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Intercultural Dialogue and Human Rights

Edited by
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PRESENTATION

WILLIAM SWEET

The world is marked not only by a diversity of cultures and traditions, but – perhaps more than ever in its history – by nations of which many are themselves home to significant difference in ethnicity, practice, and belief.

While this diversity is generally recognized as natural and valuable, it has often also presented challenges, particularly within nations and regions. How can societies have and preserve diversity, and yet ensure that their members work together for a common good? How can differences of values be acknowledged but also bridged? How can respect for the individual and individual dignity be preserved without undermining collective goods and goals? How can societies and nations work effectively and justly with others that seem very different from themselves? How can cultural, social, and individual distinctiveness and diversity be maintained in a world that is increasingly economically and politically integrated? One of the options appealed to in order to address these challenges has been intercultural dialogue.

Central to intercultural dialogue is the respect for human rights. Over sixty years ago, at the end of a terrible conflict during which values of diversity, individuality, and particularly of the dignity of the human person were so grossly violated, some 51 nations came together to establish the United Nations. Among their primary objectives was the drafting of a declaration on human rights. The identification and articulation of specific rights were not, however, easy tasks, in part because of the differences in belief, ideology, culture, and background of the members of the drafting committee and of the bodies or nations from which they came. Nevertheless, on 10 December 1948, the United Nations General Assembly formally approved the Universal Declaration of Human Rights (UDHR), which has served as the basis not only for subsequent protocols and conventions on rights, but also for the general work of the UN and its affiliated organizations, such as UNESCO, and, further, for the development of charters and bills of rights that are to be found within or alongside the constitutions of many countries and international bodies.

Still, one may ask whether the rights of the UDHR, more than sixty years after the Declaration, remain appropriate, relevant, normative, and just. Are they sufficient or even necessary to protect the values that nations and individuals are so concerned with today, and to undergird and ensure dialogue among them? Conditions, clearly, are no longer what they were in 1948. Today there are 193 members of the United Nations; there were only 56 countries of the UN present for the vote on the UDHR and, even then, eight countries abstained. The development of science and technology, for example, has revolutionized not only the relations of people to one another – the world is now, in many ways, a “global village” – but also how people

see and understand themselves. One illustration of this is the almost instantaneous communication of ideas and information around the globe – which can be both a boon and a bane. Options of what to strive for in, and how to lead, one’s life have multiplied, but one’s privacy is increasingly endangered. Moreover, the development of industry and production has made the world much smaller; globalization and economic, political and environmental crises in production in one part of the world have immediate effects in other parts, but we have also seen ‘green revolutions,’ and witnessed international transportation networks overcome what formerly were significant geographical obstacles to providing assistance in times of calamity. Further, the possibility of democracy and democratic citizenship is now within reach of more people than ever before, and the rights that go with this are not only civic and political, but economic and social, including cultural. Admittedly, however, some insist that what democracy has meant and means is not without its negative side, and local cultures and traditions are questioned and frequently undermined. Finally, diversity and the phenomenon of multiculturalism themselves pose new challenges – of cultural relativism, of excessive individualism, and of a neglect of one’s responsibilities and duties to others.

To determine how to respond to the continuing challenges of cultural diversity and pluralism, to see how dialogue among cultures and traditions can be engaged in, and to see whether the rights of the UDHR remain relevant, reflection on those rights is clearly required. This volume proposes to contribute to this discussion, by focusing on three themes.

In the first Part of this volume, “Human Rights: History and Theory,” the authors remind readers of the background to human rights, particularly as expressed in the UDHR. What was the historical context of the Universal Declaration, and how were its articles determined? (This is essential to understanding what these rights mean.) How far are such rights, then, a *product* of history? How are they related to human nature?

In his Introduction to the volume (“The Debate about the Principles of the Declaration of 1948: Questions of Yesterday and Questions of Today”), Roberto Papini reviews the genesis of the UDHR – identifying the particular contributions of the French philosopher, Jacques Maritain –, its development during the latter stages of the Second World War and the immediate post war period, but also its legacy. While the UDHR is a foundational document for the various conventions and protocols of the UN, but also for the development of declarations on human rights in Asia, Africa, and Latin America, Papini reminds the reader also of the recent challenges to the notion of human rights, and the importance of responding to them in the years ahead.

In “Human Rights in Ethics, Law, and Politics,” William Sweet concentrates on the place of human rights in contemporary ethics, political philosophy, and law, describing their character, but also arguing for their continuing relevance. Sweet draws on the work of Maritain, whose insights, Sweet believes, can not only address some contemporary challenges to the

discourse of human rights, but provide a plausible basis for rights to economic and social goods.

Though the history of 'human rights' long antedates the UDHR, in order to understand the rights described in it, one must be aware that the particular historical circumstances giving rise to the Declaration were complex. In "Jacques Maritain, Christian Politics, and the Birth of Human Rights," Samuel Moyn returns to the role of Jacques Maritain in the articulation of that list of rights – how political and historical realities led to changes in Maritain's views, how his views influenced those realities, and also how they influenced both Catholic social and political thought as well as the development of a post-war European humanism. Next, Claudia Dangond Gibsone turns to "The Influence of the Declaration of Bogotá on the Universal Declaration of Human Rights," reminding us of the American Declaration of the Rights and Duties of Man of 1948 and its place in the immediate postwar period. Dangond Gibsone compares the American Declaration to the UDHR, and draws from this a number of conclusions on the distinctiveness and originality of this relatively unstudied document. Finally, in "The Influence of NGOs on the Universal Declaration of Human Rights," Roberto Fornasier reviews more of the history of the drafting of the UDHR, here explaining the role of Christian NGOs and of Charles Malik, as well as the influence of the Latin American countries. The essays of Papini, Moyn, Dangond Gibsone, and Fornasier demonstrate that the Declaration was, indeed, the result of a very complex debate.

Pier Luca Bandinelli takes a very different approach to the history and theory of human rights, looking not at the political history, but at the bio-psychological roots, the physical mechanisms, and the neurological bases of the anthropological perspective that lie beneath key values of the UDHR, such as solidarity and cooperation. The purpose of his study is not to defend a naturalistic and materialistic analysis of these values; rather, it is to show that there is a neuro-biological foundation for a shared humanity, which argues against allegations of the arbitrariness and pure contingency of the values that underlie human rights and intercultural dialogue.

In Part II of this volume, "Cultures, Rights, and Intercultural Dialogue," the authors consider the presence of rights within cultures and traditions, particularly, seeing whether there is or can be a place for human rights within them, and what the implications of this might be for culture and for intercultural dialogue.

Mohammed Arkoun takes up the case of "Human Rights in the Historical Area of the Mediterranean" and, specifically, in the Islamic nations of the region. Arkoun notes the existence of 'declarations of human rights' by various bodies of the Islamic community, which claim that human rights are rooted in the Islamic tradition. Arkoun argues, however, that a careful examination of the texts and the contexts, show this to be misleading. By looking at historical contexts and by a 'critique of Islamic reason,' we better see the influence of the political dimension of state-endorsed 'Islam' in such declarations, as well as the meaning of the

particular articles of the Islamic declaration of 1981. But we also see, by extension, the meaning of the articles of the UDHR – and the role of ‘the Europe’ which articulates and embraces these documents. Arkoun warns us not to be deceived by superficial similarities between the UDHR and the Islamic declarations, and calls for a ‘reflexive history’ of Islam and closer examination of Islamic thought.

Scaria Thuruthiyil reviews the history and presence of human rights in India and, particularly, in the views of major figures in Indian thought during the last century. In “Human Rights in Hinduism,” he acknowledges that there is no word for ‘rights’ in Sanskrit, and that some practices (such as sati – ‘widow burning’) clearly violate human rights. Nevertheless, he holds that, given that the ideas of freedom and equality can be found in Hinduism, it can provide a theory of human rights – though one different from that found in most western traditions. Thuruthiyil notes that, in Hinduism, unlike in the West, human dignity and human rights are rooted in the performance of duty. Benedict Kanakappally provides a similar account regarding “The Question of Human Rights in Buddhism.” Given the fact that human rights discourse is fairly recent, that Buddhism has very different origins than the Western traditions, and that Buddhism is generally suspicious of ‘talk’ and discourse, it is difficult to maintain that that tradition provides a clear expression of what we call ‘human rights.’ Still, after reflecting on some practical examples of Buddhist practice and teaching, Kanakappally shows that Buddhism comes close to realizing some of the ideals of human rights – such as ‘freedom’ – and also creates conditions for human dignity. By its focus on duties, as in Hinduism, such an approach also avoids, Kanakappally claims, some of the problems of human rights. Finally, in “Human Rights from the Point of View of Black Africa,” Bénézet Bujo argues that there is a tension between Western models of human rights and the cultural traditions of Black Africa. For example, he maintains that given its distinctive, community-based approach to decision-making, and its understanding of the essential relation between ethics and authority, Black Africa should not – and, indeed, cannot – assimilate western style democracy based on the exercise of individual rights. Bujo insists that, because of the fundamental cultural differences, non-African powers should cease insisting on a blind compliance with Western models of rights. Intercultural dialogue, however, provides a means to understanding ‘local’ rationalities and practices, and Bujo suggests that, by pursuing such a dialogue, we can have a better idea of the extent to which key values of human rights, such as those present in the UDHR, might be introduced into Black Africa.

In “Respecting Cultural Diversity: China and the West,” François Jullien also emphasizes the diversity – though not the difference – of cultures, but sees the ‘gaps’ as fruitful rather than as a problem. He suggests that, despite diversity, there can be a universality of human rights – not as an a priori, but as part of a horizon in the process of acting together. Jullien is insistent that the recognition of this gap should not lead to cultures or

societies ‘turning inward,’ but, rather, to opening themselves to dialogue with others.

Maria d’Arienzo maintains that there is no fundamental conflict between the Catholic religious tradition and human rights, and that the promotion of human rights is, in fact, part of the Catholic Church’s evangelizing mission. In “Religious Freedom in the Universal Declaration of Human Rights and the Evolution of the Catholic Church,” d’Arienzo concentrates on the role of religious freedom, noting that both the UDHR and the Catholic Church converge on the centrality of human persons and their dignity, which is a basis for rights that are recognized as fundamental to both secular and Christian humanism.

In Part III, “Contemporary Challenges and ‘New’ Rights,” the authors consider not only some of the applications of the rights articulated in the Universal Declaration, but what they imply, and whether – given the changes in the last half-century – ‘new’ rights are now required.

According to Lorenzo Caselli and Adriana Di Stefano, responsible governance of the economy requires a recognition of cultural and social rights. In “Globalisation and Common Good: The Responsibility of Europe,” the authors argue that, within Europe, the frequent reference to these rights is encouraging as a way of addressing, both within and outside of Europe, a number of the challenges of globalization.

Several of the other authors in Part III argue specifically for what might be called ‘new’ rights – or, at least, rights which have not been fully articulated until the last few decades. Margret Vidar provides an extensive account of the UN attention to “The Right to Food.” She reviews the concept of ‘the right to food’ in international law, discusses its normative content, and relates it to the notions of ‘food security’ and ‘food sovereignty.’ Her study also examines the role of the Food and Agriculture Organisation of the United Nations in this, and suggests how such a right can be practically implemented, including through its recognition in national constitutions. The ‘father of economic ecology,’ M.S. Swaminathan, provides a similar summary of a ‘right to development’ in agriculture and rural modernization. In “The Right to Development: The Experience of India,” Swaminathan shows what has been done, what is needed, but also what can be done in effectively realizing this right in India.

Stéphane Bauzon presents and explains “The Right to a Human Ecology,” by which he means ‘the human right to live in a healthy environment and in a sustainable world.’ He reviews some of the different approaches of religion and philosophy to the value of the environment, including the ‘ecocentric’ view of nature, emphasizing the fundamental importance of the environment to human existence and, hence, to all human rights, but seeking to avoid the putative extremism of the ecocentric view. Amedeo Postiglione takes up some of the same issues in “Human Rights and the Environment.” Postiglione presents the relation between traditional accounts of human rights and the right to the environment, and argues for the need for a substantive protection of the environment at the international

level. He maintains that, in addition to such a right, there is a corresponding moral responsibility to protect the environment. Postiglione also emphasizes the value of the Judaeo-Christian tradition in the heritage of Europe, given its role in the defence of rights to life and their corresponding duties, and the importance of updating the Universal Declaration with a 'charter of duties.'

Discussion of "The Concept of the Responsibility to Protect" – to protect those in other countries whose rights are menaced or violated – is introduced by Roberto Garretón, and he raises the difficult question of how such a responsibility can be reconcilable with state sovereignty. Garretón reviews a number of recent cases where intervention was absent, slow, or mishandled – and the consequences disastrous – and then discusses the contributions of the *International Commission on Intervention and State Sovereignty*. Garretón calls on the international community to develop and to apply a clear statement of the responsibility to protect.

How are these and related 'new' rights to be explained and implemented? In "The Right to Democratic Citizenship: Ideas for a Reasonable Cosmopolitanism," Luigi Bonanate insists that the future development of human rights is possible only by promoting democracy, which, he holds, is essential to guaranteeing the conditions for human coexistence. On Bonanate's view, the struggles for food and water, for health, and for security, can be won only if democracy is first achieved on an international scale.

While the authors in this volume insist on human rights and intercultural dialogue, neither is, of course, an 'end.' Both are means to human flourishing – to the promotion of the dignity of the human person who is not simply an isolated individual but a being constituted essentially by relations – a social and political being who is a member of communities both visible and unseen. The essays in this volume, then, make us aware of the historical and, arguably, contingent character of human rights, while still affirming that they reflect fundamental and essential values. These essays also show us that such rights are the precondition for, but also the consequence of, the kind of intercultural dialogue that is necessary to ensuring the recognition and the preservation of diversity of culture, belief, ethnicity, practice, and tradition, but also for the respect for human dignity and the development of the human person.

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FOREWORD

HUMAN RIGHTS AND INTERCULTURAL DIALOGUE

JÁN FIGEL'

It has become commonplace to say that the European Union is founded on common values shared by all the Member States. But if we wish to fully appreciate these values and to understand the force of the principles on which a united Europe and a peaceful international community are built and which bind us together in common purpose now, we are led to the 1948 Universal Declaration of Human Rights.

It is no coincidence that the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedom, and the first founding treaty of the European Communities (the Treaty on The European Coal and Steel Community), all have their origin within a few years of one another. All of them sprung from the revulsion of a generation at the experience of a war which had seriously impaired human rights as no other, a war which had denied the humanity of entire population groups. It is no wonder then that the post-war leaders felt a need to affirm humanity and to demonstrate to their peoples their rejection of a world in which human values had been so quickly set aside.

It is as well no coincidence that the figure of Robert Schuman, great French statesman and the 'Father of Europe,' is linked to all three key above-mentioned documents and achievements. His aim was not only in securing a stable peace, but in promoting respectful human communities based on the culture of human rights, the rule of law, and cooperation. We need to remember the work of Schuman and other founding forefathers. More important and credible is to share their inspiration and to keep their spirit and commitment alive.

The Universal Declaration of Human Rights represented the first international recognition that fundamental rights and freedoms apply to every human being. It became an inspiration and a foundation for an impressive body of human rights treaties in the following years and the basis of international human rights law. The authors of the Declaration, originating from different cultural and religious backgrounds, managed to reach common ground in a divided world, while honouring their respective traditions. In Europe, the Convention for the Protection of Human Rights and Fundamental Freedoms (also called the Rome Convention of 1950) established the first ever supranational direct and compulsory jurisdiction of an international court of human rights for citizens of sovereign countries. Signatory countries started in 1949 to build today's continent-wide Council of Europe, the guardian of human rights in Europe.

Nevertheless, the European Community's first foundations made little explicit reference to human rights. Certainly, the Treaty of Rome spoke of the union of peoples, of economic and social progress, of the solidarity between Europe and overseas countries, in accordance with the principles of the United Nations Charter. But it wasn't until 1989, on the two hundredth anniversary of the French Declaration of Human Rights, that the European Community itself ventured into the area of fundamental rights, with the adoption, in the form of a non-binding declaration, of the European Community Charter of Fundamental Social Rights for Workers. But this charter, which itself drew heavily on the Social Charter of the Council of Europe, was not common to all the Member States of the Union until it was signed by the United Kingdom nearly ten years later.

Three years after the Social Charter, Europe took the step of formally recognizing human rights as one of its foundations, in the Treaty on European Union signed in Maastricht in 1992. The Treaty bound the Member States to respect fundamental rights as guaranteed by the European Convention on Human Rights and the constitutional traditions common to the Member States. This then can be described as a truly significant step in defining Europe's common values, enabling the Amsterdam Treaty, signed only a few years later in 1997, to affirm more clearly that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law – principles which are common to the Member States.

Why did the Union feel it was so essential to affirm these values in 1997? Perhaps because it was a way of ensuring that the democratic changes in Central and Eastern Europe after 1989 were anchored solidly in the Treaty, while they were preparing for the membership of the Union. Countries of the ex-Yugoslavia were passing through violent, bloody conflicts caused by militant nationalism. Similar reasoning had applied at the time of the accession to the EU of Spain, Portugal and Greece.

For someone like me, who actively lived through that process in my country, Slovakia, it is clear that the accession, and the commitment it implied to democracy and human rights, was a welcome bulwark against the voices which questioned the price of transition and the direction of our reforms. More than ten years later, with the sixtieth anniversary of the Universal Declaration, and when the countries of Central and Eastern Europe are firmly integrated in the European Union, fundamental rights continue to beat at the heart of our concerns. The Lisbon Reform Treaty proposes a more substantial and detailed commitment to human rights through the indirect incorporation of the Charter of Fundamental Rights, signed in Nice in 2000, and by enabling the Union to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms alongside its Member States. Moving from the early steel and coal agreements of the EEC towards a community of Member States and their citizens, fundamental values in united Europe become all the more important as the bedrock of democracy and of society more generally.

The European Union has shown a strong commitment both to equality of opportunity and to the promotion of intercultural dialogue. If it is true that the attachment of “Constitutional” Courts, including the European Court of Human Rights, to the protection of democracy is the yardstick by which the protection of other human rights must be measured, then by extension, it is clear that *true equality in human dignity* underpins all rights. And yet it has perhaps always been the case, as Orwell put it, that some have been more equal than others. Majorities have traditionally imposed their will on minorities, and especially where linguistic or ethnic minorities have been concerned, it is clear that their human rights have sometimes been infringed. The impacts of the Universal Declaration of Human Rights, and, in Europe, of instruments such as the Council of Europe Framework Convention for the Protection of National Minorities, have been significant in improving the situation of minorities, though difficulties still remain.

But perhaps the greatest challenge for Europe now comes from the more recent influxes of migrants from within Europe and from other cultures and traditions. The social and cultural landscape has changed substantially in many parts of Europe over the last generation.

The enlargement of 2004, that stretched the borders of the EU to include almost half a billion people, has played a part. Fears were expressed in the run-up to enlargement that hordes of new European Union citizens would flood the existing member countries of the EU, disrupting labour markets and provoking a clash of interests and lifestyles. The history of the recent past has proven the fear mongers wrong. Enlargement brought about the reunification of Europe; it made the Union more European. Enlargement has been an economic success, and though there have been strains in a few localities on social services, schools and healthcare, the receiving countries have coped well with their new arrivals. In fact, we – citizens of older and newer members of the Union alike – should all be proud that the countries of Central and Eastern Europe have contributed more than their share to Europe’s economic and social growth in the past few years. The success of the integration of EU citizens in their new homes has been an achievement of dialogue between the host communities and their new residents. In most cases, cultural differences were relatively small, and that has made integration all the easier. In addition, the new arrivals have come with skills and a motivation to work, which has made them generally quite welcome in the tight labour markets of the West.

Other challenges have come from the migratory movements that have reached Europe from beyond its borders. Migration from other regions of the world has a long tradition in some European countries, especially those with a colonial past. For instance, British authorities actively recruited Caribbean workers to face labour shortages in certain industries during the reconstruction period after World War II. For other countries, immigration is a more recent phenomenon. Italy’s migration flows, for instance, have been negative for most of its history. According to UN figures¹, in the ten years after 1950, Italy had about one million more emigrants than

immigrants. By contrast, between 1990 and the year 2000, the net balance was plus 1,161,000. These more recent waves of immigration have brought with them cultural and religious backgrounds and differences which pose new challenges to the host society.

Yet the integration of these new communities is equally essential if Europe is to avoid social breakdown and all the costs – in terms of lost income, social protection expenditure and wasted human talent – that it represents. But it seems to be clear that the models of integration adopted in Europe so far – the multicultural models of the Anglo-Saxon world, or the assimilation model of the European mainland – have failed to secure that integration. Both models have been witness, in the best of cases, to *parallel lives* being led by the different communities, with little or no interrelation between them. In the worst of cases, we have seen rioting on the streets of many European cities. Apart from this, the effects of globalisation have greatly increased Europe's contacts with the rest of the world. In their day-to-day lives, European citizens meet more and more frequently people from different cultures, religions, languages and ethnic groups. New intercultural skills are needed to help people to adapt to a changing world.

For these reasons, intercultural dialogue, dialogue between different racial and ethnic communities, is so important. We need to take a step beyond our *multicultural* societies and become more *intercultural*. This does not mean that our communities should give up their customs or traditions, or that they should be put into some melting pot to be merged into an unrecognisable average or mass. Rather, while keeping those traditions which are compatible with fundamental human rights, communities should be encouraged to discuss their approaches to common challenges, to overcome the suspicions and fears which keep them apart, to further their understanding of each other's views, and to seek solutions to concrete problems.

Europe is a great mosaic of cultures, not a melting pot. Every piece of this mosaic is different, has its unique value and important place, and the whole represents added value – an unprecedented human community living in peace, mutual respect and cooperation. European integration is the most important geopolitical innovation in the sphere of international relations since the establishment of the Westphalian peace and system of sovereign states in 1648. The best narrative for such a Europe in the twenty-first century is *diversity in unity*. Such a Europe would be an attractive example for the world. In solidarity, openness, and cooperation, it fulfils the testimony of post-war founders and will build a different, ideally more human, century. Generation after generation, again and again, Europe must remember and learn from its history.

An intercultural, grass-root approach cannot produce results overnight. It is a change which will require some time. Intercultural education, in schools and in non-formal settings such as youth clubs and community organisations, is the key to creating the basis for this dialogue. That is why in 2008, the European Year of Intercultural Dialogue, we

focused so much of our efforts on education and on work with young people. Culture is important. It defines our identity, the set of values we adhere to, and our relations to other persons, habits and traditions. Dialogue is a basis for real unity – within the family, in local communities, within nations, and among nations. Dialogue brings enrichment, synergy and understanding. It is a sign of maturity, not of weakness. In dialogue, one plus one equals more than two; this is not mathematics, it is ethics.

Our objective is to promote intercultural dialogue as a means of helping Europeans to acquire the knowledge and aptitudes to deal with a more open and complex environment, and so to benefit from the opportunities provided by a diverse and dynamic society. At the same time, we need to work towards developing an active European citizenship, based on the common values of human dignity, freedom, equality, solidarity, the principles of democracy, the rule of law, and respect for human rights.

It is encouraging to see so many creative and innovative activities which aim at bringing people together in order to know each other better, and to seek ways to live together, not just to exist next to each other. Very helpful for this is the growth of inter-faith dialogue in Europe. We can measure our success, not simply by the number of events which are organised across the Union, but mainly by the sustainability of our actions and the impact they have on wider policy debates – in education and training, youth policy, media and culture, employment, migration and minority policies – over the years to come. The desired outcome would be a change in the minds and hearts of Europeans towards a stronger culture of dialogue in our daily relations. Intercultural dialogue should not be considered an ‘event’ but, rather, a feature of life in European society.

Intercultural dialogue is important not just from the European point of view. The current conflict in the world and the increasing talk of a clash between civilizations make the intersection of human rights and intercultural dialogue perhaps even timelier than at the time when the Universal Declaration on Human Rights was born. On the one hand, the principles of equality and non-discrimination are instrumental in guaranteeing an atmosphere of open dialogue, so essential in defining our common values. On the other hand, as the UN Special Reporter on freedom of religion and belief, Asma Jahangir, put it recently, universal values should serve as a bridge between different religions and beliefs, and this may ultimately lead to the reinforcement of human rights.

Those who interpret the contemporary world in terms of clash of civilisations miss an important point. The real clash is not between civilisations; what really counts, I think, is the battle between fanaticism and love for life. Let us not forget that intolerance can take many forms. It can be directed against different people, communities or against their symbols. The ‘clash of civilisations’ is a weak description of our post–Cold War, post–ideological world; what really counts is the *fight for civilisation* and human progress within each society. This is the fight, the positive struggle

that we should support and encourage. This is what the promotion of intercultural dialogue would and should also be about.

The intercultural dimension of the Universal Declaration of Human Rights had been confirmed by many leading personalities and intellectuals. One of these is Pope Benedict XVI. Addressing the General Assembly of the UN in April 2008, he said about the Declaration:

This document was the outcome of a convergence of different religious and cultural traditions, all of them motivated by the common desire to place the human person at the heart of institutions, laws and the workings of society, and to consider the human person essential for the world of culture, religion and science. Human rights are increasingly being presented as the common language and the ethical substratum of international relations. At the same time, the universality, indivisibility and interdependence of human rights all serve as guarantees safeguarding human dignity. It is evident, though, that the rights recognized and expounded in the Declaration apply to everyone by virtue of the common origin of the person, who remains the high-point of God's creative design for the world and for history. They are based on the natural law inscribed on human hearts and present in different cultures and civilizations. Removing human rights from this context would mean restricting their range and yielding to a relativistic conception, according to which the meaning and interpretation of rights could vary and their universality would be denied in the name of different cultural, political, social and even religious outlooks. This great variety of viewpoints must not be allowed to obscure the fact that not only rights are universal, but so too is the human person, the subject of those rights.²

The present collection of essays articulates many of the central issues in the vast discourse surrounding intercultural dialogue and the place of human rights in different cultures and religions, and it does so thanks to an array of contributions that is impressive both for the intellectual standing of its authors and for the breadth of the traditions covered by the different essays. In doing so, it pays tribute to the great French philosopher Jacques Maritain (1882–1973), and keeps his legacy alive. Together with many others, Maritain was actively involved in the project and drafting of the Universal Declaration of Human Rights. We can consider him as an intellectual, spiritual and political beacon. Maritain believed in natural law ethics. For him, ethical norms were rooted in human nature and natural rights were rooted in natural law. He was as exemplary in his teachings as

he was in his service to the community. It was only logical for him to bring his *integral humanism* into the political arena.

The concept of human dignity, endowing each person with inalienable and inviolable rights, started a new era in forming international relations and the international law. Human security, cultural diversity, economic progress, social inclusion – all are important aspects and conditions of life which give real and lasting respect to the human person. The first value which humanity, as one large, universal human family, needs to embrace in a full sense is the inherent dignity of everyone, everywhere and always. If the universality of human rights is linked to a list of concrete items, the dignity of the human person is the most important, central one. We are all different, everyone is unique, but we all are equal in dignity and rights. Still, in spite of such promises and solemn declarations, the observance of this noble human endowment is far from reality in many parts of the world.

Respect for human dignity, listed by the Universal Declaration as primary, should be the consensual point for different sources of humanism – religious or secular. In this pluralistic age of ours, things can get done only if people of different intellectual and spiritual persuasions can work together in the pursuit of consensus on universal values and the common goals. Open dialogue across ideological and other divides is a precondition to serve the common good. We should remember that the great Declaration invites us all, in Article 1, to behave in the spirit of brotherhood, which is the first of the only two duties listed within the Universal Declaration of Human Rights: “*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*” This spirit is the basis for universal solidarity, one of the most cherished and the most needed values.

Respect of rights goes hand-in-hand with the ethics of responsibility. There must always be someone to protect and secure the fulfilment of rights: citizens, the community, civil society, public authority, the democratic state. Therefore, in a very limited but balanced way, the Declaration reminds us all of our duties towards the community as well: “*Everyone has duties to the community in which alone the free and full development of his personality is possible*” (Art. 29). The human being is a social being – and human dignity is a precondition of sociality.

I know, for example, how for many decades the Universal Declaration of Human Rights helped to inspire and encourage freedom-fighters and human rights defenders in Central and Eastern European countries, particularly in the time of communist oppression. It remains a living document and belongs to all of us. Therefore we need to know and understand this great piece of our legacy, feel ownership over it, and bring it into daily life in our societies.

Perceptions – or misperceptions – play as important a role in the discourse of intercultural dialogue as hard facts. This is why it is vital that we bring the debate to every nook and cranny of our societies: in our

schools and universities, in the workplace and – of course – in the intellectual arena with books such as the present one. This is why teaching and education, which is continuous and life-long, should serve to promote recognition, respect and observance of human rights.

I am sure that this publication will help us look at the increasingly diverse social and cultural mosaic of Europe and throughout the world with a clearer mind and a more pragmatic approach, based on the values of human rights and fundamental freedoms which are common to all of us. We need wisdom and imagination to come to terms with this challenge and tackle it constructively. Europe's diversity is a challenge for political leaders as well as for intellectuals. Intercultural understanding can make it easier to benefit from the diversity of our societies and focus on what unites us. The fight against intolerance and for the respect of human rights starting with dignity for all is of a social character, but it is cultural and intellectual as well. I am certain that this book will help to strengthen our adherence to common, universal values.

NOTES

¹ United Nations Population Division, *World Population Prospects: The 2000 Revision*. (POP/DB/WPP/Rev) 2000/1/F10.

² Benedict XVI, *Christ Our Hope: The Papal Addresses of the Apostolic Journey to the United States*, Mahwah, NJ, Paulist Press, 2008, p. 68.

INTRODUCTION

THE DEBATE ABOUT THE PRINCIPLES OF THE DECLARATION OF 1948: QUESTIONS OF YESTERDAY AND QUESTIONS OF TODAY

ROBERTO PAPINI

INTRODUCTION

The rights of man or human rights? Within the new Council for Human Rights of the United Nations at Geneva this subject was discussed for a long time. Behind the terminological debate there was the question, which is always topical, of also taking into account the rights and freedoms of women, in addition to economic and social rights,¹ which are insufficiently recognised, such as the right to development or the right to food, and which encounter great difficulty in being accepted in theory and above all in practice, despite the *Millennium Development Goals* which the states of the world gave themselves as objectives for the year 2015. (In this context, the right to food is indicated as the first of the emergencies.)

These questions do not have only a current relevance. Today, some sixty years after the Universal Declaration of Human Rights (approved by the General Assembly of the United Nations on 10 December 1948 at the Chaillot Palace of Paris by Resolution 27), they need to be revisited. Within the context of such an anniversary – which in today's world scene has great relevance – a return to the genesis of the Declaration, which can be defined as the *Constitution* of the movement for human rights, of the problems that were then encountered and the solutions adopted, with equivalent attention paid to the questions today concerning their nature, their recognition, their hierarchy and their range, it is important to have a better understanding of the various languages of rights that have developed in the years after decolonisation, with the independence of many countries in Asia and Africa, and during our post-modern epoch, which is characterised, as well, by the close encounter of different cultures. In addition, during the present stage of globalisation, the traditional questions of human rights of an economic, social, cultural and environmental character are raised or are perceived in a different way than was the case in the 1940s and 1950s.²

Lastly, one should not forget the difficulties that emerged during the long preparatory stage (about two years in all) which were well summarised by Jacques Maritain who answered, in the following way, the questions of journalists after the approval of the Declaration: 'Yes! We have reached an agreement on these rights, but on the condition we are not asked the *why* of this, otherwise the dispute would begin again'.³

THE GENESIS

Between the Peace of Westphalia of 1648 and the creation of the League of Nations (after the First World War), inter-state relations were exclusively between states, and even the great Declarations of the eighteenth century, which were of a national character, were only for the internal defence of individuals.⁴ The first international document where human rights and their universality were recognised was the Charter of the UN approved in San Francisco on 26 June 1945 which, in its preamble (where a common faith is expressed in ‘fundamental human rights, in the dignity and worth of the human person’) and in six articles (1, 13, 55, 62, 68 and 76),⁵ sees human rights, together with peace, as the essential goals of the new organisation. In the statutes of the League of Nations, emphasis was placed only on the obligation not to engage in discrimination towards citizens of the member states (whereas reference was not made to obligations towards citizens of states that were not members) and reference was made to the protection of minorities and to peoples subject to the mandate of the League of Nations.⁶

With the creation of the UN, it has been observed, ‘the real novelty lies in this: individuals were no longer seen at the international level only as members who belonged to a group, to a minority, or to other categories. They became subject to protection as individuals’.⁷

Even though during the war there were strong pressures to address the subject of rights – one need only remember the appeal of Pius XII in June 1941 in favour of a Convention on the rights of the person – in San Francisco the subject was not developed because there was a rapidly acquired awareness of the divisions that existed between the various alignments and a realisation that the approval of the statutes of the United Nations would thus have incurred a serious delay. As has been observed, there was agreement only on certain articles and on the specific case of the self-determination of peoples (art. 5). Some argue, in addition, that in this document rights are seen solely as relating to peace.

The creation of the UN, although relevant, taking into account as well the novelty of the initiative as compared to the League of Nations, nonetheless limited the great project of President Roosevelt, the champion of the American New Deal, involving a sort of international ‘New Deal’, a project expressed in particular during his speech to the American Senate of 6 June 1941⁸ when he held up a new and peaceful ‘world society, which, however, could not be assured, as he expressed himself by ‘exclusive alliances and spheres of influence’.

The United Nations was born with great hopes but with limited powers and the subject of the specifying and the protection of human rights was postponed, even though, it should be observed, at Bretton Woods (1944) it has already been possible to create – despite the differences of approach above all of the English and the Americans – two important institutions, the International Monetary Fund and the World Bank, for international economic and financial cooperation. Subject to the pressure of

a number of countries, in particular the smallest (who were as a result in need of greater protection) and those in Latin America, in autumn 1946 the Economic and Social Council of the UN, exercising the powers conferred on it by art. 68 of the statutes of the UN, promoted the creation of a Commission on Human Rights made up of eighteen states (Australia, Belgium, Chile, China, Cuba, Egypt, India, Iran, Yugoslavia, the Lebanon, Panama, the USA and Uruguay) which was partly representative of the political and cultural alignments within the General Assembly, which was made up at that time of fifty-five countries, with the aim of drawing up the text of an 'International Charter of Human Rights'⁹ which followed in the furrow of the Charter of the UN. This Charter of Human Rights in the end gave rise to three separate documents: the Universal Declaration of Human Rights, the two Pacts of 1966 which established mandatory obligations for the signatory states, and an optional Protocol added to the International Pact on Civil and Political Rights (which was also adopted in 1966) which established a mechanism to apply to the Commission on Human Rights in the case of a violation of one of these rights.

In addition to the difficulties that were encountered in reaching agreements between different religions, philosophies, and political and economic systems – an attempt that was absolutely new in the history of humanity – it also had to be taken into account that the relations between the USSR and the West were deteriorating rapidly and that the great powers – first and foremost – did not want their international sovereignty to be interfered with in any way. In addition, no one knew exactly what this document aimed at (the very concept of a human being was not the same for everyone). The precedents that were looked to had liberal origins and were connected with European national contexts (during the debate within the commission, however, it appeared, at least implicitly, that some of the great traditional religions of other continents recognised human rights, even though they were not formulated along the lines of the European tradition): the English *Magna Carta* of 1215 (the freedom of man and its guarantees); the English *Habeas Corpus* of 1679; the English Bill of Rights of 1689 (which never had a special role); the American Declaration of Independence of 1776; and the French Declaration of the Rights of Man and the Citizen of 1789 (which after a certain fashion already contained a potentially universal vision of human rights).

The Latin American countries were especially sensitive to the contents of their Charter of Human Rights and Duties which had been approved a few months before at Bogota on the occasion of the ninth Pan-American Conference of 2 May 1948, where the influence is evident of the Christian personalist tradition and of social Catholicism expressed in particular in the encyclicals *Rerum Novarum* (1891) and *Quadragesimo Anno* (1931).

One should also remember that in 1927 the International Diplomatic Academy had adopted a text on human rights at The Hague and that in 1929, in New York, the Institute of International Law had voted in favour of

a Declaration of International Rights (which Maritain placed in an appendix to his volume on human rights of 1942).¹⁰ The contribution of NGOs associated with the deliberations of the committees which provided drafts and comments was also important, in particular: the American Law Institute; the American Federation of Labor; the American Jewish Committee; the Women's Association; the International League for Human Rights; the International Confederation of Christian Trade Unions; the Ecumenical Council of Churches; and *Pax Romana*, an association of Catholic intellectuals. These last two organisations made an important contribution, in particular to the subject of religious freedom.¹¹ Certain specialist agencies of the UN (the ILO, the WHO, UNESCO) also took part in the deliberations of the commission.

The group that worked on the text of the Declaration, which, as has been observed, 'was made up of a cast of exceptional personalities',¹² should also be remembered. Although these people came from different countries, they had also been educated in prestigious universities in the West whose culture they thus knew. For the most part they were jurists and philosophers.

Eleanor Roosevelt¹³ was elected chairman of the commission. The prestige and flexibility, but also the firmness, of the wife of the dead President contributed to the success of the deliberations of this commission. P.C. Chang was elected the vice-chairman. Chang was a philosopher, the head of the Chinese delegation to the UN, who had a PhD from Columbia University, was an able negotiator, and was careful to incorporate into the text, as far as this was possible, the principles of Asian civilisations. Amongst the other distinguished members of the commission, reference should be made in particular to Charles H. Malik,¹⁴ a Lebanese Greek-Orthodox philosopher who had studied at the American University of Beirut, the University of Fribourg and Harvard and who was elected *rappporteur* of the commission; René Cassin, a French liberal Jew, jurist and philosopher;¹⁵ Mrs Hans Mehta, a leader of the Indian National Congress, an anti-colonialist and a defender of the rights of women; Fernand Dehousse, the Belgian socialist and jurist; Hernán Santa Cruz, a Chilean, a social democrat, and a strenuous defender of political and social rights; Carlos Romulo, a Filipino journalist and the winner of the Pulitzer Prize for his articles on the end of colonialism; and John P. Humphrey,¹⁶ a Canadian journalist and Director of the Division for Human Rights of the Secretariat of the UN, all of whom were involved in the deliberations of the commission.

Within the commission, different positions soon emerged. On the one hand, the European countries (but not Great Britain) stressed not only freedoms but also the subject of equality and in general social rights (the French Constitution of 1946 and the Italian Constitution, which was completed in 1947, were strongly influenced by the democratic parties of Christian inspiration which were sensitive to the social dimension); and, on the other, the Anglo-Saxon countries, which emphasised traditional

individual political freedoms and did not conceal a certain diffidence as regards the intervention of the state. In addition, the Socialist countries (suspicious that the Declaration could be directed against them) subordinated the individual to the state and underlined economic-social rights as compared to political freedoms, as well as stressing the self-determination of peoples (at that time in large part Western colonies) and anyway were inclined to defend the freedom of each state to apply recognised rights within the special context of each national situation. Lastly, there was the large number of countries of Latin America, which in their Constitutions had often based themselves on European social culture although they adopted the institutional system of the United States of America with a constitutionalism that guaranteed human rights, which referred to their Bogota Declaration. And finally there were the Islamic countries which did not always feel at home in a Declaration which was even then already considered too 'Western'.

The commission met for the first time from 27 January to 10 February 1947 at Lake Success near New York. The initial meetings were difficult above all, but not solely, because of the political divisions between the USA and the USSR. One of the first problems to involve a clash of views was that of whether to endow the Declaration with a mechanism for the protection of human rights but Mrs Roosevelt, helped in this by the Socialist states, was opposed, stating that many countries would not have accepted interference in their own internal forums (and in the USA some states still had racial laws), as a result of which it was decided to allocate to another document the subject of protection which, in principle, should, however, have been drawn up at the same time as the Declaration.

In addition to the political aspects, the debates ranged across cultural, philosophical and legal questions. Chang would have liked to place a preamble to the Declaration centred around the dignity of man; Malik hoped that first and foremost there would be a definition of 'man'; the Yugoslav delegate laid stress upon the principle that society should be seen as being prior to the individual whereas Malik held that 'a human being is more important than any national or cultural group to which he may belong'.

It soon became evident that the required document could not be drawn up by the whole commission and for this reason a draft committee was established to produce a 'preliminary draft' made up of four delegates: Roosevelt, Chang, Malik and Humphrey. After the first session, faced with complaints that there was no European or a representative of the Socialist countries, Mrs Roosevelt, on her own initiative, convoked representatives of Australia, of Chile, of France (R. Cassin), of Great Britain and of the Soviet Union. Humphrey, with the help of the Secretary General of the UN, was asked to draw up the first version. He engaged in a detailed study of the very many texts that existed and which also followed various cultural traditions. He particularly took into account the Statement of Essential Human Rights, which had been produced in 1944 by the American Law Institute, and the Bogota Declaration.

Humphrey's draft was made up of 48 articles (over 400 pages) and was a heterogeneous list even though sufficiently complete as regards proposals, to such an extent, indeed, that it was seen by the members of the committee as an impressive "distillation of nearly two hundred years of efforts to articulate the most basic human values in terms of rights."¹⁷ Traditional political rights were upheld, but also economic and social rights. During the discussion that followed the presentation of the text to the committee on 9 June, it was decided to engage in a broad revision of it, this task being entrusted to the future winner of the Nobel Prize for peace, René Cassin, because of the magisterial role he had played. The work of Cassin was decisive: he managed to give an internal logic to the draft, as well as greater unity. He also divided the rights into intelligible categories and gave a sense to their interdependence, laying stress on their connection with human nature. He also conceived of a preamble and added six general principles. His position was decisive in avoiding debates about views of man and society or metaphysical foundations, on which agreement was lacking, and in overcoming the contrast between those who supported only political rights (such as Great Britain) and Socialist countries which wanted, instead, to reserve a special position to social rights, which he did by connecting, in an intelligent way, both categories to human dignity. He was able in engaging in the mediations that were required between the different cultural positions, above all in sensitive areas such as religion and family law. Indeed, in the Declaration the right to divorce is not envisaged and there is no condemnation of polygamy. He was able above all else in demonstrating that the new document did not only constitute a list of rights but was also a coherent whole that had three characteristics: historicity, progressiveness and universality.

The outlines of the Declaration were submitted to the whole commission on 2-17 December during the second session. The question still remained open of its universality, even though the answer to the question posed to UNESCO helped the prospects of the document produced by Cassin.

THE ROLE OF THE 'WISE MEN' AND THE CONTRIBUTION OF JACQUES MARITAIN

In January 1947, UNESCO had already been asked to help the role of the commission by reflecting on the theoretical foundations of human rights and addressing the question of their universality: if, that is to say, it was possible to establish rights common to different cultural, religious and political traditions. A questionnaire was drawn up that was sent to distinguished figures, scientists and philosophers of the whole world and representatives of different cultures: E.H. Carr, Aldous Huxley, Jacques Maritain, Teilhard de Chardin, Harold J. Laski, Humayun Kabir, S.V. Puntambekar, Boris Techechko, Chung-Shu Lo, Benedetto Croce, Salvador de Madariaga, Shirin Abbas Sinnar, M. Gandhi, and others. Despite a different assessment

of the nature of human rights, some of them rejected the natural law at the basis of the declarations of the seventeenth and eighteenth centuries and the Socialists did not forget Marx's criticisms of the Declaration of 1789. In addition, many from non-European countries stressed relevant cultural differences. Substantially, the answers agreed on the possibility and the advisability of formulating an international Declaration on human rights. And this was the answer that UNESCO gave to the Economic and Social Council (ECOSOC) in June 1947. When reading the answers one observes, however, relevant differences of approach. Some, of a non-Western tradition, emphasised the extraneousness of the very term 'rights' to their traditions and the Asians, in particular, emphasised the need to include 'duties' side by side with rights. Gandhi wrote: 'I learnt from my illiterate but wise mother that all rights, to be deserved and preserved come from my duty well done. Thus the very right to live accrues to us when we do the duty of citizenship of the world'.¹⁸

In the difficult endeavour of reaching conclusions that could be implemented, the contribution of Jacques Maritain, who at that time was ambassador of France to the Holy See, was decisive. He was called at the last moment to take the place of Léon Blum as head of the French delegation to the Second General Conference of UNESCO held at Mexico City in November 1947. He was elected chairman of the conference and the theses that he expressed in his inaugural speech – on the subject *La voie de la paix* – were 'universally'¹⁹ accepted.

In indirect contrast with Julian Huxley, the Director General of UNESCO, who in his work *L'UNESCO: ses buts et sa philosophie* had argued that the organisation should draw up a sort of (scientific-evolutionistic) super-philosophy in order to provide a theoretical basis for its action, Maritain proposed, instead, a pragmatic approach to the question: cooperation between men was possible, despite their cultural differences. Because of their shared nature one could establish 'practical principles' (essentially human rights) which were common to different traditions and currents of thought, on the condition, however, that the theoretical justifications that each party could have made but on which there would not have been unanimity were put to one side.²⁰ He thus limited the nature of consensus to a 'practical goal', to an agreement on 'a single set of beliefs which guide actions', and added: with 'why' the dispute begins, indeed, 'spirits have never been so cruelly divided'. Despite this, a Declaration of Rights, which was terribly important, could only be seen as 'the preface to a Charter of the civilised world'. In his speech in Mexico City, Maritain also took up a question dear to him and which he had addressed on other occasions: universal peace would have been made possible not only through respect for human rights but also through the establishment 'of a supranational organisation of peoples...even though at the present moment...this is not possible'.

Maritain had already expressed his ideas in his answer to the UNESCO survey in June 1947 but it was above all after his speech in

Mexico City that this idea prevailed over the other theses, and to the point that Huxley himself, with British elegance, asked Maritain to write the introduction to the collective work *Autour de la nouvelle Déclaration Universelle des Droits de l'Homme*,²¹ in which the French philosopher forcefully expounded his thought and the whole dossier with the answers of the 'wise men' was handed by UNESCO to the Commission on Human Rights. It is known that the conclusions of this dossier influenced those who drew up the Declaration.

THE LAST STAGE OF THE COMMISSION

Having in addition the moral and intellectual support of the figures questioned by UNESCO, who had given a substantially positive answer to the possibility of an International Declaration of Human Rights, it was relatively easy for the commission to carry on with its work.²² The position of Jacques Maritain was referred to in the most difficult passages (for example whether to refer or not to natural law as a foundation for these rights, and whether to accept agreement on a list of rights without justifying them according to specific traditions), for example by the Frenchman Salvator Grunbach and implicitly by certain Asians such as Chang who stated that he wanted to confine himself to proposing Confucian principles expressed in the traditional way, being prepared for them to be taken up in a Western language

During the subsequent sessions the discussion of the commission was once again concerned with the question of the nature of the Declaration (was it binding or not?) and that of the protection of human rights. Indeed, many countries argued that without an instrument (a Convention) that laid down that respect for such rights was obligatory and an international court that punished violations of the Declaration this document would not have had any juridical relevance (the lesser countries in particular felt this need). The USA and the USSR, however, blocked any commitment designed to be a mechanism to monitor and defend the Declaration, fearing 'a sort of world government that would have inexorably threatened national sovereignty', as the Soviet delegate put it. With the support of Eleanor Roosevelt, aware that the American Senate would not have accepted this, it was decided to give priority to a declaration of principles. Thus the idea was left to one side of developing at the same time a treaty binding the signatories of the Declaration. Other questions were also discussed. The representatives of the Far East in particular stressed the absence of responsibilities side by side with rights, but the answer was that in itself a right implied a duty. The commission went back to discussing the foundation of these rights and Malik in particular wanted an explicit reference to God (persons are endowed with 'certain inalienable rights given by their Creator') in the first article but Cassin and Chang, amongst others, did not agree because this would have undermined the universality of the document. The commission thus confined itself to upholding the right to religious freedom. Cassin here

asked for the Declaration not to be defined as 'international' but 'universal'. The strongest debate revolved around the recognition of economic and social rights and in general around the role of the state in relation to them. Mrs Roosevelt accepted the insertion of the phrase 'men in need are not free men' but the USSR, strongly supported by the Latin American countries as well, worked to ensure that social rights were not relegated to a secondary level. After a keen debate, the conflict was resolved with the introduction of a new provision: a certain level of discretion was granted to each state, according to its 'organisation' and with its 'own resources' (art. 22) as regards the implementation of such rights. The question of cultural rights and the rights of minorities was also addressed by the United States and France which, with their policies of assimilation, were opposed. A compromise was reached on article 2 of the Declaration in which any form of discrimination was rejected and on article 18 on religious freedom and articles 26 and 27 in which certain cultural rights were recognised. The subject of equality between men and women was also debated – it was resolved by the fact that the term 'human being' (art. 1) referred to both men and women.

Some members asked for a recognition of the fact that the rights were written 'by nature' in human beings. Chang, who was very able during the whole of the debate, managed with great effort to avoid nature being cited. Article 1 of the last draft of the Declaration proclaimed 'human beings are endowed *by nature* with reason and conscience' but the phrase 'by nature' was dropped. In response to a proposal made by Chang (a Confucian), to article 1 was added 'spirit of brotherhood' to avoid an overly individualistic approach to human rights. Other questions (such as capital punishment, euthanasia, abortion, etc.) on which agreement was absent were also left to one side. The Muslim countries were also divided: the delegates of Pakistan and Egypt were prepared to accept that men and women had the same rights in marriage (Saudi Arabia was opposed) and Egypt itself and India were prepared to accept the changing of a person's religion (Saudi Arabia was opposed). On 18 June 1948 the commission voted in favour of the final text (12 in favour, nine against, and four abstentions). In February Malik was elected chairman of ECOSOC. On 26 August the text was unanimously approved by this body (but without a discussion). On 24 September the Declaration was presented to the third commission (for Social, Humanitarian and Cultural Affairs) of the General Assembly (made up of all the states of the UN) where the discussion was reopened at an in-depth level (170 amendments were made to the individual articles and 84 meetings were held)²³ but in the end, on 7 December, the commission recommended to the General Assembly that it approve the Declaration. On 10 December the General Assembly of the UN, meeting in Paris (perhaps, also, in order to avoid a vote in the United States where the contrast with the USSR had by now fully emerged), approved the Declaration with 48 votes in favour, none against, and 8 abstentions (Saudi Arabia, Byelorussia,

Czechoslovakia, Poland, the Ukraine, the USSR, South Africa and Yugoslavia).²⁴

THE DEVELOPMENTS OF THE DECLARATION AND THE CONTEMPORARY QUESTIONS OF HUMAN RIGHTS

Although it was a point of encounter between different philosophies but with a greater impress of Western thought, the universal code of rights expressed in the Declaration 1948 has at its base the dignity of the person and reflects the modern idea of 'freedom from', connecting it closely with justice and peace. One can say that the general architecture of the text is prevalently of 'personalist'²⁵ inspiration and on this foundation outlines a new world order of peaceful coexistence. The Declaration contains the liberal-Enlightenment tradition which lays emphasis on essential political freedoms but it does not forget social-economic rights. And, as M.A. Glendon, a professor at Harvard University, observes, 'the most zealous supporters [of those rights] were not the representatives of the Soviet bloc but the delegates of the Latin American countries'²⁶ which made up 21 of the 55 countries that created the UN. Glendon also states that the language of the Declaration closely resembles that of social Catholicism when it lays stress on basic concepts such as the 'inherent dignity' of man and the 'worth of the human person' (the word 'person' is to be found 23 times in the Declaration), or when it states that the person is 'endowed with reason and conscience'; it refers to 'inalienable rights'; it emphasises not only individual rights but also the rights of social groups, intermediary bodies such as the family which is seen as the 'natural and fundamental group unit' of society and having a right to the 'protection by society and the State', and that the first right of parents is to be able to choose the education for their children; and it recognises the right to work and the right of a worker to a just remuneration. This language, writes Glendon,²⁷ came from European and Latin American Constitutions of the twentieth century, in addition to the Bogota Declaration, texts which were often based on Christian Democratic parties, which in their turn drew upon the social encyclicals.²⁸

Of course one should not forget the contributions of the European labour movement and the Christian-social movement, the 'social' Constitutions of the post-First World War period, first and foremost that of the Weimar Republic – which was the first of the constitutional texts to speak about 'human dignity' – and included social rights as well²⁹ which were directed towards the 'common good' (art. 153), differently to those of 'real Socialism' which attributed a marginal role to rights and above all stressed the role of the state.

One may say that the principles upheld in the Universal Declaration were already influential at the Nuremberg and Tokyo trials after the Second World (these principles had been discussed by the Allies during the war and then in order to organise the future courts to judge the war criminals of these two countries), in particular emphasis was laid on the principle

according to which if laws of a state go against fundamental human values, the individual is held to transgress them.³⁰ They also had an important influence on the Constitutions³¹ of various countries, on the goals of many international (public and private) organisations, on movements that emerged to defend human rights and democracy at both a national and an international level (one need only think of the crisis of the totalitarian regimes, from Communist ones to military ones in Latin America), fostered the search for alternative models for fair and solidarity-based development in the processes of globalisation, contributed to the establishment of practical areas of understanding – together with question of peace – for dialogue between religions (one can always theologise conflicts), and became, lastly, one of the most discussed subjects in the international community. To summarise: the principles established by the Declaration of 1948 became a practical point of reference not only to assess the presence of democracy within individual states but also of peace in relations between states. The large number of Conventions subsequent to the Declaration (beginning with that on children and women) have been equally based on this culture of the UN.

The members of the commission were aware that they had engaged in an extraordinary and difficult work and that although they had only produced a Declaration of principles this would, as Mrs Roosevelt later said, have ‘an immense educational importance’³² and be a stimulus for further developments.

Despite the impulse that the Declaration gave to the value of human rights, this document is not an international treaty and one had to wait until 1966, that is to say twenty years later, for the principles of this document to be placed in two international Conventions that were binding for the countries that signed them.³³ The Cold War and the appearance of new states with new demands after decolonisation on the international stage lengthened the time of their ratification. These Conventions were the Pact for Civil and Political Rights and the Pact for Economic, Social and Cultural Rights. Once again those who wanted to keep separate these two kinds of rights prevailed.³⁴ Underlying this distinction is the idea that the first have a *preceptive* character and are thus immediately applicable at a judicial level, but that the second, when they are violated, are more difficult to define, and in addition have a *programmatic* character because a state must create specific conditions for their implementation, making them thereby, it is said, less applicable at a judicial level.³⁵

Soon criticisms rained down on the Declaration which did not want to be and could not be a universal and immutable ‘religion’ of human rights because the diversity of contexts and the different perception of rights were recognised more or less implicitly. Some of these criticisms concerned its Enlightenment-liberal-individualist approach, the so-termed ‘libertarian’ approach, which privileges political rights compared to social rights (in practical terms a minority which has already secured its social rights was protected), whereas the ‘dignity’ approach revolves around the dignity of

the person and takes account not only of his or her freedom but also of equality and solidarity. In the libertarian tradition the idea prevails of a radically autonomous individual who is capable of self-determination, whereas in the other hypothesis emphasis is placed upon the dimension of interpersonal relations.

Indeed, the Declaration of 1948, despite its limitations (the first of which was to emphasise the responsibility solely of states whereas today we not only encounter other entities such as internal terrorist groups or at an international level multinationals which are at times responsible for violations of human rights) and although it recognised the interdependence of all human rights, the principle of equality before the law, and non-discrimination, it placed value in particular on political and civil rights.

For some years increasing attention has been paid to cultural and environmental rights. The UN as well has contributed to sensitisation as regards these questions, in particular from the Rio conference on the environment of 1982 until the conference on women in Beijing in 1995. In reality, the UN has played an important role in the spread of the universal code of human right which the great religions and cultures have begun to address inasmuch as globalisation, as well, is contributing to constant contamination and dialogue between them. After decolonisation and the independence of the new states, above all from the 1960s onwards, cultural rights connected with the protection of languages and traditions have become of great contemporary relevance, both because of the demand from a suitable representation of minorities in increasingly multicultural states and because of the emergence of conflicts over identities. The natural law tradition implicit in the Declaration of 1948 and in the Pacts of 1966, which links rights to everyone and does not see them as things granted by a public power or some patriarchal or family authority, can, therefore, be in contrast with Confucian, Hindu, Islamic and African traditions which privilege collective claims over individual claims (a new phrase had to be coined in order to translate 'individual right' into Chinese) and rights over duties. Hence the criticism of the 'Western' vision to be found in the Declaration.

The Muslim world has drawn up a number of alternative Declarations to that of 1948 which consider human rights in Islam: that of Dacca of 1981 and above all that of Cairo of 1990,³⁶ which was approved within the framework of the Organisation of the Islamic Conference where, for example, differences are maintained as regards men and women. The African Declaration of Human Rights and Peoples of 1981 should also be remembered. In South-East Asia emphasis has been placed on 'Asian values' in antithesis to Western ones and in 1993 the Bangkok Declaration³⁷ came into being in which the priority of social rights over political rights was upheld and the 'right to development' was opposed to individual rights, with a different approach to the traditional Western one as regards individual rights and collective rights, with the risk, however, of subjecting to the discretion of political authorities the enjoyment of the rights of freedom of individuals. In Latin America the basic positions have reflected

those of the Universal Declaration but with a marked emphasis on the question of poverty.³⁸ At the Conference of Vienna of 1993, which commemorated the forty-fifth anniversary of the Declaration of 1948, side by side with a positive awareness of the situation of poverty in the world one could perceive on a broad scale the diversity of languages as regards human rights, and once again certain Asian countries criticised what they defined as a tendency on the part of Western countries to impose their own standards of rights with an excessive stress on political rights to the detriment of social-economic rights, and argued for the need for a 'regionalisation' of rights. However, in basic terms the debate centred more around the practical implementation of rights that upon differences as regards principles.³⁹

In the Orthodox Christian world as well there have been signs of a distancing from the Declaration of 1948. In April 2006, to give just one example, at Moscow a session was held of the World Congress of the Russian People where the Orthodox Church is present at a high level and on this occasion a document was adopted that was very critical of the 'liberal and Anglo-Saxon principles' upheld in the Universal Declaration. To summarise: the document declared that it was inadmissible that the freedom of choice of an individual has as its limit the freedom of choice of other people – there are higher values of an ethical, religious and also patriotic character which, when rooted in a society, have precedence over individual freedom.

One should observe, however, a certain politicisation of the subject of human rights, by the West as well, for example with the 'new' right of 'humanitarian interference' (or as is preferred today 'the obligation to protect human rights'), evoked in various cases to justify interventions in Somalia, in former Yugoslavia or in Iraq in the 1990s.

Lastly, the 'new' rights that have been increasingly discussed in the context of post-modernity which seem to grow in a limitless way: from those connected with the manipulation of human nature to those of homosexuals, of the freedom of women in relation to embryos, of euthanasia, etc.⁴⁰ This trend – it may be observed in passing – is also influencing international organisations which in certain cases come to interpret the Declaration of 1948 to favour contraception or mass sterilisation.⁴¹

A further question relates to the relationship for the demand for collective security, above all in the case of terrorism, and the growing and dangerous limitation on the rights of privacy without a sufficient control of the public authorities entrusted with this task.

Economic and social rights (but also cultural rights) are often threatened by the globalised economic system as well, the effects of which make themselves felt at a national and transnational level, not least because they are not sufficiently regulated by equally global political authorities and juridical institutions. In overall terms: because of an absence of global governance.

Lastly, a question which is not sufficiently thought about is the possible conflict between the rights of the individual and the rights of humanity: this is a question that is apparently a matter of legal procedure but it can involve ethical questions in the case of an opposition between the dignity of the individual and the dignity of humanity taken as a whole. The legal protection of the individual is based upon his or her status as a subject of law but humanity is not, or at least it is debatable whether it is (even though at the Nuremberg trials the approach was based upon the notion of 'crimes against humanity'), something that can raise practical problems especially since the 'protection of humanity' can appear to take priority over the protection of the individual (as in the spheres of bioethics, the environment, future generations, etc.). Some try to deal with this problem with reference to the 'principle of precaution',⁴² the point of departure for an analysis that should be deepened.

CONCLUSIONS

To what extent are questions connected with human rights different at the present time compared with the post-Second World war period because of the changed political and cultural context? Even though many of the questions that were debated during the drawing up of the Universal Declaration surprisingly (but should this really be a surprise?) are not very different from today's questions – their philosophical foundations, the 'diversity' of cultural rights, the possibility of awareness of new rights in the future – what was agreed (in order to overcome many of these difficulties as well) was that the document sought to present a common standard of achievement; it was believed that one was dealing, more or less explicitly, with principles that existed in every culture;⁴³ and it was above all else a point of departure for a better world through measures to be taken progressively at a national and international level. This result was seen by those taking part as an extraordinary result and as one that was ahead of the times.

What remains today of the universality of the rights of the Declaration of 1948? Overall, should it be seen as a hangover from Western cultural 'imperialism'?⁴⁴

The question cannot be ignored: if it were to be ignored the risk would be of a growing lack of mutual understanding between the peoples of the world. The question of the universalism of human rights and the particularism of cultures regularly represents itself because the religions and the cultures of the Far East and Africa place emphasis more on duties than on rights and the individual tends to be seen as an expression of a community and not having real autonomy (even though, thanks to the spread of UN culture concerning human rights, the situations are slowly changing). Today there is a search in various cultures for values that have affinity with Western values in order to identify transcultural rights. Here one may cite, amongst others, the work of R. Panikkar⁴⁵ and Amartya Sen⁴⁶

who point out how in other civilisations, in the past as well, principles can be encountered that are equivalent to contemporary human rights.

In addition, it should be pointed out that the rapid extension of human rights over the last decades in our post-modern societies involves a need to distinguish those that can be seen as real rights from others which are too easily claimed to be such, not least because it is clear that the more one lengthens the list, the greater the risk of insufficient protection. Furthermore, we know that a political community needs a minimal consensus on the ties that justify its existence. This is connected with the subject of the *foundation* and the *recognition* of human rights, aspects that were avoided or in the end put to one side during the drawing up of the Universal Declaration, not least because most of them, after the horrors that had been experienced, appealed to natural law,⁴⁷ but the reoccurrence of other horrors in the twenty-first century has strongly proposed anew the subject of human rights, amongst those who do not have a natural law approach as well (as for that matter has taken place as regards freedoms, for example economic freedoms, which are often specifically in contrast with certain rights). Moreover, as has been observed, new criticisms have emerged from different religions and cultures. It should be observed, however, that even though recently, in moral philosophy and the cognitive sciences, there has been reflection on what appear to be deeply rooted moral institutions, with a surprising uniformity of judgement as regards very diverse cultures,⁴⁸ and this has contributed to the debate on human rights being taken up once again, theoretically as well. Many people, however, adopt the position of Norberto Bobbio according to whom – expressed in simple terms – human rights, more than being justified should be defended.⁴⁹

However it should be observed that one of the essential concepts expressed in the Declaration of 1948 is the question of the universality – a category that is above all Western – of rights that are based neither in God nor nature (concepts not to be found in the text) but on man himself, the end and at the same time the guarantor of his rights. However, as F. Jullien writes, '*les options qu'il [l'humain] y inscrit ne peuvent elles-mêmes avancer de justification, du moins ultime, que celle de leur universalité,*⁵⁰ but faced with different cultures, the invitation to think anew about this concept 'in a different way', to have a heuristic use of this category.

Liberal political theory, to which we owe the idea of the state, of democracy and of human rights, is the daughter above all of the Enlightenment and argues that it looks at what man really is. His nature is to be found in the universality of reason (even though by this at times the Western modern *ratio* is smuggled in), whereas the various cultural expressions appear as incrustations that are not needed in absolute terms. 'Communitarian' political theories (Taylor, Sandel, Bellah, Etzioni...) which link at a deep level rights to different cultures, demonstrate, in fact, the limitations of the liberal approach: outside cultures they can only be formal principles that are often unable to have a purchase on individuals. However,

the opposite statement is also true: cultures cannot live outside the universal principles of justice, especially in an increasingly global world.

The exit route can only be based upon the recognition that an ethnic and cultural identity is not the primary identity (even though we should recognise all of its value, we should remember here that UNESCO recognised cultural diversity as a ‘common heritage of mankind’), that our universal identity as persons is prior to any particular identity, also recognising, however, that it is located in a specific context of relationships because man is a relational being, as personalist theory in all its various expressions argues.⁵¹

This approach is shared by two important thinkers – John Rawls and Jacques Maritain – not to speak of others, for the example the important testimony of the Hindu moral philosopher and economist Amartya Sen who in his works speaks about a shared humanity beyond cultural differences.

Rawls, the outstanding exponent of political neo-liberalism, rules out that the objectives of a political community can be directed by an idea of a particular good linked to a particular culture and argues instead that although with difficulty different political doctrines can find an ‘overlapping consensus’ through dialogue on shared fundamental principles of justice.⁵² This position is relatively near to that of Maritain who proposes a possible consensus on ‘shared practical principles’ (essentially human rights) despite the differences at the level of their theoretical justifications. Maritain adds that however knowledge of rights is not an easy exercise because it depends on knowledge ‘by co-naturalness’, that is to say ‘under the guidance of the inclinations of human nature’ and the moral conscience of a people, which is not always the same but varies in time and with different contexts, and the processes of barbarisation are always waiting in ambush. For this reason Maritain, although a defender of natural law, in his answer to the survey of UNESCO mentioned above, admitted that there was a historical dynamism of society within which natural law acts and thus recognised that “a Declaration of Human Rights will never be exhaustive and definitive. It will always be related to the state of moral consciousness and the civilisation of a given epoch in history...by now for men there is a greater interest in renewing declarations century by century.”⁵³

Since the post-Second World War period history has accelerated more than could be foreseen. To what extent does the Declaration of 1948 constitute the vision of a given historical epoch? Today, after the sixtieth anniversary of the Universal Declaration, would it not be advisable to begin to think about a text tailored to contemporary civilisations?

NOTES

¹ Cf. R. Werly, ‘Des mots pour le dire’, *Développement et Civilisations*, Paris, June 2006, n. 344, p. 1.

² The European regional system for the protection of human rights (to which belongs, in addition to the EU, also the Council of Europe) has been a model for other regional systems, particularly for the Latin American system and for the (Pan) African system (which is still embryonic). It is interesting to observe that an Asian system for the protection of human rights does not exist and perhaps this should be related to the 'communitarian' cultures of the Far East. At a global level the most eminent tribunal is the International Criminal Court.

³ G. Nascimbeni, 'L'ignorata carta dei diritti. Trent'anni dopo quanti sottouomini', *Il Corriere della Sera*, 9 December 1978, p. 1.

⁴ In reality, during the nineteenth century international law began to be concerned, albeit in a restrictive way, with the rights of individuals with the Conventions that prohibited the slave trade and were concerned with armed conflicts. And going back in centuries one cannot forget the first theological and juridical debate about human rights and international law after the discovery of America: cf. V. Abril Castelló, 'Los teólogos juristas de la Escuela da Salamarca. Padres de los derechos humanos en el mundo moderno y contemporaneo', *Religión y Cultura*, 1988, n. 205, pp. 271-300.

⁵ It is important to remember that different cultural traditions contributed to the protection – and thus to the foundation – of human rights which are today almost universally recognised (in theory). Amongst these two in particular stand out: an ancient tradition (from the Stoics to the Bible) which we could define as the classical lineage in which the Judeo-Christian lineage became important (the person is sacred because '*imago Dei*', as Genesis proclaims (1:26), and another which arose from a kind of 'secularisation' of the first with the Enlightenment (and its liberal-individualistic philosophy) and the French Revolution, thus from Kant to Rousseau. The first tradition recognises human rights on the basis of a natural order (whose author is God), whereas the second recognises them because man is endowed with conscience and rationality (as the Greeks had already affirmed). In this different conception of natural law (on which are founded both traditions) contrasts can be involved (for example in bioethics in the case of abortion). This matter was debated on more than one occasion during the preparation of the Declaration of 1948 but the ability of those (in particular Cassin and Chang) who feared 'metaphysical' debates, as it was put, managed to direct back the discussion onto more practical questions. The Declaration in the end confined itself to recognising 'dignity' as being 'inherent' in man and as the *a priori* that makes possible the recognition of rights and duties, the dignity that the Latins called *dignitas* and the Greeks called *axia* or *axios*, that is to say 'that which has a value in itself (an idea taken up by Kant). The subsequent national and international legislative texts (for example the texts of the Council of Europe, of the EU, the Arab Charter of Human

Rights and the African Charter) all nearly always take up the term ‘dignity’ when they refer to human rights.

⁶ The statutes of the International Labour Organisation which was created in 1919 granted a broader protection than that of the League of Nations but it was reserved to the protection of workers as such.

⁷ A. Cassese, *I diritti umani oggi* (Laterza, Rome/Bari, 2005), p. 25.

⁸ President Roosevelt emphasised respect for four freedoms: freedom of speech, freedom of thought, freedom of religion and freedom from want. The general lines of this speech were then taken up by the Atlantic Charter (1941) and to a lesser extent at the Conference of Dumbarton Oaks (August–October 1944) of the four great powers (the USA, the USSR, Great Britain and China) who met to prepare for the political organisation of the post-war period.

⁹ In reality the Economic and Social Council had previously appointed (on 16 February 1946) a Nuclear Commission made up of nine members, who were not official representatives of their governments, which drew up a series of recommendations for the council on the creation of the subsequent official commission: cf. E. Roosevelt, ‘The Promise of Human Rights’, *Foreign Affairs*, April 1948, pp. 470–477. Within the commission a discussion was also soon begun on the role and the structure of the organisation which was to be created. ‘*Deux conceptions vont s’opposer: une sorte de Cour suprême, de Conseil de Sages et, dans la logique de la Charte (de l’ONU), celle que fera prévaloir l’URSS, une émanations des Etats membres*’: E. Poulat, ‘La lente reconnaissance des droits de l’homme et le pluralisme de leur interprétation’, in R. Papini (ed.), *Droits des peuples, droits de l’homme* (Centurion, Paris, 1984), p. 29.

¹⁰ Of interest as well is the debate in France on human rights which had begun in 1940. In particular, E. Mounier opened the debate on the Declaration of 1789 in *Esprit* in 1941. In December 1941 he published his article ‘Faut-il refaire la Déclaration des droits?’ with a ‘*Projet d’une Déclaration des Droits des personnes et des collectivités*’. Mounier rebuked the Declaration of 1789 for having an excess of nationalism and individualism. After a debate in which took part some of the most important French intellectuals (amongst whom J. Lacroix, H. Marrou, J. Wahl, A. Philippe, L. Hamon, G. Scelle and R. Capitant), Mounier revised the text and published it in 1945. This text had an important influence on the drawing up of the Constitution of 1946. The historian L. Villari writes: ‘Mounier becomes topical every time that the subject of civil rights and duties, and the overcoming of individualistic and anarchic egoisms, is debated, showing that he is useful to democracy in progress’: ‘La nuova società di Mounier’, *La Repubblica*, 29 August 2008.

¹¹ Cf. F. O. Nolde, *Free and Equal. Human Rights in Ecumenical Perspective* (the World Council of Churches, Geneva, 1968); P. Chenaux, 'Les Églises chrétiennes et la Déclaration de 1948: rejet ou ralliement?', in *Universalité des Droits de l'homme et diversités de cultures* (Fribourg, Éd. Universitaires Fribourg Suisse, 1984), pp. 213-215.

¹² M. Glen Johnson, 'A Magna Carta for Mankind: Writing the Universal Declaration of Human Rights' in *The Universal Declaration of Human Rights. A History of its Creation and Implementation (1948-1998)* (Paris, UNESCO Publishing, 1998), pp. 19-24.

¹³ On E. Roosevelt cf. Allida M. Black, *What I hope to Leave Behind: the Essential Essays of Eleanor Roosevelt* (New York, Carlson Publishing Inc., 1995); Mary A. Glendon, *A World Made New. Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York, Random House, 2002); D. Winner, *Eleanor Roosevelt. The Woman who pioneered the Universal Declaration of Human Rights* (Watford, Exley, 1992); Joseph P. Lash, *Eleanor and Franklin* (New York, Norton, 1971); Joseph P. Lash, *Eleanor: The Years Alone*, London, (London, André Deutsch, 1973).

¹⁴ C. H. Malik, *War and Peace* (Stamford, Conn., The Overbrook Press, 1950. After taking part in the commission Malik was appointed chairman of the Economic and Social Council and then of the General Assembly.

¹⁵ On the decisive role of R. Cassin cf. S. Morsink, *The Universal Declaration of Human Rights. Origin, Drafting and Intent* (Philadelphia, University of Pennsylvania Press, 1999); Marc Agi, *René Cassin, Prix Nobel de la paix, 1887-1976, père de la Déclaration Universelle des droits de l'homme* (Paris, Librairie Académique Perrin, 1998); E. Pateyron, *La contribution française à la rédaction de la Déclaration Universelle des droits de l'homme* (Paris, La Documentation Française, 1999); R. Cassin, 'The United Nations and Human Rights', *Free World*, September 1946, n. 12; Marc Agi, *René Cassin, fantassin des droits de l'homme* (Paris, Plon, 1979); R. Cassin, 'La Commission des Droits de l'homme de l'ONU (1947/1971)', in *Miscellanea W.J. Ganshof van der Meersch* (Brussels, Université Libre de Bruxelles, 1972), vol. I. René Cassin has been defined as the 'father' of the Universal Declaration. He had had a long diplomatic experience as French delegate to the League of Nations (from 1924 to 1935), later joining De Gaulle in London and becoming his principal legal consultant. Indeed, he once declared: 'it was there that I had an important role because one could say that we worked together preparing for Nuremberg, the United Nations and UNESCO' (from an interview with Cassin quoted by his nephew H. Berthozin in a speech to the *Institut International des Droits de l'Homme*, quoted in the *Quaderno d'interculturala* of the Regional Council of Emilia Romagna, 1998, n. 3, p. 7. In the same interview (p. 8) Cassin adds 'they call me the 'father' of the

Universal Declaration. In reality I am the 'grandfather' inasmuch as I was the author of the third text and Pierre-Henri Teitgen wrote the second'. In truth no traces can be found of this role by Teitgen. The latter, a Christian Democrat, was later one of the most important French politicians of the Fourth Republic). Cassin took part in the preparatory conference and in the creation of the UN and was then vice-chairman of the Commission on Human Rights from its foundation until 1955. He was then its chairman until 1957. After receiving the Nobel Prize for Peace he founded in Strasbourg the *Institut International des droits de l'homme*.

¹⁶ J. P. Humphrey, *Human Rights and the United Nations: A Great Adventure* (Dobbs Ferry, New York, Transnational Publishers, 1984).

¹⁷ M. A. Glendon, *A World Made New*, p. 59.

¹⁸ M. Gandhi, 'Letter Addressed to the Director-General of UNESCO', in *Human Rights. Comments and Interpretations* (New York, Columbia University Press, 1949), p. 18.

¹⁹ The phrase is of R. Seydoux, New York ('Jacques Maritain à Mexico', *Cahiers Jacques Maritain*, October 1984, n. 10, p. 27) who went on 'Si depuis la guerre la France n'a pas retrouvé son rang dans le domaine de la politique internationale, dans celui de la culture, grâce à Jacques Maritain, elle a tenu sa place. C'était une rentrée en force'; cf. also J. Larnaud, 'En marge d'un anniversaire: Jacques Maritain et l'UNESCO', *Notes et Documents*, 1982, n. 28, pp. 1-3): 'De nombreux délégués réagissent aux thèses de Julian Huxley... mais il reçut une réponse adéquate par la bouche du philosophe catholique Jacques Maritain'. In this article Larnaud that for the celebration at UNESCO of the hundredth anniversary of the birth of the philosopher a draft resolution was presented to celebrate his memory by the French delegate M. Valéry and that 'M. Ota [Japon] avait demandé à en faire partie [tra i promotori della risoluzione] en raion du très grand rayonnement des idées de Maritain en Japon' (p. 1). The text of the paper by Maritain can be found in his book *La Voix de la paix*, now in *Oeuvres complètes* (Paris, Éditions Universitaires Fribourg Suisse-Éditions Saint-Paul 1947), vol. IX, pp. 143. Maritain had already been addressing the subject of human rights for some time, in particular in his *Les droits de l'homme et la loi naturelle* of 1942, published in the 'Civilisations' series of Edizioni della Maison Française of New York, which had been founded by Maritain and other French exiles. In the same series was published, amongst other works, also the book by G. Gurvitch, *La Déclaration des droits sociaux*. Both Maritain and Gurvitch wrote in these two works that France had to create a new 'political humanism' and thus should write a new *Déclaration des droits* which expressed political and social rights. In his small volume Maritain also referred specifically to the 'rights of working person', adding as regards them: 'D'une façon générale ce sont les droits de

l'être humain dans ses fonctions sociales, économiques et culturelles – droits des producteurs et des consommateurs, droits des techniciens, droits de ceux qui s'adonnent aux oeuvres de l'esprit – qu'un nouvel âge de civilisation aura à reconnaître et à définir. Mais c'est au sujet des droits de l'être humain comme engagé dans la fonction du travail que se posent les problèmes plus urgents', in *Oeuvres complètes*, vol. VII, p. 678. His most complete work of political philosophy (in which the subject of human rights, respect for which is essential to the development of the universal common good, is taken up) is *Man and the State* (Chicago, University of Chicago Press, 1951). On the work of Maritain in exile in the United States cf. M. Fourcade, 'Jacques Maritain et l'Europe en exil (1940-1945)', *Cahiers Jacques Maritain*, June 1994, n. 28, pp. 5-38.

²⁰ Maritain based the foundation of human rights on natural law, but according to received knowledge of the moral conscience, thereby giving a vision that was not only ontological but also historical of those rights. The Thomist G.M. Cottier OP stresses, however, the importance of the historical dimension to the affirmation of human rights (albeit founded on human nature): the fact that '*l'énumération des droits ne procède pas, pour ce qui concerne leur contenu, selon l'évidence d'une déduction analytique mais est tributaire de l'expérience historique... ne doit pas nous conduire à jeter le discrédit sur de telles déclarations. Il permet au contraire de souligner le rôle de l'expérience historique dans le développement de la conscience de l'humanité*': 'Réflexions philosophiques sur les droits de l'homme,' *Nova et Vetera*, January-March 1989, n. 1, p. 201.

²¹ *Autour de la nouvelle Déclaration Universelle des Droits de l'Homme. Textes réunis par l'UNESCO*, was published in French in 1949 with Sagittaire. The English text, *Human Rights. Comments and Interpretations*, was published in the same year by Columbia University Press and the Italian text three years later (1952) by Edizioni di Comunità, Milan. R. Mougél writes that to the *Rencontre des cultures à l'UNESCO, après le Concile Vatican II*, of 21 April 1966, 'René Cassin rendit hommage au rôle exercé par Maritain dans la préparation de la Déclaration Universelle des droits de l'homme, see 'Maritain et l'Église du Concile', *Cahiers Jacques Maritain*, June 2000, n. 40, p. 33. Cf. also R. P. McKeon, 'The Philosophic Bases and Material Circumstances of the Rights of Man', in *Human Rights: Comments and Interpretations* (London, Wingate, 1949). UNESCO continued its research work on human rights and we may remember in particular the round table held in Oxford on 11-19 November 1965 on human rights in the Asian and Islamic traditions and African *negritude*, and the Western liberal and Marxist traditions, in addition to protection at an International level, and later the conference of Bangkok of 3-7 December 1979 on different cultural and religious traditions.

²² In reality not all the members of the commission accepted the conclusions of UNESCO: cf. A. Verdoodt, *Declaración Universal de los Derechos del Hombre: nacimiento y significación* (Bilbao, Mensajero, 1969), p. 62.

²³ C. Malik later remembered the work of the final stage or third commission of the General Assembly and wrote: ‘those were great days twenty years ago when we were in the throes of elaborating for final submission to the General Assembly of the United Nations the draft Universal Declaration of Human Rights. Mrs. Roosevelt, M. Cassin, Mr. Santa Cruz and I, together with our respective advisers and assistants, soon achieved a fairly closed identity of views on aims and objectives. We worked more or less as a team: C. Malik, ‘Introduction’, F. O. Nolde, *Free and Equal Human Rights in Ecumenical Perspective*, pp. 7-9.

²⁴ On 9 December the discussion of the Assembly was opened and chaired by C. Malik who described the Declaration as a ‘composite synthesis’ of all the traditions, and in particular those of Asia and Latin America. Mrs Roosevelt described it as the ‘Magna Carta’ of all men.

