marx* (J. Swanson trans.) (New York, Routledge, 1994) 39–59, 41.

[17] Hans-Georg Gadamer, *Truth and Method* (London, Sheen and Ward, 1975) 324–41; Costas Douzinas and Ronnie Warrington with Shaun McVeigh *Postmodern Jurisprudence: The Law of Text in the Texts of Law* (London, Routledge, 1991) Chapters 2 and 3.

from certain rights.[18] Such claims, if successful, are only indirectly related to the foundational text. We are faced, therefore, with a paradigmatically open text, whose reference is a past conflict and whose performance will help decide future struggles. Interpreting human rights law, which means performing or applying a code or grammar to a conflict, is by definition controversial. The endless, repetitive and rather boring American debate on constitutional interpretation between liberals, strict constructionists and "federalists", who claim to follow the intentions of the founding fathers, is not just about the politics of interpretation.[19] It rather disguises the fact that interpretation is politics because human rights is politics by other means. Both origin and destinations of a Bill of Rights are steeped in conflict. As a result, the text is more than any piece of literature a model of undecidability, and more than any party programme a political manifesto.

The force of the declarations should not be sought therefore in their appeals to fictitious original pacts or divine sources or in the equally mythical institutional rights of the self-governing and self-taxing Englishmen. Indeed, the French declaration makes no reference at all to a social compact. The declarations create and exhaust their own legitimacy in their act of enunciation. There is no need to give any further argument, justification or reason for their genesis besides the proclamatory act which confers upon the legislators both the right to legislate these rights and to claim that they already belong to all "men". But while "man" in the abstract or human nature is the ontological bearer of rights in general, no human right in the abstract, no right to right has been created or developed.[20] Human rights involve always specific claims to free speech, security of the person etc. The ontological ground remains groundless, without substance and determination, an empty vessel which authorises the legislator and receives content and predication from historical acts of lawmaking. Human rights install the radical contingency of linguistic proclamation into the heart of constitutional arrangements.

[18] See Chapter 9.

[19] Michelle Rosenberg (ed.), *Constitutionalism, Identity, Difference and Legitimacy* (Durham, Duke University Press, 1994); *Just Interpretations* (Berkeley, University of California Press, 1998).

[20] See Renata Salecl, *The Spoils of Freedom* (London, Routledge, 1994) 123–7.

III. THE EMANCIPATION OF ABSTRACT "MAN"

When "man" replaced God as the ground of meaning and action, the protection of his rights against state power became the legal essence of modernity. But there are many problems with this "man", apparent from the beginning of the human rights tradition. The abstract "man" of philosophy is far too empty. To ground a historical constitution, he must be complemented by other substantive capacities and characteristics, Man as species existence may be the ground of the epistemological revolution of modernity, but the political constitution can scarcely be organised according to such a formal principle. Law is the terrain on which abstract nature acquires concrete form. The legal subject as the vehicle of legal rights mediates between abstract human nature and the concrete human being who travels in life creating her own unique narratives and acting them out on the world. As we will examine in detail below, the recognition of legal subjectivity is our accession to a public sphere of legal rights, limitations and duties, based on the assumption of a shared, abstract and equal essence and of a calculating, antagonistic and fearful existence.[21]

Article 1 of the French *Déclaration*, repeated almost verbatim in the Universal Declaration of Human Rights, states that all "men are born equal in rights and in dignity". Abstract and universal human nature, the essence of the human species, is parcelled out to everyone at birth in equal shares. This is evidently a great fallacy. People are not born equal but totally unequal. Indeed, infancy and childhood are the best examples of human inequality and dependency upon others, upon parents, family members, and community networks, within which human life starts, develops and ends. Once the slightest empirical or historical material is introduced into abstract human nature, once we move from the declarations onto the concrete embodied person, with gender, race, class and age, human nature with its equality and dignity retreats rapidly. This type of affirmative syntax characterises human rights declarations. Rights theorists argue that such statements are normative or aspirational and not statements of fact. They should be read as "all men should become equal in rights and dignity". But this defence is only partially successful. Rights must be presented as constative (as statements of fact) in order to establish their (false) self-

[21] See below, Chapters 8 and 9.

evidence and legitimise their legislators: "we are only declaring what has always been your natural condition and entitlements". The statement is false but the gap between its non-existent reality and its future application is the space where human rights develop. To that extent, human rights are a present lie which may be partially verified in the future.

