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Law and Justice

IILJ International Legal Theory Colloquium Spring 2010
The Turn to Governance:
The Exercise of Power in the International Public Space

Professors Benedict Kingsbury and Joseph Weiler

NYU Law School

Straus Institute for the Advanced Study of Law and Justice

Wednesdays 2pm-3.50pm on dates shown

Pollack Colloquium Room, Furman Hall 9th Floor, 245 Sullivan Street
(unless otherwise noted)

(additional seminar for students et al is Thursdays 4pm-5.50pm, on GAL)

Topics are indicative and are subject to change.

- January 20 Andrew Hurrell, Oxford University
Topic: Emerging Powers, Global Order and Global Justice
- January 27 Richard Stewart, NYU Law School
Topic: The World Trade Organization: Multiple Dimensions Of
Global Administrative Law
- February 3 Robert Keohane, Princeton University
Topic: The Regime Complex for Climate Change (paper with David Victor,
UC San Diego)
- February 10 No Colloquium - Postponed due to weather conditions
- February 17 No Colloquium
- February 24 Gianluigi Palombella, University of Parma, Law Faculty
Topic: Rule of Law in Extra-National Governance
- March 3 Joseph Weiler, NYU Law School
Topic: On the Distinction between Values and Virtues in the Process of
European Integration
- March 10 David Kretzmer, Hebrew University/Ulster
Topic: The UN Human Rights Committee and International Human Rights Monitoring
(SPECIAL SESSION, 4pm-5.50pm, Pollack Colloquium Room, Furman Hall 900)
- March 11 Jan Klabbers, University of Helsinki
Topic: Controlling International Bureaucracies
- March 17 No Colloquium – Spring Break
- March 24 Marta Cartabia, University of Milan**
Topic: Are Rights Always the Right Answers?
- March 31 No Colloquium
- April 7 Grainne de Burca, Fordham Law School
Topic: EU External Relations: Foreign Policy or Governance?
- April 14 Beth Simmons, Harvard Government Department
Topic: Effects of Investor-State Treaty Regimes and Arbitral Processes
- April 21 Benedict Kingsbury, NYU Law School
Topic: Techniques of Global Governance

ARE RIGHTS ALWAYS THE RIGHT ANSWERS?

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This is a very first draft for the discussion. Not to circulate. Not for quotations.

*The world has become man's right and everything has to become a right:
the desire for love the right to love;
the desire for rest the right to rest;
the desire for friendship the right to friendship;
the desire to exceed the speed limit the right to exceed the speed limit;
the desire for happiness the right to happiness;
s the desire to publish a book a right to publish a book;
the desire to shout in the street in the middle of a night a right to shout in the middle of a night ...*

(M. Kundera, Immortality, 1991)

1. The proliferation of rights and its five facets.

Human rights stand at an ambivalent conjuncture. On the one hand they are having an unexpected success: they have become the yardstick by which we measure human progress¹, and they have contributed to putting the human person at the center of social and political life, at the national and international levels². On the other hand, human rights skepticism has emerged in a wide array of forms in the murmurs of politicians, scholars, human rights activists and common people, for many different reasons. A

¹ N. Bobbio, *L'eta' dei diritti*, (Torino: Einaudi, 1990), at 255 describing the individual rights as sign of hope for humanity, a sign of a clear trend of the evolution of humanity towards “the better” (for the English translation of the book see N. Bobbio, *Age of Rights*, (Cambridge MA: Blackwell Publisher 1996).

² Un 60 anniversary UDHR

growing attraction towards human rights has gone hand in hand with a growing discomfort³.

This ambivalent attitude originates in the proliferation of rights⁴ that began several decades ago, and has suddenly accelerated in the last years of the twenty century. As at the end of the Second World War, when a new world was expected to be shaped on the shared bases of the Universal Declaration of Human Rights⁵, a new human rights era has been heralded since the end of the Cold War - an era of expansion of the activities undertaken under the flag of human rights. The very success of today's international rights regimes has encouraged the framing of new grievances as rights issues. So, in today's world human rights are a pervasive political idea.

Human rights have proliferated, but voices of skepticism have proliferated as well.

It was more than twenty-five years ago when warnings first emerged that the proliferation of rights may threaten the credibility and authority of the human rights tradition⁶. If the category of human rights is abused their legal teeth may be diminished, their force impoverished. The inflation of rights devalues the currency. Put it in a slightly different perspective⁷, new rights may impair the overall balance of values implied in the human rights project. The greater the number of rights recognized, the more likely they will begin to contradict one another. The adoption of new rights always has a price: any expansion is made at the expense of the traditional rights and even at the expense of the human rights project as such. It is for the sake of the human rights project itself that the rhetoric of rights should be mitigated.

³ Ch. Beitz, *The Idea of Human Rights*, (Oxford: Oxford University Press, 2009), at 3-7; M.B. Dembour, *Who Believes in Human Rights?*, (Cambridge: Cambridge University Press, 2006), at 1 ss., whose analysis results in a "nihilistic approach to human rights", at 274 ss., quite distinct from the thesis of the present paper.

⁴ An overview of the proliferation of rights and of some of the debates surrounding the new rights is offered by C. Wellmann, *The Proliferation of Rights – Moral Progress or Empty Rhetoric?*, (Boulder, Co, Westview Press, 1999).

⁵ M. A. Glendon, *A World Made New*,

⁶ P. Alston, *Conjuring up new human rights: a proposal for quality control*, 78 *American Journal of International Law* 1984, 607-621.

⁷ This is the common opinion among the constitutional scholars the same idea is phrased in a slightly different way: See for example M. Luciani Barbera e tedeschi.....

Today those alarms have not yet been taken seriously. Human rights have been tirelessly expanded and their proliferation has now many different facets.

First there has been a proliferation of *sources* of human rights. At the *international* level the body of treaties and conventions on human rights is constantly expanding and every broadening of the international instruments yields a further enlargement of the scope of the human rights doctrine. For one prominent example of this multiplication, the original Universal Declaration of Human Rights generated the two Covenants in the sixties, which in turn gave birth to several specific Conventions, further enriched by new Optional Protocols⁸. Meanwhile, at the *regional* level, several continental systems have emerged for the protection of human rights, such as the American Convention on Human Rights, the African Charter on Human and Peoples' Rights, the European Convention of Human Rights and, most recently, the Charter of Fundamental Rights of the European Union. At the *national* level domestic Constitutions and legislation are also abundant and ceaseless sources of rights. More recently even *sub-national* political entities, especially in Europe - communities, *länder*, regions, and municipalities – have committed themselves to specific charters of rights, the best known and debated of which is the Catalan Statute⁹ of 2006, in Spain.

Most regimes for the protection of rights have their own enforcement bodies, sometimes a Court, sometimes an administrative body, which expound the interpretation of the texts and very often take a dynamic attitude toward the protection of old and new rights. The body of decisions of the Courts and the Committees of Rights constitutes another source of human rights, alongside the written rights entrenched in the international, regional, national and local legal instruments,

The mosaic of sources of rights is complex and diverse. Not only it is multilayered, but also non homogeneous regarding the nature of the act: *administrative*, *legislative* and

⁸ All the UN Treaties can be retrieved at <http://www.bayefsky.com/tree.php/area/treaties>

⁹ An English version of the text can be retrieved at http://www.parlament.cat.net/porteso/estatut/estatut_angles_100506.pdf The Statute has been challenged before the Spanish Constitutional Tribunal and the case is still pending.

judge-made instruments compete on the same ground, as well as legally binding and non binding declarations, some of which only are fully justiciable.

Second, institutions for the protection of rights have expanded in number and type.. The typical post Second World War model of protection of rights was based on Courts and judicial bodies entrusted with the power of protecting rights, over and above the democratic process. Human rights were meant to have a counter-majoritarian character, because, after all, at that time national political bodies had proved to be unreliable. The judicial review of legislation was introduced in most western democracies to control the outcomes of the political process¹⁰ and the international protection of human rights was the response to the political involutions of the States. In a word, both at the constitutional and at the international level human rights were conceived as “other” in respect to the political realm. In the age of the proliferation, instead, human rights are losing their “otherness” towards the political. In a way they have been hijacked by politics¹¹. Whereas in the European context rights and courts are still faithful partners¹², in other contexts human rights have become a matter of policy¹³. In the present world the implementation of human rights has taken a variety forms¹⁴. The universe of the institutions of rights today encompasses not only courts and tribunals, but also, councils, committees, bodies, agencies, at all levels: international, regional and national, not to mention the increasing importance of the NGOs organizations.

¹⁰ Fioravanti

¹¹ David Kennedy (2004) Human rights movement part of the problem? Guilhot 2005 human rights were meant to be weapons for the critique of power and are now becoming part of the arsenal of power.... I will come back to this point at the end of the paper

¹² In most European countries a dramatic development is taking place under the influence of the European Court of Human Rights as well as the European Court of Justice, moving even the most traditional civilian legal systems towards “fundamental rights regimes”. For instance, for the French case see M. Lasser, *Judicial Transformations* (New York: Oxford University Press 2009) and for the Italian case M. Cartabia (ed)., *I diritti in azione* (Bologna: Il Mulino 2007) and my *Europe and Rights*, in 5 *European Constitutional Law Review*, 2009, 5.

¹³ P. Alston and J. Weiler.....

¹⁴ Ch. Beitz, The idea of human rights, cit., at 13-47, describing the current practice of human rights and the evolution from the juridical implementation to several different political form of implementation of human rights in the national states.

Third, the category of human rights has spun out of control because the *number* of rights has mushroomed. New social needs, new achievement of technological development, rapid evolution in the condition of human life and, indeed, globalization have generated new threats to, and requests of, the legal orders. The search for solutions to new (and old unresolved) problems is constantly in the field of human rights, and the result is a multiplication of “new rights”. To mention just a few: the right to a clean environment, the right to peace, the rights related to bioethical issues, and the right to security, as some courts have declared after 9/11. They are but few examples. More new rights are waiting in the lobby of human rights institutions, because, in the present “age of rights” framing or reframing some issues as rights is a strategic choice of a political nature¹⁵.