²⁵ R.P. Riquet in particular stressed *Les sources judéo-chrétiennes de la Déclaration des Droits de l’homme* (in *Actualité de la pensée de René Cassin*, Ed. CNRS, Paris, 1981, pp. 63-68). Others (cf. in particular J.L. Chabot, ‘Le courant personaliste et la Déclaration Universelle des Droits de l’Homme’, in J. Ferrand and H. Petit (eds.), *Fondations et naissances des Droits de l’Homme*, Paris, L’Harmattan, 2003, Vol. I, pp. 333-355) have stressed in particular the influence of J. Maritain and his volume *Les droits de l’homme et la loi naturelle* of 1942 which referred rights not to the individual but to the person, writing: ‘*la personne humaine a des droits, par la même qu’elle est personne, un tout maître de lui même et des ses actes, et qui par conséquent n’est pas seulement un moyen mais une fin, une fin qui doit être traitée comme telle. La dignité de la personne humaine, ce mot ne veut rien dire s’il ne signifie pas que de par la loi naturelle la personne humaine a le droit d’être respectée et est sujet de droit, possède des droits*’ (*Oeuvres complètes*, IX, p. 661). S. Tzitzis (‘L’Ethique des droits de l’homme et les diversités culturelles’, in Ferrand and Petit, *Fondations et naissances des Droits de l’homme*, p. 186), makes clear that the Declaration of 1948 ‘*mettant un accent plutôt sur les finalités existentielles de l’homme comme propriétaire des droits fondamentaux que sur l’ontologie de ces derniers, cet humanisme ennoblit l’individu du titre de personne. Celle-ci n’est pas seulement porteuse des droits subjectifs, inhérents à la nature humaine; elle insiste en plus sur une valeur intrinsèque à son essence, la dignité dont la personne ne saurait jamais être déchu*’. The Declaration is thus said to be based upon personalist ethics. One could thus speak about a universal anthropology of rights, albeit in the context of a primarily Judeo-Christian culture. The personalist foundation of the Declaration facilitated its recognition by the Catholic Church which, in

particular with John XXIII, observed that it was a 'sign of the times' in the encyclical of 1963 *Pacem in terris*, the Catholic Magna Carta of human rights. The Catholic Church, after abandoning its rejection of human rights (above all political rights since its approach was rather different as regards social rights) with an attenuation of its anti-liberal polemic, and above all because of the threat of forms of totalitarianism to freedom of persons (but also with a theological reassessment of the temporal sphere), recognised their value thanks to its personalist position, formulated a more concrete vision of them, which was less a-historical, than that of the encyclopaedists who had a more subjectivistic philosophy. And this took place as a result as well of the mediation of Thomists such as Maritain who were able to open a debate with modernity and try to 'purify' its values. It is true, however, that although the Church as well ratified the Declaration of 1948, at the outset it looked with a certain perplexity at a Declaration in which there was no reference to the Christian vision of rights. Thus until *Pacem in Terris* (and then with the Second Vatican Council) there was no systematic pronouncement on human rights by the Roman magisterium, even though beforehand ecclesial approaches that were favourable to them had been developed, in particular with Pius XI and the encyclical *Divini Redemptoris* (1937) and Pius XII with his Christmas message of 1942 (it has been observed that Pius XII made 210 references to human rights: cf. B. Peyroux and R. Darricau (ed.), *L'Eglise Catholique et la Déclaration des Droits de l'Homme* (Angers, Presses de l'Université d'Angers, 1990), pp. 210 and ss. Thus, the phrase itself 'human rights' was late to appear in the Roman Magisterium, although this was not true of their contents, even though with the *Populorum Progressio* (1967) of Paul VI human rights together with justice and peace became the first frontier of the Church (one need only think here of its actions in the 1970s and 1980s in Latin and Central America and in Asia and Africa). Universally applicable is the judgement of the political scientist Samuel P. Huntington to be found in *The Third Wave Democratization in the Late Twentieth Century* (Norman, OK, University of Oklahoma Press, 1993). Cf. also S. Bernal SJ, 'Universalità dei diritti umani', in L. Bonanate and R. Papini (eds.), *Pace, diritti e ordine internazionale. Quali regole per la globalizzazione?* (Naples, ESI, 2003), pp. 111-132.

²⁶ M. A. Glendon, 'The Sources of Rights Talk. Some are Catholics', *Commonweal*, October 2001, n. 12, p. 12.

²⁷ *Ibidem*, p. 12. Glendon attributes a special role to C. Malik, in addition to other Latin Americans, in proposing the language of social Catholicism. Glendon does not use the term 'personalism' as other European scholars do. Probably, the explanation for this is to be found in the fact that in the United States of America personalist movements and experiences were rather limited compared to many European countries.

²⁸ In their respective encyclicals *Rerum novarum* (1891) and *Quadragesimo anno* (1931), Leo XIII and Pius XI had already defended the rights of workers and other social rights. In reality, the Church, in looking at the common good, defended not only individual rights but also collective rights (at the beginning social rights in particular). The case of Christian Democrat parties is emblematic in seeing how rights were often conceived within a frame work of interpretation that established an interpretation of them and a hierarchy of them. In this case this frame work was above all the social doctrine of the Church with its idea of the state, of a non-elite democracy in which people actively participated, the idea of intermediate bodies, of the family, of local societies, and the protection of minorities. Rights involve limits beyond which one cannot go, but the various political and social theories locate them (at least relatively) according to their principles.

²⁹ One cannot say that the Russian Declaration on ‘working and exploited people’ of 1917 had a real influence on the Universal Declaration because the first ‘*no es en realidad una declaración de derechos economicos, sociales y culturales, sino una proclamación de principios de organización jurídica y política revolucionaria*’: J.M. Alegria, ‘Derechos humanos’, in *Conceptos fundamentales de la pastoral* (Madrid, Ed. Cristianidad, 1983), p. 228. It should be made clear that ‘despite the precedents in Socialist and solidarity-based doctrines, an authentic theory of social rights only developed towards the end of the twentieth century... the Declaration of Social Rights of George Gurvitch (1894-1965) stands out, This was written in 1946 immediately after the liberation of France from Nazism and was published in New York’: (A. Facchi, *Breve storia dei diritti umani* (Bologna, Il Mulino, 2007), p. 119).

³⁰ The Nuremberg trials to try Nazi war criminals began on 1 May 1945 after a basic agreement was made at Yalta in 1945 and began in 1949 but the discussions of the Allies about the fate of those responsible at the end of the war began at the beginning of 1944. As regards Japan, the Allies decided to ‘punish her’ during the Conference of Cairo of 1944 but more specifically in 1945 since the decision was taken to try the German and Japanese war criminals. The Tokyo trials took place between 3 May 1946 and 12 November 1948. On the influence of the Declaration of 1948 on positive law cf. in particular F. Viola (ed.), ‘Gli effetti della Dichiarazione Universale dei diritti umani sul diritto positivo’, *Ragion pratica*, vol. 11, 1998.

³¹ Cf. R. Papini, ‘Introduction à une théorie des Constitutions d’inspiration personaliste’, *Notes et Documents*, July-September 1984, n. 7, pp. 4-21. In particular, the European Constitutions of the post-Second World War period have this orientation, but so do some of those of Latin America. For example in the *incipit* of the German *Grundgesetz* one reads: ‘the dignity of

man is intangible. It is the duty of every state power to respect it and protect it’.

³² E. Roosevelt, ‘Making Human Rights Come Alive’, *Phi. Delta Kappan*, 31 September 1949, pp. 22-23. The fathers of the Declaration hoped for a steady universal acceptance of it, whereas according to Glendon Maritain was more sceptical and summed up his position in the following way: ‘As for the main challenge, Maritain said it best. Whether the music played on the Declaration’s thirty strings will be in tune with or harmful to human dignity will depend primarily on the extent to which “a culture of human dignity” develops’, in M.A. Glendon, ‘Reflections on the UDHR’, *First Things*, April 1998, p. 25.

³³ For example, China has still only signed and not ratified the pacts on civil and political rights, and the United States of America has not ratified the pact on economic, social and cultural rights. These two pacts envisage the right of self-determination of peoples, that is to say the end of the colonial experience, but in recent years it has been taken up in relation to the rights of ethnic and/or cultural minorities: cf. in particular on this subject J. Habermas and C. Taylor, *Multiculturalismo: lotte per il riconoscimento* (Milan, Feltrinelli, 1998); W. Kymlicka, *Multicultural Citizenship* (Oxford, Oxford University Press, 1995).

³⁴ On the reasons for the political-legal division between political rights and economic and social rights cf. M. Borghi, ‘The Juridical Interaction between the Right to Food and the Code of Conduct: a Symbiosis?’, in M. Borghi and L. Postiglione-Blommestein (eds.), *For an Effective Right to Adequate Food* (Fribourg, University Press Fribourg, 2002).

³⁵ Cf. C. Golay, ‘The Right to Food and Access to Justice: the International Covenant on Economic, Social and Cultural Rights Before National Jurisdictions’, in M. Borghi and L. Postiglione-Blommestein (eds.), *The Right to Adequate Food and Access to Justice* (Geneva/Zurich/Basle, Schulthess Médias Juridiques SA, 2006).

³⁶ The Arab Charter of Human Rights, which was approved by the League of Arab States in 1994, although it refers to the Cairo Declaration, has a more secular basis. However, it has not yet been ratified by the majority of States. On the question of human rights in Islam cf. A. S. Mossali, *The Islamic Quest for Democracy. Pluralism and Human Rights* (Gainesville, FL, University Press of Florida, 2002); An-Na’im, ‘Toward an Islamic Hermeneutics for Human Rights’, in An-Na’im, A. Abdullahi, J.D. Gort, H. Jansen, and H. Vroom (eds.), *Human Rights and Religious Values: an Uneasy Relationship* (Amsterdam, Rodopi, 1995); T. Randam, *L’Islam, le face à face des civilisations* (Lyons, Tawhid, 2001). The literature on this subject is extensive.

³⁷ 'The Bangkok Declaration', in M. Davis (ed.), *Human Rights and Chinese Values* (Hong Kong, Oxford University Press, 1995), pp. 205-209.

³⁸ Cf. Sergio Díaz Ricci, 'La pobreza y el rostro de los derechos humanos en América Latina', in G. F. Fernández-Jorge and H. Gentile (eds.), *Pluralismo y derechos humanos* (Cordoba, Alveroni Ed., 2007), pp. 322-329.

³⁹ On the debate in Vienna cf. in particular Amartya Sen, *Lo sviluppo è libertà* (Milan, Mondadori, 2000), chap. X ('Cultura e diritti umani') and C. Villán Durán, 'Significado y alcance de la universalidad de los derechos humanos en la Declaración de Viena', *REDI*, 1994, n. 2, pp. 505-532. The compromise that was reached was that expressed in paragraph 5 of the final Declaration: 'All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms'. And the other fundamental point of the Declaration, which was strongly debated, is expressed in paragraph 8: 'Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing'. In 1998, fifty years after the Declaration of 1948 the validity of the Declaration was symbolically repeated and UNESCO published a volume in this sense with the contributions of about thirty political and intellectual figures.

⁴⁰ The theologian G. Piana sums up the question in the following way: 'Thanks to the advance of technology, the natural determinisms become gradually replaced by human intervention upon reality, to the point that one witnesses a steady transformation of 'nature' into 'culture': cf. 'Si può ancora parlare di «natura»? Considerazioni antropologico-etiche', *Aggiornamenti Sociali*, September-October 2006, p. 680. This process of manipulation, which is increasingly evident today, naturally stresses the need to establish limits to human intervention, but the concept of nature-limit should not be understood in a physiocistic-static sense. Piana observes: 'In defining human nature as 'nature as reason' (*natura et ratio*) Aquinas confers on it a dynamic status that justifies the possibility of man's transforming intervention...The human natural law takes on a new meaning: it is qualitatively different from the infra-human natural law, which is characterised by physical and biological determinism, to the point that St. Thomas comes to declare that one can in the case of man speak about 'natural law' only by 'analogy' (p. 682). In this concept of nature there is therefore attention paid to the historical dimension of the human conscience. A 'personalist' conception of nature thus goes beyond a biological

determinism and has a conception that is more connected with history, to the idea of the person and his relational dynamism. Benedict XVI has also stressed how the concept of 'nature' is not opposed to 'culture' but, rather, points out its foundation, which is written into reason itself from which springs every culture that is authentically human: cf. *Discorso ai partecipanti al Congresso Internazionale sulla legge morale naturale promosso dalla Pontificia Università Lateranense*, 5 October 2007.

⁴¹ Cf. E. Roccella and L. Scaraffia, *Contro il Cristianesimo. L'ONU e l'Unione europea come nuova ideologia* (Piemme, Casale Monferrato, 2005).

⁴² Cf. St. Gandreau, 'Des droits de l'homme aux droits de l'humanité', in J. Ferrand and H. Petit (eds.), *Fondations et naissances des Droits de l'homme*, pp. 239-255.

⁴³ One should bear in mind that when the Universal Declaration was approved, 58 countries belonged to UN representing four-fifths of the world's population: 22 from the Americas, 5 from Asia, 8 from the Near East and Middle East, 4 from Africa and 3 from Oceania.

⁴⁴ J. Maritain, 'Introduction', in *Human Rights. Comments and Interpretations* (UNESCO, New York, Wingate, 1949), p. 16.

⁴⁵ R. Panikkar, 'Is the Notion of Human Rights a Western Concept?', *Diogenes*, 1982, vol. 30, n. 120, 75-102.

⁴⁶ A. Sen, 'Elements of a Theory of Human Rights', *Philosophy and Public Affairs*, vol. 32, 2004, pp. 315-356.

⁴⁷ One of the books that marked the 'eternal recurrence' of natural law was that by H. A. Rommen, (*Die Ewige Wiederkehr des Naturrechts*, Leipzig, Hegner, 1936) which was translated into English in 1947 and later into other languages. The famous philosopher and sociologist, of a liberal lineage, Raymond Aron, made a radical criticism of the Universal Declaration: '*Toute déclaration des droits apparaît finalement comme l'expression idéaliste de l'ordre politique ou social qu'une certaine classe ou une civilisation s'efforce de réaliser... La Déclaration de 1948 remplit la fonction équivoque de toute déclaration: elle critique la société moderne au nom des idéaux que celle-ci s'est donnée*', in *Études politiques* (Paris, Gallimard, 1972, pp. 232-233.

⁴⁸ Cf. N. Chomsky, 'Diritti Universali', *Internazionale*, 22 April 2005, n. 587, p. 17.

⁴⁹ N. Bobbio (*L'età dei diritti*, Turin, Einaudi, 1990, pp. 17-18) wrote: 'The problem that faces us, indeed, is not philosophical, legal or in a larger sense political. One is not dealing so much with knowing the number of these

rights, what their nature is and their foundation, if they are natural or historical rights, absolute or relative rights, but what is the safest way of impeding them from being violated despite these solemn declarations’.

⁵⁰ F. Jullien, *De l’universel, de l’uniforme, du commun et du dialogue entre les cultures* (Paris, Fayard, 2008), p. 169.

⁵¹ The most important debate on universalism and culturalism (understood in their broad sense) has been held in North America. M.L. Lanzillo summarises this debate in the following way: ‘in definitive terms two principal positions animated the North American debate in the 1990s and on which were constructed all the subsequent theories of multiculturalism: one which criticises liberalism understood in a classical sense, and the other perfectionist liberalism) which is said to complete the classic liberalism of individual rights by associating with them the recognition of collective rights as well as long as they do not injure individual rights’: ‘Multiculturalismo, universalismo, conflitti culturali’, *Parole Chiave*, 2007, n. 37, p. 25.

⁵² J. Rawls, *Political Liberalism* (New York, Columbia University Press, 1993), Lecture VI, pp. 248-249.

⁵³ J. Maritain, ‘Sur la philosophie des droits de l’homme (Réponse à l’enquête de l’UNESCO)’, in *Oeuvres complètes*, IX, p. 1084. Maritain took up the idea in a paper given on 21 February 1949 to the Brandeis Lawyers Society of Philadelphia: ‘The conscience of humanity – and as a consequence awareness of the dignity of the human person – is by its nature *historical*; it has known rights in different ways according to the epoch and according to humanity’s level of development; this assumes not only a move to states of better organisation but also “advances towards the conquest of freedom”.’ The Declaration of 1948, therefore, ‘should be constantly revised and “interpreted” by a list of obligations and responsibilities that fall upon man’ (in *I diritti dell’uomo e la legge naturale*, Milan, Vita e Pensiero, 1991, pp. 121-143). And also those who recognise the natural law, Maritain went on, although they state that rights appear as a part of the evolution of society, state that some rights exist as part of the existence itself of society.

PART I

HUMAN RIGHTS: HISTORY AND THEORY

CHAPTER I

**HUMAN RIGHTS IN ETHICS, LAW, AND
POLITICS**

WILLIAM SWEET

INTRODUCTION

The latter half of the 20th century may certainly be regarded as a period in which the notion of human rights has had a key role in ethics and political philosophy, law, and politics. But, at the same time, there have also been many challenges to the language and discourse of human rights, and to efforts to have human rights guaranteed and respected within the legal system and the public sphere.

For some, the very idea of human rights is incoherent or inconsistent or simply redundant, there being other ethical concepts that serve us better in dealing with moral issues. Others see human rights – or, at least, those bearing on social, economic, and cultural matters – as having no clear limits and going too far. Others still would say that universal human rights do not go far enough to deal effectively with contemporary social problems. What are we to conclude from this today, some 60 years after the proclamation of the Universal Declaration of Human Rights?

In this chapter, I argue for the continuing relevance of the discourse of human rights. At the same time, however, I emphasize that we must be careful about how we understand the notion of human rights, and what this notion presupposes. Thus, I begin with a brief outline of the place of human rights in contemporary debates in ethics, law and politics. Next, I review some of the recent challenges to human rights, and note some common concerns. I then respond by noting some of the different ways in which one might reply to these concerns, and by focusing specifically on one distinctive account of human rights – that of Jacques Maritain. I argue that Maritain's account addresses many of the challenges raised against theories of human rights, and conclude that it provides a basis for recognising 'new' rights, such as rights to culture and rights to socio-economic goods.

**THE PLACE OF HUMAN RIGHTS IN CONTEMPORARY
DEBATES**

The notion of human rights draws on the concepts of 'natural rights' and 'right,' whose origins can be traced back to mediaeval and even classical Greek thought. The notion of 'natural right' is clearly articulated in the seventeenth century (with Hugo Grotius [1583-1645] in *De Jure Belli Ac Pacis* [*The Rights of War and Peace*] [1625]), and it gradually came to have

a central role in political, social, and philosophical thought through the work of Thomas Hobbes (1588-1679) and many of those who followed (e.g., the Levellers, John Locke, Jean-Jacques Rousseau, and Thomas Paine). Thus, the notion has come to be associated with modern approaches in ethical theory, with individualism, and with the democratic tradition. Up to the early 20th century, such rights were generally referred to as ‘natural rights’ but, since the World War II, the preferred term has become ‘human rights’ – perhaps because this term does not commit one to any particular account of the nature and source of rights.

The notion of ‘human rights’ still pervades our ethical, legal, and political vocabulary, and it would be impossible to describe recent work in ethics, law, and politics, without mentioning the role played by the discourse of rights. Let me begin by a brief review of the role that the language of human rights has played in these areas.

Ethics

In contemporary ethics, one finds the notion of human rights as a key feature of at least three distinct approaches.

One approach is that of so-called rights-based ethical theories, where individual freedom is primary. As Robert Nozick famously begins his 1974 book, *Anarchy, State, and Utopia*: “Individuals have rights, and there are things no person or group may do to them (without violating their rights).”¹ For Nozick, rights are inherent in human beings, constitute a “moral space around an individual”,² and set “the constraints in which a social choice is to be made”.³ These rights to “life, health, liberty” and “possessions” – and the right to punish when these rights are violated – are “natural”; they are not dependent upon history or culture or context or the particular society in which one lives. They reflect an individual’s moral worth and dignity. But these individual rights involve nothing more than ‘freedom from’ the interference of others – i.e., they are ‘negative’. These individual ‘moral’ rights have political and legal implications. Consistent with Nozick’s “libertarian” approach, the function of the law is simply to ensure the respect of one’s negative rights; one cannot justify the existence of anything more than a ‘minimal’ state, whose primary function is the protection of the (‘negative’) rights of its members. Rights, then, are natural and based on what it is to be a person. They extend to all those who are capable of a moral personality – i.e., have the capacity to lead integrated and meaningful lives⁴ – though there is a hint that they might extend even beyond this (see Nozick’s comments on animal rights⁵).

A second approach to ethics in which a key role is played by human rights goes beyond Nozick’s libertarian model and focuses on moral agency. In a number of books — *Reason and Morality* (1978), *Human Rights* (1982), and *The Community of Rights* (1996)⁶ — Alan Gewirth argued that human beings need freedom and well-being in order for them to be agents — that is, to be able to act in a rational, voluntary and purposive

fashion for some good or goods. Freedom and well-being are generic features of human action regardless of the culture or context or historical situation. Every individual agent *must*, therefore, hold that he or she has a right to these generic features of human action for, otherwise, he or she could not act. Gewirth then adds that a person cannot claim *rights* for him or herself alone; each individual person must admit that others have these rights as well, since all agents require the same conditions for action. Thus Gewirth's (moral) Principle of Generic Consistency is that one must "Act in accord with the generic rights of your recipients as well as yourself."⁷

For Gewirth, a person's rights extend beyond the narrow list of negative rights. Gewirth argues that having a right to well-being requires having (and having a right to) a range of goods. Some of these goods are basic and indispensable to the right to well-being itself, such as a right to life and to physical and mental integrity; historical circumstance or relation to others plays no role in the attribution of such rights to individuals. But some of these goods are 'additive', that is, they increase one's capacity and ability to act purposefully. (Thus one has rights to moral and intellectual education.) The Principle of Generic Consistency leads, then, to 'positive rights,' with their corresponding political implications – that is, to rights to welfare ("productive agency"), to employment, to private property, to economic democracy, to political democracy, and, thereby, to what Gewirth calls "the supportive state." This indicates that there is no fundamental conflict (as libertarians such as Nozick have argued) between negative and positive rights and between human rights and the state, and that what is 'good' or 'right' is largely what accords with an individual's basic generic, and even non-basic rights.

Despite his defence of generic (and other basic human) rights as 'natural' and 'fundamental,' Gewirth admits that human rights are "only *prima facie*, not absolute"⁸, and may be overridden. Moreover, even fundamental rights are ascribed and attributed only to the extent that one satisfies the moral criteria for being a person – not simply for being human. In other words, while each person must have the fullest generic rights of which he or she is capable, this does not mean that everyone has the same generic rights *in full*, and Gewirth distinguishes between actual, prospective, and potential (e.g., children) agents, with each having some degree of rights. Thus, while rights are natural and related to what it is to be a person, Gewirth acknowledges that there are degrees of being a person.

A third approach in contemporary ethics sees human rights as central, but does not seek to provide a foundationalist account for them (i.e., an account that attempts to ground rights on first principles or accounts of human nature). Instead, it focuses on the social relations that characterize the ethical community. In *Rights and Persons* (1977) and *Rights in Moral Lives* (1988)⁹, A.I. Melden describes rights as intelligible only in the context of life in a moral community. Melden holds that the ascription of rights depends, at least to some extent, on the *recognition* of one as a member of the moral community — that we care about others, or at least that we are

“the reasonable object of the moral interest of everyone else”¹⁰ – and not on any particular feature we may possess, such as rationality, autonomy, or intrinsic worth. Melden argues that humans have a *basic* inalienable right “to conduct their own affairs in pursuit of their interests,”¹¹ which presupposes the right to life and the right to a moral education (so that one may become a full moral agent).¹² There are a number of additional human rights which, Melden says, are analytic consequences of this basic right (e.g., resistance to oppression, and to redress and relief from interferences). Not respecting human rights is wrong because it is not treating individuals with the dignity they deserve as capable of being full participants in the life of a moral community. And, even if one’s rights are overridden, infringed or refused, they still leave a residue or “trace.” Melden’s view, then, allows for a much broader range of rights than found in libertarian authors, is attentive to ethical relationships among human beings, and also provides one with a means of establishing a priority among rights. Still, the focus of one’s rights is to allow individuals to conduct their own affairs in pursuit of their own interests and, once rights are ascribed, what these rights involve and how they are used are largely determined by the individual alone.

Human rights have had a key role in other ethical theories as well; they are central to the stronger versions of libertarianism, such as those of Herbert Spencer, Tibor Machan and Douglas den Uyl¹³; to the natural law theory of John Finnis¹⁴; and also to ‘left libertarians’ such as Hillel Steiner¹⁵. Indeed, it is not surprising that in much of the recent ethical discourse in the west, what counts as ‘right’ and ‘wrong’ are largely determined by their effect on someone’s rights; the moral claim to do as one wishes is supported by a claim that it is one’s right (provided no one is harmed unless they consent); and that interfering with people pursuing their good in their own way (again, if no one else is harmed) is wrong because it violates their rights. It is evident, then, that rights have a key role in ethics, and so they have, in turn, an influence in law and in politics.

Law

Perhaps the most obvious place where human rights have a presence in the law is in the context of charters and declarations of rights and related conventions and protocols.

The first such documents are likely *The Virginia Declaration of Rights* (12 June 1776), *The Declaration of Independence of the United States* (4 July 1776) and Amendments I - X to the Constitution of the United States [*The Bill of Rights*] (1791); the French *Déclaration des droits de l’homme et du citoyen* [*Declaration of the Rights of Man and the Citizen*] adopted by the Constituent Assembly in 1789 and the *Constitution* of 14 September 1791, and the *Constitution of Poland* (of 3 May 1791). These declarations lie, directly or indirectly, at the root of many of the more recent charters and declarations of rights found in the constitutions and legislation of nation states – at least, in those states that recognise the rule of law – and

they express the existence of a number of basic human rights, such as rights to life, to be secure from arbitrary treatment, to liberty of opinion, belief, expression, association and assembly, and to resistance to oppression. These basic human rights are also widely taken to be foundational, and to set limits, to legal systems.

Human rights also have a central place in international law – particularly in those international documents that follow the early declarations of rights. Perhaps the most important documents of the 20th century here, are the *Universal Declaration of Human Rights*, adopted by the General Assembly of the United Nations in 1948, and the subsequent UN International Covenants on Economic, Social and Cultural Rights (1966), on Civil and Political Rights (1966), and the Optional Protocol to the International Covenant on Civil and Political Rights (1966). But the central role of human rights in international law is also evident in such documents as the “American Declaration of the Rights and Duties of Man” (1948), the “American Convention on Human Rights” (1969), the “European Convention on Human Rights” (1950) and its Protocols, the “African Charter on Human and Peoples’ Rights” (1981), and so on. Moreover, when it comes to international law, human rights issues may be addressed by The International Court of Justice (the principal judicial organ of the United Nations, whose seat is at the Peace Palace in The Hague, Netherlands), and by the International Criminal Court (established in 2002, and which has, as its focus, the prosecution of individuals for crimes against humanity, such as genocide, and war crimes). At a regional level, legal institutions, such as The Inter-American Court of Human Rights and The European Court of Human Rights have been established to receive complaints from persons claiming that their rights under these conventions or their protocols, have been violated. The Tanzania-based International Criminal Tribunal for Rwanda (ICTR) dealing with the Rwanda genocide of 1994 of Tutsis and moderate Hutus is but another example of an international legal body whose task is focussed on addressing the massive violation of human rights.

Because of their place within constitutions and the foundational legislation of states, human rights have a place even in the day-to-day operation of state law. One of the principal considerations of courts is to ensure that laws do not contravene basic human rights. And, more broadly, the practice of the courts is to guarantee a respect for and an enforcement of human rights, particularly when courts seek to balance the demands of justice and equality.

Perhaps the most obvious instance of this feature of human rights is provided by those judicial and quasi judicial bodies (such as human rights tribunals and commissions) which frequently deal with allegations of discrimination against racial or ethnic minorities or against individuals on the basis of sexual orientation, religion, age or disability – for example, concerning access to public services, such as housing, or to educational and employment opportunities. But the law also deals with other kinds of

violations of rights, such as 'hate speech' – i.e., speech designed to promote hatred of a group. Addressing rights violations is so important that courts have initiated or approved policies to react to the violation of these rights, such as 'Affirmative Action' and 'Equal Opportunity' – though how far courts can continue in this direction is a highly controversial issue.

Human rights, then, are clearly associated not only with the practice of law but with the principle of the rule of law. Indeed, it is not infrequently the case that, because of their place within the law, the law itself is subject to human rights. And because human rights are so often described as including the freedom of individuals to define their conceptions of the good in their own way, the law itself is (ironically, perhaps) supposed to be independent of any overarching ethical or moral considerations – even in countries which reject any kind of positivism in the law.

Politics

A key area in which human rights have had a place or an influence in politics is in the creation of constitutions and declarations of human rights. Although such declarations, as noted above, have a legal role, they have a political role as well; they are often the product of political activity, and define political structures and relations within (and, to an extent, among) states.

A second important area in which human rights have had a central political role are in the liberation and civil rights movements that swept through Asia, the Americas, and Africa most noticeably beginning in the 1950s. The American civil rights movements of the 1950s and 1960s, which were essentially movements that sought to guarantee African-Americans the rights of the human and the civic person, inspired a number of public policies concerning race and discrimination in education, employment, and public services. These policies brought major structural changes to the American political environment, and even served to inspire the careers of a number of American politicians. Again, liberation and rights movements in South Africa and Asia, beginning in the 1950s, ignited wide political and social change in these regions. Challenges to colonialism and oppressive totalitarian or autocratic regimes were often justified by appeals to human rights. The efforts of Archbishop Desmond Tutu (Nobel Prize, 1984) and Nelson Mandela (Nobel Prize, 1993) for the human and civil rights of *all* South Africans, led to political changes not only in the Republic of South Africa, but throughout many of the neighbouring states. The courage of Lech Walesa (Nobel Prize, 1983) and Andrei Sakharov (Nobel Prize, 1975) kept 'human rights' in the public eye, and their efforts in advocating for these rights led to major political changes in Eastern Europe. Even today, the ongoing struggle by Aung San Suu Kyi of Burma (Nobel Prize Winner in 1991) to promote human rights has had a strong impact on politics inside and outside her country. Through much of the past 60 years, movements for human rights have been closely involved with movements for political

change, and it is not surprising that human rights have come to serve as a regulative political ideal.

The role of human rights in politics is also evident in that it is generally expected that national political parties pursue human rights agendas in domestic matters, and popular political discourse is frequently marked by appeals to rights. Consider, for example, how a number of political policies – such as efforts to protect cultures and linguistic and cultural identity (e.g., multiculturalism), to address gender discrimination and issues related to sexual orientation, and to promote health and well-being through social programmes – all hinge on claims about the rights of individuals or collectivities. Indeed, in some countries, issues involving human or basic rights dominate domestic politics during election campaigns; consider the debates in the United States about the right to bear arms (the second amendment to the US constitution), or the discussions in Western countries concerning the rights to adequate medical care and social assistance.

Human rights have clearly played an important role in international politics since the end of the Second World War. During the Cold War – but also more recently, during debates on the state of democracy in China, Cuba, Zimbabwe, Myanmar, and other countries – concerns about respect for human rights not only set the tone for foreign policy, but also influence trade and offers of foreign aid. At the same time, there is a growing recognition of the obligations of wealthier and more developed nations to ensure the provision of basic rights; at the international as well as at the domestic level, there has been increased discussion of social and economic rights, such as the right to food. The human rights involved here range from the ‘negative’ to the ‘positive’ – i.e., freedom from restrictions imposed by the state, to the state providing access to certain goods – and there is a growing awareness within states for the recognition of collective as well as individual rights. Too often in these discussions, however, the understanding of the nature of ethical relations is weak, and there is much debate about which rights – the negative or the positive – should take priority, and whether any rights are absolute or universal. Thus, frequently, the rights that states are called on to preserve and protect, tend to be simply those required for greater individual choice and autonomy. Indeed, in politics, the call for rights – positive and negative, individual and collective – seems to focus on providing more opportunities for individuals to do what they choose, and fewer opportunities for the state to restrict individual choice.

The notion of human rights has had a key role in ethics and political philosophy, law, and politics, particularly during the latter half of the 20th century, and it is difficult to imagine a discussion of contemporary public affairs without mentioning them. This focus on human rights has seemed to emphasise autonomy, creating more opportunities to pursue one’s own good as one sees it, individual choice, and limiting the influences of others over oneself.

But there has also been strong opposition to the language and discourse of human rights.

RECENT CHALLENGES TO HUMAN RIGHTS

Even as talk of human rights came to dominate ethical, legal, and political discourse in the mid to late 20th century, there were always undercurrents of criticism. Such criticism has increased through the last two decades of the 20th century and into the 21st – and in all three of the areas mentioned above.

Consider, for example, the sphere of ethics. Does or should human rights have a key role in defining and determining what constitutes ‘right’ and ‘wrong’ and ‘good’ and ‘bad’? Should they determine the conditions for ethical behaviour and the ethical relations among persons? Some critics have argued that the discourse of human rights presupposes concepts such as ‘nature’ and ‘human nature’ and the idea of a natural law, from which universal and even putatively absolute rights are to be derived. But there is, these critics note, no legitimacy to these concepts or to any similar foundation for such rights. Moreover, they object that such rights are morally, but also legally and politically, dangerous, because they assert the authority of rights over ‘the good’ and over public order, and thus they have – as Jeremy Bentham would say – “anarchical” consequences.¹⁶ A focus on human rights may lead us to fail to recognise sufficiently the suffering of oppressed or marginalized groups, or the superiority in value of certain fundamental goods, such as a healthy environment – and so rights fail as principles of ethics or justice. And to the extent that greater ethical and social goods take priority over rights, the language of rights adds nothing to our ethical vocabulary.

There are other criticisms as well. Some argue that theories of human rights, and the accompanying emphases on autonomy, liberalism, and the priority of negative rights over positive rights, all reflect a gender-specific and gender-dominant (i.e., male) view of the person and of social and ethical relations among individuals, and which excludes other understandings of the person and of the relations among them; this is a critique that has been advanced by a number of feminist and post-colonial theorists.¹⁷ Others argue that to focus on human rights is ultimately to focus on *individual* rights, and this again ignores social goods and the claim that there is, for example, a common good of the community to which individual rights must yield.¹⁸ Finally, some argue that there can be no human rights apart from a legal system – that for human rights to have any authority or weight at all, there must be a community as well as a law that is able to define and sanction violations of rights. The result of this, however, is that claims to rights need to be expressed within a legal system to have any force, with the further consequence that such rights cannot be, by their very nature, universal

When it comes to the place of rights in law, we again find substantial criticism. Some have objected that legal systems vary, and that

there is no consistent definition of the person or human being within the law. Thus, any rights that legal systems enumerate cannot claim to be true of, or apply to, all human beings. Moreover, because such rights depend upon the (western) idea of a rule of law and equality before the law – and so reflect a contingent historical (rather than a universal and necessary) relation of individuals to the community – again, no rights are universal or apply to all human beings (and thus there is no reason why other cultures should think that such rights should be universal). Further still, as noted above, some object that human rights do not go far enough to satisfy the moral and legal demands of justice. Since these rights may restrict legal systems in providing appropriate remedies for certain major social problems, they may even contribute to the suffering of marginalized groups.

But perhaps the most sustained objections to human rights come from the area of politics.

In the first place, it has been frequently argued that the discourse of universal human rights is a tool (particularly, of western countries) that has been used to carry out a self-interested political agenda.¹⁹ To insist that all nations respect human rights, then, is simply the imposition of a western, ‘foreign,’ political, legal, and moral norm. As evidence for this claim, critics note that calls for the respect of rights are often inconsistent, and made only when it suits the interests of the dominant powers; critics point to how developing countries have been pressured to guarantee certain ‘negative’ human rights if they wish to benefit from foreign aid. Moreover, using the language of human rights as a substantive moral standard is suspect because these rights – particularly socio-economic rights such as rights to education, food, health, land, water, environment, social security and housing – are frequently not respected in those western nations that so often refer to them in their political rhetoric.

Critics also note that the discourse of human rights is not culturally or ideologically neutral – that such a discourse arose in a specific culture in a relatively recent epoch, reflects concepts and values that are peculiar to the west, and has no relevance to (and in fact conflicts with) the equally-legitimate values and traditions of other cultures. It simply does not make any sense to speak of *universal* human rights. At the very least, it must be left to individual states to determine the priority of ‘social,’ economic, and cultural rights in relation to civil and political rights, such as freedom of speech, association, religion, and so on.

Some have objected that ‘human rights’, as they are presented in documents such as the Universal Declaration of Human Rights, go too far – that many of these so-called rights are impractical or are in conflict with other rights. In some developing countries, positive rights, such as cultural and economic rights (e.g., rights to social security, to housing, to adequate medical care) may simply be beyond the material and financial resources available. Alternately, to attempt to guarantee social and economic rights requires the restriction or violation of other rights (e.g., of some people’s property rights, since taxation will be necessary in order to pay for

providing such positive rights). And even though many civil and political rights, understood as essentially ‘negative rights,’ may be relatively inexpensive to assure, the consequences for the growth and development of societies may be such that they would indirectly result in a significant maldistribution of resources.

Several recent critics have taken a rather different view, arguing that human rights do not go far enough to allow nations to address pressing social issues. Recently, those defending ‘green’ politics have maintained that human rights and its attendant notions are outdated – that, in a world undergoing ecological crisis or where there is a serious maldistribution of food, along with environmental problems, war, and the exclusion of people from participating in government, human rights neither do nor can serve to provide sufficiently effective instruments to address these issues, particularly when so many of these issues involve threats to life on a world-wide scale.

In short, whether it be in the area of ethics, or in law, or in politics, there have been substantial objections to human rights: that there is no human nature or natural law from which rights can be derived; that claims to rights need to be expressed within a legal system to have any force or weight (with the consequence that such rights cannot be universal); that certain rights are not applicable to certain cultures – or, at the very least, are insensitive to cultural difference; that human rights presuppose an inaccurate or incomplete account of the relation of individuals and communities; and that, even where plausible, such rights have been used to advance a problematic political agenda. The notion of human rights, distinct from legal or constitutionally guaranteed rights, is, therefore, a vague and useless — if not an altogether dangerous — idea, and there is little to be gained by an appeal to them.

Yet, despite such forceful criticisms, appeals to human rights continue to be made. Clearly, the preceding challenges call for a response, along with a further elaboration and discussion of the principles of human rights.

UNDERLYING ASSUMPTIONS

There are, then, several, substantial objections to human rights in ethics, law and politics. Is there a way of addressing these critiques and of preserving the relevance and the place of human rights?

I would argue that, in order to reply to these criticisms, we need to look first at what they have in common or presuppose about human rights, and then determine to what extent the discourse of human rights actually has these features.

The preceding objections raise four principal issues. First, these objections assume that the discourse of human rights rests on conceptions of the person and of relations among persons that are far from universal, and that the underlying account of ethical relations suggests a tension between

the individual and the community or state that simply does not exist in every culture. Second, they hold that there is simply no plausible way in which a set of universal (and, putatively, ahistorical) rights can be ascribed to all human beings. Such rights cannot be inferred from natural law, and they reflect a universalizing and totalizing discourse which ignores cultural difference and the role of (contingent) historical events. Third, such rights are allegedly not adequate to doing justice to a number of pressing socio-economic and cultural issues – issues that did not exist even a half-century ago, and which go beyond the rights and interests of individuals. And fourth – something that seems to lie at the root of the above and related concerns – the basic universal human rights defined in charters and declarations tend to emphasize the individual and individualistic conceptions of the good (which therefore focus on the rights – and primarily the ‘negative rights’ – of individuals), and give individuals priority over wider or social goods.

A common, if not constant, underlying concern, then, is that the notion of human rights is inherently individualistic – that the language of human rights presupposes that the individual is of a primary if not a preeminent value; that these individuals are independent, autonomous agents with their own conceptions of the good, and whose interests must be protected; that ethical relations and obligations are based largely on the consent of the individual parties; and that communities (especially the state) must respect individuals and the goods they choose to pursue (so that human rights are the means by which individual interests may be pursued, even against those of the community, the state, and the common good). This is, perhaps, why there has been such a close association between human rights, individualism, and liberalism (if not libertarianism).

This emphasis on the individual and the individual’s pursuit of his own good in his own way, is troubling to many who are concerned with wider social, economic, and cultural goods and the interests of the community, particularly in those parts of the world that are on the road to economic development.

But do human rights necessarily presuppose such a conception of the person, of ethical relations, and of the good? Are human rights ahistorical, totalizing, and insensitive to history and culture? Does the language of human rights necessarily imply such an individualism? Some would say ‘no’ to all of these questions.

HUMAN RIGHTS WITHOUT INDIVIDUALISM

While individualism seems to be generally assumed to be a necessary feature of human rights, there are a number of accounts which are not committed to it. J.S. Mill’s utilitarianism seems to find room for both a broad range of individual liberties (such as liberty of speech, belief, association, expression, and the like) while, at the same time, placing them within a broader context of the greatest good of the community.²⁰ (A similar position is sometimes described as ‘rule utilitarianism.’²¹) In *A Theory of*

Justice, John Rawls identifies two principles of justice that are the product of a ‘social contract’ procedure and which, again, propose a range of liberties – and even rights – that, some defenders would claim, are subject to considerations of social justice and the needs of the community as a whole.²² (Indeed, Rawls’ account of human rights can be said to include ‘positive rights,’ and provides a basis for rights to social welfare.) Late 19th thinkers such as T.H. Green and Bernard Bosanquet also argue for the importance of rights, but within a context of a broader conception of the good – one which is both an individual and a common good. Thus rights are defined and exercised with, not against, the community.²³ Finally, many scholars have been attracted to what has been called a ‘pragmatic approach’,²⁴ or have come to see the discourse of human rights as a ‘practice’ or serving as a ‘regulative political ideal,’ so that – although human rights are not natural or inevitable, are the product of historical accident, and may change – they have become “deeply rooted” and recognised as legitimate in almost every nation.²⁵ Thus, while human rights are not fixed or final, they are effectively universal.

The difficulty with many of these views, however, is that they seem to reduce or eliminate the ‘individualism’ of human rights by drawing on ethical, legal or political theories that have been accused of compromising the values and dignity of human beings altogether. An exception to this – one which provides a more radical response to the preceding challenges to human rights and which, perhaps ironically, reflects a very traditional view – is, I would argue, provided by Jacques Maritain.

MARITAIN AND THE RESPONSE TO CHALLENGES TO HUMAN RIGHTS

Jacques Maritain saw in the language and the practice of human rights a solution to many of the problems existing in the world of his time, particularly in the period from the late 1930s to the mid 1950s, and he believed that they provided a means of ensuring and promoting human dignity.

The specific details of his view appears in a number of texts: in such books and articles as *Les droits de l’homme et la loi naturelle* (1942)²⁶; *La personne et le bien commun* (1946/7)²⁷; *Man and the State* (1951)²⁸; “Natural Law and Moral Law” (1952)²⁹; and *La loi naturelle ou loi non écrite* (written in 1950-51, and posthumously published in 1986).³⁰

Maritain provides an analysis of human rights as, fundamentally, natural rights. Nevertheless, he goes beyond classical views in a number of ways. One important difference is Maritain’s distinction between the individual and the person.³¹ On Maritain’s view, human beings, as individual material beings, are part of a larger social order and have rights, but also duties, as part of that order. Yet human beings are also persons — beings who, because they are free, capable of intellectual and moral activity, and have a supernatural destiny, have dignity, cannot be subordinated to the

social order, and must be treated as 'ends.' Human beings have duties, given their relation to this supernatural order, but they also have rights, and these rights and duties may take priority over the social duties that they have as individuals. Thus, Maritain writes:

Man is a part of and inferior to the political community by reason of the things in and of him which, due as they are to the deficiencies of material individuality, depend in their very essence upon political society and which in turn may be used as means to promote the temporal good of the society. ... the individual, depends upon the community. Consequently, the community can in given circumstances, require the mathematician to serve the social group by *teaching* mathematics. ... On the other hand, by reason of the things in and of man, which are derived from the ordination of personality as such to the absolute and which thus depend in their essence on something higher than the political community and so concern properly the supra-temporal accomplishment of the person as person, man excels the political community. ... The community [therefore] will never have the right to require the mathematician *to hold as true* some one mathematical system rather than any other ... for instance, "Aryan" mathematics or "Marxist-Leninist" mathematics³²

Maritain reiterates this latter point, which emphasises some of the practical implications of the distinction between the individual and the person:

the State can, under certain definite circumstances, ask a mathematician to teach mathematics, a philosopher to teach philosophy—these are functions of the social body. But the State cannot force a philosopher or a mathematician to adopt a philosophical doctrine or a mathematical doctrine, for these things depend solely and exclusively upon truth.³³

This distinction between person and individual, then, allows Maritain to insist on the value, dignity, and rights of the human person while avoiding the consequences of an individualism that ignores or minimizes one's obligations to others and to the community. At the same time, it also allows him to insist on one's responsibilities to others and to the community, while avoiding the risk of having human beings used merely as means to social or collective goods.

According to Maritain, human rights are not only rights of the 'human person as such,' but also may include rights of the civic person and of the working person. These latter rights can also be "fundamental" and

“inalienable,”³⁴ and “antecedent” (though not in a temporal or a moral sense) to the state and civil law. In this way, Maritain extends the list of human rights significantly beyond that found in many liberal theories. Human rights have a foundation in the natural law – i.e., are rooted in the nature of the human being as a person and as a social being – but extend beyond it.

Among the basic freedoms and rights that ‘follow from’ the natural law are “[m]an’s right to existence, to personal freedom and to the pursuit of the perfection of moral life.”³⁵ But there are also other rights (and duties) “which follow from the first principle [of the natural law] in a *necessary* manner, but [...] supposing certain conditions of fact, as for instance the state of civil society or the relationship between peoples.”³⁶ These rights are “universal, at least in so far as these conditions of fact are universal data of civilized life.”³⁷ As examples of these rights and freedoms, Maritain mentions “the right to the private ownership of material goods,”³⁸ “Freedom of every person to worship God in his own way” (or “freedom of conscience”³⁹) and “Freedom of speech and expression”⁴⁰ – which he says later is better understood as “freedom of investigation [...] to seek the truth.”⁴¹ Maritain also refers to the “rights of the civic person” – “of the human individual as a citizen”⁴² – where these “political rights” “spring directly from positive law and from the fundamental constitution of the political community.”⁴³ Examples of these rights are: political equality within the state, equality before the law, and equal admission of all citizens to public employment according to their capacities.⁴⁴ Finally, Maritain refers to the rights of the “social person, more particularly of the working person.”⁴⁵ Such rights include the right to a just wage, the right to work, the freedom to organize (in trade unions), and the right to strike.⁴⁶ Such rights and freedoms ‘concretize’ the basic freedoms and rights that follow from the natural law. A right belonging to these latter categories is not, Maritain says, strictly speaking, universal or natural, since it “supposes the conditions normally required for human work and for its management (which varies, moreover, according to the form of a society and the state of development of its economy).”⁴⁷ But these rights are no less human rights.

Though Maritain regards all these rights as human rights, pertaining to all human beings, history and culture have a role. Indeed, it was only in the 18th century, Maritain notes, that there was a “sudden awareness of human rights.”⁴⁸ But this is because it was only as certain fundamental inclinations were able to develop within humanity, as human nature came to be better understood, and as our awareness – not necessarily an awareness at the conceptual level – of certain demands of the natural law increased, that the “inclination to liberty” and to “the specific equality of human beings”⁴⁹ came to exist and were recognized. In other words, while the coming into existence of certain rights is historical and culturally determined, Maritain says that this does not make human rights any less fundamental or universal.

Many of the human rights, then, are strictly speaking not natural. They may reflect life in community (and so are part of the *ius gentium* or

'common law of civilization' or international law).⁵⁰ They may even be dependent upon (as noted above) the particular conditions present in a society, and here they are influenced by, but also influence or determine, the positive law. Yet all can be said to be human rights.

All of the preceding freedoms and rights are related to our nature as morally free and rational beings, and follow – directly or indirectly – from natural law. Maritain writes that “[i]f man is morally bound to the things which are necessary to the fulfilment of his destiny, obviously, then, he has the right to fulfill his destiny; and if he has the right to fulfill his destiny he has the right to the things necessary for this purpose.”⁵¹ Maritain also insists that “the natural law [...] recognize[s] rights, in particular, rights linked to the very nature of man,”⁵² and that “[t]he notion of right [...] [is] founded on the freedom proper to spiritual agents”⁵³ – i.e., the freedom which is man’s *telos*. Since the natural law is concerned with the ‘ends’ appropriate to the nature of a being, one can say that one’s rights ultimately follow from natural law.

Maritain’s account of human rights is consistent with the role of human rights in ethics, law, and politics, outlined above. As we have seen, Maritain recognizes rights as fundamental – and even as inalienable and necessary – to the human being as moral agent. Moreover, Maritain’s discussion of the *ius gentium* and the relation of positive law to the natural law shows that he recognizes the role that human rights have – and ought to have – in the law. Maritain’s influence on those involved in the drafting of the Universal Declaration of Human Rights, and the similarities between his enumeration of human rights in 1942 (in *The Rights of Man and Natural Law*) and the rights contained in the Universal Declaration, illustrate his sympathies for human rights as lying at the root of the constitutions and legislation of modern nation states. It is no surprise, then, that Maritain’s views were appealed to by those involved in liberation movements in Latin America, in constitutional arguments in Canada (according to former minister of justice Mark MacGuigan), and, indeed, in promoting political reform.

What makes Maritain’s account particularly valuable as a defence of human rights?

Perhaps the first advantage of Maritain’s approach is that it provides a sustained account of human beings and their relations to other such beings, to their history and culture, but also to what transcends ‘the here and now’ – it is an account that is richer or ‘thicker’ than that found in many traditional liberal theories of human rights. As noted earlier, for Maritain, the human being is both an individual and a person. Maritain agrees with other liberal theorists, of course, that human beings are free and rational. But one’s animal nature, one’s affectivity, insight and intuition, one’s natural compassion, and one’s relations to others – especially (what should not be surprising in a Christian thinker), love – are also part of what a human being is. These characteristics, along with the elements of personality and of being ordered to an end which transcends the material,

are essential to being human. Indeed, one's nature as a human being is not reducible to or exhausted by the attributes that one happens to have at some particular time, but reflects one's social and physical character, including one's inclinations and one's *telos* (i.e., what one has it in him- or herself to be when fully realized).

This account of human nature shows how human rights must be understood within the context of a common good. We depend on others – indeed, our relations to others define who we are – and these relations determine our obligations as well as our rights. But these relations do not compromise our distinctiveness as persons or as individuals. For there is no one 'right' way in which individuals relate to others (though there are certainly many 'wrong' ways, i.e., ways that diminish or violate our dignity). Moreover, we can see from this that the relation to the community and to the state is not an antagonistic one, and one's (natural) obligations to them are not, in fact, limits on our freedoms or on our rights. Thus, Maritain can argue for an account of human rights that are universal and inalienable without being drawn into holding a narrow individualism.

A second advantage of Maritain's approach is that it takes history, culture, and context seriously. Maritain recognizes that our knowledge of ourselves is gradual, and that it increases and is refined over time. Knowledge of who and what human beings are, involves what Maritain calls 'knowledge by inclination' or connatural knowledge – a non-conceptual yet rational awareness of basic principles of human nature – and as certain inclinations come to the fore, they can show us more about what human beings are. Some of these inclinations – "essential in the sense that they are related to the essence of man"⁵⁴ – and even human nature itself, may not be completely 'developed' in certain individuals. Maritain writes that while some of our inclinations are "proper" to us, they emerge and develop only as the culture in which we live develops,⁵⁵ and so they are gradually discovered by experience over time. Thus, one might say that we 'grow into' our human nature⁵⁶ and "become human" through culture.⁵⁷ Again, Maritain recognizes that there are fundamental inclinations of human beings which are impeded, sometimes for centuries, by social structures.⁵⁸ Hence, Maritain describes a progressive liberation of inclinations of human nature which are essential and (already) present in human beings⁵⁹, but which cannot manifest themselves until there is a change in the social context. Our nature as human beings, then, is not given in the abstract; rather we "awaken and liberate the natural inclinations rooted in reason."⁶⁰ Indeed, there is not only a progressive revelation of human nature but also a gradual awareness of (and 'awakening' to) a natural law.⁶¹ But there is no change in our nature nor in the natural law which is discerned from it.⁶²

This feature of Maritain's account is particularly important to his ethical theory, as this gradual awareness of human nature and of the natural law bears on the question of why it is that not all people and not all cultures become aware of the natural law in the same ways and at the same time. But it also explains how there can be a slow and uneven awareness of freedom

and human rights and yet they are still basic and characteristic of all human beings. Freedom and human rights are demands of human nature. They serve an end that is a common good, and that common good is itself possible only because it reflects something that is in the nature of individuals. But *awareness* of the demands of human nature is something that comes to exist over time.

Third, Maritain's account of the human person – of the gradual development of what and who human beings are and of their relations to others – but also of the significance of history and experience of the world around us, makes his approach both more practical and more radical when it comes to addressing some of the 'new' challenges that have arisen during the 60 years since the Universal Declaration (such as crises in economic development, the environment, and non-conventional warfare and conflict). For Maritain, the social rights of an individual clearly depend on contingent factors, such as the level of economic development and the presence of the appropriate level of technology within a society.⁶³ Thus, Maritain situates the obligation to guarantee many of these rights within a realm of practicality; if, at the present moment, the realization and respect of certain rights is simply not possible, there is no obligation to ensure them. Nevertheless, Maritain's view is also radical. Just as a delay in the appearance of inclinations makes them no less characteristic of what human beings are, so a delay in the recognition of certain rights (i.e., at the epistemological level) does not make the rights themselves any less fundamental. Moreover, because of this, when conditions exist that allow the recognition and guarantee of these rights, a society must do whatever it can to see that they are respected. Thus Maritain writes: "the day when technology will have enabled us to give suitable housing to all and when the means of manufacturing, in architecture, will have enabled us to produce accommodation that conforms to the basic requirements of morality – at that moment, one will say that to have suitable housing – i.e., to live in conditions where virtue is possible – is a *natural right* for a family."⁶⁴ The positive law and the state, then, must respond to these rights when the means of achieving them become available. Thus, Maritain's account of natural law and human rights provides principles relevant to responding to some of the challenges of the past 60 years, as well as a strong basis for socio-economic, 'cultural' and 'new' rights, such as rights to food, to a healthy environment, to peace, to development, to democratic participation, and to humanitarian assistance.

Fourth, at the same time, we see that Maritain avoids allowing the interests or good of the community from compromising the value and dignity of human beings. Human rights are not just pragmatic, or conventions or practices, or contingent creations of law and politics, and are not subject to the arbitrary decisions of states or collectivities. Maritain ties human rights to human beings '*as such*', in virtue of 'the dignity of the human person' in his or her social, economic and cultural functions.⁶⁵ And, given this objective foundation, these freedoms and rights do not seem to be

things that the positive law or civil authorities could legitimately choose to respect or not.

Thus, Maritain's account of human rights has resources to respond to several of the principal concerns raised by recent critics of human rights. It has a richer account of the human person and ethical relations; recognises the role of context and history in human rights; shows flexibility, by providing a way of addressing the changes in the political, economic, social, and natural environments of the six decades since the Universal Declaration, and yet retains an objective foundation. Moreover, the rights that Maritain defends are not simply negative rights, but also include positive rights, and are consistent with a progressive, democratic and liberal view of the state. Maritain recognises that human rights embrace a wide range of rights – civic and social, and not simply 'individual' – and while he sees that rights are universal, he does not regard them as ultimate ethical or moral or legal principles. Finally, because of this more robust account of the human person, and because the rights of the person are defined within the context of a natural law and are subordinated to a greater – a transcendent – good, Maritain's view avoids the charge of being individualistic while, at the same time, provides a basis for human dignity.

CONCLUSION: HUMAN RIGHTS AND THE UNIVERSAL DECLARATION TODAY

Today's world is not the world of 1948 and the Universal Declaration. Nor is it the world of the 1930s, 1940s and 1950s, in which Maritain sketched out his account of the nature and source of rights. One obvious difference is the end of colonialism, and the concomitant growth in technological and economic globalization, where national boundaries have less and less of a defining role in human freedom and our relations with one another. And there are many other differences besides.

Today's world is pluralistic, both internationally and domestically. And to live morally in this world requires the explicit recognition of various cultures and traditions; our views about even our own laws and rights should not be taken for granted. There needs to be respect given to culture and traditions and their characteristic values (and, hence, cultural and linguistic rights); there needs to be a recognition of law and rights across cultures and traditions; there needs to be a recognition that certain social problems – such as problems of the environment, of ecology, and of social and economic development – are not just problems of one country, but of all countries; there needs to be a recognition that we have responsibilities to others – to the displaced, the refugee, the immigrant; and there needs to be a recognition that human beings should, and should properly, be involved in selecting their leaders or participating in government.

As we have seen, some have argued that human rights and its attendant individualism are inadequate and outdated — for example, that, in a world undergoing economic exploitation and ecological crisis, appeals to

human rights are insufficient, and may even contribute to the problems. And so critics have challenged the Universal Declaration, its protocols and conventions, and the discourse of human rights as a whole.

Nevertheless, such criticisms of human rights rest on a number of assumptions – that the discourse of human rights cannot be sensitive to gender or to various forms of social relations; that it assumes that the value of the individual is preeminent; that rights reflect a narrow, abstract and formal notion of the human being and its relations with others; that rights are insensitive to history and to the variations in cultures and practices; that they are imbued with ideas or ideals of law that are not universal; that they do not go far enough, and are not flexible enough, to satisfy the demands of justice.

We have seen, however, that not all human rights theories are liable to this kind of criticism – that a narrow conception of human nature or of ethical relations or of individualism are not essential elements of human rights. I have suggested that a theory of human rights, such as that presented by Maritain, not only can avoid or respond to these criticisms, but can provide a constructive alternative to other human rights views. If this is so, then Maritain's account can provide a way of addressing the challenges arising from the many changes in the world during the last 60 years – and, through its account of the human person, of human rights within the context of a common good, and their foundation in natural law – it may even provide a strong basis for 'cultural' and 'new' rights.

NOTES

¹ *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. ix.

² *Anarchy, State and Utopia*, p. 57.

³ *Anarchy, State and Utopia*, p. 166.

⁴ *Anarchy, State and Utopia*, pp. 50-51.

⁵ *Anarchy, State, and Utopia*, pp. 35-42

⁶ *Reason and Morality* (Chicago, IL: University of Chicago Press, 1978), *Human Rights: Essays on Justification and Applications* (Chicago, IL: University of Chicago Press, 1982), and *The Community of Rights* ((Chicago, IL: University of Chicago Press, 1996)

⁷ See *Community of Rights*, p. 19.

⁸ *Human Rights* p. 57.

⁹ *Rights and Persons* (Berkeley: University of California Press, 1977) and *Rights in Moral Lives: A Historical-Philosophical Essay* (Berkeley: University of California Press, 1988)

¹⁰ *Rights and Persons*, p. 192.

¹¹ *Rights and Persons*, p. 167

¹² *Rights and Persons*, p. 184.

¹³ See for example, Herbert Spencer, *The Man versus the State* (London: Williams & Norgate, 1884); Tibor Machan, *Individuals and their Rights* (LaSalle. IL: Open Court, 1989), Douglas B. Rasmussen and Douglas J. Den Uyl. *Liberty and Nature* (LaSalle. IL: Open Court. 1990).

¹⁴ John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980).

¹⁵ *An Essay on Rights*, (Oxford: Blackwell, 1994).

¹⁶ Jeremy Bentham, "Anarchical Fallacies" in *The Works of Jeremy Bentham*, ed. J. Bowring (Edinburgh: William Tait, 1843), vol. 2, pp. 491-534.

¹⁷ See, for example, Helen Bequaert Holmes, "A Feminist Analysis of the Universal Declaration of Human Rights," in *Beyond domination: New perspectives on women and philosophy*, ed. C. Gould (Totowa, NJ: Rowman and Allanheld, 1984), pp. 250-264.

¹⁸ Alasdair MacIntyre (*After Virtue: A Study in Moral Theory* [South Bend, IN: University of Notre Dame Press, 2nd ed., 1984]) and Mary Ann Glendon (*Rights Talk - The Impoverishment of Political Discourse* [New York: The Free Press, 1991]) have maintained that a preoccupation with rights (particularly individual civil rights) neglects or is inconsistent with the importance of the community and the common good.

¹⁹ Thus, in "The Imperialism of Human Rights," [*Focus on Law Studies*, 8 (1992); reprinted in *Taking Sides: Clashing Views on Controversial Moral Issues*, 4th.ed., ed. Stephen Satris (Dushkin, 1994), pp. 316-320], Vinay Lal argues that the discourse of human rights is "the most evolved form of Western imperialism" (p. 317) and that it has been "an ideological and political tool of the West" and is "contaminated." (p. 319). See my response to Lal in "Human Rights and Cultural Diversity," *International Journal of Applied Philosophy*, 12 (1998): 117-132

²⁰ See J.S. Mill, *On Liberty*, 1859.

²¹ See, for example, R.B. Brandt, *Morality, Utilitarianism, and Rights* (New York: Cambridge University Press, 1992) and D. Lyons, *Forms and Limits of Utilitarianism* (Oxford: Oxford University Press, 1965).

²² See Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press, 1971). The first principle is: "each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar

system of liberty for all.” (These basic liberties include freedom of thought, association, religion, etc.) But since inequalities sometimes produce greater incentives (which benefits all), Rawls recognizes a second principle, namely: “Social and Economic inequalities are to be arranged such that they both: a) are to the greatest advantage of the most disadvantaged [which Rawls calls the ‘difference principle’] and, b) are “attached to offices and positions open to all under conditions of fair equality of opportunity.”

²³ See my *Idealism and Rights* (Lanham, MD, 1997).

²⁴ The British international relations specialist, Chris Brown, believes that rights discourse in the west has been successful only because it is parasitic on a distinctively western, liberal notion of “ethical community” that cannot be found in many non-western nations. Brown allows that only a gradual expansion of the boundaries of the western moral community could ultimately lead to a set of transcultural general moral principles which could be called ‘rights,’ though even here there would always be ‘local differences.’ See, for example, Chris Brown, “Universal Human Rights: A Critique”, *The International Journal of Human. Rights*, 1 (1997): 41-65.

²⁵ See Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, NY: Cornell University Press, 1989) and later work.

²⁶ New York: Éditions de la Maison française, 1942; translated as: *The Rights of Man and Natural Law*. Tr. Doris C. Anson (London: Geoffrey Bles, 1944).

²⁷ *La personne et le bien commun* (Paris: Desclée de Brouwer, 1947) [*The Person and the Common Good*. Tr. John J. Fitzgerald (New York: Charles Scribner’s Sons, 1947)]

²⁸ Chicago: University of Chicago Press, 1951.

²⁹ In *Moral Principles of Action*, ed. Ruth Anshen (New York: Harper & Bros., 1952), pp. 62-76.

³⁰ *La loi naturelle ou loi non écrite: texte inédit, établi par Georges Brazzola* (Fribourg, Suisse: Éditions universitaires, 1986; translated as *Lectures on Natural Law*, tr. William Sweet, in *The Collected Works of Jacques Maritain*, Vol. VI (Notre Dame, IN: University of Notre Dame Press, [forthcoming])]) See also the texts in *Natural Law : Reflections on Theory and Practice*, ed. W. Sweet (South Bend, IN: St Augustine’s Press, 2001)

³¹ See *The Person and the Common Good*.

³² *Person and the Common Good*, p. 74.

³³ Cf. *The Rights of Man and Natural Law*, p. 17.

³⁴ See *Man and the State*, p. 106-7 and Maritain's Introduction to *Human Rights: Comments and Interpretations, a symposium edited by UNESCO* (London: Allan Wingate 1949), p. vii. For a discussion of the different ways in which rights are inalienable, see *Man and the State*, pp. 97-107.

³⁵ *The Rights of Man and Natural Law*, p. 40.

³⁶ *The Rights of Man and Natural Law*, p. 39.

³⁷ *The Rights of Man and Natural Law*, pp. 39-40.

³⁸ *The Rights of Man and Natural Law*, p. 40.

³⁹ *The Rights of Man and Natural Law*, p. 46.

⁴⁰ *The Rights of Man and Natural Law*, p. 41.

⁴¹ *The Rights of Man and Natural Law*, p. 49.

⁴² *The Rights of Man and Natural Law*, p. 48.

⁴³ *The Rights of Man and Natural Law*, p. 46.

⁴⁴ *The Rights of Man and Natural Law*, p. 49.

⁴⁵ *The Rights of Man and Natural Law*, p. 51.

⁴⁶ *The Rights of Man and Natural Law*, pp. 52-53; see also pp. 61-62.

⁴⁷ *The Rights of Man and Natural Law*, pp. 40-41.

⁴⁸ *La loi naturelle ou loi non écrite*, p. 189.

⁴⁹ *La loi naturelle ou loi non écrite*, p. 189.

⁵⁰ See *Man and the State*, pp. 97-107; this follows closely Maritain's presentation in *The Rights of Man and the Natural Law*; see also *Natural Law: Reflections on Theory and Practice*, pp. 62-65.

⁵¹ *The Rights of Man and Natural Law*, p. 37.

⁵² *The Rights of Man and Natural Law*, p. 37.

⁵³ *The Rights of Man and Natural Law*, p. 37.

⁵⁴ *Loi naturelle ou loi non-écrite*, p. 188.

⁵⁵ *La loi naturelle ou loi non écrite*, p. 126.

⁵⁶ *La loi naturelle ou loi non écrite*, pp. 153-154.

⁵⁷ *La loi naturelle ou loi non écrite*, p. 137.

⁵⁸ *La loi naturelle ou loi non écrite*, p. 189.

⁵⁹ *La loi naturelle ou loi non écrite*, p. 188.

⁶⁰ *La loi naturelle ou loi non écrite*, p. 159.

⁶¹ *La loi naturelle ou loi non écrite*, p. 192.

⁶² *La loi naturelle ou loi non écrite*, p. 189.

⁶³ *La loi naturelle ou loi non écrite*, p. 190.

⁶⁴ *La loi naturelle ou loi non écrite*, pp. 190-191; emphasis mine.

⁶⁵ *The Rights of Man and Natural Law*, p. 51.

CHAPTER II

JACQUES MARITAIN, CHRISTIAN POLITICS, AND THE BIRTH OF HUMAN RIGHTS

SAMUEL MOYN

Jacques Maritain, the Catholic philosopher and publicist, was the highest profile thinker to defend the concept of human rights in the immediate postwar period, the era of their framing in the Universal Declaration and embedding in European identity. What I would like to analyze in this essay is how this once reactionary critic of rights transformed into their champion. The basic argument is that this change has to be correlated with overall ideological change in Catholicism, in which dominant old political options disappeared and new ones were needed. They were created, not simply adopted from elsewhere: Maritain – who castigated the individualist language of rights through the late 1930s – changed them through his turn to them as much as they changed him. And his personalist and communitarian recasting of the language as a new option for Christianity helps explain why commitments to human dignity and human rights could become as prominent as they did in the postwar European order.

For we must give up once and for all the idea that the history of human rights is a story of static doctrine, without regard to its changing meanings over time.¹ In a recent book, Jay Winter has proposed that the Universal Declaration of Human Rights be seen as a “utopia,” albeit in a minor key.² If so, what matters is whose utopia it was, and with what content, at the moment of its formulation and at different stages of its reception. I will try to argue that, in terms of the cultural meanings that the concept had in the beginning, human rights reflected most centrally the ideology of “personalist humanism.” This ideology, the intellectual backbone of the larger postwar European politics of human dignity, not only cannot be left out when pondering the original meaning of human rights, but was arguably their most determining constituent. On reflection, other proposals for understanding the content and ambiance of human rights in this inaugural era are not all that plausible. The Universal Declaration was certainly not a revolutionary document, in continuity with the revolutionary ideology of rights of the early modern period, even though it made a place for some of its long since domesticated content. The years of immediate postwar European history were also not a “republican moment.” Finally, though the Universal Declaration is as much backward looking as forward looking, the people who understood human rights as a response to the Holocaust specifically were few and far between (though Maritain himself may have been one of them). Conversely, the ideology of personalist humanism, associated with the third way spiritualist and communitarian

search for a way in between the rival materialisms of individualist liberalism and totalitarian communism, fits quite well with the main political drift of the moment in European society. When one considers the postwar years as the period of stabilization and reconstruction that they were – an era of the “re-recasting” of bourgeois Europe, if I may put it that way – then whole postwar politics of human dignity looks like its ideological translation, with its emphasis on the restoration of fundamental values, often thought to be religious in basis, and its resumption of the moral truths of “Western civilization.”³ Thus, the origin of human rights was not just an American “new deal for the world,” but also the creation of a distinctive European humanism.⁴

In what follows, the goal is to fix as precisely as possible the chronology Maritain’s turn to rights and to piece together basic elements of the larger context of the transformation of political Christianity required to explain that turn. Contrary to a common misunderstanding, Maritain’s break with his reactionary affiliates around Action Française in the late 1920s (precipitated by the Pope’s condemnation of the group) did not by itself transform this thinker into a supporter of rights. In Maritain’s eyes, it was a matter of saving Maurras’s insight from his error: “the truths acknowledged by the criticism of liberal and revolution ideology must be delivered in a higher synthesis than the mere nationalist idea could ever guarantee,” he wrote in *The Things that Are Not Caesar’s*, justifying his response to the papal ban. “Men in our time are summoned to an integral restoration of Christian values, to a universal reinvention of order.” In many ways Christianity’s liberation from direct politics meant the continuation of an old project in resituated form. Indeed, far from being neutral towards the form of government, religion requires us to “procure the truly human and therefore moral good of the social body.”⁵ An intricate path would lead him from here to his epoch-making *Integral Humanism* (1936) and beyond. The papal ban eventually did lead him to attack “political theology,” i.e., the belief that Christianity should seek an integralist society in which the line between Church and state would fade away. And this led Maritain to some courageous stands in the later 1930s – opposition to Italy’s invasion of Ethiopia as a perversion of the humanism its partisans claimed they were bringing to savage lands; vituperation of the widespread belief that Catholics should rally against republicanism (and communism) in the Spanish Civil War as part of a religious crusade; and even principled denunciation of Christian and other forms of antisemitism.⁶

That Maritain earned attacks as “red” and even “Jewish” as a result of these stands against the current of his co-religionists is not surprising. (In welcoming him to America, even Catholics there would have to make sure: the first three questions posed to him in a *Commonweal* interview of 1939 inquired in order whether he was a Jew, mason, or communist.)⁷ He was

advocating a minority view in French (and world) Catholicism. But since it would eventually become a majority view, it bears insisting that these stands cannot be separated from the positive vision Maritain was developing. If one's question is why, from cause to cause, a vision like Maritain's would later win out, one cannot restrict one's attention to the cause by itself, for the answer lies in the larger reinvented Christian vision on offer.⁸ That his risky bet paid off means that the focus must be just as much on what he wanted to bring about, for the "democracy" and "rights" that Maritain's humanism would shortly come to imply could mean many things. Maritain's bold dissent against the Christian right of his time established the kernel of a vision of a different Christian order in whose service he worked, whose point was to provide a plausible alternative to secularism east and west, and it was this vision that was to survive its competitive 1930s origins by many decades. It is this vision, indeed, that Maritain merely updated when he turned to human rights not long after.

One interesting sign of this is that he freely entered the 1930s competition over new order visions, promoting a Catholic entrant, one that eventually would take on board human rights. In an outtake from his book *Integral Humanism* published in English on "the new Christian order to come," Maritain offered a speculative philosophy of history as to how the new reign of spirit he advocated might be brought about. Maritain predicted a "historical catastrophe of world proportions" following from the crisis of liberalism; and, appealing to old millennialist scripts of time, Maritain saw in the coming catastrophe the beginning of the celebrated "third age" of the world anticipated by Christian philosophers of history since the middle ages. "[T]his third era," Maritain hypothesized, "should begin to appear with the general dissolution of post-medieval humanism and nobody knows how many centuries it would last after that. There is no intention of suggesting, with some millenarist thinkers, that it should be a golden age [but o]nly under this order could integral humanism blossom to fulness." It was precisely and only by renouncing the explicit claim to governmental power that Christianity could realize the universal civilization that was its destiny, and individual Christians, far from accepting a merely interior faith because of the failure of theocratic aspirations, had to mobilize. "A full dissemination of Christianity in the temporal order is promised at the historical period which will follow the dissolution of man-centered humanism," Maritain maintained.⁹ For a long time, however, indeed late into the 1930s, there was simply no sign in Maritain's thought that such "Christian humanism" meant human rights.

The central concept that would eventually permit (though not at all require) this derivation was that of the "person," which would eventually become the foundational term of the Universal Declaration of 1948. Aside from an interesting but glancing early reference in 1915, Maritain's first major

defense of “the person” and its retroactive identification with Thomism (Maritain’s philosophical school throughout his career) occurs in his popular Action Française era book *Three Reformers* (1925).¹⁰ The reason this is of interest, to start, is that the basic claim of the sociopolitical relevance of “the person” antedates Maritain’s break with the far right of his day. The crux of the idea of “the person” is its opposition to “the individual.” Maritain not only politicized the distinction as he invoked it; he did so in a way that fit his politics at the time. “In the social order, the modern city sacrifices the *person* to the *individual*; it gives universal suffrage, equal rights, liberty of opinion, to the *individual*, and delivers the *person*, isolated, naked, with no social framework to support and protect it, to all the devouring powers which threaten the soul’s life, to the pitiless actions and reactions of conflicting interests and appetites, to the infinite demands of matter to manufacture and use.” Yet because it left the individual alone, modernity also, in an apparent paradox, opened the way for a far more depraved collectivization than the religious civilization it had somehow caused to fall. “If the State is to be built out of this dust of individuals, then ... the individual will be completely annexed to the social whole.” Liberalism and communism were at root the same mistake. Yet it cannot be said in this era that Maritain did much more than gesture towards the political significance of personalism. He claimed that the distinction between person and individual “contains, in the realm of metaphysical principles, the solution of many social problems.” He suggested that the personalist city must be Christian (and vilified the secularist reformer Jean-Jacques Rousseau for arrogating God’s sovereignty for the people), but that is about it.¹¹ It was left to others, especially the “non-conformist” and “new order” intellectuals, and above all Emmanuel Mounier, to make the person the touchstone of French social and political thought in the 1930s. In this first decade of its circulation, however, personalism excluded rights as well, and in all of its forms.

That is why we must look carefully at the Church and world politics to contextualize Maritain’s intellectual adventure. “Although in the extraordinary conditions of these times the Church usually acquiesces in certain modern liberties, she does so not as preferring them in themselves, but as judging it expedient to allow them until in happier times she can exercise her own liberty,” Pope Leo XIII had written in 1888.¹² The move towards the later twentieth century embrace of rights talk as the essence of Christian social thought – notably in John XXIII’s “Pacem in Terris” as well as in some documents of the Second Vatican Council that he called, and then in a different but equally pronounced way in the storied papacy of John Paul II – occurred neither at a slow and steady pace nor all at once in a single transformative moment. The terms “dignity” and “person” are of somewhat older vintage in papal pronouncement than that of “rights,”

precisely because the former were ambiguous enough to be compatible with a wide range of inferred doctrines in different national settings and within specific national communities. But the same is true even of the latter, to the point that it also appeared on occasion earlier than the crucial period of the late 1930s and early 1940s, first associated with the social question and the “rights of labor” (notably in Leo’s own *Rerum Novarum* and later Pius XI’s *Quadragesimo Anno*). Nevertheless, these invocations were “neither comprehensive nor tightly systematic.”¹³

The first period of quickened use, which has not been effectively studied, occurred in the antitotalitarian transformation of the Church in the late 1930s, which led Pius XI towards the end of his papacy to begin to use the language in a more serious and organizing way. The remarkable turn against “statolatry” by no means compelled any embrace of rights as an organizing doctrine; but it did involve the assertion of religious sovereignty over personal conscience. Interestingly, it was most frequently antiliberal premises that led to what may seem a liberalizing outcome in this denunciation of the era’s dictators (Benito Mussolini usually exempted), with the modern and “secularist” separation of state from church often presented as having allowed the menacing totalitarian hypertrophy of the state to occur.¹⁴ In any event, it was at this moment that Pius – who knew Maritain well and esteemed his work – turned directly to personalism as the foundation of Church’s spiritual alternative to totalitarianism, in 1937-38. “Man, as a person,” Pius declared, “possesses rights that he holds from God and which must remain, with regard to the collectivity, beyond the reach of anything that would tend to deny them, to abolish them, or to neglect them.”¹⁵ This phraseology, from the anti-Nazi encyclical of March 1937, *Mit brennender Sorge*, was matched by the anti-communist encyclical of the same month, *Divini redemptoris*, the latter with greater emphasis on the right of property in the context of a more general picture of the rights of the person against the totalitarian collective.¹⁶

It was thus in a moment of discovering two extreme political ideologies that, in its view, left no room for Christianity that the Church discovered its sovereignty over the “human,” over which in turn no merely temporal politics can claim full authority. What such changes in papal political theory meant on the ground, in the context of much other doctrine and the inherited weight of tradition, varied widely – especially after Pius XII’s election a year later to face the final crisis of the 1930s and the difficult choices of the war. With respect to the language of rights as well as in other ways, Pius XII left his options open, encouraging some possible lines of future development and tolerating others. In different national contexts, rights talk had different fates: the new language of the rights of the human person were not just passively received, but actively shaped from place to place and moment to moment. As Paul Hanebrink has shown in the case of Hungarian debates, for example, what was at stake for some churchmen and Christian politicians was only “the rights of (Christian) man,” chiefly the defense of the right of conversion against racist

essentialism, still in the name of a exclusionary vision of a Christianized nation.¹⁷ But in America – before Maritain ever turned to rights – a small band of liberal Catholics chose a different direction.