And that future had and still has to wait. Let us examine, briefly, the contents of human nature in its country of origin, France. The Marquis de Condorcet and a few pre-revolutionary philosophers argued that natural rights belong to the abstract man, because " 'they are derived from the nature of man', defined as 'a sensitive being . . . capable of reasoning and of having moral ideas' ".[22] But after sex, colour and ethnicity were added, this abstract disembodied human nature took a very concrete form, that of a white, property-owning man. Men represented humanity because their reason, morality and integrity made them an exact image of the "man" of the declarations. Compared with this prototype of humanity, women's "fleeting feelings" and "natural tendencies precluded their ability to live up to the individual prototype". Any biological, psychological or social difference from the male model were interpreted as handicaps and signs of inferiority:

> Maleness was equated with individuality, and femaleness with otherness in a fixed, hierarchical, and immobile opposition (masculinity was not seen as femininity's other). The political individual was then taken to be both universal and male; the female was not an individual, both because she was non-identical with the human prototype and because she was the other who confirmed the (male) individual's individuality. [23]

As a result, the days following the Revolution were some of the darkest in the history of women.[24] Female nature was caught between the "éternelle malade" of Michelet and the "hysterical woman" of Charcot and was defined as private and practical, her vocation delicate, fragile and emotional, indispensable for domestic tasks but

[22] Quoted in Joan Scott, *Only Paradoxes to Offer: French Feminists and the Rights of Man* (Cambridge Mass., Harvard University Press, 1996) 6. For a history of women rights, see P. Hoffman, *La Femme dans la Pensée des Lumières* (Paris, Orphys, 1977); E. Varikas, "Droit naturel, nature féminine et égalité des sexes", *Revue Internationale des Recherches et des Synthèses en Sciences Sociales*, 3–4, 1987.

[23] ibid., 8.

[24] Nicole Arnaud-Duc, "Women Entrapped: from Public Non-existence to Private Protection", in A.-J. Arnaud and E. Kingdom, *Women's Rights and the Rights of Men* (Aberdeen University Press, 1990) 9.

totally unsuitable to the exercise of political and legal rights. In October 1793, the Convention representative Fabre d'Eglantine denounced women who were claiming citizen rights and were not "occupées du soin de leurs ménages, des mères inséparables de leurs enfants ou des filles qui travaillent pour leurs parents et prennent soin de leurs plus jeunes soeurs; mais . . . un sorte des chevaliers errants, . . . des filles émancipées, des grenadiers femelles".[25] Portalis, the main inspiration behind the Code Napoléon, exalted women's "delicate and fine tact, which gives them a sixth sense and which is lost and does not get perfected, except with the exercise of all the virtues, finally, their touching modesty . . . which they cannot lose without becoming more vicious than we, men".[26] As late as 1912, the eminent jurist Maurice Hauriou argued that a woman is not a "null" but a "nonexistent" citizen, like a incestuous or same sex marriage.[27]

Women were not given the right to vote, in France, until 1944. Women's franchise was "the object of a conspiracy of silence, albeit unofficially, on the part of all the revolutionary and post-revolutionary constitutions . . . The pretext is to be found in the substantive reference in the Code to female nature and the necessities of everyday life".[28] Similarly, women's rights to education and work were not recognised until well into the twentieth century and still today they have not been raised to the full status of humanity or of the "man" of the revolution. As a contemporary commentator puts it, we cannot contemplate a declaration of the rights of women because "nous aboutirions alors à la destruction du concept d'être humain".[29] Elizabeth Kingdom concludes that "whatever the general critique of the 1789 Declaration as a social document, its formal constitution of the rights of the citizen could not reliably incorporate the "lost rights" of pre- and post-revolutionary women".[30]

The prototype of human nature was not just male; it was also white. The French Colonies were populated mostly by slaves at the

[25] Quoted ibid., 21.
[26] Quoted ibid., 11.
[27] ibid., 14.
[28] A.-J. Arnaud, "Women in the Boudoir, Women at the Pools: 1804, the History of a Confinement", in A.-J. Arnaud and E. Kingdom, *Women's Rights and the Rights of Men* (Aberdeen University Press, 1990) 1.
[29] R. Badinter, *L'Universalité des Droits de l'Homme dans une Monde Pluraliste*, Strasbourg, Conseil d' Europe, 1989, 2.
[30] Elizabeth Kingdom, "Gendering Rights", in A.-J. Arnaud and E. Kingdom, *Women's Rights and the Rights of Men* (Aberdeen University Press, 1990) 99. For definite statements on the current feminist position on rights, see Luce Irigaray, *Thinking the Difference* (K. Montin trans.) (New York, Routledge, 1994); Nicola Lacey, *Unspeakable Subjects* (Oxford, Hart, 1998).