Fourth, the proliferation has also expanded the categories of *rights holders*. Human rights used to be addressed to all human beings, regardless of the person’s color, gender, or social and personal life conditions. Now they tend to be strictly tailored on the needs of each group - and the number of groups is constantly proliferating. The main factor responsible for this fragmentation is the idea of non discrimination. Typically the strive against discrimination starts with claims for unqualified legislation –color-blind, sex-blind, age-blind, religion-blind legislation – and ends up with claims for special rights, tailored on the peculiarities of each class of people. Eventually the result is that every class of individuals has its own rights: the rights of women, the rights of consumers, the rights of children, the rights of disabled people, the rights of the mentally ill, cultural rights of minority groups, the rights of migrant workers, and so on.

Fifth and finally, perhaps most importantly, the types of relationship to which human rights are meant to apply is spreading. Traditionally, human rights used to entail a “vertical” relationship between state and citizen, or let’s say between public institutions and the citizen. Today, rights are claimed within all sorts of social and personal

¹⁵ I will come back to this point later, in par. 6. For a different evaluation of the proliferation of rights see C. Bob, *Introduction: Fighting for new rights*, in C. Bob (ed), *The international struggle for new human rights*, University of Pennsylvania Press, Philadelphia, 2009, p. 13 where the need of adoption of new rights for some neglected categories of peoples, like children born of wartime rape, LGTB people, Indian untouchables, people with HIV or Aids, and so on is strongly claimed. In his view advancing an issue as a right issue is just a matter of strategy aiming at exerting a greater pressure to solve a problem. So in his view the criticism to the proliferation of rights is just misplaced.

relationship, often involving “horizontal” relationship, with private partners: rights are claimed against multinational companies, against the spouse, the parent, the teacher, and the doctor. The shift is not only from vertical relationship to horizontal relationship, but from professional and more impersonal relationship to more personal and intimate ones: at the extreme, even the idea of rights among friends has been advanced¹⁶.

Most of these expanding ramifications have been welcomed with open arms by opinion makers, people in general, political parties and political and judicial institutions. Under human rights the individual person with her needs and desires become the central motif. Human rights are meant to inject ethical standards in political life, in order to improve the quality of life. So, it is a common implicit assumption that the wider the numbers of rights, the better off our society. The trust for a moral progress of humanity has been put in the hands of human rights. And yet, at least in some instances this trust appears to be misplaced.

2. The quest for a new lexicon

Let us start at the end of the story: western societies are going through a period of crisis. The unexpected economic recession has shed a sinister light on the major problems of contemporary world, and has undermined the self-confidence of peoples and institutions. The wounds of terrorism were not yet mended when western societies started cracking again under the pressure of the economic recession. The twin social upheavals of the twenty-first century - international terrorism and the financial crisis, alongside the rapid evolution in the life styles due to technological progress and globalization, are bringing about major changes, as well as a general sense of uncertainty and anxiety. Public institutions have to face problems which appear to be out of control.

In this context, the sense of trust and progress entrenched in the human rights project is staggering. Whereas in the past the only reasonable question appeared to be how to secure the complete implementation of the human rights instruments, now, in the era of the great success of human rights, a new question is looming: are human rights able to

¹⁶ M. J. Meyer, *Rights Between Friends*, *The Journal of Philosophy*, vol. 89, no 9 (set 1992), pp. 467-483

improve the condition of human life? For a long time, facing the striking gap between the rhetoric of rights and the grim realities of human existence, the only reasonable answer seemed to be a restless and incremental enforcement of the rights proclaimed in the founding documents accompanied by their seemingly boundless evolutionary interpretation at the hands of Courts. Now a different and more radical problem is emerging: are rights always a good toolkit to improve our societies? One might wonder whether rights are suitable to cope with the challenges of the global world such as the climate change and other environmental problems, terrorism, and the economic and financial crisis. The vanguard rights of the new generations encompass a right to a clean environment, the rights to peace and security, and the economic and social rights, but the human rights language sounds disproportionate to the dimension of problems. Can we seriously pretend to solve the problems of pollution and climate change by claiming the right to a healthy environment? To counter the problem of terrorism with a right to security, or to face the economic and financial recession with the weapons of economic and social rights? In front of unexpected turbulences of such a huge size it has become clear that new subjective rights are not a panacea.

History teaches that crises can also illuminate new possibilities for the human family. The fruitful years which followed the Second World War and the institutional creativity of that time are the clearest evidence of that possibility¹⁷. The dimension and characteristics of the new social needs are bringing to light certain structural limits of the language of rights and pushing the search in a different direction. A sense of powerlessness urges a new quest.

In a recent document, the British Government has urged a new agenda, a new vocabulary and a new set of concepts in order to face the challenges of the present era of turbulence. Surprisingly enough, the Government's green paper¹⁸ assumes that the language of rights suffers from intrinsic limits and proposes to recover the noble and ancient tradition of the

¹⁷ A. Cassese

¹⁸ Ministry of Justice, Rights and Responsibilities: developing our constitutional framework, 23 March 2009, in <http://www.justice.gov.uk/publications/rights-responsibilities.htm>

language of responsibilities and virtues, dating back to Aristotle and Cicero, and entrenched, though neglected, in many constitutional documents¹⁹.

The basic assumption of the Green Paper is that the public attitude of people is becoming selfish and consumeristic, and society more atomized. People think of themselves more as customers than as citizens. People are more independent and more empowered, and this is valuable; however, this evolution towards independence and empowerment has the perverse effect of encouraging people to assert their rights in a selfish way, without regard to others. Rights have become commodified.

Moreover, the Paper notes, many urgent problems cannot be solved only with the adjudication of particular rights. Among them, significantly, the British Government mentions environment, education and family life, and the wellbeing of children, healthcare and housing, and calls for a more active participation in political and civil society through voting, jury service, reporting crimes, paying taxes, etc.

Time has come, following the British proposal, to give responsibility the same relevance in the constitutional architecture that has thus far been attained only by rights. Many of the most urgent problems of the twenty-first century, says the British Government, cannot find an answer in the noble tradition of bills of rights.

For a number of reasons that I hope to make clear in the following sections of this paper I do not think that the solution to the structural incapability of human rights to address some of the basic human needs can be fixed by issuing a “charter of responsibilities” and I am not sure that the British Government is right when it says that “the articulation of responsibilities [can] offer security to those who can feel intensely vulnerable [...], an anchor for people as we enter a new age of anxiety and uncertainty”. Nonetheless the British Green Paper is very interesting in so far as it detects a problem: rights are not always the right answer.

¹⁹ The Green paper recalls several provisions of the Universal Declaration of Human Rights, of the European Convention of Human Rights, of the Covenants of the civil and political rights, and on the economic, social and cultural rights, the American Declaration of the Rights and Duties of Man, the African Charter on Human and Peoples’ Rights and several national constitutional documents.

Human rights remain essential to the foundation of our democratic polities. Nobody wants to get rid of them. We have to treasure the individual rights, since they have been an essential defense of human person against all form of power and abuse of power, including political totalitarianism. However, rights are not a panacea. Sometimes they are ineffective; sometimes they have even produced detrimental outcomes.

3. A cold and inhospitable society...

To an American reader the British proposal might seem a trivial one. *Deja-vu*, one could say: the classical proposal aiming at recovering an ethic of duties and responsibilities as opposed to the project of rights. Duties *versus* rights²⁰. The temptation to quickly dismiss the problem is difficult to resist. After all, whereas Europe is going through an era of “rights enthusiasm” – with the outstanding exception of the U.K. - , on the other side of the Atlantic the mood is diverse.

Many warnings about human rights have been animating the public debate for decades in the United States²¹, even among human rights supporters. Just to recall some of them, the human rights debate is crowded of many “*versus*”, each of which has multiple nuanced variations on the single theme: communitarianism *versus* liberalism, universalism *versus* particularism, juristocracy *versus* democracy, centralization *versus* federalism, natural rights *versus* contractualism, and so on²². Most of these critiques track back to the legacy of many classical critics of the rights of the XIX century, such as

²⁰ For this approach see for example M. Viroli ... I will come back later to this point, to make more clear that duties are not the equivalent of responsibilities.

²¹ In Europe the critique to human rights is still absent or very limited as pointed out G. De Burca, *The Language of Rights and European Integration?* in G. More and J. Shaw, eds., *New Legal Dynamics of the European Union*, (Oxford University Press, 1995). A remarkable exception is the book by M.B. Dembour, *Who Believes in Human Rights*, Cambridge University Press (2006), analyzing the European Convention of Human Rights and the case law of the European Court of Human Rights in the light of the classical critiques to human rights: Marxist, utilitarian, feminist, realist, etc.

²² An account of some of these criticism can be read in Cass R. Sunstein, *Rights and their critics*, 70 *Notre Dame Law Review* (1995), 727 ss., discussing the critique of absoluteness and rigidity of rights which is assumed to impair the political debate, their indeterminacy, abstract character, their excesses of individualism, and others.

Burke, Bentham, Marx, a part of the liberal debate which has been overlooked and underestimated in Europe in comparison to the American culture²³.

In recent years, some of these critics have been dropped, whereas others are gaining increasing attention²⁴. In particular, for different reasons, many scholars are raising questions like: “what kind of society is the human rights project shaping?” “What kind of humanity is implied in the human rights discourse?” and, more sharply, “is our society more human thanks to the success of human rights?”

It is worth remarking that this kind of arguments are raised in countries where human rights are on the whole successful, not where they are trampled on. The enigma stems from success, not from failure. Why, when Europe and America are considered the champions of rights, “the lands of rights” in the “age of rights”, do some people doubt that they have become a better place to live? Although human rights have proved to be conditions *sine qua non* for human societies, the progress of human rights does not necessarily herald the progress of humanity.

Let us listen to some witnesses.

In his recent lectures on hate speech, Jeremy Waldron makes the case that in a well-ordered society people need to rely on ‘provisions of assurance’, meaning that they must be able to be sure that when they leave home in the morning they can reasonably count on not being discriminated against or humiliated or terrorized. They need to feel secure that they can enjoy the fundamentals of justice: respect for equality and dignity. But - here comes the most relevant part of his argument to our purposes - “society does not become well-ordered by magic. The expressive disciplinary work of law may be necessary as an ingredient in the change of heart on the part of its ... citizen that a well ordered society presupposes”²⁵. However, the general and diffuse assurance to all

²³ The debate is collected and refreshed in the current context by J. Waldron (ed), ‘Nonsense upon stilts’ – Bentham, Burke and Marx on the Rights of Man, Methuen, London and New York, 1987.

²⁴ D. Kennedy ... M. Ignatieff...