In an unremembered but fateful statement to Americans on the jubilee of Catholic University, Pius XI had written barely two months before his death that “Christian teaching alone gives full meaning to the demands of human rights and liberty because it alone gives worth and dignity to human personality.” In a pastoral letter, American bishops took the argument a step further: “His Holiness calls us to the defense of our democratic government in a constitution that safeguards the inalienable rights of man.”¹⁸ Historians who have examined the crucial early war years to trace the remarkable afflatus of the hitherto largely unused (in English) phrase of “human rights” have discovered minor percolations but little else until something happened to catapult the term into its immediate postwar career. Completely neglected among these percolations so far highlighted, however, is the comparatively early Catholic articulation of the human rights idea.¹⁹

In 1939 already, in response to the papal turn against totalitarianism and his letter insisting on the rights of the person, the prominent liberal Catholic John A. Ryan, together with Notre Dame’s Charles Miltner, founded the short-lived Committee of Catholics for Human Rights, to oppose the radio priest Charles Coughlin and rampant American Catholic racism; and in the early issues of their publication, *The Voice for Human Rights*, they featured Jacques Maritain as a key icon and author (even though he had not yet started to use their language).²⁰ The organization had originated out of a predecessor group more specifically concerned with antisemitism, but the rhetorical shift allowed generalization beyond that issue, as in Amarillo bishop Robert Lucey’s ringing complaint in 1940 that “Millions of citizens throughout the world are no longer considered as inviolable persons: they are mere things to be juggled at will by gangster governments. ... The natural law demands that all human rights be afforded to all human beings.”²¹ And some of the time, Pius XII turned to the rights talk that his predecessor had initiated. Already in his widely reported Christmas message to the world for 1940, he followed Maritain in calling for a new Christian order, and in his Pentecost radio message six months later, he recommended a declaration of the rights of the human person as its basis; and as of America’s entry into the war in late 1941 American Catholics were alluding to Pius’s peace points as implying that the United States should become “the instrument of Almighty God” for setting up a “new era” in which “human rights” would offer all peoples “prosperity and a chance of the pursuit of happiness.”²²

As the war continued, papal pronouncement remained open-textured enough for Catholics to infer widely different messages from it. But one of the Catholic bishops who formed a committee to promote the papal peace points in this country, Aloysius Muench of Fargo, North Dakota, entertained the belief – at least according to his later testimony –

that FDR's later language of new order and four freedoms merely amplified the pope's call for a postwar political settlement based on universal moral principles. This was especially so thanks to the 1942 letter FDR wrote to American bishops after the country's entrance in the war that the United Nations would seek "the establishment of an international order in which the spirit of Christ shall rule the hearts of men and nations." "We were assured by the late President Roosevelt," Muench recalled just after the conflict, when he had become papal nuncio to defeated Germany, "that the war would not be one of vengeance but to establish a new order in the spirit of Christ [and] a crusade for the preservation of the rights of men."²³ American Catholics were in advance of others, and even their president, in deploying the phrase "human rights," but by 1941-42 Catholics in Germany and France were to be using the language too. The nuance and specificity of wartime human rights discourse remains to be studied; the defense of the human rarely meant any special concern with the Holocaust and frequently went along with fierce Christian anticommunism in which enthusiastic support for Adolf Hitler's anti-Bolshevik crusade could coexist with dissent from his depredations against life.²⁴ Nevertheless, the language is there, as a possible new basis of the Church's political identity, for those who had stopped dreaming the dream of "holy empire." German bishops, in a common pastoral letter of Easter 1942, rose in protest of their regime's trampling not just of the church's rights (in disregard of the earlier concordat) but also of human rights – "the general rights divinely guaranteed to men." The extraordinary clandestine resistance group of French Catholics, *Témoignage chrétien*, republished this letter and amplified the call in its summer booklet "Human and Christian Rights."²⁵

Maritain intersected this earlier but episodic, unsystematic and selective Catholic tradition of rights and made it his most enduring contribution to the twentieth-century church and world. Maritain had already, by the late 1930s, begun a geographical and intellectual voyage to the American scene – one that would be fateful for the future of Catholicism as a whole. He originally went to North America in 1933, when he accepted fellow Thomist Étienne Gilson's invitation to lecture annually at a new Institute for Medieval Studies in Toronto; and he first set foot in the United States in 1938.²⁶ But it was only the war that led his Christian humanism in the direction of rights. This is not to say that the Catholic rights turned described above did not have an immediate effect: in speaking on the Jewish question in 1937-38, Maritain could rise in defense of "a pluralism founded on the dignity of the human person, and established on the basis of complete equality of civic rights, and effective respect for the liberties of the person in his individual life." The defense, however, immediately had to be couched in absolutely clear rejection "the old Liberalism," even as it was "thoroughly opposed to the ignominious medievalist Hitlerian parody." Rights, Maritain emphasized, were only going to be retrievable "in a general new régime of civilization, freedom from the ills of capitalistic materialism as well as from the even greater ills of Fascism, Racism, and

Communism.”²⁷ In any case, far from becoming the self-evident entailments of the dignity of the human person they would shortly become (let alone the key watchwords of politics), rights remained highly uncertain in the place they initially found in Maritain’s thought: in a Chicago speech from the same period, Maritain still claimed to his American audience, in perfect fidelity to integral humanism, that “democracy can no longer afford the luxury of drifting. Individualism in the sense of individual rights and comforts must cease to be its chief objective.”²⁸ Fortunately, he continued, there were emerging signs that America planned to rediscover the religious imperatives of its civilization. In his Théâtre Marigny speech, just after the Munich agreements and the year before German tanks rolled into Paris, Maritain could lavish praise upon the remarkable State of the Union address that Franklin Delano Roosevelt gave for 1939 in which he endorsed religion as the foundation of democracy. (In the same address, Maritain likewise cited Walter Lippmann marveling that “the President, who is the most influential democratic leader in the world, should recognize religion as the *source* of democracy ... is a fundamental reorientation in the liberal democratic outlook upon life.”)²⁹ But what kind of response events, together with America’s return to its religious basis, would force or allow did not become clear immediately.

Maritain, on his annual visit to North America when France fell, had to stay there, and played a critical role in the organization of émigré intellectual life during the following years.³⁰ From the 1930s, there is a large intraphilosophical and intratheological literature about the viability of Maritain’s person/individual distinction, what it might mean, and why it might matter.³¹ It would be wrong to isolate the doctrine from politics, however. By itself, personalism could have led Maritain, like so many other French Catholics and para-Catholics, into the arms of the Vichy government, whose leader, indeed, himself proclaimed that “individualism has nothing in common with respect for the human person” (a respect he promised his regime would restore, along with religious civilization). Maritain’s formulae of the “primacy of the spiritual” and “integral humanism” were even used as sloganeering buzzwords by Vichyite intellectuals and youth.³² But Maritain, in exile, opposed Vichy uncompromisingly, and soon became an inspiration for the Christian resistance, even if he was ambivalent about Charles de Gaulle as the Free French leader, on the grounds that the latter would not concur with his vision of personalistic democracy.³³

It was most clearly in early 1942 Maritain transformed into the philosopher of human rights that he had never been before.³⁴ (By his Christmas message of 1942, the one frequently discussed solely for its insufficient reference to Jewish suffering, Pius too was laying out his postwar vision in terms of the dignity of the person and human rights.)³⁵ In

Natural Law and Human Rights, Maritain took what would be a fateful step for postwar intellectual history as a whole, making the claim that a revival of natural law implies a broad set of prepolitical human rights. What would have been – and still is – curious about this claim, of course, is that whatever their opinions of the origins of modern rights talk, nearly all histories of the political language concur that the rise of rights in political theory occurred after and because of the destruction of the Thomistic natural law tradition.³⁶ In either a stroke of a master or a sleight of hand, Maritain – as if the Church had not long and unanimously rejected modern rights – claimed that the one implied the other and indeed that only the one plausibly and palatably justified the other. He did so in the teeth of plausible initial skepticism from his own most brilliant disciples, the Catholic émigrés Waldemar Gurian and Yves Simon, that Thomism might now be unsalvageable due to its votaries' almost uniformly reactionary political choices. In a now famous remark, Gurian noted: "if Thomas were alive today he would be for Franco, for Tizo, for Pétain. ... To be practical in 1941 with St. Thomas in politics is a joke." In private, Simon went so far as to worry that a generation's worth of criticism of the French Revolution and its rights had, sadly, redounded to the benefit "not of Thomas but of Hitler."³⁷

Maritain energetically strove to override this skepticism, so that it is due above all to him that what came to be the Catholic position in recent political theory came about, with the older view that Catholicism's political and social doctrine could not be reformulated in terms of rights dropped in exchange for the claim that only the Catholic vision placing them in the framework of the common good afforded a persuasive theory of rights.³⁸ If it is true that Maritain "formulate[d] ideas about the dignity of the human person, human freedom, human rights, and democracy which were interpreted by critics as an accommodation to the post-Enlightenment philosophy that he despised," it was because of Maritain's historically dubious but strategically brilliant gambit to capture an originally alien language for Catholicism and claim a perfect and necessary fit. In reality, Maritain "retained natural law but redefined its content."³⁹ Some Catholics wondered then and since if Maritain conceded too much to modernity ("dressing up poor Thomas Aquinas in the rags of a laicist apostle of democracy," in Aurel Kolnai's hilariously grim assessment), yet Maritain's view of continuity between natural law and natural rights has generally won the day.⁴⁰

In the flow of Maritain's political theory in these years, in fact, the Catholic position of the non-individualist person in the non-totalitarian community remained stable, as the overall governing framework into which rights were introduced. In an atmosphere in which many Catholics understood the defense of the West to mean all-out war against Bolshevism even at the price of alliance with unholy forces (like the French cardinal who saw the Archangel Michael leading "the old Christian and civilized peoples who defend their past and their future at the side of the German

armies”), Maritain’s message seems often to have been primarily directed against political theology, and against the Christian preference for fascism as the lesser evil. “An obscure process of leniency toward totalitarian forms that lying propaganda tries to picture as the upholders of order,” Maritain regretted at the University of Pennsylvania bicentennial in 1940, “has thus invaded parts of the believing groups in many countries.”⁴¹ “The error of those Catholics who follow Pétain in France or Franco in Spain,” Maritain wrote Charles de Gaulle in 1941, “is to convert Catholic thought, though lack of social and political education, in the direction of old paternalistic conceptions of history rejected in the meantime by the popes and condemned by history.”⁴² “The ideology now being fed to the French in the absence of a genuine reconstruction program,” he noted in his widely-noticed and clandestinely spread *France My Country*, “is a bizarre mixture of commonplaces, where these borrowed from Catholic social teachings are imbedded in the teachings of the political school of total nationalism.”⁴³

The idea, then, was that Catholic social thinking could be and had to be saved from its accidental entanglements with nationalism. What then was involved in Maritain’s new defense of rights and democracy? Stuart Hughes once observed: “All [Maritain’s] subsequent volumes of polemic and public philosophy were footnotes to or expansions on the themes that *True Humanism* had announced.”⁴⁴ Given the major change of vocabulary to rights talk or democracy that occurred after, it is surprising that this statement only needs slight correction. In the first place, Maritain’s attitude towards the catastrophe of modernity softened slightly but discernibly (though it never reversed). “The modern world has pursued good things,” Maritain allowed already in 1938, “down wrong pathways.”⁴⁵ Second, while he continued to place much stock in parastate charitable action, he did far more graphically come down in favor of a specific regime – perhaps in a way that conflicted fragrantly with his earlier ban on “political theology.” That Maritain in the late 1930s and after advocated a *democracy* infused by Christianity made his new stance no less an endorsement of a non-neutral political theology. Finally, this relative move toward an affirmation of a specific kind of state framework within which alone a “new Christian order” could come about forced Maritain to quietly but decisively drop his old associations of formal liberties and formal democracy with liberal individualism on its deathbed. He broke almost completely with visions, like either Marxism or Mounier’s personalism, that treated formal rights and democracy as elements of a hypocritical capitalist sham. Formal or “bourgeois” liberties formerly condemned now had to be resurrected as providing the legal carapace of the Christian state and intrastate order. Arguably, however, these innovations were in the service of keeping Maritain’s Christian vision the same in new circumstances. The goal remained a personalist communitarianism, even if that substantive vision prompted a less critical attitude towards formal guarantees and political structures or might indeed invest them with considerable significance. (One could say something similar of Pius XII who, having adopted the rhetoric of

the rights of the person, was by his 1944 Christmas message following Maritain by endorsing democracy on condition of differentiating between its Christian communitarian and reprobate secularist version.)⁴⁶

It was thus due neither to doctrinal purification nor to institutional destiny that Maritain could be led to expound “Christian humanism” by early 1942 in *Fortune* magazine, still castigating modern man for “claim[ing] human rights and dignity – without God, for his ideology grounded human rights and human dignity in a godlike, infinite autonomy of human will” but also now referring to the apparently alternative “concept of, and devotion to, the rights of the human person” as “the most significant political improvement of modern times.”⁴⁷ In these years, Maritain reached almost manic heights of activity, both authorial and organizational, in his participation in the New York and larger American émigré community and in a far-flung international network of correspondents and publishers. Notably, in late 1941 and early 1942 he was deeply involved in gathering editorial suggestions for a manifesto of Catholic intellectuals and putting it in final form, expressing the antitotalitarian critique of fascism and the alternative of personalist rights that was much noticed.⁴⁸ But the basis of his activity remained largely constant. In the deluge of his remarkable output over period -- from essay collections like *Scholasticism and Politics* to pamphlets like *Christianity and Democracy* and from radio messages to the French people to occasional intervention pieces -- Maritain rearticulated personalist communitarianism in the language of rights-based democracy. Further, having inventively claimed for Catholicism new compatibility with modern democracy and rights, Maritain reciprocally credited Catholicism with having been – often behind the backs of actual Catholic thinkers and actors – the source of those norms. At the Liberation, he offered his political and social philosophy to his French brethren, who he thought were finally in a position to see the mutuality of Christianity and democracy that their oppositional history – not least in their own country – had obscured.⁴⁹

By 1944 the rights of the human person, as galvanized by Maritain’s enthusiastic promotion and as the ground of his reappropriation of democracy, were understood by activist Catholics to be the main bulwark against Hitlerian racism.⁵⁰ And such Catholics also claimed that the concept provided the key slogan for the postwar settlement, which would have to be based on principle not power. The answer would be a vision of human rights that split the difference, or rather found the proper reconciliation, between self and collective. Appealing to Pius XII’s Christmas message of 1942, Richard Pattee explained on the radio in 1945, “The genius of Catholicism is perhaps no better illustrated than in the subtle and profound harmony that is established between the dignity of the human being as a singular person, and the obligations and duties of that person as a member of society.”⁵¹ As FDR turned by 1944 to supplement his promise of four freedoms with a “second bill of rights” ensuring social protection, Maritain worked with sociologist Georges Gurvitch to bring the originally French tradition of social rights to the attention of the world.⁵²

A new paradigm had been forged. Thanks to FDR's championship of them – but also the earlier and continuing cultural factors that historical scholarship on wartime and postwar human rights has so far left out – the phrase “human rights” gradually entered diplomatic parlance and became a brief slogan in international affairs in the period following the Allied victory. There is no need here to follow Maritain's own involvement in this moment, which has been studied elsewhere; thanks to its late interwar promotion, ongoing papal pronouncement, Maritain's strenuous advocacy, and the generally religious ambiance of the drafting process, “the person” became a prominent feature of the declaration, beginning in the preambular affirmation of “the dignity and worth of the human person.”⁵³ It may be true, then, that (as Mark Mazower has argued) there was a conceptual shift from group to individual in diplomatic and legal circles that set the stage for the post-World War II human rights moment. But there was also a shift afoot from the individual to the person, and in terms of its *cultural meaning* at the time, and its embedding in European politics, the Universal Declaration is a profoundly communitarian document -- precisely a moral repudiation of dangerous individualism in the name of personalism.⁵⁴ Indeed, in my view this is the key to placing the document more securely in the ambiance of the war's aftermath, as part of the moral reconstruction of Europe perceived to be necessary to stave off future world crises and wars.

As Wolfram Kaiser and Roberto Papini have shown, Christian democracy, hegemonic starting in this era as the continent restabilized, made a politics of personalism and dignity central to its work nationally and construction of Europe regionally.⁵⁵ “In the inter-war period catholicism had been closely linked to nationalism and the League of Nations had been presented as being a dangerous centre of masonic power,” Richard Vinen observes, in a similar vein.” After 1945, this changed. Catholic organizations were enthusiastic proponents of international harmony, within the western bloc at least, and Christian Democrat parties in all European countries were so intimately linked to European integration that some began to feel that Europe was being built under the aegis of the ‘catholic international.’”⁵⁶ It should be noted that Maritain's high-profile turn to democracy did not make him a prominent defender of Christian parties in particular, so that the specific form of this historic convergence is not due to his influence.⁵⁷ And in spite of his leading and premier role in spelling out a Catholic rights tradition, it would be mistaken, for instance, to posit any real influence of Maritain on the evolution German-speaking Catholicism so crucial in this era (a significant portion of German Catholics would understand the postwar defense of “the West” to provide an alternative to the America Maritain came to love).⁵⁸ All this said, he remains a powerfully illustrative figure, since even in the German case it is hard not to notice a concordance between Maritain's thought and the spiritualistic antimaterialism and emphasis on personal dignity – including sometimes

human rights -- prevalent at the time. As Maria Mitchell has emphasized, spiritualistic personalism came close to providing the central ideological fulcrum of Christian democracy in Germany, and just as in the case of the Universal Declaration on which it drew, the Federal Republic Basic Law's opening affirmation of human dignity is probably best to read not just retrospectively as a response to the Nazi past but prospectively as an allusion to the kind of future that would best overcome that past. In any event, it is a mistake to think about the "recivilization" of West Germany in the absence of the religious ideology that provided its justification and explained the specific, non-secular, moralized form it was supposed to take.⁵⁹ That the incipient Cold War would soon come to be widely understood in terms of the defense of religion and "the West" that the Church's struggle against communism had already been for three decades was no doubt crucial here.⁶⁰

In this sense, Maritain's personal trajectory, and incubation of a Christian alternative to integralism and communism based on rights, anticipated and assisted the shift of the Church and the continent in a new direction. Yet as with Christian politics generally, the same history suggests that the language of human rights in its original time, though certainly a form of idealism, was one that succeeded because it could continue some core ideological commitments in a way that also overcame and corrected for Catholic political positions in the interwar period and during the disastrous war – including a flirtation with the extreme right or embrace of rightist regimes, occasionally in the name of "humanity." In spite of this immediate past, Catholicism as an institution and Christian civilization as an idea managed to emerge from the war cleanly. Indeed, among many other factors, the Christian democratic and Cold War promotion of human dignity and rights allowed it once again to become – as it did surprisingly quickly – the self-proclaimed representative of the values of the European West, of putative universal significance for the world. Yet the very success of this transformation may have made it easy to forget the very recent and very contingent circumstances in which the relationship between Catholicism and human rights had been brokered. In a last ditch plea to an overwhelmingly secularized continent shortly before his death, John Paul II worried that the very Europe that had come to celebrate rights as the core of its identity also seemed poised to cut the last thread binding it to the Christianity that had allowed their discovery. If Christian Europe finally passed into history, then the faith in rights that was its precious contribution might slowly evaporate, like a sea whose source has been cut off. After all, John Paul said, it was from "the biblical conception of man [that] Europe drew the best of its humanistic culture, and, not least, advanced the dignity of the person as the subject of inalienable rights."⁶¹ The powerful invention of tradition that could allow such a view occurred in the 1930s and 1940s, thanks to Jacques Maritain above all.

NOTES

¹ Samuel Moyn, "On the Genealogy of Morals," *The Nation*, April 17, 2007.

² J.M. Winter, *Dreams of Peace and Freedom: Utopian Moments in the Twentieth Century* (New Haven, 2006), chap. 4.

³ The reference is to Charles S. Maier, *Recasting Bourgeois Europe: Stabilization in France, Germany and Italy in the Decade after World War I* (Princeton, 1975). Nothing comparable exists for the post-World War II moment.

⁴ Cf. Elizabeth S. Borgwardt, *A New Deal for the World: America's Vision for Human Rights* (Cambridge, Mass., 2005).

⁵ Jacques Maritain, *Primauté du spirituel* (Paris, 1927), 220, in English as *The Things that Are Not Caesar's*, trans. J.F. Scanlan (New York, 1931), p. 69. See also Maritain, "Le sens de la condamnation," in P. Doncouer, et al., *Pourquoi Rome a parlé* (Paris, 1927).

⁶ For the putative humanity of the Italian campaign, see "Pour la défense de l'Occident et la paix en Europe," *Le Temps*, November 4, 1935. For Maritain's response, see the manifesto "Pour la justice et la paix," *Sept*, October 18, 1935. See also Yves Simon, *La campagne d'Éthiopie et la pensée politique française* (Paris, 1936). On Spain, see Maritain, "De la guerre sainte," *Nouvelle revue française* (July 1937), in English in Alfred Mendizabal, *The Martyrdom of Spain: Origins of a Civil War* (New York, 1938) and as "The Idea of Holy War," in Justin O'Brien, ed., *From the N.R.F.* (New York, 1958). For comment, see José M. Sánchez, *The Spanish Civil War as a Religious Tragedy* (Notre Dame, 1986), chaps. 11-12 and Jay P. Corrin, *Catholic Intellectuals and the Challenge of Democracy* (Notre Dame, 2002), chaps. 12-13. On his interventions throughout, see Bernard E. Doering, *Jacques Maritain and French Catholic Intellectuals* (Notre Dame, 1983), chaps. 3-4. On antisemitism, see Doering, *Jacques Maritain*, chap. 5; Robert Royal, ed., *Jacques Maritain and the Jews* (Notre Dame, 1994); Pierre Vidal-Naquet, "Jacques Maritain et les juifs: réflexions sur un parcours," in Maritain, *L'impossible antisémitisme* (Paris, 1995).

⁷ "An Interview with Jacques Maritain," *Commonweal*, February 3, 1939.

⁸ Cf. John Connelly, "Catholic Racism and Its Opponents," *Journal of Modern History* 79, 4 (December 2007), pp. 813-47.

⁹ Maritain, "The Possibility of a New Christian Order," *The Colosseum* 2 (1935), pp. 85-86, 89. A primary model Maritain had in mind was the celebrated Catholic Action movements of the interwar period, but he also inclined to the corporatist solutions of contemporary papal ideology, even as he warned that the "Austro-fascist" version of this corporatism was not the only possible one.

¹⁰ The early statement runs as follows: “L’individualisme absolu aboutit ainsi, par une de ces dérisions qui ne sont pas rares dans l’histoire de la pensée, à sacrifier à l’Etat ces droits premiers de la personne humaine que la loi naturelle place hors de la portée du pouvoir civil et au-dessus de lui: droit de propriété, ou droit de l’ouvrier sur son travail, comme aussi les droits concernant la constitution de la société familiale, antérieure par nature à la société civile.” Maritain, “Individualisme et étatisme,” *La Croix*, May 2-3, 1915, a summary of a lesson he gave at the Institut Catholique in March of that year, indicting a modern German derangement starting with Martin Luther (though it also infected France through the democratic Jean-Jacques Rousseau) for leading to war. I am grateful to Piero Viotto for informing me of this reference.

¹¹ Maritain, *Trois réformateurs: Luther – Descartes -- Rousseau* (Paris, 1925), 28-30, 192; in English, *Three Reformers: Luther – Descartes – Rousseau* (New York, 1955), pp. 21-22, 23-24, 136-37.

¹² Leo XIII, Encyclical Letter “*Libertas*,” June 20, 1888.

¹³ J. Bryan Hehir, “Religious Activism for Human Rights: A Christian Case Study,” in John Witte, Jr. and Johan D. van der Vyver, eds., *Religious Human Rights in Global Perspective: Religious Perspectives* (The Hague, 1996), p. 101.

¹⁴ Cf. Emilio Gentile, *Politics as Religion*, trans. George Staunton (Princeton, 2006), pp. 92-93 and chap. 4, *passim*.

¹⁵ Pius XII, Encyclical Letter “*Mit brennender Sorge*,” March 14, 1937, as translated in Georges Passelecq and Bernard Suchecky, *The Hidden Encyclical of Pius XI*, trans. Steven Rendall (New York, 1997), p. 105.

¹⁶ See esp. Fabrice Bouthillon, *La naissance de la Mardité: Une théologie politique à l’âge totalitaire, Pie XI (1922-1939)* (Strasbourg, 2001). Other works, such as Anthony Rhodes, *The Vatican in the Age of the Dictators* (London, 1973), provide the facts.

¹⁷ Paul A. Hanebrink, *In Defense of Christian Hungary: Religion, Nationalism, and Antisemitism, 1890-1944* (Ithaca, 2006), pp. 170-80.

¹⁸ “Pope Bids Church to Guard Man’s Rights,” *New York Times*, October 13, 1938; “Pastoral Letter [of the American Catholic Hierarchy] on the Teaching of Democracy,” *New York Times*, November 25, 1938.

¹⁹ See esp. A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford, 2001), chap. 4, also Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen*, 2nd ed. (Philadelphia, 2003), chap. 5.

²⁰ Maritain, “French Catholic Scholar States Position on War,” *Voice for Human Rights* 1, 3 (November 1939), p. 8. See also Maritain, “Vichy’s Racial Decrees Deny French Tradition, Says Famed Philosopher,” *Voice for Human Rights* 2, 2 (November 1940), and “Maritain Rejects Explanations Offered by Vichy Government for Defeat of French Nation,” *Voice of Human Rights* 2, 3 (December 1940). See the related volume, John A. Ryan et al., *Democracy: Should It Survive?* (Milwaukee, 1943), whose dominant theme is the threat of totalitarianism to the dignity of the person and to which Maritain contributed an essay entitled “Humanism and the Dignity of Man.”

²¹ Robert E. Lucey, “A Worldwide Attack on Man,” *Voice for Human Rights* 1, 2 (September 1940): 7; on the name change, see “Change of Name Shows Broader Application of Principles,” *Voice for Human Rights* 1, 2 (September 1940), p. 10.

²² See, e.g., “Pope Pius Tells World How to Make New Order,” *Chicago Daily Tribune*, December 25, 1940; “Catholics Back ‘War for Peace,’” *Washington Post*, December 19, 1941; letter to bishops as cited in Maritain, *Christianity and Democracy* trans. Doris Anson (New York, 1944), p. 58.

²³ Aloysius Muench, “One World in Charity” (1946), rpt. as Appendix C in Suzanne Brown-Fleming, *The Holocaust and the Catholic Conscience* (Notre Dame, 2006), p. 154.

²⁴ As, for example, the case of Bishop Klemens von Galen shows. See Beth A. Griech-Poelle, *Bishop von Galen: German Catholicism and National Socialism* (New Haven, 2002).

²⁵ See the text of the issue in François and Renée Bédarida, eds., *La Résistance spirituelle 1941-1944: Les cahiers clandestins du “Témoignage chrétien”* (Paris, 2001), pp. 159-86.

²⁶ See the excellent reconstruction by Florian Michel, “Jacques Maritain en Amérique du Nord,” *Cahiers Jacques Maritain* 45 (December 2002), pp. 26-86. Some of his earliest connections, in an atmosphere in which American Catholicism considered its own non-state religiosity the “hypothesis” in special circumstances rather than a “thesis” or general model, were with Dorothy Day and her Catholic Worker Movement. See Mark and Louise Zwick, *The Catholic Worker Movement: Intellectual and Spiritual Origins* (New York, 2005), chap. 10.

²⁷ Maritain, *A Christian Looks at the Jewish Question* (New York, 1939), 34. Most of material cited here actually originated in another essay on the Jews of 1937, and was inserted in this English translation of a February 1938 Paris lecture for the December 1938 New York lecture. See Maritain, “L’impossible antisémitisme,” in Henri Daniel-Rops, ed., *Les Juifs* (Paris, 1937) and “Les Juifs parmi les nations,” *La Vie intellectuelle*, February

1938, both rpt. in Maritain, *L'impossible antisémitisme*, pref. Pierre Vidal-Naquet (Paris, 1994), pp. 97-98, 125.

²⁸ "Warns America Sectarianism Is a World Menace: Rejuvenated Democracy Is Urged by Maritain," *Chicago Daily Tribune*, October 25, 1938.

²⁹ Maritain, *Le Crépuscule de la civilisation* (Paris, 1941), 78, in English, *The Twilight of Civilization*, trans. Lionel Landry (New York, 1943), 54-55.

³⁰ See Michel Fourcade, "Jacques Maritain et l'Europe en exil (1940-1945)," *Cahiers Jacques Maritain* 28 (June 1994), pp. 5-38 and Doering, "L'héritage américain de Jacques Maritain," in Michel Bressolette and René Mougél, eds., *Jacques Maritain face à la modernité: Enjeux d'une approche philosophique* (Toulouse, 1995).

³¹ "Why have philosophers devoted so much attention in recent years to the distinction between person and individual?" one Catholic philosopher asked in 1943, going on to conclude that even in Scholastic terms the distinction is baseless. "In this matter, they are motivated chiefly by the desire to provide a philosophical answer to the claims of totalitarianism." John A. Creaveny, "Person and Individual," *The New Scholasticism* 18, 3 (July 1943), p. 247. See the response to this article of Francis McMahon, "Religion and Freedom," *Review of Politics* 5, 4 (October 1943), p. 542, and Maritain to Waldemar Gurian, November 5, 1943, Notre Dame Archives CZAN. For some important statements by major Catholic theologians in the postwar period, see Karol Wojtyła, "Thomistic Personalism" (1961), "On the Dignity of the Human Person" (1964), and other essays in *Person and Community: Selected Essays (Catholic Thought from Lublin)*, trans. Theresa Sandok (New York, 1993); Joseph Ratzinger, "Zum Personverständnis in der Theologie," in *Dogma und Verkündigung* (Munich, 1973); and Hans Urs von Balthasar, "On the Concept of Person," *Communio* 13 (Spring 1986), p. 18-26. Though primarily indebted to Max Scheler, the personalist Wojtyła taught together at Lublin with Maritain's chief Polish disciple, Stefan Swiezawski; cf. Avery Cardinal Dulles, "John Paul II and the Mystery of the Human Person," *America*, February 2, 2004.

³² Cited in John Hellman, *Emmanuel Mounier and the New Catholic Left, 1930-1950* (Toronto, 1981), 168. For personalism -- including fulsome invocation of Maritain's formulae -- at Vichy, see Hellman's writings: "Maritain, Simon, and Vichy's Elite Schools," in Michael D. Torre, ed., *Freedom in the Modern World* (Notre Dame, 1989), "Communitarians, Non-conformists, and the Search for a 'New Man' in Vichy France," in Sarah Fishman et al., eds., *France at War: Vichy and the Historians* (Oxford, 2000), and *The Knight-Monks of Vichy France: Uriage, 1940-1945* (Montreal, 1994).

³³ On this issue, see Hellman's excellent article, "The Anti-Democratic Impulse in Catholicism: Jacques Maritain, Yves Simon, and Charles de Gaulle during World War II," *Journal of Church and State* 33, 3 (Summer 1991), pp. 453-71.

³⁴ The earliest publications are "The Natural Law and Human Rights" (Windsor, Ontario, 1942), an award acceptance speech dated January 18, 1942 published as a pamphlet, and "Natural Law and Human Rights," *Dublin Review* 210 (April 1942), pp. 116-24.

³⁵ Pius XII, "The Internal Order of States and People," in *The Major Addresses of Pope Pius XII*, 2 vols., ed. Vincent A. Yzermans (St. Paul, 1961). In the same collection, one may wish to compare the 1958 Christmas message, "The Rights of Man."

³⁶ For radically contrasting stories of the origins of rights that nevertheless concur on this point, see Leo Strauss, *Natural Right and History* (Chicago, 1953); Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge, 1979); and Michel Villey, *Le droit et les droits de l'homme* (Paris, 1983).

³⁷ Gurian is cited in Yves R. Simon to Maritain, July 16, 1941, Yves Simon Institute, South Bend, Indiana. I am grateful to Anthony O. Simon for access to this correspondence, though this line has been cited elsewhere, notably in John T. McGreevy's graceful and illuminating *Catholicism and American Freedom: A History* (New York, 2003), p. 198. Simon's own remark is in a letter to Maritain, December 20, 1940, Jacques Maritain Center Archives JM 28/03.

³⁸ In 1943, Thomist Charles de Koninck published *De la primauté du bien commun contre les personnalistes* (Quebec, 1943) (the contents are self-explanatory); cf. Yves Simon's amusing reply, "On the Common Good," *Review of Politics* 6, 2 (October 1944), pp. 530-33. One may compare here the revival of natural law by Heinrich A. Rommen, author of *Die ewige Wiederkehr des Naturrechts* (Leipzig, 1936) and anti-Nazi Catholic who emigrated to the United States in 1938. There, he wrote his mammoth *The State in Catholic Thought* (St. Louis, 1945), in which the concept of rights, though treated positively, is barely integrated and not allowed to compete with the more fundamental ones of natural law and common good (pp. 44, 58-59, 277-78, 377-78). However, a good number of his postwar mss., held at Georgetown University where he became a professor, turn frontally to the topic. His study of natural law appears in English as *The Natural Law: A Study in Legal and Social History and Philosophy*, trans. Thomas Hanley (St. Louis, 1947). For two postwar articles, see Rommen, "The Church and Human Rights," in Gurian and M.A. Fitzsimmons, eds., *The Catholic Church in World Affairs* (Notre Dame, 1954) and "Vers l'internationalisation

des droits de l'homme," *World Justice/Justice dans le monde* 1, 2 (December 1959), pp. 147-77.

³⁹ Julie Clague, "'A Dubious Idiom and Rhetoric': How Problematic Is the Language of Human Rights in Catholic Social Thought?," in J.S. Boswell et al., eds., *Catholic Social Thought: Twilight or Renaissance?* (Leuven, 2000), p. 130; Robert Kraynak, *Christian Faith and Modern Democracy: God and Politics in a Fallen World* (Notre Dame, 2001), p. 156. In the Anglo-American world, see John Finnis, *Natural Law and Natural Rights* (Oxford, 1980), esp. chap. 8 and many other works. Alasdair MacIntyre's *After Virtue: A Study in Moral Theory* (Notre Dame, 1981), took the position – more plausible historically at least – that medieval natural law did not flow into modern natural rights but broke down to produce them, but MacIntyre remained a marginal dissenter in an era when Pope John Paul II would champion the equation of Catholicism and human rights. For other worries that human rights opens the door to "liberalism" rather than successfully reformulates natural law, see Ernest L. Fortin, "The New Rights Theory and the Natural Law," in *Classical Christianity and the Political Order* (Lanham, 1996); John Hittinger, "Jacques Maritain and Yves Simon's Use of Thomas Aquinas in Their Defense of Liberal Democracy," in David M. Gallagher, ed., *Thomas Aquinas and His Legacy* (Washington, 1994); Ralph McInerney, "Maritain and Natural Rights," in *Art and Prudence: Studies in the Thought of Jacques Maritain* (Notre Dame, 1988); James V. Schall, "Human Rights as an Ideological Project," *American Journal of Jurisprudence* 32 (1987), pp. 47-61; and Schall, *Jacques Maritain: The Philosopher in Society* (Lanham, 1998), chap. 5.

⁴⁰ Aurel Kolnai, "The Synthesis of Christ and Anti-Christ," *Integrity* 5, 11 (August 1951), p. 41 (see also John Oesterreicher's response in a letter, *Commonweal*, September 14, 1951).

⁴¹ Alfred Cardinal Baudrillart, cited in Michael Burleigh, *Sacred Causes: The Clash of Religion and Politics, from the Great War to the War on Terror* (New York, 2007), p. 233; William L. Laurence, "Political Theory of Religion Is Hit," *New York Times*, September 17, 1940. For similar themes, see Maritain, "Religion and Politics in France," *Foreign Affairs* 20, 2 (January 1942). Though well-informed, Maritain consistently presented France as captured, thus drastically understating the extent and zeal of the collaborationism of some of his countrymen.

⁴² Maritain to Charles de Gaulle, 21 November 1941, in *Cahiers Jacques Maritain* 16-17 (April 1988), p. 61. By the next year he urged de Gaulle to champion a "renewed democratic ideal" rooted in personalism. *Ibid.*, p. 68.

⁴³ Maritain, *A travers le désastre* (New York, 1941), pp. 89-90; in English, *France, My Country: Through the Disaster* (New York, 1941), p. 66.

⁴⁴ H. Stuart Hughes, *The Obstructed Path: French Social Thought in the Years of Desperation* (New York, 1968), p. 76.

⁴⁵ Maritain, *Crépuscule*, p. 26, in English, p. 12.

⁴⁶ See Pius XII, “True and False Democracy,” in *Major Addresses*.

⁴⁷ Maritain, “Christian Humanism,” *Fortune*, April 1942.

⁴⁸ *Devant la crise mondiale: Manifeste de Catholiques européens séjournant en Amérique* (New York, 1942), in English as “Manifesto on the War,” *Commonweal*, August 21, 1942; for the redaction process, Jacques Maritain Center Archives, JM 18/01-06.

⁴⁹ Maritain, “Integral Humanism and the Crisis of Modern Times,” *Review of Politics* 1 (January 1939), pp. 1-17, rpt. as *Scholasticism and Politics* (New York, 1940), chap. 1; “Christianity and Democracy,” *Commonweal*, May 7, 1943; *Christianisme et démocratie* (New York, 1943), in English as *Christianity and Democracy; Principes d’une politique humaniste* (New York, 1944); and *Pour la justice*. Of particular interest are Maritain’s brief radio messages broadcast into France; see Maritain, *Messages, 1941-1945* (New York and Paris, 1945). Finally, Maritain, *A travers la victoire* (Paris, 1944-45).

⁵⁰ Joseph T. Delos et al., *Race, Nation, Person: Social Aspects of the Race Problem* (New York, 1944), with chapters like “The Rights of the Human Person vis-à-vis of the State and the Race” and “Catholic Personalism Faces Our Times.”

⁵¹ Richard Pattee, “Human Rights” (June 3, 1945), in George N. Shuster et al., *Problems of the Postwar World: A Catholic Hour Symposium* (Washington, 1945), 29.

⁵² See Georges Gurvitch, *La déclaration des droits sociaux* (New York, 1944), in English as *The Bill of Social Rights* (New York, 1946), and the prefatory drafts by Maritain (in whose series the book appeared) in the Jacques Maritain Center archives. On FDR and social rights, see Cass R. Sunstein, *The Second Bill of Rights: FDR’s Unfinished Revolution and Why We Need It More than Ever* (New York, 2004).

⁵³ Among the framers, most credit for the UDHR’s personalism is due to the Lebanese Christian philosopher Charles Malik. Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York, 2001), 39-41 and *passim*. Details of Maritain’s UNESCO work are available here too. See also René Mougel, “J. Maritain et la Déclaration universelle des droits de l’homme,” *Cahiers Jacques Maritain* 37 (November 1998), pp. 13-15.

⁵⁴ Cf. Mark Mazower, "The Strange Triumph of Human Rights, 1930-1950," *Historical Journal* 47, 2 (June 2004), pp. 379-98.

⁵⁵ Wolfram Kaiser, *Christian Democracy and the Origins of the European Union* (Cambridge, 2007) and Roberto Papini, *The Christian Democrat International*, trans. Robert Royal (Lanham, 1997).

⁵⁶ Richard Vinen, *Bourgeois Politics in France, 1945-1951* (Cambridge, 1995), p. 152.

⁵⁷ Intervening in a famous fracas between Mounier and early Christian Democrat Paul Archambault during the 1930s, Maritain insisted that the new Christianity couldn't be equated with a party program, being "of a freer and more elevated order, which on the contrary seeks to renew the very manner of posing the problem." Integral humanism "could not be reduced to any of the operative ideologies in the political formation due to the nineteenth century and still extant." Maritain, "Au sujet de 'la democratie et la revolution,'" *L'Aube*, January 25, 1934. His postwar views did change, of course, but never made him a primary ideologue of Christian Democratic politics.

⁵⁸ On Maritain and Germany, see Edward M. Andries, "On the German Constitution's Fiftieth Anniversary: Jacques Maritain and the 1949 Basic Law (*Grundgesetz*)," *Emory International Law Review* 13 (1999), pp. 4-75 and Heinz Hürten, "Der Einfluß Jacques Maritains auf das politische Denken in Deutschland," in *Katholiken, Kirche, und Staat als Problem der Historie*, ed. Hubert Gruber (Paderborn, 1994). On "the West," see such works as Hürten, "Der Topos vom christlichen Abendland in Literatur und Publizistik nach den beiden Weltkriegen," in *ibid.*; Axel Schildt, *Zwischen Abendland und Amerika: Studien zur westdeutschen Ideenlandschaft der 50er Jahre* (Munich, 1999); Vanessa Conze, "Abendland gegen Amerika!: 'Europa' als antiamerikanisches Konzept im westeuropäischen Konservatismus (1950-70)," in Jan C. Behrend and Arpád von Klimó, eds., *Antiamerikanismus im 20. Jahrhundert* (Berlin, 2005). See also Maritain, "Christliche Politik," *Deutsche Universitätszeitung*, April 28, 1950.

⁵⁹ Maria Mitchell, "Materialism and Secularism: CDU Politicians and National Socialism, 1945-49," *Journal of Modern History* 67, 2 (June 1995), pp. 278-308 and Mitchell, "'Antimaterialism' in Early German Christian Democracy," in Thomas Kselman and Joseph A. Buttigieg, eds., *European Christian Democracy: Historical Legacies and Comparative Perspectives* (Notre Dame, 2003); see also Anton Rauscher, ed., *Kirche und Katholizismus 1945-1949* (Munich, 1977). The absence of religion from such works as Konrad Jarausch, *After Hitler: Recivilizing Germans, 1945-1995* (New York, 2006) and Tony Judt, *Postwar: A History of Europe since 1945* (New York, 2005) is glaring. James Q. Whitman's provocative assertion of a fascist background to postwar dignity is wanting for similar

reasons; the key is to recognize the transformation of political Christianity from its proximity to fascism to its postwar antifascism. Whitman, "From Fascist 'Honour' to European 'Dignity,'" in Christian Joerges and Navraj Singh Ghaleigh, eds., *The Darker Legacy of European Law: Perceptions of Europe and Perspectives on a European Order in Legal Scholarship during the Era of Fascism and National Socialism* (Cambridge, 2003).

⁶⁰ Dianne Kirby, "Divinely Sanctioned: The Anglo-American Cold War Alliance and the Defence of Western Civilization and Christianity, 1945-1948," *Journal of Contemporary History* 35, 3 (2000), pp. 385-412 and Kirby, ed., *Religion and the Cold War* (New York, 2003).

⁶¹ John Paul II, Apostolic Exhortation "Ecclesia in Europa," June 28, 2003. The legal philosopher Michael J. Perry is best associated with such claims on the American academic scene. Perry, *The Idea of Human Rights: Four Inquiries* (New York, 1998), chap. 1, and *Toward a Theory of Human Rights* (Cambridge, 2006).

CHAPTER III

THE INFLUENCE OF THE DECLARATION OF BOGOTÁ ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

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In 2009, the American Declaration of the Rights and Duties of Man, which is part of the Inter-American System, celebrated 60 years of existence. It had been approved at the IX Conference of the Organisation of American States that took place in Bogotá, Colombia, between March and April, 1948. It is, undoubtedly, a very important document. Nevertheless, there are only a few studies about it, and almost none highlights the fact that this declaration was conceived, approved and implemented before the Universal Declaration of Human Rights, which has existed since December 10th 1948.

This essay will examine the relevance of the Inter-American Human Rights System, emphasizing the originality of the American Declaration of the Rights and Duties of Man. To this purpose, the document is divided into three parts. The first one shows the relevance of the issue of human rights throughout the history of the Inter-American System; it also shows how the Inter-American System is built over the protection and guarantee of human rights, as they are essential for democracy. Secondly, the essay describes the American Declaration of the Rights and Duties of Man and compares its clauses with those of the Universal Declaration. Finally, some conclusions on the importance and originality of the Inter-American instrument are presented.

HUMAN RIGHTS AND THE AMERICAN CONTINENT

Even before the independence of the American countries, incumbents and citizens of the continent have been interested in the way human rights are conquered and guaranteed. Only a few years after the Independence process, in 1826, with the *Unión, Liga y Confederación Perpetuas Treaty* of Panamá, the signing states¹ agreed to “abolish and end the traffic of slaves that came from Africa,”² stating that those who disobeyed would be accused of piracy. Later on, in 1928, some Conventions on Asylum were approved, with the aim of protecting political rights.³

In 1933, while there was uncertainty because of the economic crisis (Depression), the German people were electing Adolf Hitler as their Chancellor, and in Siam –Thailand – a revolution against the monarchy was taking place, in America the concern was about how to protect the rights of men and women as equals and how to avoid discrimination.⁴ The American people also became interested in the indigenous populations. In 1938 formal

meetings were devoted to examining their rights,⁵ and at the VIII American International Conference a Declaration for their defense was even adopted.

But it was at the Inter-American Conference on Problems of War and Peace – better known as ‘Conference of Chapultepec’ – , held between 21 February and 8 March 1945 in Mexico City, when perhaps for the first time the subject of the rights and duties of man was officially addressed. It was precisely during this Conference that Resolution XL on ‘International Protection of Essential Human Rights’ was issued. At that time, the Inter-American Juridical Committee was entrusted with the task to elaborate a draft declaration to include not only the rights but also the duties of man. The Preamble of the Resolution states that:

The Declaration of the United Nations had enshrined the need for the international protection of fundamental human rights;

That for the effectiveness of such protection it is necessary for the States to agree in a Convention on the issue;

That the international protection of fundamental human rights will certainly end with the wrong use of diplomatic protection for citizens who live abroad, and will also encourage the protection of the right to equality among nationals and foreigners.⁶

The same Conference also addressed other issues directly related to human rights, such as racial discrimination. In this regard, Resolution XLI was adopted. Nations were asked to take due action to prevent any discriminatory act based on race or religion. Given the context of the time, framed by the end of World War II, this fact is of the utmost importance.

Some States, like Uruguay, even raised the question of the possibility to legitimate collective interventions against a Member State of the OAS that continuously violated human rights. Although the proposal was discussed, at that time it was not really clear which human rights were meant to be protected by the State.

At this time, both the international and the Inter-American human rights protection systems began to be built, but on different basis.

As it is known, during the Yalta Conference in 1945, Sir Winston Churchill of the United Kingdom, Joseph Stalin of the Soviet Union, along with President Franklin Delano Roosevelt of the United States, declared their determination to establish a global organization to work for the maintenance of peace and security.

Consequently, the San Francisco Conference took place on April 25 of that year. It was attended by representatives of 50 Nations, who agreed to what we know as the Charter of the United Nations, adopted unanimously on June 25th at the San Francisco Opera House.

Seven months after the creation of the Organization of American States, on October 24th, with the majority ratification of its constituent Charter, the United Nations was born.

For its part, the Inter-American system is built rather on the idea of achieving respect for representative democracy, harmonizing it with security principles, and always under the assumption of respect and guarantee of human rights. Later on, in 1959, when the V meeting of consultation of Ministers of Foreign Affairs took place, representatives of the member states discussed the relationship between representative democracy and respect for human rights, as well as how to enforce these two fundamental principles.

Indeed, the main documents of the Inter-American System show how human rights are substantial links between democracy, development and security.

An example that illustrates the previous statements is the Inter-American Treaty of Reciprocal Assistance, whose main subject was precisely hemispheric security. In its Preamble, the treaty stated that “peace is founded on justice and the moral order and, therefore, on the recognition and international protection of human rights and freedoms.”

The OAS Charter of 1948 indicated that one of its principles is respect for human rights, over any consideration of race, nationality, creed or sex. In that sense, a priority duty of Member States is to guarantee “human rights and the principles of universal morality”. Along with the Charter of the OAS, during the IX International Conference or Bogota Conference, several documents on human rights and duties were adopted. The most relevant is Resolution XXX, better known as The American Declaration of the Rights and Duties of Man, which, as stated earlier, is older than the Universal Declaration of Human Rights (December 10th, 1948).

THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN COMPARED TO THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The American Declaration of the Rights and Duties of Man has a Preamble and 38 clauses. Its text clearly states that for the American States “the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality.” This is why they must be respected and at the same time the corresponding duties should be enforced.

The text of this important declaration was prepared by a group of people from different countries. They were: Luis Fernán Cisneros (Peru), who assumed the Presidency of the group; Guy Pérez Cisneros (Cuba), Rapporteur; Henry V. Corominas (Argentina); Alberto Salinas López (Bolivia); Camilo de Oliveira (Brazil); Luis López de Mesa (Colombia);

Edward A. Jamison (USA); Germán Fernández del Castillo (Mexico); and Melchor Monteverde (Venezuela).

After several rounds of discussions, this working group presented some conclusions before the Sixth Committee. The proposal was so successful, that the Commission accepted it and began to think about the legal way by which member states would adopt the document. The report written by the Special Rapporteur states:

“With regard to Sub-Commission A (“International Human Rights and Duties”), two issues were discussed: one was the possibility to have a Convention rather than a Declaration. The difference is that the first one is compulsory and the second one is not. The second issue was if it was worth giving the document an international guarantee for its effectiveness. Since the beginning, the existence of three groups was clear: 1) Those who, like Brazil and Uruguay, wanted the Pact to be compulsory for every State, with international guarantees for its protection; 2) Those who, like Colombia, sought a smooth guarantee, in order to ease the parts’ fear of losing sovereignty; 3) And finally, those who thought that it was reasonable and useful to take into account those sacred principles which are the pith and marrow and the essence of Americanness (“americanidad”), but who did not dare to make them mandatory for every state, because they were convinced that not all of the American countries were politically equipped to assume these responsibilities. Thus, this group of states preferred to postpone the commitment required.”⁷

It is important to note that in 1998, during the XXVIII OAS General Assembly, Resolution 1591 was approved. The OAS decided to request the Permanent Council to consider if it would be appropriate to propose “changing the title of the American Declaration of Human Rights and Duties of Man to the ‘American Declaration of ‘rights and duties of the person’, or other relevant expression, and replace in the entire text the word ‘man’ for ‘person.’”⁸ This task was extended in the XXIX General Assembly with Resolution 1635/1999. To date, a decision has not been made.⁹

Other relevant instruments adopted at this Conference were:

a) Resolution XXXI, whereby the Inter-American Juridical Committee was requested to submit a proposal of statutes for the establishment of an Inter-American Court that could guarantee human rights, under the assumption that “there is no right properly secured without a due tribunal.” The explanatory statement of this resolution contains a warning

about the potential problem of enabling citizens to directly access an international tribunal against their own given State. The “dogma of the absolute sovereignty of States is opposed to this” and “while this dogma is already outdated, there will be strong opposition to developments in this regard.”¹⁰ When the Committee undertook this task, it decided to refrain from writing the draft entrusted, as there was no “positive substantial right on the subject”¹¹ and an initiative of this nature would “involve a radical transformation of the existing constitutional systems in all countries of the continent;”¹²

(b) The Inter-American Convention on the granting of political rights to women;

(c) Resolution XXIII on the economic status of female workers; and

(d) Resolution XIX or inter-American Charter of social guarantees that reflects the fundamental rights of workers.

A comparison of the texts of the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights, shows that the former is a more comprehensive instrument in terms of rights: it includes political, social, economic and even cultural rights, while the latter falls somewhat short with regard to these rights.

Additionally, as mentioned earlier, the American Declaration devotes most of its clauses to establishing specific duties related to each right, while the Universal Declaration only mentions in one article and in a general way the existence of duties:

“Article 29-1.” Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.”

The following comparison of the two texts demonstrates that the American Declaration covers in a more detailed way not only the human rights but also the duties and addresses them at the same level of emphasis:

	American Declaration of the Rights and Duties of Man	Universal Declaration of Human Rights
Approval	OAS General Assembly. April 1948.	UN General Assembly. December 1948.
Preamble	Dignity of the human person. Protection of essential human rights. Their basis are the attributes of the human person. Their protection should guide American law. Equality of men. Each right implies a correlative duty. Rights express freedom. Duties express the dignity of freedom. Culture is an expression of the spirit.	Freedom, justice and peace are based on the dignity of each Member of the family. The violation of human rights have been the cause of barbarous acts which has outraged the conscience of mankind. Human Rights are essential in lawful regimes. Equality of men in dignity and rights.
Right to life, liberty and personal security	It is a right of all human beings (art. 1)	It is a right of every individual (art. 3)
Right to religious freedom and worship	Art. 3	Art. 18
Right to freedom of investigation, opinion, expression and dissemination	Art. 4	Art. 19
Right to protection of honor, personal reputation and private and family life	Art. 5	
Right to a family and to protection thereof	Art. 6	Art. 16

Right to protection for mothers and children	Art. 7	
Right to have a residence and to mobilize	Art. 8	Art. 13
Right to the inviolability of the home	Art. 9	Art. 12
Right to the inviolability and transmission of correspondence	Art. 10	
Right to the preservation of health and welfare	Art. 11	
Right to education	Art. 12	Art. 26
Right to the benefits of culture	Art. 13	Art. 27
Right to work and to fair remuneration	Art. 14	Art. 23
Right to leisure time and to the use thereof	Art. 15	Art. 24
Right to social security	Art. 16.	Art. 22
Right to the recognition of legal personality and civil rights	Art. 17	Art. 6 – Juridical personality
Right to a fair trial	Art. 18	Art. 10, 11
Right to have a nationality	Art. 19	Art. 15
Right to vote and to participate in government	Art. 20	Art. 21
Right of assembly	Art. 21	
Right of association	Art. 22	Art. 20
Right to property	Art. 23	Art. 17
Right of petition	Art. 24	
Right of protection from arbitrary detention	Art. 25	Art. 9

Right to due process of law	Art. 26	Art. 8
Right of asylum	Art. 27	Art. 14
Scope of the rights of man	Art. 28	
No slavery or servitude		Art. 4
No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment		Art. 5
Duties in General		Art. 29
Duties before society	To live and share with other people Art. 29.	
Duties toward children	It is the duty of every person to aid, support, educate and protect his minor children. Art. 30	
Duties toward parents	It is the duty of children to honor their parents always and to aid, support and protect them when they need it. Art. 30	
Duty to receive instruction	It is the duty of every person to acquire at least an elementary education. Art. 31	
Duty to vote	It is the duty of every person to vote in the popular elections of the country of which he is a national, when he is legally capable of doing so. Art. 32	
Duty to obey the law	Art. 33	
Duty to serve the community and the nation	It is the duty of every able-bodied person to render whatever civil and military service his country may require for its defense and	

	<p>preservation, and, in case of public disaster, to render such services as may be in his power.</p> <p>It is likewise his duty to hold any public office to which he may be elected by popular vote in the state of which he is a national.</p> <p>Art. 34</p>	
Duties with respect to social security and welfare	To cooperate with the State Art. 35	
Duty to pay taxes	To support public services Art. 36	
Duty to work	In order to obtain the means of livelihood or to benefit his community. Art. 37	
Duty to refrain from political activities in a foreign country	It is the duty of every person to refrain from taking part in political activities that, according to law, are reserved exclusively for the citizens of the state in which he is an alien. Art. 38	

CONCLUSIONS

A perusal of the two instruments easily shows that despite having similar foundations and conceiving human rights as a natural consequence of human dignity, the Universal Declaration stresses the defense and guarantee of human rights on the basis that they will help prevent assaults among States and thus bring peace among Nations, while the Inter-American system views such rights as the basis for the consolidation of any struggling democracy.

It is also clear that the American conception enriches the view of rights rising and listing eleven duties that must be understood as correlated to safeguards.

This last feature of the American Declaration of the Rights and Duties of man is, still today, innovative and certainly very clever, in the

sense that it makes clear for everyone that being part of a State entails responsibilities in relation to their fellow citizens and, of course, the State.

Seen today, one might assert that the American instrument is an avant-garde and visionary document. Clearly, being a Declaration and therefore having full force, and being part of the *corpus juris* of human rights and becoming customary law, its interpretative wealth helps sustain the most entrenched idea that not only individuals are subject of rights and duties but also, and most important today, legal persons (societies, foundations, nongovernmental organizations, etc).

Indeed, it is precisely the hermeneutic power of the Declaration what allows to reiterate and enforce what is today known as the social responsibility of legal persons,¹³ generating a greater and more permanent efficiency and effectiveness of human rights.

NOTES

¹ Colombia, Centroamérica, Perú y Estados Unidos Mexicanos.

² Tratado de Unión, Liga y Confederación Perpetuas. Panamá, 1826. Art. 27. In: *Conferencias Internacionales Americanas*, pp. xxviii ff.

³ Convention on Asylum. Havana, 1928; Convention on Political Asylum. Montevideo, 1933.

⁴ Convention on Women's Nationality, Montevideo. 1933.

⁵ Resolution about freedom of association and freedom of expression of workers; Resolution xxxvi states that "any persecution because of race or religion...is against the political and juridical regimes of the American States." In: *Conferencias Internacionales Americanas*, Primer Suplemento, 1938-1942, Washington, D.C., pp. 23-48. See Rafael Nieto Navia, 'Introducción al sistema interamericano de protección de los derechos humanos'. ed. Temis. Instituto Interamericano de Derechos Humanos, 1993.

⁶ Unión Panamericana. Departamento Jurídico. *Conferencias Internacionales Americanas*. Segundo Suplemento: 1945-1954. Washington, D.C.: U.P., 1956, p. 50. In: Alvaro Tirado Mejía. *Colombia en la oea*. Ministerio de Relaciones Exteriores. Santa Fe de Bogotá, 1998.

⁷ El Sistema Interamericano, pp 517-518. In: Rafael Nieto Navia, 'Introducción al sistema interamericano de protección de los derechos humanos'. ed. Temis. Instituto Interamericano de Derechos Humanos, 1993.

⁸ AG/RES. 1591 (XXVIII-O/98)

⁹ Organización de Estados Americanos. 60 años de aprendizaje. Cancillería de Colombia. Trabajo en colaboración, ed by Augusto Ramírez-Ocampo. Imprenta Nacional. Abril 2008.

¹⁰ Resolución XXXI. IX Conferencia de Bogotá.

¹¹ Resolución XXXI. IX Conferencia de Bogotá.

¹² Rafael Nieto Navia, *Introducción Al Sistema Interamericano De Protección De Los Derechos Humanos*. ed. Temis. Instituto Interamericano de Derechos Humanos, 1993, p. 43.

¹³ See *United Nations Global Compact*, 1999.

CHAPTER IV

**THE INFLUENCE OF NGOs ON THE
UNIVERSAL DECLARATION OF HUMAN
RIGHTS**

ROBERTO FORNASIER

THE CRUCIAL YEARS: 1945-1948

The Universal Declaration of Human Rights, which was approved by an overwhelming majority by the General Assembly of the United Nations on 10 December 1948, is certainly one of the most important documents in the process of development of the protection of human rights. However, one should remember that the itinerary of its composition was long and complex and this was located in the years of reconstruction after the Second World War, the beginning of the Cold War and the process of decolonisation.¹

The Charter of the United Nations had already envisaged that the Economic and Social Council could create commissions to promote human rights (art. 68) and a year after the founding conference of San Francisco the first Nuclear Committee met with the aim of providing general recommendations on the composition of the future Commission on Human Rights of the UN.² This commission met for the first time in plenary session in January-February 1947 in Lake Success (USA), and began to discuss the first draft of a declaration which had been drawn up by the Director of the Division for Human Rights of the UN secretariat, the Canadian J.P. Humphrey.³ Given the notable divergences of opinion that existed amongst the delegates,⁴ a sub-committee was created to speed up the proceedings and this was made up of three leaders (E. Roosevelt, Malik and Chang) and the representatives of Australia, Chile, France, the USSR and Great Britain, helped by Humphrey. The principal problem, which immediately presented itself, concerned the kind of document that was to be drawn up, that is to say was it to be a simple declaration or a binding convention? The Soviet Union was firmly against the drawing up of a charter that would be a legislative act of the United Nations or integrated into the statutes of the UN; other countries, amongst which the United States of America, declared that they were hostile to the idea of an international convention signed and ratified by the members of the UN. The hypothesis of a manifesto to be incorporated into the national constitutions of states did not meet with greater success. In the end, the commission coalesced around a method that Cassin defined as '*tryptique*', which involved drawing up a declaration – an authentic collective manifesto – but working at the same time on a project for a binding pact and certain preliminary provisions as regards implementation. As we know, the second and more ambitious part of the

project was implemented only in 1966 with the signing of two pacts on human rights. The pathway that led to the Declaration of 1948 had greater success.

The second plenary session of the commission was held in Geneva in December 1947 in a rather tense climate because of the increase in the tensions between the two super-powers. A large number of NGOs also took part and these could intervene in the debates and present written memoranda. The result of these meetings was a new draft, made up of thirty-three articles, which was used as a basis for the sending in of comments by the states that belonged to the UN.⁵

During this stage of the deliberations, which also included the second series of meetings of the sub-committee which were held in May 1948, the most demanding work of drawing up a detailed draft was performed in particular by the French representative, the jurist R. Cassin, who revised and gave overall form to the preliminary text produced by Humphrey.⁶

The third and last plenary session of the Commission on Human Rights took place in June 1948⁷ and a definitive text was submitted to ECOSOC, which at that time was chaired by Malik himself. The discussion of the declaration was only one of many points in the crowded diary of the UN and thus, after a short debate, the document was approved unanimously on 26 August. The last obstacle to overcome was the examination of the declaration by the Third Committee of the General Assembly which was responsible for social, humanitarian and cultural affairs. This committee was also chaired by Malik. The discussion was intense and lasted for a number of months, with over eighty meetings of the committee.⁸ Finally, on 9 December – the same day as the approval of the convention on genocide – the declaration reached the General Assembly which was meeting in Paris. The next day it was approved with forty-eight votes in favour and eight abstentions, becoming a sort of ‘Magna Carta for mankind’.⁹

THE DIRECT AND INDIRECT INFLUENCES OF CHRISTIAN NGOS ON THE DECLARATION OF 1948

The influences on the Declaration during its drafting, which lasted for two years, were many in number and came from various directions: from national governments, from individual personalities, from professional or confessional organisations, from philosophical approaches, etc. Cassin, for example, cites certain ‘*remarquables*’ books which appeared during the Second World war and which influenced the ideas underlying the Declaration itself: *Les droits de l’homme et la loi naturelle* by Maritain; *Les droits sociaux* by Gurvitch; and *The Great Decision* by Prof. J.J. Shotwell.

As regards the influences of the world of non-governmental organisations (NGOs), these were both direct and indirect in character inasmuch as the Commission on Human Rights of the UN availed itself of the help and cooperation of various NGOs which played a lobbying role during the sensitive moment when the Declaration was adopted and were

present at the debates and sent memoranda to the commission.¹⁰ Secondly, important figures on the commission adopted suggestions they had received from various NGOs – Charles Malik, who strived for a long time to incorporate certain fundamental points which were tenaciously promoted by certain Christian NGOs into the Declaration, should be remembered in particular. Thirdly, most of the member states of the UN were at that time countries from South and Central America that were in large part Catholic and shared various positions expressed by Christian NGOs, especially on economic-social rights. It should also be remembered that the NGOs often acted in a compact way although they belonged to very different sectors and professed heterogeneous political ideas. This was because they adopted, as the UN commission did as well, the recommendation as to methodology made by the wise men of UNESCO, and this at a time when the divisions caused by the intensification of the Cold War appeared to make people think that the entire project of a Declaration would be shipwrecked.

The Directive Role of the Non-Governmental Organisations (NGOs)

Although the principal work of the drafting of the final text of the Declaration was done by the government delegates, the role played by certain NGOs which took part in the activities of the Commission on Human Rights from its inception should not be forgotten. The Charter of the United Nations, indeed, had envisaged certain NGOs – in a consultative capacity – being able to work with the various organs established by the statutes. ECOSOC drew up a list, divided into two classes of participation, namely ‘A’ and ‘B’, for those NGOs that were accredited with the Commission on Human Rights. There were thus organisations that were purely political, such as the Inter-Parliamentary Union; others of a social character such as the American Federation of Labor (represented by T. Sender); and others of a feminist orientation such as the International Council of Women (with Mrs Van Eeghen) or the Women’s International Democratic Federation. Amongst the NGOs of a Christian character that were most active in the process involving the drafting of the Declaration, the International Federation of Christian Trade Unions, the International Union of Catholic Women Leagues, the Commission of the Churches on International Affairs, and the World Jewish Congress certainly stood out. The first, the International Federation of Christian Trade Unions (IFCTU), which was represented on the commission by August Vanistendael and P.J.S. Serrarens, was an NGO with a Catholic basis, had its headquarters in Brussels and was important during the stage when social rights were discussed, in particular the right to strike and to form trade unions. The International Union of Catholic Women’s Leagues (IUCWL), represented by Mrs Schaeffer and Mrs de Romer, acted vigorously when the right to divorce and the right to have an abortion were discussed. The Commission of the Churches on International Affairs – with its headquarters in Geneva – was, instead, an expression of the Protestant world and was authoritatively

represented by F. Nolde. The Jewish world, lastly, was principally represented by the World Jewish Congress, with Bienenfeld and Easterman, but also by the Consultative Council of Jewish Organizations (with M. Wimm, E. Weill, Prof. N. Bentwich and Prof. P. Mantoux) and by the Coordinating Board of Jewish Organizations (with A.G. Brotman).

It should also be made clear that the accredited NGOs had an opportunity to intervene from the beginning of the process involving the drafting of the Declaration. As early as the first session of the commission, in January 1947, the Indian delegate, Mrs Mentha, had a motion passed to the effect that 'the communications of organizations having consultative status should be discussed; the others as listed by the Secretariat may be made available to members of the Commission upon their request'. Along the same lines, Lebeau (the Belgian representative) wanted a distinction to be made between communications received from NGOs with a consultative status, which could be freely studied, and those received from organisations outside the UN which were consultable 'without a formal decision of the Commission', inasmuch as the delegates 'should not be subject to the pressure of the public opinion'.¹¹

Even before this, when Humphrey and Laugier prepared to draw up the first draft of the Declaration on which the commission was later to work, they had an opportunity to examine a number of 'draft declarations' given to the Secretariat on Human Rights of the UN, amongst which were two presented by the American Jewish Committee and the American Bar Association¹².

Thus the role of this heterogeneous world was principally that of lobbying, of manoeuvring, of applying pressure to secure the placing of specific provisions in the articles of the Declaration, but it also involved a presence during the debates between the government representatives as well as personal and direct contacts with the members of the commission and the handing in of written memoranda. The importance of the work of the NGOs was stressed by Malik himself who in 1968 remembered that they 'surrounded us on every side and they followed our progress with extraordinary keenness'.¹³ Especially evident was the pressure applied by the representative of the Protestant world, F. Nolde, who enjoyed, in the eyes of Malik as well, a solid reputation for objectivity and justice.

The principal problem that the accredited NGOs had to address with the commission was the fact that they had the right to speak only when requested to do so by the chairman and to place their texts before the commission they had to persuade a government representative to sponsor them and to present them officially. Thus in May 1946 the commission decided to hear the opinion of numerous NGOs to guide it in carrying out its deliberations. The first to speak was Nolde, the representative of the World Council of Churches, who emphasised the primary position of freedom of religion. There then followed the contributions of many other exponents of NGOs who offered a rich gamut of opinions to the commission: from feminist organisations, such as the National Women's Trade Union League,

to political ones such as the American Bar Association or the American Law Institute, and on to religious ones such as the National Conference of Christians and Jews or the American Jewish Committee.¹⁴

In Malik's view the principal value of the NGOs was that they 'served as batteries of unofficial advisers to the various delegations, supplying them on a continuing basis with streams of ideas and suggestions'. In January 1947, at the first session of the Commission on Human Rights, the Belgian delegate Lebeau explained that the communications of the NGOs were useful as 'an indication of public opinion' and Malik added that he saw them as 'an ear to the world'.¹⁵

One example of the role of lobbying performed by the NGOs as regards the UN was that of the varied feminist organisations which pushed with success to change the sexist language of the first versions of the text. Thus, art. 1, which originally referred to 'all men', became 'all human beings'; in art. 2, amongst the forms of discrimination to be avoided, discrimination on the grounds of sex was also mentioned; the whole of the Declaration, lastly, envisages the use of neutral terms such as 'everyone', 'no one', 'all people', etc.¹⁶

At the deliberations of the commission were present, as has already been observed, various religious NGOs, the expression of both the Catholic and the Protestant worlds, as well as the Jewish world, which played an important role in the years 1946-1948. The direct contribution of the Holy See was limited inasmuch – for various reasons – it partly detached itself from the process of the composition of the Declaration.¹⁷

When entering into the detail of the work carried out by these religious organisations, one can identify certain occasions which serve as examples to provide an idea of their contribution. The International Union of Catholic Women Leagues (IUCWL) and the International Federation of Christian Trade Unions (IFCTU) worked – together with the representatives of the Latin American countries – to ensure that the 'right to divorce' did not appear in art. 16 on the family. Indeed, the text drawn up by the commission envisaged that men and women had equal rights as regards contracting and dissolving a marriage according to national law. At this point R. de Romer, the representative of the IUCWL, explained that it preferred a text 'affirming equality as regards marriage without specifying whether it was a case of contracting marriage or dissolving it'.¹⁸ Vanistendael of the IFCTU made clear to the commission that 'the Declaration is a moral guide for the nations...it was imperative that it should contain no principle that might offend the conscience of a large number of people. If the Declaration proclaimed the right to dissolve marriage, it would be unacceptable to hundreds of millions of Christians in countries that were Members of the United Nations'. Mrs. Schaeffer, of the 'Catholic women', also explained that her NGO represented 120 associations from sixty countries and that the principle of dissolution or divorce would have offended the Christian conscience. This position was strongly supported by the South American delegates but, in the end, the

Soviet line was imposed – which was also supported by the Danish delegate Begtrup – which wanted an explicit reference to the dissolution of marriage, seeing it as a matter of non-discrimination on grounds of sex rather than linked to specific religious beliefs.¹⁹

As regards the family, the representative of the IUCWL, C. Schaeffer, was keen to observe, when the commission discussed art. 16 on education, that Nazi indoctrination had poisoned very large numbers of German young people. He stressed that ‘the articles failed to mention the fundamental right and responsibility incumbent upon parents to educate their children as they saw fit. If that right were not stated in the Declaration, there might well be a recurrence of situations such as that which prevailed in Germany under Hitler’.²⁰ Thus, thanks to the emphasis of the World Jewish Congress and Beaufort, the Dutch representative, a third section was added to article 26 which read: ‘Parents have a prior right to choose the kind of education that shall be given to their children’.

Another example which allows us to understand the role of the NGOs of a religious character was the initiative of Vanistendael – this time supported by Malik – who proposed, during the second session of the commission, to place a section in art. 3 which protected life from conception onwards, independently of the physical or mental conditions of the foetus, and to avoid any reference to the right to engage in an abortion.²¹ This proposal, which was also emphasised in a memorandum submitted to the commission, was supported by other NGOs (in particular the IUCWL), as well as the representative of Chile, Cruz Coke, who – also as a medical doctor – opposed a legal recognition of abortion in the Declaration and proposed an amendment by which ‘unborn children, incurable, mentally defectives and lunatics shall have the right to life’. In the end these proposals were not incorporated into the final version but the subject was discussed a number of times by the government representatives. Whatever the case, the final article did not include any reference to the right to have an abortion.

Naturally the IFCTU, with A. Vanistendael, also stood out in the field of social rights, for example by promoting – together with the World Federation of Trade Unions, the American Federation of Labor and the South American Delegates – an explicit recognition of the rights of trade unions in the Declaration given that the first draft by Humphrey had not referred to them.²² Vanistendael, together with Sender, of the AFL, was very active during the drafting stage of art. 23 and stressed important points which were then incorporated into the final text, such as the possibility of workers choosing their trade unions or the importance of measures to be taken to avoid unemployment. Moreover during the third session of the commission he supported the principle that ‘à travail égal, salaire égal’, which became the second section of that article.²³

The ICFTU also stood out in supporting the creation of mechanisms to protect people against unemployment inasmuch as ‘it was a duty of the State to guarantee employment; it had the primary duty of harmonizing the

economic life of the nation to permit full employment'. When the commission seemed to be moving towards not placing a reference to protection against unemployment Vanistendael acted once again, observing that 'this was a question of protecting rights that had only recently been recognized' and which should be mentioned explicitly.²⁴ In the end this position prevailed because art. 23 reads 'Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment'.

It should also be observed that despite the cultural differences, on various occasions the NGOs acted compactly and promoted the placing of specific principles in the Declaration. Thus article 14 on the right to asylum was drawn up in its final form specifically as a result of the unity of action of the NGOs. In this case Mrs de Romero of the IUCWL, as well as Vanistendael, Mrs Sender and Easterman, supported a project presented by Weiss, of the International Refugee Organisation, and thanks to the support of the delegate of the Philippines, General Romulo, a final text was reached which reads: 'Everyone has the right to seek and to enjoy in other countries asylum from persecution'.²⁵

Amongst the rights of the NGOs there was also that of being able to supplying useful texts and dossiers to the government delegates. Amongst the many communications that arrived there was also a document presented in December 1947 by Serrarens, who was also a member of the ICFTU, which referred to the proceedings of a congress of his organisation which had been held in Paris in 1937 at which Maritain gave the inaugural speech on the human person. In this way the importance of work for the full development of the human person, the dangers inherent in a hypertrophic level of state responsibilities; and the importance of the family which the state should protect, etc., were all emphasised.²⁶ Various other memoranda were given to the secretariat chaired by Humphrey, amongst which was one by the National Catholic Welfare Association, whose headquarters were in Washington, which had been drawn up under the impetus of the American Catholic bishops,²⁷ and one by the Institute of American Law, etc.²⁸

Amongst the NGOs of a religious character, the Jewish ones were especially active in denouncing the holocaust and stimulating the government delegates to include in the text certain articles to avoid a repetition of Nazi horrors, such as art. 5 against torture²⁹ or art. 7 on equality before the law or art. 10 on the need to have impartial courts, art. 14 on the right to asylum, and 26 on education.³⁰ In this case Bienenfeld and the representative of UNESCO, P. Lebar, explained that in Germany 'under the Hitler regime, education had been admirably organized but had, nevertheless, produced disastrous results.³¹ In the view of Easterman, education had to fight first of all a spirit of intolerance and hatred, fostering understanding and friendship between nations and racial and religious groups (this principle became the second section of art. 26), whilst Miss Schaefer of the IUCWL strongly defended the primary right of patents to

educate their children (which became, as has been pointed out, the third section of this article).³²

Lastly, one should observe that amongst the government delegates it was specifically Malik who stood out as an attentive listener to the representatives of the NGOs, and to such an extent that amongst his colleagues it was he who supported the view of Bienenfeld, the delegate of the World Jewish Congress, who argued that the right to education should not be generic – ‘it was necessary to specify the nature of such education’ to avoid indoctrination by possible future totalitarian governments.³³

Amongst the figures who were representatives of the NGOs that most stood out as regards their charisma and activities, reference should be made to Otto Frederick Nolde, the delegate of the Commission of the Churches on International Affairs (CCIA), an organisation of Protestant Churches that had been created in April 1946.³⁴ According to E. Roosevelt, Nolde “has attended almost every session of the Commission on Human Rights. He is one of the observers representing non-governmental organizations who attends as constantly as the delegates do.”³⁵ Nolde strove above all else for the insertion of religious freedom into the text of the Declaration, and acted both through his personal contacts with the government delegates and by being present during the debates. He also shared various philosophical principles with Malik, such as that on natural rights, as a result of which the CCIA neither “expected or desired that the Christian faith should be made to prevail” but ‘emphasised the principle that the governments could not grant human rights, but only recognise the human rights which man already possessed.’³⁶ Nolde was very attentive to the fundamental principle of religious freedom which he expounded in a large number of public speeches between 1946 and 1948, as well as in articles that appeared in various reviews.³⁷ In March 1947 he also sent a memorandum to the Division for Human Rights of the UN which was chaired by Humphrey, emphasising the right of a person to change their religion or belief, and tried to have this principle inserted through ‘informal contacts in the corridors, at luncheons and dinners’ as well, as well as by maintaining a correspondence with many delegates of the UN Third Committee. In the end his efforts were rewarded, not least thanks to the insistence of Malik, because art. 18 explicitly recognised the freedom of a person “to change his religion or belief.”³⁸

The Support Given by Charles Malik to the Christian NGOs

Of the various sources that influenced the final text of the Declaration of 1948, the greatest contribution undoubtedly came from the personal beliefs, ideas and specific culture of the members of the Commission on Human Rights which drafted the final text. Most of the government delegates were Catholics but also of fundamental importance was the role of a Greek Orthodox intellectual, Charles Malik (1906-87), the representative of the newly created state of the Lebanon.³⁹ It was he, as has already been pointed

out, who on a number of occasions supported the vision expressed by the Christian NGOs. He shared their basic ideas and motives and adopted various suggestions made by their representatives. His contribution was also decisive as regards the adoption of the text by 1948, inasmuch as he held a series of exceptional series of institutional positions which allowed him to speed up the discussion in the various bodies of the UN: in addition to being the *rapporteur* of the Commission on Human Rights, Malik was also elected President of ECOSOC and chairman of the Third Committee of the General Assembly. Indeed Glendon writes that “no individual played a greater role in shaping and securing consensus for the UN’s 1948 Universal Declaration.”⁴⁰

His basic role has been known about for some time but it is helpful to remember that at every meeting and debate he acted to impose his personalist approach to man – in which he was followed and supported by Nolde and Vanistendael of the IFCTU – which held that the human person has a worth greater than any social group, “is inherently prior to any group to which he may belong,”⁴¹ especially as regards the state, as was maintained by the delegates of the Soviet camp. From the outset he strove to affirm that “the human person has nothing more sacred and more inviolable than his spirit and his conscience”⁴² and the final text of the Declaration bears in it this personalist contribution: in particular the article on the family (art. 16), to which the Christian NGOs greatly contributed, and that on freedom of religion (art. 18) which was strongly supported by Nolde.⁴³ It was Malik who proposed the seventh section of the preamble which stressed the importance of a shared conception of rights and freedoms enunciated by the Declaration, referring to Maritain’s speech of November 1947 to the UNESCO assembly.⁴⁴ And it was he who wanted to insert into art. 1 a precise reference to the nature, to the essence, of man which distinguished him in essential terms from the animals, and this reference was to be found in the ‘reason and conscience’ of every human being referred to in the Declaration.⁴⁵ On a number of occasions this Lebanese diplomat dwelt on freedom of conscience and religion, agreeing to the full with the opinions of Nolde, the representative of the Protestant world, and seeing it as a fundamental right,⁴⁶ as he saw the right to *change* one’s own opinion or creed as a fundamental right.⁴⁷ On a number of occasions he was in total disagreement with the Soviet representative inasmuch as he saw the person as prior to, and more important than, the state, and condemned the errors of ‘statism’, ‘materialism’ and ‘socialism’ which denied the importance of institutions between man and the state apparatus, such as the family but also the Church.⁴⁸

A second point that he stressed, and here once again he was supported by the Christian NGOs, was that of an *explicit reference to God* in the Declaration, even though in the end the line that was contrary to a theistic vision of society prevailed. On a number of occasions, indeed, he proposed articles that made God the guarantor of natural law and the family founded on marriage. During the second session of the commission he

presented a text which stated that ‘the family deriving from marriage is the natural and fundamental group unit of society. It is endowed by the Creator with inalienable rights antecedent to all positive law’.⁴⁹ After the vote the first section was accepted and became the first part of art. 16 whilst the second section was rejected, primarily because of the intransigent opposition of the Soviet Union. But Malik did not give up and in May 1948 he forcefully proposed the idea – when speaking to the drafting committee – that ‘the family was the cradle of all human rights and liberties’ and that it ‘is endowed by the Creator with inalienable rights antecedent to all positive law’. He also explained that the word ‘Creator’ did not have theological implications inasmuch as it did not necessarily mean ‘God’ and that in some philosophical systems it referred solely to ‘Nature’.⁵⁰ The amendment was rejected once again but in the autumn of 1948 the delegations of Brazil and Holland proposed an explicit reference to God in art. 1. In the end, however, within the context of pressure applied by the Soviet Union and the advice to be moderate made by Chang and Santa Cruz (the delegate of Chile), any reference to God was avoided.⁵¹ Whatever the case, in 1986, when remembering what had happened at the UN, Malik explained that ‘offensive’ terms such as ‘God’ or ‘Creator’ were avoided but the phrase remained that human rights are ‘endowed’. Thus ‘the phrase “are endowed” raises the question: endowed by whom or by what? Clearly the atheist would say the “what” is “nature”, but the theist is then free to say the “who” is “God”’.⁵²

The Inherent Community of Outlook between the Christian NGOs and the Latin American Bloc

Another important factor that contributed to the placing of certain Christian principles in the text of the Declaration was the influence of the countries of Latin and Central America, in large part Catholic, which acted as a sort of ‘bloc’, often voting compactly and proposing amendments to the Declaration together. It was specifically these states that on various occasions supported the proposals of the Christian-based NGOs, sharing the spirit that animated them and the motivations involved (one may think here, for example, of the battle to avoid the insertion of an explicit reference to abortion and to divorce in the Declaration).