time of the Revolution. Slavery was abolished in metropolitan France, in 1792, and two years later further afield, in an attempt by the revolutionaries to defeat the British in the Caribbean, but this was temporary.[31] It was restored by the Empire, in 1802, and was not abolished again until 1848. Race, like gender equality, was unknown to the Declaration. As Joan Scott concludes, individuality was racially defined. "The superiority of white Western men to their 'savage' counterparts lay in an individuality achieved and expressed through the social and affective divisions of labour formalised by the institution of monogamous marriage".[32]

The historical unreality and emptiness of the concept of "man" and the related incompleteness and indeterminacy of human rights discourse were at the centre of their early critiques from right and left. We will examine below the critiques of Burke and Marx in some detail. But we can anticipate here their attack on "man", as an all too concrete abstraction. "I have met Italians, Russians, Spaniards, Englishmen, Frenchmen, but I do not know man in general" wrote the French conservative Joseph de Maistre.[33] Edmund Burke agreed; rights are a "metaphysical abstraction",[34] their "abstract perfection is their practical defect".[35] "What is the use of discussing a man's abstract right to food or medicine? The question is upon the method of procuring and administering them. In that deliberation I shall always advise to call in the aid of the farmer and the physician, rather than the professor of metaphysics".[36] Rights are not universal or absolute, they do not belong to abstract men but to particular people in concrete societies with their "infinite modification" of circumstances, tradition and legal entitlement.

Marx, at the other end of the political spectrum, agreed: "Man is in the most literal sense of the word *zoon politikon*, not only a social

[31] C.L.R. James describes an interesting incident during the session of the National Assembly which abolished slavery in 1794. A black woman who had regularly attended the Assembly fainted when the abolition vote was passed. On hearing this, a representative asked that she be admitted to the sitting. She was sat next to the speaker with tears in her eyes and was greeted with applause. *The Black Jacobins: Toussaint d'Ouverture and the San Domingo Revolution* (New York, Vintage, 1980) 140–1.
[32] Joan Scott, op. cit., supra n. 22, 11. See infra part iv for the treatment of foreigners in post-revolutionary France.
[33] Quoted in Claude Lefort, *The Political Forms of Modern Society* (Cambridge, Polity, 1986) 257.
[34] Edmund Burke, *Reflections on the Revolution in France* (J.G.A. Pockock ed.) (Indianapolis, Hackett, 1987), 85
[35] ibid., 105.
[36] ibid., 85.

animal, but an animal which can develop into an individual only in society".[37] Their agreement is only partial and follows Aristotle and Montesquieu, by emphasising the concrete action and historical provenance of rights. But the critique of the abstract "man" of rights is not simply an attack on their excessive rationalism or their metaphysical "speculativism". For Marx, the "man" of the rights, rather than being an empty vessel without determination, and therefore unreal, non existent, is too full of substance. The rights of the declarations, under the cloak of universality and abstraction, celebrate and enthrone the power of a concrete, too concrete man: the possessive individual, the market orientated white bourgeois male whose right to property is turned into the cornerstone of all other rights and underpins the economic power of capital and the political power of the capitalist class. For Burke and Marx, the subject of rights does not exist. It is either too abstract to be real or too concrete to be universal. In both cases, the subject is fake because its essence does not and cannot correspond with real people.

IV. RIGHTS CAN BE GUARANTEED ONLY BY NATIONAL LAW

All struggle against oppression, when successful, divides into the excitement of newly-found freedom and the urge for order. The eighteenth century revolutions and declarations were expressions of rebellion against the old destined to mature, first, into the passion and, then, into the boredom of the new. But history had to wait before the potential grew into the actual and natural rights mutated into human rights. In the meantime, as with most successful revolutions, the emphasis shifted from freedom to law and from nature to order. Natural rights link the promise of freedom to the discipline of law. The institution of rights was not unknown to the *ancien régime*. Private law rights and some protections against administrative abuse were recognised in civilian France, while the American colonists enjoyed many of the common law remedies and protections of the "free-born Englishman". What distinguished the revolutionary from earlier conceptions of right was the claim that a new type of state organisation was to be grounded on the recognition and protection of these rights.