²⁵ J. Waldron, What does a well-ordered society look like?, 2009 Holmes Lectures, Harvard law School, October 5-7 2009, in http://www.law.nyu.edu/news/WALDRON_HOLMES_LECTURES , at 9.

inhabitants about the most basic elements of justice is a matter of public good: “like street lighting, it is a public good that redounds to the advantage of individuals ... but unlike street lighting, which can be provided by a central utility company, *the public good of assurance depends on and arises out of what hundreds or thousands of ordinary citizen do singly and together*”²⁶. So, on the one hand, Waldron urges a regulation of one of the most basic classical rights of the liberal tradition, the freedom of speech. The assumption is that hundreds of years of free speech without limitations and constraints have generated a “society which has been far from well-ordered – indeed hideously ill-ordered – so far as the basic elements of justice and dignity are concerned”²⁷. The high rate of protection of an individual right has not per se generated a more well-ordered – not to say hospitable society. On the other hand, his conception of a well-ordered society implies the active and whole-hearted contribution and responsibility of each and every citizen. If the citizens do not play their part, the goal of improving social life for all lies well beyond the reach of governmental action²⁸.

Looking to the other side of the western world, Joseph Weiler goes even further. Not only do human rights not magically generate human societies, but they sometimes have just the opposite effect. His analysis is focused on Europe, whereby the insistence on human rights has not resulted in a warmer and more caring society. Weiler’s accusation against the European Union is harsh: not only does the practice of the European institutions corrupt the values on which the European project was founded – democracy, human rights, rule of law, solidarity and peace - but it also encourages a personal disposition inimical to those values. Weiler stresses that although it should be made clear that “our commitment to constitutionally protected human rights should be without compromise ... the culture of human rights may produce unintended consequence on that very deep ideal ... that places the individual at the center and calls for redefinition of human relations”. As he says, the purpose of human rights has always been to put *the individual at the center*, but unfortunately, the result is a society of *self-centered*

²⁶ J. Waldron, What does a well-ordered society look like?, cit., at 15

²⁷ J. Waldron, What does a well-ordered society look like?, cit. at 19, where he recalls the shameful era of slavery, discrimination, segregation of the American history

²⁸ The same quest for a more responsible, considerate and attentive citizenship is the leit-motif of J. Waldron, *The Image of God: Rights, reason, and Order*, forthcoming in J. Witte and F. Alexander, *Cambridge Companion to Christianity and Human Rights*, forthcoming.

individuals. According to his view, there are two major downsides of the culture that human rights have produced in Europe. First, the culture of human rights “demands very little of all of us who believe in them ... it is not conducive to the virtues and sensibility necessary for real community and solidarity”. Second, “the culture of rights, want it or not, undermines somewhat the counter culture of responsibility and duty”. The result is the advance of “personal materialism, self-centeredness, Sartre style ennui and narcissism in a society which genuinely and laudably values liberty and human rights”²⁹.

Why this contradiction? Why does a project that is genuinely based on the intent of promoting and protecting the human person result in a cold and inhospitable society? The problems seem severe because they arise in contexts, like Europe and US, where the where the project is being on the whole successful. This renders the critique even more puzzling, because it suggests that the problem lies in the project itself and not in its insufficient implementation.

After the Second World War we have relied on *human rights* to secure the moral progress of humanity. Nowadays *rights* are at the center of the public concern and they are thriving, at least in the liberal (social) democracies, thanks to the legacy of the past generations. But what about the *human*? Might it be that entranced by rights, we have put the *human* into brackets?

In the following pages I will try to explore some aspects of the human rights theory and practice in search of the cultural matrices of the limits of the right discourse.

This kind of inquiry does not start from scratch. On the one hand, it can take advantage of a line of reflections well developed in American thought. On the other hand, it can profit of the outcomes of a long and well established practice throughout the world. The experience of more than sixty years of human rights protection offer many useful examples in order to better understand the power and the limits of the rights ideals.

4. ... on both sides of the Atlantic.

²⁹ J. Weiler, Europe – Nous coalisons des Etats, nous n’unissons pas des homes, in <http://www.iilj.org/courses/documents/2009Colloquium.Session9.Weiler.pdf> p. 31 ss.

One of the most common and shared critiques argues that the human rights discourse suffers from an “original sin”, that of individualism. Being rooted in the eighteenth-century liberal philosophy of Hobbes and Locke³⁰, human rights mirror and at the same time give shape to a kind of individualistic, egoistic and atomistic human being, separated and isolated from his and her human fellows. The state of nature is the environment where the original rights to life, property and liberty are conceived, and by definition the state of nature is a place of distrust where men have no social bonds and are concerned only by their own egoistic interests. *Homo homini lupus*.

This line of critique goes back to Karl Marx, who was the first to note in *On the Jewish Question*, 1843³¹, that the implicit image of the man of rights is that of an isolated monad, an individual separated by his social context withdrawn into himself. In the Marxist view, the critique to liberal rights is conflated with a more general and encompassing critique to liberalism. Overtime that view has been rejected in so far as it aims at dissolving the individual into the group, in the class, in the social structure which he is ascribed to. The human person is devalued in that context. This criticism of the individual rights has developed into an attack to the liberal democracy as such, with major undesirable spin-offs. It goes without saying that this criticism of human rights is unacceptable in its ultimate results –it is especially unnecessary to insist on this point now that the cold war is ended and the socialist regimes have been overthrown in Europe.

The recognition of the supreme and universal value of each individual human person is a contribution of the human rights project that will hopefully never be put into question again³². Nevertheless, some of the downsides of the individualistic conception of human rights have proved to be real weaknesses and should be taken seriously. The purpose here is not to raise doubts about the human rights idea as such, but to prevent some possible corruptions of it, in particular those that stem from inappropriate ramifications of the

³⁰ An illuminating account of the relationship between modern talk of rights and the ideas of the Enlightenment see A. McIntyre, *After Virtue*, Notre Dame University press, 1981 68-70; M. Villey, *Les Droits de l’homme* And P. Manent

³¹ An overview of the Marxist critique to human rights and the text by Karl Marx can be read in J. Waldron, *Nonsense Upon Stilts*, Methuen, New York, 1987, p. 119 ss.

³² For this reason I can’t share the ultimate result of the communitarian thought and the cultural relativism...

individualistic view of the human condition. Human rights speak about human beings. When they interact with a reductionist understanding of the human person, they are bound to result in a society of strangers and enemies, a society where “you do not know your neighbor, until he makes too much disturbance”³³.

The decline of human rights into an intense, excessive form of individualism³⁴ is one of the most widespread temptations of the present western society. The source of this temptation is in the original cultural matrix of the rights project.

The historical reply to the excesses of individualism deriving from the Eighteenth century liberal tradition has been the declaration of social rights and the construction of the welfare institutions. Well aware of the limits of liberalism, the European polities that have been rebuilt in the twenty century after the World Wars have placed at the heart of their constitutional foundation the value of solidarity, alongside with that of liberty. The same happened in the incipient European integration in the fifties³⁵. The pure liberal polity was overcome and replaced by the social democracies in Europe. In the constitutional documents of second half of the twenty's century, the social rights were meant to satisfy the most basic and practical human needs that fell short of the classical liberal liberties. Even the twin UN Covenants of 1966 on Civic and Political Rights and on Economic, Social and Cultural Rights perfectly mirror the understanding of that time, the first one sticking with the traditional classic liberties, and the second covering further and more practical needs of the less wealthy people at least. Typically a comparative lawyer would highlight the absence of social rights in the American tradition, more faithful to the original ideas of the classical liberalism, and would stress the presence of social rights in most European Constitutions. After all it is unquestionable that the catalogue of rights in most European countries, including the very recent Charter of fundamental rights of the European Union, encompasses a wide range of social rights, starting with the rights of workers and the right to health care, which are not considered in other traditions.

³³

³⁴ Fukuyama

³⁵ Value of solidarity etc.

Notwithstanding the “air bag role” (or shock absorbing role) of the welfare state and of social rights the result is not as satisfactory as was expected. European societies are not necessarily a better place to live, as Weiler demonstrates; they are not necessarily more merciful than others. Although the value of solidarity has been put heart of the constitutional foundation, it has not been an effective hindrance on the assault of the individualistic culture of rights.

Many form of skepticism are directed towards social rights: it is commonly stated that the scarcity of the resources³⁶ renders the goals proclaimed in social and economic rights illusionary and unrealistic. However, there are more serious and radical arguments. The reason why social rights are not the most suitable equipment to attain the purpose of nurturing a more caring and solidaristic society has been captured by a very telling example, taken from the well-known story of the Samaritan who has become in the western civilization the hallmark of mercy, compassion and care: the Samaritan is a foreigner who bumps into a wounded man and is moved by compassion; he stops to bind his wounds, brings him to an inn, takes care of him and leaves some money to the innkeeper for hosting him for some days until he is recovered. He is a foreigner, but becomes a neighbor to the unlucky man who has been assaulted by thieves. Now, following Elizabeth Wolgast’s narrative³⁷, let us imagine a different version of the story of the Samaritan: instead of attending the stranger personally, the Samaritan sends his servant, or if the story takes place in a modern society, calls the ambulance and the police, so that the health care system provides all the necessary services and keep him in a hospital until he recovers. Surely, the second Samaritan is more efficient than the first. If we value the two actions against the benchmark of the health care efficiency, the second Samaritan acts in a more appropriate way: better to be in hospital than in an inn; better to be treated with appropriate professionalism than with oil and fortuitous bandages. Surely each of us would like to be cured in a hospital rather than in a casual inn. But there is something in the second hypothetical story that gets lost. It does not concern the addressee of the care. From his perspectives his physical problems are better

³⁶ Beits and M.B. Dembour, *Who Believes in Human Rights*, (Cambridge: Cambridge University Press, 2006), 1 ss.; M. Cranston, *are there any Human Rights*, *Dedalus* (1983): 1-17, at 13

³⁷ E. H. Wolgast, *The Grammar of Justice*, (Ithaca and London: Cornell University Press, 1987), at 77 ss.

and quicker solved by the emergency service rather than by the Samaritan. What gets lost is the personal encounter and the personal reciprocal involvement of two human beings. The second Samaritan is a *socius* rather than a neighbor³⁸, someone who relates to other people only through institutional mediation, where the richness of the interhuman relationships may fade.