When Humphrey, the Secretary of the Division for Human Rights, prepared to draw up the first draft of the Declaration, the first three governments to present proposals were those of Panama, Chile and Cuba.⁵³ We know that this Canadian diplomat drew heavily upon these documents in drawing up his draft for the Declaration,⁵⁴ not least because they had been drafted after large-scale international research. These texts – which were similar to the ones that were subsequently handed in by various other NGOs – stressed the importance of the family; contained the idea that side by side with rights one had to take into account rights and limitations; and contained first and second generation rights, namely economic-social

rights.⁵⁵ In addition Humphrey composed his draft comparing the constitutions of over fifty countries, amongst which were many of Latin American countries which stressed the dignity of the person, the fundamental role of the family and religion, as well as the importance of economic-social rights.⁵⁶

In the discussions that took place on the Commission on Human Rights from 1946 to 1948 the Latin American bloc often acted compactly and frequently appointed as their spokesman Hernàn Santa Cruz, the Chilean delegate who was a member of the Popular Front and a personal friend of Humphrey. He showed that he was one of the 'most zealous promoters of social and economic rights'⁵⁷ and it was he, as we have seen, who fought together with Vanistendael, albeit unsuccessfully, to place in the text an article that protected 'unborn children and incurables, mentally defectives and lunatics'.⁵⁸

During the final stage of the discussion, furthermore, they often referred by way of comparison with the Bogota Declaration, the American Declaration of the Rights and Duties of Man, a text adopted in the capital of Colombia on 30 April 1948 during the ninth conference of American states.⁵⁹ Morsink writes that the UN Declaration was strongly influenced by the document approved by Latin American states, and to such an extent that in 1948 the 'Bogota threat' had to be avoided, namely the attempt by the Cuban delegate to create a specific committee to compare the two texts before continuing the discussion within the UN.⁶⁰ According to Pérez Cisneros, indeed, a sub-committee ought to have been created to study and compare the two texts. But it was Malik and Santa Cruz, once again, who avoided further delays in the approval of the final document, making clear that 'the relevant portions of the Bogota declaration had already been taken into consideration'.⁶¹ During the course of the discussion by the UN Third Committee during the summer of 1948, the Latin American delegates often proposed amendments which went back to the Bogota text. But it was in the case of the new generation of rights, especially those connected with work (art. 23 and art. 24), that they really acted as a 'bloc', speaking with one voice and supporting the text drawn up by Humphrey.⁶² It was specifically in connection with these two articles that one could witness a real coming together in a compact way of the positions of these countries and certain Christian NGOs, in particular the IFCTU, and to such an extent that one may say that the right to protection against unemployment (23, section 1) and the right to form trade unions to protect workers' interests (23, section 4) were inserted specifically as a result of the joint efforts of the South American delegates and Vanistendael.

The importance of the Latin American bloc was thus decisive as regards the insertion of specific articles supported by the Christian NGOs and the role of these states was acknowledged by Malik himself. In the concluding speech to the UN General Assembly, on the day before the adoption of the Declaration, Malik emphasised that it had drawn heavily upon the initial documents presented by Panama, Cuba and Chile. He also

recalled the work done for over two years by Santa Cruz, Pérez Cisneros (the Cuban delegate), De Aréchaga (the Uruguayan delegate), and Minerva Bernardino (the Dominican delegate).

The UNESCO Survey provided a Work Method to the NGOs Present at Geneva

René Cassin, one of the fathers of the Declaration, wrote in 1951 that a final text on human rights had been arrived at which was not 'inféodée à aucune doctrine particulière – ni celle des droits naturels et absolus, ni l'individualisme du XVIIIème siècle, ni la dialectique marxiste' but which represented 'une vigoureuse protestation contre la tyrannie, la barbarie et l'oppression'.⁶³

In drawing up the text of the Declaration, indeed, Cassin had to interact on the UN commission with exponents of cultures and ideologies that were very different: representatives of the Communist world, Orientals, Muslims, Westerners and South Americans. The fundamental point that this French jurist emphasised was that beyond agreement on the listing of individual rights one had to adopt a *method* that would allow work to be continued until a final text was obtained. The fundamental suggestion as regards the method to be adopted – when it seemed that the entire project would be shipwrecked – came from a committee of wise men brought together by UNESCO with the principal task of providing recommendations to the Commission on Human Rights of the UN.

In July 1947 the UNESCO Committee on the Philosophical Principles of Human Rights⁶⁴ obtained encouraging results after receiving about seventy answers to the questionnaire that required an analysis of the subject of human rights. Amongst those who were interviewed there figured the most important personalities of the cultural world at an international level, from Gandhi to Croce and on to Teilhard de Chardin, but it was Jacques Maritain who was entrusted with collecting together in a volume the answers that had come in. He also wrote a general introductory analysis. This Christian philosopher, who at that time was the French ambassador to the Holy See, had stressed the fact that one could arrive at an agreement on '*un certain nombre de vérités pratiques*' on various '*conclusions pratiques*, inasmuch as the extremely different – or even opposing – theoretical ideas of the UN commission made an '*accord théorique*'⁶⁵ impossible. In his introduction to the UNESCO text, Maritain repeated that in order to achieve a 'democratic charter' it would be necessary to aim for a practical convergence, agreeing not upon a shared speculative ideology but upon principles for action, upon a practical ideology – '*une sorte de résidu commun, une sorte de commune loi non écrite*'.⁶⁶

What should be emphasised here is that this work method, based upon the fruitful cooperation of exponents of different cultures, was partly adopted not only when the commission was sitting but also by members of NGOs during the two years when the Declaration was being drawn up.

Often, indeed, the representatives of the Catholic or Protestant worlds found that they were in full agreement with the exponents of the Jewish NGOs or secular NGOs in proposing texts and amendments. One may think here, for example, of article 14 on the right to asylum which was supported by Easterman and Bienenfeld of the World Jewish Congress but also by Mrs Romer of the IUCWL and by Mrs Sender of the AFL.⁶⁷

It was Cassin once again – explicitly citing the contribution of Maritain – who stressed the importance of the ‘*idéalisme pratique*’ which permeated the deliberations of the commission and which allowed a final agreement on an ‘*idéal commun à atteindre*’, leading to a final text of planetary importance, to a ‘*principe directeur des régimes démocratiques*’.⁶⁸

Whatever the case, the point to be stressed is that the Declaration of 1948 brought with it this ‘practical ideology’, adopted also by the heterogeneous group of NGOs present during the deliberations of the commission and adopted by Humphrey as well in the composition of the first draft, something that explains the fact that his document ‘had not been based on any philosophy’.⁶⁹ The day of the approval of the final text, namely 10 December 1948, the Brazilian delegate expressed the same concept when he made clear that ‘the draft declaration did not reflect the particular point of view of any one people or of any one group of peoples. Neither was it the expression of any one political doctrine or philosophical system. It was the result of the intellectual and moral cooperation of a large number of nations’.⁷⁰

CONCLUSION: A DECLARATION ATTENTIVE TO THE WORTH OF THE HUMAN PERSON AND TO WORLD PEACE

In the end, as we have seen, the Declaration approved in December 1948 turned out to be the outcome of complex debate, of a compromise within the United Nations, but one can detect in its essential features certain influences of a Christian stamp which were supported by various NGOs and adopted by the government delegates through a number of channels: the two principal Catholic NGOs, the IUCWL, with Mrs Romer and Mrs Schaeffer, and the IFCTU, with Vanistendael and Serrarens, as well as Nolde, a Protestant, acted during the whole itinerary of the text not only through a role of lobbying and pressure but also by sharing and supporting various theoretical positions expressed by Malik and South American countries.

For this reason the final text bore within it certain basic values that were shared and agreed upon by all the NGOs present during the debates of the period of two years while it was being drawn up, and to such an extent that often it seems more appropriate to talk about NGOs *tout court* rather than Christian or Jewish NGOs, inasmuch as often they found that the NGOs acted with a total unity of intent. Thus it is that in the whole of the Declaration an *ecumenical value* emerges which was born specifically from the fact that it was drawn up taking into account the different ideologies, ideas of man and positions expressed by various the NGOs. The

Declaration, as the Chinese delegation on the Commission on Human Rights said in 1947, had to reconcile Confucius with St. Thomas Aquinas.

Secondly, the need was upheld to defend the *human person* as such, the bearer of a series of values and natural rights that had to prevail against excessive state power and all kinds of national requirements. Since then the concept has prevailed that the violation of human rights is an ‘international crime against humanity’, actionable in every corner of the planet.

Thirdly, the commission itself adopted a basic philosophy which – for the first time in history – saw the question of human rights as ‘strictly connected to that of democracy and that of peace’.⁷¹ wars and forms of totalitarianism – as recent history had taught – brought with them total contempt for the human person and his or her most basic rights.⁷² The Second World War had been seen as a clash of civilisations between governments that respected the fundamental freedoms of individuals, on the one hand, and governments that implemented barbaric policies, treading on every rule of civil coexistence so as to increase their power, on the other.

This last factor, the close connection between *peace and human rights*, is evident in the whole of the Declaration⁷³ in which the rights that are listed appear as a barrier against the barbarities of war: many articles, in fact, were written to avoid the repetition of horrors that were still felt in the memories of the delegates and Malik himself emphasised that the Declaration had two roots: one was positive, consisting of the four freedoms proclaimed by F.D. Roosevelt in 1941, and one was negative and came from the experience of the Holocaust.⁷⁴ The first two sections of the preamble themselves refer to this connection between peace and human rights, observing how war had degenerated into barbaric acts. For this reason on 9 December 1948 Malik stated that the document had been rooted ‘in outrages of the recent war and in the barbarities of the Nazi and fascist doctrine’.⁷⁵ Art. 1 itself, according to the words of Cassin, ‘had wished to indicate the unity of the human race regardless of frontiers, as opposed to theories like those of Hitler’;⁷⁶ art. 4 was drafted remembering Nazi practices as regards the treatment of prisoners of war as well; art. 5 sought to avoid the repetition of the torture that had taken place in the Nazi lagers; art. 7, according to Malik, ‘had been considered against the background of criminal events which took place in Nazi Germany’;⁷⁷ art. 10 on impartial courts was drafted in the wake of the experience of Nazi judicial sentences; art. 21 sought to oppose a future new positing of the ‘*Führerprinzip*’; and art. 30, again according to Malik, ‘was based on the concept of checking and preventing the growth of nascent Nazi, fascist or other totalitarian ideologies’.⁷⁸

In December 1948, despite the continuation of the Berlin blockade and the strong international tension between the United States and the Soviet Union, the whole of mankind took a step forward on the pathway of civilisation thanks to the work and the contribution of various Christian NGOs and other secular or Jewish organisations. After the Nazi barbarities and the ‘clash of civilisations’ between democracies and fascist states

during the war years, a text was reached that conjoined, at the level of ideals, human rights and international peace. Thus it was that the first 'decatalogue' of human rights was born which did not bear within it complex philosophical disquisitions on their foundation but, rather, presented itself as a sort of 'always open list' which scratched the absolute sovereignty of states, protecting a core of natural rights 'against the state itself'.⁷⁹

NOTES

¹ Cf. for example the recollections of E. Roosevelt, "The Promise of Human Rights," *Foreign Affairs*, 1948, n. 26, pp. 470-477.

² This committee, which had nine members, met on 29 April and 20 May 1946 at Hunter College of New York and elected E. Roosevelt as its chairman (on E. Roosevelt see M. Glen Johnson, 'The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights', *Human Rights Quarterly*, 1987, n. 9, pp. 19-48) and expressed the need to appoint independent figures to the Commission on Human Rights. This suggestion, however, was rejected by ECOSOC which preferred to elect eighteen representatives of the member states.

³ The account of the meetings of the first session of the commission, which had eighteen members, is to be found in the UN archives: E/CN.4/SR.1-22. E. Roosevelt was once again elected its chairman and was helped by Chang from China and Malik who acted as *rapporteur*. The Draft Outline drawn up by Humphrey in forty-eight articles is document E/CN.4/AC.1/3; the documents that he and Laugier used to draw up the text (that is to say the three drafts by Chile, Cuba and Panama, fifty-five Constitutions and a draft of the American Federation of Labour and two proposals by India and the USA), in 408 pages, can be found in E/CN.4/AC.1/3/Add.1.

⁴ M.A. Glendon, in *A World Made New. Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York, Random House, 2002), writes that 'most of the delegates were strangers to one another', p. 35.

⁵ UN archives, E/CN.4/95. The account of the various meetings of the second session of the commission can be found in E/CN.4/SR.23-45.

⁶ On the differences between the draft by Humphrey and the Cassin version see the fundamental work by J. Morsink, *The Universal Declaration of Human Rights. Origins, Drafting, and Intent* (Philadelphia, University of Pennsylvania Press, 1999). For a broad understanding of Cassin, see M. Agi, *René Cassin. Prix Nobel de la Paix (1887-1976). Père de la Déclaration Universelle des droits de l'homme* (Paris, 1998), chaps. XII-XVII. The proceedings of the two sessions of the sub-committee can be found in the UN archives: E/CN.4/AC.1/SR.1-44. See also the comments of

J.P. Humphrey: 'The Memoirs of John P. Humphrey', *Human Rights Quarterly*, 1983, n. 5, pp. 418-419.

⁷ An account of the proceedings of the third session of the commission can be found in the UN archives: E/CN.4/SR.46-81.

⁸ Cf. the UN archives, 84th-180th meetings of the third committee of the General Assembly.

⁹ Cf. the UN archives, 180th-183rd meetings of the General Assembly. Of use also is the article by M. Glen Johnson, 'A Magna Carta for Mankind: Writing the Universal Declaration of Human Rights', in *The Universal Declaration of Human Rights; a History of Its Creation and Implementation. 1948-1998* (Paris, UNESCO Publishing, 1998), pp. 19-75.

¹⁰ On the role of NGOs as 'voices of moral conscience' cf. A. Cassese, *I diritti umani nel mondo contemporaneo*, (Laterza, Rome/Bari, 2003⁸), p. 101; P. Alston, 'L'era della globalizzazione e la sfida di espandere la responsabilità per i diritti umani', in P. Alston, A. Cassese, *Ripensare i diritti umani nel XXI secolo* (EGA, Turin, 2003). Of help as well W. Korey, *NGOs and the Universal Declaration of Human Rights. A Curious Grapevine* (New York, St. Martin's Press, 1998).

¹¹ UN archives, E/CN.4/SR.3.

¹² Cf. J. Morsink, *The Universal Declaration of Human Rights*, p. 2, and UN archives, E/CN.4/SR.13. The Secretariat had also received a draft from the Catholic Welfare Association.

¹³ C. Malik, 'Preface' to O.F. Nolde, *Free and Equal. Human Rights in Ecumenical Perspective* (Geneva, World Council of Churches, 1968).

¹⁴ At the session of May 1946 various representatives of NGOs spoke in addition to Nolde, amongst whom J.M. Proskauer (the American Jewish Committee); G.B. Ford (the Church Peace Union); R. Schneiderman (the Women's Trade Union League); W.L. Ransom (the American Bar Assoc.); J. Miller (the National Association of Broadcasters); E. Roddam (the Motion Picture Association of the USA); and R.N. Baldwin (the Civil Liberties Union): cf. UN archives, E/HR/28.

¹⁵ UN archives, E/CN.4/SR.4.

¹⁶ On the role of lobbying of feminist organisations cf. J. Morsink, *The Universal Declaration of Human Rights. Origins, Drafting, and Intent*, pp. 116-129.

¹⁷ Cf. P. Chenaux, 'Les Eglises chrétiennes et la déclaration de 1948: rejet ou ralliement?', in *Universalité de droits de l'homme et diversité des cultures* (Fribourg, Éd. Universitaires Fribourg Suisse, 1984), pp. 205-213.

¹⁸ J. Morsink, *The Universal Declaration of Human Rights. Origins, Drafting, and Intent*, p. 122

¹⁹ UN archives, E/CN.4/SR.58. Cf. also P. de la Chapelle, *La Déclaration universelle des droits de l'homme et le catholicisme* (Paris, Librairie Générale de Droit et de Jurisprudence, 1967), pp. 137-141, and J. Morsink, *The Universal Declaration of Human Rights*, p. 122.

²⁰ J. Morsink, *The Universal Declaration of Human Rights*, p. 265.

²¹ Cf. UN archives, E/CN.4/AC.2/SR.3 and P. de la Chapelle, *La Déclaration universelle des droits de l'homme et le catholicisme*, pp. 95-96. The article proposed by van Istendael read: '*tout homme a droit à la vie, à la sûreté de sa personne. Ces droits lui sont acquis, indépendamment de sa condition physique ou mentale, à partir du premier moment de son développement physique. Ceci comprend le droit à des conditions d'existence qui lui permettent de vivre dans la dignité et de développer normalement sa personnalité*'. Mrs de Romer, in this case, wrote to E. Roosevelt directly in December 1947, emphasising the same position as Vanistendael. The Panamanian delegate did the same.

²² Cf. P. de la Chapelle, *La Déclaration universelle des droits de l'homme et le catholicisme*, pp. 158 (on art. 20, freedom of assembly and association) and 174-8 (on art. 23, the right to work and trade union freedoms); J. Morsink, *The Universal Declaration of Human Rights*, pp. 168 and ss.

²³ Cf. P. de la Chapelle, *La Déclaration universelle des droits de l'homme et le catholicisme*, cit., pp. 176-178.

²⁴ Cf. J. Morsink, *The Universal Declaration of Human Rights*, pp. 162-168.

²⁵ Cf. J. Morsink, *The Universal Declaration of Human Rights*, pp. 75-79 and P. de la Chapelle, *La Déclaration universelle des droits de l'homme et le catholicisme*, pp. 128-132.

²⁶ Cf. UN archives, E/CN.4/45. Another summary of the communications received from NGOs, and in particular from Jewish organisations, is to be found in E/CN.4/51.

²⁷ In the view of P. de la Chapelle, art. 5 of this memorandum influenced the insertion of art. 7 of the Declaration on equality before the law (*La Déclaration universelle des droits de l'homme et le catholicisme*, p. 105).

²⁸ For the memorandum of the IFCTU cf. P. de la Chapelle, *La Déclaration universelle des droits de l'homme et le catholicisme*, p. 96, note 72. Another memorandum was given in by the World Federation of Trade Unions (WFTU) in March 1947 for the insertion of the right to form trade unions. The AFL did the same in June 1947: cf. J. Morsink, *The Universal Declaration of Human Rights*, p. 169.

²⁹ The AFL had presented a project to insert an article that specifically condemned torture: cf. UN archives, E/CN.4/W.16 and P. de la Chapelle, p. 100.

³⁰ In particular sections 2 and 3 of art. 26, to avoid the repetition of Nazi indoctrination, 'was placed on the drafting table by Bienenfeld of the World Jewish Congress': J. Morsink, *The Universal Declaration of Human Rights*, p. 90.

³¹ UN archives, E/CN.4/SR.67. The third section of art. 26, which upholds the primary right of parents as regards education, was supported, instead, by Malik and C. Schaeffer, of the IUCWL, to prevent a situation of state indoctrination, as had occurred in Nazi Germany: cf. J. Morsink, *The Universal Declaration of Human Rights*, pp. 215-16 and 265.

³² Cf. P. de la Chapelle, *La Déclaration universelle des droits de l'homme et le catholicisme*, pp. 185-188.

³³ Cf. UN archives, E/CN.4/SR.67. Another principle advanced by the Jewish organisations – and supported by Malik – related to freedom of expression, which could not be pushed to include freedom to incitement of hatred and racial hatred: cf. UN archives, E/CN.4/SR.62.

³⁴ The CCIA, which obtained consultative status with ECOSOC, acted as the agency of the World Council of Churches which was then being created (it was officially created only in August 1948 at the Congress of Amsterdam): Nolde acted in those years as the Director of the CCIA and as Executive Secretary of the Joint Committee on Religious Liberty.

³⁵ Cf. O.F. Nolde, *Free and Equal*, p. 36.

³⁶ *Ibid.*, p. 38.

³⁷ Archives of the World Council of Churches, Geneva, O.F. Nolde Papers, *Masterlist of speeches*, n. 2, 3, 3/A, 4 and 5; see also O.F. Nolde Papers, *Articles Reports, Publications and Religious Freedom in the Face of Dominant Forces* (in particular the article that appeared in *The Christian Century*, 5 May 1948, vol. LXV, n. 18).

³⁸ O.F. Nolde, *Free and Equal*, p. 44-45; in addition to corresponding with many delegates, Nolde 'conferred personally with about seventy per cent of them'. Cf. also P. de la Chapelle, *La Déclaration universelle des droits de l'homme et le catholicisme*, pp. 148-149.

³⁹ Cf. Humphrey's recollection of him in *Human Rights Quarterly*, p. 397.

⁴⁰ M.A. Glendon, 'Introduction' to C. Malik (ed.), *The Challenge of Human Rights. Charles Malik and the Universal Declaration* (Oxford, C. Malik

Foundation, 2000), p. 1. Cf. also M.A. Glendon, *A World Made New*, pp. 124-129.

⁴¹ C. Malik, speech of 4 February 1947 (*The Challenge of Human Rights. Charles Malik and the Universal Declaration*, p. 29).

⁴² UN archives, E/CN.4/SR.14.

⁴³ Cf. P. de la Chapelle, *La Déclaration universelle des droits de l'homme et le catholicisme*, pp. 138-140 and J. Morsink, *The Universal Declaration of Human Rights*, p. 87 and p. 231. It is helpful to remember that Malik was also the 'original sponsor' of art. 28 on a just world order for the implementation of human rights and that he supported art. 30 in order to prevent the growth of possible Fascist or Nazi groups in the future..

⁴⁴ Cf. P. de la Chapelle, *La Déclaration universelle des droits de l'homme et le catholicisme*, pp. 71-72.

⁴⁵ UN archives, E/CN.4/SR.50. On a number of occasions, during his contributions, he tried (together with Change, the representative of a 'classic Chinese culture) to give a philosophical connotation to the debate inasmuch as he thought that a text drawn up only by 'jurists, politicians and diplomats' would have lacked depth and incisiveness. Thus Malik, in answering the Indian delegate, made clear that 'one must have ideological presuppositions' and that one had to avoid two errors – pure legalism, on the one hand, and the danger of totalitarianism, on the other, which sought to make the state the sole guarantor of rights and freedoms, as, indeed, the delegates of the Communist countries wanted: cf. C. Malik, *The Challenge of Human Rights*, p. 25.

⁴⁶ See for example the speech of 17 June 1947, in C. Malik, *The Challenge*, pp. 65 and 72

⁴⁷ The right to change one's own religion or belief was inserted into the Declaration in art. 18 but it was one of the principal reasons for the abstention of Saudi Arabia: cf. J. Morsink, *The Universal Declaration of Human Rights*, pp. 24-26.

⁴⁸ See the speech given on 26 February 1948, in C. Malik, *The Challenge*, pp. 93-95; cf. also J. Morsink, *The Universal Declaration of Human Rights*, pp. 242-243. Not only Malik but also the Latin American delegates declared themselves absolutely opposed to laying down a series of duties towards the state. They thought that the state was the principal enemy – and not the guarantor as the Communist delegates affirmed – of human rights. In discussion, for example of art. 19, the Chilean delegate, during the second session of the Commission on Human Rights, declared that 'the State constituted the chief threat to the rights of the individuals': UN archives, E/CN.4/SR.34.

⁴⁹ UN archives, E/CN.4/SR.37.

⁵⁰ *Ibid.*, E/CN.4/AC.1/SR.37; E/CN.4/SR.58.

⁵¹ Brazil had proposed beginning art. 1 with ‘Created in the image and likeness of God, they are endowed with reason and conscience’; Holland, instead, proposed the placing in the preamble of a phrase which held that the human family is ‘based on man’s divine origin and immortal destiny. The Brazilian delegate explained that a reference to God would have been greeted with joy by the overwhelming majority of people in the world and the Dutchman, Beaufort, observed that ‘the majority of the world’s population still believed in the existence of a supreme Being’ (UN archives, GA *Third Committee*, 92nd, 98th, 99th, 164th meetings). On the other hand, Chang, the Chinese delegate, proposed the withdrawal of the amendments on God the Creator because it would create ‘metaphysical problems’, whilst the Chilean delegate H. Santa Cruz, although a sincere Catholic, conceived of a declaration of a secular character that was not linked to a specific philosophical outlook: cf. J. Morsink, *The Universal Declaration of Human Rights*, pp. 281-290.

⁵² C. Malik, *The Challenge*, p. 246. We should also remember that at the time of the final Declaration, the Dutch delegate complained to the General Assembly of the absence of a mention of the divine origins of man and to a Supreme Being (Cf. UN archives, General Assembly, Plenary Session, 180th meeting).

⁵³ The draft presented by Cuba, in twenty-two articles, which was to have been a ‘working document’ for Humphrey, is to be found in the UN archives, E/CN.4/1. The document presented by the Panamanian delegate, in eighteen articles, had been composed in 1942-3 under the auspices of the American Law Institute and was based upon the advice that had been received from a large number of different countries (cf. UN archives, E/CN.4/3). The draft presented by the Chileans had also been drawn up taking into account a vast series of sources and took the form of a preliminary version of the American Declaration of the Rights and Duties of Man commissioned by the Intra-American Conference in 1945.

⁵⁴ J. Morsink, *The Universal Declaration of Human Rights*, p. 6, writes that in preparing his ‘Documented Outline’ Humphrey drew freely from the Panamanian text, Cuban text and from a draft presented in 1945 by H. Lauterpacht (see in particular pp. 131-132). Cf. also Humphrey, in *Human Rights Quarterly*, pp. 406-407.

⁵⁵ See also UN archives, E/HR/13, where Cassin showed that he was favourable to consulting two documents presented by Cuba and Panama because he thought they constituted ‘a good basis for discussion’. Laugier

himself, the right hand man of Humphrey, declared that he was in favour of the use of these two texts: E/HR/15. Cf. also UN archives, E/CN.4/SR.81.

⁵⁶ Cf. M.A. Glendon, 'The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea', *Harvard Human Rights Journal*, Spring 2003, vol. 16, p. 35: the author emphasises that the Constitutions of the Latin American countries were influenced more by *Rerum Novarum* of 1891 and *Quadragesimo Anno* of 1931 than by Marxist models.

⁵⁷ *Ibid.*, p. 35. Morsink also confirms that Santa Cruz 'often was the spokesman for the Latin American contingent' (*op. cit.*, p. 89).

⁵⁸ This was an amendment to art. 3, on the right to life: see M.A. Glendon, *A World Made New*, p. 282 and UN archives, E/CN.4/SR.35.

⁵⁹ This Declaration, which has thirty-eight articles and is organised into rights (1-28) and duties (29-38), is to be found in UN archives, E/CN.4/122.

⁶⁰ The proposal of the Cuban delegate to compare the two texts and to model the draft drawn up by the Commission on Human Rights on the Bogota text would have delayed the deliberations of the UN Third Committee and impeded an approval of the final text by 1948: cf. M.A. Glendon, *A World Made New*, pp. 140-141; J.P. Humphrey, in *Human Rights Quarterly*, p. 425.

⁶¹ UN archives, *Third Committee*, 90th meeting. At the 91st meeting Santa Cruz observed that although the draft was not perfect it was nonetheless of fundamental importance to approve it during the current session.

⁶² Humphrey, who was also a Socialist, had composed a series of articles connected with the right to work, drawing upon the Constitutions of a number of countries of Central and South America: cf. J. Morsink, *The Universal Declaration of Human Rights*, p. 157. The same 'basic rights', such as the right to food, to clothing, to a home and to medical treatment (art. 25), as well as the right to social security (art. 22) or the right to take part in the cultural life of the community (art. 27), were inserted as a result of the pressure applied by the Latin American bloc: cf. UNM archives, E/CN.4/SR.72, where the Uruguayan delegate observes that 'the concept of social security was of paramount importance and had been recognised as such in the Bogota Declaration'.

⁶³ R. Cassin, *La Déclaration universelle et la mise en oeuvre des droits de l'homme* (Paris, Librairie du Recueil Sirey, 1951), p. 290.

⁶⁴ The members of the committee were: the historian E.H. Carr, chairman; the philosopher of the University of Chicago R.O. McKeon, speakers; P. Auger; G. Friedmann; the Englishman H.J. Laski; the Chinaman Chung-Shu

Lo; and the Belgian L. Somerhausen. They met in Paris from 26 June to 2 July 1947, reaching conclusions that were printed in the collective volume edited by Maritain: J. Maritain (ed.), *Dei diritti dell'uomo. Testi raccolti dall'UNESCO* (Milan, Edizioni di Comunità, 1952), pp. 357-390.

⁶⁵ Cf. the reply of June 1947 of J. Maritain, 'Sur la philosophie des droits de l'homme', in *Œuvres Complètes (OC)*, vol. IX, pp. 1081-1089.

⁶⁶ Cf. the 'introduction aux textes réunis par l'UNESCO', written by Maritain in July-August 1948 in New York, in *OC*, vol. IX, p. 1206. His proposal deserves especial attention, not least because he expounded it in an exhaustive way from a podium that had a worldwide resonance, that his to say his inaugural speech of the second General Assembly of UNESCO which was held in Mexico City in November 1947. Secondly, he held the important position of ambassador of France to the Vatican and had a series of privileged relationships with the highest exponents of the Roman Curia, with politicians and diplomats of the whole world, as well as with many intellectuals of clear international fame, amongst whom R. McKeon and E. Gilson, both of whom were members of the UNESCO committee.

⁶⁷ Cf. J. Morsink, *The Universal Declaration of Human Rights*, pp. 76-77.

⁶⁸ R. Cassin, *La Déclaration universelle*, p. 291. Malik, too, at a sitting of 14 May 1947, made clear to the commission that 'we have much sympathy with what the representative of UNESCO said, that there is preparatory, theoretical and philosophical work in connection with this job, which cannot be overlooked'. But not all the government representatives willingly accepted the 'interference' of the UNESCO committee in the deliberations of the Commission on Human Rights. Thus the Belgian delegate, F. Dehousse, in December 1947, complained both because the work of UNESCO was done without a precise authorisation from ECOSOC and because the final document has been published in the *UN Weekly Bulletin* (UN archives, E/CN.4/SR.26. Cf. also M.A. Glendon, *A World Made New*, pp. 83-84 and J. Morsink, *The Universal Declaration of Human Rights*, pp. 301-2). A few days later, J.L. Havet, the representative of UNESCO, explained to the delegates to the commission that the work had been done to promote 'a better understanding among men belonging to different cultures and professing different ideologies'. He observed that his organisation had sent out 150 questionnaires and received about seventy replies, and that their publication would help 'the growth of public interest in the philosophical problem of human rights' (UN archives, E/CN.4/78, doc. del 16 December 1947).

⁶⁹ UN archives, E/CN.4/AC.1/SR.1.

⁷⁰ *Ibidem*, General Assembly, Plenary Session, 183rd meeting, 10 December 1948. Malik said the same in his final speech, making clear that ‘no regional philosophy or way of life was permitted to prevail’.

⁷¹ N. Bobbio, *L'età dei diritti* (Turin, Einaudi, 1997), p. VII.

⁷² On this point cf. Cassese, *I diritti umani*, p. 27.

⁷³ Cf. the lucid analysis, article by article, of J. Morsink, ‘World War Two and the Universal Declaration’, *Human Rights Quarterly*, 1993, n. 15, pp. 357-405.

⁷⁴ UN archives, General Assembly, Plenary Session, 180th meeting, 9 December 1948.

⁷⁵ *Ibidem*.

⁷⁶ J. Morsink, *The Universal Declaration of Human Rights*, p. 38.

⁷⁷ *Ibidem*, p. 43.

⁷⁸ *Ibid.*, p. 87.

⁷⁹ N. Bobbio, *Il Terzo assente. Saggi e discorsi sulla pace e la Guerra* (Milan, Sonda, 1989), p. 73. Cf. also D. Archibugi and D. Beetham, *Diritti umani e democrazia cosmopolitica* (Milan, Feltrinelli, 1998), pp. 7-24. It is instead Cassese who uses the term ‘decalogue’ to indicate the importance of the Declaration of 1948 (in *I diritti umani*).

CHAPTER V

THE NEUROLOGICAL BASES OF THE VALUES OF COOPERATION AND SOLIDARITY BEYOND CULTURAL AND SOCIAL DIFFERENCES

PIER LUCA BANDINELLI

Kindness is a form of intelligence

THE HISTORY OF THE IDEA OF SOLIDARITY

The concept of solidarity appeared after the French Revolution in the Civil Code of 1804 and envisaged obligations that were to be binding between people and established a responsibility on the part of people linked by a relationship of community to engage in cooperation and mutual help.

This concept was subsequently integrated into politics after 1830, through the clubs of the Republican Left, as an expression of Christian sociality directed towards fraternity, and subsequently spread within society on the tide of that working-class mutual help of the middle of the nineteenth century which opposed the people to the bourgeoisie.

The aim of solidarity was to recognise antagonism and at the same time to discover the existence of interests shared by the two classes in order to rediscover unity in opposition to social atomism which arose with the disappearance of religious and traditional community ties and the emergence of an individualistic society, which was increasingly egoistic, as a heterogenesis of the affirmation of the principle of 1789. At this historical stage the need was felt for social cohesion and solidarity appeared to be able to achieve it.

The strength of the idea of solidarity developed in the insights of the philosophers who saw society as an integrated society in which there is interdependence between its components and of Léon Bourgeois, the promoter of the League of Nations, who transformed solidarity into social solidarity, which expressed the idea of the duty of each individual towards society as a whole.

These ideas constituted the premisses for a secularisation of the idea of charity which concerned the state, the guarantor of the fundamental rights of existence and of individuals, and which was subsequently extended in Europe and the United States of America with the European Charter of Rights and with the principles of 'justice' expounded by the philosopher John Rawls.

In our epoch the Treaty of Maastricht obliged the member states of the EU to sacrifice their national interests to the benefit of the interests of the European Community. The UN promotes economic help and assistance

to poor countries. Where there are environmental or humanitarian disasters the most organised societies try to create chains of solidarity, and the globalisation of emergencies gives practical form to the idea of general assistance involving reciprocal help.

THE AETIOLOGICAL AND ANTHROPOLOGICAL ROOTS OF MECHANISMS OF COOPERATION

Cooperative Mechanisms studied in Aetiology

In the animal world every form of behaviour that increases the possibilities of survival and/or reproduction of the recipient to the disadvantage of its performer is defined as 'altruistic'.

A classic example of this is so-called 'broken wing' behaviour engaged in by a large number of birds that nest on the ground. In these species, when a potential predator draws near to the nest in which the chicks are to be found the adults immediately draw away from it and behave as though they were wounded, thereby portraying themselves as an easy prey. In this way they capture the attention of the aggressor and distract its attention at the same time from their young. Altruism is an interesting theoretical problem in aetiology because it apparently seems to go against Darwin's theory of natural selection. According to this theory, indeed, in an individual only those characteristics should be established which increase its chances of survival and reproduction (so-termed 'individual fitness').

It has been asked, therefore, how it is possible that certain forms of behaviour are selected which penalise those that exhibit them but favour other individuals. Various hypotheses have been formulated to try to explain this apparent paradox in evolution.

The *first hypothesis* is that of selection through next of kin which explains altruistic behaviour towards next of kin. The most classic example in this case is that of certain kinds of insects or marine invertebrates.

This hypothesis was originally formulated by Hamilton in the early 1960s when studying social hymenoptera. Starting with insects this theory was then extended to other kinds of animals where altruistic behaviour promotes the survival of a sufficient number of individuals related to the altruist and thus the bearers of shared genes ('inclusive fitness'), and represented one of the theoretical cornerstones of the discipline called 'sociobiology' (E.O. Wilson, 1980). The more genes two organisms have in common the more likely it is that they will cooperate and will express altruistic behaviour. Hence the concept of 'kinship selection': an organism increases its own fitness if it contributes after a certain fashion to the reproductive success of a close relative. In addition, taking action near to a nest to help in the raising of the young of a sister is a contribution, even though to a somewhat lesser extent, to the perpetuation of its own genetic make up. For an ultra-Darwinian, therefore, apparently altruistic cooperation, which forms the basis of social behaviour, in reality is a

masked form of egoism. In this case cooperation is expressed at different levels, in strict dependence on the quantity of genes that are shared by the individuals that cooperate. Colonies of marine invertebrates in this sense represent the purest situation. All the individuals (polyps) of a colony of coral or of jellyfish or the individual zooids of a colony of bryozoans are genetically identical. The case of jellyfish or bryozoans differs because of the fact that colonies can be made up of many different kinds of individuals. The Portuguese man of war (*Physalia physalis*), for example, is made up of individual polyps that create a floating cluster, including those who sting to immobilise their prey and ward off predators. The case of bryozoans is similar. A number of different types of zooids can be found in a colony, including some that feed, others engaged in the task of reproduction, and yet others that keep the colony clean and ward off enemies. The division of labour is the key to understanding the biology of 'social' systems. A complex colony of bryozoan zooid jellyfish is, from many fundamental points of view, very similar to a multi-cellular single animal. One should bear in mind that their cells, which in the body of a human being number billions and belong to about two hundred different types, are nonetheless genetically identical. If one observes the individuals polyps of a coral species that lives on the bottom of the sea, one reaches the conclusion that these coral colonies are authentic societies of many different polyps. But it is equally right, and perhaps more advisable, to see them in a different way and to see them as being similar to the body of a multi-cellular animal. The division of labour between the various kinds of polyps corresponds in a precise way to the diversified systems of organs that are present in the body of a complex animal.

A *second hypothesis* is that of mutualism (or direct reciprocity) which emphasises the egoistic incentives in the bilateral interaction of cooperation. In this case, individuals cooperate to achieve a goal and each individual gains from this cooperation a net and simultaneous advantage. An example of this is that of male lions that are not related and together take control of a pride of female lions.

A *third case* is that of reciprocal altruism. In this case an alliance is established between strangers with the exchange of altruistic acts which, however, produces a non-simultaneous advantage for these allies. An example of this is supplied to us by the alliances that are established between two anubis baboons in order to distract another male who has secured a female in heat.

Grooming and coalitions during agonistic interactions constitute other typical examples of reciprocal altruism (Trivers 1971). Grooming (an English term that refers to the maintenance of personal cleanliness and hygiene) is behaviour that can be observed in various primates, amongst which chimpanzees, whereby an animal cleans its fellow of parasites. This practice appears to have an important social value which is that of strengthening the social structure of a group or in unions between animals of different sex, or in the resolving of disputes. This term has been extended

to refer to similar behaviour in other animals. Seyfarth (1977) developed an influential theoretical model which describes the distribution of grooming amongst female primates. This model assumes that these females compete to accede to, and to curry favour with, individuals of a high social rank in order to exchange grooming, with subsequent help during aggressive interactions. It emerges that primates distribute grooming with reference to the social rank of the receiving individual, compete for access to individuals of high rank, and exchange grooming with support during agonistic interactions.

A further observation of the ethologist de Waal (1990) explains the behaviour of two chimpanzees who were not able to prevail over each other in the competition for rank. In this situation one of the two chimpanzees directed attention onto an insignificant object by emitting a signal that indicated to all the members of the group 'I have discovered something new and important'. None of them, with the exception of the contender, dwelt upon the object, finding it (or so it appears) insignificant, already known and banal. The 'peer' contender was the only one that flanked the chimpanzee in carefully observing the object (let us suppose a simple stone). The two chimpanzees thus stopped opposing each other as though they had deliberately activated, and with a transparent 'excuse', a joint cooperative system in order to end the activation of the competitive system. The meaning of the instrumental character of this kind of joint interaction is that it is an instrument in the search for another kind of social interaction to that underway but not an instrument as regards other advantages (for example clearing a river bank so that both can obtain water to drink).

More recently the theory of altruistic punishment (Fehr and Gächter, 2002) has been studied and this lays emphasis, as regards the genesis of cooperation, on a readiness to punish those that do not cooperate or violate rules, even though the punishment does not obtain any advantage for those engaging in this cooperation.

Cooperative Mechanisms from the Anthropological Point of View

Ethics can be defined as doctrine or speculative inquiry concerning the practical behaviour of man faced with the two concepts of good and evil. For a form of behaviour to acquire an ethical connotation three conditions, according to Ayala (1987; 2001), have to be met: a) the capacity to foresee the consequences of one's own actions; b) the capacity to formulate value judgements; and c) the capacity to choose between alternative courses of action. Here one could also say that self-awareness, as an expression of abstract intelligence or reflex psychism, and freedom, constitute the conditions for behaviour to be ethically relevant

As regards prehistoric man, his abstract intelligence is documented by technology of a planning character (Bergson; Piveteau) that is to be observed in the making of tools that were increasingly advanced at a technological level, which also acquired a meaning in his life context and

thus a symbolic value as well (functional symbolism). Freedom as self-determination took on a particular importance, as was revealed in technology as well. These are the characteristics of cultural behaviour specific to man in which the conditions for his ethical character can be recognised.

The conditions for ethical behaviour are as old as man because they are connected with the capacity for culture which marks him out.

Ethically-relevant contents and behaviour are what is perceived as a value or anti-value at a social or community level, even though they are not always to be found at an individual level. It is rather reductive to think that the ethical contents are determined by genes or established by natural selection, as the sociobiologists argue: 'Moral codes are determined by cultural history and by social considerations and not by the interests of our genes' (Ayala, 2001).

There are forms of behaviour that can be referred to the biological sphere, as a necessary substratum for their taking place, but in their taking place they take on a value and a significance for the life of man and thus become or are perceived as values. In addition to these values some ethically relevant forms of behaviour should be remembered, such as altruism and cooperation which have a qualitative meaning that is different from those to be found in the animal world because of the awareness and the freedom with which they are expressed.

Value requests connected with the human condition

The bio-psychic structure of man is such as to induce requests that have relevance at the ethical level. They can correspond to the fundamental or vital needs of an individual or the species, but such needs are perceived as values, as essential goods to be obtained (the nuclear family, the upbringing of offspring, sociality, etc.)

Other requests correspond to needs established by social living (for example the disapproval of lying, of murder, of theft, of incest, etc.) (Facchini, 1991).

These different values, expressed with special awareness and modalities by different peoples, can be seen as universals of nature or transcultural (Kluckhohn and Kroeber, 1982). If mankind has come down to us, this is because certain forms of behaviour have been seen and experienced as values by the societies which preceded us.

Altruism and cooperation in the evolution of the human species

The concept of altruism in the biological field is applied to the forms of behaviour of individuals which have beneficial effects on other individuals (a group or the species), with a sacrifice made by those who engage in them. This definition can include cooperation, a modality that is to be encountered in the relationships between the individuals of the same species. In the case

of man such forms of behaviour acquire awareness and are engaged in freely, as a result of which they acquire an ethical value.

The cooperation that is to be observed in the animal world increases with the history of evolution of life on earth. In the view of Nowak (2006), it constitutes in 'a fundamental principle of evolution side by side with mutation and natural selection'. This author listed five mechanisms for the evolution of cooperation: *kinship selection*, *group selection*, *network reciprocity*, *indirect reciprocity* and *direct reciprocity*. These two forms, because they are conditioned by a cognitive capacity, are typical of the human species and depend on culture. In man consciousness and freedom mark out cooperation.

The forms of cooperation developed by man during his evolutionary history developed beginning with sexuality and the family to be then transformed into strategies for survival implemented by the nuclear family and the group through the organisation of territory and the search for resources, in particular through hunting.

The various forms of cooperation of the evolutionary history of man are supported by archaeological evidence which attests, in the production of the most ancient expressions of lithic culture and the organisation of territories as well, to expressions that can be referred to more than one individual.

Forms of cooperation increased during the middle and high Palaeolithic age and then during the Neolithic age. The brain size of species that belong to the category of mammals is closely correlated with body weight: with an increase in the latter parameter there is also an increase in the former, following a very precise index. This index of correlation does not, however, apply to the primates and the species that belong to this family have a brain size, and in particular an expansion of the neo-cortex, that is greater than one would expect on the basis of their body weight. This expansion prevalently concerns the frontal cortex which in human beings and in the large anthropomorphic monkeys occupies a third of the entire cerebral cortex (Semendeferi *et al.*, 2002). Comparative studies have demonstrated that the human prefrontal areas are those where the process of encephalisation has the greatest expression in absolute terms (Semendeferi *et al.*, 2001). Paleo-anthropological and comparative neuroanatomy studies suggest that this steady expansion of the prefrontal areas began with the appearance of *Homo habilis* about 2.3 million years ago. Various hypotheses have been formulated to explain the selective pushes that were able to favour the evolution of such a phenomenon. According to the prevalent hypothesis, the increase in the brain mass is an adaptive trait that primates evolved in response to selective pressures applied by the complex social systems within which they evolved (Whiten and Byrne, 1997). At the base of this hypothesis, advanced in its most explicit form by Humphrey (1976), but already outlined prior to him by Chance and Mead (1953) and by Jolly (1966), there is the observation that the social world, because of the challenges with which it confronts the individual, is more complex than the

physical world, which is usually more predictable. This hypothesis has been formalised and defined as *the hypothesis of the social brain* (Dunbar, 1998). The central idea is that at the basis of the progressive expansion of the neo-cortex in primates was the need to manipulate multiple information connected with the social sphere. It was therefore the social environment and not the ecological or physical environment that applied selective pressures in relation to which primates evolved neuro-cognitive mechanisms for the solving of problems such as: a) the capacity to make predictions about the behaviour of others; b) the capacity to manipulate the other individuals of the groups; and c) the choice of individuals with whom to form relationships of alliance and cooperation.

The hypothesis of the social brain thus identifies in the complex nature of groups within which human beings evolved the evolutionist pressure at the base of the progressive expansion and specialisation of the prefrontal areas (Dunbar, 1993; 2003). According to this hypothesis, evolution favoured individuals that were cognitively able to make use of articulated strategies for the formation of alliances and the management of complex patterns of social interaction. It is possible to posit that this imposed the emergence of specific capacities able to manage different levels of the management of social information as well as the development of a system able to manipulate and give meaning to the behaviour of others (Povinelli and Preuss, 1995; Barresi and Moore, 1996).

THE NEUROLOGICAL BASES OF COOPERATION AND SOLIDARITY

Antonio Damasio (*L'errore di Cartesio*, 1995), an American neurobiologist, argues that the brain is much more than the sum of its parts: 'The mind has its seat in the cerebral processes but these exist because the brain interacts with the body and the body with the environment. Not everything is written in the genes, is innate. It is the emotions and experience that gives form to the brain'.

The brain is not an organ that is defined at birth but constitutes a potentiality that is achieved day after day in interaction with the external world.

Social Intelligence

Through the approach of the social neurosciences, according to which the brain has a structure which makes it able to resolve situations of a social type, Goleman (2006) describes a sub-system of intelligence applied to social situations (so-termed 'social intelligence') which is strongly influenced by interpersonal relationships. At the moment we enter into contact and interact with another individual, neuronal mechanisms are activated in our brains that allow us to enter into a sort of functional tie, a sort of reciprocal adaptation of two brains that 'connect' with each other

and influence each other. By employing neuroimaging techniques such as functional magnetic resonance, psychologists and neuroscientists have managed to draw up a map of the brain from which it is deduced that the set of neuronal networks are activated and cooperate during different kinds of social interaction.

The recent developments in the neurosciences have enabled us to explain that the cerebral centres in which the emotions are dealt with are the seat where the capacities that are needed to govern our behaviour and acquire abilities of a social kind are located, and it is known how such emotion centres are able to learn in a different way to the thought processes. What is relevant today are not so much specific technical capacities as capacities which enable us to know how to learn through experience, to listen and to communicate, to adapt, to address obstacles in a creative way, to engage in self-control, confidence and personal motivation, to know how relate to others effectively, to use a capacity for organisation and to take on roles of leadership. These characteristics of the personality, which can be defined as forms of emotional intelligence, represent a different way of being intelligent and the potential to express emotional intelligence is present in all individuals.

In this case it is important to begin to consider the emotions themselves as intelligent and able to register information of great importance, information which must be taken account of, connecting it to speech and thought. The emotions are fundamental components of individual and collective existence, fundamental resources for social, relational and affective life.

By emotional intelligence is meant that system of characteristics that allow us to relate in a positive way with others by interacting in a constructive way.

Metacognition, Empathy and the Theory of Mind (ToM)

One of the most important components of this aspect of intelligence is *empathy*, that is to say the capacity to recognise emotions and feelings in others and to manage to understand different points of view, interests and possible interior difficulties.

Metacognition is that cognitive capacity which enables a person to represent himself or herself while he or she is in a relationship with the world around him or her and with other people, drawing up hypotheses on the meaning of his or her mental functioning and that of others, and consequent behaviour (either individually or in reciprocity)

If the metacognitive capacity is defective, there can be 'distortions' of thought (similar to optical illusions) which have as a consequence possible erroneous inferences about the behaviour of others: 'my office chief is angry today and so is against me'. In the absence of metacognitive capacities, there cannot be elaborated, that is to say, alternative hypotheses such as 'he quarrelled with his wife', 'he had a car accident', etc. Similar to

metacognition is the so-termed *theory of mind* (ToM) which describes the ability to predict, explain or interpret the actions of other people, attributing to them specific beliefs, intentions and wishes.

To have a theory of mind means to understand that human beings are entities that are endowed with mental states such as a system of beliefs (and thus a vision of the world), wishes and intentions, and that these mental states have a causal relationship with the events of the physical world, that is to say that they can be their cause and effect. It also means being able to make an explicit reference to one's own mind and the mind of other people and to predict people's behaviour. It has been authoritatively argued that a defective development of a theory of mind is associated with the syndrome of autism (Baron-Cohen, Leslie and Frith, 1985; Baron-Cohen, 1995), whilst its subsequent deterioration is associated with certain expressions of schizophrenia (Frith, 1992; Corcoran, Frith and Mercer, 1995).

It is believed that the full appearance of a theory of mind coincides with reaching an understanding of false belief. The understanding of false belief relates to the capacity of a subject to see that another person can have a belief which he or she holds to be true but which that person knows to be false. It therefore requires a capacity to represent the relationship of the representation of another person with reality. Understanding of a false belief develops towards the age of three or four. After reaching this stage of development, children, in addition to understanding that a person can have an erroneous idea about something, can also represent what the erroneous belief will be and what effect it will have on the behaviour of that person (Wimmer and Perner, 1983; Baron-Cohen, Leslie and Frith, 1985). From an adaptive point of view the most important result of this acquisition is that in becoming a part of a causal network in the world mental states become inferable and reliable: it will thus be possible to predict them and to explain them on the basis of indices such as the behaviour of people and the elements that are present in a given situation.

As a whole all these studies substantially agree in suggesting the existence of a neural system distributed beneath the neurocognitive mechanism of the theory of mind. This system is said to include three distinct areas of the brain: 1) the upper temporal furrows; 2) the temporal poles; and 3) the prefrontal medial cortex (Frith and Frith 2003; Gallagher and Frith 2003).

According to a vision that is broadly shared by the literature in the field, these three areas of the brain, which constitute the neural sub-stratum by which the theory of mind expresses itself, perform different functions: the *upper temporal furrows* are responsible for the recognition and the initial analysis of the biological movement of others, such as the direction of a look, the reading of lips and the movement of the body, the hands and the lips (Allison *et al.*, 2000); the *temporal poles*, which are associated with the mnemonic processes, provide the semantic and episodic context within which stimuli are worked through; the *prefrontal medial cortex*, lastly, is involved in the subsequent analyses of stimuli and produces an explicit representation

of a person's own mental states and the mental states of other people (Adolphs, 2003).

The theory of mind is a neurocognitive mechanism which in addition to allowing the interpretation in the *present* of the behaviour of others, also allows predictions to be made about how that behaviour could evolve in the *future*. For this reason the anterior paracingulate cortex is active not only during the understanding of the mental states of two agents in social interaction but also during the understanding of the mental states of a person who, although acting privately, is preparing for a future social interaction. To this end, Walter *et al.* (2004) have introduced a new conceptual category – *prospective social interaction*, that is to say a private intention directed, however, towards the achievement of a social interaction, such as for example a person who is preparing for an amorous meeting. In prospective social intentions the social interaction is not expressed in the present but is implicit in the actions of the represented individual agent.

These authors have demonstrated the specific role of the anterior paracingulate cortex in the understanding of social interactions and in particular the activation of this area of the brain in the understanding of prospective social intentions. The fact that the anterior paracingulate cortex is active during the understanding of prospective social intentions has suggested that its role may be that of allowing a distinction to be made between social goals and private goals.

Empathy, therefore, is closely connected with good metacognitive capacities and this, according to a more complete definition, is conceived as the capacity to immerse oneself in the states of mind and thoughts of other people on the basis of: a) an understanding of their emotional signals; b) a taking on of their subjective perspective; and c) a sharing in their feelings.

The advantages connected with the possession of developed empathetic skills can be referred to the fact that they represent an important factor in the development of the ability to be in a relationship with other people both because they promote pre-social forms of behaviour and because of the facilitation of forms of behaviour of a cooperative kind that favour successful social integration. In addition, sensitivity to the emotions and the perspective of other people is seen as a characteristic that connotes assertiveness, that is to say that style of communication that characterises a sociable individual who is confident and open to dialogue. Thanks to empathy, assertive behaviour minimises risks of not being understood, promoting contact that respects the space and the needs of other people.

An absence of empathy represents the fulcrum of certain behavioural disturbances characterised by frequent resort to the practice of verbal and physical aggression, even in the presence of sufficient capacities to control expressions of emotion. An incapacity to understand the emotions of other people, indeed, can involve distortions in the interpretation of intentions and as a consequence generate out-of-place defensive forms of behaviour. To be empathetic means, therefore, to perceive the inner world of the other by identifying with, although maintaining awareness of, that

otherness. This relationship is expressed in nearness but this last is experienced without fear of con-fusion. Of fundamental importance in being empathetic is an understanding of other people. This is both a physiological and mental phenomenon determined by an interactive relationship that shares the same inner perceptions. A person who has the talent of empathy demonstrates that he or she is attentive to the feelings of others, perceives malaise and knows how to be ready to help, and the relational attitude is *appreciative, legitimating and reciprocal*. Criticism is seen as advice (and not as an attack) and has the task of pointing out inadequate forms of behaviour in order to lead to self-improvement. In these conditions a relational climate is created which allows respect and the *promotion of diversity* read as an opportunity for growth and dialogue, beyond any prejudice or intolerance.

The social skills with which we face up to relations is a necessary factor in addressing collective life in a positive way and it is determined, in addition to empathy, also by social abilities understood as capacities to decline the emotions of others in a positive way. A great deal of scientific evidence has demonstrated that 'positive' feelings spread more quickly than 'negative' ones and their effects have a positive influence on cooperation, loyalty, and cooperation between individuals.

The 'Mirror Neurons'

When a relational 'synchrony' is established with another person, emotional sharing is facilitated thanks to the presence in the prefrontal cortex, and in the parietal areas, of neurons which have an 'imitative' function (mirror neurons). These were discovered by the Italian neuroscientist Giacomo Rizzolatti. Through direct stimulation the activation of these neurons allows us to enter into simultaneous and complementary resonance with our fellows.

The mirror neurons establish a sort of bridge between the observer and the actor and are at the centre of imitative forms of behaviour which are very important above all else during the stage of childhood. From the point of view of movement, an action is understood because a moving representation of that action is activated in our brain.

The movement system, however, is not the only one to enter into resonance. An evident example of the role of the 'mirror systems' from the point of view of its consequences for empathy and thus for altruism is provided by studies on pain. When one experiences pain one generally has reactions involving immobility (movement block) or flight: from an evolutionary point of view these opposing reactions, according to the case in hand, favour survival. The responses involving a block on movement (a kind of light muscular paralysis) are, however, also induced by the observation of other people who experience pain. In other words, automatic responses occur which are at the base of empathetic reactions based upon sensorial characteristics of pain experienced by the other person which after

a certain fashion is mirrored in the same areas of the body of the person who observes. Various forms of research and analyses indicate in addition that the brain reacts in a different way to situations that involve a personal or an impersonal dilemma. In the first case those areas are activated that are normally connected to the expression of social emotions such as the medial frontal lobe, the posterior cingulate lobe and the angular lobe. In the case of impersonal judgements those prefrontal and parietal areas are activated that are involved in the 'memory of work' and thus secondarily in the construction of judgements of an analytical kind. During the course of evolution this development is said to have been favoured of a kind of 'wisdom' which rewards a balanced form of moral judgement in which reason and emotion interact. And there is a great deal of data provided by the neurosciences which explain the anatomical-physiological sub-strata of forms of behaviour that are connected with altruism, empathy and moral judgements, and which clarify which are the factors that contribute to outlining their spheres and range, their utilitarian and non-utilitarian consequences.

In this condition of relational contract, rational thought loses its predominance, giving space to emotional and perception functions that favour 'empathetic resonance' thanks to the activation of mirror neurons. Learning by imitation, which is typical of development in children, is an example of how one learns, simply by looking, what another person is doing. In this sense we may think of our minds as being in a constant interaction of 'dialogue' with other minds, exploiting the 'social' aptitude for communication, the capacity to speak to other people, making the explicit contents of messages coincide with our own beliefs and emotions.

Words and body language coherently support each other, sending back dialogically adequate attention and responses. The awareness through which social intelligence is expressed is expressed through relational skills: *primary empathy*, *synchrony*, *empathetic attention* and *social cognition*. These capacities intersect and complete each other. Social ability constitutes the way in which social awareness is used and one identifies with the *synchrony of the relationship*, *self-presentation*, *influence* and *solicitude*. The mechanisms and areas of the brain which allow these articulated relational skills are varied.

Primary empathy, which is connected with the so-called lower pathway of the brain (thalamus-amigdaloides), is expressed automatically and rapidly, and is activated by mirror neurons: being an intuitive capacity, it also allows the perception of emotional signals of a non-verbal kind. Primary empathy cannot be localised in a specific area of the brain but involves various areas of the brain that are connected with the various feelings that are experienced. Differently from momentary empathy, synchrony is at work, a skill directed at the other in a more direct way and which allows both active listening and two-directional dialogue.

Empathetic attention permits an explicit understanding of the feeling and thinking of the other. *Social cognition* is the capacity to read and

interpret the dynamics of power that arise in groups and the emotional flows that follow each other in the evolution of the group relationship, and constitutes the foundation of social ability.

Synchrony, the cipher of social ability, is a neural predisposition with its seat in the lower *pathway system* by which interlocutors reciprocally and simultaneously interpret messages that are vehicled in a non-verbal way. This 'discord' is expressed in the incapacity to read synchronic signs. The element defined as *self-presentation* refers to the capacity to produce and transmit a given image of oneself. *Influence* shapes the outcome of social interactions through self-control in situations using the right declination of social communication. Lastly there is *solicitude* which leads us to consider the needs of others and activate consequent forms of behaviour. Solicitude is promoted by the activation of the so-termed (thalamic-cortical) higher pathway of the brain and is similar to the concept of 'sensitivity'

In the current epoch, despite the enormous expansion of all the systems of communication, paradoxically man is living through a period of social isolation which he seems not to treat, and all of this leads to indifference in human relationships, with a tendency to develop narcissistic and egoistic aspects which clash with the innate and natural sociality of the brain.

From this point of view there is increasingly less search for the other: modernity, technologies, intense rhythms of life and competitiveness for its own sake create emotional distance and incompatibility. Social intelligence, which allows the achievement of a synthesis between intellectual and emotional endowments, becoming a strategic resource for relating to others and communicating in complex societies, is the means by which that aspect of the mind that appreciates relationships between individuals is developed. Goleman analyses two typologies of interaction with the other: I-him/I-you

The I-him relationship is marked by indifference or emotional coldness, a lack of empathy, and distance. The other is objectified. This kind of relationship is defined by psychology with the term 'heteronomic' in order to define the opportunistic exploitation of people. With the interaction I-you a reciprocal adaptation of the interior worlds of people in their relationships with each other is created, with the activation of mechanisms connected with empathy, and the lower pathway is involved in order to enter into a dialogical and two directional harmony. In the I-him modality the activation of the brain is limited to the higher pathway. The reality of daily experience alternates the two interactive modalities. The beginning of every relationship tends to be of the I-him type and is then transformed, possibly subsequently, into the I-you modality.

Psychologists talk of the 'dark triad', namely narcissists, machiavels, and psychopaths. Without empathy a person is unable to see the other as 'you', to create emotional and intellectual interchange; forms of behaviour marked by cruelty, insensitivity, and emotional indifference

towards other can arise. Narcissists, led to the self-celebration of themselves, are self-referential, they do not bother about the consequences of their actions and feel empathy only in a utilitarian and selective way. Machiavels are selfish, rational and aware of themselves and others. They develop an empathy that is strongly directed towards a pre-established goal and see the emotions of other people in a probabilistic way. Psychopaths feel neither anxiety nor fear, they do not experience emotional stress, and empathy is absent from their sphere of feeling. As a consequence they can become dangerous and run the risk of being criminals. A lack of empathetic attention is expressed, with a different value, in the carriers of the Asperger syndrome and in those with autism. These people have a deficit as regards 'mental sight' (understood as the capacity for looking inside other people in order to grasp their feelings and thoughts). Mental sight allows us to distinguish ourselves from other people and uses mirror neurons to be on the same wavelength as the other person. People with Asperger's syndrome and autism have a deficit in the prefrontal cortex which inhibits the normal working of mirror neurons during the interpretation and imitation of facial expressions. Their capacity for interpersonal relationships and the recognition of emotions and feelings are compromised.

Empathetic contact activated in affective relationship is conditioned by the neural networks that work for attachment, self-care and care for other people, and the erotic-sexual impulse. The modalities in which the various types of attachment have their origins in childhood. According to the relationship that is experienced, there will be an adult modality of engaging in attachment. If the childhood experience was reassuring and continuous, a serene adult emotional approach will exist. On the other hand there is a shallow, evasive and diffident relational style towards partners if the child was neglected during its childhood. Lastly, if anxiety and insecurity were experienced, the affective behaviour of adults will be directed towards fear of being abandoned and not being loved.

The styles of attachment act on the ability to be or not to be empathetic: people with a safe attachment can enter into contact with the pain of other people, they will be able to offer help: people who have experienced an anxious-insecure attachment will live the interaction with malaise and will feel the anxiety of others and experience difficulties in establishing helping relationships. People with an evasive attachment are not able to feel compassion, tend to avoid emotional contact and do not allow themselves to become involved, given that they are not able to provide solidarity and support.

Given that human beings are naturally given to empathy, to cooperation, to altruism and to social intelligence, searching actively for dialogue with the other, these forms of behaviour constitute fundamental skills in countering a growing 'social autism', the outcome of the complexity in which communities find themselves living in the epoch of technological post-Fordism.

Other Areas of the Brain involved in Mechanisms of Cooperation (The Cerebral Regions of Justice and Efficiency)

During the course of decision-making processes different regions of the brain are activated. The analysis of data obtained from image of the brain of those engaging in a choice demonstrate that the region of the insula is the one that is used when a sense of justice prevails, whereas the region of the putamen is more active when the orientation towards efficiency is greatest.

A group of researchers of the University of Illinois and the California Institute of Technology (Hsu *et al.* 2008) published the results of an experiment that was carried out with the use of functional magnetic resonance (fMRI) on a group of people faced with a dilemma involving distributive justice and performance.

They presented to this group a problem involving the delivery of food aid to orphans in a third-world country afflicted by famine in the following way. The time of the journey needed to deliver the food to all children would have caused a loss of 20kg from the consignment. If the transporter limited himself to distributing the aid only to a half of the hungry orphans, the loss from the consignment would only have been 5kg. Was it better to give food to less children in order to limit the losses or better to accept a reduction of the consignment by a fifth in order to give all the children the possibility of eating?

The first alternative proposed aimed at efficiency; the second at fairness. While the choice was being made the participants looked at photographs on the screen of children waiting for the consignment of food and the possible effects of the two decisions.

Most of those asked chose the fair solution. The fMRI analysed the working of the brains of those who decided and revealed that three frontal-orbital regions, the insula, the putamen and the caudate nucleus were involved in individual choices in different ways.

The insula is connected with emotions such as anger, fear and wellbeing. It was shown to be the region most involved in the choice based upon distributive justice. The emotional responses were shown to be correlated with the violation of the rules and the ethical principles upon which the person based his or her conduct. The putamen and the caudate nucleus were shown to be the regions that were most activated by the rational orientation. These areas of the brain could be activated in those tasks related to reflection, learning and the directing of individual behaviour to social interests and respect for social rules. As regards the internalisation of social rules, the classic studies of Elliot Turiel (1998) demonstrated how in children, starting at the age of thirty-nine months, two distinct conceptual domains differentiate themselves spontaneously as regards 'social conventions', that is to say the things that are imposed or prohibited by the cultural or religious community in which a child grows up, and the 'moral imperatives' such as not lying, not stealing, not attacking without good reason and not destroying other people's possessions. To transgress the

conventions is seen as much less grave than disobeying universally recognised moral rules.

ALTRUISM AND COOPERATION IN MAN: PROSPECTS AND CONCLUSIONS

As we have seen, altruism and cooperative approaches in man belong to ethically relevant and freely adopts forms of behaviour, even though specific functions and structures exist which have their sub-stratum in our neuronal network.

Altruism does not end in cooperation and is separate from gratitude or reciprocity. In this sense two characteristics of human altruism can be stressed: free-giving (which does not exclude *a priori* reciprocity) and motivations which in the highest expressions of altruism transcend reciprocity. Cooperation and altruism should be recognised as having a great importance for that process of humanisation which with the appearance of man was set in motion through culture, and involves a growth in the sociality and the quality of life.

What does acting for the good of another person mean? When is this altruistic and when, instead, is it mere calculation and search for a return (for example an exchange)? Why should an individual make his own the aim (the good) of another person and act as a consequence? Why is the notion of 'altruism' used in evolutionist biology not sufficient in psychology?

In psychology a *pseudo-altruism* or *limited altruism* is accepted given that when someone performs an act that benefits another person he or she always knows (and expects) that there will be consequences that are positive for him or her: from not feeling bad or guilty to the approval of his or her own behaviour and morality, and from receiving approval from others to receiving gratitude etc.

Although altruism was originally defined as behaviour that was only beneficial to the person who received it, and with a price for he or she who provided it, many authors use the term for forms of behaviour which have a price but are also potentially beneficial for the donor. In line with this broad definition, two concepts have been traditionally proposed to explain the evolution of altruism: inclusive fitness (Hamilton, 1964) and inclusive altruism (Trivers, 1971).

Following the theories of Hamilton and Trivers, further conditions or factors were proposed which can foster altruism (amply discussed in Kappeler and van Schaik, 2006; Nowak, 2006), for example indirect reciprocity, group selection, and reputation.

Various conditions seem to be important for altruism to become stable in evolutionary terms: the members of a social group must recognise each other individually, interact with each other repeatedly, remember the type of interaction with each social partner and modify their behaviour on the basis of previous interactions in order to avoid their altruism being

exploited by other individuals. A further factor that can foster altruism and at the same time reduce the risk of exploitation is the capacity to predict the behaviour of potential social partners (Tooby and Cosmides, 1996). The banker's paradox describes a situation in which it is less likely that an individual in need of help will receive it because his or her condition makes him or her potentially not very able to reciprocate the help that has been received. In these circumstances altruism should not evolve. Tooby and Cosmides (1996) posit that friendly relations between the members of a social group have evolved precisely to foster the exchange of altruistic forms of behaviour and avoid the potential risks described in the banker's paradox. This seems to be one of the fundamental reasons why friendly relations are observed in various social species. In men, for example, forms of altruistic behaviour are more directed towards friends than towards outsiders (Majolo *et al.*, 2006).

The prisoner's dilemma is an analytical method that is often used to study altruism at a didactic level (Axelrod, 1984). In this game, each participant has two options: to be altruistic (providing a benefit to the other participants) or not to be altruistic. The rules of the game are such that altruism is beneficial to both participants only when it is reciprocated, whereas the player who chooses not to be altruistic obtains the maximum benefit when he plays with an altruist.

Empirical studies and mathematical simulations demonstrate that the best strategy is not to be an altruist if the prisoner's dilemma is played for one hand. Being an altruistic can become, on the other hand, an evolutionarily stable strategy for both participants when they play a number of times in succession.

In this context, in order to study the evolution of the mechanisms of social cooperation models have been created using the methods of statistical thermodynamics (Glance and Huberman, 1994). The objective of this branch of physics is to obtain the macroscopic properties of matter from the interactions of the component molecules. The authors have adapted this approach to the study of the associative behaviour of individuals on whom are imposed social choices, with the mathematical construction of what is called a stability curve. This curve describes the stability of the behaviour of a group of terms of the 'quantity' of cooperation that is present. The points of the curve derive from knowledge of costs, benefits and individual expectations connected with a given social choice. The function of stability generally has two minimums that represent the most stable states for the group: broad desertion and broad cooperation. They are separated from a high barrier which is the state of minor stability. The relative height of these characteristics of the curve depends on the size of the group and the quantity of information available to its members. A society of virtual agents, that is to say programmes that act as individuals, is placed in front of a social choice. The agents, at regular intervals and in an asynchronous way, recalculate their options and decide whether to cooperate or to desert the group to which they belong.

Their decisions are based upon the information that they have as regards how many others are cooperating, information that can also be imprecise or not up-to-date. Summing the actions of all the agents, one obtains the level of cooperation or defection as regards the group.

A typical experiment, which explains certain forms of human behaviour where there exists a game of mechanisms of desertion/cooperation was carried out with a group of ten agents, all with an initial approach of desertion.

If an agent makes a mistake when calculating how many others are cooperating and changes his or her behaviour, he or she could induce the rest of the group to engage in a similar move. The group, therefore, remains at the initial metastable state of desertion or near to it for a long time until it does not move to cooperation with a rapid and sudden transition. This sudden appearance of cooperation in a computer simulation well represents certain real social phenomena such as the rapid spread of environmental awareness and commitment which has taken place over recent years.

A heterogeneous group can present two kinds of diversification within it: a variation around an average value or a segmentation into factions. The first case involves a simple enlargement of the variety of opinions amongst individuals who, however, remain fundamentally equal. A second type of diversification with social groups takes place when an average value of reference does not exist. This situation is present in groups made up of a number of distinct factions, each one of which is characterised by a distinct system of values. In the first case, if most of the group adopts an approach of desertion, the first individual to decide to cooperate will probably be the one with a greater vision of the future. His or her decision could then convince the other members whose horizons are higher than the average to cooperate. One can thus set in motion a cascade until the whole of the group cooperates. In the second case, that is to say in the wider group which contains a number of internal factions, the transition from total desertion to cooperation takes place in successive stages. The first to engage in the transition is the sub-group with the highest tendency to cooperation (for example that which in its expectations has the broadest horizon or that with the lowest average costs for cooperation). The other groups then follow, probably on the basis of their basic wish to engage in cooperative behaviour.

According to this model, the move from an approach of desertion to one of cooperation of large hierarchical organisations (or vice versa) usually has its origin within smaller units which generally occupy the lowest level of the hierarchy. Cooperation can subsequently spread to the higher levels. The tendency to change can also become exhausted if the stimulus to cooperation that comes from very distant units is too attenuated to make itself felt. In this case the organisation can contain for long periods sectors that cooperate and others that do not.

According to these models, and starting with the theoretical frameworks presented in the previous paragraphs, it would appear advisable to emphasise the following points by way of conclusion:

1. The importance of a correct upbringing, not only at a rational level and the level of the transmission of social rules and conventions, but also, and above all else, an emotional/affective upbringing of children by the principal figures of attachment. This aspect, which is only apparently banal, constitutes the only chance for children to be able to understand their own and other people's emotional states and to be able as a consequence to 'harmonise' with the mental states of the people with whom they come into contact. This makes possible the structuring and the progressive development of those metacognitive capacities which are so important for the development of empathy (and the consequent refinement of those capacities related to care for, and sensitivity to, the needs of the 'other' and the 'diverse'), a crucial characteristic for the implementation of every form of behaviour connected with cooperation and solidarity. Side by side with this 'family' upbringing, the promotion of educational and school programmes that stress the importance of civic education and above all of education of the vision of the future connected with the common good of future generations, from a perspective of sustainable development (an example amongst many could be the importance of teaching programmes that promote amongst children the idea of the importance of the selective collection of garbage or the use of alternative forms of energy), is fundamental. A daily, thoughtful look, attentive to history, a dialogical look that is able to understand ambivalences in the context of differences that vanish and cultural contradictions. It shows not only 'laceration' but also the possibility of organising a multiethnic cultural framework, one's own life and coexistence. It is a look that is at one and the same time sceptical, disillusioned and self-critical but which, however, allows the development of the sharing of emotional states. For the first time in human history there is an opportunity, following profound political and technological transformations, that a contemporary experiential space will be created of a global civilisation characterised by daily global events, by global cooperation and by global empathy. The fact is that we are witnessing the possibility of a horizon of perception and experience in one world, in which, however, there continue to exist diversities of cultures and interdependencies are growing. Cosmopolitan empathy is integrated into and coloured by national empathy. Ulrich Beck (cf. *Lo sguardo cosmopolita*, 2005) identifies five constituent principles of the cosmopolitan outlook:

- The principle of the experience of crisis of world society, that is to say of interdependence perceived through global risks and crises, the collapse of boundaries between the internal and the external, between us and the others, between the national and the international.

- The recognition of the differences of world society, with the consequent conflict-ridden character of world society and curiosity about the otherness of others.
- Cosmopolitan empathy and changes in perspective and in the virtual interchangeability of situations (as an opportunity and as a threat).
- The unliveable character of a world society without boundaries with the impetus that comes from this to trace new-old boundaries and put up new-old walls.
- The mixing which affirms that cultures and local, national, ethnic, religious and cosmopolitan penetrate each other, connect with each other and mix with each other; cosmopolitanism without provincialism is empty, provincialism without cosmopolitanism is blind.
- In the era of the cosmopolitan outlook, given that all men think and feel more or less in the same way, each human being can accede to the feelings of everyone else: it is enough for him or her to have a rapid look at himself or herself. Thus there will be no acute poverty that he or she cannot understand without difficulty and whose scale does not provoke in him or her the instinct to solidarity, whether one is dealing with friends or enemies: his or her imaginative strength means that he or she can immediately put himself or herself in other people's shoes.

2. For those who are already adults, given the crucial importance of the imitation mechanisms of cooperative attitudes (for example through mirror neurons), of the greatest importance is the implementation of micro-behaviour of a cooperative character. This could constitute that silent operations that allows each person in their own small world to set in motion that small process of change that on a large scale can invert into a virtuous circle that perverse mechanism represented by the exaggerated egoism and narcissism of our epoch. These pathologies which are by now so widespread, even though socially accepted and apparently 'winners', have as a consequence the fact of increasing diffidence and indifference towards our neighbour. The outcome of this process is to increase that sense of loneliness which dominates our epoch to the point of the isolation of each one of us into individual monads (despite the apparent explosion of opportunities at the level of communication), in a desperately paranoid defence of this condition.

3. As a last fundamental point it seems to me necessary to say first that everything that was described in the section on the areas of the brain involved in the development of cooperative forms of behaviour was analysed with the aim of making understood what these areas are, without, however, falling into that *pseudo-scientific reductionism* that explains human behaviour on the basis of the activation of certain areas of the brain, *positing in the final analysis that their activation is the 'cause' of our behaviour*. My point of view is extremely opposed, that is to say that these areas represent only the physical substratum by which it is possible to engage in certain forms of behaviour – their true cause is our intentionality.

In this sense, therefore, cooperation and solidarity transcend the cerebral apparatuses that represent their biological basis, given that they are freely chosen acts, and above all without them involving any form of secondary interest. At the same time, however, the fact that all human beings have the same functional organisation of the various areas of their brains, in every race, in every culture, in every form of social organisation, in people who belong to every religious creed, demonstrates in an unequivocal way how cooperative and solidarity-inspired forms of behaviour transcend the apparent differences that exist between the peoples that live on the earth, and represent, instead, universally valid potentialities for development in all forms of culture and social organisation. The observations that have been made in this essay allow us to understand how there exists a neurobiological foundation of a 'shared humanity' that stands beyond any cultural, social, racial or religious difference. The fact that some scholars still stress the importance of cultural differences in relations between the members of different peoples, in the light of what has been argued hitherto in this chapter seems to be not very sustainable from the point of view of the scientific evidence.

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PART II

**CULTURES, RIGHTS, AND
INTERCULTURAL DIALOGUE**

CHAPTER VI

HUMAN RIGHTS IN THE HISTORICAL AREA OF THE MEDITERRANEAN

MOHAMMED ARKOUN

“To think is to say no. Note that the sign indicating ‘yes’ is that of a man who is falling asleep; on the other hand, when waking up, one shakes one’s head in a way that says ‘no.’ No to what? To the world, to the tyrant, to the preacher? This is only an appearance. In all these cases, it is to itself that thought says ‘no.’

It breaks with happy acquiescence. It separates from itself. It fights against itself. There is no other battle in the world. What makes the world mislead me by means of its perspectives, its mists, its diverted shocks, is that I agree – that I do not seek something else. And what makes the tyrant the master of me is that I show respect instead of investigating. Even a true doctrine collapses into falsehood by this drowsiness. It is by believing that men are slaves. To think is to deny what one believes. He who believes does not even know what he thinks. He who is satisfied with his thought simply does not think. – Alain¹

A MODEST PROLEGOMENA²

Rather than limiting the examination of human rights to the particular case of what we globally call Islam, I want to place Islamic thought in the broader perspective of the general history of thought in the Mediterranean. All of the countries unduly described as Muslim are more concerned with the issue of human rights than of Islam as a system of beliefs and non-beliefs. This does not mean that the history of thought in the Islamic context is totally independent from that of Islam as a religion; it is important to note that the cognitive issues and problems addressed by analytical and critical thinking overflow on all sides the development of a restricting knowledge, dogmatically imposed in the field of religion controlled by religious authorities. We know that this control is extended in all religions to the so-called rational sciences (*‘aqliyya*) in the case of classical Islamic thought.

The notion of the geohistorical Mediterranean area should not be confused with that of the geopolitical area called the Near, Middle or recently, the Greater Middle East. The geopolitical area is that which the European powers have vied for since the nineteenth century, when the Ottoman Empire became the “sick man” at whose bedside Europe sat in

order to divide its remains among themselves. This is what France did in Algeria in July 1830. After 1945, the intervention of the two major Cold War powers exacerbated these rivalries even more, and led to the tragic wars in progress since the establishment of the State of Israel and more dramatically after September 11, 2001.

The rival powers of yesterday and today have shown little concern about the deepening of the history of cultures and civilizations that have marked so indelibly the religious, intellectual and cultural history of Christian Europe. There is a long tradition of the exclusion of Islam as a religion, and of its struggle against the Empires that have imposed real but precarious hegemonies in Christian Europe, which began and have continued to grow since the 13th century. The French president recently convened 47 heads of state in Paris in order to launch the 'Union for the Mediterranean.' As in Barcelona in 1995, everything happens between states, of which one needs to manage the sensitivities, the calculations about their domestic politics, and the fears of not controlling the near future. That is why they spoke, at Barcelona, of ecology, energy, water, economic trade, emigration; but there was no discussion of a broad research program in the human and applied social sciences about societies that have been under-analyzed and which are still subject to prelogical archaicisms by the politics of traditionalization. They did not raise, further, the parlous state of educational systems that, on the one hand, reinforce Islamist fundamentalism and, on the other, continue the application of a secular neutrality in respect of any teaching of history and comparative anthropology concerning the religious phenomena which weigh so heavily on international relations.

Thus, a pragmatic policy of cooperation in trade pushes to the indefinite future the crucial fight against the expansion plans of these institutionalized regimes of ignorance, passed on today throughout the Mediterranean historical area. The ignorance is assigned to "Islam," with a political arrogance that the whole of Europe / the West affirms, in order to mitigate the disastrous effects of a geopolitical strategy of domination based on *Realpolitik*, after the fashion of Napoleon or Bismarck. At the national celebration of 14 July, the French president had the Universal Declaration of Human Rights, passed by the UN in December 1948, read to the 47 invited heads of state. The political aim of this initiative is clear; but how many heads of state and 'grand personalities' will remember that Saudi Arabia had not initially voted for the Declaration, and that the Vatican merely encouraged the work of preparation of this statement.³ This is precisely the key point which deeply opposes secularized Europe / the West to not only Islam but to all three versions of monotheism, not to mention the great nations who enter in the historical competition. The gap is intellectual, spiritual and cultural; political oppositions that have recognized the importance of civil wars, notably under the French Revolution, are only the consequence of a wound still open at the level of what I call the human

subject – as a person destined to freedom of conscience and self-unfolding – but, as an individual citizen, subject to a duly legitimate law.

Although it is based on theologies that are mutually exclusive, the convergence of the voices of the Catholic Magisterium and the Saudi monarchy (that could not claim any Islamic theological legitimacy) highlights a gap that has widened since September 11. During his pontificate, John XXIII put an end to what proved to be a theological ignorance or mistake on the part of an authority that is in principle infallible. This revision was in line with ‘opening’ at Vatican II vis-à-vis the inescapable achievements of modernity. In this regard, I wrote some time ago that monotheism awaits a Vatican III; and I mean monotheism, not Catholicism alone, for Vatican II led to advances that created opportunities to think about the future of the religious in a positive perspective that should surely trigger a liberating emulation on the side of Judaism and Islam. It is worth mentioning here the two contexts that have led me to propose, insistently, the calling of a Vatican III.