[37] Karl Marx, *Grundrisse* in D. McLellan (ed.), *Selected Writings* (Oxford, Oxford University Press, 1975) 346.

But here we come across one more paradox. Human rights were declared inalienable because they were independent of governments, temporal and local factors and expressed in legal form the eternal rights of man. If all men share a common human nature, there is no need to invoke any power for their proclamation and no special legislation was necessary since all law-making power now emanated from the sovereign people. Yet, the French Declaration is quite categorical as to the real source of universal rights. Let us follow briefly its strict logic. Article 1 states that "men are born and remain free and equal of right", Article 2 that "the aim of any political association is to preserve the natural and inalienable rights of man" and Article 3 proceeds to define this association: "The principle of all Sovereignty lies essentially with the nation. No group, nor individual may exercise any authority that does not expressly proceed from it". Finally, according to Article 6, "The law is the expression of the general will; all citizens have the right to work towards its creation either in person or through their representatives".

Rights are declared on behalf of the universal "man", but the act of enunciation establishes the power of a particular type of political association, the nation and its state, to become the sovereign lawmaker and secondly, of a particular "man", the national citizen, to become the beneficiary of rights. First, national sovereignty. The declarations proclaim the universality of right but their immediate effect is to establish the boundless power of the state and its law. It was the enunciation of rights which established the right of the Constituent Assemblies to legislate. In a paradoxical fashion, these declarations of universal principle "perform" the foundation of local sovereignty. The progeny gave birth to its own progenitor and created him in his own image and likeness.

The metonymical relationship and the mirroring effect between the "sovereign" man of the declarations and the "sovereign" state is also apparent in international law and politics. The standard presentation of states in the international scene is of a unitary, free and willing actor who, like the individual, is autonomous and formally equal with others. International law is littered with analogies between man and state and its legitimacy is founded on them. Internally, the principle of popular (or in Britain parliamentary) sovereignty states that the will of all citizens becomes trans-substantiated, through elections, votes and law-making, into a singular general will which expresses the common interest of the nation and resembles, in all particulars, the free will of the individual. Internationally, this free and united will is confronted

with similar actors and, as a result, all the main tropes of eighteenth century political philosophy come into play. The state of nature (absence of international law), the social contract (the treaty creating the United Nations) and the fearful and calculating attitude to others characterise also the nature and relations of these oversized individuals.

The key principle of territorial integrity and non-intervention, for example, is presented as the logical outcome of the negative freedom that states and individuals enjoy equally. In international law, "[n]ations are regarded as individual free persons living in a state of nature . . . Since by nature all nations are equal, since moreover all men are equal in a moral sense whose rights and obligations are the same; the rights and obligations of all nations are the same".[38] Every single trait of the natural man of the declarations has been displaced onto the state and, undoubtedly, the grand proclamations sound more realistic in relation to the autonomy and freedom of action of the state: "Sovereign man and sovereign states are defined not by connection or relationships but by autonomy in decision-making and freedom from the power of others. Security is understood in terms not of celebrating and sustaining life but as the capacity to indifferent to 'others' and, if necessary, to harm them".[39] Negative liberty and formal equality lead to the contractarianism of treaties and to reciprocal relations between mutually disinterested parties in which "I observe your territorial integrity (negative liberty) because in doing so I reinforce a system in which you are expected to observe mine".[40] International law presupposes a subject similar in all particulars to that of the declarations. The modern nation-state came to existence and acquired legitimacy by pronouncing the sovereignty of the subject and adopting all its characteristics. In this elaborate hall of mirrors, the fictions of the free individual and of the all-devouring Leviathan became intimately connected companions and determined the political trajectory of modernity. If the declarations ushered in the epoch of the individual, they also launched the age of the state, mirror of the individual. Human rights and national sovereignty, the two antithetical principles of international law were born together, their contradiction more apparent than real. But we are rushing. Let us return to the declarations and their effects.

[38] Quoted in Fiona Robinson, "The limits of a rights-based approach to international ethics", in Tony Evans (ed.), *Human Rights Fifty Years on: A reappraisal* (Manchester, Manchester University Press, 1998) 62.

[39] V. S. Peterson and A. Sisson Ryan, *Global Gender Issues* (Boulder, Westview Press, 1993) 34.

[40] ibid., 63.