Social rights and welfare institutions can, and actually do, provide benefits so that people are assured that in case of need they will be rescued. Social rights have entitled the poorest people of some basic goods and guarantees. Much better with than without them.

Social rights and welfare institutions cannot generate Samaritans, though.

And still, even the most developed welfare states cannot do without a Samaritan. They still need a Samaritan, at least to call the ambulance.

Social rights are not a synonym for solidarity. They bestow a mediated form of support among strangers, which may remain strangers³⁹. Social rights or whatever kind of rights cannot generate Samaritans because rights adopt the perspective of the recipient⁴⁰ and shade the agent. By consequence, more rights produce more recipients, but cannot generate a single agent.

If it is true, as has been said, that the main problem of the rhetoric of individual rights is that they cultivate cold and inhospitable societies, made of passive and partial personalities who dismiss their relational constituencies, their agency and responsibility, then it is clear that that problem cannot be solved by the institutional provider of social rights. For that reason, although social rights can soften the harshness of the modern liberal societies, they are unable to heal the specific “original sin” of the selfish and unconcerned human person generated by the individualistic culture. They can cure the symptoms, but not the disease.

³⁸ Neighbor and socius

³⁹ M. Ignatieff, *The Needs of Strangers*, London 1984, pp. 9-10

⁴⁰ N. Wolterstorff, *Justice*, (Princeton: Princeton University Press, 2008); at 8 stresses that when we speak of duty, obligation, guilt, benevolence, virtue, rational agency and the like we focus on the agent dimension, whereas when we speak of rights and of being wronged, we focus on the recipient dimension: this is the specific contribution, and the limit as well, of the language of rights.

Paradoxical as it may sound, social rights and libertarian individualism can go hand in hand. And more rights, even more social rights, are not able per se to recover the reductionist understanding of the human person that the individualistic culture is inclined to take on .

4. The abstract individual.

The shortcomings of the rights project hereby recalled push the inquiry towards the subject of rights. Who is the (wo)man of rights? What are her/his traits when (s)he acts as a rights holder? What about the all the spectators or the bystanders⁴¹, all of us that often times are neither victims nor violator of human rights? What are the effects that the contemporary practice of human rights produce on the understanding on the human person, as an individual and in relation to the others?

In order to approach these challenging investigations, let us consider some of the “new rights” originated from the matrix of the right to privacy, probably the purest expression of the liberal understanding of the individual. The rights under privacy in particular are the ripest fruits of the culture of individualism and hence they shed a clear unequivocal light on the advantages and the downsides, on the merits and on the limits of such an understanding of human person. It is in the new rights born under the privacy penumbra that the individual libertarian rights seem to be at their zenith.

The attractive side of the privacy rights, is that the picture an individual liberated from all legal and social hindrances - his or her freedom appears highly valued. It is precisely because of the high value attached to the individual that privacy is by far the “trump”⁴² of the current debate on human rights. In the light of privacy the individual appears liberated from all constraints and empowered to be the master of his own life. There is a strict connection between the high value that privacy confers to the individual and the fact that many “new rights” are offspring of it. For this reason, privacy is

⁴¹ J.H.H. Weiler, *Nous n*

⁴² The theory of rights as trumps is developed by R. Dworkin, *Rights as Trumps*, in J. Waldron (ed), *Theories of rights*, (Oxford: Oxford University Press 1984) at 153 ss., and Id., *Taking rights Seriously*, (London:Duckworth, 1978), at 269 ss.

becoming one of the *pass partout* for new rights – the other being the principle of non discrimination. Whereas at their origin the privacy rights were but a libertarian “dialect” of the human rights talk, at present they have now become the mainstream understanding of individual rights, the legal Esperanto⁴³ of western societies. In Europe, privacy has been imported under the label of the right to self determination. The *dignitarian* tradition of human rights entrenched therein is rapidly yielding in front of the seductive power of the libertarian tradition⁴⁴ : the Europe of rights is developing under the influence of the American judicial culture, as mediated by the international institutions of human rights.⁴⁵

More specifically, privacy or self determination rights are blooming on the fertile soil of bioethical disputes, regarding the edges of life. On that ground a new generation of rights is developing, as an outcome of the value of individual privacy or self determination.

Let us repeat: the purpose of attaching and preserving the highest value to the individual person is uncontroversial, even incontrovertible⁴⁶. The intention of privacy rights to preserve and enhance the value of the human person is unquestionable. The shortcomings of these rights however flow from the fact that the legal image of the human person under privacy is an impoverished one, ultimately artificial⁴⁷.

⁴³ JJ. Klabbers, *Glorified Esperanto? Rethinking Human Rights*, in *Finnish Yearbook of International Law*, 2002, 63 – 77.

⁴⁴ Under the influence of the jurisprudence of the European institutions, and in particular of the European Court of Human Rights, even those European Countries like Germany and Italy which could be ascribed to a different conception of the human person are now abandoning their national constitutional tradition and are getting closer and closer to the individualistic libertarian dialect of rights. Under this respect an evolution has taken place in the last 10-15 years. The libertarian and dignitarian version of human rights are described in M. A. Glendon, *Rights Talk*, New York: Free Press, 1991, 61 onwards. The same dichotomy is at the base of E.J. Eberle, *Dignity and Liberty, Constitutional Visions in Germany and the United States*, Westport, Conn. : Praeger, 2002.

⁴⁵ “The Europe of the Rights of Man is but the advance guard of American influence, whose judicial culture is in the process of flooding the entire world. Europeanization is but the mask of a globalization that is currently submerging us all”, Procureur general Juan Francois Burgelin of the French Cour de Cassation, quoted in M. Lasser, *Judicial Transformations*, cit.

⁴⁶ A. Glendon, *Rights Talk*, 47 ss.

⁴⁷ In the same direction E. H. Wolgast, *The Grammar of Justice*, cit, at 25-26: “the atomistic model has important virtues. It founds the values of the community on private values; it encourages criticism of government ... it limits government’s powers, as they may threaten to interfere with the needs of atomistic units ... it gives us a common ground in the values of

So, what is wrong with the legal image of the man and woman of rights? What does he or she lack? Sometimes examples might be more powerful than speculation. So, let us try to read a couple of cases of privacy rights in the perspective of getting acquainted with the subject of rights. Cases can be read in many different lights. Very often cases are read in order to discuss the method of interpretation, to assess the coherence with the previous case-law, to unveil the political view of the judges, or simply to criticize the final outcome of the decision. Let us try for a moment to focus on a slightly unusual question. What kind of human being is implied in the court reasoning? Is he or she a real human being that might be met in the street?

I would like to contrast two cases of the Supreme Court of the United States, related to one of the most hotly debated issues in Europe and in America: termination of life. We could have taken other cases from the European case law or other western countries⁴⁸ on the same issues: they all follow the same pattern. I am using the American cases because the image of the human person is more clearly sketched. The two cases are Cruzan and Glucksberg, the two legal yardsticks of the “right to die” in U.S. law.

In Cruzan⁴⁹ the US Supreme Court traced from the right to privacy the patient’s right to refuse unwanted medical treatment even when they are life-saving, provided that the family proves with clear and convincing evidence that the person would want withdrawal of life saving treatments. In Glucksberg⁵⁰ the US Supreme Court decided that under the American constitution there is no right to assisted suicide. A clear line has been made between assisted suicide and withdrawal (or refusal) of lifesaving medical treatment by prohibiting the former and permitting the latter⁵¹. Setting aside all the difficult issues

freedom, autonomy, respect, equality, and the sanctity of desires ... But it leaves a great deal out... In it one cannot picture human connections or responsibilities; we cannot locate friendliness or sympathy in it... The atomistic person is an unfortunate myth.” Under a different perspective the social atomism has been criticized also by M. Sandel, *Liberalism and its critics* (Oxford 1984), M. Sandel, *Liberalism and the limits of justice* (Cambridge 1982), A. McIntyre, *After Virtue: A Study in Moral Theory* (London 1981)

⁴⁸ Eluana, Canada Pretty, Svizzera

⁴⁹ U.S. Supreme Court, *Cruzan v. Director, Missouri department of Helth*, June 25, 1990, 497 U.S. 261, 110 S. Ct. 2841

⁵⁰ U.S. Supreme Court, *Washington v. Gluckberg*, June 26, 1997, 521 U.S. 702, 117 S. Ct. 2258.

⁵¹ U.S. Supreme Court, *Dennis C. Vacco v. Tomothy E. Quill*, June 26, 1997, 521 U.S. 793, 117 S. Ct. 2293.

implied in the question relating to euthanasia and all the distinctions about active and passive euthanasia, competent and incompetent patients, and many other delicate issues, let us try to re-read the two cases in the aforementioned light.

In Cruzan, the main legal problem for the Court was to ascertain the true and pure will of the patient. The case was hard because the patient was an incompetent person. How to be sure that the patient's will was genuine? What kind of evidence should the family bring to the Court? Considering that the decision to be taken would have irreversible effects, what standard of evidence should be required? The Court decided that a very high standard of evidence was required for permitting the withdrawal of a life saving treatment and for that reason the decision was criticized⁵². What is interesting for our purposes is that in the understanding of the Court the right bearer is defined by his/her will. The free will of the person is the only aspect the Court is interested in. The difficulty of that case was to piece together shreds of evidence about the will of the person. No doubt, however, that the pivot of the Court's reasoning was the patient's freedom of choice and therefore her will.

The legal image of the person implied in Glucksberg is different: the focus shifted towards the concrete circumstances of the rights bearer. Whereas in Cruzan the protagonist of the case is the personal autonomy of the individual, the pure free will, in Glucksberg the Court is concerned about the real factual situation of the individual. In Glucksberg the Court takes into account some relational, factual and social factors that did not appear in Cruzan. For example in Glucksberg the Court stresses that often times people who ask to be assisted in suicide are neither wealthy nor healthy. They might be vulnerable, they might be poor, elderly, disabled persons. All that considered, the Court went on saying that the disadvantaged must be protected against the risk of abuse or of subtle coercions and undue influence on the part of the physicians, the medical staff or even the relatives. An insidious indifference towards the terminally ill or other disadvantaged people coupled with a cost saving mentality might produce undue social

⁵² R. Dworkin, Assisted Suicide: What the Court Really Said, *New York Review of Books* 44, no 14, Spet. 25, 1997, 40-44.

and moral pressure and push vulnerable persons to take unwilled decisions⁵³. The very same reasons are at the origin of the Concluding observation of the UN Human Rights Committee regarding euthanasia in Netherlands⁵⁴: considering the high numbers of cases of euthanasia occurring in the Netherlands and the risks of abuse and misuse of euthanasia, the Committee expresses serious concern for the pressure that could lead people to ask or to accept euthanasia, for routinization and insensitivity of a practice that by definition should only regard extreme cases and for the risk that new born handicapped infants have their lives ended by medical personnel. The right to privacy (or to self determination in the European legal language) is seen in the possible concrete situation of the rights bearer and on this basis the Supreme Court rejects the request of stating a new fundamental right to assisted suicide under privacy.