The first context dates back to December 12, 1989. President Francois Mitterrand made a deeply symbolic gesture by deciding to close the celebrations of the bicentenary of the Revolution by transferring the ashes of Father Gregory, who had signed the Civil Constitution of the Clergy, to the Pantheon of the great servants of a unified France (remember that the sociologist Emile Poulat wrote a very enlightening book on “the Two Frances” – *Liberté, laïcité: La guerre des deux France et principe de modernité* [*Liberty and Laicity: The War of the Two Frances and the Principle of Modernity*] (1988)). Although invited to the ceremony, Cardinal Lustiger of Paris refused to attend for reasons he did not then explain. I would add that many French were not aware of this “detail,” which can indeed be understood only by historians aware of the stakes involved in the still passionate debates – sometimes educational and more often regressive – between religion and secularism.

The second context is also related to Cardinal Lustiger. The journal, the *Revue des deux mondes* hosted a dinner in his honor on the occasion of the publication of an issue devoted to the ‘realities of Christianity,’ on which I had worked. In introducing the symposium, the Cardinal returned to an idea dear to John Paul II and his successor: the re-Christianization of a Europe dominated by the culture of unbelief. I noted that, in the current political context, it is dangerous to insist on any missionary initiative, because it would encourage a mimetic escalation, particularly with Wahhabi Islam, whose modes and means of expansion are well-known. Certainly, replied the cardinal; but it is time to show that not all religions have equal status in terms of the intrinsic truth of their teachings and theological constructs of faith beyond systems of belief and non-belief. It is therefore necessary to initiate a project to establish a *hierarchy of religions* in respect to their relevance to the spiritual and intellectual needs of the human subject.

The audacity of this response surprised the audience; as for myself, I accepted it, because it is part of the perspective of a story and a comparative anthropology of all religions. I am convinced that such research would nourish a general teaching of religion, aiming at the dissemination of knowledge that can be shared across all the theological constructs of the orthodox traditions descended from the distant Middle Ages. These constructs that still dominate our minds are kept safe from any cognitive verification. There is an urgent need for an analysis of these historical, cultural and intellectual assumptions and, in the case of Islam, one which I have undertaken since the publication of my critique of Islamic reason in 1984. In her latest book, *Thérèse mon amour* [*Teresa, my love*], Julia Kristeva also has made an invaluable contribution to that perspective that I have tried to open, to situate Islam – not so much in relation to its many competing traditions in order to keep the monopoly of the “authentic” version, revealed by God – given the historical necessity of taking on the new challenges of current history concerning the future of religions in connection with the human condition. This ambition is similar to that of Kristeva, who expresses herself as follows:

Nouvel Observateur - Would you say that there is a religious revival?

J. Kristeva. – Yes, as if the followers of Mao are returning to Moses or St. Paul! However, this “return of the religious” is beyond “the broken thread of tradition” (as Tocqueville and Hannah Arendt have said), and in the twentieth century it has already experienced a double movement that continues to enrich contemporary experience: normative modernity (with Herman Cohen, Scholem and Lévinas) and critical modernity (Kafka, Benjamin, Arendt) attentive to the Bible, but also to Nietzsche, Heidegger and phenomenology. Today, a third movement is looming, to which I belong and what I would call an “analytical modernity.” The inner life, clogged by the disasters of globalization, revolts and wakes itself up in the form of singular creativities, specific to each, meditating and transforming, both their debt to and their distance vis-à-vis our triple heritage: Jewish, Christian and Greek, with the graft of Islam. With this in mind, I tried to tame the loving faith of Theresa.⁴

The three types of modernity mentioned are part of a periodization specific to the historical course of thought in Europe; it does not include the inverted temporality of the course of Islamic thought in the Mediterranean ‘area’. To date, Islam has not been confronted in a systematic way, and follows none of the three movements identified by Kristeva. Neither historians nor the

classical scholars of Islam, let alone political scientists who work in the short term, have learned the practical consequences of a 'double break' of Islam since the 1950s, when it became an agent, a helpful tool of nationalistic rhetorics of liberation and of identity construction. On the one hand, this exploited Islam has long been separated from the "Golden Age," glorified in identity politics, but very poorly known in its functions and its actual historical content. On the other hand, postcolonial states-parties who have obstructed any progress of democratic culture, have nurtured a fundamentalist Islam that has turned against them, disputing with them about the legitimacy of an Islam deprived of broad access to intellectual, cultural, legal and educational modernity. An important part of the law remains tied to God's law (*sharī'a*).

The three modernities, normative, critical and analytical, in fact coexist in both philosophical thought and in the diverse sciences of man and society. Therefore, I support the idea of a reason that is on the rise in the large non-European cultures, in order to find adequate responses to historic gaps that no form of modern reasoning has truly dealt with. Clearly, in placing her work in analytic modernity, Kristeva has long contributed to the victories of an emerging reason. She recognizes herself as a "monstre de carrefour" [monster of the crossroads], where Orthodox Christianity, the experience of an atheistic Communism which denied a religious burial to her father in Bulgaria, and an exuberant display of her personality in France in the 1960s to 1980s, were all mixed together.⁵ Her book on St. Theresa could not have been written by a native Frenchman who grew up in the stable ethos of the secular republic.

THE ISSUE OF HUMAN RIGHTS IN THE MEDITERRANEAN AREA

I do not claim any spiritual, ethical, philosophical and civilizational privilege for the historic Mediterranean area. Invited to address the question of the Islamic origin of human rights, I always try in my research to go beyond discussions of Islam with a capital 'I,' with its exegetical, theological, doctrinal, and institutional limitations in which the faithful enclose themselves and, with them, the researchers for whom *objectivity* means to report and state exactly what Muslims say about their religion, their culture and civilization. I have long denounced the imprisonment of Islam in an 'enclave' cut off from the vast historical Mediterranean area where it emerged and cut off from the places it conquered by the sword and where it has spread out throughout the world. Such an objectivity is not only unrealistic, but false and dangerous, because it ignores the aspirations of the human and social sciences as they developed following the example of Europe and the West. In addition, we find that post-colonial states cultivate an invincible suspicion of any involvement in the construction of an area of historic Euro-Mediterranean solidarity, extending instead the dynamic

unleashed by the European Union to overcome the era of wars within Europe.⁶

I therefore pursue here the presentation of a modest prolegomena to properly put into historical, anthropological and philosophical perspective, the questions of right in general and of human rights, which have become a leitmotif that is more ideological than reflexive, since invoking them took over from the earlier mission to 'civilize' that legitimized the colonial conquests. Besides, we have heard lawyers, judges and legal professionals denounce the expansion of legislation, and the ascription of rights to companies, associations, private initiatives, and individuals, to the point of confusing the rights of dignity with the rights to expand one's clientele. It also comes with the proliferation of rights that ultimately "denude the law" of meaning (Philippe Bilger). "If you remove the right as a principle of the legitimacy of rights, you put men into the hands of the state, the market or religion." "Everything on the 8 o'clock news virtually becomes a law" (Guy Carcassonne).⁷

Considering the current state of international law and national rights, we can argue that the rule of law is constantly to be achieved, and so lies before us, even in the most advanced democracies. We talk about the proliferation of rogue states, dangerous states, states which cynically confiscate the basic rights of individuals by denying them the status of citizen, of human person, of being the kind of being who has the vocation to exercise freedom with responsibility. But there is also talk of official lies in the home of Habeas Corpus, and in the great American democracy. We see that Mireille Delmas Marty, professor at the Collège de France, calls on the "imagining forces of law"⁸ to establish a new international law, widening the search for legitimacy to every act of law-making at the global level.

Here, again, I have had an uphill fight, because I have been alone for years in my efforts to share these ideas. On the side of conservative and militant Islam, the doors remain closed; but two competing religions distinguish themselves "happily," so to speak, concerning an Islam that is a hostage, at the same time, by political regimes lacking democratic legitimacy, and by opposition movements advocating civil war to restore the Model imagined – indeed, fantasized – of Medina at the time of the Prophet. I emphasize as well the attitude of Judaism, here equally taken hostage by the political priorities set by the establishment of the State of Israel, but that obscures the archaisms and theological-political arrangements, as unfaithful to the work of Spinoza as those of Muslims today with regard to the work of Averroes. So go the monotheistic religions at the dawn of the twenty-first century.

The explanation for this isolation is even worse: it is the epistemic and epistemological conservatism of the human and social sciences with regard to the historical drama that has gone through Islam as one of the historical paths of the human condition, and Muslims, as both actors and victims of this drama at the same time, for which few demanding thinkers are have given themselves the tools and the will necessary to take up this

task. To this conservatism is added the explicit or implicit complicity of several major players: the new experts on “Islam” who have marginalized traditional Islamic scholars in order to produce best selling books on fundamentalism, integralism, and Islamic terrorism, where Islam is more overwhelmed and disqualified than supported in the anthropological perspective as *a critique of all cultures and traditions of thought*. Political scientists are also sought by states seeking renowned “scientific” advisers to enlighten their geopolitical strategies; by media anxious to base their reports on some authorities whose scientificity in return receives more publicity; by publishers looking to increase their sales; finally, by audiences who then flock to the titles, regarded as the most “engaged,” to further inflame their already bubbling imaginations against the absolute evil of terrorism associated with Islam worldwide. Just take an inventory of titles published in European languages since September 11 or, worse, since the creation of the State of Israel, to grasp the weight of the ‘imaginaries’ of exclusion, vengeance, eradication, purification, resentment, hatred, and rage in that same West that refuses to write and teach history and anthropology of traditional religions, and which has been taken over by the secular religions in proliferating what we uniformly call modernity. Religions – all religions – should be treated as so many historical journeys of the human condition.

From my intellectual isolation, I say that, as long as this concept-program of “historical paths of the human condition” is not integrated into the programs of research and teaching of the human and social sciences (including the new queen of the sciences, called, in the plural, the political sciences); and as long as the Universal Declaration of Human Rights is read as ritually as believers read their Scriptures; as long as this Declaration is not qualified to be universalizable, in order to allow the historical path that has moved many people the time to enter the general shift towards the effective implementation of human rights to all those who engage the historical development of the human condition; as long as Europe hides behind double standards⁹ as it has done since the 19th century; our humanity will continue indefinitely to tell itself the same foundation stories, now disenchanted, but nevertheless perpetuated in the languages, rituals, dreams and beliefs of “the Great Illusion,” from the time of *Genesis* in the case of monotheism – recurrent illusions which have taken over from one another since the introduction of modern forms of political, legal and intellectual sovereignty.

All this said with the necessary rigor, I recall that it was in Christian Europe that *habeas corpus* – an Anglo-Saxon institution which guarantees individual liberty – was introduced in 1679; that the Declaration of the Rights of Man was affirmed in 1789 in France, then expanded by the UN throughout the rest of the world. This is indeed a matter of a major historical process, precisely for the emancipation of the human condition. The problem lies in the effectiveness of these acknowledgments that honor the human spirit, but always which it is necessary to emphasize, at the same time, their weaknesses, their irregularities, and their aberrations when we

also recognize the inconceivable fact that French women did not receive the right to vote until 1945! Is it the same inconceivability that explains, *a fortiori*, the codes of rights of citizenship introduced by the same revolutionary France in the French department of Algeria and elsewhere in its colonial empire? The basic idea here, remaining on this issue of intellectual criticism, is that the epistemic network that the Enlightenment philosophers wanted to substitute for the Christian theology of political and cognitive legitimacy, resulted only in the rhetoric of the ‘imaginary’ of salvation by means of scientific progress, and the formal institution of the Republic with the equally idealistic motto of ‘Liberty, Equality, Fraternity’ inscribed on the façade of every town hall in France.

It is true that this motto proclaims an open system of citizenship, which is a revolutionary break with the idea of the brotherhood of human beings empowered by the Word of God, a brotherhood drastically restricted only to the “faithful” – this word means more in this context than “believers” – of each version of this Word as transmitted by a series of messengers whose success, let us not forget, is based on a total or partial subversion of codes and representations instituted by its predecessors. Jews refuse to acknowledge the divinity of Jesus, and Muslims still live with the certainty of earlier Scriptures having been altered, and of the Oneness of God restored to its purity by the last of the messengers. Thus one notes the sad, if not desperate continuing of the use already made by religions, of the power of the empires that they have governed with a dual system of criteria. The *episteme* underlying this continuity is infinitely more real, more sustainable, and more effective in the various courses [parcours] of the human condition, than those fleeting, inconsistent, but recurring in utopias, hopes, and ideal symbolic figures. It is always the human spirit that reproduces these two *epistemes* in all circumstances and at all times without yet succeeding in achieving a definitive exit towards a regime of truth, of law and of universalizable governance. *Everything begins in mysticism and ends in politics*, Charles Péguy repeated, with the nostalgia of being, and *The Dour Desire to Endure* [*Le dur désir de durer*] (of Guillaume Apollinaire) that distinguishes man from the rest of living beings.

Here we see the full impact of the question of regimes of truth, established and long imposed by religions using legitimate violence. Marcel Gauchet has written extensively on the cultural history of human rights; René Girard has developed the theory of the scapegoat, whereby one appeases the vengeful anger of individuals, groups, communities or nations; many others still have supported the idea that Christianity is the only religion that has historically led to the exit from religion. The Italian philosopher Gianni Vattimo speaks of *a Christianity without religion*. Such theses, as I have said, cannot help but stir up mimicking rivalries and ignite new blazes. In order to undertake research that is inextricably historical, anthropological, linguistic, psychoanalytical and philosophical, it is essential to open up issues hitherto closed, prohibited, protected or simply overlooked for all kinds of reasons.

Let us see what is there – not only about human rights, but about the critique of law in Islamic contexts. I will not repeat what I have already explained at length about the conditions of a *critique of legal reason in Islam* (see Chapter 5 of *Humanisme et Islam [Humanism and Islam]*). To further analyze the conflicts within each society, among the various intra-European historic itineraries, and especially among the countries of Euroland and those of the Arab-Turkish-Iranian-Islamic Mediterranean, let me recall a fact which will measure the recent historical gaps between the societies on both shores. I want to compare the *Charter of Fundamental Rights of the European Union* and the preambles of the constitutions of the Arab-Turkish-Iranian countries, which were the protagonists in the general history of the Mediterranean. The comparison will include a historical moment and a moment of philosophical anthropology. On the basis of hard data and insights provided by this comparative approach, one wonders how the Mediterranean area may overcome the ideological divisions that continue to feed the civil wars within many societies and especially block a policy of cultural reunification [*remembrement*] and economic integration of the Euro-Mediterranean geohistorical sphere.

Between 1543 and 1687, from the Copernican revolution to the *Philosophiae naturalis principia mathematica* of Newton, Europe has had the privilege of experiencing successive scientific revolutions that have made this region of the world a center of the production of history, a decisive moment in the adventure of modern man. All knowledge, all beliefs, and broad areas of the theologies and philosophies inherited from Antiquity and the Middle Ages in the Mediterranean area, have been either deleted from the new works and studies in Europe, or rendered intellectually and scientifically obsolete by a succession of radical epistemic breaks, up until today. This explains the tensions with the Catholic magisterium, the success of Protestantism which is more in tune with modernity, and the resistance or sidelining of Judaism and Islam.¹⁰ For these latter, the historical necessity of anti-colonial and anti-imperialist struggle continues to serve as a motivating excuse [*alibi*] to conceal the processes of regression and underdevelopment at work *within* the political systems, societies, and cultural systems of self-representation that have prevailed since the 13th-14th centuries. One can speak of two historically-correlated processes of regression and underdevelopment in the Islamic context: there is failure, neglect and decline, relative to the creative dynamism of classical Islam; there is underdevelopment compared with the forces of change that arose in the same period, [that is, of] the societies of the Christian and European shore of the Mediterranean.

The *Charter of Fundamental Rights of the European Union* states in the preamble of Convention 47 of 14 September 2000: “Inspired by its cultural, religious, and humanist heritage, the Union is founded on the indivisible, universal principles of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law.”

On 22 September 2000, the French Prime Minister, Lionel Jospin, telephoned Roman Herzog, President of Germany and President of the Commission in charge of drafting the charter, to “remind [the Commission] that France is a secular republic and that the reference to the religious heritage of the Union is unacceptable to her.” To justify this intervention, Pierre Moscovici, in charge of European Affairs, invoked the French Constitution: “There is no reference in our constitution of any kind of a religious heritage. We therefore consider that the statement is contrary to the secular spirit of our institutions, and goes well beyond our constitutional traditions which this would require us to modify.” One reads in the preamble of the Constitution of 1958: “France is an indivisible, secular, democratic and social republic. It ensures equality before the law for all citizens without distinction of origin, race or religion. It respects all beliefs.” This is reflected in the institutional practice of the management of “cults” by the Ministry of the Interior. The Republic as “one and indivisible” – as Allah is in the Qur’an – is the subject of heated debates that take on the appearance of a creed, and that can lead to the resignation of a minister. This is part of what one calls the “French exception.”

One can see how far historical understanding is absent from the legal reasoning of the French minister concerning secularism. It is pure dogmatic ideology. Instead of seizing a great opportunity in the process of building the European Union to open a large path of historical, cultural, and philosophical enquiry concerning the redefinition and the place of the fact of religion – but of no specific religion – within a Union in the course of expansion, a socialist minister, concerned with pleasing his electoral base, held back such a rich perspective for the sake of a crude reaffirmation of an anti-clerical secularism in the process of extinction. The preamble of every constitution presents itself as an inaugurating moment, setting an explicit encoding of all legal activities of citizens within a territorially delimited political space with borders recognized in international treaties. Defenders of the ‘*indivisible Republic*’ refused to ask themselves about the historical conditions (including the ideology and the philosophical assumptions of the framers of the Constitution) which determined the political options listed in the Constitution. It requires an exceptional social and political crisis for a Constitution to change options of religious or philosophical significance. From one constitution to another, however, there is a continuity of *sacred* principles – though what sense does this term retain in a strict secularist hypothesis? – that underpin the historical being of the unified nation.

From the standpoint of the historical criticism of the competing systems of thought in the drafting of any ‘basic law,’ the foundational religious texts and the secular texts of modern constitutions show several commonalities concerning the processes of the conceptualization and of the advancement to the functions of the supreme body of authority. Once passed, a constitution is the object of exegetical discussions by a body of experts, just as foundational religious texts are by lawyer-theologians. The modern critique of legal reasoning does not cross the boundaries that protect

an existing constitution, just as religious texts are open to exegesis but not to the subversion of their status as the founding and legitimizing source of the laws of the city.

Secular thought encourages the subversion of religious texts, but prescribes limits when it comes to those texts developed by *its* axioms, *its* principles, and *its* philosophical and legal postulates. We know that the philosophy of law is a secondary concern, even useless, for positivist lawyers and therefore for judges. It is the same, of course, for religious law. However, the requirement of a critique of legal reasoning leads neither to anarchy nor to a constant rejection of a common law; it allows only an increase of the role of a changing civil society in the initiation of procedures of review and discussion of all types of constitution and juridical construction. Representative parliamentary democracy is now showing its limits, not in authoritarian regimes which openly pervert it in manipulating texts and even elections, but in the countries of Europe and America, where formal procedures are followed.¹¹

What is the situation in those countries which claim to follow the Islamic model of historical action and development of the human subject? One notes three complementary examples: that of Egypt, the secular Republic of Turkey, and the Islamic Republic of Iran. The three lead us back to a rich historical past with differentiated doctrinal magisteria: Sunni, Shi'ite, and secular.

The Example of Egypt

The state, civil society, the individual, positive law, the separation of powers, the status of the human person, the fundamental freedoms of the person and citizen – all are on the agenda of the debates and the struggles underway in Islamic contexts. Depending on the social groups and their cultural references, the confrontations emphasise either the conditions for access to a framework of secular thought and legislation, or the strict application of religious law as articulated by the founding doctors of the schools, which brings one back to maintaining the theological dogmatic 'enclosure' also bequeathed by the medieval doctors. These latter are cited by contemporary scholars as the body of the authority, of which it is important to maintain the fiction. Specifically, I mean that it is the analyst who speaks of 'fiction' with justification; supporters of every regime of truth talk about legitimacy, authenticity and sacredness of the divine law.

In fact, the cleavage between the two positions is not absolutely strict: there are secularists who reject the religious 'enclosure,' but agree to work within the laïcising nationalist 'enclosure' in cases where religion is making a comeback as a constituent of the cultural identity of the nation. The exit from both the one and the other enclosure is scarcely explicitly constituted as an object of research and debate to deepen the critical analysis of the risks of a less confrontational and more programmatic third way, that aims at redefining secularism and religion in the perspective of a

moving beyond the options given above. We see that this third way is in the process of being opened up in Europe, through the interactions between the national debates and the negotiations at the level of the Commission and of the European Parliament.

I have already indicated that, in the Islamic contexts, postcolonial states have made these distinctions less clear because they have placed Islam under state control, in subordinating the doctrinal magisterium of the scholars to the purposes of the regimes in place. This management of religions affirms populist religiosity, which structures the imagination [*imaginaires*] about religion open to the contributions of critical knowledge. It should be noted that the populist religiosity, exploited both by the official ideology and by the fundamentalist movements of political oppositions, is different from what I have called popular religion run by the social groups or brotherhoods [*confréries*]. The deepest difference is epistemic, in the sense that the cultural and customary codes of the peasant and rural populations have for centuries ensured the functioning of social solidarities, economic exchanges, and symbolic capital for each ethno-cultural group. Inspired by the modernizing or even socialist-communist ideologies of the 1950s to 1970s, the new post-colonial states have broken the popular codes in rejecting the maraboutic Islam tied to the colonial system. At the same time, rapid population growth, the uprooting of rural communities, and the emergence of generations of youth, repressed in the suburbs of large cities, have contributed to the expansion of a populist religiosity that is inseparable from the ideological tinkering engaged in at several levels of culture and social belonging.

The historical, sociological, cultural, and epistemic analysis of all these changes between 1950-2008 remains patchy, fragmented and above-all cut off from the long-term data regarding Islamic thought.¹² I shall mention the example of education systems, often highlighted and criticized, but always subject to official guidance inconsistent with the formation of critical thinking. Of all the ministries of education, of culture, of religious affairs, and of “national guidance” (*al-irshâd al-qawmî*, with strong religious connotations of the term *irshâd*) that have occurred since independence in different so-called Muslim countries, how many present the minimal historical culture and political authority needed to alter the history and teaching curricula towards the training of critical thinking rather than obscurantist indoctrination particularly in the field of religion? There is the exception of Tunisia, with the choices of Habib Bourguiba at the beginning of independence, and the reform of Mohammed Charfi who unfortunately recently passed away. This intervention, which is hardly imitated elsewhere, deserves to be repeated, reinforced and amplified throughout the Mediterranean area.

In such conditions, one can determine the extent of accumulated ignorance in all matters relating to law, its implementation and its construction, in all of the societies in the Mediterranean and, in particular, in those which claim an Islamic heritage. That raises the crucial question: In

the name of what right, in our phase of the crisis of law in a large number of existing regimes? We have some answers to these questions in the work of Baudouin Dupret, a specialist in the evolution of law, notably in Egypt.¹³ It is in Egypt, in fact, that the construction of a modern positive law has progressed significantly since the 1930s, thanks to great jurists such as Abd el-Razzâq el-Sanhourî and his disciple Chafik Chéhata. Yet we read in the preamble to the constitution of 1980 the following statement: "Islam is the religion of the state, Arabic its official language, and the principles of the shari'a the main source of legislation (*mabâdi' al-sharî'a al-masdar al-ra'îsi li-tashrî*)." This statement has given rise to two interpretive strategies: for some, "There is no room in Egypt for anything other than the shari'a", for others, "Article 2 may be sanctioned only politically...; the constitution contains no objective standard upon which an action for nullity of unconstitutionality could be based."¹⁴

In Egypt, as elsewhere, there are eminent lawyers who seek to free the legal sphere from the dogmatic influence of a religious right, which, moreover, remained immune from all criticism on what Islamic thought practiced under the name *Usûl al-din* and *Usûl al-fiqh* (*Sources of the Faith* and *Foundations of the Law*).¹⁵ One exhausts oneself in trying to resolve individual cases, but does not address the problems coming up. The 'state control' of religion has reached such a level of bureaucratization of the 'managers of the sacred and of mental conditioning,' including of a significant number of "intellectuals," that the balance of power between modernists and conservatives is turned easily toward the latter when the political stakes of a case are considered important by the regime. One finds oneself always in peripheral, purely procedural and interpretive battles. Even teachers of the history of Islamic thought stick to descriptive and narrative accounts, where it would be necessary to initiate a reassessment of the authority attached to the *Official Closed Corpus* [the canonical version of the text] about belief, such as I have, for some time, deconstructed in several publications.¹⁶

In the *Collection of Judgments of the Supreme Constitutional Court of Egypt*, there is an illuminating example of this very ancient reformist position (*Islâh*) in Islamic thought as well as in other monotheistic traditions. One sees a clear division between rules whose origin and meaning are absolute and nullifying (*al-ahkâm al-shar'iyya al-qat'iyya fî thubûtihâ wa dalâlutuhâ*), and rules based on opinion (*Al-ahkâm al-zanniyya*). The jurist's effort of interpretation (*ijtihâd*) is possible only for the latter [i.e., the rules]. According to the hierarchy of the authority of the laws established by this division, the application of modern law constructed by legislators elected by universal suffrage, can never prevail over the principles defined by the divine law (*sharî'a*). In other words, it remains free from all forms of subversion or attempts of renunciation, as was the case for Catholic canon law in Europe (which is in effect today only in the Vatican). We know that the philological and historicist critique started, beginning in the sixteenth century, to subvert the religious heritage of the

Middle Ages, based on the mental tools of classical reason; thereafter, the Enlightenment in particular became the guide for republican and democratic constructions in the common historical field whose expansion in the world is well known.

With colonialism in the nineteenth century, religious traditions and cultures, which stood apart away from what must be called the intellectual – and not just political – subversion in Europe, were the object of descriptive investigations that had no effect on application of local customs and so-called Muslim law, especially in urban areas.¹⁷ In extending the application of so-called Muslim law to all matters of personal status (*al-ahwâl al-shakhsiyya*), independence reduced customs to residues. Thus, the same historical criticism which had liberating effects in Europe, created fields of rubble in colonized societies where tradition – very impoverished and disfigured over time – still became a refuge, a fulcrum for resistance to foreign domination. While, in the 1960s, the discourse of decolonization proclaimed *the right of peoples to self-determination*, the contradictions between the aspiration to modern freedoms and the politics of traditionalization and identity reconstruction were exacerbated everywhere, making difficult – indeed, impossible – the critique of the foundations of Law and of religious thought in all contexts governed by the supremacy of the principles of the *sharî'a*.

The Example of Iran

It is in Iran that imamist Shi'ite Islam became the official religion in 1507 with Shah Ismail. It thus differs theologically from all countries with a Sunni majority. Iran is also distinguished by a rich history prior to Islamization. There are traces of the influence of Zoroastrianism and Manichaeism in the first constructions of the Islamic tradition; when the seat of the caliphate was transferred to Baghdad, the Persian elites contributed in a significant way to the formation and evolution of the Abbasid state and classical Islamic thought. When Iran returned to its language and culture beginning in the eleventh century, the intellectual and cultural life in Sunni Islam gradually lost the benefit of the educational tensions of the debates among the great minds on the construction of parallel competing orthodoxies. The Shi'ites rallied late to the authenticity of the *Mushaf* – the *Official Closed Corpus* – established under the control of the Sunni authorities alone. But even though this debate ended after the eleventh century, discussions of the prophetic traditions remain intact and have not yet been submitted to the scrutiny of historians within what I call *the exhaustive Islamic tradition*.¹⁸ The work of the Orientalists of the nineteenth and twentieth centuries on the historical and sociological tradition of the collection and the formulation of the *Official Closed Corpus*, specific to each orthodoxy, remained unknown or totally rejected by those who managed the official creed. There is also a rejection of the *corpus* of each community by rival groups, which the modern historian studies under

the classifications of the heresiographies of the classical period of doctrinal pluralism. Heresiography deals with schisms and of sects, distinguishing the 'orthodox' community, to whom salvation is promised, from all others who are misguided and promised punishment.

It is true that the language of eschatology and the traditional categorizations of heresiography tend to fade more and more in the context of *de facto* secularization of the areas of law. The notion of democratic legitimacy imposes itself *de facto* during elections, constitutional debates, the legislative practice of parliaments, and judicial confrontations. It imposes itself more by the finding of formal infringements, or by the regular procedures of democratic practice, than by the scrupulous respect for democratic imperatives. One talks about democracy without democrats. At the same time, the principle of supremacy of the *shari'a* remains an obstacle to a radical critique of legal reasoning, including of the crisis of democratic legitimacy generated by the lies of the state and the use of the media during the two Gulf wars.¹⁹ This means that the cognitive legitimacy of religious studies and the juridical legitimacy inherited from the medieval corpus, are rendered obsolete both by historical research (which has made some real progress in the last 20 years), and by a culture of distrust – and even of rejection – generated by authoritarian regimes since the 1960s.

Beginning in those early years, we began to talk of states without the Nation, working against the creation of civil societies capable of performing the essential function of counter-weight. But the process of democratization is so regularly retracted and perverted everywhere, that the distrust of societies has turned into rebellion and civil wars. There is a form of clergy in Shi'ism which knows how to maintain an influence better established on the written tradition than on the leaders of the Sunni brotherhoods. That is why it played a decisive role in the elimination of the new modernizing middle class, whose roots go back to the period of the Constitution (1905-1911).²⁰ The authoritarianism of Reza Shah expanded the coalition of scholars, merchants and intellectuals who supported the arrival of Khomeini without having measured the regressive scope of the so-called Islamic Revolution, particularly its relationship with the concept of divine law. The Iranian clergy had better access to the masses to manipulate popular religiosity and to marginalize minorities capable of enhancing the effectiveness of democratic culture and the critical thinking that must accompany it in order to avoid a return to clericalism.

This explains why current political regimes and their oppositions, who engage in bidding wars of violence on the issue of loyalty to the *shari'a*, can agree to ignore the results of the best social scientific, political and juridical research. The legitimacies that compete in the civil wars in progress and at the level of global Islam – the so-called Wahhabi Islam of the Saudi state, the Shi'ite Islam reactivated by the so-called Islamic revolution of Khomeini – remain as groundless in law and political theology as they have been since the first fracture of the great quarrel (*Fitna kubra*) between Ali and Mu'awiya in 661.²¹ Legitimacy has always rested on the

certitudes of “faith”; in the modern constructions of legitimacy and of legality, faith is not what it was, and states scarcely take account of either the citizens (often abused, and deprived of basic rights) or civil societies (struggling for recognition and to be able to act as such against states).

It is useful to recall here one of my concise formulas which allows one to cover the whole issue of law in Islam, based on modern concepts of legitimacy and legality, and in addition to all the theological-political Islamic literature. *Islam is theologically Protestant and politically Catholic*. This definition allows us to identify homologies – the structures of resonance – of posturing and of theological-political structures, in order to distinguish them from those of political philosophy which has supplanted the conceptual legacy of the divine law (as Rémi Brague has recently analysed).²² This means that Islam has never, and never will, have a hierarchical body of doctrinal authority in matters of faith, like the Christian magisteria (Catholic, Orthodox and Protestant). Every Muslim has a *de jure* right of free inquiry, which means that one’s exegetical or interpretive reasoning can be authoritative if it is approved over time by a significant number of other recognized voices. However, the exercise of political power implies a vertical hierarchy which comes from the Caliph, Imam, the Sultan, the King, the Emir, or the leader of a brotherhood – including, by delegation, all those involved in carrying out legal norms and regulations in Name of the Law of God. The legislative authority that ensures conformity of the legal and moral (*ahkam*) with the “limitations” set by God (*hudud Allah*) belongs exclusively to the doctors of the Divine Law.

So there is a distinction between bodies of religious authority and of political power, but a *de facto* state control – never *de jure* – of the administrators of religious authority. This is worse than a confusion of bodies, which would leave room for eventual recovery of the legitimacy related to the full exercise of the religious authority. A long tradition of confiscation of the function of authority was thus imposed since the arrival in power of the Umayyads in Damascus in 661. One finds there teachers of the law who defended the idea of refusing any collaboration with state institutions, in order not to make the effective exercise of authority subject to political power. This systematic confiscation forged, over time, a force of obedience fueled by two key principles in Islamic contexts: the love of the divine law, and application of the Quranic verse which regulates the relation between the believer and God: “One does not ask God to account for what He does; but to them, they will be called to make an account.”

The Presidents of the so-called Islamic republics since the 1950s, escape this analysis of legitimacy and legality only when the many problems accumulated since the Great Quarrel, *Fitna* – which between 656-661 opened up divisions on the Succession to Muhammad – are settled. There, as well, the *de facto* alliance of scholars of yesterday and today, together with those in power, continues to prevent the initiating of great projects, of which the present study highlights the complexity along the way. Pending the conditions necessary for the initiation of and serious

engagement in these projects, the formula of Max Weber about the State, as exercising the monopoly of legal violence, continues to impose itself, without any option, in all societies caught up in the Islamic hope, in its mythoideological version, beginning in the 1950s. It should be borne in mind that legal violence has been carried out everywhere in varying degrees since the emergence of postcolonial states (depending on the historical path in the long and medium term, with the strict control of the freedoms to think, interpret, publish, discuss, teach, and disseminate scientific and artistic works), especially when the stakes for power and belief are high.

Concerning Iran, one must add something about another difference, in comparison with Sunni Islam in general. Besides the theology of the Imamate, as distinguished from that of the Sunni caliphate or sultanate, historians of Islamic thought discuss the 'expulsion' of philosophy after the death of Averroes in 1198. With the publication of his *History of Islamic Philosophy* in 1964, Henry Corbin introduced the thesis that philosophy has had a long and rich career in Shi'ite Iran up until today. As always, debate on this thesis, concerning the intellectual history of the uses and vicissitudes of what I have called *Islamic reason*,²³ is often removed from the table by ideological battles about national identities. Historically, it is beginning with the turn of twelfth and thirteenth centuries that interference starts to occur between the initiatory writing of mystical teachings and the expansion of the Islam of the brotherhoods who became administrators of popular religiosity. These are expressed and experienced in unwritten local languages, rooted more in local traditions than in doctrinal constructions of scholarly literature written in Arabic up until the twelfth and thirteenth centuries. We thus move from classical Islam of the eighth to thirteenth centuries, to popular Islam, highly ritualized and fed on beliefs associated with magical practices and folk tales, as described by ethnographers and sociologists from 1800 to 1940. The nationalist rhetoric of the struggle against colonial domination diverted attention from these internal developments in the ethnocultural milieu and in the most diverse cultural groups, in order to better denounce the colonial policies of the disintegration of Islamic identities. We see a closing of the eyes to the regressions of the rational sciences and religious studies that Ghazali (d. 1111) had already felt the need to revive in his famous book *The Revival of the Religious Sciences* (*Iḥyā' 'ulūm al-dīn*).

This historical sketch allows us to understand the historical decline of thought and legal studies during a rather long period where the recourse to local customs, well prior to Islamic law and justice, continues to impose itself or to regain ground lost in centuries of the expansion of the Divine Law. To complete this picture, it is necessary to discuss the development of illuminative philosophy in 'imamian Islam' in Iran along with the expansion of 'brotherhood Islam.' This is a matter of philosophy in the Greek tradition, as practiced by Avicenna in integrating the Persian illuminative line taken by Yahya al-Suhrawardi (executed in 1191). We must also mention the massive intervention of the works of Ibn 'Arabi (d. 1240), which illustrates the fecundity of the creative imagination in the Islamic

religious-philosophical field. The popular way of expansion of these currents is also enriched by the expectation of the Mahdi, *Maitre de l'heure* [Master of the Age], which is found in the nineteenth century as a guide for popular movements in Sudan and Senegal. Transethnic and cross-cultural oral histories thus crossed the borders of the various schisms in Islam as well as those of the Jewish and Christian imaginations.

In Islam, as elsewhere, the opposing border is that of the logocentric discursivity – inaugurated by the Aristotelian corpus and expanded over the centuries in the philosophical reason in Europe – faced with writing that uses all the resources of the mythos, of symbolic function, of the *Mensonge romantique et vérité romanesque* (*Deceit, Desire and the Novel*) which René Girard analyzed, beginning in 1961, in a well-known book that heralded a broad anthropological exploration. Avicennian stories are articulated in a philosophical and medical work, which carries out, to a high degree, both philosophical quest and clinical experimentation. Avicenna thus brings together thought that, after him, takes two paths which move away from each other to reach the tragic misunderstanding of September 11, when the West confirmed the choice of sovereignty appropriate to teletechnoscientific reason – that is to say, of a conquering violence that has become systemic at the global level – while the “East” – complicated, dark, diffuse, dreamy and esoteric, partially constructed since the nineteenth century by the imperial West – burrowed itself into historical dead ends, such as lying to oneself that has nothing romantic about it, and the macabre reality of the gruesome massacres for liberation that occurred in more oppressive regimes. (I am thinking of Algeria, 1954-62 and 1992-2003, Iraq from 1981-2008, Palestine (1948-2008 ...), Lebanon, Sudan, the Guinea of Ahmed Sékou Touré, Pakistan, Indonesia, Chechnya, etc.).

The monumental works left by a line of Iranian thinkers from the thirteenth to the eighteenth century, commands admiration for the energy, inventiveness, perseverance, and the asceticism of the human mind. They have given rise to the no less detailed work of Western scholars, including two well-known Frenchmen, Henry Corbin and his disciple Christian Jambet (who was more concise in his analysis). Let me list some names, but without the titles of their major works. Nasîr al-dîn al-Tûsî (1201-1274), Haydar Âmulî (1319-1385), Mullâ Sadrâ (d. 1571), Mir Dâmâd (d. 1630) ... Until the arrival of Khomeini, their successors commented, glossed, transmitted, and ruminated, more than added or opened new paths. The book mentioned above by Kristeva on St. Teresa (1515-1582), provides valuable tools and opens new perspectives on a comparative study of contemplative spirituality in both the Islamic and Catholic contexts; this latter exploration is even more important, in that Teresa was a contemporary of the great Mullâ Sadrâ.

It is noteworthy that the Safavid dynasty, which ruled from 1501 to 1786, and were contemporaries of the Ottomans and Mughals, brought the Shi'ite religion under state control by ensuring the services of jurists who would control orthodoxy. The opposition of these jurists against mystics and

“philosophers” of illuminative wisdom (*ḥikma al-ishrāq*) did not prevent the latter from keeping their positions as speakers and teachers. This was not the case for the Malikite lawyers in Andalusia and the Maghreb; this explains the disappearance of philosophy in the line of Averroes. Thus we find in Iran, more than in Sunni circles, lasting divisions between esoteric and exoteric knowledge (*zâhir / bâtin*), and theological discourse against Gnosticism (*kalâm / 'irfân*). The distinction between reason / tradition / insight (*'aql/naql/ishrâq-'irfân-bâtin*), as a ‘third way’ and level of knowledge, withered and became a cognitive and ideological border. Averroist philosophical reason (*'aql*) was isolated, monitored by juridical reason and by the interior light of what is called *ḥikma* (a Qur’anic term which carries the sense and scope of wisdom, as opposed to *'falsafa'*). The whole *ishrâq-'irfân-bâtin* uses stories of dreams, supernatural visions, celestial travel and encounters in the transcendental Pleroma (al mala’-al-a’lâ) to prove the truth of these visionary constructions.

I permitted myself to make this historical digression about Iran today in order to remind us of that which is unthought and unthinkable in the historical development of societies that are marked by the irresistible expansion of a cobbled together religiosity.²⁴ This cobbling together is gaining ground even in secular western societies, where all categories of people seriously ask whether there are explicit verses about the episodes or behaviour of Muslims that would require the intervention of the state of law. They thus support a form of pre-modern belief in evading the problems of any interpretation of sacred texts to validate or invalidate an exegesis. I will return to these unthought and unthinkable matters after considering the example of Turkey.

The Example of Turkey

This example has become unfortunate, ever since a ruling party, which displayed strong Islamic convictions, officially defended the entry of Turkey into the European Union. When a trial balloon was launched by King Hassan II for the possible admission of Morocco, we heard comments of disdain and condescension on the part of senior European Union officials, including a government minister from Belgium. Islam is always frightening and reprehensible in the whole of Europe and the West. I myself have indicated here and in many other places the multiple reasons that perpetuate, strengthen and justify these suspicions and refusals without examination. The desire to be part of Europe expressed by the Turkey of today deserves more attention, because there was the event of Kemal Atatürk, which was unparalleled in other Islamic countries. Here is how I, as a historian of Islamic thought, analyze this case.

The Young Turk movement at the beginning of the twentieth century found, in the intervention of Atatürk, a highly proactive and radical political expression: in a single movement, he abolished the Ottoman sultanate and established a secular republic on the model of France which,

in 1905, voted the famous law of separation of church and state, whose first centennial was celebrated throughout the year 2005. Muslim reformers in Egypt and Syria in particular, cried foul, and called for the restoration of the Caliphate – a utopia that showed the lack of historical culture in the reformers. But not all, however; there were liberal intellectuals who saw in the gesture of Atatürk both progress and an example. This is the case of Ali ‘Abd al-Razîq, the author of a bold book in 1925, *L’islam et les fondements du pouvoir* [*Islam and the foundations of power*], which has been taken up and commented on today by liberals open to secularism.

To make the establishment of the secular Republic irreversible, the father of modern Turkey substituted the Latin alphabet for the Arabic script that had long been used to write Turkish; he imposed European clothing for traditional male dress, including the hat, in order to marginalize the turban, a symbol of regressive religious authority. He replaced shari’a with the Swiss Code and, in 1934, he gave women the right to vote. He asserted his belief that only European civilization opened the way of progress for traditional societies. This subversion was rather violent, as it was not preceded by any cultural and educational preparation, to get a complex society with multiple religious and ethno-cultural world views, to shift to a modern secular society. Secularism in the French style was more subversive, even in France, than Anglo-Saxon secularism. In addition, it has a long political, cultural, intellectual, and scientific history; the founding event was the Revolution of 1789-92. Now such historic and symbolic capital cannot be exported in bits and pieces. This remains true today, so it is pointless to rehash the debates and daily controversies around the pressures of inherently misleading “problems,” such as the veil and the bride’s virginity, as Voltaire or some obscure professor or journalist has written. In obscuring, neglecting or deliberately ignoring substantive issues, the states of the European Union continue to lose human energy, material resources, and valuable time when they create policies of proximity, squandering subsidies, organizing the election of representative counsels of Islam, ostentatiously inaugurating mosques ...

The basic problems can be summarized as follows. Turkey expresses a real desire to associate with Europe based on the authority of a democratically elected government which is, at the same time, spokesperson for a fraction of Turkish society directly concerned with the historical conditions of the creation of a secular republic that erased the long history of the Ottoman Empire in the Mediterranean historical area. But this long history brings with it historical paths obscured both by Christian Europe from the sixteenth to the eighteenth centuries – and then the secular Europe of industrial bourgeois capitalism – and by the inadequacies, the resignations, and the obscurantisms inherent in the internal politics of the Ottoman regime in respect of an area ranging from Iraq to Algeria. The critical assessment of this policy is far from being done thoroughly, including in particular the intellectual history of Islamic thought and of the Arabic language as vehicle of all the historical, theological, spiritual,

exegetical, legal, philosophical, literary, and artistic expressions of what lawyers have called “the abode of Islam” (*dâr al-islâm*) from the eighth to the fifteenth century. (I am not speaking of the languages and cultural, social and economic history of countries with strong identities, placed under the control of Istanbul after 1453.)

The critical history of each of these countries is virtually ignored despite recent progress, often distorted and weakened by the weight of each dominant nationalism since the nineteenth century. Colonial rulers continue to significantly distort the relationship needed to avoid critical rantings and imaginary constructions of each identity after the “liberations.”²⁵ Atatürk’s Turkey has not only removed, abolished in a way, the rich history of a vast empire; Atatürk also deprived what one calls modern Turkey of its actual historical memory by making it difficult for generations after 1924 to access the archives written in Arabic and in Turkish with Arabic characters. I have often raised this issue with Turkish colleagues; the answers are hesitant, probably because secular orthodoxy that has quickly become a categorical imperative for political actors supportive of the new state: intellectuals, the bureaucracy, the technostructures of the ministries and of the highest levels of government, particularly military and security forces, whose role remains dominant. This means that the work of critical self-analysis by modern Turkey is very far from being accomplished.

This vital problem arises fully in Turkey, the Arab-Muslim world, and the European Union today. It arises more insistently and liberatingly, as a fruitful challenge to the assumption of the admission of Turkey into the European Union, or, in the case of a continuing refusal, it will harden in a fierce quest for identity after the fashion of all the quests in societies marked, not by the return to “authentic” Islam²⁶, but to that Islam everywhere tinkered with, manipulated, imagined, used as a weapon of combat against an enemy called the West (*al-gharb*), while Atatürk implemented the inescapable historical alternative to Islam of the abolished sultanate. This last proposal refers us to what I call and continue to practice – reflective history. The desire to be part of Europe is the confirmation of the will of Atatürk and his supporters, to engage Turkey in the European course of human history. This desire has been a special challenge, particularly since more than four centuries of Ottoman policy cannot be erased by hasty actions, poorly explained to the people. In this regard, we must emphasize the heavy responsibility of the Ottoman state, which contented itself with merely formalizing the positive law (*fiqh*) of the Hanafi school throughout a vast empire, while ignoring the importance of the political, legal, intellectual and scientific revolutions that gave Europe the tools needed for its expansion throughout the world.

Neither the political will of Atatürk, nor the desire of the current government to be part of Europe, are enough today to overcome two major obstacles: 1) the ambiguity of a strategy that gives proof of an imagined Islam more than subject to tasks of a ‘radical critique of Islamic reason’ mired in ritualistic constraints and dogmatic assumptions, 2) the new work

that in Europe and America imposes the crisis of the legitimacy of representative and parliamentary democracy. Islamist rhetoric about Islamic legitimacy perpetuates all the ineptitudes, conservatisms, archaisms, arbitrary dogmatisms, institutional ignorance, and regressive shackles, of an outdated law that has paralyzed and weakened all the societies maintained for centuries under the regimes of three major Empires, Ottoman, Safavid and Mughal. We know how the colonial regimes that have taken over these empires have introduced the dialectics of rejection and resistance to the occupants, damaging all efforts of reform initiated by reformers more or less themselves prepared to go beyond the mythoidéological tinkering of the revival of so-called authentic Islam.²⁷ The most perverse effect of colonial rule is to have extended and stiffened the imposition on the former subjects of the three Muslim empires: the codes of rights of citizenship, the citadels of religious millets, and the precarious lifestyles of self-sufficient ethnolinguistic groups. We read of the socio-political metamorphosis of these various impositions in *Les identités meurtrières* by Amin Maalouf.²⁸

European policymakers do not see these major issues of a history to come with actors who establish their new solidarity on a lucid, critical, informed, historical consciousness, detached from all the bad habits of reason. These policymakers of all levels cynically or unwittingly extend the tactics, judgments and prejudices of predecessors from a time not far from the colonial period. We can read several studies on this very important point in the book referred to above by Pierre-Jean Luizard. The answers given so far to the Turkish candidacy clearly illustrate the widely discussed arguments in France during the war in Algeria. This does not exonerate Turkish citizens and those responsible of those preliminary tasks that would make the success of the bid possible. Conversely, Europeans must agree to reread the whole of the history of thought in its various dimensions and orientations within the context of the Mediterranean historical area. The common goal which should motivate the tasks indicated for all participants, is to exit definitely from a Mediterranean area, transformed over centuries into a field of recurring rivalries, of wars of conquest and domination, of massacres and destruction of others, all the more hated and rejected, that are the exact mirror reflections of ambitions, passions and desires of power, all equally based on "ideological palaces built with the [same] rubble from an ancient social discourse."²⁹

In the face of prospects opened in this way, but still unthought, for Turkey in its historical and geopolitical complexity, for states that claim to deal with the past and the future of "Islam," and for Europeans who refuse to take responsibility for a history in which they are the major players since the 18th century; before such data and such visions of a history that is finally in solidarity with peoples free of all the old and new obstacles, we still see the calculations, the reluctances, the obstinate refusals, the obsolete battles of manipulating states, and of separatist movements indifferent to the impact of the future on our present tragedy. So runs the history of social imaginations that allow themselves to be indefinitely inflamed by promises

of Salvation in eternal life, or of liberation and justice immediately after the final battle.

CAN WE SPEAK OF THE “ISLAMIC ORIGINS” OF HUMAN RIGHTS?

At this point in our reflective quest, we can say that the earlier modest prolegomena has brought us back, in fact, to issues so complex, so unfamiliar and so vital to a history in solidarity with peoples and cultures, that the readers of this essay can join the worker-thinkers in the shadows and in the indifference of the great policymakers who are domineering and so sure of themselves, and who say, make and break the law in national and international contexts. Working in virtual anonymity does not mean we are unaware of *Macht* and *Realpolitik*.

After all that I have said, I can write of “Islamic origins” only in quotation marks, and with a large question mark. Along the way, I have already noted several milestones and outlined some answers to questions that I will now discuss in detail from a particular text: the Universal Islamic Declaration of Human Rights, presented formally to the UNESCO on 19 September 1981, at the initiative of the Islamic Council and its Secretary General Azzam Salem.³⁰ I attended this event, where I took lots of notes, not only on the content of the interventions, but also on Aït Ahmed and Ben Bella, two participants of the Algerian war of liberation, who found themselves together there for the first time after their violent separation during the first stages of the first government of independent Algeria.

I will not dwell on the deconstruction of the 23 articles of the Declaration, all “based” on a selection of Quranic verses and traditions of the Prophet (*hadīth*). Like Judaism and Christianity, “Islam” had to demonstrate to world opinion that the large corpus of Islamic belief *already* offered the complete doctrinal – not necessarily conceptual – matrix of human rights. We do not doubt that, in that context, one has already stigmatized “rightism” – the excessive deference to human rights – as an ideological discourse, and one that proclaimed the death of the subject after that of God. Anthropology, linguistics and structural semiotics confronted history, psychology, and philosophy on the new status of the human subject. Marxist voices, which little suspected in the 1980s that their own death was imminent, still made themselves heard.

I just wrote “Islam” with a capital ‘I’ to draw attention to two important functions of the term in the context of our deconstruction of the so-called Islamic discourse of human rights. This Islam is called “actant” in semiotics, because it fulfills, at the same time, *grammatical* functions as subject, complement, and object of the 3rd person, and *semiotic* functions of sender, recipient, adjuvant, opponent, and actor, living in founding and continuing narratives. Linguistically, these multiple functions of the “actant” are fulfilled by Allah, the name of the one God who speaks through successive revelations to human mediators called prophets and messengers.

In all the Quranic statements collected in the Official Closed Corpus (*Mushaf*), there are 1697 occurrences of the term (without including nouns that designate him as well). The term Islam, however, is only used six times, with very abstract, undefined content. In contemporary Islamic discourse, as well as in all the media of the world and in everything that is written and taught about “Islam”, the term assumes all functions of the first “actant” in the Qur’an to the point of completely substituting itself totally to the actant Allah, who keeps his place as the destination of prayers, invocations and all the rituals of communication between the believer as a creature and his Creator.

The most important feature is that the founding function of Allah – as he presents Himself as the sender, as free will, and as Cause and first Source of the world, of beings, and of meaning – is transferred to Islam, which to him, fully and without limitation, is a series of constructions, manipulations, and exploitations by men (*insân*) as the almost exclusive key players of concrete earthly history. I speak of men in the plural and not man in the generic sense that includes women and children. The history of the concept of man is completely invisible in the Declaration, which focuses on ‘man’ (the expression used in the West), until the recent introduction of the concept of human rights. Nothing is said specifically on the legal status of “man” as such in the foundational religious texts (that, of course, ignore the modern concept of equal citizens across racial and especially religious distinctions). Muslim jurists distinguish the free Muslim believer, subject to the standards of orthodox belief and enjoying the protection of the law; the Muslim slave, until and unless he is set free; the non-Muslim slave; all the infidels to be fought until the final and complete conversion; the woman and child. These articles of law are blurred, more or less, in different political regimes; but they are not the subject of a modern law of citizenship in a secular regime of the law.

The Islam of the Declaration remains the collection of the corpuses of belief and of positive law (*fiqh*) – wrongfully confused with the concept of God’s law, shari’a – where the terms and definitions of orthodox belief and concrete conduct that are embodied in daily life, are coded carefully. As such, it somehow usurps the status and functions that Allah provides in his revelation. The usurpation is surreptitious and remains invisible due to the function of a dressing up [*transvestism*], passed on to ritual expressions of beliefs, sermons, educational and academic discourse purged of any hint of critical conceptualization, any analysis of un-veiling, of de-construction, of ex-plicitation. This function of ‘dressing up’ and misleading is reinforced by all forms of nationalist and official political discourse, as there is always and everywhere, a state control of thought and life that it is no longer possible to describe broadly as religious.

The Declaration of 19 September 1981 illustrates the current offhandedness of unqualified individuals who, in high positions of public visibility such as the UNESCO, engage in the widespread operation of presenting Islam as a process of political and religious institutionalizing of

human existence, and in a Quranic discourse which claimed – by lawyers, through explanations of exegesis, in spiritualist amplifications of the mystics and esoteric interpreters, and in the expert advice given by muftis – at the same time, to be the Word of God fully assumed in the development of the law (*istinbât al-ahkâm*³¹). This is a matter of, as we have seen, of a “perfect” coherence, assumed in the faith, but kept away from all the questions of reason “external” to the true faith.

AN EXAMPLE OF DISCOURSE ANALYSIS

Lacking the space to apply discourse analysis to the entire text, it nevertheless seems necessary to give a sample of this exercise, by retaining only the preamble of the Declaration (contained in the Appendix to the present study). The discussion in the preceding section would remain too abstract for readers unfamiliar with the reflexive history of Islamic thought in general and Islamic theological and legal thought in particular. I know many readers are not especially familiar with discourse analysis as a discipline in its own right, but one may have a more precise idea of it if one obtains the indispensable *Dictionnaire d'analyse du discours*, edited by Patrick Charaudeau and Dominique Maingueneau.³² To grasp and assess the validity of the argument underlying my presentation, the reader ought to be familiar with other disciplines, summarized in the following dictionaries; the list is merely indicative:

- Abercombie, N., S. Hill, and B. S. Turner: *The Penguin Dictionary of Sociology*, 4th ed., 2000.
- Arnaud, A.J. et al. (ed.): *Dictionnaire encyclopédique de théorie et de sociologie du droit*, Paris, 1993.
- Bonte, P. and M. Izard: *Dictionnaire de l'Ethnologie et de l'Anthropologie*, PUF, 1991.
- Bosworth, C. E., *The Islamic Dynasties*, 2nd ed. Edinburgh
- Greimas, A.J. and Courtes, J.: *Sémiotique. Dictionnaire raisonné de la théorie du langage*, Paris: vol. 1, 1979; vol. 2, 1986.
- Fontana Dictionary of Modern Thought*, 2nd ed. Harper Collins, 1999.
- Canto-Sperber, Monique: *Dictionnaire d'Ethique et de philosophie morale*, PUF, 1997.
- Lacoste, J. Yves : *Dictionnaire de théologie*, PUF, 1998.
- Raynaud, Ph. and Stéphane Rials: *Dictionnaire de philosophie politique*, PUF, 1997.
- Schmitt, J. Cl. and J. Le Goff: *Dictionnaire raisonné du Moyen Age*, Fayard, 1999.

What is required of the reader of a discourse – i.e., of the articulated set of statements by a speaker or author – is *a fortiori* also required of all those who planned, prepared and publicly proclaimed the Declaration that concerns us. It goes without saying that the universal declarations

'sanctified' over time in the United States, France and the United Nations should be subjected to the same analysis, not only for their intrinsic content but also for the uses that various historical actors have made of them since their adoption.

The Organizing Postulates of the Discourse

The Declaration wishes to be universal, and it is proclaimed "to the world" from a distinguished international body itself linked to articles of foundation that set specific terms of a universal operation beginning in 1945. Now the expectations, the vocabulary, the provisions, and the whole axis of vision and effectiveness are all placed under the strict control of two founding sources: the Qur'an and the Hadith corpus in the Sunni version. The drafters of the Declaration are superbly unaware of the blatant denials of the reflective history of Islamic thought, especially anything related to the textual history of the formation of all corpuses of all belief, including the Qur'an, in all traditions claiming to orthodoxy within this Islamic community (*ummah*) postulated as unified from the outset and without internal dissent. This is a theological and exegetical – and therefore legal – takeover in the operations of the gathering and selection of verses and of hadith, and of all the arguments that oppose an imaginary *ummah* to what I call the exhaustive Islamic tradition, that allows the right to speak to all the social actors of yesterday and today in the name of Islam. In other words, a Universal Declaration of Human Rights in 1981 and even more so (*a fortiori*) in 2008, after so much destruction of human lives, must include in its preamble, a definitive departure from the context of theological and heresiographical thought inherited from the distant Middle Ages, which has otherwise been erased from the memory of believers.

There is another fraudulent gathering operating in the Declaration and, in this line, in all contemporary Islamic discourse since 1945, when the nationalist liberation movements began to mobilize activists to restore *the Arab-Islamic character*, extended to all colonized countries. The operation of a restoration involves a returning to what has already been given in the past in complete form and content, but which colonialism had reduced to ruins. The approach uses the idea of reform (*Islah*), which quickly became a structuring obsession of Islamic consciousness initiated in Quranic discourse and in the social-historical constructions of great Ideal Symbolic Figures (ISFs), such as the Prophet, for all Muslims, and of 'Alī ibn Abi Tālib and the Imams, for the Shī'ites. With the Declaration and all similar discourses of orientation of history, we remain in the mythohistorical system of thought which is not specific to Islam and to so-called pre-modern societies. I have shown elsewhere that mythohistory is still engaged in, in the West and even in the France of the Third Republic, up to the 1960s, in France, where the great French historians have done much for the enlargement of the territory the historian and the epistemology of historical writing.³³

The point that one should remember here, is that the political discourse of postcolonial party-states soon made an epistemic break worse than that felt by mythohistory and the reformist obsession up until the 1930s. I remind the reader of the first political-religious movement that engaged in political activism in the public square in 1928 by Hassan al-Banna. The liberation movements of the 1950s and 60s left the impression that they had integrated the secular philosophico-political culture of rights when they preached Arab socialist revolution in the ideological line of the Soviet model of popular democracies. The United Arab Republic of Egypt and the Democratic and Popular Republic of Algeria still bear a strong official trace of a 'twin path,' this time mytho-ideological and above all mythohistorical. The first 'path' was that of Dr. Nasser, who hanged Sayyid Qutb, a distinguished practitioner and authority of the mythohistory that had nurtured, for fifteen centuries, that Islamic consciousness so present in the Declaration before us. The political violence of the collectivist ideology silenced all dissenting voices and enemies of the Arab Socialist Revolution; it overlooked that it was thus destroying the irreplaceable peasant culture of the Nile, which, beyond the specifically Islamic mythohistory, was the carrier of the varied cultural codes that had ensured social cohesion in the long history of peasant and pastoral civilization.

I want to pay tribute to the memory of Sayyid 'Uways, an Egyptian colleague who became a close friend, who understood the cultural and political drama that Egypt knew under Nasser, and the consequences of which are to be seen to this day in several other countries. In his role as a sociologist and anthropologist, he gathered the complaints that Egyptian peasants addressed in the form of letters to the custodian of the tomb of Shâfi'i (d. 820), founder of the juridical school that bears his name. These complaints in fact pertained to the person authorized in the bureaucracy charged with implementing the agrarian revolution. The success of the book that followed encouraged the author to extend the investigation to another social group affected by the subversion of traditional cultural codes: he collected all the messages and inscriptions that taxi drivers in Cairo had inside their cars. Both books³⁴ influenced my teaching career at the Sorbonne in the 1970s; I have included them several times in my course program because, alongside Egypt, Algeria experienced the same collectivist revolution and farmers suffered the same ordeals.

The second 'path' of the authoritarianism of the party-states was to support the so-called socialist revolution (and its essentially atheist ideology), by a deliberate policy of "traditionalisation" of thought and culture. The Arabic term, which designates this large-scale operation and its incalculable consequences, is *tasnîn* – to submit to the categorical imperatives of the prophetic tradition (Sunna, from which the old expression *Ahl al-Sunna wa-l-Jamâ'a*, which distinguishes and opposes the Muslims faithful to the Sunna and to the Community, to those that the Sunni "orthodox" call the recalcitrant opponents *al-rawâfid*, which in turn overstated the issue of fidelity to authentic Islam by calling themselves *ahl*

al-'isma wa-l-'adâla – Muslims loyal to the infallibility of the Imams and justice). The whole preamble of the Declaration confirms, with the certitude of dogmatic belief, the major split on a fundamental problem that remains today – the unthinkable and the unthought murderous Muslims who kill one another, not in the name of the imagined *authentic Islam*, but of an Islam, more than ever reduced by all participants to a devastating mythoidéological fiction.³⁵ It now feeds the populist imaginaries of “modern” megacities, that is to say, the generation born under the regimes of this ‘twin path.’

Nasser placed the old Autonomous University of Al-Azhar, which was founded by the Ismaili Fatimids after 969, under state control; just as the Algerian regime built, at great expense, the Islamic University of Constantine to train personnel to manage Shari'a and the so-called ‘original’ teaching (*aslî*, with particular reference to the methodology of the *Usûl*, already mentioned). The university is thus transformed into a tool of the state control of thought, law, and orthodox religious practice. Mohammad al-Ghazâlî, an influential Muslim brother and adviser to President Chadli Benjedid, directed the first scientific council of the new University of Constantine, an honor he could not have been given in Egypt. (I cannot detail here the parallel evolution of al-Zaytuna University in Tunis and the University of Al-Qarawiyyin in Fes.)

The Declaration lies within an authoritarian context that everywhere controls the efforts of Leagues of Human Rights to improve respect for freedom. We see that some editors have the courage to explain in their articles that rights are, to date, far from being protected in several regimes. But this courage is almost nullified by the anachronistic attachment of these rights to a nascent Islam. We fall into the harmful effects of the second ‘path.’ Recall another decisive event which explains the Sunni orientation of the Declaration. The so-called Islamic Revolution had just been established in Iran with Khomeini in February 1979. Khomeini accomplished the opposite of that gesture of Atatürk: he abolished the secular regime of the Shah, the new Pharaoh who found refuge with the King of Morocco, thereby avoiding a public trial and execution like Louis XVI in France. Khomeini saw himself as the embodiment of the return to divine law, based on the *marja' al-taqlid* of imamian Islam, that is to say, the obligatory reference to the body of the infallible authority of the twelve Imams at the time of the opposition in Sunni caliphate. This aspect has escaped observers and commentators, it is nevertheless a major key to the analysis of contemporary Islamic discourse on “legitimacy.”

The incompetence of the Safavid state in terms of legitimacy is equal to that of the Ottoman state. There was even a severe conflict between the two states in the matter of the revolts in Anatolia of the “Redheads” (*Kizilbaç*), who claimed to draw on Safavid Shi'ism. One will read with profit, in *Legitimizing the Order*³⁶, the arguments of the protagonists that illustrate the state of law in the two Islams in the early sixteenth century. We find the initial quarrel in 660-661, and then in the things done by the installation of Umayyad and Abbasid power, which imposed the legitimacy

and legality discussed and maintained by the Sunni line against Shi'ite opposition, up until the rise of the Safavid state. Khomeini and his supporters endorsed the inefficiencies of the managerial dynasties of state-controlled Shi'ism; he published a summary treatise, outside of the whole history of Islamic thought, by announcing that the government of the Teacher of the Divine Law (*wilâyat al-Faqih*³⁷) will finally restore the legitimacies and legalities trampled on by the servants of Satan (the West).

Thus arose disproportionately the second 'path,' that takes its arrogance from petro-dollars, like the Saudi rival who became aware of the new Shi'ite challenge by reminding everyone loudly that the King of Saudi Arabia is the "protector of the two holy places" (al-Haramayn, Mecca and Medina, *versus* Najaf and Qum, the two seats of the imamian Vatican (to which we must add Mashhad, where the shrine of the eighth Imam, 'Alî al-Ridhâ, is to be found). This brings us back to the streets of Baghdad and Beirut, where Sunni and Shi'ite symbolisms ferociously confront each other, together with the complications of the "values" of the West and the European 'Rightism' of human rights, in order to finally establish a lasting peace in a democracy that itself is from now on disqualified for such an historic mission!

Another complication arises; it is neither the last nor the least. In the world of Muslim immigrants, who remain in a close relationship with the militant global Islamist movements, a Messianic vision of the future – according to which Islam, as a lever of historical action, will eventually impose itself in Europe in two or three generations due to population growth and guaranteed access to the exercise of all democratic rights – has propagated since the late 1980s. It is a matter, then, of a peaceful and lawful conquest. This vision both underlies the whole Declaration and is explicit in the preamble (see below: "Human rights in Islam are firmly rooted in the belief that God, and God alone, is the Law Giver and the Source of all human rights. ... We... affirm our commitment to uphold the following inviolable and inalienable human rights that we consider are enjoined by Islam."³⁸)

We see clearly here the profound implications of ongoing conflicts; they affect the sociolinguistic conditions of the construction of collective selves, subject to radically conflicting representations of historical time and mythoidéological time. Instead of bringing intellectual, cultural, scientific, educational, civic responses to such mental gaps in the same civic [public] spaces, since September 11 the military and police response has had priority and the primacy nationally and internationally. Alongside the war to eradicate terrorism, which has been carried out everywhere, we see developing a diplomacy of an apologetics of true Islam, moderate Islam, the golden age of Islamic civilization, interreligious dialogue, intercultural exchanges, multiculturalism, subsidies to private education, construction of mosques, etc. Yet we know that the regimes in Islamic lands are obliged to continue the mimetic escalation of the recourse to 'religion as opium,' shared by many around the world. Minorities await lucid researchers such

as Sayyid ‘Uways to collect their daily murmurings. They also hope that the researchers who use the *imagining forces of the law* will be heard by the great powers that have helped to promote the “just war” against the “holy war,” to impose systemic violence as a necessary and urgent remedy at the global level.

This radicalization of systemic violence is an irreducible dimension of the relations of power which condition the use of an international law, inherited from the age of the dispossession of the world by a Europe that is itself riven by endless rivalries among nation states, and turned in onto the defense of sacred national interests. While violence of intra-European rivalries found ways of moving beyond this, with the construction of the European Union, systemic violence fueled by ideological nationalist fictions with the multiplier effects of sacred violence and the sacralising power of religion that have made a comeback, continued its ravages in all those countries dispossessed of their law codes and their systems of solidarity, and then delivered them, without any option, to the mechanisms of the “right of peoples to self-determination.” Here again we have a right perceived as sacred, that quickly became a murderous slogan. Always creative, the thinkers of Europe invented another very tempting slogan, “the duty of non-interference ends when non-assistance to persons in danger begins” (François Mitterrand). We are there, with no way out ahead. I think of the obstacles, stumblings, inconsistencies, and sensitivities that obstruct the leaders of the Union for the Mediterranean.

I can continue this deconstruction of law in general, there where it elaborates itself on behalf of advanced democracy. But I have said enough to locate the dreams, the self promotions, and the wordy proclamations of the Declaration – which, to my knowledge, has never been taken up since in view of a much-needed updating. I prefer, however, to add a few observations on the manipulation of the Scriptures.

The Handling of Scripture

I deliberately use the term “Sacred Scriptures” in order to make some critical clarifications. Such an expression cannot be part of orthodox Islamic thought or speech; it is accepted in interfaith dialogue to the extent that one ignores the Qur’anic position on the alteration of the Scriptures (*tahrif*) after the Jewish and Christian stage of revelation. This objection can be clarified historically, but it remains a constitutive position of the theological status of Qur’anic discourse as the ultimate manifestation of God’s word, with the enunciative mediation of the Seal of Prophets. To avoid this debate, Muslims talk about the holy book in the singular, to refer only to the Qur’an.

I use the term “Sacred Scriptures” not as a theological concept, but as an expression that sends one on an examination that is, at the same time, both linguistic and anthropological, of the two terms “sacred” and “scripture.” This displacement of the theological field to the multiple fields

of the human sciences, the social sciences, political science and legal studies, is now a prerequisite for any research in the field of religion. Christian “Critical” theologians now submit theological knowledge to what we know (methodologically and epistemologically) about knowledge based on religion as a system of beliefs and non beliefs. In reading the Declaration or any contemporary Islamic discourse, there is neither theological concern, much less a worry about shifting from the believer’s knowledge to critical knowledge. It is a matter, then, of a radical disqualification of all discourse about divine law that refuses any passage through all the stages of the metamodern, let alone modern, critique of knowledge.

Linguistically, all writing is in dialectical relationship with the speaker. This dialectic subsists, at other levels and in new relations, in the passing from writing by hand to the circulation of “writing” using audiovisual accompaniments. However, historically, the concept of Holy Scripture refers first to the oral utterances of what is recorded in the writings long after the oral circulation of the word postulated as divine. Moreover, even after its conservation in the manuscripts, ‘the word’ has an oral use that is not only that of liturgical recitation or citation, but of the commentaries that accompany each citation. Despite the rituals that ought to accompany any written or oral use of the holy word, there must be a spreading, if not rendering more commonplace and debased, of holiness, through repetition. These distinctions and the confrontations of the sacred / holy with the profane apply to all religions that claim to protect, by prohibitions protected thanks to the rituals, the sacredness and the holiness of all that is transfigured, sanctified, sanctified, transcendentalized, ontologized in the discourses of belief, theology, exegesis, and all the more in the technical exercise of deducing legal standards from holy or sacred texts.

These brief analytical remarks help in understanding the linguistic mechanisms of the ‘dressing up’ [*transvestism*] in all religious discourse. The vocabulary of the Declaration and the manipulation of citations go beyond the mere ‘dressing up’ of the actual content of words and the effective goals of contexts that are mutilated each time. It is thus possible to root, in the imaginations and memories of the recipients (audiences, readers), that which Gaston Bachelard recognized long ago under the concept of *false knowledge*.

For brevity’s sake, I will provide Articles 12 and 13 in the appendix. They deal with two problems that allow one to measure the considerable historical lags of Islamic thought in relation to the conquests of intellectual modernity and to the even more binding challenges of the current globalization process. To the operations of ‘dressing up’ and manipulation, add the regressive processes which mark the course of Islamic thought in relation to that of the *Nahda* ([or “renaissance”] 1830-1940), described as a liberal age. Two verses are cited to draw the Islamic boundaries on freedom of thought, conscience and religious freedom. We do not know whether to talk about the naïveté or the extreme ignorance of

the drafters. Do they aim only at indoctrination of Muslims, or they are dreaming – despite world opinion, which is waiting for signs of openness and of peace seeking especially from enlightened Muslims? For the two verses, cut out of their immediate contexts in the text and from the relatively well-known events to which they are linked, suggest to unsuspecting readers, the opposite of the rights specified in the articles. Thus, Sura 33 is entitled *al-ahzâb*, the plural of *Hizb* – as in political party Hizbu-llâh now well known in Lebanon. It concerns a coalition of Meccan polytheistic and Jewish clans to attack believers who supported the Prophet in Medina. The vocabulary (“hypocrites ...”) refers to specific social groups that formed the coalition. So here we have a problem reading the text in the linguistic historical and semiotic sense, which must be clarified and resolved before using any verse whatever as a basis of law or as any kind of ethical and spiritual value. The second verse (109, 6) is one of the most cited today whenever it is a matter of “proving” that Islam is tolerant. This is a clause, in a very short textual unit, that allows no break either in its rhythmic form and rhyme or in its content. It is a matter of a declaration of radical separation between the new emerging worship (which became Islam) and polytheistic worship. The doctrinal meaning of this excerpt was actually expressed during the lifetime of the Prophet, after him in a large and recurring controversy throughout the Quranic discourse, and also in pitched battles such as the one just mentioned. It is found in the positive law (*fiqh*) about apostasy (*ridda*) and conversion. I would add that the same problem arises again with today’s advanced democracies, as they attempt to legislate about proliferating sects: *What distinguishes a cult from a religion?* The issue can become theological only after the legislator has found an answer beyond all dogma and all truncated knowledge.

These observations lead us to raise the problem of religious belief; when it is based on discursive practices which nullify any appeal to the understanding of facts and the coherent exercise of rational analysis, it becomes a dangerous source of alienation for the human subject and for the society where such modes of belief have become the educational standard and the orthodoxy protected by the state. It is thus that institutionalized ignorance acquires a sociological expansion unprecedented in societies subject to the tyranny of emotions and the ideological use of the media, and even of public schooling – compulsory and free of charge, but cut off from any idea of critical distance. Thus we discover that, beyond the internal divisions about the textual sources and their exegesis which should incorporate within it an Islamic consciousness, brought together but rigorously criticized³⁹ – there here is an axiological stance – which is much more serious than an assumption – according to which rights described in the Islamic Declaration existed much earlier than those produced by Europeans beginning in the eighteenth century: “Fourteen centuries ago, by Divine Law, Islam codified Human Rights.”⁴⁰ The chronological priority here states the primacy of what God has revealed about the constructions of human reason enclosed within its limits, its passions and its arbitrary nature.

The same axiological posture is found today among Jews who speak of the first religion, chronologically and theologically, against all spreading of the words of Jesus of Nazareth transfigured in Jesus Christ in the various Christianities. Beyond the theological aporia in the interiority of the three versions of monotheism, I see a philosophical knot there that is not yet untied.

I want to return to the question of anachronism as an epistemic and epistemological basis common to all the theological and traditional metaphysical discourses inherited from the Middle Ages – common, not only to monotheistic traditions of thought, but even to certain categories of historians in Europe and elsewhere. Anachronism has a pivotal role in all contemporary Islamic discourse; the discourses of Jews and Christians do not avoid this; but they are identified and condemned by a theological reason that respects the accomplishments of the human and social sciences.⁴¹ Anachronism is even more prevalent and pernicious at the level of psycho-socio-linguistics that the Arabic language does not have a satisfactory translation for a key concept of historical criticism. The entire Declaration is a tissue of anachronisms. I use the word pernicious, because anachronism permeates the vocabulary of texts (I think as much of the Bible, the Gospels, and the great founding stories, as of the Qur'an) as an insidious disease eats away at a healthy body.

I will stick to a single example, because it is fairly indicative. The Qur'an uses two terms to refer to "man": *bashar* (36 occurrences) and *insân* (65) – to which must be added the collective term *nâs* – "people called out to in a discourse," later expanded to "humanity." The first means "skin," and refers to the human race without distinction of sex, number or dignity; the second refers to man as a material body and spirit; man raised to the rank of lieutenant and interlocutor with God on earth. It is true that, following the long tradition of prophetic language from Adam to Moses, Jesus and Muhammad, an evolution of the concept takes place, from *bashar* to *insân*. This evolution has led to an enduring conflict between the theology of the *rights of God*, from which flow obligations and rights of man, and the secular philosophy of the rights of man and the citizen, acquired by the historical struggle of men against men to the point of leading to the death of God.

Is there here anachronism or an as yet unexhausted and perhaps endless debate? This is a fair way of rethinking the dispute about anachronism in the field of the law and the ethical-legal status of the human person. For it is about this when monotheistic religions insist on reminding us of the birth of the person and the awareness of guilt of the subject. There are duties or obligations that weigh on man in the impartial exercise of his own rights. Now, the obligations to God as a reference point for the judgement of all guilt, disappear in the welfare state, and with hypertrophy of the individual ego of the subject of a law that nullifies itself in order to distribute rights to individuals and groups set up as so many new strongholds in competition. The rights of each tend to take away those of

others when ethics is ejected from law. Conversely, the theology of God's rights ignores the concept of the citizen and the legal space of citizenship, by adhering itself to a notion of abstract man created in God's image.

There is thus an anachronism and a claim of a universal which ignores many regions of the inhabited world. This does not prevent polemic from inflating [*enfler*] the controversy between the defenders of man as having a spiritual orientation, and secular reductionists who insist on the rights of concrete citizens. We will go beyond these two inflexibilities in reconsidering the question of law as a precarious compromise, born of a balance of power, here and now, between an infinite variety of protagonists demanding their rights. This aporia will exist for as long as there are those faithful to the covenant between the living God and the "faithful" (in the sense of having a trusting abandonment and love of the law, lived in this covenant). (This faithfulness is different from the belief that contents itself with complying with ritual prescriptions, but which abandons the permanent reconstruction of the self.) We know that there are efforts in this direction among Christian theologians and Jewish thinkers, but scarcely yet among Muslims. I have in mind the works of P. Ricoeur and E. Lévinas, although the word Islam never mentioned by them, which delays the departure from the traditionally religious in order to rethink the human subject beyond all the inherited theologies.

Anachronism has a negative impact on the debate that I have been trying to open. To return to our example of man in the Quran and earlier writings, theologies speak too quickly of the 'universal man,' as already present in ancient cultures enriched by the word of God. Whether theological or philosophical, critical reason works best in the context of the universalizable, and can demand the Universal only when the new challenges of history require it to constantly recognize its mistakes and to follow the path of Sisyphus. Several articles of the Declaration amass anachronisms at the risk of denying history. It is unnecessary to dwell longer on the analysis of other articles of the Declaration. Without respect for the rights which reason has fought for in all cultures, it is not possible today to write and publish a text like the present one, in the hope that it will be read and understood without ending up in some kind of excommunication. This text will be a test of the journeys of modern liberty, made in Islamic contexts, outside and well beyond the insularities that defer the ongoing battles between the supporters of a return to a regressive religion and those who work towards overcoming the recurring objections among all forms of clericalism and the "philosophical" rigidities to a secularism – or, more broadly, among a culture of disbelief backed the 'sovereignism' of states, the omnipresence of the media, and the strategies of the free market.

TENTATIVE CONCLUSIONS

From these regressive-progressive journeys, sending us back to the ancient moments of history, and brought together by the urgencies of the present time in order to better anticipate the responses of the shocks of the near future, I would like people to remember the following essential points, in order to make future advances.

1. The Declaration that I have just analyzed is no more than a historical marker which allows measuring the intellectual, scientific, cultural, political, institutional lags that already separated, at the beginning of the nineteenth century, the Europe of the bourgeois conquerors and of the reason of the Enlightenment, and all the countries of the South-East coast of the Mediterranean. These lags have not to date been the object of a comprehensive analysis of the epistemic networks and epistemological breaks that separated the Arab-Iranian-Turkish logosphere from the Greek-European-Latin logosphere, considered both in the very long term and in the medium and short terms. That is what I have tried to do here in such a quick and allusive way. That's also why I say "tentative conclusions." This is a matter of lengthy research that must be assigned to interdisciplinary teams, where all the voices of all the collective memories, both unheard and present, would be for the first time properly represented and especially prepared in strict compliance with the 'given' that I call 'reason in the process of emergence.' It turns out that the battles of reason for autonomy and freedom have already been outlined by Muslim thinkers in the fleeting period of Arabic humanism from the fourth to the tenth century. The Declaration overlooks that it is the tragic expression of this "orthodox" Islam that triumphed to the point of contributing to the historical termination of a humanism that had scarcely begun.

In the return to the religious, sociologists have been content to give warnings about ideological excesses, but their voices have been muffled by the weight of literature focused on Islamist fundamentalism and radicalism. The preparations necessary to open and clear up the way to a Union for the Mediterranean are, in my opinion, avoided. One ritually confirms the incomparable backwardness of "Islam," a concept so little drawn on that it is useless without the deconstruction outlined in this essay; but it neglects the archaeological investigations that reveal the mechanisms and the structuring dogmatisms of the common imagination to Islam, that is, at the same time, both a fiction and an effective ideological lever. That's why I multiplied references to works that indicated the tasks of emerging reason.