It was not just the state-as-individual that was the other side of the coin of rights. The legislator of the proclaimed universal community of reason was none other than the historical legislator of the French or American nation. "The sovereignty of the nation had just been asserted at the expense of the privilege of a state or class. And it was impossible to leap beyond that point into the unfolding of history".[41] From that point, statehood, sovereignty and territory follow the principle of nationality. If the Declaration inaugurated modernity, it also started nationalism and all its consequences: genocides, ethnic and civil wars, ethnic cleansing, minorities, refugees, statelessness. Citizenship introduced a new type of privilege which was protected for some by excluding others. After the revolutions, nation-states are defined by territorial boundaries, which demarcate them from other states and exclude other people and nations. Citizenship shifted exclusion from class to nation, which became a disguised class barrier.

Thus, the universal legislator and the Kantian autonomous subject turn into a mirage, as soon as empirical characteristics are added to them. The principle of autonomy is created in the moulding together of the split self and the split community that modernity introduced against the horizon of an alleged universal community. This paradox was first acted out by the French revolutionaries. The National Assembly notionally split itself into two parts: a philosophical and a historical. The first legislated on behalf of "man" for the whole world, the second for the only territory and people it could, France and its dependencies. The gap between the two is also the distance between the universality of the law of reason (eventually of human rights) and the generality of state legislation. From that point onwards, it remains unknown:

> whether the law thereby declared is French or human, whether the war conducted in the name of rights is one of conquest or one of liberation, whether the violence exerted under the title of freedom is repressive or pedagogical (progressive), whether those nations which are not French ought to become French or become human by endowing themselves with Constitutions that conform to the Declaration.[42]

The French Assembly, of course, did not and could not legislate for the world; what it did was to attempt to make the discourse of

[41] Julia Kristeva, *Nations without Nationalism* (L. Roudiez trans.) (New York, Columbia University Press, 1993), 26.

[42] Lyotard, op.cit., supra n. 15, 147. This statement seems to represent also the post-Kosovo late modernity, if one substitutes American for French.

universal right part of the foundation myth of modern France. The universality of the claims was the reason why to many the French Revolution seemed to possess the characteristics of a religious uprising. As Toqueville put it, the revolution "seemed more interested in the regeneration of humankind than in the reform of France".[43]

And yet, by introducing the distinction between human being and citizen, the Declaration acknowledged the tension between the universal and the local and accepted its historical specificity. The performative contradiction between the declaration of rights for all humanity which created the power of the National Assembly to establish these rights only for the French introduced an element of exclusion and violence in constitutional politics. From now on political legitimacy derives from the fact that the legislator and the addressee of his commands (the legal subjects) are one and the same. The essence of political freedom is that the subjects who make law are also law's subjected. Democratic legislation is introduced on behalf of the citizens who, in the Rousseauan version of the social contract, participate in the creation of the general will. But the law of the state, despite its generality excludes from the community of its subjects all those who do not belong to the nation. There is a gap between the subject of the statement "we the people legislate norm x" and of its passive form "we the people ought to obey x". The first group consists of the legislators, the voters and those whose interests are represented in politics. The second includes additionally others, aliens, immigrants and refugees as well as internal aliens, the "enemy within", who are given notice that if they come in contact with the state, the authority of its law will be engaged. They are subjected to the law but they are not law's subjects. A necessary dissymmetry develops therefore between the addressees of the law (subjects, citizens, the nation) and those others, its secondary and potential addressees. As Kristeva puts it, "never has democracy been more explicit, for it excludes no-one – except foreigners".[44]

Immediately after the French Revolution, the National Assembly adopted a decree which allowed the naturalisation of most foreigners residing in France. Cosmopolitan clubs and newspapers were founded, foreigners joined the revolutionary army and, in 1792, a number of foreign radicals and writers were given the honorary title of French citizen, because they had been "allies of the French

[43] Alexis de Tocqueville, *L'ancien régime et la révolution* (Paris, Gallimard, 1967) 89.

[44] Julia Kristeva, *Strangers to Ourselves* (Leon Roudiez trans.) (Columbia University Press, 1991) 149.

people" and had attacked "the foundations of tyranny and prepared the way for liberty".[45] They included Priestley, Paine (who became a member of the National Assembly representing the Pas-de-Calais), Bentham, Wilberforce, Clarckson, Washington, Hamilton and Madison.[46] But the climate changed dramatically after the first defeats in the revolutionary wars and the victory of the Jacobins. By 1794, foreigners were forbidden to stay in Paris and other major cities and towns, they were excluded from public service, political rights and public bodies and the property of English and Spanish citizens was confiscated. Many revolutionary foreigners and cosmopolitan French were executed during the Terror. "The scaffold took care of the cosmopolitan's lot, while nationalism – perhaps 'regretfully' and 'reluctantly' – became paramount in both minds and laws".[47] Tom Paine was arrested in December 1793; he was lucky to avoid the guillotine and was released ten months later through the intercession of the American Ambassador who claimed that he was an American citizen.[48] "It should be noted", Kristeva dryly concludes "that those steps [against foreigners] were not as harsh as those taken during the war of 1914" and pale into insignificance when we reach the war of 1939.[49]