The right holders in *Cruzan* and *Glucksberg* are different subjects: an abstract individual in the first case, a real person in the second. A great contrast opposes the protagonists of *Cruzan* with that of *Glucksberg*. In the first cases the (wo)man of the rights is regarded only in her capacity of free choice, with no emphasis on her needs, wants, distress, concerns: an unencumbered self⁵⁵. She is detached from all relationship. She is a subject made of a pure will, in someway a noble, though abstract, prototype of the human species. In the second, the (wo)man of the rights is an historical, real, concrete person, living in specific social and personal conditions, who might undergo unwanted interference from other people, an *homme situe*⁵⁶.

Unlike *Cruzan*, *Glucksberg* takes into account the context of situation and relationship in which the individual lives, a context of facts, circumstances, affections and relationship which might play a role both in the elaboration of the individual choice⁵⁷ and as to the consequences of the decision to be taken. Carefully read, *Glucksberg* undermine the basic

⁵³ The practice of euthanasia in the Netherlands shows a high percentage of cases of euthanasia without an explicit request on the part of the patient.

⁵⁴ CCPR/CO/72/NET/ 27 august 2001, reiterated in CCPR/C/NLD/CO/4 25 August 2009.

⁵⁵ A very helpful discussion about the differences in the process and results of deliberation of an unencumbered individual (pure preferential choice) and a person qualified by constitutive attachments, history and circumstances in M. J. Sandel, *Liberalism and the Limits of Justice*, Cambridge University Press (1982), 2nd ed. 1998, pp. 178-183

⁵⁶ G. Burdeau, J. Maritain

⁵⁷ behavioralism

assumption of the very idea of privacy, i.e. that privacy rights cover personal decisions that are not affected by others and do not affect others⁵⁸.

Rights under privacy have had the unquestionable merit to release the individual from all form of coercion on the part of the government's power or even of other persons. But at what point emancipation becomes abstraction? A matter of discussion should be whether the holder of these rights is a real person or is instead an abstract image of an airy individual, made of a pure will, living in a nowhere land, unencumbered and disentangled.

This ambivalence has rested within the right to privacy since the origin of that right. Meant to define an inviolable private sphere, where the single person was protected, out of the reach of the government and out of the reach of other people - the right to be let alone⁵⁹ – the privacy rights developed an absolute paradigm of liberty, pulled out of the idea of property⁶⁰. The result is a set of rights⁶¹ which nurture a culture of sovereign individuals, lonely persons, disentangled from all relationship and from all constituent factual circumstances. Privacy rights reduce the individual to a pure capacity of freedom of choice - the procedural freedom, to use Sen's terminology⁶², which is surely a relevant trait of the human person, but which just as certainly fails to capture the whole complexity of the human person.

No surprise indeed that the most influential and controversial offspring of the right to privacy – *Roe v. Wade*⁶³ – has stirred a deeply divisive and never-ending debate on some

⁵⁸ G.U. Rescigno

⁵⁹ The theory of right to be let alone was firstly elaborated by Warren and Brandeis ... Harvard Law Review 1890....

⁶⁰ A beautiful historical narrative of the right of privacy is in Mary Ann Glendon, Rights Talk, ... 1991, p. 48 ss, showing how John Stuart Mill, On Liberty influenced Warren and Brandeis and later the case law of the American courts, up to the Supreme Court.

⁶¹ For an overview of the rights developed in the context of the right to privacy see ..R. Standler, Rights under privacy

⁶² A. Sen Elements of a Theory of Human Rights, 32 Philosophy and Public Affairs (2004), 315 – 353 and Id., The idea of Justice (Cambridge Ma: The Belknap Press of Harvard University Press, 2009) at 286-290.

⁶³ See Mary Ann Glendon, Rights Talk, ... 1991, p. 47-75, spec. 58; E. Fox-Genovese, Feminism Without Illusion, University of Carolina University Press, Chapel Hill, 1991, at 83. for a

undesirable consequences of this understanding of the human condition. Looking at the human person through the lens of privacy rights means taking a partial perspective and ultimately overlooking some important human features. It is not fortuitous that the extreme judicial expression of the culture of individualism, of its values of autonomy, separation and in the end loneliness opened a discussion that is far from having being settled.

In her passionate and powerful criticism to the libertarian individualistic dialect of human rights which invaded America in the second part of the twentieth century, Mary Ann Glendon⁶⁴ has convincingly shown how the insistence only on privacy and individual liberty cultivates a society of lonely people, waters down all sense of responsibility and disrupt all sort of social ties that at the time of the foundation of the United States were taken for granted in social life⁶⁵. All the relational dimensions of the human person are disregarded and dispersed.

Quite surprisingly, even among pro-choicers, the rhetoric of individual privacy rights has been sharply criticized because it does not mirror a comprehensive understanding, especially on the part of women. The ethics of care⁶⁶, for example, is a feminist line of criticism to the human rights language that draws the attention on some dimensions of the human person which are usually neglected in the common mind-set of justice and rights. The target of the criticism is the selfishness and separation promoted by the rights talk, which results in a world that is preoccupied and obsessed with creating and maintaining boundaries between people: “good fences make good neighbors”⁶⁷, seems to be the motto. The values of separation, independence and autonomy are historically grounded, deeply rooted in and nurtured by the individual rights tradition, which prompts non interference among people and have a high potential of indifference and unconcern. Rights reflect a partial vision of human experience and conceal an important part of it, that part which is made of relationship, of responsibilities, of care and affection. Whereas rights tend to dissolve all natural bonds in support of individual claims, human

general overview of the feminist critique to Roe Versus Wade, see C. Wellmann, *The Proliferation of Rights*, (Boulder Co: Westview Press 1999) at 85 ss.

⁶⁴ M. A. Glendon, *Rights Talk*, ... 1991, 47 -144

⁶⁵ Tocqueville ...

⁶⁶ C. Gilligan, *In a Different Voice*, Harvard University Press, Cambridge (USA), 1982, 2 nd ed 1993.

⁶⁷ C. Gilligan, *In a Different Voice*, p. XIV, quoting Robert Frost’s poem.

experience knows the drive towards the other, that knits a genuine fabric of relationship and interdependence. Rights require just not hurting others, responsibilities require caring of others.

Although the idea of relating rights to the male sensitivity and care to the female one is not convincing⁶⁸, this analysis seizes the limits of the rights approach to human experience, urging the integration of justice with care, so that the human drive to autonomy and to interconnection are united in an enlarged and more adequate conception. *Iustitia et pietas*⁶⁹ is the enduring legacy of western civilization. “The dialogue between fairness and care gives rise to a more comprehensive portrayal [...] of human development and *a more generative view of human life*”⁷⁰.

A generative capacity in social life: this is the point that individual rights are bound to miss. The structure of rights is not constitutive of social life⁷¹. Just the opposite, they may have a fallback function to perform when the constitutive elements of human relationship fall apart. In some way rights are triggered when human relations fail. Rights require just non-hurting, but they do not require caring. Rights may be respected without really caring about human persons. Therefore they do not have any power to generate or to regenerate human relationship.

In a word rights have an important function to perform, but it is a limited one: they provide a sort of background guarantee or insurance in case of human failure. Hence they are unsuitable to satisfy all human needs, nor are they the right equipment to solve all social problems. In some cases, the appeal to individual rights is inappropriate or a mere rhetorical device. In some other cases, moreover, they can have a detrimental effect.

5. A case study: rights of children

A good example of the ambivalent use of human rights concerns the rights of children. On this terrain we can easily detect some important achievements about the

⁶⁸ M. Brabeck, Moral Judgenemt: Theory and research on Differences between Males and Females, in Mary Jeanne Larrabee (ed), *An Ethic of Care*, p. 33-48

⁶⁹ Dante, *Paradiso*,the highest virtues

⁷⁰ C. Gilligan, *In a Different Voice*, p. 174

⁷¹ J. Waldron, *When justice replaces affection: the need for rights*, in J. Waldron, *Liberal Rights*, Cambridge Unviersity Press, 1993, p. 370 ss, at 374

condition of children prompted by the rights discourse, alongside with some questionable ramifications of “new rights” based on an inappropriate representation of the human experience. As a matter of fact, the rights of children are going through a burning debate, stirred by the Convention of the Right of the Child of 1989. The Convention per se has not been controversial. It has been heralded as one the most relevant advances in the field of human rights. It is the first virtually universal human rights convention, having being signed by 191 states; it is the most widely ratified treaty in history and it has been considered as a turning point in the struggle to achieve justice for children. Quite unsurprisingly it has been welcomed with great enthusiasm. Everybody is sensitive to children. Nobody doubts of the necessity of protecting children as the most valuable and pristine expression of humanity. Nobody doubts of the necessity of opposing the persistent and shameful practices of child trafficking and sexual exploitation, child abuse and violence on the part of adults, child labor, child soldiers, just to mention some of the form of abuse of children that are far from being defeated⁷². Wrongs against innocents undeniably exist and are unanimously blamed.

Insofar as it has contributed to give primary consideration to the best interest of children and to strive against some of the shameful widespread abuses against children the Convention has promptly mobilized governmental and non governmental institutions to engage resources to improve children’s conditions of life around the world⁷³. However, the story of the Convention is uneven. After a first glorious chapter, a more problematic one followed. As time passed, some parts of the Convention have brought about a diffuse sense of bewilderment⁷⁴. The USA’s delay or refusal to ratify the Convention is the most evident sign of the hesitation that has emerged overtime. Many reservations on the part of several signatory States are a further proof of a torn attitude towards the rights of children.