2. It is naive to ask 'Islam-fiction' to revive that famous *ijtihad* which had already been terminated from the time that the methodological corset of foundationalist thought (*'ilm al-usūl*) had planted the first seeds of what became the ideological monster called fundamentalism or 'integristism.' Those who yearn with nostalgia for this golden age of religious studies,

overlook there, too, the significance and the necessity of going through the critique of Islamic reason. Only this critique may finally reveal what all Muslims continue to prefer to overlook – that the shackles of *usûl al-fiqh* has led to two structuring results of contemporary Islamic discourse: 1) the illusion that the eponymous masters of the juridical schools in Sunnism, Shi'ism and Ibadism have carried out a proper derivation of legal norms beginning with the texts of the first two sacralizing sources: the Qur'an and the Hadith; 2) the historical fait accompli of the sacralizing of the law that has raised the eponymous masters (Mâlik, Abû Hanîfa, Ja'far al-sâdiq, etc.) to the rank of mediating authorities who have exempted generations of jurists, up to the present day, from going back each time to the sacralising texts⁴² in order to reconsider, in each new context, the arguments made by the first generation of judges and lawyers who started this work in totally different conditions. The production of mediators between believers and the beloved god or gods is a phenomenon common to all religious traditions; the mediators increase like saints and marabouts in the Islamic context, to the extent that analytical and interrogating reason loses its prerogatives in favor of social imaginaries. In Europe, the reason of the Enlightenment had weakened, then disqualified the processes of sacralization and sanctification. Traces survive, however, in some Republican ceremonials, such as the interment in the Pantheon in Paris of the great servants of the state and the Republic.

After 1945, the nationalist rhetoric of liberation in the colonized countries borrowed on the fly some of the ideas or postures of modern reason; but it was necessary to ignite the social imaginaries by pulling on two mythoideological levers:

- Keeping quiet about the real history of reason in its Islamic trajectory in those centuries precisely where reason in Christian and Latin Europe allowed those consequences, 'terminated' in the lands of Islam, to flourish;

- Devaluing as far as possible the European trajectory, by denouncing the crimes of genocide and colonization. One adds thus the obscuring of a real, decisive, but demobilizing history, and the hypertrophy of the discourse of victimhood, which remains profitable even after more than 60 years of exercise of national sovereignty. I am certain that the last two statements will scandalize the ideologues who earn their stripes and privileges with the escalation of victimhood. So I will immediately add that the colonial powers are also sticking to their guns about exaggerated victimhood. The U.S. has claimed victim status after September 11 in order to justify the old self-defense in the name of higher "values." This is exactly the old law of retaliation, and the argument of verse 33, 60 discussed above. The French parliament reignited the escalation of victimhood in February 2005, when it tried to pass a law on teaching about the benefits of colonization.

3. Only reflexive history fulfills the indispensable cathartic function which all cultures urgently need today. Yet so-called “professional” historians do not stoop to this function, that departs from the respect for facts; another tyranny that limits the ambitions of reason. Yet we see the contributions of historical foresight on the comparative trajectories of reason in Islam and Europe during four decisive centuries when the tragedies – the tragedies of the Balkans (Greece, Bosnia, Serbia, Kosovo, Albania) and of those that took place in the South and in the East of what was the Mare Nostrum before the intervention of Islam – were planned. In the background of the killings in Bosnia and Kosovo, there is the Islam of the Ottoman bureaucracy and raging hatreds fueled by the sermons of Latin and Orthodox Christianity up to the present day. These hatreds, fed by both sides, generated the same unthinkable and the same major unthoughts, by all methods of ‘dressing up’ and manipulation, of Scriptural solicitations that are always true, holy, and divine for each community, always invested in victims discourses, as fruitful sources of legitimacy for the clergy and for the regimes in place.

The concepts of thinkable and unthinkable, of thought and of unthought, meet in philosophy, but rarely in the work of narrative history and description. They are very rare, even among historians of philosophy for whom it is sufficient to simply make explicit the thought of the authors, in the context of what was thinkable for them. In the history of theological reasoning, the couples mentioned refer to socio-cultural and ideological spaces that arise within sociology and historical anthropology. I apply this Islamic reason, which remains new, indeed unknown, to Jewish, Christian, secular, etc. reason.

Here, then, we have outlined a new plan for a comparative reflexive history of systems of philosophical, theological, exegetical, legal, ethical, and sociological thought in the historical Mediterranean area. This is a matter of applying to collective tragedies experienced by the peoples of the South and of the East of the Mediterranean, the psychoanalytic therapy of liberation, by language and in uncensored language; all suffering repressed in individual and collective unconsciousnesses; the suffering of the victims as well as their culpabilities killed off the dominant, who were all executioners. Such an initiative would help break the historical deadlocks multiplied by those who want to transfer democracy like a commodity, and by those who wave the banner of the party of human rights in response to those who take to the streets to protest against Islamophobia or anti-Semitism. Human rights is a culture, a way of thinking and of emancipating the human condition in the slow process of the awareness of the self by the self of each society, knowing that there are societies that stand about, linking their fate for centuries to *marja ‘al-taqlîd*, to symbolic figures on whom we project values and invariant norms, while the real story follows its inexorable course. The real story reveals what the actors are struggling to hide or to ignore, in strengthening political taboos, false ritualizations, and

the reproduction of a sacred simultaneously disintegrated and profaned in a thousand ways.

Humanitarian relief is vital to maintaining a glimmer of hope among people subject, without recourse, to all kinds of oppression; but they never recover a full and lasting human dignity. The West has the human, scientific, cultural, and technological resources needed to offer solutions ahead of time, but it lacks a philosophy of going beyond all the ethics that 'free' consciences from acting on this, noting the impossibility under present conditions of relieving all the miseries of the world. There are miseries generated, amplified, and compounded in the geopolitical strategies that constantly redraw, from a small number of hegemonic centers, the map of the wills to power and of the miseries of the world.

We call for a history of solidarity, of peoples and cultures, to make way at this time for objective, rigorous, and comprehensive surveys, of great intuitions magnificently expressed in the slow and broad deployment of the monotheistic prophetic discourse, in Asian and African wisdoms, and, then, in the latest visions of scientific and philosophical reason. There is too much ignorance, false and dangerous knowledge, and murderous prejudice, accumulated in the cultures of the world that are increasingly being asked to proclaim "identities" conceived as fortresses, refuges and ideological springboards, than renewed bodies of intellectual, ethical, legal and philosophical authority. I try not use the term spiritual because I know that spirituality is also sought today to serve as a counterblast to fundamentalists who kill in the name of God. Let me refer to one final pathway to conclude this contribution to the empowerment of emerging reason. About spirituality, I have to give a final reference. Since I have to hand the *Dictionnaire de Théologie* published in 1998 under the editorship of Jean-Yves Lacoste, I constantly refer to it for a great number of concepts, themes, and doctrinal constructions. It is an inexhaustible source of accurate information, detailed analyzes, and references to countless authors, from the time of the great seminal works of Greek philosophical thought, to the Fathers of the Church of late antiquity and of the Middle Ages, up to many living thinkers who have contributed to this beautiful restoration of the paths of the *fides quaerens intellectum*. There we understand why the topic of spirituality cannot be raised, without having seen, heard, and read such masters as P. R. L. Brown, of whom it has been said⁴³:

Peter Robert Lamont Brown's concept of late antiquity recognizes few academic boundaries or disciplinary barriers. His writing cannot but stir the blood of young scholars. It promises a bazaar of possibility. Late antiquity, as defined in a recent handbook co-edited by Brown, is a distinctive and decisive period of history between around 250 and 800 C.E. [Brown writes:]

It is not as it once was for Edward Gibbon, a subject of obsessive fascination only as the story of the unraveling of a once glorious and “higher” state of civilization. It was not a period of irrevocable Decline and Fall; nor was it merely a violent and hurried prelude to better things.... Not only did late antiquity last for over half a millennium; much of what was created in that period still runs in our veins. It is, for instance, from late antiquity that we have inherited the codifications of Roman law that are the root of the judicial systems of so many states in Europe and the Americas. The forms of Judaism associated with the emergence of the rabbinate and the codification of the Talmud emerged from late antique Roman Palestine and from the distinctive society of Sassanian Mesopotamia. The basic structures and dogmatic formulations of the Christian church, both in Latin Catholicism and in the many forms of eastern Christianity, came from this time, as did the first, triumphant expression of the Muslim faith. [G.W. Bowersock, Peter Brown, Oleg Grabar, editors. *Late antiquity: a guide to the postclassical world* (Harvard University Press, 1999), ix-x.

APPENDIX

FROM THE “UNIVERSAL ISLAMIC DECLARATION OF HUMAN RIGHTS,” ADOPTED ON 21 DHUL QAIDAH 1401 (19 SEPTEMBER 1981)⁴⁴

Preamble

Fourteen centuries ago, Islam codified Human Rights, comprehensively and in depth, and surrounded them with appropriate guarantees to safeguard them; and it founded its society upon bases and principles which strengthen and support those rights.

Islam is the seal of the heavenly messages revealed by the Lord of the Worlds to His messengers (peace be on them), that they might communicate these to humanity, as guidance and direction towards that which will ensure them a good and noble life ruled by truth, goodness, justice and peace.

Thence it is incumbent upon Muslims to communicate to all mankind the summons of Islam, in obedience to the command of their Lord: “May there be among you a people who Will summon to what is good and command what is acceptable and forbid evil” (3;104). This is also in fulfilment of their duty to humanity, and their loyal participation in saving

the world from the error which abounds there, and releasing the nations from all kinds of oppression under which they suffer.

Wherefore we, the community of Muslims, with all our variety of peoples and regions Declare that:

- We worship God, the One, the Almighty;
- We believe that He is the absolute ruler in this life and the next, and that to Him we shall all return; that it is He alone who is able to guide mankind to that wherein is their good and wellbeing, after having made man His deputy on earth, and having put beneath him the whole of creation;
- We confirm the unity of the true faith, brought by the Messengers of our Lord, each of which has placed a stone into the building which the Almighty has completed through the message of Muhammad; thus as he said: “I am the (final) stone and I am the seal of the Prophets”;
- We assent that human reason is incapable of establishing the most correct plan for life, independently of God’s guidance and revelation;
- In the light of our glorious Scripture, we see clearly man’s place in the universe, the ultimate aim of his existence and the wisdom in his creation;
- We know that his Creator endowed him with dignity, nobility and grace, above the vast number of His creature;
- We perceive the innumerable and immeasurable graces with which his Lord the most High has surrounded him;
- We truly comprehend the concept of the Community (*umma*) which embodies the unity of Muslims, despite the diversity of their regions and their peoples;
- We are profoundly aware of the corrupt conditions and evil regimes which trouble today’s world;
- We sincerely desire to fulfil our responsibility towards human society, as members thereof;
- We wish to carry out the duty of proclamation which Islam has laid upon our shoulders, striving for the establishment of a more excellent life;
 - based upon virtue, purified of evil –
 - where co-operation and peace will replace hostility, brotherhood replace enmity –
 - where co-operation and peace will reign in place of conflict and wars
-
- life wherein humankind will breathe the qualities of freedom and equality, of brotherhood, nobility, dignity ... instead of being stilled beneath the constraints of slavery, racial and social discrimination, oppression and humiliation...
- whereby he will be prepared to carry out his true mission in the universe: the adoration of his Creator, the most High; and the civilisation of the whole world.

(Such a life) would permit him to enjoy the bounty of his Creator and enable him to act justly towards mankind, which represents in relation to him a vast family, to which he is bound by a profound sense of the unity

of the human race, this unity producing a relationship, joining together all the sons of Adam.

Taking all this into consideration:

We, the Community of Muslims, bearing the standard of the summons to God: at the beginning of the 15th century of the Hijra, proclaim in the name of Islam this Declaration of the Rights of Man, derived from the noble Qur'ān and the pure Sunna of the Prophet. On this basis, they are eternal rights, not capable of being suppressed nor rectified, nor abrogated nor suspended.

These are rights laid down by the Creator, praised be He, and no single human being, whoever he be, has the right to suspend them nor to infringe upon them; their essential immunity cannot be suspended by the will of any individual refusing to observe them, nor by the (collective) will of any society, represented by the institutions it has established, whatever their nature and whatever the authorities granting them.

The confirmation of these rights is the correct introduction to the establishment of a true Islamic society ...

1. A society within which all people are equal, with no distinction nor privilege between individuals based on origin, race, sex, colour, language or religion;

2. A society in which equality is the basis of enjoyment of rights and the discharge of duties ... an equality springing from the unity of human descent: "O people! We created you of male and female" (49:13); and from the dignity which the Creator, the most High, has bestowed on mankind: "We have ennobled the sons of Adam, and have carried them over land and sea and have bestowed on them good things, and have favoured them greatly above most of our creation" (17:70).

3. A society in which the freedom of the human being is the very meaning of his life, where he is born free and carries out his personal destiny in liberty, free from repression, tyranny, humiliation and slavery;

4. A society which considers the family the core of society, assures for it protection and respect, and provides for it all the means of stability and progress;

5. A society where the ruler and the people are equal, before a law laid down by the Creator, praised be He, without distinction nor privilege;

6. A society where authority is a trust placed on the shoulders of the ruler, to carry out the objectives prescribed by the šari'a, and in the way it has laid down that they should be so fulfilled;

7. A society in which every individual believes that God alone is the master of the entire universe, and that everything in it is subject to all God's people, as a gift from His bounty, where none has a prior claim (over others). It is the right of each human being to receive a just share of this divine gift: "And He has put at your service all that is in the heavens and the earth, from Him" (45:13)

8. A society where (the principle of) *šūrā* (consultation) is acknowledged in the policies determining the affairs of the community, and is practised by the authorities which apply and carry out these (policies): “And their affair is by consultation among them” (42:38).

9. A society in which ample opportunities are available for every individual to discharge his responsibilities in it according to his capacity and ability, and to render account for them in this world before his community and in the next before his Creator: “Each of you is a shepherd and each is responsible for his flock.”

10. A society where ruler and ruled are on an equal footing before the judiciary, even in the discharge of judicial procedures;

11. A society in which every individual is the conscience of his social group, and has the right to initiate legal action – in accordance with the (principle of) *hisba* – against any person who perpetrates a crime against society; and he can ask for support from others ... while those others have the duty to help him and not to forsake him in his just cause;

12. A society which rejects all kinds of tyranny, and guarantees to every individual within it safety, freedom, dignity and justice, as is required by the rights which God’s *šarī’a* has established for mankind; the effort to implement them, and the vigilance to guard them;

these rights which are proclaimed to the world by This Declaration.

...

12. The Right to Freedom of Thought, Belief and Expression

(a) Every individual may think, believe, and express his thoughts and his belief, without interference or opposition from anyone, so long as he abides by the general limits which the *šarī’a* has established. It is not permitted to publish falsehood, nor to spread abroad anything which contains incitement to evil or distresses the community: “If the hypocrites and those in whose hearts is sickness and those who spread lies in the city do not desist, we shall set you against them; then they shall not be your neighbours there except for a little; they are accursed; wherever they are met with, they shall be taken and killed” (33:60-61).

...

13. The Right to Religious Freedom

Every person has freedom of belief, and [therefore] freedom of worship in conformity with his belief: “To you your religion, to me mine” (109:6).

NOTES

¹ *Propos sur la religion*, no. 64 (Paris, PUF, 1969), pp. 201-203.

² See the majestic Prolegomenas of Ibn Khaldun (d. 1406).

³ I thank my friend Roberto Papini who sent me the following information: “In 1948 the Vatican was not a member of the United Nations. It became a permanent observer accredited to New York only in 1964. In Mary Ann Glendon’s book, *Eleanor Roosevelt and the Universal Declaration of Human Rights, A World Made New* (New York, Random House, 2001, p. 132), it appears that René Cassin was encouraged, during the preparation of the Declaration, by Archbishop Angelo Roncalli (later Pope John XXIII), then Nuncio in Paris. In addition, in his radio message of Christmas 1942, Pius XII stressed the importance of human rights.”

⁴ *Nouvel Observateur*, May 22, 2008.

⁵ I have already mentioned that which I myself owed at that period of intellectual, cultural and political ferment in French universities, in my article “Les réponses de l’islamologie appliquée,” in *Regards sur La France. Trente spécialistes internationaux dressent le bilan de santé de l’hexagone*, ed. K. E. Bitar and R. Fadel (Paris, Seuil, 2007).

⁶ I must pay tribute to the perspective first proposed by Taha Hussein who, in 1938, defended the intellectual and cultural integration of Egypt as part of a larger vision of the flow of ideas and works of civilization in the Mediterranean area. See his book *L’avenir de la culture en Egypte* (Cairo, 1938). This approach has already sparked violent rejection of nationalist and Islamist tendencies.

⁷ We have heard all these phrases, and many others, made by eminent jurists at the XXIII Rencontres de Pétrarque à Montpellier. See Jean Birnbaum, “L’Etat de droit est devant nous,” in *Le Monde* 23/07/08.

⁸ This is general title under which Mirelle Delmas-Marty has published three volumes: *Les forces imaginantes du droit: t. I, Le Relatif et l’Universel* (Paris, Seuil, 2004); t. II, *Le pluralisme ordonné* (Paris, Seuil, 2006); t. III, *La refondation des pouvoirs* (Paris, Seuil, 2007).

⁹ Robert Kagan has vehemently defended, with conviction, the policies of the United States in the aftermath of September 11, in ridiculing the weakness of Europe faced with the threat of systemic violence in the world. Among other cynical analyses, he has written: “For it is the United States that has had the difficult task of navigating between these two worlds, trying to abide by, defend, and further the laws of advanced civilized society while simultaneously employing military force against those who refuse to abide by those rules.” “Power and Weakness,” in *Policy Review*, 2002, No. 113.

¹⁰ Concerning the precise historical role of philosophical and scientific thought in Arabic on Latin-Christian thought in Europe, beginning in the twelfth century, an old controversy has been revived by two articles that I discuss elsewhere: Pierre-Philippe Rey: “Pourquoi une anthropologie de la

libération?,” in *Nouvel Organon inaliénable et réflexif*, n° 1 (Paris, Les éditions d’une nuit sans lune, 2008); Sylvain Gouguenheim, *Aristote au Mont St Michel. Les racines grecques de l’Europe chrétienne* (Paris, Seuil, 2008); see also M. Arkoun, “Le problème des influences en histoire culturelle d’après l’exemple arabo-islamique,” in *Culture arabe et culture européenne. L’inconnu au Turban dans l’album de famille*, ed. M. Pondevie Roumane et alia (Paris, L’Harmattan, 2006).

¹¹ Despite the similarities of form and procedure that I have just noted, we should not forget the radical differences that separate the theological-political assumptions from the philosophical-political ones. At this level of analysis, it is appropriate to go beyond the “dogmatic certainties” that have prevented the continuation of instructive tensions between the two positions of reason. Emerging reason rejects all rigid positions, in order to emphasize the diversity of approaches, methods, epistemic networks, hubs of thought, etc.

¹² A relevant example of the analysis of action systems that weave through daily life, and which manage to challenge the omnipotence of the reference to the dominant Islamic norms, may be found in Jean-Noël Ferrié, *Le régime de la civilité en Egypte. Public et réislamisation* (Paris, éditions CNRS, 2004).

¹³ See also, by the same author, *Le jugement en action. Ethnométhodologie du droit, de la morale et de la justice en Egypte* (Paris, CEDEJ/Librairie Droz, 2006).

¹⁴ N. Bernard-Maugiron and B. Dupret, “Le prince et son juge: droit et politique dans l’Egypte contemporaine”, in *Egypte-Monde arabe*, 2, 1999, pp. 107-125, at p. 107.

¹⁵ See my “Critique de la Raison juridique en Islam,” in *Humanisme et islam*, op. cit.

¹⁶ See *Unthought*, Chapters 1, 2, 3 and 6.

¹⁷ The policies of the colonial powers vis-à-vis religion in general and Islam in particular have always been dominated by the principle of ‘Discipline and Punish,’ according to the valuable analysis of Michel Foucault in a book of that name. It was never a matter of developing educational strategies for the emancipation of thinking to accommodate the modern principles of law. See the recent studies compiled and edited by Pierre-Jean Luizard in *Le choc colonial et l’islam. Les politiques religieuses des puissances coloniales en terres d’islam* (Paris, La Découverte, 2006).

¹⁸ See Arkoun, “L’islam actuel devant sa tradition et la mondialisation,” in *Islam et Changement social*, ed. Mondher Kilani (Lausanne, Payot, 1998);

“Pour un remembrement historique de la conscience islamique,” in *Pour une Critique de la raison islamique* (Paris, 1984).

¹⁹ There are passionate debates in Europe concerning the new challenges posed by democratic practice. See Pierre Rosanvallon, *La contre-démocratie. La politique à l'âge de la défiance* (Paris, Seuil, 2006).

²⁰ To understand the historically programmed failure of the middle class, see Azadeh Kian-Thiébaud, *Secularization of Iran. A doomed failure?* (Paris, Peeters, 1998). The question of social and cultural insecurity of the middle class remains an open one in all societies where the double reference to belief and the divine law prevails. We can see the critical importance of this fragility in the most recent book of Keith D. Watenpaugh, *Being Modern in the Middle East. Revolution, Nationalism, Colonialism and the Arab Middle Class* (Princeton, Princeton University Press, 2006).

²¹ Historians refer unceasingly to this event, where problems of what we today call legitimacy, legality, and law have arisen. In fact, even the concepts of *sharī'a*, *fiqh*, *kalām*, *ahkām sultāniyya*, *siyāsa shar'iyya* did not yet exist; they are worked on much later in the context of the caliphate and imperial state between the eighth and the eleventh centuries. They wither away to the extent that one moves from the phase of creativity and research within a framework of doctrinal pluralism to the phase of scholastic repetition within institutions focused on a lineage where the founders of the schools are no longer mentioned except as eponymous ancestors. The intellectual, social and political conditions, wherein these founders made a real intellectual effort (*ijtihād*), are completely erased from memories. This erasing is very old; we see it expressed today in the mechanical use, empty of all historical content, that Muslims make in the appeal to *ijtihād* in order to revive creative thinking.

²² In *La Loi de Dieu. Histoire philosophique d'une alliance* (Paris, Gallimard, 2005).

²³ *Pour une critique de la Raison islamique* (Paris, 1984) and *The Unthought in Contemporary Islamic Thought* (London, Saqi Books, 2003); 2nd ed. under the title *Islam: to Reform or to Subvert?* (London, Saqi Books, 2006).

²⁴ The concept of ‘bricolage,’ proposed by Claude Lévi-Strauss concerning ‘the savage mind,’ really caught on in the years 1970-80. F. Bourricaud applied it to the practices of intellectuals in *Le bricolage idéologique. Essais sur les intellectuels et les passions démocratiques* (Paris, PUF, 1980). It has been further applied to all levels and all types of contemporary Islamic discourse, in which populist – and, even more, popular – religiosity had a more cultivated reception in societies conquered by the Islam of petrodollars and of an Islamic Republic which ritualized and bureaucratized

the daily lives of Iranian “citizens.” The *Res publica* is actually a *Res Islamica*, where ideological tinkering of the religious and the political dominate the conduct of actors in both the public and the private spheres.

²⁵ I have heard Moroccans express their pride of having escaped Ottoman occupation, thanks to the continuity of the monarchical Moroccan state; the Algerians, on the other hand, welcome the Ottoman presence in Algeria, which delayed colonial occupation until 1830.

²⁶ That is to say, to this reformism of a mythological nature, called *islâh*, that haunts the Islamic consciousness as soon as the voice of the prophet ceased to be heard. For the first converts were immediately referred to the exceptional course they had just experienced during 20 years in two small oases – Mecca and Yathrib - which were soon superseded by capitals with a prestigious past.

²⁷ This is the whole issue of reformism (*islâh*) or of the revival of Islam that I am referring to briefly as *islâh*. For a more detailed critique of the idea and practice of *Islah*, see my book *Islam: Reform to or to Subvert?*

²⁸ [See Amin Maalouf, *In the Name of Identity: Violence and the Need to Belong*, tr. Barbara Bray (New York, Arcade Publishing, 2000).] See *Legitimizing the Order. The Ottoman Rhetoric of State Power*, ed. Hakan T. Karateke and Marius Reinkowski (Leiden, Brill, 2005).

²⁹ This is a magnificent definition of myth that I have used as a permanent guide since I discovered it in Claude Levi-Strauss. It is understood that I am referring to the Sacred Scriptures of the three versions of monotheism, which have each built an ideological palace for their faithful, where it is easy to enter, but impossible to leave except on pain of excommunication or execution. We should add that modern Europe has built its own palaces with the rubble of the palaces before it, that it had reduced to ruin. I call this the ever-changing vagaries of reason.

³⁰ You can read a French translation of the Arabic version by Maurice Borrmans in *Islamochristiana*, 1983 [see also the English translation in the same issue – ed.]. The text shows nothing more than an interest in a historical indicator on the intellectual and cultural development of Islamic thought concerning the continually relevant question of the rights of man, expanded with the term ‘human rights’ to those of women, children, and of the oppressed in several countries. I take up this text, which has not had any notable effect on the 56 states composing the *Organization of the Islamic Conference*. The structure of the argument of each article remains unchanged in the discourse of protest and self-promotion of what might be called the *populist common imagination* of Islam, which must also be qualified as *contemporary*, but surely not as *modern*, as is commonly understood in the English-language literature.

³¹ This is a very technical process that requires the use of multiple disciplines such as grammar, stylistics, rhetoric, Arabic etymology, history, theology, linguistic logic and formal logic, the mastery of the rules of disputation (*munâzara*) with other jurist-theologians. All these disciplines were introduced and taught in the first four centuries of the Hegira, but research stopped in order to expand the horizons of knowledge and critical discourse. However this expansion is essential to keep the effectiveness of critical legal reasoning, specifically of we call *ijtihâd*, at the time of the formation of the disciplines of law, theology, philosophy, history, etc.

³² Paris, Seuil, 2002.

³³ See Mohammed Arkoun and Joseph Maila, *De Manhattan à Bagdad. Au-delà du Bien et du Mal* (Paris, Desclée de Brouwer, 2003).

³⁴ These titles speak for themselves: *Zâhirat al-murâsala ilâ darîh al-Safi'î* [*The phenomenon of correspondence with the Mausoleum of Shafi'i*] (Cairo, 1968); *Hutâf al-sâmitîn* [*The murmurs of the silenced*] (Cairo, 1970).

³⁵ To understand the exact scope of this concept, we must remember the work of C. Castoriadis concerning the imaginary institution of society; of P. Berger on the social construction of reality; of Freud and his countless successors on religion as the great illusion, but also as a source of construction of the self. When reason is perverted and the codes of law are disintegrated by policies of systematic elimination of critical reason, the mythoidelological fiction builds the collective self, which cancels the areas of construction of the autonomous human subject.

³⁶ *Legitimizing the Order: the Ottoman Rhetoric of State Power*, op. cit.

³⁷ Apart from Iranian intellectuals, other voices in the Arab world such as the Egyptian Hasan Hanafi have fervently praised the Islamic Revolution, “theorized” in a manifesto that is mediocre in form and even worse in content. I mention this to emphasize that the second ‘path’ was applauded by “intellectuals” of renown; it was not just by politicians, Islamist rhetoricians, and populist sermonizers.

³⁸ [This text does not, in fact, appear in the Document that Arkoun appends below; it appears in a different ‘translation’ or edition of that Universal Islamic Declaration of Human Rights; see *The International Journal of Human Rights*, 2 (1998), pp 102-112, and see note 40 below.]

³⁹ On this key concept of a critique of Islamic reason, refer to my *Pour une Critique de la Raison islamique*, chapter 4.

⁴⁰ [This is not the wording found in the text that Arkoun provides in the appendix, but that of different ‘translation’ or edition. See note 38 above.]

⁴¹ See Pierre Gisel and Jean-Marc Tétaz (eds.), *Théories de la religion* (Geneva, Labor et Fides, 2002).

⁴² One commonly speaks of sacred texts and of Sacred Scriptures; we forget that the sacred is a taboo that strengthens and enlarges itself, to the extent that the rituals of protection of an object or of a time or space that is designated as prohibited, strengthen among the faithful, the force of sacralization. We can talk then of the continuous emission of the sacred and of sanctity during pilgrimages, for example.

⁴³ [John Rawlings, “Introduction to “Scholarship and Imagination: The Study of Late Antiquity” by P. R. L. Brown (Stanford Presidential Lectures in the Humanities and Arts),” available online at <http://prelectur.stanford.edu/lecturers/brown/index.html>]

⁴⁴ [This translation, by Penelope Johnstone, of the “Universal Islamic Declaration of Human Rights” appeared in *Islamochristiana*, 9 (1983), pp. 103-20, together with the French translation cited by Arkoun. It should be noted that neither is the ‘official’ translation often cited in texts on human rights. – ed.]

CHAPTER VII

HUMAN RIGHTS IN HINDUISM

SCARIA THURUTHIYIL

INTRODUCTION

India won its independence from the British rule on 1 August 1947 and in 1950 declared itself a sovereign, secular and democratic republic, with a most modern constitution that guarantees the socio-political, economic and religious rights and freedom of every citizen of India. India, member country of the United Nations, whole-heartedly accepted the Magna Carta of the Universal Declaration of Human Rights (UDHR) declared by the General Assembly of the United Nations on 10 December 1948, and seeks not only to publicize, to disseminate and display the text, but strives to guarantee and promote these rights for every citizen through its various institutions, political, legal, judicial, social, economic, and religious.

India is a land of many contradictions and Hinduism – its principal religion – is a contradiction in itself. Over 81% of its citizens belong to Hinduism. The intent of this short essay is to analyse different aspects of Hinduism to find out their relationship with human rights. It is an attempt to find answers to the following questions: Is Hinduism opposed to human rights promulgated in the UDHR? Do human rights exist and can they be founded in Hinduism? Does Hinduism promote human rights?

To answer these questions it is of paramount importance to know, at least in a nutshell, what is meant by the Hinduism with which we intend to confront human rights.

HINDUISM

Any discussion of Hinduism in general terms is difficult because of the enormous variety and plurality within this tradition. Hinduism claims to have 4000 years of unbroken history.¹ It is not one or a unique religion, but a mosaic of religions, which include nature worship, cult rendered to innumerable spirits, such as the spirits of fore-fathers and heroes, worship and cult rendered to many gods and goddesses (polytheism), but also to one Supreme God (monotheism) and also a high level of mysticism that seeks not only the union of the soul (*atman*) with the Absolute (*Brahman*), but the identification of the soul with the Absolute, overcoming every trace of dualism – *atman is Brahman*. Hinduism is the religion of Indians, who do not belong just to one ethnic group or race. India in her maternal womb embraces all the races of the world (Aborigines, Tribals, Indo-Aryans, Dravidians, Turks, Mongols, Arabs, Afghans, Armenians, Greeks, Jews,

etc.) with their own traditions, cultures, languages, customs and religions. Hinduism is an amalgamation of the religious faiths of all these peoples and races, at various stages of their development. It has no historical founder, no prophets, no single text which is of ultimate authority, no fixed dogmas to be adhered to, not even the obligation to believe in a Supreme Being (even an atheist can be a Hindu), no institutional hierarchy, no authority to enforce its beliefs on its adherents. In fact it can be affirmed that 'Hinduism is more a culture than a creed' (S. Radhakrishnan),² a way of living rather than a way of thought. However there exist some fundamental beliefs, which all the adherents of Hinduism accept and are considered essential to Hinduism, viz., belief in the creation, conservation and dissolution of the world in cyclic form, belief in the Vedas (sacred books believed to be revealed), belief in karma and *karma-samsāra* (reincarnation), acceptance and observation of the duties of the castes (*varṇa-dharma*) and of the four stages of life (*varṇāśrama-dharma*), belief in the possibility of arriving at a final liberation (*mokṣa*) from the chain of reincarnation.³

If Hinduism is 'more of a culture,' 'a way of living more than a creed,' then it is important to answer another basic question, viz., in Hinduism, is the correct formulation of beliefs more important than correct form of practice? Hinduism cannot be reduced only to the practice of laws contained in its Dharma Sutra. Its teachings are contained in the Veda, especially in the Upanishads (Vedanta), to which we shall refer when we seek to found human rights in Hinduism. However many scholars, like Kana Mitra, affirm that most of the Hindus are tradition-oriented and consider the correct form of practice (contained in the Dharma Sutra) is more important than the correct formulation of beliefs,⁴ especially when we treat a practical theme like the present one. The Codex of praxis, that regulates the religious and social life of the Hindus, is found in the Dharma Sutra,⁵ among which Manu's Dharma Sutra (*Manava Dharmasastra* or *Manusmṛiti*)⁶ is considered most authoritative by traditionally-oriented Hindus.

When we analyse the *Manusmṛiti*, it is more than evident that this Code of Law upholds not only the hierarchical social order of Hinduism (the caste system) but also many other traditional religious beliefs and practices that seem not only incompatible with the idea of human rights but even violate them. In fact Hinduism is accused of upholding inequality among human beings and practicing injustice – absolutely incompatible, therefore, with basic human rights. We intend to take up a few of these beliefs and practices, and see whether they are actually incompatible with human rights or not.

KARMA, KARMA-SAMSĀRA AND HUMAN RIGHTS

Karma and *karma-samsāra* are basic beliefs of Hinduism and are also upheld by its various philosophical schools, both orthodox (*āstika*)⁷ and heterodox (*nāstika*).⁸ Are not these doctrines incompatible and a violation of human rights?

Karma literally means action. It also means the fruits of one's action. According to the theory of karma, no child is born as, so-to-say, a blank sheet of paper on which he/she begins to write his/her own history from the moment that he/she is born, but is born with his/her own past which his/her soul (atman) brings along from his/her previous life. Karma is responsible for the various differences (character, talents, intellectual capacity, caste, etc.) that exist among human beings. The doctrine of karma vindicates and explains away the problem of evil and suffering both at the individual, family, and social levels. Thus, for example, one is born handicapped (blind, deaf, lame, sick or mentally handicapped) or in a lower caste because of his/her previous karma or because of the karma of his/her family. Strictly connected with the doctrine of karma is *karma-samsāra* or the doctrine of reincarnation. This doctrine is based on an inexorable law, viz., you are totally responsible for your own actions and you will harvest the fruits of your actions; if your actions are good then you will reap good fruit, but if instead your actions are bad, then you must pay the debt. One existence alone is often not enough to pay both one's debts incurred during his/her life and those debts that one brings along when he/she is born. Hence, there is the necessity of being born again and again – reincarnation – until one fully pays his/her debts.

From these doctrines one can easily draw the conclusion that all are born neither free nor equal, and hence have no equal rights. This seems to go against the first article of fundamental human rights declared by the UN: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."⁹ It must be argued, however, that these doctrines of karma and *karma-samsāra* do not directly go against the first article of universal human rights, since the teaching of these two doctrines is not regarding the equality or non-equality of human beings as such, but regarding the cause for the differences, at various levels, that exist among individuals, which is precisely due to one's own karma, on which depends and will depend the quality of his/her life now and in future.

THE CASTE SYSTEM (VARṆA, JĀTI) AND HUMAN RIGHTS

Nowhere else in the world has inequality been so elaborately constructed as in the Hindu institution of *varṇa*. It is a perennial scar on the beauty of the Indian culture. The question of the caste system and its relationship to human rights is a very complex and even a vexed one.¹⁰ The question here is: how does the caste system fare with the very first article of UDHR?

The word 'caste' is derived from the Portuguese term *casta*, meaning breed, race or kind. In Hinduism, the term used is *varṇa* or *jāti*. Hindu society is a complex phenomena of various communities systematised in hierarchical order. This institution is known as *varṇa-dharma*, which literally means the law of colour (of the skin) and indicates, therefore, that the stratification of the Indian society took its origin from the

distinction of the colour of the peoples. In fact the Indo-Aryans who established themselves in India towards the second millennium B.C. were white, while the earlier inhabitants (the Dravidian race) were dark in colour. These two peoples were distinct from one another not only in colour and race, but also in culture and religion. The *R̥gVeda* uses the term *varṇa* (colour) in connection with these two groups of people, who were antagonistic to each other. The Aryans (conquerors) were convinced that they were a superior race and called the others *dāsa* or *dāsyu*, which means 'servants'. With the passage of time, Hindu society was divided into four groups (castes), based on professional skills, talents, individual disposition, etc.: *Brāhmaṇa*, *Kṣatriya*, *Vaiśya* and *Śūdra* (the conquered people: servants of the above three castes).¹¹ The first three castes are the noble or clean castes, the "twice-born" (with the ritual of initiation, *upanayana*, undergone by male members in which the investiture with the Hindu sacred thread constitutes a kind of ritual rebirth), while the fourth class has no right to the rite of initiation.

In the beginning, the *varṇa* system was very favourable to the harmonious development of the society and of the individual in as much to each one was assigned particular duties, whether religious or social. It was an elastic institution. But with the passage of time, these four *varṇa* bifurcated into innumerable classes according to occupation or work. The social structure became more and more rigid, and occupation became hereditary. The birth of the individual became more important than his talent or capacity to determine which type of occupation ought to be followed. Thus the institution of the social class degenerated into caste (*jāti*). One is born into a caste and retains his caste till death. It should be noted that each of these four castes, especially the fourth, is divided into hundreds of sub-castes as well.

Manu codified the laws (Dharma Sutra) regarding conduct, duties and contacts (relationships) between the castes and gave them a permanent and rigid basis.¹² In this Code, duties and rights are specified not in terms of one's humanity but in terms of caste, age, and sex.¹³ He even proposed a mythological theory regarding the origin of the castes which can be found also in the famous *Purushasukta* of the *R̥gVeda* (cf. X, 19, 12). Manu writes: "For the prosperity of the worlds, he (the Supreme Being) allowed the *Brāhmaṇa*, the *Kṣatriya*, the *Vaiśya* and the *Śūdra* to proceed from his mouth, from his arms, from his legs and from his feet" (Manu, I, 31).¹⁴ The lawgiver affirms also that the duties and occupations of each caste were assigned by God. To the *Brāhmaṇa* (priestly class), he assigned the duty of learn and teach the Veda and to offer sacrifices; to the *Kṣatriya* (warrior or kingly caste), that of protecting the people from criminal and political dangers, distributing gifts and learning the Veda from the *Brāhmaṇa*; to the *Vaiśya* (producing and cultivating caste) was allotted the care of animals, cultivation, commerce and the study of Veda, again from *Brāhmaṇa*; the only occupation assigned to the *Śūdra* was that of serving humbly the other three castes, and they were denied the right to share the *Brāhmaṇa*'s

wisdom on Veda (cf. *ibid.*, I, 87-91; *Gīta*, XVIII, 41-44) The *varṇa* system was given a religious stamp by the Brahmans to uphold their supremacy over the other castes.¹⁵

Apart from the four castes, mentioned above, there developed also a fifth one – the “casteless”, “outcastes” or the “untouchables”, who have none of the above caste privileges. Mahatma Gandhi called them *Harijan* (children of God); today they are known as *Dalit* (depressed or broken) and their number is over 140 million (138 million, according to the 1991 census) and most of them belong to the Scheduled Castes.¹⁶ *Dalits* are to do all types of menial jobs which others refuse to do, like cleaning toilets, burying carcasses, scavenging, etc. They are considered impure or unclean and they are to avoid every form of contact with the higher castes, lest they contaminate them. Orthodox Hindus treat anyone who works in any kind of polluting job as untouchable and do not have any contact with them. According to Orthodox rules, anyone who does not belong to the four *varṇa* is an untouchable.¹⁷ The untouchables are to dwell apart and keep away from coming into contact with the upper castes. They are allowed to enter neither the house of an upper-caste person, nor the temple to pray. They are forbidden to draw water from the common well set apart for the higher castes; they are to have their own wells. They are not allowed to study the Veda, not even allowed to hear the Veda when read by the noble castes. They have no right to send their children to school; no right to marry someone from a higher caste; their women are often abused, violated and even killed.

“The pariah sector, by which I mean the worst bracket of the social have-nots, is a sad spectacle of human rights privation. Landless, untouchable, even unapproachable, homeless, lifelong bonded labour, these *antyajas* of India are victims unlimited and de facto denied those constitutional rights of Indians incorporated.”¹⁸ Untouchability in the caste system is one of the cruellest features of the caste system. It is one of the strongest racist phenomena in the world. In short, *Dalits* are deprived of many of the universal human rights declared by the UN. Untouchability was legally abolished in 1950, but it is still practiced in different parts of India, especially in villages.¹⁹

The history of human rights in traditional Hinduism indicates one important characteristic: a recognition of plurality and distinctiveness among human beings based on the caste system. The Codex of Law has many discriminatory attitudes and has led to many forms of injustice and inhumanity. The caste system is the strongest negation of individuality,²⁰ and seems to be wholly incompatible with human rights.

In recent years, many scholars, as well as religious, political and social leaders have tried to offer answers to the problem of the caste-system and human rights. Can the concept of human rights be somehow extracted from the unpromising ore of the caste system? Scholars hold on to opposite opinions: some do not deem it possible, while others think that it is possible. Arvind Sharma, an expert on the theme under study, states that these

scholars can be divided into two categories: (i) those who affirm that human rights can be advanced only by doing away with the caste system altogether; he calls it the “dismissive approach”, and (ii) those who affirm that the caste system is not really opposed to human rights; he calls it the “derivative approach”.²¹ Some of the strong supporters of the “dismissive approach” are Dr. B. R. Ambedkar, Dr. S. Radhakrishnan and K. M. Panikkar.

Dr. B. R. Ambedkar (1891-1956) was born an untouchable. He played a major role in the drafting of the Indian Constitution and is known as the ‘father’ of the Indian Constitution, that guarantees the fundamental rights of equality and freedom, including political, religious, freedom to property, right to constitutional remedies, the right to fight against exploitation, etc. With tenacity he fought against and rejected the caste system altogether. Many of these rights, enumerated in the Indian Constitution, directly challenge the unequal privileges enjoined to the traditional Hindu system of *varṇa-dharma*. He was absolutely convinced that Hinduism with its caste system could not be reconciled with human rights. In fact he left Hinduism and, together with a large number of *Dalits*, embraced Buddhism.²²

Dr. S. Radhakrishnan (1888-1975), philosopher and ex-president of India, was one of the most persuasive exponents of Hinduism, although in the beginning defended an idealized version of the *varṇa* system as compatible with equality and human rights. He declared in 1950: “If democracy is to be seriously implemented, then caste and untouchability should go.”²³ According to him, it was not enough to transform or bring about some changes in the caste system; it should be eliminated. He held that ‘caste’ should be based on worth and not on birth.

The Indian historian and diplomat K. M. Panikkar (1894-1963) admitted the existence of the inequality of the caste or *jāti* system but exculpated the *varṇa* system. He was, however, not so much concerned with human rights as with the consolidation of the Hindu community on the basis of equality. He dealt with the caste system from the social point of view and upheld the equality of all within Hinduism.²⁴

Some of the important adherents of the “derivative approach” are Mahatma Gandhi, R. Panikkar, and J. B. Carman. They maintained that the concept of human rights could be derived from the caste system.

Mahatma Gandhi (1869-1948), who was consulted by the Committee constituted by the UN to draw up the Universal Declaration of Human Rights, was the epitome of human rights and its movement within traditional Hinduism. He fought against every form of discrimination based on caste, creed and sex. He did everything possible to abolish untouchability and improve the social and economic condition of the outcastes. His fight for the rights of the untouchables was based on his idea of human rights, based on equality of all human beings. Gandhi wrote: “Men are equal. For, though they are not of the same age, same height, the same skin and the same intellect, these inequalities are temporary and superficial, the soul that is hidden beneath this earthly crust is one and the same for all men and

women belonging to all climes...The word "inequality" has a bad odour to it, and it has led to arrogance and inhumanities, both in East and West".²⁵ For Gandhi God is Truth. He strongly believed that no form of Hindu theology can justify the inequality of human beings. According to him, theistic Hinduism upholds human equality because all are God's children and non-theistic Hinduism emphasizes the identity of the essence of all human beings.²⁶ He identified himself with the untouchables in order to affirm and promote their equal dignity as human beings. In his ashrams he had Hindus of different castes, including *Śūdras* and *Harijans*, as well as Muslims and Christians, living together as a community enjoying equal rights and responsibly fulfilling different duties for the community. He himself, a *Kṣatriya* and a *Vedantin*, set the example of doing menial jobs, including so-called polluting jobs like that of cleaning toilets, reserved to the untouchables as per Hindu tradition.

In his campaign against untouchability, Gandhi asserted human rights in opposition to the caste system. He saw no point in untouchability or a class of outcastes, but saw some point in the caste system. In fact he affirmed human rights both in support and in opposition to the caste system.²⁷ His position seems strange indeed! The question is: if Gandhi could not justify inequality, how could he justify the caste system while denouncing untouchability? The point is that he did not see that caste system really advocated inequality because for him *varṇa* is based on birth; one's birth determined one's *varṇa* and what it meant was that one might earn one's livelihood through one's inherited profession. All other talents that one may possess have to be made available to society free of charge.²⁸

I do not believe that interdining or even intermarriage necessarily deprives a man of his status that his birth has given him. The four divisions define a man's calling; they do not restrict or regulate social intercourse. The divisions define duties; they confer no privileges. It is, I hold, against the genius of Hinduism to arrogate to oneself a higher status or assign to another a lower. All are born to serve God's creation: a *brahmaṇa* with his knowledge, a *kṣatriya* with his power of protection, a *vaiśya* with his commercial ability and a *śūdra* with bodily labour.²⁹

According to Gandhi, equality and dignity of the human person do not originate from one's birth or caste, but from service, from the performances of one's duties. It is duty (*dharma*) that confers one with dignity and equality. Thus, for example, he was willing to accept the superiority of a Brahman or equally that of a *Śūdra* insofar as it implied some qualities of the individual (practice of virtues like *ahimsa*, *karuna*, veracity, etc.) and not a status by birth. For a Brahman to claim superiority is to forfeit the claim.³⁰ Gandhi, in short, accepted the idea of differing rights and duties or

varṇa-dharma (duty of one's *varṇa*) as formulated in Hindu law-books (*Manusmṛti*).³¹

R. Panikkar (1918 - 2010) warns against confusing equality with uniformity. According to him it is not true that all men are born equal in every way. He writes: "All humans are equal as God's creation but are not the same; therefore, all should give and receive according to their own nature. These groups uphold the ideal of following one's own nature (*svadharmā*) in the Bhagavad-Gita."³²

J. B. Carman (1930 -) states that privileges can lead to the notion of rights.³³ The caste system is connected with privileges and hence can account for the emergence of rights – which is a shift from duties (*dharma*) to rights. Privileges, and therefore rights, come from duties responsibly performed. Gandhi and some other religious reformers of Hinduism were of this opinion. Duties can be made the basis of universal rights, and all have, in addition to their particular occupational duties, a common *dharma* of fundamental duties, among which the most important are *satya* (telling truth) and *ahimsa* (non-violence).³⁴

Klaus K. Klosterman (1933 -) opines that the Brahmans did not develop "human rights" but "caste-rights", which in the course of time had a side effect, viz., the birth of the casteless or the fifth caste or the untouchables (consisting of those who violated the rules of their castes, intermarriage, committed serious sins, etc.) who were cut off from all the rights and privileges that the caste society extended to its members.³⁵

From what we have discussed above two conclusions emerge. *First*, according to scholars, in the original Hindu religious texts (Veda) there is no explicit reference to the caste system as something hereditary that lasts through generations. The hereditary aspect of caste system is grounded and upheld in the Laws of Manu.³⁶ Originally each of the four castes was created to serve a specific purpose or perform a duty; it was an effective system to organize society, a division of labour. In fact in the Vedic scriptures the idea of equality of all is evidenced in verses like the following: "I am reciter of hymns, my father is a physician, and my mother grinds corn with stones" (*R̥gVeda* IX, 112.3) or "...[all] are like the spokes of a wheel of the chariot connecting its rim and the hub".³⁷ The former verse means that one can become and do any occupation that he desires and is not restricted by his 'caste' and the latter verse affirms that in the Vedic period all human beings were considered equal.³⁸ *Second*, according to scholars, there are ways by which the caste system can be brought into relationship with human rights. The concept of *varṇa* can be viewed as a system of balancing duties and privileges. Human rights can be brought into relationship with both sides of this scale. The point at which Hindu thought makes its own contribution to human rights discourse is when it proposes that the discourse must view rights and duties as an integrated whole. We shall return to this theme while seeking to found human rights in Hinduism (see below).

WOMEN AND HUMAN RIGHTS

According to Manu's Code, not only does caste play an important role in determining one's rights and duties, but also age and sex. The roles of male and female are interdependent but they are not equal. In general, the social status of woman, as described in the Book of Law, is not very desirable. She does not have political or civil rights. Her education is practically out of question. She is never independent as such; throughout her life she is to depend on a man: as a child, on her father; after marriage, on her husband; in old age on her son.³⁹ There are disparaging attitudes towards women in Manu's Code when we find statements like: "It is in the very nature of woman to seduce man in this world; hence the wise men should behave cautiously in the company of women. Women are able to seduce not only the stupid of this world but also the wise, and make them slaves of instinct and anger" (Manu, II, 213-214)⁴⁰. The Dharma Sutra dedicates ample space to enumerate the duties of the wife.⁴¹ She has the duty to honour her husband as a god and only in that way may she hope to reach her final liberation. It was also believed that a non-married woman could never reach *mokṣa*. The Code of Manu appears to be propagating and upholding the inequality of woman.

But at the same time, the domestic and social position of a married woman is not all that negative in the Book of Law. According to Manu, the wife is 'half of man,' that he is complete only after taking a wife. His religious life depends greatly on his wife because she helps him to offer domestic sacrifices. The wife is considered as Lakshmi (the goddess of prosperity). Manu lauds the role of mother and motherhood: a mother gives birth to children (the noblest of all rights and duties of a mother), administers the family affairs, takes care of the husband and children, etc. The mother is the queen of the family. Manu affirms: "the spiritual master (*achārya*) is ten times more venerable than the master of letters (*upadhyāya*); the father is a hundred times more venerable than the spiritual master; the mother instead is a thousand times more worthy than the father" (cf. *ibid.*, II, 145).

WIDOWS AND HUMAN RIGHTS

According to the Book of Law, the life of a widow is more severe and harder than that of a monk or nun.⁴² She should avoid every type of delicious food, fast as often as possible, should not even pronounce the name of a stranger (man), should keep her senses under control, and should not use ornaments or put perfume on her body or adorn her body with flowers or wear elegant clothes. She should dress only in white clothes (colour of the dress set apart for widows), eat only once a day, sleep on the floor, and should not take part in any feast or celebration or social event. Another humiliating practice, at least in some castes, was shaving the head. All these applied even to child-widows. A second marriage was not only not

allowed but even despised by the Hindus (cf. Dharma Sutra, V, 157-160). From antiquity, the practice of not allowing widows, even child-widows, to remarry was rooted in the Hindu tradition. With this terrible destiny in view, it was not surprising that many widows, in the past, preferred to immolate themselves in the funeral pyre of their dead husbands. In 1856, the Indian government, through the "Hindu Widows' Remarriage Act," legalised the marriage of widows notwithstanding the law and tradition contained in the Book of Law.⁴³ Of course the social condition of widows, today, is very much changed for the better, but is still not so brilliant; many unjust traditions and practices of violation against women's rights need to be changed.⁴⁴

THE IMMOLATION OF WIDOWS (*SATĪ*) AND HUMAN RIGHTS

Another practice, which seems to be very heroic on one side but on the other side quite inhuman, was that of self-immolation of the wife in the funeral pyre of her dead husband. This practice, known as *satī*, was allegedly left to the free choice of the widow, but often such freedom did not really exist. Very often widows committed *satī* thinking of the inhuman treatment that awaited them in their families. In the past, the practice of *satī* was very popular in different parts of India, especially in Bengal. In 1829 such practice was prohibited by the government. Notwithstanding the prohibition, this practice continued for a longer period of time and even in our days every now and then such cases take place. When such cases do take place, while some consider it a horror and a murder, and are of the opinion that those responsible should not go scot-free, others instead (especially those belonging to the caste of the person who commits *satī*) praise such an act as bravery and martyrdom and consider her a goddess. It is still a die-hard tradition within Hinduism that violates the human rights of women.

THE PRACTICE OF CHILD MARRIAGE AND HUMAN RIGHTS

The practice of child marriage is another violation of human rights, a scar in the social life of Hindu tradition proposed by Manu, and still upheld by Hindu tradition. As per tradition, girls should be married before reaching puberty. Some texts in fact declare that matrimony should take place in the period of infancy. A father would commit a sin if he did not get his daughter married off before her reaching puberty. The normal age for a girl to get married was eight years old. It is however to be noted that such a marriage was only a rite or sacrament (*samskāra*) and was not consummated before reaching puberty. This practice also was abolished in 1929 and 1938, through "The Child Marriage Restraint Act", according to which the minimum age required to enter into marriage contract was 14 years for girls and 18 for boys. But notwithstanding this law, the practice of child-marriage

is still rampant in many parts of the country, especially in villages and in the lower castes.⁴⁵

MODERN HINDUISM AND HUMAN RIGHTS

Many reformers of Hinduism (neo-Hinduism) who were influenced by Christianity, like Ram Mohan Roy (1772-1833), the “father of modern India” and founder of the Brahma Samāj, sought to reform Hinduism by eliminating many social malpractices upheld in the name of religion. Ram Mohan Roy fought to abolish polytheism, idolatry, polygamy, the institution of the caste system, child-marriage, *satī*, animal sacrifice, etc. He advocated the equality of all humans irrespective of caste, creed or sex. He rejected Manu’s Code of Law on the ground that this text belongs to the category of tradition (*Smṛiti*) and not of revelation (*Śruti*). The revealed texts of Hinduism, the Veda and Upanishad, advocate the equality of all humans. As a monotheist, he advocated the equality of all humans since all are children of the one and only God.⁴⁶

Vivekananda (1863-1902), the founder of the Ramakrishna Mission, gave a dynamic interpretation of the *vedānta* religion, where he stresses the unity of all things in as much as it is the Supreme Spirit that animates everything, from the smallest of animals to the highest of all creation, the human being. Man in his essence is identical with the divine. He declared: “You are divinities on the earth! Sinners? It is a sin to call man so. We are the gods greater than whom there never was nor will ever be. Bow to no one except to your own highest “Self”.”⁴⁷ He tried mightily to purify Hinduism from various disintegrating elements and he too vehemently fought against the oppressive caste system, child-marriage, the unequal and degrading status of women, etc. He advocated the equality of all human beings on the basis of teaching of Vedānta. In essence every human being is atman and therefore divine (*atman is Brahman*), and therefore all human beings, in essence, are of the same essence as Brahman; all are children of the same Divinity.⁴⁸

Rabindranath Tagore (1861-1941), the poet-philosopher, educationalist, and monotheist, was also consulted in the framing of the Universal Declaration of Human Rights, and was another influential personality in the human-rights movement in India. He was a strong advocate and promoter of humanism. In his book, *Religion of Man*, Tagore gives a theoretical account of his view on humanism, a humanism that affirms the dignity of every single individual endowed with freedom and equal rights. The institution of Shantiniketan (ashram, school and the *Visva-Bharati* university) that he founded in the early part of last century, still flourishes and shines like a beacon of his ideals of humanism.⁴⁹

Mahatma Gandhi, father of the nation, advocate of *ahimsa* and *satyāgraha* (attachment to truth) through which means the independence of India was brought about, was a staunch defender of human rights for all, especially for the untouchables, and one of the greatest figures of the human

rights movement not only within traditional Hinduism but throughout the world. Following in the footsteps of Gandhi there were many others, like Vinoba Bhave (1895-1982), who tried to reform Hinduism from the various inhuman and unjust practices within it, like polytheism, idolatry, polygamy, the caste system, untouchability, child-marriage, *satī*, animal sacrifice, etc., whereby they advocated humanism and promoted human rights at all levels.

FOUNDATIONS FOR HUMAN RIGHTS IN HINDUISM

Regarding the foundation of human rights there exist various theories, legal, moral, ethical and religious, all of which have their own merits and demerits. Can human rights be founded in Hinduism?

Rights (Adhikāra)

As in other major religions, in Hinduism there is no word for 'rights'. The closest word to rights is *adhikāra* (just claim or right). In Hinduism, the insistence is more on Dharma (duty) than *adhikāra*. A discussion on the foundation of human rights in terms of *adhikāra* cannot take us very far, because this term is used in reference to the rights of the Brahmans and not of others. This term would also suggest that Hinduism advocates only the rights of the Brahmans and not the rights of all humans⁵⁰ except in exceptional cases, viz., in the context of a crisis (*āpad-dharma*), when these rights (*adhikāra*) could belong to all. For example, it is the king's duty (*rāja-dharma*) to protect and assist all his subjects in times of crisis. There is, however, no right for the subjects to be ruled over fairly or justly; they cannot enforce their rights on the king. But, in exceptional cases, viz., in the context of crisis (e.g. war), they have the *adhikāra* to rebel against the king if he does not fulfil his duty of protecting them⁵¹ and have even the right to get rid of him, as is evidenced in the *Mahabharata*. (The *Mahabharata* grants the people the right to "gird themselves up and kill a cruel king, who does not protect his subjects" (*Mahabharata -Anusasanaparva* 61.32-33).)

Again, if we were to take into consideration the four fundamental axiological orientations called *puruṣārtha*, we can align the concept of *adhikāra* to each of them. The *puruṣārthas* are: *kāma* (desire, pleasure), *artha* (wealth), *dharma* (the moral), and *mokṣa* (the metaphysical – religious).⁵² Each one has the right to *kāma*, *artha*, *dharma* and *mokṣa*. Arvind Sharma opines that the ethical view of human rights can be connected with the *kāma* dimension, the legal view linked with *artha*, the moral view of human rights with *dharma*, and religious view with *mokṣa*.⁵³ The *puruṣārthas* are the four scopes of human existence. The ultimate scope of human existence is *mokṣa* (eternal happiness). But man is a combination of both spirit and body, and in order to live a happy life, it is necessary to satisfy the needs of both, he has to satisfy his material needs, for which he needs material means or goods (*artha*), and needs to satisfy and enjoy his/her psycho-physical needs (*kāma*), but both *artha* and *kāma* are to be

regulated by moral laws (*dharma*); only in this way is one able to reach his/her *summum bonum* or mokṣa.

Dharma

The Hindu view, instead, is strongly in favour of grounding human rights in *dharma* or morality. According to many scholars, *dharma* offers a solid grounding of human rights. Hence a preliminary examination of the concept of human rights is not relevant. However a further analysis of the concept of *dharma* can reveal that the concept of human rights can be interpreted within the context of human duties, because these two concepts, *dharma* and *adhikāra*, cannot stand separately but only together. The social structures (the *varṇa* system) and the underlying social vision of human dignity in traditional Hinduism rest not on human rights but on social duties (*dharma*). Persons are seen as bearers of duties, not rights, and whatever rights one has and enjoys rest on the discharge of his/her duties – and therein lies his/her worth and dignity.

What is *dharma*? It is difficult to define *dharma* because it has various variations in signification. At the same time, there does not exist another Hindu term more important in Hinduism. The term *dharma* derives from the root *dhr* which means “to uphold”, “to maintain”, or “to nourish”. The concept of *dharma* refers, first of all, to the structure of reality as a whole. It is *dharma* which “holds” the whole universe together; it is that which “maintains” the balance of the universe. It holds together, in a systemic manner, the integrity and progression of life in the universe.⁵⁴ It is similar to another term that we find in the Veda: *Rta* – the eternal and immutable law or cosmic order hidden behind the regularity of nature.⁵⁵ Secondly, *dharma* refers to human action which includes duty, morality, ritual, law, order and justice. Hindu thought starts with the cosmos and works its way into the individual. All human beings must work towards and have the duty to maintain the cosmos, including themselves, in harmony and peace. It is the duty of each individual and society to maintain this larger cosmic framework of which they are a part.⁵⁶ Both individual and society have the obligation or duty to uphold and maintain this cosmic order or law. If this harmony is violated or destroyed, peaceful co-existence and the prosperity of human beings will be at stake.

Dharma, at the human level, embraces the whole life of man. It is a mode of life or a code of conduct that regulates an individual’s action, both as individual and member of society. It stands to signify the fulfilment of moral and religious laws, living a life that is just and virtuous.⁵⁷ It is *dharma* which brings about one’s development and enables one to reach the goal of existence. *Dharma*, therefore, involves self-regulation and social regulation. It is that which upholds and maintains man and society. According to Kanada, *dharma* is that which leads an individual to prosperity (*abhyudaya*); one’s total well being: physical, psychological, material, social, economic, spiritual and, finally, one’s total liberation (*mokṣa*).⁵⁸

For the Mīmāṃsā School, *dharma* indicates the fulfilment of the commandments of the Veda and Veda teaches *dharma* or religious duty.

...Veda teaches *dharma* (religious duty). What is *dharma*? It is what is enjoined in the Veda...[However] *the commands of the Veda should not be mistaken for those of ordinary morality* [although] it is true that ordinary morality is required for a man before he gains competence to perform the rituals enjoined in the Vedas.⁵⁹

The *Mahabharata* and *Manuṣmṛiti* define *dharma* in terms of good conduct of moral life (*sadācāra*). *Dharma* consists in the observance of moral principles, like truth (*satya*), pardoning (*kṣama*), controlling the mind (*dāma*), non-anger (*akrodha*), purity of the body and the mind (*sauca*), compassion (*karuna*), non-violence (*ahimsa*), etc. *Dharma* is not just a theoretical concept, but touches and comprehends every field of human existence, physical, psychological, moral, spiritual and religious, both at the individual and social levels. An individual is expected to conform his/her life and his/her conduct with the teachings of the scriptures and nourish himself/herself with good thoughts. For the individual, *dharma* consists, above all, in the fulfilment of his/her moral duty; for society, *dharma* furnishes rules to maintain harmony and to avoid possible conflicts between individuals. *Dharma* is, therefore, that which upholds and maintains the individual and the society. It furnishes a sense of direction, coherence and unity to human life, both individual and societal.

The duties in question are those of the castes (*varṇa-dharma*) and those of the stages in life (*āśrama-dharma*). These two are conjointly known as *varṇaśrama-dharma*.⁶⁰ Each individual is expected to perform the duties of the caste to which he/she pertains as well as the duties of the four stages of human existence: *brahmacārya* or stage of studentship, *grihastha* or married life, *vānaprastha* or retirement from active life lived preferably in a forest or secluded place apart, and *sannyāsa* or the mendicant form of life, a solitary life of contemplation and union with God. It is to be noted that all these stages, except that of *brahmacārya*, is open to all castes, including the lowest caste and the untouchables, and when one becomes a *sannyāsin*, he does not pertain anymore to his caste of origin but is above all castes.

Dharma has another significance as well, viz., *sadhārana-dharma* or duties common to all irrespective of caste, class, sex or stages of life.⁶¹

Apart from the specific qualities required to be possessed by members of each of the four *varṇas*, all Dharmasastra texts attach the highest importance to certain moral qualities and enjoin them on all men. For example, Manu X.63, Jaj. I.2, Gaut. Dh. S. VIII. 23-25, Matsya 52. 8-10, prescribe for all *varṇas* a brief code of morals, such as

ahimsa, truthfulness, non-stealing (i.e. no wrongful taking of another's property), purity and controlling one's senses, etc. The Mitaksara on Yaj. I.22 explains that the word *sarvesam* therein states that these moral qualities, if practised, are the means of Dharma for all men from Brahmans to Candalas.⁶²

These are the ethical virtues that establish a virtuous, self-regarding human person who has equal regard for others as well. An individual becomes a mature person by practicing moral virtues (*dharma*), and his/her worth and dignity, privileges and rights depend on his/her ethical or virtuous life (*svayam-dharma* = subjective, personal ethical life).

According to Kana Mitra, this idea of *svayam-dharma*, if not understood as a rigid code, can be a contribution in the field of human rights in its suggestion that differences (between individuals and castes) be taken seriously. Manu in fact offers suggestions in taking it in the non-rigid way, when he states that dharma "is followed by those learned of the Vedas and what is approved by the conscience of the virtuous who are exempt from hatred and inordinate affection" (Manu 2:1).⁶³ In order to determine the rights and duties of humans, therefore, tradition, conscience and reason must all be consulted. Rights and duties of different people in different situations are different, but every human being deserves and should have equal consideration and equal concern.⁶⁴

In Hinduism, therefore, the insistence is not on the rights of the human person as such but on his/her duties (*dharma*), and in the fulfilment of his/her *dharma*, he/she gets his/her human dignity and his/her genuine freedom. Hinduism (like most other religions) emphasizes the duties of men rather than their rights. Duties and rights are complementary and hence it is possible to formulate ideas about rights from ideas about duties, and precisely this is the position of Hinduism.⁶⁵ Mahatma Gandhi expressed that "...all rights to be deserved and preserved came from duty well done. Thus the very right to live accrues to us only when we do the duty of citizenship of the world".⁶⁶ This would mean that all rights in the UDHR would be correlated with duties. Some Indian scholars have taken the idea of duties further and have said that Article 29 of the UDHR should be the guiding principle and all the other Articles should be subordinated to this one.⁶⁷ Human dignity and human worth come from duties (*dharma*) responsibly fulfilled which lead to freedom and equality. In this sense, *dharma* is the closest equivalent to "right" mentioned in the UDHR.⁶⁸

Vedānta

The various *vedānta* schools, in particular, the *Advaita Vedānta* School of Śāṅkarācārya (9th century A.D.) and Viśistādvaita school of Rāmānuja (12th century?) upheld human rights on the basis that all human beings have the same essence (*atman*) and hence all are equal. The absolute non-dualism

(Śāṅkarācārya) and the qualified non-dualism (Rāmānuja) affirm that human beings and the divine Being are same in essence. Accordingly, all human beings are equal in as much as all have the same nature (atman); all are equal because all share in the same divine nature of Brahman who is the only Reality. Human beings not only *have* but *are* of the same nature: *atman is Brahman*. Each one, however, is to ‘realize’ this nature (divine) and should strive towards this realization following one’s nature (*svadharma*) and one’s *varṇaśrama-dharma*.

Hinduism and Freedom of Religion

Hinduism provides for human rights in the context of religious freedom as stated in the UDHR. Hinduism has been the most tolerant religion in the world and is still notwithstanding the birth of the fundamentalist movement, *Hindutva*, in the recent years.⁶⁹ It is the *Sanātana Dharma* (eternal, universal dharma or religion). It is an all-inclusive religion. It embraces Buddhism, Jainism and Sikhism; all born within its maternal womb. It has given asylum to Zoroastrianism and to the Dalai Lama and his followers of Tibetan Lamaism. It has welcomed Christianity and accepted Islam; all the religions of the world today exist in India. All the religions are equally respected and are free to practice their religion. There has been a harmonious co-existence of all the various religions. The nature of religious tolerance is derived from the belief that the Supreme Being is without name, form, personality or qualities (*Parā Brahman*). “The real is one; the learned call it by various names”.⁷⁰ In the *Bhagavad-Gīta*⁷¹ it is stated: “whoever approaches me in whatever manner, I accept him. All paths men are struggling through lead unto Me”.⁷² Vedānta is wholly tolerant of all religions, as it teaches that “Brahman is the only reality; the world in last analysis is illusory; the individual soul and Brahman are not different.”⁷³

CONCLUSION

From the discussion above we can draw two important conclusions: first, Hinduism, like the Judeo-Christian traditions, can provide a theory of human rights. Ideas of equality and freedom exist in Hinduism. All human beings are essentially equal because all share in the same divine nature of Brahman (God), who is present in all, as well as in the whole cosmos. All have the same rights, as well as the opportunity to ‘realize’ their goals, especially the highest spiritual goal (*mokṣa*). Secondly, in Hinduism the concept of ‘rights’ emerges from the concept of ‘duty’ (*dharma*). Dharma requires of each one, irrespective of the caste to which he/she may belong, to observe *yama* (negative ethical disciplines: *ahimsa* or non-violence; *satya* or truthfulness; *asteya* or abstaining from stealing; *brahmacārya* or controlling one’s passions and sexual desires; *aparigraha* or non-avarice) and *niyama* (positive ethical virtues: *santoshā* or joyfulness; *tapas* or penitence; *svādhyāya* or study of scriptures; *īśvarapranidhāna* or

remembrance of God). It is the practice of these virtues, as well as fulfilling the dharma of the caste (*varṇa-dharma*) to which one belongs and of the four stages of life (*varṇāśrama-dharma*), that clothes an individual with his/her human dignity; it is dharma that crowns one with equality; it is dharma that enables one to live a virtuous life, and it is dharma that leads one to enjoy genuine freedom. Hinduism not only upholds equality, dignity and freedom of every human being but also offers the means for their realization. In this sense article 29§1 – *Everyone has duties to the community in which alone the free and full development of his personality is possible* – would top the list of human rights enumerated in the UDHR.

NOTES

¹ Cf. Daniel Acharuparambil, *Induismo, vita e pensiero*, Roma, Edizioni dei PP. Carmelitani Scalzi “Teresianum”, 1976, p. 15.

² Cf. Raymond Hammer, *The Eternal Teaching*, reproduced from R. Pierce Beaver, et al., *Eerdmans' Handbook to the World's Religions*, First American Edition, William B. Eerdmans Publishing Company, 1982, in <http://www.hope.edu/academic/religion/reader/hinduism.html>, visited on 24.02.08

³ Cf. Daniel Acharuprambil, op. cit., p. 17.

⁴ Cf. Kana Mitra, “Human Rights in Hinduism,” in *Journal of Ecumenical Studies*, 19 3 (1982), p. 77.

⁵ There are several *Dharma Sutras* associated with various authors, like *Gautama Dharma Sutra*, *Baudhyana Dharma Sutra*, *Apasthambha Dharma Sutra*, etc.

⁶ *Manava Dharma Sutra* = *The Treatise on Human Duties*. For a history of Manu's *Dharma Sutra*, see Georg Bühler, *The Laws of Manu*, New York, Dover, 1969, pp. xi - cvi.

⁷ The main orthodox schools are: Nyāya, Vaiśeshika, Sāmkhya, Yoga, Mīmāmsa and Vedānta; they accept the authority of the Veda.

⁸ The heterodox schools are: Buddhism, Jainism and Cārvāka; they deny the authority of the Veda.

⁹ Article 1 of UDHR, United Nations, 10 December 1948.

¹⁰ Cf. Arvind Sharma, *Hinduism and Human Rights. A Conceptual Approach*, New Delhi. Oxford University Press, 2003, p. 50.

¹¹ Cf. Daniel Acharuparambil, op. cit., pp. 240-241.

¹² One of the main scopes of the Codex seems to have been to give a divine sanction to the institution of caste and to preserve the supremacy of the Brahmans.

¹³ In Manu's Codex there are some general rules of conduct for all humans; e.g., 8:350 suggests that any human can slay an assassin, yet punishment against adultery is different for different castes; e.g., 8:359 indicates that everyone except a Brahman should suffer death for such an offence (cf. Kana Mitra, op. cit., p. 79)

¹⁴ Scholars are of the opinion that the quoted verse is an interpolation in the original text made by the Brahmans who wanted to have absolute control over the other castes.

¹⁵ There were several revolts against the Brahmans, who controlled the other castes, among which the most noted were the birth of alternative religions, especially Buddhism and Jainism in the fifth century B.C. and Sikhism in the fifteenth century A.D. These religions opposed every form of discrimination and injustice based on caste, colour, creed or sex, preached *karuna* (compassion) and *ahimsa* (non-violence), and upheld the equality of all human beings. There were also nonreligious forms of revolt, like the *Loka-yatas* (peoples' caste) which propagated non-belief in any ultimate meaning for human existence, *cārvāka* (materialists) who pursued a life of pleasure, and some *bhakti* movements, like that of Chaitanya (a fifteenth century *vaishnava* saint, who protested against caste system), Alvars (an eighth century *vaishnava* who did not accept any caste distinctions; among the ten recognized saints of the alvars, some were *śūdras*, some outcastes and one was a woman), and the *virashivas* (tenth century A.D., who also discarded every form of caste system.) As per the teachings of the above-mentioned religious movements, all humans are equal as God's creation, and as such everyone should give (duty) and receive (rights) according to his/her own nature (*svadharmā*), which is strongly advocated in the *Bhagavad-Gita* (cf. Kana Mitra, op. cit. 80-81).

¹⁶ Cf. *Caste System in Modern India*, in <http://adaniel.tripod.com/modernindia.hmt>; visited 25.02.08

¹⁷ Cf. <http://adaniel.tripod.com/untouchables.htm>, visited on 25.02.08

¹⁸ V. R. Krishna Iyer, *Human Rights and Inhuman Wrongs*, Delhi, B. R. Publishing Corporation, 1990, p. 10.

¹⁹ We have examples of individuals belonging to the untouchable caste – *Dalit* – who were highly qualified and held important positions in society and politics, like Dr. Ambedkar (father of the constitutions of the democratic, secular Indian Republic) and K. Narayan (ex-president of India). These examples go to prove that, in spite of the low social and economic status of the untouchables, every citizen, irrespective of caste,

creed or sex, is guaranteed of his/her human rights, and the higher castes, upheld by traditional Hinduism, cannot but accept the irrationality of their belief in the caste system. In its effort to abolish untouchability and the hierarchical caste system, we find the reservation policy (reservation of seats in education, in public offices, in jobs, etc.) for the Scheduled Castes, Scheduled Tribes, Other Backward Classes). Education is the best way to overcome this social curse. Other means could be: a more vibrant democracy, empowering of women at the political level, economic progress with globalization, political movement by Dalits demanding their just rights, Human Rights Watch being ready to denounce cases of violence against Dalits, emigration that brings into contact with other peoples and cultures, etc.

²⁰ Cf. Kana Mitra, op. cit., p. 83.

²¹ Cf. Arvind Sharma, op. cit., p. 52f.

²² Cf. *ibid.*, p. 53.

²³ S. Radhakrishnan, *The Brahma Sutra: The Philosophy of Spiritual Life*, London, George Allen & Unwin, 1960, 163, quoted in Arvind Sharma, op. cit., p. 53.

²⁴ Cf. *ibid.*, pp. 53-54.

²⁵ Mohandas K. Gandhi, *None High, None Low.*, Anand T. Hingorani (ed.), Bombay, Bharatiya Vidya Bhavan, 1975, p. 2; cited in Kana Mitra, p. 82.

²⁶ *Ibid.*, p. 82.

²⁷ Cf. Arvind Sharma, op. cit. pp. 54-55.

²⁸ *Ibid.*, p. 55.

²⁹ M. K. Gandhi, op. cit., 333; cited in Arvind Sharma, op. cit., p. 55.

³⁰ Cf. Kana Mitra, op. cit., p. 82.

³¹ Cf. *ibid.* pp. 54-55. We shall return to this theme below: see the paragraph on “founding human rights in Hinduism”.

³² Cited in Robert Traer, *Faith in Human Rights*, Washington D.C., Georgetown University Press, 1991, p. 132; cited in Arvind Sharma, op. cit., p. 56.

³³ Cf. John B. Carman, “Duties and Rights in Hindu Society,” in Leroy S. Rouser (ed.), *Human Rights and the World's Religions*, Notre Dame, Indiana, University of Notre Dame Press, 1988, p. 121.

³⁴ Cf. Arvind Sharma, op. cit., pp. 56 -57.

³⁵ Klaus K. Klosterman, *A Survey of Hinduism*, Albany, State University of New York Press, 1989, 326., cited by Arvind Sharma, op. cit., p. 57.

³⁶ See in particular 11.132 and 12.55 in the *Laws of Manu*.

³⁷ As stated in Nanda, "Hinduism and Human Rights," in Werner (ed.), *Human Rights and Humanitarian Law: The Quest for Universality*, The Hague/Boston, M. Nijhoff, 1997, 30, cited in Dipti Patel, op. cit., p. 6.

³⁸ Cf. *ibid.*

³⁹ Manu 9:3: "Her father protects [her] in childhood, her husband protects [her] in youth, and her sons protect her in old age: a woman is never fit for independence" (Bühler, *Laws of Manu*, op.cit., p. 328).

⁴⁰ Translation into English done by the author of this article.

⁴¹ Manu 9:76: "If a husband went abroad for some sacred duty, [she] must wait for him eight years, if [he went] to [acquire] learning or fame six [years], if [he went] for pleasure three years."; Manu 9:77: "For one year let a husband bear the wife who hates him; but after [the lapse of] a year let him deprive her of her property and cease to cohabit with her" (*ibid.*, p. 341).

⁴² Cf. Daniel Acharuparambil, op. cit., p. 231f.

⁴³ *Ibid.*, p. 231.

⁴⁴ Notwithstanding the non-equal status of women and the deplorable status of widows, it should be noted that Hinduism did produce some very prominent women who played an important role in the socio-economic, political and religious life of India – for example, Indira Gandhi, a widow, became the prime minister of India, and she was one of the first woman prime ministers of the world.

⁴⁵ Cf. Daniel Acharuparambil, op. cit., p. 230.

⁴⁶ Cf. Kana Mitra, op. cit., 81.

⁴⁷ Cf. Daniel Acharuparambil, op. cit., p. 292.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, pp. 81-82.

⁵⁰ *Ibid.*, pp. 78-79.

⁵¹ Cf. Dipti Patel, op. cit., pp. 8-9.

⁵² Cf. Arvind Sharma, op. cit., pp. 10-11.

⁵³ Cf. *ibid.*

⁵⁴ Cf. Dipti Patel, op. cit., p. 6.

⁵⁵ Cf. Daniel Acharuparambil, op. cit., p. 33.

⁵⁶ Cf. As stated in Nanda, op. cit., 30; cited in Dipti Patel, op. cit., 6.

⁵⁷ Cf. Daniel Acharuparambil, op. cit., p. 216.

⁵⁸ Ibid.

⁵⁹ T. M. P. Mahadevan, *Outlines of Hinduism*, Bombay, Chetana Limited, 1971, p. 135, cited in Arvid Sharma, op. cit., p. 14.

⁶⁰ Cf. Arvind Sharma, op. cit., p. 14.

⁶¹ Ibid.

⁶² *Candālas* are the impure ones, untouchables, of the lowest of the *Śūdras*. P. V. Kane, *History of Dharmasastra*, Vol. V, Part II, Poona, Bhandarkar Oriental Research Institute, 1973, p. 1637, cited in Arvind Sharma, op. cit., p. 14.

⁶³ Quoted in Kana Mitra, op. cit., p. 83.

⁶⁴ Cf. Kana Mitra, op. cit., p. 83.

⁶⁵ Cf. Kana Mitra, op. cit. p. 79.

⁶⁶ As quoted in Anand Sharma, op. cit., p. 17.

⁶⁷ Pandey, "Human Rights: An Indian Perspective," in Ricoeur (ed.), *Philosophical Foundations of Human Rights* (Prepared by UNESCO and the International Institute of Philosophy, 1986), p. 267, cited in Dipti Patel, op. cit., p. 8.

⁶⁸ Cf. Kana Mitra, op. cit., p. 79.

⁶⁹ Unfortunately one cannot deny the fact that in the post-independent period, a new Hindu ideology, known as *Hindutva*, is spreading like wild-fire, along with some of its socio-political institutions, like *Rashtriya Swayamsewak* (RSS), *Vishva Hindu Parishad* (VHP), *Bajrang Dal*, *Shiv Sena* – all communalists and fundamentalists. Since the 1980s, with the rise of the BJP (nationalist political party), later elected to govern India, some of these institutions have become intolerant of other religions, especially Christianity, and intimidate them even by having recourse to violence, destroying property and killing innocent people.

⁷⁰ As stated in Smith, *India as a Secular State* (Princeton: Princeton University Press, 1963), n. 81, 147, cited in Dipti Patel, op. cit., 14.

⁷¹ Cf. chapter 4 for a wider understanding of this theme.

⁷² *Bhagvad-Gīta*, Chapter IV, verse 11, as stated in Nanda, op. cit. n. 32, p. 33.

⁷³ *Brama satyam jaganmitya, Jivo Brahmaiva naparah.*

CHAPTER VIII

**THE QUESTION OF HUMAN RIGHTS IN
BUDDHISM**

BENEDICT KANAKAPPALLY

The commemoration of sixtieth anniversary of the UN Declaration on Human Rights, it could possibly be said, comes in the midst of an epochal change affecting the whole world. Economic liberalization and globalization along with other social and historical forces have had the effect of straining the prevalent international order and some of the hitherto accepted norms of human living together at the global level. Part of the change occurring in the way people everywhere think about themselves in relation to others, it might be argued, is closely linked to a resurgent sense of their religious and cultural identities, and a perceived need to defend these. The Asian continent, home to roughly two-thirds of humanity, is probably the place where the active and passive forces of the present-day global changes are most clearly on display. Asia finds itself in the forefront of the process of a global change, not only on account of its emergent economies, but also on account of its age-old cultural and religious traditions which need to face up to the challenges of the contemporary world.