The elevation of the national law into the only upholder of rights and the resulting treatment of foreigners as lesser humans, indicates that the separation between man and citizen is a main characteristic of modern law. The nation-state comes into existence through the exclusion of other people and nations. The modern subject reaches her humanity by acquiring political rights of citizenship, which guarantee her admission to the universal human nature by excluding from that status others with no rights. The citizen has rights and duties to the extent that he belongs to the common will and to the state. The alien is not a citizen. He does not have rights because he is not part of the state and he is a lesser human being because he is not a citizen. One is a man to greater or lesser degree because one is a citizen to a greater or lesser degree. The alien is the gap between man and citizen. The modern subject is the citizen and citizenship guarantees the

[45] ibid., 156.

[46] Ehsan Naraghi, "The Republic's Citizens of Honour" in *1789: An Idea that Changed the World*, in *The UNESCO Courier*, June 1989, 13.

[47] ibid., 160.

[48] This fascinating story is narrated in Albert Mathiez, *La Révolution et les étrangers* (Paris, La Renaissance du Livre, 1928). For a concise history, on which the present account is based, see Kristeva, supra n. 44, 148–67.

[49] Kristeva, supra n. 44, 161.

minimum requirements necessary for being a man, a human being. We become human through citizenship and subjectivity is based on the gap, the difference between universal man and state citizen.

We can conclude that the "man" of the declarations is an abstraction, universal but unreal, an "unencumbered" entity stripped down of its characteristics. As the representative of Reason, he has no time or place. The citizen, on the other hand is always a Burkean "Englishman". (S)he has the rights and duties given to him by state laws and national tradition, (s)he must be subjected to the law in order to become law's subject. As Jay Bernstein puts it, "citizenship stands between and mediates the abstract particularity of personal identity and the abstract universality of human rights. Individuals only have rights in community".[50] For those who lack representation very little is left. The stateless, the refugees, the minorities of various types have no human rights. When liberal states claim that they abolish privileges and protect universal rights, they mean that privileges are now extended to a group called citizenry, still a small minority. Modern subjectivity is based on those others whose existence is evidence of the universality of human nature but whose exclusion is absolutely crucial for concrete personhood, in other words for citizenship.

It may be argued, therefore, that the Declaration of Human Rights is the precondition of sovereignty and is inescapably intertwined with legislation. The modern sovereign comes into its omnipotent life by proclaiming the rights of citizens. Looked from this perspective, human rights are attempts to build a protective principle against Leviathan, based on the recognition of desire and its erection as a counter principle to the desire of the state. If modern public law is the legalisation of politics, human rights are the legalisation of desire and their main components mirror closely the characteristics of Leviathan. The Hobbesian natural right finds its limit in the other and the absolute other is death. These two principles that appear to be contradictory, to speak to two totally different logics, are the two sides of the same coin. Their historical combination could only succeed in absolute apocalyptic moments, at which a revolutionary class grasps history and imposes a radical new logic. But this combination of law and revolutionary reason which can change the root of the ancient rivers of history is only feasible through apocalyptic violence;

[50] Jay Bernstein, "Rights, Revolution and Community: Marx's 'On the Jewish Question' " in Peter Osborne (ed.), *Socialism and the Limits of Liberalism* (London, Verso, 1991) 91–119, 114.

man became the principle of politics in a momentary eruption and its accompanying declarations in France and America. Once the contradictory logic was normalised and put into practice, the two limbs of the paradox, according to which man can have inalienable rights when he has no rights other than those granted to him by the sovereign, break up and determine two opposing trajectories. That of sovereignty, legal positivism and utilitarian intervention and, that of a self-creating desire which is potentially critical of the state and its law. Positivism is an attack on all principles of transcendence. The radical project of human rights, while accepting modernity's rejection of religious transcendence, insists on the importance of the principle of transcendence for the reconstruction of historical forms and inherits the classical task of imagining a political and legal order which is beyond the here and now.