⁷² See the data reported in B. Simmons, *Mobilizing for Human Rights*, 2009, Cambridge University Press, p. 310 - 311

⁷³ As to the effects of the CRC on the concrete conditions of life of children, see B. Simmons, *Mobilizing for Human Rights*, 2009, p. 318 onwards, dealing with the problems of child labor, immunization and child soldiers.

⁷⁴ A sharp critique to the Convention is made by L. M. Kohm, *Suffer the Little Children: How the United Nations Convention on the Rights of the Child has not supported Children*, in 22 *New International Law Review*, 2009, 57 ss.

In particular two competing visions confront each other in the field of the protection of children⁷⁵. The first and well-established one considers children as a specific class of people, who deserve additional measure of protection, taking into account their vulnerability and their ontological dependency from their parents or other adults. Let's name this first one the "special protection approach". The second and more recent one aims at children's empowerment and emancipation, regards children as subjects entitled to rights, not only as object of protection. Let's call this second one the "children rights approach". The Convention on the rights of children approved by the United Nations in 1989 has been mainly interpreted as a turning point from the protection of children to the conferral of individual rights⁷⁶.

The typical protectionist approach was taken on by early international documents such as the Declaration on the Rights of Child of 1924, the Universal Declaration of Human Rights of 1948, the Declaration of the Rights of the Child of 1959 and at the national level by the majority of the national Constitutions. Following this approach children are considered within the context of their relationship with the parents and the emphasis is on the need of protecting and safeguarding them. Coherently these documents speak mainly the language of duties and responsibilities of the adults and of obligation of the society and governments in respect to the children. Material needs as well as intellectual, affective and spiritual needs of children have been incrementally spelled out in the international and constitutional documents as the most relevant priorities to be addressed in all societies and circumstances. A chronological reading of the condition of minor children in the legal documents⁷⁷ reveals a growing and ever more comprehensive concern for children needs encompassing not only the opposition to the most obnoxious abuse of children, but also a positive awareness of all the needs related to

⁷⁵ This dichotomy is assumed for ex by P. Alston and J. Tobin, *Laying the Foundations for Children's Rights*, Unicef, Florence, Italy, 2005; D. B. Thronson, *Kids will be kids?* 63 *Ohio State Law Journal*, (2002) 979 ss.

⁷⁶ P. Alston and J. Tobin, *Laying the Foundations for Children's Rights*, Unicef, Florence, Italy, 2005, p. 7-8.

⁷⁷ For a history of the developments of the child rights idea see P. E. Veerman, *The rights of the Child and the changing image of childhood*

the well-being of children, starting with material aid, support, education, care, assistance and protection from all sort of abuses⁷⁸.

Along this evolution the UN Convention on the Rights of the Child of 1989 is generally considered a paramount innovation because it introduces - or it is generally understood and represented as introducing - a new legal framework for the status of children, based indeed on a rights approach.

As a matter of fact, if compared to other instruments of protection of the children, the 1989 Convention stands out for two main reasons. First, for the wide range of rights granted to children and second for a overall shift of the paradigm of protection.

As to the scope, the Convention takes advantage of the well-established tradition of protecting children and moves beyond it, granting children a series of unprecedented rights. It is a shared opinion that one of the most significant dimensions of the Convention is its integration of civil, political, economic, social and cultural rights in one human rights instrument. It provides a comprehensive enumeration of rights and freedoms that children should enjoy, including for example protection against abuse, healthcare, education, an adequate standard of living, freedom of expression and play, and all sort of civil and political rights that used to be a prerogative of adults, including freedom of expression and information, freedom of thought, conscience and religion, their rights to privacy and correspondence, freedom of assembly and association⁷⁹. The Convention has a very comprehensive scope, encompassing social, economic, civil and political rights.

As to the general construction of the Convention, its basic underpinning is that the child is to be regarded as an individual, as a right bearer on his own. The UN Convention has been heralded as a unique innovation because it can be read as moving beyond the view of children as persons in need of special care and protection to the acceptance of children

⁷⁸ A general overview of several Constitutions and of all the relevant international documents in P. Alston and J. Tobin, *Laying the Foundations for Children's Rights*, cit., p. 23 ss, and 2 ss.

⁷⁹ For an overview see T. Hammarberg, *The UN Convention of the Rights of the Child – and How to make it work* (1990 12 Hum Rights Q 97 at 100 and S. Toope, “The convention on the Rights of the Child: implication for Canada” in M. Freeman (ed), *Children's Rights: A Comparative Perspective* (Aldershot, U.K. Dartmouth Publishing, 1996) at 33.

as individuals⁸⁰ with unique personas and dignity to be recognized under international and constitutional law. It is mainly focused on children as a rights bearers rather than on parents, legal guardians and social structures as responsible for preventing harm on children and for ensuring them care and protection.

Often times this evolution from protection to rights is presented as an uncontroversial progress towards the well-being of children. Some voices, however, offer a different view⁸¹.

The main reason why the “rights approach” to children is not universally supported does not spring from indifference towards children or a short sighted view. Nobody underplays the importance of children’s problems. Distrust for children rights derives instead from the contrast between the real needs and dependency of children and the idea of autonomy and individual choice entrenched in the rights discourse. The “rights approach” is contested by people who share the same concern for children as the “rights approach” supporters. The dispute is not about the ultimate goal, which in both cases is the well being and the flourishing of children, stopping abuse and molestation and enhancing care about all their needs. The dispute is about a different understanding of children’s condition.

The libertarian individualistic approach to rights is unquestionably commendable in as much as it aims at overturning the old widespread idea of children as private property of their parents or guardians. However, the very same libertarian individualistic approach to rights appears peculiarly inappropriate for children because it does not take into account the ontological dependency of children. The same “original sin” of individualism, that of obscuring the relational structure of the human person, has its paramount expression in relation to childhood. Since children are naturally dependent on adults, a shift to the idiom of rights misses the deepest reality of being a child. Children live and flourish in the context of a healthy relationship with adults. Outside a relational

⁸⁰ A. Lopatka, *An Introduction to the United Nations Convention on the Rights of the Child*, in 6 *Transnational Law and Contemporary problems* 1996, p. 251 ss.

⁸¹ M. Minow, *Interpreting rights: an Essay for Robert Cove*, 96 *Yale Law Journal* (1987), 1860, 1867-71, John. E. Coons et al, *Puzzling Over Children’s Rights* 1991 *BYU L. Rev* 307, 341. L. Marie Johm and M. E. Lawrence, *Sex at Six: the Victimisation of innocence and other concerns over Childrens’ rights* 36 *Brandeis J Fam Law* (1997-98) 361, 369, Barbara Bennett Woodhouse, *Child’s custody in the age of children’s rights: the search for a just and workable standard*, 33 *Fam, L. Q* 1999, 815-816 Id., *From Property to Personhood: a Child centered perspective on Parents’ rights*, 5 *Geo Journal of fighting poverty*, 1998, 313 ss.

context they cannot develop, they can hardly survive. For this reason rights are not the most appropriate instrument to satisfy their needs and to solve their problems. Children's rights have been called "Wrong rights"⁸². And there are good arguments to doubt about the benefit of speaking to children the language of rights. There are good reasons to doubt that rights are an effective means to address injustice against children.

First, individual rights have an adversarial structure. Rights are claims, and to claim something it so claim against another and therefore claims tend to break relationship. To stand on one's right is to distance oneself from those to whom the claim is made; it is to open hostilities and to announce that bonds of affection can no longer hold. The difficulty of putting rights in the hands of children is that those rights are to be claimed and exercised against those upon whom children depend. Realistically such claims threaten the closest relationship that a child has.

Moreover, individual rights mainly serve the goal of independence, autonomy, liberty which are not the first priorities for the purpose of achieving children's well-being. To be more precise, in childrearing it becomes clear that independence, autonomy and liberty are not the result of boundaries and separation, but the fruit of relationship. In the context of childrearing we can best understand the emergence of autonomy through – not against – relationship with others. Paradoxically as it might sound, childhood dependence is a stage of life from which children normally emerge and are helped and urged to emerge by those who have most power on them⁸³. If we ask ourselves what actually enables people to be autonomous, the answer is not isolation, but relationships – with parents, teachers, friends, loved ones – that provide the support and guidance necessary for the development and experience of autonomy⁸⁴. In children lives this paradox is all the more evident.

Finally, the rights language is not able to capture things that are vital for children: kindness, love, care, attention, involvement, good feeling. "If there is an important rights for children it should be the rights to be given good parental care, but it is the parents that are responsible for giving such care. The alternative of giving children a right that they

⁸² E. Wolgast, *The Grammar of Justice*, cit, at 28 ss. considers that the rights of patients and the rights of children as clear examples of wrong rights.

⁸³ O. O'Neill, *Children's Rights and Children lives*, 1988 445 ss, p. 462

⁸⁴ M. Minow, J. Nedeslky, *Reconceiving autonomy: sources thoughts and Possibilities* (1989) *Yale Journal Law and feminism*, 7, at 13.

may claim is no substitute”⁸⁵. There is no individual right that can secure these goods. “Cold, distant or fanatical parents and teachers, even if they violate no rights, deny the children “the genial play of life”: they can wither children’s lives”⁸⁶. What is essential for children’s well-being is not a matter of right.

It is no mere accident that one of the main concern of the British proposal discussed above is to promote children’s well being, a task which is out of the reach of the rights language.

In a word, the rhetoric of the rights of children is tantalizing and has probably played an important role in drawing attention to major social wrongs in order to raise awareness and to urge institutional action to address them. As a political device for mobilizing political attention the rhetoric of children rights has had a good deal of success. However if we ask whether and by what proportion the children are better off today as a result of the insistence of children’s rights⁸⁷, we suspect that that idea of relying on the rights of children is deceptive, at the end of the day, because it does not reflect the real experience of children, which is inexorably intertwined with others. Missing this trait of children’s life is missing the core of their very humanity.

6. At a crossroads between justice and politics.

There is something deeply attractive in the idea of human rights, since they possess at the same time a strong moral appeal and an unquestionable political strength⁸⁸. This fortunate mix of qualities not only makes rights a necessary component of all polities – national, local, supernational, international -, but also accounts for their unrestrained expansion. Rights proliferate as a tentative reply to the aspiration to justice; rights proliferate also because they have proved to be powerful political “trumps”. Rights growth is a tentative reply to the unquenchable thirst for justice, at the same time being a convenient bypass amidst the convoluted and time-consuming paths of politics.