It is only against the backdrop of such unprecedented changes taking place in Asia and elsewhere in the world that one may properly appreciate and assess the importance of the question of human rights in relation to Buddhism. Incidentally, the supposed human rights violations in those very parts of Asia traditionally under the cultural dominance of Buddhism have made the question all the more relevant. If the decades-long ethnic-religious conflict, with its undeniable human rights violations taking place in the Theravada heartland of Sri Lanka, has been on and off the radar of world's attention, the sad plight of another Buddhist country like Myanmar, from the point of view of human rights, has been thrust into world's attention by the recent violent protests there, in which not a few Buddhist monks have lost their lives. But undoubtedly, what has given the question of human rights in relation to Buddhism its recent prominence in the global media has been the alleged human rights violations taking place in Tibet, and the ensuing outbreak of violence and protests both inside and outside the country. Even though Tibetan Buddhism (*Vajrayana*) itself stands for only a part of the Buddhist world, the unambiguous stance taken in support of human rights by its spiritual leader in exile, the Dalai Lama, the recipient of the 1989 Nobel Prize for peace, has added a new dimension to the question of human rights and Buddhism.¹ In a sense, it is difficult to think of a more urgent question for Buddhism in the twenty-first century than human rights.

The question, however, can be approached in a variety of ways and from various angles. Given that human rights in their current conception and formulation constitute a relatively recent development, whose philosophical underpinnings as well as historical origin are all clearly Western, it becomes possible to ask if Buddhism can have anything meaningful at all to say in the matter of human rights. The question can be posed in the following ways: From the point of view of its doctrine or praxis, does Buddhism subscribe to the notion of human rights? Even if not explicitly articulated – which would be only understandable – in which area of its doctrine may one come across a principle capable of sustaining talk about human dignity and rights? Or, even if the notion of human rights in our current understanding is in no way locatable in any fundamental doctrine of Buddhism, has it somehow been in the spirit of original Buddhism to promote some of those very values enshrined in the various pronouncements of human rights? This question can also trigger other parallel questions, like the compliance of Buddhist countries today to the international standards of human rights. Similarly, a question can also be asked whether, historically speaking, the areas influenced by a Buddhist culture have not perhaps been also the areas where a sense of human equality – reflected also in the social position and education of women – and a greater respect for human life in general have prevailed. Of course, if this question would have to be answered in the affirmative, then naturally one would be faced with a kind of paradox: Buddhism, which apparently does not speak anywhere in its texts about human dignity and rights, will have been in effect a promoter of some of the cherished ideals lying behind the present-day articulations of human rights. And this, on the other hand, will not at all surprising, given the overall Buddhist distrust of talk and speculation, and its emphasis upon the practical, so neatly expressed in the Buddhist parable of the “poisoned arrow”. Anyway, given that there is obviously also resistance presented to the recognition, adoption and implementation of the universal human rights principles, at least in some quarters of the Buddhist world, it can also be asked whether such resistance can at all find any solid base in any fundamental doctrinal principle of Buddhism.

Admittedly, there is a notable dearth of studies on the question of Buddhism and human rights. Traditionally, Buddhist scholarship, by both Buddhists as well as others, has paid scant attention to the issue of human rights.² What we have stated above are some of the questions that are being increasingly asked by Buddhists as well as those who, for one reason or another, are interested in the Buddhist response to a world in rapid change, where the need for internationally recognized principles and standards of human conduct, that do take into account also the cultural and religious specificity of peoples, has never been greater. The present article is not an attempt to answer these or other possible questions that could be formulated in connection with Buddhism and human rights. The attempt here is rather to present a brief account of some original and fundamental aspects of

Buddhism that should be considered crucial in any discussion about human rights in relation to Buddhism. If anything, it should at least point to the complexity and the difficulty of any straightforward talk about human rights involving Buddhism.

SOME UNIQUE ASPECTS OF BUDDHISM

Buddhism today is a religion practised mostly in Asia, by a not so easily quantifiable number of persons. At least in some parts of the Asian continent where it is practised, the line of separation between Buddhism and other local religions often tends to vanish. Buddhism in its historical evolution and in the process of its geographical expansion has in fact given rise to forms and expressions of the same that are vastly different. Though it could be argued that such diversification of the Buddhist religion was somehow foreseen from the very start, and that each of its various forms is itself a Buddhist *yana* (“way”, i.e., way to the same), there are certainly aspects of its original expressions and aims whose continuation in the present-day forms of Buddhism is open to doubt. Ever since critical studies on Buddhism have been undertaken, what has struck its students mostly has been its passionate denial of an eternal soul in man and additionally its refusal to acknowledge a reality that is central to most religious systems, namely the reality of a Supreme Being or God. Already this particularity of Buddhism would demand that any attempt to derive from Buddhist thinking any theoretical foundations for human rights be seen in perspective. Although it is a matter of some debate, it would appear that the justification behind the concept itself of human rights, according to the UN declaration relating to the same, would lie in the “inherent dignity” of human beings.³ Clearly, the essentialist understanding of man underlying the UN terminology of “inherent dignity” is something that can find no justification in Buddhism. It is clearly the case that the Buddhist conception of man in terms of a constantly changing aggregate of physical and mental states and events can hardly be seen as the subject of rights or duties. If the UN Universal Declaration of Human Rights attempt to ground these in human dignity looks haphazard, not so the monotheistic religions, like Christianity’s justification of these in terms of human dignity understood in reference to God. The fact that Buddhism does not subscribe to a notion of God naturally makes such an option, of theologically grounding human rights and dignity, unavailable to it. However, the Buddhist denial of God and a permanent soul in man, which makes it a unique case in the history of religion itself, may be thought to point to something more significant, namely, its originally reactionary and anti-metaphysical character. And this is strangely not without some profound implications for the question of human dignity and equality.

Buddhism which rose in India around 5th century B.C. was clearly a spiritual movement whose singular aim was to chart a course of human liberation, intended in a transcendental sense. It shares a common

environment of radical questioning and reflection found in the *Upanishads*, and contains some of the same presuppositions and aims found in similar religious movements that arose at the time in India – for example, Jainism. But what makes Buddhism stand apart from other currents of religious thinking and spirituality, especially the one represented by the *Upanishads*, is its open defiance of the dominant Hindu or Brahmanic religious culture and ideals. It is not difficult to see in this sense that the underlying aim of some of the early Buddhist *suttas* – which by the way record Buddha’s debates with Brahmanic scholars – is to expose the Brahmanic claim to religious and social hegemony as totally false. What the Buddha calls radically into question in some of his discourses is the foundation itself of the Brahmanic religious world-view, constructed around such notions as divine revelation, a divinely sanctioned social order, the mysterious power contained in religious rituals, etc. Some of the concrete expressions of this will be the Buddha’s rejection of the Hindu scriptures of the Vedas along with all its cultic and ritual apparatus, its social system of castes, its claims regarding the divine institution of kingship, and the sacredness of Sanskrit language.

As regards the question of human dignity and equality, Buddha’s refutation of the Hindu ideas of social castes and the divine origin of political power remains certainly significant. From among a series of text and passages contained in the Pali canon of the Buddhist scriptures that deal with the question of castes, one might mention the following ones for their clear and logical rebuttal of the concept of caste and its attendant view of inherent inequality of men: the “Ambattha sutta” and “Sonadanta sutta” of the *Dighanikaya* and the “Madhura sutta” and “Esukari sutta” of the *Majjhimanikaya*.⁴ That men are born as non-equals is a view entrenched in the notion of castes which finds its religious sanction in Hindu scriptures. In the most important Hindu religious text of the *Rig-Veda*, the origin of caste will be placed at the beginning of time. In the hymn known as the *Purusha-sukta* (lit. ‘Hymn about Man’), we find a narration of cosmo-genesis and, included in it, the description of the origin of castes. The origin of the world is pictured here as resulting from the dismemberment of the *Purusha* (the primeval man), performed by gods at the beginning. From the same act arise also the four traditional Hindu castes whose origin will be mentioned as follows: “When they divided the Man, into how many parts did they apportion him? What do they call his mouth, his two arms and thighs and feet? His mouth became the Priest [*Brahmin*]; his arms were made into the Warrior [*Kshatriya*], his thighs the People [*Vaishya*], and from his feet the Servants [*Shudra*] were born.”⁵

It is the vision of man as subjected to a divinely instituted social hierarchy based on inherent inequality between men that will be challenged by Buddha in the above mentioned texts. While Buddha himself can see the usefulness of a social order based on social or occupational classes, what can be clearly noted in these texts is his rejection of the system of castes, which imprisons man in his predetermined functions and status. Social class is a

system of remuneration; it awards the individual on the basis of his performance; it accepts in principle the possibility of moving higher or lower in the class hierarchy. Caste, on the contrary, is a system of ascriptive social ranking; it excludes in principle all social mobility; born into a caste, in the thinking of Brahmanic orthodoxy, an individual remains in it until his death. Though it is true that, during the time of Buddha, the Hindu system of caste had not known the kind of rigidity and discriminatory practices that were to characterize it in the course of time, what he detects and combats in the doctrine of castes is its grounding in an unverifiable religious claim and a metaphysical theory of human nature.

“Aggañña suttanta” of the *Dighanikaya* is a text which theorizes on the origins of castes and of political authority in a speculative way. It speaks about the possible origin of castes and, more importantly, about the authority of the king as part of a social evolution – an evolution that consisted in a gradual decline in the standards of human behaviour and the need to constitute an authority so as to guarantee order. What may be clearly noted in this text is the view about the origin of private property as linked to certain prevailing social conditions, and about kingship itself as the result of a social contract or popular consensus. According to the text, in order to ensure that justice and peace prevailed in the original society, the people came together and said: “Come let us appoint a certain being from among ourselves who would show anger where anger is due, censure those who deserve censure and banish those who deserve banishment! And in return, let us grant him a share of the rice. So they went to the one who was the handsomest, the most pleasant and capable and asked him to do this for them in return for a share of rice, and he agreed.”⁶

What is striking in the Buddhist description of the possible origins of castes and of royal power is its contrast with the Brahmanic version of the same in terms of their mythical and divine origins. As is obvious, the Brahmanic version was meant to serve as a theological rationale for a socio-political order in which the members of the Brahmanic caste themselves were the clear beneficiaries. In the aforementioned text, the Buddha will accomplish a complete demystification of the priestly and royal power with the repeated assertion that the Brahmins and the kings and the nobles have the very same human failings and limits and are like everyone else.

The early Buddhist texts clearly offer a phenomenological view of man seen as an individual being, sharing in the same human condition of existential *dukkha* and with the same chances of a radical liberation as everyone else. Buddha will locate the root cause of the problem of social inequality, and the dominance established by a few over others in the name of some abstruse religious verities, in the exercise of metaphysical speculations. The anti-metaphysical stance of Buddhism which its early texts evince is also what gives it its curious aspect of being somewhat post-modern. Questions about the origin, nature and the essence of things as well as of the world and man will be set aside as futile and unhelpful by Buddha, as it was by pretending to know the answers to such questions that

Brahmanism itself legitimized its world-view and therewith its oppressive power structures. The “Brahmajala sutta” and “Potthapada sutta” of the *Dighanikaya* may be seen as paradigmatic in the Buddhist critique of an essentialist metaphysics used to justify and consolidate a prevailing socio-political order. As a matter of fact, what lies behind the Buddhist rejection of the notion of God and the concept of human soul too would be, rather than any attempt to negate their ontological reality as such, a concern to safeguard the dignity and freedom of individuals against those who might turn these into instruments of their power and oppression.⁷

Clearly, the early Buddhist texts do not at all speak directly about such things as human dignity or rights, or about anything comparable to such notions. Indeed, they would even appear to undermine the very base upon which such concepts as human dignity, rights and duties could be made to stand. Even so, in its demolition of all conceptual frameworks behind such notions, what Buddhism actually does could be interpreted as creating conditions favourable for securing man’s actual dignity, his right not to be subjected to social discriminations and his right to self-determination. In fact, it is at the practical level that one could appreciate how Buddhism often comes close to realizing some of the noble ideals present in the various charters of the human rights of modern times.

SOME PRACTICAL EXAMPLES FROM EARLY BUDDHISM

L.P.N. Perera in his work, *Buddhism and Human Rights*,⁸ has sought to highlight an underlying unity of views and purposes between various articles of the Universal Declaration of Human Rights and early Buddhist teachings. But more than anything, it is in the area of Buddhist practices linked to the life and organization of its *sangha* (monastic community) and in reference to its general moral counsels, that one might note an overarching sense of harmony between Buddhism and some of the ideals of human rights. Buddha has often been represented in the past as a spiritual personality completely aloof from the reality of the world. But this picture of Buddha could not be more distant from the truth. Though Buddha was by no means a social revolutionary – the so-called “socially engaged Buddhism” itself is of a recent origin⁹ – what emerges clearly from a study of the historical personality of Buddha is the picture of a person well-versed in the ways of the world, capable of using to his advantage the socio-political situations of the time.¹⁰ In this sense, Buddha’s cultivation of what appears to be a close relationship with two important kings of the period is not without some significance. On the whole, if Buddha and early Buddhism will in some ways emphasize the transcendent dimensions of life and reality, this will certainly not be at the cost of an overall disengagement from worldly affairs and concerns.

The Buddhist *sangha* and the wider community of Buddhist lay disciples are organized in the lines of a clearly egalitarian view of man. It is worth noting that Buddhism was possibly the first religion ever in history

not identify itself with any particular ethnic, linguistic or cultural group, but to project itself as a religion for the whole of humanity. The Buddhist *sangha* itself had an international character from the beginning, since its first members came from different kingdoms and republics that flourished in the Gangetic plain at the time, and had no single language recognized as its official tongue. It goes without saying that caste-based distinctions had no place in the Buddhist *sangha*. Schumann in his study on the historical Buddha looks into the composition of the early *sangha* in terms of the social provenance of its members, which can somehow be deduced even today on the basis of their names found in the Buddhist texts.¹¹ And what emerges from this is a picture of a *sangha* that did include not only members of the four traditional castes but also those who were even at that time considered as out-castes. Such caste-free internal organization of the Buddhist *sangha* in an otherwise caste-conscious social environment is indicative ultimately only of one thing: namely, the Buddhist sense of a fundamental human equality. The Buddhist prohibition to engage in slave-trade,¹² even if it could have a binding effect only on Buddhists, is a further example of the Buddhist respect for the human individual as such, independently of his socially and religiously ascribed roles and status.

Seen in the context of the time what would appear as even more revolutionary in the early Buddhism is its approach and attitude to women. Among the many “firsts” which Buddhism can legitimately lay claim to, the institution of a female religious order is certainly one. Although the female branch of the Buddhist *sangha* was in many ways subjected to the supervision of its male counterpart and had many more rules to conform to, there are also provisions to guarantee its freedom in ordinary affairs without any undue interference from the part of the male *sangha*. Anyway, what lies at the heart of the foundation of the female *sangha*, as it emerges from the Buddhist text dealing with it,¹³ is Buddha’s recognition of women’s equality with men as the proper subjects of religious and spiritual realization. To understand its revolutionary implications, one would have to contrast it with the orthodox Hindu view of women as religious subjects, which they become only through marriage.¹⁴

The *sangha* itself with its rules and regulations – which were in fact some of the most elaborate and the strictest of its kind in religion – was meant to provide the ideal condition for what Buddhism considered as human perfection. But within accepted limits and within the framework of the *Vinaya* rules, however, what the *sangha* effectively did give rise to was a context of egalitarianism, of communal and democratic decision-making, freedom of thought, safeguards against every sort of arbitrariness and the possibility to defend oneself if accused of any wrong-doing. Significantly, the *sangha* would not have any person invested with any special authority as its head; the rules and doctrines taught by Buddha (*Dhamma-vinaya*) are the only form of authority known in *sangha*.¹⁵ As the Buddhist monastic community was built around a particular conception of life and religious duties, it is not of course appropriate to speak of the rules of *sangha* and the

style of life they ensured as being really consistent with the Universal Declaration of Human Rights. Even so, what can safely be said in this regard is that, whoever freely chose to become part of *sangha*, until he chose to leave it (which was also possible), did find an ambient where certain fundamental values associated with human rights prevailed.

Though it is not our intention to enter into the details of the *Vinaya* rules, what strikes even in a casual reading of these rules is the emphasis placed in them on securing the consensus of all the members of the *sangha* in every important decision. So also, the importance attached in these rules to the procedural correctness of the official acts of *sangha*, whether it be the fortnightly assembly of the members of *sangha*, or the ordination of monks, or the imposition of penalties on members who are found guilty of a breach of rules. It is interesting to note in *Vinaya* a set of rules that specifically relate to the mutual respect that had to be shown by the members of the *sangha*¹⁶ and to the allocation of places in its residences. The residences of the *sangha* were in fact common property, and each member had a claim to a place in any of these. Therefore, on more than one occasion the *Vinaya* rules enjoin a punishment on whoever attempts to deprive another such a right.¹⁷

Apart from the rules and regulations of *sangha*, the principle of the (“five good habits”), applicable also to lay Buddhists, remains significant in any discourse regarding Buddhism and the fundamental values proposed by human rights. The *panca-sīla* – which should be more appropriately seen as moral counsels, in the sense that they derive their justification from the point of view of the final scope of human life as envisioned in Buddhism – of abstaining from taking life, from stealing, from telling lies, from sexual misconduct and from using consciousness altering substances – have certainly helped to create a climate in which effectively human dignity and the respect for human life, freedom, and fundamental rights would be more secure.

SOME CONCLUDING REMARKS

Religions can play a reactionary or a facilitatory role when it comes to the effective recognition, promotion and defence of human rights, and, it could be said that the struggle is now within them whether or not to be serious allies in shaping a universal consciousness around some generally recognized basic human rights and freedoms. Clearly, religions do have their own theologico-anthropological views and tradition-tested answers and attitudes upon which to found what is deemed right and wrong in human behaviour and relationships, in the ordering of societies, in the exercise of authority, etc. For that matter, any attempt aimed at discovering genuine conformities between such modern notions like human rights and religious ideas can, at best, only be partially successful, especially when this has to do with religions that do not share the same philosophical premisses as those behind the conception of human rights. Even so, if the history of

religions can tell us anything, it is that religions themselves are phenomena in constant evolution and transformation, by virtue of a bidirectional interaction with the world in which they happen to exist. It could be argued that the rise and fall of religions themselves are determined in the end by their capacity or otherwise to enter into a constructive dialogue with its surrounding world. What the history of religions further tells us is the enormous capacity every great religion has to adapt to every new epoch, and make its own even what could have originally been extraneous or alien interests and concerns.

It is not at all an exaggeration to say that Buddhism, which arose around 2,500 years ago, constitutes a unique religious phenomenon: the original spiritual thrust and vision, around which the movement of Buddhism took shape, actually did dispense with those categories which most religions consider as fundamental. As to the question of human rights, it is fair to say that there is no discussion in early Buddhism about such notions as human rights or about anything resembling them. It is also true that Buddhism lacks a developed tradition of social and political philosophy, and that up to very recent times there has never been in it any discussion about human rights.¹⁸ But that, however, may not be end of the matter: if we have been successful in doing so, what we have shown in the foregoing pages is that, even while being silent about human dignity and rights, early Buddhism may have done more than most religions to create conditions suited to a general respect of human life and personal freedoms. While early Buddhism will show a marked interest in the ultimate and transcendent dimension of reality, it will however not be oblivious of the concerns of the phenomenal realm.

Human rights have become today a question of great urgency in relation to Buddhism, as the human rights record of some of the traditionally Buddhist countries remains at best mixed. In a growing corpus of books and articles dealing with this subject, it has become commonplace to affirm that there is indeed no incompatibility between Buddhist teachings and the ideals enshrined in the UN declaration of basic human rights. Some authors would even go as far as to say that there is in fact a convergence between Buddhist ethical teachings and the essence of human rights. However, how the modern human rights themselves, in the way they are understood today, may be made to follow from some Buddhist doctrines or how such rights may logically be linked to Buddhism remains a knotty problem. Not that there are no attempts made in this direction. One of the ways in which human rights are made to conform to Buddhism is by way of emphasizing the moral principles contained in it which, though expressed in a language of "duty," can, it is argued, nevertheless be seen as the indispensable correlates of rights. In the same way, the theory of "dependent origination" (*paticcasamuppada*) is proposed by some as a possible Buddhist entry point to the modern discourse on human rights. The theory, which is about relativity and the interdependence of phenomena, is invoked to found the actual interrelatedness of persons, and so to argue for a

commonly constituted existential realm in which respect, freedom, and basic rights are guaranteed. Many other attempts to bring together Buddhism and human rights will be specific to the different schools of thought found in Buddhism today, and will revolve around such notions and concepts as “Emptiness” (*Śūnyata*), “Dhamma”, “Universal Buddhahood”, “Compassion”, the universal capacity for “Enlightenment” etc. Even if Buddhism is what it has become today in its variegated expressions, what cannot also be in doubt is how some of these might actually be very far from the original vision and concerns of Buddhism.

It could possibly be said that Buddhism from the start has always subscribed to a realistic and pragmatic view in all things. It would consider its own theories and doctrines themselves as being ultimately instrumental, as a ladder one uses to climb and then abandons, or as a raft one uses to cross a river and then leaves behind on reaching the other shore. For the same reason, Buddhism should have no problem in accepting any principle or theory that has a proven usefulness for bringing about a generally acknowledged good, like bettering the living condition of man or alleviating his suffering. As a religious thinking that tends to emphasize the expedient and the useful (*upaya*) over the theoretical and the speculative, it becomes possible for Buddhism to endorse the human rights as a useful and efficient means today for securing some of very things it has originally stood for, namely the dignity and equality of man and his liberation – this, not only in its meta-empirical sense but also in its more mundane sense. On the other hand, what will possibly be looked upon with suspicion from the part of Buddhism will be the metaphysical ground upon which such rights themselves may be made to stand. The UN declaration itself, even with all its beguiling philosophical obscurity, it may be argued, points in the end to a sense of pragmatism when it speaks of these rights as “the foundation of freedom, justice and peace in the world.” In the end, it could be said that Buddhism itself can possibly bring into the present-day discourse on human rights a new perspective. by bringing to bear upon such discourse its overarching principle of the “middle-way”: a middle-way that helps to steer clear of some of the well-known difficulties contained in the UN Declaration of Human Rights – such as its talk about rights without any allusion to duties, or its claim to universality without any consideration whatever paid to cultural and religious particularities, or, again, its all too individualistic character.

NOTES

¹ The Dalai Lama’s advocacy for human rights is based on what he calls “universal responsibility” (in the Tibetan language, *chi sem*), a Buddhist notion that has to do with one’s awareness regarding the universal dimension of one’s actions, capable of assuring the equal right of all to happiness and to avoid suffering. See Sua Santità il Dalai Lama, *Una rivoluzione per la pace*, Sperling Kupfer Editori, Milano 1999, pp.141-49.

² For a bibliography on the topic Buddhism and Human Rights up to the year 1997 see Damien V. Keon, Charles S. Prebish and Wayne R. Husted (eds.), *Buddhism and Human Rights*, Richmond, Curzon Press, 1998, pp. 223ff.

³ MacIntyre, for example, finds in the UN declaration on human rights a good example of the normal UN practice of not giving good reasons for any of its assertions. Cf. A. MacIntyre, *After Virtue. A Study in Moral Theory*, London, Duckworth, 1981, p. 69.

⁴ See *Majjhima-nikaya: Middle Length Sayings*, London, Pali Text Society, 1954-59, vol. II, pp. 83-90; 178-84.

⁵ *Rig-Veda*, 10.90.11-12.

⁶ *Aggañña suttanta*, 20.

⁷ As a work that seek to shed light upon the Buddhist problematic on God and the soul could be indicated the book by R. Panikkar, *Il silenzio del Buddha. Un a-teismo religioso*, Milano, Oscar Mondadori, 2006.

⁸ See L.P.N. Perera, *Buddhism and Human Rights. A Buddhist Commentary on the Universal Declaration of Human Rights*, Colombo, Karunaratne and Sons, 1991.

⁹ In any case, it is important to acknowledge the role played by such movements as “socially engaged Buddhism”, started by Thich Nhat Hanh in Vietnam, and Neo-Buddhism, started by B.R. Ambedkar in India, in the present-day discussions about Buddhism and human rights.

¹⁰ Cf. H.W. Schumann, *Il Buddha storico*, Roma, Salerno Editrice, 1986, p. 7.

¹¹ See *Ibid.*, pp. 219-222.

¹² Cf. *Anguttaranikaya*, 5, 177.

¹³ *Cullavagga* (of *Vinaya*), X.1

¹⁴ Cf. *Manusmriti*, II, 67.

¹⁵ Cf. *Mahaparinibbana suttanta*, 6.1.

¹⁶ *Pacittiya dhamma* (of *Patimokkha sutta*), nn. 2; 3; 13; 54; 55; 74.

¹⁷ *Cullavagga*, VI, 11,2; *Pacittiya dhamma* (of *Patimokkha sutta*), nn.16; 17.

¹⁸ Damien V. Keon, Charles S. Prebish and Wayne R. Husted (eds.), *Buddhism and Human Rights*, p. v.

CHAPTER IX

HUMAN RIGHTS FROM THE POINT OF VIEW OF BLACK AFRICA

BÉNÉZET BUJO

When we read the *Universal Declaration of Human Rights* of 1948 from the perspective of sub-Saharan Africa, one is struck by the emphasis on the individual, while the community seems to play a clearly subordinate role (cf. art. 29). It is obvious that such an approach runs into difficulties in the African tradition, which attaches great importance to the community. Therefore one may ask whether the aforementioned Declaration is so universal that it can impose itself on Black Africa. To answer this question, we start with the anthropological foundation of Africa before moving to concrete examples. But to begin with we must briefly describe the Western view of human rights.

BRIEF OUTLINE OF THE WESTERN CONCEPT OF HUMAN RIGHTS

In studying human rights as conceived and practiced by the European and North American world, we cannot overlook Kantian philosophy, with its concept of freedom centered on the individual and making autonomy the essence of individuality.¹ What such a philosophy would emphasize above all is human dignity and individual liberty. In this connection, Leonard Swidler has noted that in Confucianism, for example, the human person has rights only to the extent that he has a certain position in society. In other words, he has no rights as a human being in itself, but only so far as he is a son, father, brother etc.. The idea of human rights in the Western sense, on the other hand, is founded on a certain individualism, whereby the person is valued as an individual and not because of his relations with others.²

It is, we may say, from this fundamental notion based ultimately on the nature of man and his rational capacity – a notion specifically found in the Enlightenment, and particularly in Immanuel Kant, one of its key figures – that the rights of man have been clearly formulated.³

Christianity added to this the concept of man as image of God. Theologians such as St. Thomas Aquinas⁴ did not hesitate to base their teaching concerning the dignity of man on this reality, which is rooted in the Biblical message of creation. As it says in *Genesis* 1, 26: “Let us make man in our image, after our likeness.” This instruction is supported and completed by the New Testament message that man is saved by Christ and thereby participates in a divine filiation. Thus, all human beings are brothers

and sisters and enjoy an inalienable dignity. Human rights, according to Christianity, are deeply rooted in the notion of God as creator and savior.

Taking into account everything that has been said, and given the context in which rights have emerged in the West, we easily understand why some issues (such as individual conscience as the final authoritative body, freedom of speech, democracy, etc.) play an important role which can no longer be challenged in Euro-American society. The question is whether, faced with the multiculturalism of today, we can universalize those realities which arose in particular contexts. In this respect, the work of Paul Ricoeur deserves special attention, for example, when he says that, despite the ratification of human rights by “the near unanimity of the States,” it did not dispel the suspicion that such rights “are only fruit of the cultural history specific to the West, with its wars of religion, and its laborious and never completed learning about tolerance.”⁵ With regard to those particular laws guaranteeing the rights of man, the same French philosopher says they are “indeed the product of a singular history which is basically that of Western democracies.”⁶ And the author adds: “[...] to the extent that the values produced in this history are not shared by other cultures, the charge of ethnocentrism resounds over these declarations themselves, even though they have been ratified by all the governments of the planet.”⁷ While one might not agree with this charge, according to Ricoeur we must allow a discussion at the level of “the convictions inserted into concrete forms of life.” But, he notes, nothing will result from this discussion if each party is not ready to admit that “some universals are embedded in those cultures regarded as exotic.”⁸ Our author argues for recognition of “universals in context, or potential or inchoate universals” to better reflect “the careful balance [...] between universality and historicity.”⁹ If we would achieve that goal, we must get together and sit down again around a table to talk about the different perspectives in which we see human rights, without thereby undermining human dignity.

In this spirit, we will attempt to analyze the African tradition in order to ask whether human rights, as they are generally understood, take account of the vision of the Black-African world.

THE BLACK-AFRICAN TRADITION AND THE UNDERSTANDING OF HUMAN RIGHTS

Raising the question of human rights in the context of sub-Saharan Africa cannot be done without referring to the anthropological conception of the African. In considering this question, we recognize that in Black African communities, rights and ethical duties are not to be separated. Both aspects imply one another and overlap.

The Three Key Dimensions of the Concept of Rights in Sub-Saharan Africa

We have repeatedly emphasized¹⁰ that the black African community is

constituted by the living, the dead, and the not-yet-born.¹¹ These three dimensions of the same community interact with each other. We will understand this more easily if we recognize that, in Black Africa, the person exists only in the context of interpersonal relationships. All members are thus interdependent, and the good or bad acts of one individual affect the entire community. In other words, the good act of one person strengthens all others, just like an evil act done by one member diminishes the life of all.

It should be noted that, given that this is a holistic vision of community, the dead are dependent on the living, and vice versa. Moreover, the living and the dead can be understood only in relation to the not-yet-born. It is in this sense that we should understand the worship and veneration of ancestors. The living can flourish only if they are in harmony with the dead, that is to say, among other things, that they should be concerned with offerings to them, and avoid anything that would offend them. On the other hand, the dead are there to protect their descendents from harm, so that they may have life in abundance. Finally, the living and the dead are doomed to extinction if they do not care about the children not-yet-born, for they are destined to succeed those who are living today who, in turn, will be the dead tomorrow, and their memory can be preserved only by the future generation.¹²

If the Black African attaches great importance to this tripartite or three-dimensional community, one may wonder whether, in the end, individuals are not robbed of their own identity and value. This question makes sense only if one is satisfied with superficial observation. In reality, individuals do not lose their identity in the community. This is already confirmed by the names we give to children. In many ethnic groups, children do not bear the name of their father, but each has its own, since the name is the essence and identity of each person. Thus, in some African languages like Swahili, Lingala, Kilendu and others, we do not ask "What is your name?" but, rather, "Who is your name?" This linguistic characteristic shows clearly how a name is not a category of 'thing,' but the human person in his inalienable identity. But again, this identity itself cannot grow and flourish except by interpersonal relationships, just as the community can only have vitality insofar as it encourages this identity, and helps it to grow. That the latter is fundamental for the survival of the community is proved not only by individual naming, but by many proverbs, tales and legends, which continue to emphasize this.¹³ It is at this level of interaction between individuals and community that we should focus the debate on human rights in sub-Saharan Africa.

The above shows clearly that, for the Black-African, human rights extend to the whole tripartite community and to each of its members. We should note in particular the rights of the dead, which seem to have a different character than that to which we are accustomed in the West. Indeed, if one takes into account the interrelationships between the living and the dead, the latter intervene constantly in daily life, and even ask for, if need be, what they are owed. They have a right to food, honor,

reverence, compensation, forgiveness, and so on. They can own a piece of land, streams, rivers, forests, and other things. These properties, belonging to the ancestors, must be used with great respect. Thus someone, particularly a foreigner, who uses something which belongs to the dead, without having first requested permission from them, is in serious breach of the rights of the ancestors. This applies especially to places of birth or those places that house the tombs of the ancestors. Places of birth, for example, are marked by the presence of the umbilical cord of an ancestor. A portion of that person is, thus, buried in this place, which is now forever linked to his person and his destiny. This place can be characterized as the birthplace of the ancestor and his descendants.

A similar arrangement applies to places where the graves of ancestors are located. Some ethnic groups plant a tree that does not appear to die – for example, the ficus, which does not dry up, but remains green through all seasons. This tree establishes both the presence of the ancestor as well as the latter's rights and those of his descendants in the possession of the land. When someone dies far from the place of his ancestors, it is customary among certain groups to cut the fingernails and the hair of the deceased, and to return them to his homeland. Sometimes, one takes a little earth from the grave to make a second tomb close to one's ancestors, a place that is supposed to be the repository of that person's umbilical cord. This act in turn continues to build and secure the basic rights of the dead. All this suggests at the same time that, in establishing and respecting the rights of the dead, the rights of the living and the not-yet-born are respected and established as well. Particularly as regards the latter, all that belongs to the dead and the living prepares and ensures the future of the next generation who, at the same time, are the future of those already dead and of the living – those who will die in the future. It is in this sense that, in the African tradition, it is absurd to discuss whether and when the unborn or those still in the womb are persons, in order to ascribe rights to them, e.g., the right to life. For Black Africans, it is clear that the human person is constituted by bundles of interpersonal relationships. Thus, an unborn child is undoubtedly a person who is immersed in relationships with God, the ancestors, and the living. God sends them by means of their ancestors and they, in turn, pass them on to the living to ensure that they enter life. Thus seen, a child is not a person because he has the potential which predestines him to be a rational being, but because the entire community envelopes him in relationships as one of their own, and as a continuation of the life that that child is entitled to at the highest level.¹⁴

When we study carefully and specifically the issue of the rights of the dead, we see how relevant it is in the contemporary context. In Sub-Saharan Africa, those who take the property of the dead go against human rights. It offends not only the dead but the living as well as the not-yet born to whom it denies the right to life. It is in this sense that the person must be brought to justice.

In the context of the modern history of Africa, these considerations are of great importance in order to understand what is at stake today in the continent. One should mention, for example, the totally arbitrary chopping up and division of Africa by the Western colonial powers. In light of what has just been said about the concept of Africa, it was a matter of a usurpation and reallocation that ignored the rights of Black Africans. Many Black Africans were moved far away from the location of the graves of their ancestors, from the land of their umbilical cord, and were even sold as slaves and taken to other continents. For the “victors of history,” this was never regarded as a violation of human rights, and it is not obvious that even today the descendants of the slave merchants and of the colonial powers of the past have understood this any better. We can speak of a historical irony, given that – as Ottfried Höffe points about – the first declarations of human rights were written by “White-Anglo-Saxon-Protestants” who, thanks to the work of their slaves, were free or had the time to deal intensively with constitutions establishing such rights.¹⁵ If, in the post-slavery colonial and post-colonial period, political and socio-economic poverty continued to rage in Black Africa, one cannot honestly forget the more than dramatic history of the continent, although not everything is explained by that. Indeed, slavery and colonial history dealt a fatal blow to the vitality of sub-Saharan Africa from which it has never recovered. The loss of people in their prime, exported as slaves to other continents, the expropriation of the material resources of the “dark continent” – all this has considerably reduced the life force of the Africa, which even today has scarcely been able to find its equilibrium and its dignity in the community of nations. For Africans, this is unquestionably the consequence of violations of human rights perpetrated by the “victors of history” against the tripartite community described in this study. It is unfortunate that this violation is not recognized as such by the international community, and that it feels the need neither to provide compensation nor to apologize to descendants of the victims. Sixty years after the *Universal Declaration of Human Rights*, it would finally be enough to review what is meant by human rights, and to initiate – not in an exotic way, but with all seriousness and honesty – a dialogue towards a new debate that would enrich all partners. To refuse such a dialogue would be to confine oneself in a sort of superiority complex, which considers universal what is perhaps only a reality specific to a particular context, with a different anthropological and ethical rationality.

HUMAN RIGHTS AND ETHICAL DUTIES

A debate on human rights should not fail also to ask the question of the ethical duties that constitute the core of the practices surrounding respect for human dignity. It is because of this concern that, some years ago, Helmut Schmidt, the former Chancellor of the Federal Republic of Germany, edited a study containing proposals made by the InterAction Council on universal duties of man.¹⁶ He noted that, following the experience of recent decades,

democracy and human rights will remain a dead letter if a government is satisfied with lip service without trying to actually engage with and for an effective practice of democracy and human rights.¹⁷ In addition, the author continued, today the ethical imperative of the “Declaration of Human Rights” of 1948 runs a certain risk. Indeed, on one hand, the term “human rights” is used by some Western politicians as much as a combative concept as an aggressive instrument for pressure in foreign policy. Moreover, existing human rights are not accepted by all, but rather are regarded by some as a typically Western concept and partly even as an instrument that only prolongs the supremacy of the West. In Asia, one finds a very serious and justified critique that the fundamental concept of rights, as it is found in the West, neglects or misunderstands the need for virtues, duties and the responsibility of individuals in relation to the family, community and society or the state. Some Asians, said Schmidt, go so far as to see a principled opposition between the concept of human dignity in Asia and that in the West.¹⁸

All this indicates that, after so many years since the Universal Declaration of Human Rights – Schmidt was speaking on the occasion of its 50th anniversary – it is more than urgent to be equally concerned about *Human Responsibilities*. This is a matter of agreeing on the ethical minimum necessary, not only for individuals but for political authorities, religious communities, churches and nations.¹⁹

That demanded by Helmut Schmidt and the InterAction Council is situated in the wake of the Black-African concept that cannot imagine rights not filled with ethics as the core of everything. In this, there is a significant difference between the sub-Saharan African conception and the western view. For the latter, the duties related to ‘right’ and those concerning ethics are not on the same level. According to this logic, there may be duties in an ethical sense, without this being linked to the duties relative to human rights.²⁰ Thus, Immanuel Kant distinguishes between “duties of rights” (*Rechtspflichten*) and “duties of virtue” (*Tugendpflichten*). While the duties of rights – the *Rechtspflichten* – concern justice, the duties of virtues – *Tugendpflichten* – refer to the good life. We can therefore say that the duties attached to rights (*Rechtspflichten*) are those that are essential to the mutual care that we give to each other as persons. This recognition of others as individuals with their own dignity who cannot be degraded to the level of objects, forces us at the same time to recognize one another’s rights. This is a *mutual obligation*. In other words: The duties related to rights concern contracts, so that everyone is entitled to demand the same from the other as he himself owes to the latter.

When it comes to duties in the matter of the virtues (*Tugendpflichten*), the situation is different because it no longer concerns what is mutually due [*dû*] or a contract: We cannot expect it for oneself, and others have no right to oblige us. According to Kant, this category of obligation is constituted by two dimensions: on the one hand, it is a matter of the perfection of the individual himself, but on the other hand there is the

good of other human beings where the happiness of others comes into play. Together they ultimately concern the good life as such and not justice which arises from contract.²¹

Following these two categories of duties, which one may call 'officia iuris' and 'officia virtutis,'²² in the first case we have duties formulated with precision and which bind more tightly, whereas in the second case, where we dealing with ethical duties of the good life, one is bound only in a broad way, that does not say how the subject should behave in the specific context.²³ In fact, 'officia iuris' duties are limited only to the external sphere and cannot oblige in conscience.²⁴ In actual practice, they seem to have an undoubtable priority over the good life, so that, according to Arno Anzenbacher, one has, for example, the duty to return a borrowed object to its owner, even if we could make others happy with the same object. This means that we should never violate the principles of justice in the name of the good life. In other words, human rights take precedence over human duties, as they relate to the ethical duties of the good life.²⁵

If we now turn to the Black African view, we see a different way of approaching the problem about the duties described above. We know that the world view of sub-Saharan Africa is fundamentally holistic, without any dichotomy between the sacred and the profane, or between soul and body. Similarly, we find that the field of rights is never to be separated from that of ethics, because everything about human action worthy of the name is intended to enhance life, and individuals and community as a whole. Thus, the fundamental principle of African ethics is life. Rights themselves have no force if they do not serve life, and in this regard they fall within the area of ethics. This means that rights must be justified by an ethics that follows a model based on an anamnestic rationality.²⁶ This expression means that African ethical thinking is structured along a commemorative and narrative pattern in the Biblical sense of the term. It is a matter of taking up again, in community, the words, injunctions, practices, etc. bequeathed by the ancestors, in order to revisit or rehash them in the gut of the community, to test them and make them potentially more suitable and more dynamic to giving abundant life, a life that nobody should be denied.²⁷ If one starts from these assumptions, it is clear that morality and rights in Africa converge, and that ultimately it is the ethical aspect which takes precedence. Rights are neither fixed in writing nor administered in a professional way; it is a matter of the existential relationship to the dynamic speech of one's ancestors and forebearers, subject to a constant exegesis whose sole purpose is to contribute to the growth of the life of the entire community. However, it is not excluded that there is a hierarchy of values, and that failure in some areas should be subject to more severe sanctions than failure is in others. But these sanctions do not imply that there are rights without the good life described in Western ethics. The penalty itself can have no force unless it promotes life which, as we have said, gives African morality its dynamism and is its soul. In connection with the issue of human rights, this means that rights cannot be justified unless they are based on the ethics of

life. This is not a matter of handing over morality to the sphere of religion, so as to appeal to the intention which arises from the will and to which right has no access, while rights – including human rights – would fall within the sphere of positive law without necessarily obliging in conscience.²⁸ If one examines the situation in sub-Saharan Africa concerning the observation or violation of human rights, one wonders about prosecuting those practices discordant with the Universal Declaration of Human Rights, based on Western rationality, for which the morality of rights does not have the same importance as for Black Africa. For the West, for example, it is enough that such a politician put into practice the requirements of the Universal Declaration cited above, even while he fails to observe moral practices such as honesty, the education of children, marital fidelity and so on. For Africans, this not to be separated from public life, but is part of life in abundance; it is a matter, here, of a man who at the same time flouts the rights of man, since there is no right more fundamental than the right to life. Thus, in the former Burundi, the King's advisor, the *Mushingantahe*, could be chosen only on the basis of his honesty in all things, for his integrity in all areas was a sufficient guarantee that a man who takes to heart the common good and will not act selfishly. In other words, if he is so honest, no one will worry whether he will violate the rights of members of the community.²⁹

If this is so, for Africans it is not enough that political leaders meet the requirements of human rights as conceived by the West. In this context, to cite one example, it is inconceivable that a Chief, in the name of private property, will deposit his financial assets in foreign banks, instead of sharing them with his people who live in misery. For Westerners, so long as there is no proof that this leader has embezzled public funds, he has not violated human rights, since he is the owner of his property. At most, there may be an ethical issue that requires that he practice love of neighbor. In Black Africa, however, it is not at all a question of private morality, but of a communitarian ethics that involves human rights. Indeed, being the Chief means giving life to people in the name of God and the ancestors. An official who withholds things for himself, based on the concept of private property, deprives others of their basic right which is, at the same time, the supreme principle of morality. In many Black African ethnic groups, such a leader should be deposed by the people in the name of one's ancestors as he respects neither their rights nor their ethical standards.

Such an example also shows that, by not seeking to fully explore the Black African concepts of rights and morality, Western communities violate human rights instead of promoting them, because they believe that only the Universal Declaration, as it was formulated in 1948, is valid. It is in this way that one comes to supporting corrupt leaders who actually have no interest in the good of the people as entrusted to them by their ancestors, but who rather serve the interests of those outside, who provide, among other things, weapons to further oppress their subjects or to create and maintain

discord with nearby countries, instead of concerning themselves with peace and reconciliation, which are the inalienable heritage of our forefathers.

To better understand this critique, we need to leave generalities behind, and provide specific examples concerning human rights, as they were understood sixty years ago.

CONCRETE CASES IN THE BLACK AFRICAN CONTEXT

We cannot go through all the articles of the *Universal Declaration of Human Rights*, but will limit ourselves to some typical examples in order to highlight the particularity of Africa. Specifically, we will focus on the articles dealing with freedom of conscience and opinion, as well as on the right relative to so-called democratic elections.

The Problem of Freedom of Conscience and Opinion

Article 8 of the Universal Declaration of Human Rights specifically describes, *inter alia*, freedom of conscience, while article 19 speaks of freedom of opinion and expression. When we have the Black African concepts of the individual and the community before us, we see that these articles cannot apply there as they do in the West (which emphasizes the place of the individual over the community, although article 29 shows an awareness of the importance of the latter). That the community plays a lesser role than the individual is highlighted by the Western concept, for which individual conscience is the supreme authority which we must absolutely obey, even if it goes against the entire community. This is, admittedly, a well-informed conscience that is free of any arbitrariness. But if this condition is fulfilled, the individual must fully use his freedom as an autonomous person. For Western theological thinking, this freedom is rooted in God who wants the people to be themselves.³⁰

Such an understanding of conscience, that implies at the same time an individual freedom, cannot be applied indiscriminately to the African vision of the person. We have stressed that, in Black Africa, the person becomes a person through relationships with others. This also applies to the problem of conscience and freedom: the individual is free only insofar as the community in all its three dimensions is free. There is a continuous interaction here. On the one hand, the individual must strive to promote freedom in the community but, on the other hand, the individual himself cannot be free without the community, in turn, transmitting freedom to him. This is not only a *negative* freedom – being free *from* – but also *positive* and relational, in the sense of “being free *for* and *with*.” Once the individual is free, he has a duty at the same time to free the community, and vice versa.³¹

Often we hear that in Africa the influence of the group is so strong that the individual acts under pressure from the latter. Without denying that abuses occur, we must emphasize that what is seen from the outside does not necessarily reflect what actually occurs. It is true that, during lengthy

discussions, decisions are often made which determine the conduct of the individual. However, sometimes the community fails to fully convince the individual, and that he agrees to comply with the opinion of the community, knowing that his *inchoate* freedom will be able to grow with the support of all. Thus seen, it is not a matter of coercion, but a free act, although still in an embryonic state. This means at the same time that, in matters of conscience, the individual is not necessarily the last resort, but there are cases where the community can show the way forward and serve as the supreme authority for the individual.

Similar reasoning is found concerning freedom of opinion and expression which the *Universal Declaration of Human Rights* speaks of in article 19. According to the Black African understanding, opinion and expression have no legitimate place except so far as they are able to encourage community life. We have emphasized: It is the community, during a lengthy discussion, which is empowered to determine whether a view generates life or whether, instead, it produces death. The Bambara of Mali talk about the immensity of the word. As such, 'the word' covers all of humanity. Moreover, as already stated, it has various functions, so that such a word is too broad for a single mouth. It must be shared by several so that one can appreciate its depth. Only after this form of sharing, in the form of a lengthy 'mulling over,' is the word available for public use.³²

Given what has been said, one will easily understand that the form of freedom of opinion and expression introduced by the West often does not contribute to the welfare of Africa. For example, modern media, which in the name of this freedom spread all kinds of opinions (particularly among people with a very different rationality than that of the Euro-American world), do not contribute in any way to the flourishing of the black continent. Such words are not reflected upon by the community and can have a deadly character if we consider, for example, political propaganda or advertisements of all kinds, including the pornography among children and youth. A word not mulled over by the community is harmful and destroys interpersonal relationships; this has been highlighted by the publication of the caricatures of Mohammed by the Danish media not so long ago. In the African context, in this case, there was no sensitivity to other cultures and religions, since the only rationale that prevailed was that advocated by human rights modeled on Western culture, where one has almost nothing but a private sphere.

Election Law and the Freedom to Vote

Article 21 / 3 reads: "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures." In the Black African context, one welcomes the accent on the people, who ground the authority of the rulers. But at the same time we will not find relevant the

procedure prescribed for the act of the people. One finally wonders in the name of what principle can the West prescribe to all cultures a way of acting that is its own by reason of its own experience, an experience that can be only contextual. We have shown throughout this study that, in Africa, discussion in community is essential and vital. Thus, with regard to how to proceed in politics, Africans have always practiced 'talking in community' (*palabre*). Even where there was a hereditary monarchy, the Chief or the King was not an absolute authority, but would be surrounded by advisers chosen by the people. This choice was not determined by a vote, but in the exchange that took place during a lengthy discussion. The candidates proposed by members of the community had to meet certain qualities which, as mentioned above, included living a virtuous life. This is highlighted by the institution of "*Umushingantahe*" in Burundi, which has already been discussed. A *Mushingantahe* appointed by the people was subjected to a sort of "novitiate," a period when the people watched him in his private life and in his relations with others. Only after he had passed this novitiate was he 'consecrated' for life as councilor of the King and representative of the people. Should he disqualify himself, the same people who had 'consecrated' him would undertake the steps necessary to remove him.³³ A similar practice can be observed among the Beti of Cameroon, which is a nation without a Chief. Only those possessing ethical qualities can be representatives of the people.³⁴

If we start with these African practices that make the practice of lengthy discussion (*des palabres*) the basic tool for organizing political life, we will understand in part the difficulties that Africans have in participating in the democratic system as advocated by the West. In these lengthy discussions, we 'deconstruct' speech so that any machinations are eliminated. In the case where one votes without any careful discussion in putting the various separate opinions in the foreground, especially when the vote is secret, one is unable to detect the poison that destroys the community. Moreover, the vote that bases itself only on the will of the majority, will not be able to expose evil intentions or ambitions that undermine the common good. On the other hand, in the African *palabre* system, decisions are not the result of a majority but of a consensus that seeks to avoid humiliating the opponent, and which, at the same time, is able to unite all the parties. In this way, one does not find malcontents who, subsequently, might challenge decisions, unlike today where we see people rallying ethnic groups against each other. It seems that Western-style democracy is not assimilable by Black Africans precisely because they live between the two systems: the African tradition, on the one hand, and Western modernity, on the other. In the final analysis, it is the African tradition that prevails; as "culture-core," it constitutes the soul of African life, and transforms in its own way everything that comes from the outside.³⁵ Since it is so, the international community should now cease requiring compliance with democratic standards along the lines established by the *Universal Declaration* of 1948. More precisely, there is almost no

point in sending foreign observers to each round of elections in order to ensure that standards in effect in the West are applied in Black Africa. We should encourage Black Africans rather to find their own democratic way, rooted in their own traditions, and which would better respect the dignity of each person. An attempt such as the *Truth and Reconciliation Commission* of South Africa, established in 1995 to discuss issues raised by the policy of apartheid,³⁶ or the 'national conferences' that several countries in Africa held after the fall of communism,³⁷ were modern practices which have attempted to update the traditional practice of lengthy discussion (*palabre*). These attempts should not be abandoned, even though some of them have not been entirely successful. They are rather a call to intensify the study of African tradition in order to bring that tradition into the service of modernity, a modernity which is increasingly exhibiting a culture without humanity.

CONCLUSION

The above considerations call for both the international community and Black Africans themselves to review the current practices on human rights as stipulated sixty years ago. At the time that this Declaration was born, one had no doubt consulted all the nations recognized at the time, and the whole was based on Western culture. Today the question arises, to what extent the consent of these few nations is representative of contemporary multiculturalism. Paul Ricoeur, as we noted at the beginning, is right to suggest a new debate to revivify the *Universal Declaration of Human Rights* with the appearance on the stage of other states with different cultures and rationalities. This is not to suggest putting aside what is in effect, but to revisit the implementation of abstract principles that cannot be done uniformly in different contexts. This latter point must be strongly emphasized today, in the age of globalization. The former practice runs the risk of reducing the world to a monoculture that can ultimately mean only the crushing of the weakest by the most powerful. If we are so insistent on biodiversity in ecological and environmental policy, it makes no sense that, in the area of culture, diversity is unimportant. So far as one requires all nations to conform to a monoculture, we have instituted a new imperialism, and claims to promote human dignity become thus a resounding failure. Respect for another culture in its own particularity is indispensable for a lasting peace among nations. Speaking of human rights implies also taking account of cultural rights,³⁸ otherwise the dignity of others is not respected. This makes it imperative that an intercultural dialogue take place, to learn about different rationalities before coming to determine what the human rights are in a particular area. The recent example of the blunders of the French charity, Zoe's Ark, in Chad is only a confirmation of this, when it came to their efforts to arrange for the adoption of children who were allegedly orphans. However, talking of orphans in sub-Saharan Africa presupposes already having good information on the traditional family

system. Parents – father, mother, brothers, sisters, etc. – are not to be understood in the Western sense, for all can be parents, grandparents, children, brothers and sisters of everyone else, particularly within a clan group. This also affects the understanding, for example, of article 26 / 3 of the *Universal Declaration of Human Rights*, which gives to parents first the right to choose the education to be given to their children.

We can therefore conclude that the multiculturalism of the modern world, which was not taken into account in the setting of human rights in 1948, should lead the different states of our time to revise the concept of what was hitherto believed to be definitive and universal.

NOTES

¹ Cf. I. Kant, *Die Metaphysik der Sitten*. Rechtslehre AB 45, in *Werke in sechs Bänden*, W. Weischedel (ed.), Bd. IV, p. 345. See the commentary by O. Höffe, *Immanuel Kant* (München, ²1988), p. 218; B. Bujo, *The Ethical Dimension of Community. The African Model and the Dialogue Between North and South* (Nairobi, 1998), pp. 144-145. Cf. W. Schild, “Menschenrechte,” in U. Ruh, D. Seeber, R. Walter (eds.), *Handwörterbuch religiöser Gegenwartsfragen* (Sonderausgabe) (Freiburg i. Br., ²1989), p. 270; K. Hilpert, “Menschenrechte,” in *Lexikon für Theologie und Kirche* ³ Vol. VII, pp. 120-125.

² Cf. L. Swidler, “Die Menschenrechte. Ein geschichtlicher Überblick,” in *Concilium* 26 (1990), pp. 98-104; here, p. 98.

³ Cf. B. Bujo, *The Ethical Dimension*, p. 144.

⁴ Cf. *Summa Theologiae*, I q. 3 a. 1 ad 2; q. 93 a. 4c.

⁵ P. Ricoeur, *Soi-même comme un autre* (Paris, 1990), p. 335.

⁶ *Ibid.*, pp. 335-336.

⁷ *Ibid.*, p. 336.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Cf. Among many others: J. S. Mbiti, *African Religions and Philosophy* (London/Nairobi, 1983); B. Bujo, *Wider den Universalanspruch westlicher Moral. Grundlagen afrikanischer Ethik (Quaestiones disputatae 182)*, (Freiburg i. Br., 2000); id., *Plädoyer für ein neues Modell von Ehe und Sexualität. Afrikanische Anfragen an das westliche Christentum (Quaestiones disputatae 223)* (Freiburg i. Br., 2007).

¹¹ For those unfamiliar with the term, it is important to emphasise that the concept “not-yet-born” is not equivalent to the term “unborn”; the latter is

simply an absence, while the term “not-yet-born” is dynamic, and contains a hope for that which is to come.

¹² On this, see B. Bujo, *Plädoyer für ein neues Modell*, pp. 22-45.

¹³ Cf. some examples in B. Bujo, *Wider den Universalanspruch westlicher Moral*, pp. 121-133. See, as well, the study by F. C. Ezekwonna, *African Communitarian Ethic: The Basis for the Moral Conscience and Autonomy of the Individual. Igbo Culture as a Case Study* (Bern, 2005).

¹⁴ We have discussed this question extensively in our study *Die ethische Dimension der Gemeinschaft. Das afrikanische Modell im Nord-Süd-Dialog* (Freiburg i.Ue/Freiburg i. Br., 1993), pp. 134-146, particularly on pp. 143-145.

¹⁵ Cf. O. Höffe, *Vernunft und Recht. Bausteine zu einem interkulturellen Rechtsdiskussion* (Frankfurt a. M., 1996), pp. 56-60 and 64.

¹⁶ Cf. H. Schmidt (ed.), *Allgemeine Erklärung der Menschenpflichten. Ein Vorschlag* (München/Zürich, 1997), particularly pp. 21-45.

¹⁷ Cf. H. Schmidt, “Zum Geleit,” in his *Allgemeine Erklärung der Menschenpflichten*, ed. H. Schmidt, p. 7.

¹⁸ Cf. *ibid.*, pp. 8-9.

¹⁹ Cf. *ibid.*, p. 11.

²⁰ Cf. A. Anzenbacher, “Menschenrechte – Menschenpflichten. Eine ethische Reflexion,” in T. Hoppe (ed.), *Menschenrechte – Menschenpflichten* (Bonn, 1999), pp. 6-23, at p. 7.

²¹ Cf. I. Kant, *Metaphysik der Sitten*, ed. Wilhelm Weischedel, Bd. IV (Darmstadt, 1984), A 11-14. See the discussion in Anzenbacher, “Menschenrechte – Menschenpflichten,” pp. 8-11.

²² Cf. Anzenbacher, “Menschenrechte – Menschenpflichten,” p. 6.

²³ Cf. Anzenbacher, “Menschenrechte – Menschenpflichten,” pp. 13-15, which is based on the view of Kant, *Metaphysik der Sitten*, pp. 18-23.

²⁴ Cf. J. Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Frankfurt a. M., 1992), p. 567. Here the author explains and confirms the theory of Kant, and adds that the law must be understood as a compensation for the weaknesses of an autonomous morality: « Wichtige Merkmale des positiven Rechts werden verständlich, wenn wir das Recht aus diesem Blickwinkel einer Kompensation der Schwächen autonomer Moral begreifen » [“Important aspects of positive law become intelligible if we conceive of law from this

angle of compensating for the weakness of an autonomous morality.”] (p. 567).

²⁵ Cf. Anzenbacher, “Menschenrechte – Menschenpflichten,” p. 15.

²⁶ “Anamnestic reason attains its rationality in the form of the remembrance of someone else’s suffering.” See Johannes Baptist Metz, *A Passion for God: the mystical-political dimension of Christianity*, tr. and ed. James Matthew Ashley (Paulist Press, 1998), p. 145.

²⁷ For more details, see B. Bujo, “Die Frage nach der Entstehung von Moral und Recht aus nichtokzidentaler Sicht,” in U. Fink and R. Zihlmann (eds), *Kirche – Kultur – Kommunikation. Peter Henrici zum 70. Geburtstag* (Zürich, 1998), pp. 67-73.

²⁸ Cf. Anzenbacher’s explanations in “Menschenrechte – Menschenpflichten,” p. 21.

²⁹ For a discussion of the institution of the *Bashingantahe*, see Ph. Ntahombaye, A. Ntabona, J. Gahama, and L. Kagabo (eds.), *L’institution des Bashingantahe au Burundi. Etude pluridisciplinaire* (Bujumbura, 1999).

³⁰ Cf. Saint Thomas d’Aquinas, *De veritate* q, 5 a. 3 which speaks of man willed by God “propter se et in specie et in individuo”.

³¹ For more details, cf. Bujo, *Die Ethische Dimension*, pp. 60-73, id., *Wider den Universalanspruch*, pp. 150-155.

³² Cf. E. E. Uzukwu, *A Listening Church. Autonomy and Communion in African Churches* (New York, Maryknoll, 1996), pp. 127-129.

³³ Cf. the studies by A. Ntabona, “Le concept d’Umushingantahe et ses implications sur l’éducation de la jeunesse aujourd’hui au Burundi,” in *Au Cœur de l’Afrique* 25 (1985), pp. 263-301; id., “Institution des Bashingantahe à l’heure du pluralisme politique africain,” in *Au Cœur de l’Afrique* 59 (1991), pp. 263-284.

³⁴ Cf. S. Y. Mengue, “La conception de l’autorité dans la tradition beti du Cameroun et dans la tradition ecclésiale de Vatican II. Approche éthique,” *Mémoire de Licence en théologie* (Fribourg, 2007); id., “Les Beti : un modèle pour fonctionner autrement ?,” in *Universitas. Le Magazine de l’Université de Fribourg, Suisse*, juin 2007, p. 31.

³⁵ Concerning this notion of the “culture-core” [*culture-noyau*], cf. F. Koller, *Entwicklungszusammenarbeit und Ethik – eine Evaluation. Das Beispiel eines Dezentralisierungsprogramms in Burkina Faso* (Bern/Stuttgart/Wien, 2007); B. Bujo, “Culture africaine et développement: un dialogue nécessaire,” in *Finance & the Common Good/Bien Commun* 28/29 (2007), pp. 40-45.

³⁶ See the excellent commentary in F. Koller, *Entwicklungszusammenarbeit und Ethik*, pp. 119-124.

³⁷ Cf. M. R. Afan, *La participation démocratique en Afrique. Ethique politique et engagement chrétien* (Fribourg/Paris, 2001).

³⁸ Cf. M. Borghi and P. Meyer-Bisch (eds), *La pierre angulaire. Le « flou crucial » des droits culturels* (Fribourg/Suisse, 2001).

CHAPTER X

RESPECTING CULTURAL DIVERSITY: CHINA AND THE WEST¹

FRANÇOIS JULLIEN

THE PLURALITY OF CULTURES: RESISTANCE TO STANDARDIZATION

Will the world of the future be one with a globalized culture, that is to say, uniform, standardized, and sterilized? We would be bored in such a world. But let us distinguish the universal from the uniform: the universal is a requirement of reason, one that was developed by science and the discourse of truth, while the uniform is simply the result of production: about that which is less expensive because it is produced on an assembly line. Today, however, thanks to technology and the media, a uniformity in lifestyle has come to cover the planet. Around the world, we invariably find the same shop windows, the same hotels, the same keys, the same clichés, and the same signs of happiness and consumption. Closed in on itself, the (global) whole does no more than reflect itself. For we do not believe that such a standardization can be limited simply to material goods. No, it invades the imagination and diminishes it. The last time I was in Beijing, for example, I saw stacks of Harry Potter books, filling the bookstores, just as I had seen when leaving Paris. The dreams of teenagers worldwide will, from now on, be following an identical format.

We know, however, that plurality is intrinsic to the being of culture. Indeed, there is a continuous, contradictory double movement: culture is constantly both homogenizing and diversifying; mixing up and emerging; de-identifying and re-identifying itself; complying and resisting; imposing itself and being divided. We have consistently seen cultures borrow, assimilate, merge into larger groups, and being standardized, but also the reverse: a continuous re-specification and re-individuation. But does the plurality of cultures not have to agree on an alternate mode, on a unitary phenomenon, such as do so many of the world's cultures? No: *a* culture that becomes *the* culture in the singular, whether it be that of a country or of the world, is, above all, dead.

Without doubt, this is one of the most significant discoveries that we have made in the last century, Asians and Westerners alike. Before 'East' and 'West' met, we each thought that our culture was "the" culture. We never suspected that we articulate our questions and our concepts from the individuality of a language and a history of thought. Philosophy in Europe believed that it was asking such questions for the first time, and had no idea of the biases that this implied. But more recently, these

ethnocentrism have come to crack under the reciprocal pressures they exert, and we find ourselves as cultural subjects. We discover that there are other ways to question the world, and even that we can think without questioning: the Taoist sage is cautious about making an enigma of the world, in order to better follow its course, while the Greek philosopher pursues an insatiable ‘Why?’ We learn that when we say “thing” – the most elementary word in the English language, a word at once so compact and the least distinctive, inheriting from the Latin ‘*res*’ the sense of the material and property, the Chinese say: “east-west” (*dong-xi*): not a unitary term, but already one suggesting a relationship. On the one hand, Europeans tend towards a thinking about substance – a reflection on being, engaged in by “ontology”; on the other, Asians are led to consider phenomena as interactions, and the world as a set of polarities. Or when Westerners say “landscape” (land-scape, Landschaft, paesetto, paesaggio, etc.), they are favoring a view of a subject cutting a piece of “country”, as it is grasped by simply looking at it, and as it shapes the horizon. In Chinese, however, one says: *shan-shui*, “mountain(s) - water(s)”, that is to say, again an interaction between two poles: those of Upper and Lower, or vertical and horizontal, of what is compact (solid: the mountain) and fluid (elusive: water), the opaque and transparent, the immobile and moving. The Chinese have already entered into the vast cosmic tension.

However, what is the relationship of the cultural subject to its culture, of culture existing only as diverse cultures? What does it mean, and how can I even say “my” culture? Let us agree that the cultural subject is neither passive nor possessive. Not passive: I belong to a cultural community (language, history, religious tradition, generation, etc.), as when I say “my” family, but it is a belonging-dependence that I can just tolerate as an “atavism.” I am called instead to rework, to transform, and thus to diversify, since this is the essence of culture. This cultural subject is not, moreover, possessive; when I say “my” culture, I can understand it less as property; most commonly, it is in meeting another culture that we are aware of the culture from which we come, where we were raised, that is to say, through which a subject is awakened. For me, for example, it was only in pursuing my studies in China when I was a young Hellenist, that I could, reflecting on ‘my’ culture, begin to see a little better what makes Europe what it is. It is there that I found, to begin with, one of the challenges of my work: to show, from the Chinese perspective, those implicit choices, largely buried, that made “Europe,” but which are so well assimilated in Europe that we do not notice them any more – from which we can rethink our questions and restart philosophy.

I propose to consider the diversity of cultures, therefore, not in terms of difference, but from the perspective of “*gap*.” Focussing on the difference between cultures leads to thinking the cultural from the perspective of specificity, and leads to making cultural membership an argument about identity – something suspect: we know in France to which ‘communitarian’ results that inevitably leads. But to consider the plurality

of cultures in terms of a “gap” makes them look more as open possibilities, inventive matters which can be exploited fruitfully. These cultures see themselves as a resource in which we can freely move for us to re-examine ourselves – and this is even the opportunity of our generation to reverse the globalized sterilization that I began by denouncing. So, given that we care, albeit a little too late, at the planetary scale, about the natural resources which we fear possibly drying up, why do we not also concern ourselves about these cultural resources that we see now making themselves sterile, under a globalized normativity, and gradually buried or, worse, misrepresented: these shows of pseudo-traditional and of Disneyland culture, which we build here and there, you and us, something so kitschy, as if we were so anxious preserve the “tradition” ...

WHAT IS THE UNIVERSALITY OF HUMAN RIGHTS?

One cannot seriously defend the plurality of cultures without recognizing to what conflicts it can lead, for example, Chinese and Europeans, especially regarding the issue of human rights. But we Europeans must admit that the concept of human rights has a singular history which is that of Europe: it takes form, particularly with Hobbes, in the seventeenth century, in the conception of a natural right which no longer consists of multiple legal relationships linking all beings (as in Roman law), but of liberty as the single and fundamental right. Then it makes its way through the notions of work and property (Locke) and that of a being naturally endowed with freedom and, thus, equal, but which society always threatens to chain (cf. Rousseau). As such, human rights are linked to the historical promotion of the individual in European bourgeois society as well as the ideas of social contract and of happiness as ultimate end of humanity. As such, they are the object of a double abstraction – of “rights” and “man.” Rights: from the reciprocity of relationships, the concept of right emphasizes the side of the subject, by focusing on the claim and the confrontation embodied in the source of freedom; man: it finds itself isolated from the loving context – from the animal to the cosmos, and the social and political dimensions are the product of a subsequent construction.

The rights of man thus separate man from the rest of the universe, and make his liberty, as a subject, the primary value. Do we find rights as such in other cultures? Clearly, the answer is no. Other cultures – even the largest, such as that of the Chinese – have favored the integration of man in his world. I propose, then, to generalize that there are thus two cultural logics that confront one another: that of emancipation (through the universality of human rights) and that of integration (through belonging: family - corporate - ethnic - cosmic). Illustrating the second, we have the “harmony” of the Chinese tradition. The first conception begins with the individual design, the second with the collective. Both are understandable, but they arise from different, even opposite, options. The question is whether, in the future, they will remain irreconcilable.

Despite what they officially claim, human rights belong to a distinctive ideology of which, even in Europe, there is little awareness: the withdrawal from the cosmos, the loss of harmony, the abstraction of the individual and the determination of his irreducible status as “image of God,” the priority of demands on the community, etc.. If human rights have benefitted from a ‘sanctification’ which absolutizes them, it is also because of an abandonment of the sacred divine in Enlightenment Europe, and the attempt to transfer its ‘transcendence’ to them. Does this mean relativizing them (as one is tempted to do today, in the international situation), either by seeking to find them, in one form or another, in other cultures, or by agreeing to dull their edge, to see in them only a “symbol”? I think not: if they are not absolute, human rights are empty. But is their claim to universality, since we know through what historical conditioning they were born, not unreasonable?

I propose that Chinese and Europeans agree on a universality of human rights, taking into account the dual convenience of their design. Take, first, that of their radicality: human rights take hold of the human being at its most elementary stage, at the level of existence, considering the human in its final condition, ahead of all others, which would therefore be unconditioned: as simply that one is born. However, in this light, it is not so much the individual (who is a particular ideological construction which one can easily show is arbitrary), as the fact that it comes from man: if man is at issue, an imprescriptible duty, a priori, appears.

The universalizing capacity of human rights draws also from another fact: that their negative character (i.e., that against which they stand) is much broader than their positive extension (i.e., that which they support). There is, in other words, a dissymmetry between the two sides of the concept. Their positive content, that is to say their relation to a particular ideological belief, we know is debatable – i.e., the myth of the primacy of the individual, associations as contractual relationships, etc.. Given that these are myths, I do not see why Europeans would use them to teach other cultures how to live. However, on their negative side, that of refusal to the intolerable – to say no and to protest – human rights are a tool that can be passed from hand to hand, and can become common across cultures. In their capacity to say no to oppression, they manage to bring out something unconditioned in every historical condition. For, by their absence, that is to say when they are no longer respected, they clearly show us an absolute that we could not but acknowledge positively, without falling immediately into some ideological bias. If, because a father had stolen an apple, one sentenced his child to death, this “absolute” would bring out, everywhere in the world, the same cry against this unacceptable “punishment.”

Proposing, as I just did, the term “universalizing,” I wish to emphasize two things. Instead of assuming that the rights of man possess a universality from the outset, by I know not what innateness, I would say that

the universal is to be found there, in the process, continuing, ongoing (but never completed): in the process of realizing itself. The universal is before us as a horizon. On the other hand, instead of being a property that one passively possesses, human rights are *agents*. Both making and promoting, they are vectors of the universal, not by reference to or under the control of some instituted representation. They are no longer to be reevaluated on the possible extension of a truth, but through their particular opening, culturally divided, they elevate from the universal to humanity.

Can we say, however, that only (European) human rights are universalizing? Think of what we read in Mencius: anyone, suddenly seeing a child about to fall into a well, is seized with fear for him and makes a motion to grab or restrain him. This movement, which springs from us, is completely reactive; it is something we cannot not do. Yet, Mencius continues: he who would not react in such a way, who would not stretch out his arms to save the child, is “not man.” You see, that rather than start from a positive definition of man (which would be ideologically conditioned and so specific), the Chinese thinker refers to him ‘negatively,’ by saying “he who is not a man.” He also brought into view the notion of something surging outward, something unacceptable, which in itself has the uncontrolled character of “humanity,” a vocation of universality. This irresistible refusal to let the child fall into the well emerges as something universalizing; Europeans like myself see ourselves fully both in this experience and in this analysis.

DIA-LOGUE

When we think about the future evolution of culture, we can foresee two broad scenarios. On the one hand, given the current tensions between cultures, especially concerning human rights, we see a “shock” or clash – this is the thesis of the American conservative, the late Samuel P. Huntington. Huntington, however, is surely wrong to take the notion of “cultural identity”, defined by difference and defended by the community concerned, as an inevitable source of antagonism: he has no idea of the fruitfulness of cultural differences as resources to exploit. We see clearly that, nevertheless, these gaps have not stopped working and transforming history. Hence, we demur from his alarmist vision. On the other hand, we can dream, conversely, of a great synthesis of cultures, sharing what may complete each: the Orient and the Occident, for so long silos of human experience, are finally wed in a great symbolic marriage of “East *and* West.” But, at the same time, this “*fin heureuse*”, this happy ending, which sees the extinction of tensions between cultures, would also reabsorb, under its ecumenical covering, the plural that makes them work. And in what language will this final integration occur? The tensions between cultures are also a source of activation.

Distrustful of both this irenicism and this alarmism, we inevitably fall back on the hope of a “dialogue.” But let us admit that dialogue seems

to be a notion hopelessly weak in its appointed use, vis-à-vis cultures and their lines of confrontation. Would it not conceal, easily, the relations of force which, lightened, do not disregard themselves as such? Can values, if they are absolute, be traded off one for another? It is not even that, if each reduces the claims of his own values, or moderates his commitment to them, that peace comes. (Why does Europe haggle over so much or so little about freedom?). The solution is, in other words, not compromise, but understanding. Tolerance, which today one incessantly says is of the utmost urgency among nations, can only come from a shared understanding: that each culture, each person, makes intelligible in its own language the values of the other and, consequently, reflects them – and, so, works with them.

It is therefore urgent to extricate the notion of “dialogue” from the ideological softness that it so often entails, and give it again a robust sense. And for that, let me go back to its Greek sense that its Chinese equivalent, “duihua,” does not completely express. Dialogue is heard, first in the “dia” – the distance of the gap – between cultures that are necessarily plural, thus maintaining a tension in what is separated: a dialogue, as the Greeks taught us, is even more rigorous and fruitful if it knows how to put the antagonisms face to face, rather than dodge them. Then, it is heard in the “logos,” whereby all cultures maintain among themselves a principle of communicability, and that all the cultural is intelligible without loss and without residue. For while dialogue is never as neutral as they say, and while it is even skewed by power relationships and oblique strategies, this does not prevent it from being operative. But operative in what way? Not that one wants to agree with another at any price, but simply because, in order to dialogue, it is imperative that each person take down the boundaries around his position, put it into tension, and allow the possibility of a face-to-face meeting. Not that such a dialogue will reveal a pre-established universal, but because all dialogue *de facto* forces everyone to reexplain their own ideas in order to enter into communication and, therefore, also to reflect.

If I insist on this character of the cultural as completely intelligible, it is that I want to react against the temptation we see developing here and there around the world, but also in China, not only to elevate cultural values into national values, but also to take them as not fully communicable. Cultures then enclose themselves in their “mystery” and their “essence”; this gives rise to a “cultural nativism” (*bentuzhuyi*), invoking an “inbreeding.” Thus, I fear that such notions as the “centrality” of the Chinese, or the “Chinese spirit,” or “Asian values,” come to enclose themselves in terms of identity, believing them as carrying an unchanging tradition along with an irreducible originality. In this case, the cultural *comes out of the intelligible*, and finds itself misrepresented, because it is restated as “Nature”; the possibility of dialogue is closed, and all the “harmony” that is then said about the relation of cultures would simply be artificial.

But the fact that we are here, face to face, in our respective working languages, and seeking to understand one another across the gap between our respective positions, fortunately proves otherwise.

NOTES

¹ This text was originally presented at a conference held in Beijing on 25 April 2008, at the Institute of Foreign Affairs, in the context of a lively debate concerning the question of human rights following the Chinese intervention in Tibet.

CHAPTER XI

RELIGIOUS FREEDOM IN THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND THE EVOLUTION OF THE CATHOLIC CHURCH

MARIA D'ARIENZO

INTRODUCTION

The role of the Catholic Church in the promotion of human rights has found a constant echo in its words of appreciation of, and support for, the Universal Declaration of Human Rights of 1948, voiced by Popes over recent decades. The more mature awareness that has been acquired in political and social consciousness of the dignity of the human person – “that historically and culturally has been expressed through the progressive identification and upholding of human rights proclaimed in solemn international Declarations”¹ – constitutes, as John Paul II observed, the “point of encounter for a fruitful indeed necessary dialogue”² between the Church and the contemporary world. The upholding of the supreme value of the dignity of the human person has made possible the linking of a secular vision of the world with the vision of Catholicism, and to which the influence of the Catholic natural law tradition of Maritain has made a by no means small contribution. This is borne witness to, *inter alia*, by the important role that he played on the occasion of the drafting of the Declaration of 1948. For that matter, as John Paul II clearly specified, “it is not out of opportunism or exploitation that the Church, ‘an expert in humanity’³, rises to the defence of human rights. It is out of an authentic Gospel commitment, to which it remains faithful... opting for man seen in his integral being.”⁴ Emphasis is thus placed on the relevance of human rights in Catholic doctrine, whose foundation is contained in the Gospel message itself, from which the Church “draws inspiration and the criteria to work and increase peace and justice against all forms of slavery, violence, aggression against man and his rights.”⁵ Because it is anchored in the Christian vision of man as a creature made in the image of God, the promotion of the ethics of human rights is inherent in the evangelising mission of the Church in the world. It would thus appear to be possible to perceive a dialectic dynamic between the Catholic anthropological approach and its liberal counterpart in the interpretation of the principles on which the Declaration of 1948 is based, which is expressed in the official position of the Church in an approach that is at one and the same time one of moral support and “critical awareness.” This appears evident with reference above all else to the right to religious freedom, which is seen in the Catholic vision of human rights as being of primary importance as regards the other rights

which the Church approaches from a dual perspective: the theological perspective of the constitutive freedom of the Church as an institution of God, and the perspective of natural law which consists of the free exercise of the religious dimension of the person. The right to freedom in the field of religion is thus the perspective in which are considered the reflections below on the questions and issues connected with the relationship between religious rights and human rights.

AUTHORITY AND FREEDOM IN THE RELIGIOUS AND CIVIL SPHERES

Within the context of the studies of the history of Christianity, with reference to religious tolerance and freedom, it appears evident that juridical and theological debates have been essential moments in the understanding of the meaning of natural law concepts in a contemporary framework and in ascertaining their specific contents. The exploration of religious contexts, above all those of the sixteenth century, also allows it to be emphasised that natural law was the theoretical root for the upholding of freedom of conscience as an expression of the specific essence of man and, in the ultimate analysis, of his dignity. As is known, it was specifically the theological-juridical reflections of the second wave of Spanish Scholastics, which arose following the Christianisation of the New World, that had a determining role in the development of the doctrine of human rights through the reworking of medieval natural law by Las Casas in defence of the rights of the native peoples against the excesses of colonisation, but above all else with the explicit upholding of the subjective rights of all men by Francisco de Vitoria.

The lively debate that developed within the Reformed world against the intolerance of ecclesiastical and civil power in relation to heretics, helped to underpin, for that matter, the upholding of the principle of freedom of conscience and religion as upheld in modern constitutional and international charters.

The theorisation of the inability of civil authority to punish those seen and condemned as heretics by ecclesiastical orthodoxy was consequentially connected, on the one hand, with a condemnation of the illegitimacy of coercion and violence in the name of religion, and, on the other, with the identification of freedom of conscience as a limit to the power of the civil magistrate. Freedom of conscience was thus upheld in relation to ecclesiastical authority and institutions before this was done in relation to civil authority and institutions.

The most effective defence against the death penalty being inflicted on heretics, and at the same time a more incisive upholding of the nexus that existed between the dignity of man and freedom of conscience, is that expressed by Sébastien Castellion in *Contra libellum Calvinii*, a work written in response to the publication in which Calvin had sought to justify his determining role in the sentencing to be burnt at the stake of the Spanish

anti-Trinitarian Michele Serveto: “to kill a man does not mean to defend a doctrine but to kill a man. When the Genevans put Serveto to death they did not kill a doctrine, they killed a man.”⁶

This approach allows a more careful reconsideration of the theological aspects, as well as the juridical-political aspects, that underlay the drawing up and development of the concepts of free self-determination in the religious field as an expression of the dignity of man, leaving aside its recognition by a positive legal system.

The right to freedom of religion as a human right constitutes, in this sense, a juridical-regulatory formalisation of the guarantee of the human person in relation to powers external to him, whether civil or ecclesiastical, inasmuch as it is rooted in the dignity of the person itself.

RELIGIOUS FREEDOM IN THE UNIVERSAL DECLARATION OF HUMAN RIGHTS OF 1948

A historical-conceptual reconstruction of human dignity as the foundation of freedom of conscience also allows a clarification of the problem of interpretation of the specific contents of the right to religious freedom referred to in the Universal Declaration of Human Rights of 1948 in article 18, together with freedom of thought and conscience.⁷

What are traditionally defined as ‘freedoms of the spirit’ are comprised in an overall way as aspects that are not separate from a single right whose specific subject is free determination on the part of everyone in the sphere of religion.

From a terminological point of view, the right that is formulated in article 18 of the Universal Declaration of Human Rights of 1948 is narrower than definitions in constitutions which envisage their protection in individual countries, embracing the various dimensions in which the spiritual orientation of man takes shape and develops in a relationship of interconnection that is one of both specification and complementariness. The three aspects in which the right enunciated by article 18 is expressed, indeed, go from freedom of thought – that freedom to form one’s own beliefs in the field of religion, that is to say the freedom to have one’s own vision of the world and of life – to freedom of conscience – as freedom to match one’s own behaviour to one’s inner beliefs and to profess one’s own faith independently of any external conditioning – and, lastly, the freedom of religion which more strictly concerns the external expressions of one’s own adherence to a religion as the private and public exercise of worship and propaganda.