Along all the twentieth century human rights have been considered as being “other” from politics. In particular, in domestic constitutional law they have played a counter-

⁸⁵ E. Wolagst

⁸⁶ O. O’Neill, *Children’s Rights and Children lives*, 1988 445 ss, p. 451

⁸⁷ P. Alston and J. Tobin expressly say that they

⁸⁸ A. Sen, *Elements of a Theory of Human Rights*, 32 *Philosophy and Public Affairs* (2004), 315 – 353.

majoritarian role in the hands of the Courts, and in international law they have allowed external intervention in domestic political life in order to protect the individual when the national government failed. In both cases they have been a counter balancing power, based on a duality⁸⁹ between rights and politics. In other words, just because of their “otherness” they enjoyed the authority of critical standards or benchmark against which the political action could be directed and corrected.

Even now the *ideal* of rights and the ideal of justice are still profoundly intertwined. Human rights aspire to function as a shared moral touchstone in the global arena. Whereas laws and statutes have proved to be a weak safeguard against the abuses of power, and politics is by definition the arena where partial interests clash, rights contend to serve the idea of justice - both as a bulwark against all sorts of assault to human dignity and as a strain towards better political a social conditions of peoples’ lives.

However, if we move from the ideal of rights to the *practice* of rights⁹⁰, the more they are developed, the more the distinction between human rights and politics is blurred. And although human rights activism still likes to portray itself as an antipolitics, as a matter of fact it shows all the characters of political action, implies taking sides and typically stresses the interests of some groups, dropping the case for other interests and other groups. As a consequence, effective human rights activism in the present practice is often partial and political⁹¹.

What renders the history of human rights all the more puzzling is that even in the present “politicized” practice, human rights are not losing their moral appeal. The practice of human rights is going into the road of politics while the ideal of human rights retains its moral flavor. Therefore they are still regarded as the most advanced and sophisticated instrument to pursue the ideal of justice; but in as much as they are captured by politics we realize that even rights should undergo a kind of scrutiny because they may be corrupted and they may even be wrong. They still pretend to be above politics,

⁸⁹ In this respect, human rights have been a second track, distinguished from the legislative one, and they may be intended as an important component of the rule of law, as understood by G. Palombella

⁹⁰ Ch. Beitz, *The Idea of Human Rights*, cit. speaks of rights as “an emergent practice in the international arena” at 9 ss. and at 102 ss.

⁹¹ M. Ignatieff, *Human rights as politics and idolatry* ... p. 9; P. Allott, *Eunomia: A New Order for a New World* (Oxford: Oxford University Press, 2001), at 287 ss. stressing that human rights after 1945 quickly became “perverted” and “degraded”, a “plaything” for governments, diplomats, bureaucracies, lawyers.

but in reality it is not always the case. To be more precise: the more they multiply the greater the risk that rights disguise sheer interest or that they overflow from their proper domain or that willy nilly they become grounded on a contingent and partial representation of the human person.

The dynamism that might explain the ambivalent contingency of human rights, being at the same time a counterbalance of politics (the ideal) and a part of it (the practice), is possibly rooted in a recurrent misunderstanding of the relationship between rights and justice, omitting that justice is always inescapably an outreaching goal towards which all laws and rights tend and yet never achieve⁹².

Since rights are meant to and actually do serve the purpose of justice, the most common slippage is to imply that the greater the emphasis on rights, the closer the destination of justice. Rights without limitations and the multiplication of rights are the fruits of this slippage. Absoluteness and multiplication of rights are the two sides of the same coin, byproducts of the same move towards a more “perfect” justice. Absolute and countless rights are indeed victims of their own success: since they have been powerful tools against some major injustices caused by uncontrolled powers, they tend to be reproduced, in order to approach the unachieved goal of a better justice. But adding more rights simply does not do the trick. Unfortunately, rights that are unlimited in content and in number are exposed to a utopian degeneration, that disconnects rights from human condition. The result is that they drive fast and without boundaries, but away from their destination. The ancient wisdom of the civil law tradition is relevant and can be here recalled: *summus jus, summa injuria*.

As far as absolute rights are concerned, the point has already been made by Mary Ann Glendon some years ago: “Asboluteness is an illusion and hardly a harmless one. When we assert our rights to life, liberty and property, we are expressing the reasonable hope that such things can be made more secure by law and politics. When we assert these rights in an absolute form, however, we are expressing infinite and impossible desires – to be completely free, to possess things totally, to be captain of our fate, and masters of our souls. There is a pathos as well as a bravado in these attempts to deny the fragility and the contingency of human existence, personal freedom, and the possession of worldly goods ... Thus, for example, those who contest the legitimacy of mandatory automobile

⁹² L. G., ch 11 ...

seat-belt or motorcycle helmet law frequently say: “It’s my body and I have the rights to do as I please with it”. However, the paradox of human existence is that “the independent individualistic, helmetless and free on the open road, becomes the most dependent of individuals in the spinal injury ward”⁹³. Here there is something that logic cannot explain, but human experience can: “*un droit porte’ trop loin devient une injustice*”⁹⁴.

The same can be repeated as to the multiplication of rights. The underlying intent of expanding the realm of rights is to promote justice. More rights for more justice. However, there are a number of reasons to suspect that justice is not a matter of quantity. In the field of justice the idea of progress per accumulation does not work⁹⁵.

There are some classical argument against the multiplication of rights that may be useful to recall, the most relevant of which is that all new rights have to interact with the other “old rights”, which on their turn may result diminished in the balancing assessment of the competing interests: if we insist too much on the freedom of speech the right to privacy may be undermined, and so on. The overall meaning of a piece of legislation can be reshaped not only by means of reduction but also by means of addition. The same apply to all declarations and bills of rights, written and unwritten.

Moreover, as history has proved, the increase in the number of rights has multiplied also the legal disputes and the interpersonal conflicts. Overtime people become more litigious in their personal interaction, making human relationship more confrontational. At the institutional level, new rights overburden the legal system, clog the courts so that there are intolerable delays before a judicial decision is issued and fundamental rights restored. As the European experience demonstrates, excessive length in judicial procedures may become itself a violation of human rights⁹⁶. Delayed justice in most cases is denied justice.

⁹³ M.A. Glendon, Rights Talk, ... p. 45-46

⁹⁴ Voltaire

⁹⁵ JC on family

⁹⁶ A great number of decision of the European Court of Human Rights are based on art. 6 of the Convention of human rights and concern the excessive length of process. Many member states suffer of this endemic problem, first of all Italy. The irony here is that also the process before the European Court of human rights are more and more delayed, because of the huge number of complaints brought before the Courts by individuals.

Furthermore, the proliferation results in a rights' congestion that inevitably invites public institutions to cherry-pick, opening the door for an institutional abuse of rights⁹⁷. Legal, financial and institutional resources will always be limited, so that promising people a never-ending list of rights is selling illusions: some of them will be prioritized over the others, and the generosity of the list of rights prompts expectations that are impossible to be maintained. If resources are devoted to security, they are inevitably distracted from education or health care or administration of justice, just to give an example, and this is true not only for social and economic rights, but for all sorts of rights: all rights cost⁹⁸.

Finally there is a more substantive reason why the multiplication of rights is an illusionary path, a *trump l'oeil*. A right always depicts the individual under a specific angle and insists on some limited, if important, features. The (wo)man of rights is always described as a potential victim or a potential claimant. By definition rights are not capable to encompass all the constituencies of human experience. Needs⁹⁹, relationship, responsibility, virtues, etc. are bound to fall outside the scope of the rights approach. There is an inescapable blind-spot on the rights' portrait of the human person. Multiplying rights does not serve the purpose of completing the image. A multiplication of partialities does not make the whole. As a matter of fact, many of the new rights result from a process of fragmentation. In particular, all the rights deriving from the principle of non discrimination have in common this character. In Europe, for example, a great emphasis on non discrimination principle has brought about an increasing number of special rights, starting with the rights of women, the rights of LGTB persons, the rights of Roma, the rights of elderly, the rights of migrant workers, rights of children, etc. The result is a scattered image of human person, portrayed on the basis of a single, although relevant, feature of her identity. In the end the human person is trapped into partial aspects of her human experience and the whole complexity of human personality is shaded. In the long term, this strategy falls short from the goal of enhancing freedom and

⁹⁷ A. Sajo, Abuse of Fundamental Rights or the Difficulties of Purosiveness, in A. Sajo ed., Abuse: the dark Side of Fundamnetal Rights, Eleven International Publishing, Netherlands, 2006, 29-98, at 49

⁹⁸ C. Sunstein A veritable "human rights market" is emerging and is being explored, for example by U. Baxi, The future of human rights, 3rd ed. (2008) Oxford University press, p. 216 ss; 276 ss.

⁹⁹ As matter of facts in the present mainstream culture needs are considered the very antagonist of rights.....

it might even turn into different and more insidious form of oppression. For sure it does not support a comprehensive and integral development of the human potential if the image of the human person is preposterous and distorted. Law and rights do not control the human heart. However they play no small role in shaping the human habits and behavior of people. The legal image of the right bearer implied in the culture of individual rights is sooner or later mirrored in the living society

The grotesque result of a human personality developed on single if valuable aspects is well described by the Italian novelist, Italo Calvino, in the allegoric “The cloven Viscount” : Viscount Medardo of Terralba, is a young Italian nobleman. Fighting against the Turks, he is split in two by a cannonball. Each of the two parts survives and each of the two parts pretends to be the real Visconte Medardo. Their names are eloquent: Gramo (the Bad) and Buono (the Good). The Gramo displays a perverted and evil nature, shown especially in his penchant for splitting things—such as fruits, frogs, and mushrooms—into two parts. Buono lives happily in the forest and returns home only after long wandering. At home Gramo causes damage and pain, Buono does good deeds. What is interesting in the novel is that eventually the villagers dislike equally both viscounts, as Gramo's malevolence provokes hostility as much as Buono's altruism provokes inexplicable uneasiness. Both halves cause damage and are difficult for the community to accept. Bewilderment and distress in the village are caused not only by Gramo, as might be obvious, but also Buono. Both of them are simply inhuman. It is not until the two parts challenge each other to a duel and are severely wounded, that a doctor takes the two bodies and sews the two sides together. Viscount finally is whole and the life of the village community is restored to peace and prosperity.

7. For a modest approach to human rights.

“Rights have their place, but their place is limited”¹⁰⁰.

This statement may sound a trivial commonplace to some, a sort of inconsequential proposition. In the age of the proliferation of rights however it is not a minor reminder.

¹⁰⁰ E. Wolgast, *The Grammar of Justice*, cit at 49.

There is a kind of *hybris* sneaking in the limitless practice of human rights that renders that suggestion all the most meaningful. It urges for a *modest approach to human rights*, based on the assumption that human rights can be helpful tools to correct injustice and also to advance the conditions of life, but they are in no way meant to achieve a perfect justice. In the restless and never-ending pursuit of justice, rights play an important role, but they necessarily leave a great deal out. Moreover, they have to leave a great deal out. They have to leave room for human agency and responsible human behavior.

In his recent book on the *Idea of Justice*, Amartya Sen corrects the most popular idea of justice according to some insights of paramount importance. His idea of justice is based on two propositions. First, unlike most common approach to justice influenced by the enlightenment, Sen's idea of justice does not want to focus the attention on what identifies a "perfect justice"; his methodology is rather bases on a relative comparison between justice and injustice. The question he asks about justice is "how can we proceed to address question of enhancing justice and removing injustice"? He drops the search for a definitive answer about the nature of perfect justice¹⁰¹. The human longing for justice appears then as an indefinite corrective to injustice rather than something definable in its own¹⁰². Second, unlike the common approach, Sen's idea of justice focuses more on people's behavior than on just institutions. "Justice is ultimately connected with the way people's lives go, and not merely with the nature of the institutions surrounding them. In contrast, many of the principal theories of justice concentrate overwhelmingly on how to establish just institutions and give some derivative and subsidiary role to behavioral features"¹⁰³. Institutions and rules are necessary for a more just society. Institutions and rules, however, play a significant but limited and instrumental role in the pursuit of justice. They can supply neither justice nor pieces of it. There are some crucial inadequacies in the overstatement of the importance of institutions where human behavior is assumed to be but compliance with rules and institutional commandments. "The right state of human affairs, the moral well-being of the world can never be guaranteed simply through structures alone, however good they are. Such structures are not only important, but necessary; yet they cannot and must not marginalize human

¹⁰¹ A. Sen, *The Idea of Justice*, cit at IX

¹⁰² A similar approach can be read in E. Wolgast, *The Grammar of Justice*, at 146.

¹⁰³ A. Sen, *The Idea of Justice*, at XI

freedom. Even the best structures function only when the community is animated by convictions capable of motivating people to assent freely to the social order. Freedom requires conviction; conviction does not exist on its own, but must always be gained anew by the community”¹⁰⁴.

Sen dissociates himself from what he calls the “transcendental” approach to justice aiming at portraying the “perfect just institutions” and endorses a more modest and convincing method based on a “comparative” analysis and focused on people’s lives. The dichotomy between this two different ideas of justice is retrieved from the traditional Indian culture which distinguishes between *Niti* and *Nyaya*. Justice as *Niti* is a matter of rules and institution. The idea of *Nyaya*, reminds that “the role of institutions, rules and organization, important as they are, have to be assessed in the broader and more inclusive perspective of *Nyaya*, which is inescapably linked with the world that actually emerges, not just the institutions or rules we happen to have”. *Niti*, and the commitment for perfect just institutions can always bring about undesirable consequences: *fiat iustitia et pereat mundus*. And “indeed, if the world does perish, there would be nothing much to celebrate”. That is why just rules and institutions need always to be tested and adjusted according to the concrete outcomes they produce within the real experience of people.

Justice is always exposed to distortion, as the long-lasting wisdom of Western and Eastern culture reminds us. Might it be that the proliferation of rights and the overstatement of their importance is a new attractive and seductive expression of this ambiguity? Might it be that the excesses of rights are a new token of *Niti*? If it is true that “the multiplication of right-defining rules has not reduced, but in fact augmented the risks of violations” and “the denial of rights in the name of rights is spreading”¹⁰⁵, do we not need to deflect from a *Niti* conception of rights towards a new idea of *Nyaya*-based rights, always open to corrections and amendments, ready to step back in front of inconvenient and unreasonable consequences that occur in people’s lives under the sign of rights?

¹⁰⁴ SS 24, 25

¹⁰⁵ G. Palombella, The abuse of rights and the rule of law, in A. Sajo, Abuse: the dark side of fundamental rights (2006), Eleven International Publishing, Netherlands, p. 5; in the same direction L. Mazor, Too many, Too much, Too strong: is there a need for a doctrine of abuse of political and civil rights, in A. Sajo, Abuse: the dark side of fundamental rights, cit., 294-308, at 308 says that even rights may be sources of abuses.

A modest approach to human rights is not necessarily a minimalist one. It is instead an approach open to test and to question even human rights against the tribunal of experience. In front of the proliferation of rights, more than one voice has already spoken for the reduction of the number of rights, proposing to stick and fix the catalogue of rights to the original negative liberties¹⁰⁶, in order to arrest the overwhelming production of improbable romantic rights.

For three reasons, at least, I do not agree with this kind of reply to the proliferation of rights. First, some of the new rights are a genuine attempt to answer to new problems and address social, technological, and political developments. Human and social life evolves and might require a dynamic approach to laws and to rights alike.

Second, a reduction in the number of rights is a hard kind of project to realize, because it should be carried out by the very same institutions who derive their authority from the rights that they are called to enforce. In spite of the fact that rights have been affirmed to contrast the abuse of power, they can always be used as, and actually they are instruments of power. To be precise they prevent the abuse of power by vesting some institutions with a counterbalancing power. Although it would be beneficial, it is difficult to imagine such a magnanimous institution that moves towards a revision of rights in the sense of reducing their scope. It would be a sort of self-destructive move or at least a diminishing one. I cannot foresee the arrival of a new Justinian, the roman emperor *che trasse dalle leggi il troppo e il vano*¹⁰⁷, and actually handed over to humanity one of the most influential and long standing bodies of law that shaped the western civilization. However, if it is not realistic to expect in the short term that any right will be repealed, it is surely urgent to discourage further unnecessary expansions. Since rights are so difficult to be stricken from the list once they have been included, and since rights trump all other competing arguments once they are put on the table, in the present era we need a cautious stance in front of the relentless pressure for new rights. Usually once a new right start to circulate in public speech it is very difficult to contest it and to confute its legitimacy. There is a sort of presumptive authority of all claims that take the form of rights. This presumption in the present era of abuse of rights should be turned upside down. The case

¹⁰⁶ M. Ignatieff... the distinction between negative liberties and positive liberties is taken from I. Berlin

¹⁰⁷ Dante, Divine Comedy, 6: "Caesar I was, and am Justinian,/ Who, by the will of primal Love I feel,/Took from the laws the useless and redundant"

can be made for a kind of *inversion of the burden of the proof*. Although we might need a dynamic expansion of rights to keep up with the evolution of social life, it does not mean that all new needs should be directed into the frame of human rights. Just the opposite, every new right should undergo a strict scrutiny, proving that it is not interchangeable with any equivalent measure, showing advantages of introducing a new right and confuting all possible downsides.

Third, I cannot endorse the minimalist view, because it has a sort of nostalgic flavor for the glorious eighteenth century liberal state that used to be. In our complex societies of the twenty-first century human rights serve more complex functions. Surely they still maintain the original negative function which is to secure some goods which have proved to be threatened by public or private powers. *Rights from wrongs*¹⁰⁸: when the historical experience teaches that some kind of actions are unquestionably wrongs that nobody would like to witness again, there is a good reason to shield some goods and to lock them out of the political bargaining. The history of the twentieth century, the Universal declaration of human rights¹⁰⁹ and the re-constitutionalization of many European countries in that period are clear examples of this function of human rights. However, this understanding of human rights conceals the positive function of human rights which is to contribute to more favorable social conditions for the human flourishing. A good deal of the political rights and of the basic social and economic rights – like the right to education, for example – and also the negative liberties serve precisely this second positive function. Many national constitutions draw a clear connection between rights and the flourishing of human personality. The Italian Constitution does it at art. 2: “The Republic recognizes and guarantees the inviolable rights of man, as an individual, and in the social groups where his personality develops”; a similar reference to the development of human personality can be read in art. 2 (1) of the German Constitution. A connection between human development and human rights has been made also in international law¹¹⁰. Thanks to both these functions - of limiting powers and setting up more favorable political and social conditions - human rights are an indispensable servant for the development and flourishing of the human potential.

¹⁰⁸ A. Dershowitz, *Rights, from wrongs*.....

¹⁰⁹ Glendon A world made new

¹¹⁰

However, here a creeping misunderstanding can be detected. Are human rights supports of, or substitutes for, human development?

In a way, a modest approach to human rights is an approach that relies on human agency and responsibility and on the unpredictable way they react in front of human necessity and the circumstances of life. Unlike the man of rights, the man of responsibility, agency and virtue “often acts in nonstandard, non prescribable ways. He takes chances in regard to the way things will turn out and the way will look to others; he is driven by something more than avoidance of wrong”¹¹¹. A modest approach to human rights definitely is not a matter of counterbalancing rights with some duties prescribed by the law, the constitution or by some international charter. It is rather a matter of gambling on human responsibility. It is an idea of rights that calls upon resources to discern and do what is necessary for the flourishing of the area of human life committed to one’s care. Responsibility is not just a matter of submission to an order. Responsibility calls upon human agency, for a more active engagement on the part of each individual.

Rights, charters of rights, institutions of rights have their place. It is an important place: although we can spend a whole life without claiming a single right, every day we enjoy them. But still their place is limited. They cannot do all the work. In a way they are servant to human agency and responsibility. They should be understood as facilitators¹¹² and supports to the full deployment of the human potential rather than dispensers of human development. Agency, virtues, responsibilities, personal commitment and participation of the citizens in social and political life should develop side by side with human rights. There is a common claim resounding in different contexts of the western societies: It is a sort of call for recovering and awakening human agency.

New York, March 15, 2010

¹¹¹ E. Wolgast, *The Grammar of Justice*, at 145

¹¹² J. Klabbers, *Glorified Esperanto? Rethinking Human Rights*, in *Finnish Yearbook of International Law*, 2002, 63 – 77, spec. P. 77, Id. *Doing the Right Thing? Foreign Tort Law and Human Rights*, in C. Scott (ed.) *Torture as Tort*, Hart Publis. Oxford, 2001, 553-566, spec. 564