In this perspective are indicated, albeit not precisely, the specific contents of the right to freedom in the sphere of religion, understood substantially as freedom to choose, to express and to change one’s own creed. The unitary approach to these three aspects, which it is difficult to separate, allows us to understand within the sphere of the international protection of freedom in the religious domain, both the options of a spiritual

character and specifically religious beliefs, as well as the choice not to have a religion, including, therefore, also agnostic or atheistic positions.

Yet it is true that in the history of the West the process involving the secularisation of politics has taken place through the guaranteeing of freedom of conscience understood as immunity from external coercion as regards individual adherence to a confession. In this sense, religious freedom was established in the first instance as the freedom of believers. Only subsequently was it upheld in the sense of freedom in the religious sphere, including thereby also the freedom not to have or not to choose a religion.

FREEDOM OF THOUGHT, OF CONSCIENCE AND OF RELIGION AT AN INTERNATIONAL LEVEL

The position adopted by the Soviet delegate to freedom of thought and conscience, and the request for an explicit reference to 'religion' in a way that was different to that of freedom of conscience, bring out the lack of definite distinctive criteria as regards these three concepts. In the experience of states with a liberal background, freedom of religion includes in itself that of conscience, as a dimension of individual religious experience, and the freedom to profess one's own faith. It is freedom of conscience, referable both to a believer and to an agnostic or atheist, that in other approaches includes religious freedom understood as the exercise of freedom of conscience in the religious sphere.⁸

In this sense, the juridical notion of the principle of religious freedom, including both the right to have a given belief and the right to express it both in public and in private, implies, with a view to the drawing up of adequate international promotion, an interpretive reconstruction of the meaning of the various dimensions in which this principle is expressed. Whereas freedom of thought and conscience is protected in an absolute way, the external expression of one's own beliefs in social life can be subjected to the limits envisaged by article 29 of the Universal Declaration of Human Rights applicable on a legislative basis "for the purpose of securing due recognition and respect for the rights and freedoms of others" and "of meeting the just requirements of morality, public order and the general welfare in a democratic society."

The debate on the declared juridical universality of human rights and the particularism of cultures, which emerged at the first stages of the process of the internationalisation of these rights, brings out the sensitive questions and issues connected with religious freedom and human rights. Inasmuch as the formulation of freedom in the religious sphere in particular, but more generally the very notion of human rights, traces back its roots to an approach centred around the individual and directed towards his rights, this itself encounters difficulty in being actuated as shared *spiritual ethics* in relation to cultures that have an anthropological vision, a normative universe and a system of values influenced by a moral and religious horizon

centred not around the autonomy of the individual but the social and specifically religious community that is belonged to.⁹

Freedom in the religious sphere is, in fact, defined in the Universal Declaration of Human Rights of 1948 as a prevalently individual right, without any specific reference to religious groups as such. In this sense, article 18 of the Universal Declaration of Human Rights of 1948 reflects, at the level of unitary synthesis, both the Christian and secular roots that define the history of the establishment of the right to religious freedom in the Western world. It is specifically this notion that brings out the distance from each other of various approaches such as the oriental ones – in which the very concept of a subjective individual right encounters difficulty in being accepted inasmuch as stress is placed on the duties of a person in relation to the society to which he belongs more than upon the rights of the individual in relation to state power¹⁰ – or the Islamic approach, where the question of human rights and their foundation is closely connected with the religious perspective specific to Muslim law, revealing a vision of man, of his social and familial relationships and of religious freedom, that is different to that expressed in the Universal Declaration of Human Rights, as is borne witness to by the Islamic declarations on human rights.¹¹

RELIGIOUS FREEDOM IN THE CHRISTIAN WESTERN TRADITION

In reality, the individual approach that characterises the right to freedom in the religious field proclaimed in art. 18 of the Declaration of 1948 reflects the historical-political roots that marked the establishment of this right in the Christian West. The very indeterminateness that exists between freedom of conscience and religion that is present in the international lexicon brings out the juxtaposition of the two distinct, although contemporaneous, aspirations which connoted the dynamics between authority and freedom in the process of the construction of the modern state: that of freedom of faith, claimed by individuals in relation above all else to the Churches or religious confessions to which they belonged, and that of confessional freedom claimed by Churches or religious confessions in relation to political power. The formal convergence of these requests for freedom with the need to end wars and violence perpetrated in the name of religion, and to assure the compactness of the social fabric in the same territory, took practical form during the sixteenth century in Europe in the theorisation of toleration as a pragmatic instrument of government for the creation of a civil community that was autonomous in its aims in relation to the religious community. It is also true, however, that the natural law concept of toleration itself preserves these two meanings – the theological meaning, as a method against the intolerance of religious power in order to guarantee freedom of individual conscience in the field of faith, and that meaning as a premiss for the political legitimation of more than one religion in the same territory which opened up the road to the recognition of confessional pluralism.¹²

The dual conceptualisation of toleration, as an ethical-normative value and recognition and appreciation of diversity in the field of religion, on the one hand, and as a political instrument that assured the freedom of different religious professions, on the other, marked a slow and tortuous pathway that led to the establishment of the right to freedom in the religious field as upheld in modern and international constitutional charters, in whose fixed expression has been included also the promotion and appreciation of the collective as well as the individual dimension of law, and thus of confessional freedom as well. The collective or associative profile of freedom in the religious field was understood, however, above all as a projection of an individual subjective right and not as a collective right whose ownership is first of all attributed to the confession that is belonged to. It is also true that the legal concept of religious freedom was drawn up to protect not just the institutionalised orthodoxy of confessions but also the freedom of dissidents in relation to the religious communities that they belonged to.¹³ This principle is clearly formulated in art. 2 of the Declaration of 1948, where it is stated that universal rights must be respected independently of the particular characteristics of individuals, amongst which is placed religion, thus protecting the primacy of the individual conscience over the rights of religious collectivities.

In this sense, the right to freedom in the religious sphere envisaged by the Declaration of 1948 reflects an approach – specific to the history of relations between religion and politics in the West – which was legally established specifically in opposition to the concept of *libertas Ecclesiae* upheld by the Catholic Church and directed towards maintaining its own corporative existence as an autonomous society in relation to the political power. With the traditional thesis of *societas iuridice perfecta*, which had already been drawn up in the sixteenth and seventeenth centuries, the Catholic Church developed from Pius IX to Pius XII a doctrine of opposition to state interference in its own spiritual domain, reasserting its own independence in relation to all external power.

It is also true that in the sphere of the spiritual and religious perspective – according to which the personal dimension is not independent of that communal dimension which in contrary fashion is said to constitute the necessary mediation between the individual and the divine¹⁴ – the concept of freedom took on specific connotations inasmuch as it was closely connected with the search for truth on which it is based. A freedom founded in an exclusively subjective disposition would not be acceptable, in other terms, from a strictly religious point of view.

RELIGIOUS FREEDOM IN THE ECCLESIASTICAL MAGISTERIUM

The Catholic Magisterium would firmly and clearly reject, therefore, the conceptions of liberal modernity which sought, with different shadings, to reduce the religious approach to the purely individual dimension. Religious

freedom as an expression of freedom of conscience was severely condemned by Gregory XVI in his encyclical *Mirari vos*¹⁵ and by Pius IX in his encyclical *Quanta cura* and in the syllabus attached to it.¹⁶ In the subsequent magisteria, beginning with the encyclical *Libertas* of Leo XIII,¹⁷ a doctrinal framework was developed within which, in the name of the rights of truth against error, the question of freedom was addressed with reference to the distinction between ‘erroneous conscience’ – understood as the complete self-determination of the individual in his own sphere of ethics – which could not be a foundation of subjective rights, and ‘conscience directed towards true religion,’ seen as ‘true freedom’ which the political power had the duty of assuring. Thus the right to freedom in the religious sphere was understood at the outset only within the profile of the right to profess the Catholic faith. Progressively, however, the question was addressed beginning with the inherent rights of the dignity of the human person and with the outlining of a different Catholic conception of the state as a guarantor of human rights and no longer of religious truth. Leo XIII in *Rerum novarum*¹⁸ had already, in relation to the question of workers, referred explicitly to the dignity of man as a foundation of inviolable rights. Pius XI with his encyclicals *Quadragesimo anno*,¹⁹ *Non abbiamo bisogno*,²⁰ *Divini Redemptoris*²¹ and *Mit Brennender Sorge*,²² established the premisses for the development of an ethics of peace founded on the dignity and the rights of the human person as the ‘subject, foundation and end’ of social life to which the state is subordinated that was sustained subsequently by Pius XII against the totalitarian state with a view to the construction of a new international order.²³

An important change in the Magisterium of the Church took place with John XXIII. Although he explicitly stressed the concept of the freedom of the Church to perform its spiritual mission in a way that respected the spheres assigned to the two powers,²⁴ he had already in his encyclical *Ad Petri Cathedram* of 1959²⁵ flagged positive divine law as a foundation of *libertas Ecclesiae* derived from the Church’s nature as a society of divine institution with that freedom attributed by state power to every human organisation that works in civil society.²⁶

This enrichment of the canon natural law concept of *libertas Ecclesiae* was the outcome of an approach that was, compared to the Magisterium of his predecessors, innovative as regards the question of freedom and which found its complete and clear formulation with the Second Vatican Council.²⁷ With the declaration on religious freedom, *Dignitatis Humanae*, the subject of the original and constitutive freedom of the Church to perform its mission, which the Church claimed as a perfect society, was reconnected with the common law of religious freedom which the state is obliged to assure to all men in both individual and associated form because it is founded on the very nature of the human person. The traditional approach of the Magisteria of previous Popes which centred around reference either to true religion or to the rectitude of conscience, and which was still present in John XXIII’s *Pacem in terris*, was thus

definitively superseded. The formulation of religious freedom as a negative right which the civil power had to assure to everyone according to conscience, with the sole limit of the requirements of public order, constituted the outcome of a long and lively debate on the part of the Second Vatican Council²⁸ which allowed the Catholic Church to find language in common with the democratic and pluralist political communities of the time.²⁹ The right to religious freedom understood as 'immunity from coercion' on the part of the state or individuals was also extended to religious communities which "are a requirement of the social nature both of man and of religion itself."³⁰

In the light of the teachings of the Second Vatican Council, the ancient principle of *libertas Ecclesiae* would appear to be placed within common law as a specification of religious freedom understood as collective freedom. However, it was the same text of the Second Vatican Council which indicated that the 'freedom of the Church'³¹ was the fundamental principle of the relations between the Church and civil society and that "a harmony exists between the freedom of the Church and religious freedom which is to be recognized as the right of all men and communities and sanctioned by constitutional law," with a distinction clearly being made between the two concepts. In reality, when reading *Dignitatis humanae* in the light of the pastoral constitution *Gaudium et spes* and the dogmatic constitution *Lumen Gentium* it appears clear that *libertas Ecclesiae* is the fundamental axis around which is organised the legal definition of religious freedom as a right on the civil plane. The Church as communion reaffirmed that it was the bearer of an original and constitutive freedom as a spiritual authority founded by God. However, in harmony with the concept of religious freedom as an expression of the dignity of man upheld in constitutional and international charters, the Church placed it on an external civil plan as an expression of the communitarian profile in which the freedom of Catholic believers takes places, which the state is obliged to assure as with every religious community. For that matter, this approach derived from two foundations which for Catholic doctrine are at the base of the right to religious freedom: "the dignity of the human person which is known by means of the revealed word of God and by reason itself."

CONCLUSIONS

Theological reflection on the subject of religious freedom constituted on the part of the Catholic Church a process of becoming aware of changes derived from the liberal-democratic experience (and not only from that) in contemporary society as is expressly stated in sections 1 and 15 of *Dignitatis Humanae*. Beginning above all else with the Second Vatican Council, there have been many actions and initiatives taken by the Catholic Church in defence of freedom and human rights.³² The explicit references by Popes to the importance of the Universal Declaration of 1948 bear witness to the full agreement of the Church on the shared ideal of the

promotion of the human person, as is evident from the relevance acquired by the subject of human rights in the teaching of the Magisterium. The close connection between the mission of the Church in the contemporary world and the promotion of the human rights proclaimed in the Declaration of 1948 was clearly emphasised by John Paul II in his encyclical in which the whole of the Church is invited to transform itself into a 'critical conscience' of humanity out of respect for the spiritual, and not merely literal, significance of the Declaration.³³

The evangelical mission involving the promotion of man, created in the image of God, which defines in a religious sense the role of the Church in the protection of human rights, brings out the spiritual perspective which naturally animates its action as a 'critical conscience.' The definition of what could be defined as integral humanism is expressed, *inter alia*, in the initiatives and speeches above all of the most recent Popes through warnings about respect for the universality and indivisibility of rights and the unitary character of the spirit of the Declaration. The *ad extra* perspective in which the discourse in human rights is seen by Catholic doctrine allows the Church thereby to reassert its specific conception of the dignity of man founded on the close connection between truth, freedom and natural law that is present in every man and recognisable through reason. In the approach of the Catholic Church it is natural law, which is common to all men, which makes *universal* the rights that are founded on it, whose ultimate source lies in man himself and his natural search for the truth of God in the world.

Thus the centrality of the human person and his dignity, which became thanks to the Universal Declaration of Human Rights of 1948 an "ethical substratum of international relations,"³⁴ constitutes the point of 'convergence' between the secular and religious conceptions of human rights. The common finality of the concrete promotion of human rights, an expression of the dignity of man in his unity and integrality, offers conditions by which the Church in its work "directed towards obtaining freedom for every believer"³⁵ and a greater protection of rights "shaped by the transcendent nature of the person,"³⁶ solicits the promotion of religious-communitarian as well as individual dimension, the public as well as private promotion, of religious freedom to achieve a full actuation of law in the Catholic approach.

To conclude: for the Church today, the Universal Declaration of Human Rights is acknowledged as being a milestone on the long and difficult pathway of mankind, as John Paul II observed to the General Assembly of the UN on 2 October 1979.³⁷

NOTES

¹ John Paul II, "Discorso a conclusione del V colloquio giuridico della pontificia Università lateranense," in *I diritti fondamentali della persona umana e la libertà religiosa. Atti del V colloquio giuridico (8-10 marzo*

1984), edited by F. Biffi (Vatican City, Libreria Editrice Vaticana, 1985), p. 7.

² *Ibid.* p. 8.

³ Paul VI, "Address to the UN," 4 October 1965.

⁴ *Ibid.*, p. 8.

⁵ *Ibid.*, p. 8.

⁶ S. Castellion, *Contra libellum Calvini*, art. 77. An Italian translation of this work is published in G. Radetti, *Fede, dubbio e tolleranza. Pagine scelte* (Florence, La Nuova Italia, 1960), p. 118.

⁷ On the historical development of the international protection of religious freedom cf. P. Lanarès, *La liberté religieuse dans les conventions internationales et dans le droit public général* (Horvarth, Horvarth, 1964).

⁸ G. Dalla Torre, *La città sul monte. Contributo ad una teoria canonistica sulle relazioni tra chiesa e Comunità politica* (A.V.E., Rome, 1996), pp. 72-73.

⁹ M. Ricca, *Oltre Babele. Codici per una democrazia interculturale* (Bari, Dedalo, 2008).

¹⁰ Cf. the Bangkok Declaration proclaimed on the occasion of the regional conference of the World Congress on Human Rights of 1993, in *Law and Society Trust Fortnightly Review*, 1 May 1993, pp. 1-8.

¹¹ The texts of the Universal Islamic Declaration on Human Rights, drawn up in 1981 by the Islamic Council of Europe, and the Cairo Declaration on Human Rights in Islam, drawn up by the Organisation of the Islamic Conference, are published in A. Pacini, *L'Islam e il dibattito sui diritti dell'uomo* (Turin, Fondazione Giovanni Agnelli, 1998).

¹² I would like here to refer the reader to M. d'Arienzo, *La libertà di coscienza nel pensiero di Sébastien Castellion* (Turin, Giappichelli, 2008).

¹³ On the difference between religious freedom and confessional freedom, cf. S. Ferlito, *Diritto soggettivo e libertà religiosa. Riflessioni per uno studio storico e concettuale* (Naples, E.S.I., 2003), pp. 60-63.

¹⁴ On the concept of religious community, cf. P. Valdrini, "Communauté et institution en droit canonique," in M. Tedeschi (ed.), *Comunità e soggettività* (Cosenza, Pellegrini, 2006), pp. 279-292.

¹⁵ Gregory XVI, enc. let. *Mirari vos* (15 August 1832), in *ASS*, 4 (1868), p. 344 ss.

- ¹⁶ Pius IX, enc. let. *Quanta cura* (8 December 1864), in ASS, 3, (1867), p. 161 ss.
- ¹⁷ Leo XIII, enc. et. *Libertas* (20 June 1888), in ASS, 20, (1887), p. 603 ss.
- ¹⁸ Leo XIII, enc. lett. *Rerum novarum* (15 May 1891), in AAS, XXIII (1890-1891), pp. 640-670.
- ¹⁹ Pius XI, enc. lett. *Quadragesimo anno* (15 May 1931), in AAS, XXIII (1931), pp. 177-228.
- ²⁰ Pius XI, enc. lett. *Non abbiamo bisogno* (29 May 1931), in AAS, XXIII, pp. 285-312.
- ²¹ Pius XI, enc. lett. *Divini Redemptoris* (19 March 1937), in AAS, XXIX, pp. 65-106.
- ²² Pius XI, enc. lett. *Mit brennender Sorge* (14 March 1937), in AAS, XXIX, pp. 145-167.
- ²³ Of particular importance as regards references to human rights are the Christmas radio messages of Pius XII in 1942, in AAS, XXXV, (1943), pp. 14 ss., and those of 1944 in AAS, XXXVII, (1945), pp. 13 ss.
- ²⁴ John XXIII, "Radiomessaggio dell'11 settembre 1962 ai fedeli di tutto il mondo," in *Il diritto ecclesiastico*, 1962, I, p. 245.
- ²⁵ John XXIII, enc. lett. *Ad Petri Cathedram* (29 June 1959), in AAS, 1959, p. 528 ss.
- ²⁶ Cf. on this point the observations of M. Condorelli, "Concordati e libertà della chiesa," in *Il diritto ecclesiastico*, 79, 1968, pp. 226-287, specifically pp. 267 ss.; and *Libertà della chiesa e laicità dello Stato nel recente magistero ecclesiastico*, in *La chiesa dopo il Concilio. Atti del Congresso internazionale di diritto canonico, Roma, 14-19 gennaio 1970*, II, (Milan, Giuffrè, 1972), pp. 351-373, specifically p. 360 ss., both published in M. Condorelli, *Scritti di storia e di diritto* (Milan, Giuffrè, 1996), respectively pp. 171-287 and pp. 265-373.
- ²⁷ On the influence of the philosophical thought of Jacques Maritain on the debates of the Second Vatican Council and the documents of the same, cf. R. Papini and P. Viotto, "Jacques Maritain et le Concile Vatican II," *Notes et Documents*, 3, 2005, pp. 44-54.
- ²⁸ R. Minnerath, *Le droit de l'Église à la liberté. Du Syllabus à Vatican II* (Paris, Beauchesne, 1982).
- ²⁹ Cf. M. Tedeschi, "Chiesa e Stato," heading in *Novissimo Digesto italiano, Appendice A-Cod*, I, (Turin, UTET, 1980), pp. 1145-1152.

³⁰ *Dignitatis humanae*, n. 4.

³¹ *Ibid.*, n. 13.

³² G. Filibeck (ed.), *I Diritti dell'Uomo nell'insegnamento della chiesa: da Giovanni XXIII a Giovanni Paolo II (1958-1998)* (Vatican City, Libreria Editrice Vaticana, 1999).

³³ Thus, “the Church, aware that the “letter” on its own can kill, while only “the spirit gives life”, must continually ask, together with these people of good will, whether the Declaration of Human Rights and the acceptance of their “letter” mean everywhere also the actualization of their “spirit””: *Redemptor hominis* n. 17.

³⁴ Benedict XVI, “Address to the General Assembly of the United Nations,” 18 April 2008.

³⁵ Benedict XVI, “Address.”

³⁶ Benedict XVI, “Address.”

³⁷ Conseil Pontifical ‘Justice et Paix’, *Compendium de la doctrine sociale de l’église* (Vatican City, Libreria Editrice Vaticana, 2005), p. 82.

PART III

**CONTEMPORARY CHALLENGES AND
'NEW' RIGHTS**

CHAPTER XII

GLOBALISATION AND THE COMMON GOOD: THE RESPONSIBILITY OF EUROPE¹

LORENZO CASELLI
ADRIANA DI STEFANO

I

The nexus that links globalisation to the pursuit of the common good has still to be explored, just as the contours of Europe's responsibility in the matter, its specific role, still appears to be far too unclear.

Numerous contradictions characterise the contemporary processes of globalisation, which is not taking place according to linear and unequivocal forms. If we examine the question closely, the speeds of these processes, which are very differentiated, are more accentuated at a financial-speculative level and slower at a cultural and civil level. The production of private goods is greater than the production of public goods, with a consequent failure as regards the distribution of income and life chances at a world level. Using a figurative image, we could observe that profit nowadays is running faster than solidarity! From this follows processes of asymmetric integration, with marked differences in the positions of the various subjects involved. For some of these, globalisation constitutes a great opportunity; for others, it can be a limit, an impediment to which one should react by activating forms of defence, asking for measures that involve safeguards and protection.

All of this generates dangers, threats, and growing instability, and it is the poorest countries that bear the brunt at the level of:

- Economic-financial insecurity. Short-term capital movements travelling around the world in the space of a night can undermine the economy of an entire country.

- Health-care insecurity. AIDS has a dramatic effect on less developed areas – in the case of nine countries of Sub-Saharan Africa, it is envisaged that in a short time the life expectancy of the populations will diminish drastically.

- Cultural insecurity – the cultural flows are one-directional, from rich countries to poor countries, and this is an assault that endangers cultural diversity and historic cultural identities. The performing arts are one of the major exporting industries, and Hollywood exports to the value of over thirty billion dollars a year.

- Personal insecurity. Organised crime manages to grasp all the advantages of globalisation; the internet is an instrument for the recycling of dirty money, the drug traffic and arms trafficking, and prostitution.

- Political, military and collective insecurity as regards the scarce opportunities that the less developed countries have to construct a pathway of civil and economic growth in freedom, solidarity and democracy – poor countries often wage war by proxy for rich countries.

- Ecological insecurity. The acute poverty of poor countries, combined with the superfluous consumption of rich countries, generates unbearable pressures for the environment. To acquire hard currency to pay its debts or the imports that it needs to survive, respect for the air, for water and for greenery is the last of the concerns of a hungry country. And the question of food, today, is dramatic. The strong and unexpected increase in food prices has undermined the purchasing power of consumers in rich countries and provoked popular reactions in poor countries. According to the FAO, 36 countries, amongst which 21 in Africa, needed external food aid in 2008.

The list could go on. The globalisation of production, trade, technology and above all of finance is increasingly placing itself beyond control and regulation by individual states. The gap between national levels and the international level increasingly tends to expand. The German sociologist U. Beck has observed: “we entered the era of globalisation before we had the political and cultural instruments to govern it.”²

II

The challenge of the past (one may think here of the Bretton Woods agreements) was to govern a lacerated and divided world. The challenge of today and of tomorrow is to govern an interdependent world in which there are no alternatives to peace and solidarity.

We need great social, political, economic and institutional innovations. We need above all awareness of the need to change. Here there are three fundamental steps.

1. Globalisation can become a positive force for all the citizens of the world. This was written into the resolution of the heads of state and government of 187 countries at the time of the millennium summit held in September 2000 at the United Nations.
2. Aiming for enlarged leadership that is able to represent in a suitable way the reality of a multipolar world is indispensable, as is dealing with the growing influence of some developing countries. It is fully evident that the G8 alone is no longer able to assure a leading role at an international level.
3. The participation of enlarged leadership should not be limited to government and parliamentary institutions. It should also involve representatives of civil society, NGOs, and the world of work and companies. The construction ‘from the grass roots’ of a difficult consensus on values and objectives is an ineluctable turning point.

This world, that is increasingly interdependent and complex, can no longer be completely explained in terms of 'North and South', 'development and under-development', 'wealth and poverty.' We may refer to four great intercommunicating areas.

The first area covers the countries of advanced capitalism. The USA, Europe, Japan, Australia and a part of South-East Asia have about a thousand million people and a particularly high average *per capita* income which is the expression of a consolidated prosperity (the USA: \$45,000; Great Britain: \$40,000; Japan: \$38,000; France and Germany: \$36,000; Italy: \$32,000). For decades, these countries have been the uncontested leaders of the world economy. Today their supremacy has been called into question and their growth rates are slowing as a result of numerous problems connected with the American financial crisis, the weak dollar, the price of oil, etc.

Then there is a second group of countries which we could define as 'globalised emerging' countries – typically Russia, China, India and Brazil. These are differentiated realities as regards their history, cultures and points of departure but they all share the capacity to be fully integrated into the world economy and to know how to use globalisation as an instrument to strengthen their development and their power to influence events. The population of this group of countries is above three billion inhabitants, the average *per capita* income is still modest (India: \$9,000; China: \$2,000; Brazil: \$4,730; Russia: \$5,800), but their economic growth rates are very high, on average 10% a year.

The third group is made up of about fifty average-income countries with 1.1 billion inhabitants and these countries control a large part of the natural resources that are crucial for world growth, including 60% of all oil reserves. These are countries that substantially live off capital but they are unable to transform their financial wealth into a dynamic and propulsive economic expansion compared to other nations and regions.

The last group of countries is that of the poorest states which have a billion people, most of which are to be found in Sub-Saharan Africa. Average *per capita* incomes are very modest (a few hundred American dollars) and their economies are stagnant or in decline and are insulated from the processes of globalisation. When a little development is registered, this is accompanied by very strong imbalances within that country.

These four blocs of countries are linked to each other by relationships of interdependence, complementariness and conflict. By way of these relationships passes the possibility of governance of the processes of globalisation and thus the future of the world and mankind – a future that depends, and will always depend, on the ability to manage what we could define as 'global common goods.' Their privatistic and egoistic appropriation leads them to being weakened, whereas their efficacy is strengthened by their shared and solidarity-inspired use amongst and between peoples and states.

Here are some strategic common goods at the world level: knowledge, know-how, information, the environment and the climate, energy, health and life chances, human resources – especially those represented by the under-used or wasted potentialities inherent in a multitude of poor people who are forced to the margins of production and development – and, lastly, peace. This is a resource that is, unfortunately scarce, but it is also highly useful to everyone!

On the world scene, sectorial problems do not exist; rather there are problems that are closely interconnected. Human (and social) rights, the environment, education, development, trade, health, inequalities and conflicts equally constitute pieces of the same mosaic, the constitutive elements of what constitutes the ‘great social question of the twenty-first century.’ Another world, therefore, is possible.

III

None of us is an island. Scientific-technological know-how, the communication but also the fear of processes that are incommensurable and uncontrollable in terms of risk, almost in an absurd way, unifies the global nature of men into a community. Interdependence, on a world scale, becomes a moral and political category of fundamental importance. In it is to be found the power point which the instrument of rationality needs both to overturn situations of injustice and exclusion that can no longer be accepted at the level of the judgement of the international community and to understand and appreciate all the potentialities that are inherent in the processes of globalisation.

In other words, globalisation requires a supplement of rationality, a supplement of rationalities that is connected to the participation of people and peoples and to solidarity in economic and social relationships. The potentialities of globalisation can be grasped through an increase in the number of ‘players’ and the creation of conditions so that the various national and local subjective realities are enabled to interconnect and to accede to the creation and the use of a universal common good, in a way that respects and appreciates their historical-cultural specificities.

Although in a profoundly contradictory way, at the level of world civil society there seems to be emerging a new need for politics, a new need for collective dimensions in which to encounter each other with trust and experience increasingly sizeable forms of solidarity. Faced with this need we should develop structures and suitable practices of acceptance – structures and practices by which ‘global citizenship’ can be made to grow, a citizenship founded on the indivisibility and interdependence of human rights, a citizenship that is achieved through the difficult and never final achievement of successive levels of solidarity and participation: from the city to the region, to the state, and on to great continental areas until one reaches the universal in which ‘the other’ is not an adversary but a partner at the service of a shared project.

I am thinking of the European metropolises, and here I would like to quote Bauman:

We are faced with an epochal challenge. Globalisation is mixing ethnic groupings, cultures and religions and turning our cities into a collection of diasporas! Either we will know how to take advantage of this historic mixing by appreciating this diversity and thereby enriching shared living or our cities in the years to come will be the terrain of conflict of an unending urban war.³

How can we rise to this challenge? To do this we must refer to a hardcore of shared values at a global and local level. Is this possible? The answer is in the negative if you believe that there are only regional, closed and incommunicable ethics. It is also in the negative if you believe that one cannot go beyond a radical pluralism. However, the answer is in the positive if you think that despite cultural, social and religious diversities a shared basis of humanity can be seen which deserves to be brought to the light.

This basis lies in the golden rule that one should do to others what you would have them do unto you. In the Torah and the Gospel of Jesus Christ we find the following commandment: 'love your neighbour as yourself.' Similarly in one of the Hadiths, which are the most important source of Muslim law after the Qur'an, we can read: 'None of you will be a believer unless you wish for your brother what you wish for yourself.'

These statements ask for declination at a global and local level in a perspective of a culture of peace, of tolerance and of solidarity at the service of a more just economic order. A few kilometres separate Europe from Africa – Spain from Morocco – but the differentials in standards of living between the north coast of the Mediterranean and the south coast of the Mediterranean are very heavy: twice as high as those that exist between the United States of America and Mexico. Within fifteen to twenty years, in order to provide hope to the young people of the southern front, it will be necessary to create ninety million jobs. Coexistence, without any doubt, passes by way of these data. The responsibility of Europe is thus called to the fore.

IV

To unfold all its positive potentialities, globalisation needs a strong ethical – but also political and institutional – anchoring. Europe is faced with a great challenge: to become a laboratory of hope for itself and for 'others' who call upon it in increasing numbers. A hope of prosperity, justice, solidarity and generosity.

What can Europe do for these others? The future of the European Union depends, and will increasingly depend, on the future of those human, social and economic realities which today are outside the Union but which

dramatically call on the Union. In other words, Europe must connect the quality and quantity of its development to a fairer and more solidarity-inspired development. Here our credibility is at stake. Certain steps cannot be avoided in this field.

The first step. The scandal of the Common Agricultural Policy. The CAP costs European families over 100 billion euros. This is an unsustainable waste that has knocked the agricultural systems of many developing countries out of the game.

The second step. The continuation of the barriers to imports from poor countries. These countries must be able to export to the EU any kind of merchandise they wish, with the exception of drugs and arms.

The third step. The problem of relocations. Should Europe encourage its own companies not to relocate, or should it instead encourage them to engage in a different kind of relocation which is directed towards sustainable growth?

The fourth step. The proposal by Europe of a cooperative model of development that is coherent with its values and its culture, a model that is able to help the various local realities to be protagonists of their own growth. In this approach should be placed both bilateral or multilateral transfers of technology; the achievement of joint ventures; the supply of know-how; and more generally, the question of the cancelling of debts (I would like to observe here the initiatives of the Italian Church as regards Guinea and the Gambia); the achievement of an international fiscal system; and the redirection of financial flows by moving from a short-term speculative logic to a logic of the promotion of real development.

What can Europe do for these others? It should invest in global awareness and collective responsibility; responsibility and programming by the multiple European subjects and institutions which, in various ways, can make their contribution. A few quick points on this.

The major European companies. Reference is made to 'corporate social responsibility,' to social legitimisation. Poor countries, developing countries, must be taken on as stakeholders by big companies.

The European trade unions. Within large companies they have acquired rights at the level of consultation and participation. They could use such opportunities to obtain from the affiliates of European multinationals that work in developing countries those forms of conduct that are consistent with the fundamental rights of the people and communities that are involved, relating to, and cooperating with, local workers' organisations and fostering their creation and growth.

European civil society (in its various expressions, association, movements, etc.). One may think only of the great opportunities for fair and solidarity-inspired consumption in synergy with the development of the experiences in the field of microcredit.

Lastly, European schools as places where boys and girls from different backgrounds and forms of belonging learn to live together, to accept each other, and to construct a shared citizenship in dialogue.

All of this is possible but it is also very difficult. In the European cultural experience – an experience that arose from the original encounter of different civilisations – fundamental values have been strengthened for renewed programming at the service of man: the spirit of freedom and democracy, creative imagination, the ineluctable value of conscience, the recognition of individual and social rights, and the meaning of solidarity. Nonetheless our memory and our identity are often wounded or lacerated, they bear the burden of wars, forms of incomprehension, injustices, hesitations and forms of subordination, and so on. Despite this, Europe can play certain fundamental cards.

The European Union is the only existing model for the overcoming of historic divisions and the achievement of forms of supranational integration. Faced with the explosion of social, cultural and ethnic differences, Europe has only one alternative: that of being an area of reconciliation and dialogue, an area to reconstruct political and social mediations between the economy and culture on new bases, an area where a multiplicity of memberships become a factor for enrichment and growth.

Edgar Morin, interviewed by *Le Monde Diplomatique* in November 1991 a few months before the Maastricht agreements, observed with great accuracy:

Europe, which is made up of extremely complex societies, must accept the challenge of complexity. A complex society is a society that confers great freedom and responsibility on individuals and groups, which allows the initiative, autonomy and creativity which are needed to meet other challenges... A society can advance in complexity – and thus in democracy – only if it advances in solidarity.

Solidarity on the internal front – which enlargement towards countries with notably lower income levels makes even more necessary – is closely linked with solidarity on the external front, towards the whole world, beginning with Africa and the Middle East. Europe cannot do without an international policy that is consistent with the values of its cultural and religious identity, able at the same time to draw upon the riches of other peoples. Starting with Europe, a proposal is possible which establishes as a priority the extension of democratic freedoms, the elimination of poverty, respect for the environment, and intercultural dialogue.

The future of the European Union depends, and will increasingly depend, on the future of those human, social and economic realities which are today 'outside' the Union and which dramatically call upon it, through migratory flows as well. The great challenge that we have before us is a reconciled, solidarity-inspired, open and creative Europe.

What can Europe do for these others? I once again repeat the basic question. What contribution can it make to resolving the great problems that are on the table? Inasmuch as we know as Europeans how to answer this question, we will also be able to address questions at home. In looking at who calls upon us, we look at ourselves in a better way.

In a Europe that is increasingly open to different cultures, races and religions and where there is no alternative to dialogue, the subject of the unity of Christians is crucial. Ecumenism can be the prophecy of new relationships, the prefiguring of a shared home that excludes nobody. Memory of the Christian roots of Europe – and this is something that has been much discussed – becomes credible if it is combined with a commitment to the creation of general conditions where all parties can be reconciled and where the values that are professed become the foundation of a good life for everyone.

V

The legal approach that can be recreated here, instead, does not appear to coincide totally with this. In a global context that is characterised by the land/sea alternative of Schmitt and by the profound crisis of the *ius publicum europaeum*, Europe seems, therefore, to propose a single and original model for development, territorial cohesion and solidarity. In the context of an international community which is constantly searching for a new *nomos*, it presents itself as a ‘great area’ (*Großraum*) of political and economic decisions and a place involving the coexistence of individuals who are increasingly assimilated by new forms of ‘social,’ cosmopolitan and ever more ‘multicultural’ – prior to legal – citizenship.

The idea of citizenship is crucial in the analysis – which is always open – of the impact of economic globalisation on spheres of freedom and on the individual rights of individuals, not only as subjects who belong abstractly to a legal system but as social actors who are fully integrated into, and protected within, the cultural and political communities to which they belong.

From this point of view, Europe is called upon to respond to important challenges that condition thinking about its future as a regional system *sui generis* of political and legal integration beyond the nation state. The deconstruction of theories of sovereignty and of the classical formulas of the political-juridical lexicon (such as that of citizenship); the crisis of territoriality as a fundamental canon of jurisdiction (emblematic here is the case of the globalised use of cyberspace, as indeed is that of the Alien Tort Claims Act of the United States of America, which follow the furrow of the upholding of ‘strong sovereignties’ and extreme models of the extraterritoriality of legal rules); as well as the current trends towards the fragmentation of international law and the connected proliferation of new models of legal production towards forms of ‘privatisation’ of law (laws without a state – one may think here of the complex movement of

deregulation of the *lex mercatoria* or so-termed transnational law – which bases the regulation of the globalisation of markets on contractual freedom – and the codes of best practice of corporate governance, the ethical codes and other instruments of soft law which are the outcome of initiatives involving the self-regulation of the organisations of civil society), are all phenomena that today raise a series of fundamental questions linked to the lack of an ethical foundation and effectiveness of the (internal, international, transnational) law of the globalised network society.

Legal rules, in other terms, have not themselves become globalised and the debates about legal globalisation do not fail to demonstrate – side by side with the substantial positivity of such phenomena which are suitable to filling the spaces left empty by traditional law anchored in the sovereignty of states – the incompleteness and the failings of the *leges mercatoriae* and connected self-referential logics.

From this comes a condition of structural fragmentariness of the model of *contrat sans loi* of globalisation, ‘proto-law,’ in the definition of Gunther Teubner, which does not have the fundamental feature of effectiveness.

VI

If this is how things are, an analysis of globalisation and the common good can but search for the canons of effectiveness and the ethical foundations of a law of the global community with reference to universal human rights – the shared language of international relations and the ‘binding’ moment of the *ius gentium* of the third millennium.

In his address to the General Assembly of the United Nations on the sixtieth anniversary of the Universal Declaration of Human Rights (18 April 2008), Benedict XVI solemnly stated that the universality, the indivisibility and the interdependence of human rights are guarantees for the safeguarding of human dignity and the pursuit of the common good. He dwelt in particular on the principle of the ‘responsibility to protect,’ thereby following in the furrow of the traditional teaching of the social doctrine of the Catholic Church.

The life of the community, both domestically and internationally, clearly demonstrates that respect for rights, and the guarantees that follow from them, are measures of the common good that serve to evaluate the relationship between justice and injustice, development and poverty, security and conflict. The promotion of human rights remains the most effective strategy for eliminating inequalities between countries and social groups, and for increasing security.⁴

Globalisation, therefore, brings on stage – as a foundation of a complete and ‘total’ juridical dimension of economic-financial and human relations in the contemporary world – the *nomos* of human rights in their original conception of classical freedoms and in the most mature formulas of economic, social and cultural rights.

The Universal Declaration of 1948, a text that is not legally binding (the resolution by which it was adopted has the value of a simple recommendation of the General Assembly of the UN to states), but whose moral and symbolic force was to give impetus to the subsequent evolution of an international regulatory corpus of human rights, contains a rather broad catalogue of guarantees: the rights to personal freedom, those of the individual in the community to which he or she belongs, freedom of thought, conscience, religion, opinion and expression, peaceful assembly and association, political participation, but also rights to social security, to work, to rest and to free time, to an adequate standard of living, to education and to culture.

Only after almost two decades were these contents transfused into two international treaties, that is to say documents that are legally binding for states, which were adopted by the General Assembly on 16 December 1966 (they came into force in 1976 after the minimal number of thirty-five ratifications had been achieved): the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*. This last pact was incorporated into an international instrument that is autonomous as regards the first pact on civil and political rights because of the need to link the protection of certain rights, such as that to work, to the general state of development of each specific society. It is thus no accident that the Covenant reads: “Each State Party to the present Covenant undertakes to take steps... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appropriate means.”

The most important guarantees of this treaty certainly include those relating to the family, to mothers and children, to the fundamental right to freedom from hunger and the right to enjoy the best conditions possible of physical and mental health, the right to primary, secondary and higher education, and also the freedom to engage in scientific research and creative activity.

The international protection of human rights at a universal level matured over time within the UN orbit at an international level above all after the Conference of Vienna of June 1993 – from the creation of the High Commission for Human Rights, with tasks of coordination, until the more recent establishment in 2006 of the *Council for Human Rights* which took the place of the previous committee. There then developed a constant movement and debate within the organs of the United Nations which gave rise to a series of international conventions of a generalist nature along the lines of the two Conventions of 1966, that is to say of a sectorial character, on the protection of specific rights or the recognition of individual

categories of the beneficiaries of such rights. The UN model for guaranteeing human rights is administered by a series of committees (each one of which controls adherence to individual conventions) before which adherent states are called to discuss periodic reports on the implementation of the relevant international obligations.

This fragmentariness, which is also evident in the breaking down into veritable packages of the regulatory instruments as regards human rights, could form a system only in the presence of a unitary *voluntas* which at the moment cannot be found either in the universal international community or in a, for now, only hypothetical international civil society. We are thus led back to regional dimensions and amongst these of particular interest is the European dimension.

VI

European law, at a time of the fragmentation and regionalisation of international law, constitutes an original and advanced model of reference for the theorisation of a juridical system that is able to respond to the socio-cultural challenges of globalisation. And we can say a great deal about the protection of recognised first, second and third generation fundamental rights in the countries that belong to this geographical area.

One need only think that the continent of Europe experienced, from the period immediately after the Second World War, the birth not only of the European communities and then the European Union but also of a group of international organisations directed as regards their goals towards efforts to regulate the phenomena of economic-financial globalisation. For example, we have the Organisation for Economic Cooperation and Development (OECD) and the Council of Europe, which at the present time includes forty-seven member states and has the task of achieving “a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress” (art. 1, a).

It was within the Council of Europe and as a result of the impetus at the level of ideals of the Universal Declaration of Human Rights that the most important ‘system’ for the protection of fundamental rights in Europe was born, namely the European Convention for the Protection of Human Rights and Fundamental Freedoms, which was signed in Rome on 4 November 1950 (coming into force on 3 September 1953) and then subsequently modified and updated with the approval of fourteen additional protocols, the last of which has not yet come into force. This Convention guaranteed an overall catalogue of civil and political rights and created an international mechanism for the control of the adherent states which could be activated by states or private individuals or groups of private individuals. A European Court of Human Rights was to examine the cases submitted to it against a state that was the author of a purported violation only after the internal pathways of recourse had been exhausted and could declare the

existence or otherwise of the violation of a right and obligations of pecuniary compensation on the part of a 'condemned' state, that is to say one held to be responsible for the violation of conventional obligations.

Complementary to this – even though according to pathways still to be explored, to that provided by the Council of Europe – is the protection of human rights to be found in the system of the European Union.

The guarantee of fundamental human rights in the context of the European Community, today recognised by art. 6 of the Treaty on the European Union, developed, as is well known, within the jurisprudence of the Court of Justice which, beginning in the 1970s in its application of European Community law, showed itself to be sensitive to the profiles of the protection of rights recognised by the Constitutions of the member states and at an international level by the European Convention on Human Rights.

The level of recognition of human rights by the institutions of the European Community, however, was (and this was no accident) for long seen as being lacking from a social point of view. The reference of the EU Treaty to the text of the Convention of Rome of 1950, based upon the guaranteeing of civil and political rights, contributed only in part (taking into account the interpretation that the jurisprudence of the Court of Strasbourg gave of the Convention itself) to countering this dangerous shortfall.

The Charter of Fundamental Rights of the European Union, which was solemnly proclaimed at Nice on 7 December 2000 by the European Parliament, European Council and European Commission, represents, therefore, an overall catalogue of rights directly intended to go beyond the previous model for the protection of rights and classic freedoms of the Convention of Rome to open up a path, within the framework of the Union, to a new season of economic, social and cultural rights. Organised into six headings, it dedicates in particular the second heading (Freedom), the third heading (Equality) and the fourth heading (Solidarity) to the recognition of certain social and cultural rights with formulas that were at times unprecedented and innovative: for example, artistic freedom and freedom as regards research and the right to education, professional freedom, business freedom and the right to work, as well as the right to asylum and protection in cases of expulsion and extradition. There then follow provisions on respect for cultural, religious and linguistic diversity, and on the rights of children, elderly people and the disabled. The heading entitled 'Solidarity' includes guarantees for workers, an adequate protection of family and professional life (the protection of motherhood and parental leave), guarantees for social security and welfare, and the protection of health, of the environment and of consumers.

Although the non-binding legal value of the Charter has raised certain questions – especially with reference to many of the economic, social and cultural rights which were unprecedented inasmuch as they were not envisaged by the Convention of Rome or by the EU and EC treaties – the Court of Justice has on a number of occasions taken into account the

guarantees of the Nice Charter when judging the conduct of states in matters for which the European Union is responsible. The role of judges of the Community in this context becomes complementary to that of the European Court of Human Rights which is called to verify respect for those rights envisaged by the European Convention (as well) when the application of Community law does not apply.

As we have seen, therefore, these different pathways, which are still searching for coordination, nonetheless demonstrate a strong conditioning by traditional visions of rights, namely civil and political rights, involving traditional freedom, and still leave in the shade aspects of the social regulation of the market entrusted in the treaties of the European Community more to the background subject of freedom of circulation than to a comprehensive structure of social rights.

However, it is to be hoped that within the European regional framework, the frequent reference to the 'public' ethics of fundamental freedoms and in particular the reference which is still embryonic to economic, social and cultural rights can represent a pathway for the maturation of a fruitful dialogue between globalisation and law in order to achieve a responsible governance of the economy, of markets, of information, and of individuals, based upon the moral value of human dignity and at the service, therefore, of solidarity within a framework of progress.

NOTES

¹ This essay seeks to offer a first analytical perspective at the level of economics and legal thought. Sections 1-4 are the work of Lorenzo Caselli; sections 5-7 were written by Adriana Di Stefano.

² U. Beck, *Che cos'è la globalizzazione. Rischi e prospettive della società planetaria* (Carocci, Rome, 1999).

³ Z. Bauman, *Dentro la globalizzazione. Le conseguenze sulle persone* (Laterza, Bari, 2006).

⁴ Benedict XVI, *Pope Benedict in America: The Full Texts of Papal Talks Given During His Apostolic Visit to the United States* (San Francisco, Ignatius Press, 2008), p. 96.

CHAPTER XIII
THE RIGHT TO FOOD

MARGRET VIDAR

INTRODUCTION

Rising food prices since 2007 have brought renewed international attention to a human right that was first recognized internationally in the Universal Declaration of Human Rights, the right to food.

The poor spend a much higher proportion of their income on food than those who are better off. Estimates of this proportion range from 50 to 80 percent. Food price inflation, therefore, has much more effect on the poorest. In some cases, the price hike may benefit poor farmers by raising their income. However, most of the poor are net buyers of food, even in rural areas, where the most vulnerable are landless farm labourers and small holders who may not grow enough food to feed themselves and their families.

The right to food can and should guide policy responses at the national and international levels. It provides a conceptual framework for short term, medium term and long term responses, both on the substance of what should be done and the process by which it should be done.

In the following, we will review the concept of the right to food in international law, and its relationship with the concepts of food security and food sovereignty. The Right to Food Guidelines (Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security¹) and the role of the Food and Agriculture Organisation of the United Nations (FAO) will be explored, followed by an in-depth discussion of the legislative steps needed for implementing the right to food.

THE RIGHT TO FOOD, FOOD SECURITY AND FOOD SOVEREIGNTY

The entirety of human rights constitutes the codification of the value of human dignity and of the human person. Access to food is essential for human survival, development and dignity. The Universal Declaration of Human Rights affirms that all human beings are born free and equal in dignity and rights. The essence of human rights was admirably captured by Eleanor Roosevelt, former Chairperson of the UN Commission on Human Rights and first lady of the United States of America: “A right is not something that somebody gives you; it is something nobody can take away”.²

Every human being everywhere always has the right to food. Our main concern, however, should be those whose right to adequate food is not realized. These include the 854 million people in the world who suffer from hunger³ as well as the over 2 billion people who suffer from micronutrient deficiencies, such as vitamin A, iodine and iron.⁴ Even those who suffer from obesity, increasingly a symptom of poverty, often do not have access to healthy and nutritious, or “adequate” food. Such lack of access to adequate food is also a human rights concern. With the rising food prices, FAO estimates that 50 million people more became hungry in 2007.⁵

The Right to Food in International Law

The right to food is recognized in a number of international instruments,⁶ the adoption of each of which represents further recognition and reaffirmation of the right itself.

- The right to an adequate standard of living, including food, clothing and housing was proclaimed in the Universal Declaration of Human Rights in 1948.
- This right was codified in the International Covenant on Economic, Social and Cultural Rights of 1966, which also recognized the fundamental right to be free from hunger.
- The protection of the right to life in the International Covenant on Civil and Political Rights has been interpreted to also cover death from malnutrition.
- The Convention on the Prevention and Punishment of the Crime of Genocide of 1948 proscribes deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.
- Prisoners of War, internees and other persons in the power of a Party to the Geneva Conventions of 1949 enjoy wide-ranging rights to be fed. In addition, the deliberate starvation of civilians is prohibited and warring parties must allow relief consignments to go through.
- The Convention relating to the Status of Refugees of 1951 and the Convention relating to the Status of Stateless Persons of 1954 accord the same treatment to refugees and stateless persons relating to rationing and public relief as to nationals.
- The Convention on the Elimination of All Forms of Discrimination Against Women of 1979 establishes the obligation to ensure adequate nutrition to women during pregnancy and lactation. It also contains provisions of access to resources for rural women.
- The Convention of the Rights of the Child obliges States to combat malnutrition and to provide adequate and nutritious foods, as well as to provide material support to nutrition programmes.

- The Statutes of the International Criminal Court of 1998 defines genocide in the same way as the Genocide Convention, and specifies that crimes against humanity include deprivation of access to food calculated to bring about the destruction of part of the population. War crimes include the deliberate starvation of civilians, including by wilfully impeding relief supplies.

International Covenant on Economic, Social and Cultural Rights

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
 - (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
 - (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

(In Annex to UN General Assembly Resolution 2200A (XXI), 16 December 1966)

The Normative Content of the Right to Food

General Comment 12⁷ of the Committee on Economic, Social and Cultural Rights is an authoritative interpretation of the right to adequate food, as enshrined in Article 11 of the International Covenant on Economic, Social and Cultural Rights, which, as of 18 April 2008, has 158 State Parties.⁸ The Right to Food Guidelines mostly follow the interpretation of General Comment 12.

According to General Comment 12, “The right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement.” This implies:

- The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture;
- The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.

The UN Special Rapporteur on the Right to Food, whose mandate was established by the Commission on Human Rights in 2000, has defined the right to food as:

the right to have regular and permanent access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual or collective, fulfilling and dignified life free of fear.⁹

It should be stressed that the recognition of the right to food does not replace individual responsibility. The right to food does not mean that the State must provide food directly to everyone. Such a direct entitlement can only arise when an individual is unable, for reasons beyond his or her control, to provide for herself. All individuals must respect the right of others to adequate food and the right to food should primarily be fulfilled through individuals' own efforts to feed themselves and their families. Parents bear special obligations to ensure that their children are adequately nourished.

State Obligations

Article 2 of the International Covenant on Economic, Social and Cultural Rights obliges states parties to take continuous legal, administrative, financial and policy steps, to the maximum of available resources, for the progressive realization of the right to adequate food for all. A distinction is made between obligations of conduct and of results, and violations can be of commission or of omission. A distinction is also made between the unwillingness and the inability of states to take action.

The Committee on Economic, Social and Cultural Rights has adopted a trichotomy of obligations to better clarify the steps that should be taken, namely to respect, protect and fulfil the right to food. The obligation to respect the right to food means that all organs of the state must refrain from any measure that could impede existing access to food. The obligation to protect the right to food means that legislation and other measures must be in place to protect individuals from the actions of third parties that could deprive them of the right to food. The obligation to fulfil has two

dimensions, to facilitate and provide. The obligation to facilitate implies that the state must take proactive measures to improve the possibilities of people to feed themselves. The obligation to provide food or means to buy food is then the obligation of last resort. It recognizes that there will always be individuals who cannot feed themselves, such as the sick, the elderly or the unemployed, and that situations of emergency can arise that require direct provision.¹⁰

While the importance of creating an enabling environment where everyone can enjoy the right to food by their own efforts should be stressed, it remains incumbent on the State to ensure that those who are unable to do so for themselves are adequately provided for, so that as a minimum, no one suffers from hunger.

Food Security

Food security, as defined by FAO, “exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life.”¹¹ The right to food has similar definitions.¹² Both stress that food can be obtained through own production or through purchase. The four pillars of food security are availability, access, stability of supply and utilization.¹³ Economic access is a key aspect of food security and the right to food. The definition of the right to food, however, places more emphasis on acceptability within the culture to which individuals belong, on sustainability, and on not having to sacrifice other human rights for the right to food.¹⁴

Despite the similarities, the right to food goes beyond the concept of food security. Food security is a technical definition and political goal, but the right to food is a human right that every person should enjoy, as a matter of right. All human rights entail obligations for the state and moral responsibilities for all members of society. This empowers individuals as rights holders to hold their government accountable for its acts and omissions. It also brings in principles of *process* that are drawn from the entirety of human rights. These principles include participation, accountability, non-discrimination, transparency, human dignity, empowerment and the rule of law.¹⁵ We will return to them below.

Food Sovereignty

Food sovereignty is an emerging concept that also has some similarities with the right to food. However, it is a political concept rather than a legal one, and is not yet recognized in international law. Food sovereignty implies the right to adequate and culturally appropriate food produced sustainably and the right of “peoples” to define their own food and agriculture systems. It emphasizes local markets and production by small scale fishers, farmers and pastoralists.¹⁶ The concept is driven by civil society, although some

countries have incorporated it into their own policy and even legal frameworks, and focuses less on individual rights than on the right of “peoples”, which in turn is an ill-defined subject in international law, as it can denote sub-national groups as well as nations represented by governments.

By contrast, the right to food is subject to the general principle that human rights should be implemented regardless of political and economic systems.¹⁷ This principle should be seen in the context of cold war realities, and may be somewhat outdated. The consequence remains, however, that it is difficult to use the principles of the right to food as a sweeping argument for small-scale farming and local production, or against international trade.

THE RIGHT TO FOOD GUIDELINES

The right to food obligations of the state are complex and manifold and touch different areas of state policies, laws and institutions. The Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security – the Right to Food Guidelines for short – bring clarity to the complexity. They were adopted unanimously by the FAO Council in 2004¹⁸, following a decision by the World Food Summit, entitled *five years later*,¹⁹ and two years of negotiations by a special Intergovernmental Working Group established for the purpose under the FAO Committee on World Food Security.²⁰ The Guidelines have been accepted by all 189 FAO members.²¹

The campaign for the Guidelines started in preparation for the first World Food Summit in 1996. Many governments and NGOs called for the drafting of a Code of Conduct on the Right to Food.²² However, political agreement on this was not possible at the time. Following the World Food Summit, three international NGOs – FoodFirst Information and Action Network (FIAN) International, World Alliance for Nutrition and Human Rights (WANAHR) and the International Jacques Maritain Institute – produced a draft Code of Conduct²³ that was since endorsed by over 800 NGOs and was an input to the drafting of the Right to Food Guidelines.²⁴

The establishment and work of the Intergovernmental Working Group on Right to Food Guidelines (IGWG-RTFGs) was a major new development in the field of socio-economic rights. This was the first time that the right to food was discussed in substance and detail within an FAO body and also the first time that States agreed on the meaning of the right to adequate food. The conclusion of the negotiations within 2 years stands in sharp contrast to the length of time many other instruments have taken.

The Right to Food Guidelines are, in their own words, a human rights tool addressed to all States. They are voluntary and non-legally binding although they build on international law and provide guidance on implementation of already existing obligations. They are addressed to all States, Parties and Non-Parties to the ICESCR, including developing and developed countries. The Right to Food Guidelines stress a wide range of

principles including equality and non-discrimination, participation and inclusion, accountability and rule of law, and the principle that all human rights are universal, indivisible, inter-related and interdependent. They also seek to strengthen good governance and the rule of law. Throughout, the Guidelines encourage a gender perspective and stress equal rights of women as well as special protection for pregnant women and mothers.²⁵ Empowerment and participation are stressed, as key elements of a rights based approach, and building people's capacity is indicated as one way to enhance the former.

The Guidelines are structured into three main sections:

- Section I contains the Preface and Introduction, including the text of major international legal instruments and definitions of food security, the right to food and human rights based approaches.
- Section II is entitled Enabling Environment, Assistance and Accountability, and contains Guidelines 1 – 19, covering a wide array of legal, policy and institutional areas, as listed in the box below.
- Section III is devoted to International Measures, Actions and Commitments, as listed in the box below.

Right to Food Guidelines

Section II: Guidelines 1-19

- 1: Democracy, Good Governance, Human Rights and the Rule of Law
- 2: Economic Development Policies
- 3: Strategies
- 4: Market Systems
- 5: Institutions
- 6: Stakeholders
- 7: Legal Framework
- 8: Access to Resources and Assets
- 9: Food Safety and Consumer Protection
- 10: Nutrition
- 11: Education and Awareness Raising
- 12: National Financial Resources
- 13: Support for Vulnerable Groups
- 14: Safety Nets
- 15: International Food Aid
- 16: Natural and Human-Made Disasters
- 17: Monitoring, Indicators and Benchmarks
- 18: National Human Rights Institutions
- 19: International Dimension

Section III

- International Cooperation and Unilateral Measures;
- Role of the International Community;
- Technical Cooperation;
- International Trade;
- External Debt;
- Official Development Assistance;
- International Food Aid;
- Partnerships with NGOs/CSOs/Private Sector;
- Promotion and Protection of the Right to Adequate Food;
- International Reporting

The Right to Food Guidelines are normative in nature, but they provide practical recommendations for turning the general human rights obligations into concrete and practical recommendations. The Guidelines address in a comprehensive and holistic way the measures that should be taken to build an enabling environment where people can feed themselves, a system of assistance to those who are unable to feed themselves, and measures to enhance accountability of all state actors.

As to the uses of the Right to Food Guidelines, they contain definitions of the meaning of the right to food that States have agreed to themselves. The Guidelines translate principles into practical recommendations for policies, institutions and legislation. They are a useful tool for coordination, as they clarify the different roles that different public institutions and stakeholders play in realizing the right to food. They can be used in advocacy for improved policies and programmes. In short, they contain recommendations for sound food security policies, strategies and processes.

ROLE OF FAO

The right to food is at the heart of FAO's mandate. The Constitution of the Organization contains an explicit reference to the fundamental right to be free from hunger, making it the *raison d'être* of FAO.²⁶ The Constitution was amended in 1965 to include this reference, which echoes Article 11:2 of the International Covenant on Economic, Social and Cultural Rights. In turn, the FAO Director-General had proposed the wording of that paragraph.²⁷ FAO members at the highest level – heads of state and government – have also reaffirmed the right to adequate food and the fundamental right to be free from hunger at the World Food Summits in 1996²⁸ and 2002.²⁹

The Right to Food Unit was established by FAO, formally as of 2006, to follow up on the World Food Summit and Right to Food

Guidelines commitments. It seeks to raise awareness among different sectors of society about the right to food and the corresponding responsibilities. It researches deeper into concrete aspects of implementing the right to food. It publishes material to disseminate accessible information about the right to food. The Unit conducts a variety of activities to strengthen the capacity of different stakeholders to work with the right to food, and it is involved in supporting a number of countries in taking steps to implement the right to food.

FAO has identified five essential areas of action for the implementation of the right to food³⁰, to be undertaken by duty bearers and stakeholders such as civil society organizations (see box).

Five Areas of Action

1. Advocacy & Training

Only educated duty-bearers are able to keep their obligations and only knowledgeable rights-holders know how to claim their right to food.

2. Information & Assessment

Only informed duty-bearers can identify those rights-holders most in need and meet their demands for food security.

3. Legislation & Accountability

Only with enforceable justice, trusted institutions and a legal system oriented towards the human right to food will rights-holders be in a position to hold duty-bearers accountable for guaranteeing food security.

4. Strategy & Coordination

Only through effective human rights-oriented policies and coordinated rights-based strategies can duty-bearers fulfil their obligations to enable rights-holders to feed themselves.

5. Benchmarks & Monitoring

Only through achievable goals and ongoing, community-based, national and international evaluation can duty-bearers and rights-holders achieve lasting food security.

The Right to Food Unit of FAO also recommends seven practical steps that governments should take for implementing the right to food.³¹ They could be applied in this sequence, but of course, in reality, most countries have already undertaken some if not all of the steps.

The first step is to identify the hungry and food insecure. It is imperative to know who and where the hungry are. Many people are in vulnerable livelihoods or in vulnerable areas. Other persons, such as children, the elderly and the sick, are physically vulnerable. A human rights approach looks specifically out for any signs of discrimination on the

grounds of race, language, religion or other characteristics prohibited by international law.³² This step is stressed in Right to Food Guidelines 2.2, 13.1 and 13.2. In the context of rapidly rising food prices, this assessment may have to be undertaken more often than otherwise necessary.

The second step is to assess existing policies, institutions and laws, especially with regard to the food insecure. How do these policies address the problems of the hungry and food insecure? Do some policies or laws work against the hungry and cause or perpetuate hunger? Is institutional responsibility clear, and do different institutions work together effectively to address food insecurity? Right to Food Guidelines 3.2 and 5.1 recommend the undertaking of such an assessment, including of institutions.

The third step is to elaborate a sound food security strategy. The Right to Food Guidelines detail the areas of importance and the processes that should be followed. Guideline 3 is entirely devoted to strategies, and Guidelines 2.1, 2.4, 12.3 and 14.4 also give relevant guidance. Of course, national priorities must be set, and a strategic decision on how to address food security must be taken. The various policy options to address the rise in food prices should be aimed, first, at ensuring 'safety net' coverage for those most affected, and second, to address long term affordability of food. From a human rights perspective, it is also very important to determine ways in which people will be able to participate in the process and hold government to account.

The fourth step is to assign the roles and responsibilities of different institutions and ensure they coordinate their efforts. The question of the lead institution needs to be decided and its capacity strengthened if needed. Any institutional gaps need to be filled. It must be clear what the obligations and roles of each institution are, and which responsibilities should be dealt with by each institution. Right to Food Guideline 5 is devoted to institutional questions and Guideline 6 recommends a multi-stakeholder approach. Coordination institutions can play key roles in ensuring adequate and holistic responses to the food price crisis.

The fifth step is to incorporate the right to food into the legal framework. Guideline 7 addresses this question specifically. In addition, Guidelines 1.2, 4.2 and 8.1 contain relevant recommendations. There are three main levels of legislative action: constitutional provisions, framework law on the right to food, and sectoral law review and reform. This will be reviewed in detail in the following section.

The sixth step is to ensure effective monitoring systems for the right to food. The government must monitor progress in realizing the right to food and the effect of policy interventions. In addition, independent national human rights institutions must have the power and capacity to perform their monitoring tasks. Monitoring the right to food is in many ways the same as monitoring food security; the basic data and analytical tools are the same. However, right to food monitoring pays special attention to the human rights aspects and should also itself be carried out in ways that are consistent with human rights. The monitoring process should be with the

full and meaningful participation of the communities concerned and should serve to empower individuals and their communities to ask the central government for changes. For this to happen, it is essential that the monitoring information be disseminated to the communities in question in ways that they understand. Right to Food Guideline 17 is devoted entirely to monitoring; Guideline 5.1 discusses the institutional dimension thereof and Guideline 18 the role of national human rights institutions.

The seventh and final step is to ensure adequate recourse to deal with cases when the rights of individuals or groups are not respected, protected or fulfilled. Many activities are related to this step. Access to justice at the national and local level must be facilitated. Administrative complaint mechanisms may have to be strengthened and information about them disseminated. Judges and lawyers must be trained to handle cases involving the right to food. Right to Food Guideline 7.2 states that recourse should be adequate, effective and prompt. Also relevant are Guidelines 1.4 and 1.5 on general human rights and legal protection and Guideline 18 on human rights institutions. Last, but not least, individuals must be informed about their rights and available recourse, as pointed out in Guideline 7.3.

LEGISLATIVE MEASURES

There are three main levels of legislative action that can be undertaken. The constitution is the obvious first step. Explicitly recognizing the right to food as a justiciable human right will ensure that the courts can address cases brought to them. Framework law can spell out more precise obligations of each actor and the rights and remedies available to individuals and groups. It can also establish or strengthen institutions charged with implementing or monitoring the right to food. Third, since the right to food cuts across many sectors and types of legislation – from access to natural resources, through employment and social security, to food safety, consumer protection and trade – it is recommended to undertake a review of relevant sectoral laws for compatibility with the right to food, to ensure that they promote and do not prevent the right to food.

Right to Food Guideline 7 addresses the legal framework. It envisages possible domestic legal and constitutional provisions, including the direct incorporation of the right to food. It stresses that there should be adequate, prompt and effective remedies in case rights are not upheld, and that there must be public information about existing rights.

RIGHT TO FOOD GUIDELINE 7: LEGAL FRAMEWORK

7.1 States are invited to consider, in accordance with their domestic legal and policy frameworks, whether to include provisions in their domestic law, possibly including constitutional or legislative review that facilitates the progressive realization of the right to adequate food in the context of national food security.

7.2 States are invited to consider, in accordance with their domestic legal and policy frameworks, whether to include provisions in their domestic law, which may include their constitutions, bills of rights or legislation, to directly implement the progressive realization of the right to adequate food. Administrative, quasi-judicial and judicial mechanisms to provide adequate, effective and prompt remedies accessible, in particular, to members of vulnerable groups may be envisaged.

7.3 States that have established a right to adequate food under their legal system should inform the general public of all available rights and remedies to which they are entitled.

7.4 States should consider strengthening their domestic law and policies to accord access by women heads of households to poverty reduction and nutrition security programmes and projects.

Constitutions

The right to food or aspects thereof are recognized in most constitutions around the world.³³ The protection can be direct and explicit, or it can be indirect and implicit. The provisions may be situated in a section on justiciable rights or in a section on principles of state policy. The most common constitutional provisions are formulated along the lines of the Universal Declaration of Human Rights, recognizing the right of everyone to an adequate standard of living, including food, clothing and shelter. Others refer to a decent living standard or life in dignity. Yet other constitutions list components of these rights only, such as food or nutrition.³⁴

A good example of explicit and direct constitutional protection is the Constitution of South Africa, which provides for a general right of everyone to have access to food and water (section 27), and specific nutrition rights for children (section 28) and for persons deprived of their liberty (section 35). The way in which the social, economic and cultural rights are drafted leaves no doubt as to the justiciability of those rights. In section 7 (2) of the Constitution, the State is required to respect, protect, promote and fulfil the rights in the Bill of Rights. Section 38 of the Constitution states that a class, group or individual can “approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.”

India, by contrast, has a provision under the Chapter on Directive Principles of State Policy, that stipulates: “The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties” (Article 47).

Article 21 on the protection the right to life, however, has been interpreted, bearing this provision in mind.³⁵

As a final illustrative example, Switzerland's Federal Constitution stipulates in Article 12: "Anyone who is in a situation of distress and unable to provide for his or her basic needs, has a right to help and assistance and to receive the necessary means for an existence consistent with human dignity."

Framework Law

Article 2 of the International Covenant on Economic, Social and Cultural Rights specifies the obligation of State Parties to adopt *legislative measures*. The Committee on Economic, Social and Cultural Rights recommends the adoption of framework law as a means for implementation of the right to food.³⁶

Framework law has many advantages. It enhances transparency and accountability by defining the right to food more precisely and spelling out corresponding obligations. It can establish principles for policies to be adopted for the realization of the right to food and provide a basis for judicial action. Importantly, it can assign roles and responsibilities of different government institutions and strengthen coordination of the different sectors involved in ensuring the right to food. Such coordination is necessary both vertically, from central to decentralized instances of the government, and horizontally, among sectors.

Key provisions³⁷ of a right to food framework law would be the following:

- Definition of the content of the right to food;
- Assigning corresponding obligations for public authorities;
- Prohibition of discrimination;
- Special measures for vulnerable population groups;
- Measures to enhance right to food implementation, such as requiring an impact assessment, or education and information measures;
- Institutional setting for implementation;
- Mechanisms for civil society participation;
- Procedures and remedies for possible right to food violations;
- Financial arrangements;
- Provisions on implementing legislation and sectoral compliance review.

Recent years have seen much legislative action, especially in Latin America. Food and nutrition security laws have been drafted or adopted, giving recognition and substance to the right to food and provided a legal basis for the food security systems in Argentina, Brazil, Ecuador, Guatemala, Malawi, Mexico, Mozambique, Nicaragua, Paraguay, Peru, South Africa and Uganda.³⁸

Sectoral Law Review

Whether or not framework law on the right to food exists or is being planned, any assessment of the situation concerning the right to food in a particular country should involve a review of relevant sectoral legislation. Some legislation should have the realization of the right to food as its central premise; other should simply respect the right to food. The review should assess how different laws impact the right to food, and whether particular provisions help or hinder that process. Whether laws live up to the obligation to respect, protect and fulfil the right to food, individually and as a system, should be the leading review question. The review should also assess procedural aspects of the right to food, and in particular whether the following human rights principles³⁹ are implemented and respected:

- *Participation*: Does the law provide mechanisms for public and civil society participation in decision making, monitoring or other aspects?
- *Accountability*: Are there provisions for individual accountability of officials involved in implementing the law or for the institution as such?
- *Non-Discrimination*: Does the law address de facto discrimination and contain specific provisions to help rectifying it, for instance against women or indigenous groups?
- *Transparency*: Are there clear provisions about publication of decisions, reports etc. in language that people understand and in ways that are accessible?
- *Human Dignity*: Does the law stipulate respect for individuals in enforcing the law?
- *Empowerment*: Are there any accompanying measures so that individual and groups are able to know and claim their rights and take advantage of opportunities created in the law?
- *Rule and Law and Recourse*: Are there provisions for redress and complaint mechanisms in the law?

The scope of the legislative review needs to be defined, as the potential field of relevance to the right to food is quite broad. Which laws and sectors to include in a review should be determined on the basis of an initial assessment of obstacles to the realization of the right to food and of whose right to food is not realized and why. Below are some areas that could be the subject of legislative review

- Consumer protection;
 - Food safety and control;
 - Food fortification and nutritional quality standards;
 - Labelling standards (the consumer's right to know);
 - Marketing, especially to children, of low-nutrient, energy-dense foods;

- Consumer participation and non-scientific (cultural preferences, ethics) considerations;
- Drinking water and sanitation standards;
 - Privatization laws;
 - Protection of economic access of the poorest persons;
- Access to land, water and natural resources:
 - Security of land tenure;
 - Land reform or redistribution;
 - Use rights of water for household and farms;
 - Genetic resources, farmers' rights and farmers' privileges;
- Food production environment:
 - Access to seeds, fertilizers, pest management;
 - Rural credit;
 - Warehousing and post harvest interventions;
 - Fisheries regulations and access;
- Environmental protection:
 - Pollution of soil and water;
 - Pesticide and other agro-chemical regulations;
 - Biological diversity;
 - Traditional farming practices;
- Social safety nets and social assistance legislation:
 - Food and cash assistance;
 - School feeding;
 - Food for work or food for education programmes;
 - Vitamin and food supplements for physically vulnerable groups;
- Public education and nutrition information:
 - School curricula;
 - Public health campaigns;
 - Nutrition information in mother and child clinics;
- Vulnerability
 - Food insecurity and vulnerability information and mapping systems;
 - Special protection for socio-politico-economically vulnerable groups, such as indigenous peoples;
- Trade, taxes, tariffs and subsidies;
- Market and price monitoring and interventions;
- Emergencies:
 - Monitoring and early warning;
 - Emergency preparedness;
 - Institutional response responsibility;
 - Food stocks.

The review should include recommendations about provisions to be revoked and amended.

Justiciability

Prompt, effective and adequate recourse is specified in Right to Food Guideline 7, as mentioned above. Yet, the justiciability of the right to food is still doubted and resisted by some.⁴⁰ At the national level there is increasing – but still limited – national jurisprudence. This author ventures that the reasons for this scarcity have less to do with the state of law, and more to do with capacity of lawyers to bring cases to court and the understanding of judges of the right to food. The complexity of the right to food, and the frequent difficulty of identifying the specific duty bearer to blame, can also be part of the reason.

The obligations to respect and to protect the right to food are more easily justiciable than the obligations to fulfil the right to food, also because there is a wide margin of discretion as to which measures to adopt in order to fulfil the right to food.⁴¹

The South African Constitutional Court has adopted a doctrine of “reasonableness” in cases involving obligations to fulfil socio-economic rights. It asks whether the legislative and other measures adopted are reasonable, and whether they address the needs of the most vulnerable.⁴²

Swiss Jurisprudence

An important case on the right to food and minimum subsistence comes from Switzerland. In 1996, the Swiss Federal Court, which is the highest court in Switzerland, recognized the right to minimum basic conditions, including “the guarantee of all basic human needs, such as food, clothing and housing” to prevent a situation where people “are reduced to beggars, a condition unworthy of being called human”. The case was brought by three brothers, state-less Czech refugees, who found themselves in Switzerland with no food and no money. They could not work, because they could not get a permit, and without papers they could not leave the country. Their request for assistance to the cantonal authorities in Bern was refused.⁴³

The Court in this case deemed that it lacked the legal competence to set priorities for the allocation of resources necessary to realize the right to minimum conditions of existence, including food. However, it determined that it could set aside legislation if the outcome of this legislative framework failed to meet the minimum claim required by constitutional rights. In this case, the exclusion of three non-nationals from social welfare legislation was found to be a violation of their right to food, despite the fact that they were illegal immigrants. The Swiss Federal Court decision determined that the right to food in this sense could be the foundation of a justiciable claim for official assistance.⁴⁴

Transforming the hitherto unwritten constitutional right, the 1999 Swiss Constitution contains an explicit Constitutional provision on the right to assistance in situations of distress, as discussed above in the section on constitutions.

Indian Jurisprudence

According to the “Right to Food Campaign,” the year 2001 witnessed a time of widespread drought across the country. In many states, it was the second or third successive year of drought. In this time of crisis, state governments often failed to meet their responsibilities towards drought-affected citizens, as spelt out in their respective “famine codes” or “scarcity manuals.” This failure was all the more shocking in view of the country’s gigantic food stocks (approximately 50 million tonnes at that time).

In response to this situation, the People’s Union for Civil Liberties (Rajasthan) filed a writ petition in the Supreme Court in April 2001, demanding the immediate utilization of the country’s food stocks for drought relief and prevention of hunger. The scope of the petition was not restricted to drought situations alone. It also focused on the general need to uphold the “right to food.” The respondents to the lawsuit were the Union of India, all the state/Union Territory (UT) governments, and the Food Corporation of India.⁴⁵

The Supreme Court held its first hearing on 9 May 2001 and has held regular hearings in the case since then. The case is ongoing, but a number of interim orders have been issued. In its Interim Order of 2 May 2003 the Court stated:

Article 21 of the Constitution of India protects for every citizen a right to live with human dignity. Would the very existence of life of those families which are below poverty line not come under danger for want of appropriate schemes and implementation thereof, to provide requisite aid to such families? Reference can also be made to Article 47 which inter alia provides that the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties.⁴⁶

The Supreme Court has thus formally recognized the right to food, and has ordered the central and State governments to take a number of measures to improve the situation. The justiciability of this right is therefore confirmed, and the Court has issued a number of orders to government, entailing expenditure of resources.

CONCLUSION

The right to food is a human right. This means that all human beings have the right to food, no matter who they are, where they live or whether they have done anything to “deserve” the right to food. States have obligations to respect, protect and fulfil the right to food. Everyone has responsibilities to help make the right to food happen. The concept of the right to food builds

on the concept of food security, but stresses individual access and processes in obtaining this access. FAO promotes, in the context of the right to food, the principles of participation, accountability, non-discrimination, transparency, human dignity, empowerment and the rule of law or recourse, to guide all processes toward realization of the right to food.

The importance of the Right to Food Guidelines must be stressed. They exist to help put the principles into practice. They constitute the international consensus about the implementation of the right to food. The Guidelines address the five areas of action necessary for national level implementation. They are also the basis for the seven steps of implementation for governments. These Guidelines should guide the current worldwide discussions about rising food prices and appropriate policy responses, to ensure that the right to food of the individual is the primary objective and that democratic processes are followed in devising them.

Legislative measures are at three levels: constitutions, framework law and sectoral laws. FAO recommends that states take legislative action to ensure threefold protection of the right to food.

The right to food is the human right to feed oneself in dignity. That is not too much for anyone to demand.

NOTES

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² Quoted in Wordnet-Online: <http://www.wordnet-online.com/right.shtml>

³ FAO, *The State of Food Insecurity in the World (SOFI) 2006*, Rome, 2006, p. 8.

⁴ FAO and International Life Sciences Institute, *Preventing micronutrient malnutrition: A guide to food-based approaches - A manual for policy makers and programme planners*, Washington, 1997, table 1.

⁵ Jacques Diouf, Director-General of FAO, address to European Parliament, Brussels, 3 July 2008, FAO press release <http://www.fao.org/newsroom/en/news/2008/1000866/index.html>

⁶ FAO Legislative Study 68, *Extracts from international and regional instruments and declarations, and other authoritative texts addressing the right to food*, Rome, 1999.

⁷ Committee on Economic, Social and Cultural Rights, *General Comment 12, the Right to Adequate Food (Article 11 of the Covenant)*, UN Document No E/C/12/1999/5, 12 May 1999.

⁸ See status of ratification of the Covenant at <http://www2.ohchr.org/english/bodies/ratification/3.htm>

⁹ See UN, *The Right to Food*, Report by the Special Rapporteur on the right to food, Mr. Jean Ziegler, submitted in accordance with Commission on Human Rights resolution 2000/10, UN Document No E/CN.4/2001/53, 7 February 2001, p. 7.

¹⁰ Committee on Economic, Social and Cultural Rights, General Comment 12, *The Right to Adequate Food*, UN document E/C.12/1999/5.

¹¹ FAO, *The State of Food Insecurity in the World (SOFI) 2001*, Rome, 2001, p. 49.

¹² Committee on Economic, Social and Cultural Rights, General Comment 12, *The Right to Adequate Food*, UN document E/C.12/1999/5.

¹³ See www.fivims.org

¹⁴ Committee on Economic, Social and Cultural Rights, General Comment 12, *The Right to Adequate Food*, UN document E/C.12/1999/5, para. 8

¹⁵ FAO, *A Primer on the Right to Adequate Food*, E-learning course, Lesson 1: Human Rights-Based Approach to Development, pp. 13-14, 2007, available on CD-ROM and online at http://www.fao.org/righttofood/index_en.htm

¹⁶ *Declaration of the (NGO) Forum for Food Sovereignty*, Nyéléni 2007, Sélingué, Mali, 27 February 2007.

¹⁷ *Vienna Declaration of Human Rights and Plan of Action*, UN doc. A/CONF.157/23, 1993, para 5.

¹⁸ *Report of the 126th Session of the Council*, 22-27 November 2004, Rome, FAO doc CL127/REP (2004).

¹⁹ FAO, *International Alliance Against Hunger*, Declaration of the World Food Summit: *five years later*, Rome, June 2002, Report of the World Food Summit: *five years later*, part one, Appendix, operative paragraph 10.

²⁰ FAO Council Document CL/123/22 and *Report of the 123rd Session of the Council*, Rome, 28 October to 2 November 2002, Appendix D.

²¹ *Report of the Conference of FAO*, Thirty-third Session, Rome, 19 - 26 November 2005, FAO doc C 2005/REP.

²² Institut International Jacques Maritain, *Notes et Documents*, n°45/47, janvier-décembre 1996, Dossier: “*The Right to Food, a Fundamental Human Right*.” (See also Institut International Jacques Maritain, AA.VV. *El derecho a la alimentación como derecho humano fundamental*, Caracas, Fundación Polar, 1996.)

²³ See Institut International Jacques Maritain, *Notes et Documents*, n° 56, septembre-décembre 1999, Dossier: “Code of Conduct on the Right to Adequate Food”.

²⁴ The Institut International Jacques Maritain has since issued a number of publications on the right to food, including *For an Effective Right to Adequate Food*, Marco Borghi and Letizia Postiglione Blommestein (eds), Fribourg, Presses Universitaires Fribourg, 2002; *The Right to Food and the Cost of Hunger*, Letizia Postiglione-Blommestein and Simone Arnaldi (eds), Rome, Ministry of Agricultural and Forestry Policies, 2003; AA.VV., *El derecho a la alimentación. Temas seleccionados*, Caracas, Fundación Polar-International Jacques Maritain Institute, 2004; and *The Right to Adequate Food and Access to Justice*, Marco Borghi and Letizia Postiglione Blommestein (eds), Bruxelles, Schulthess-Bruylant, 2006.

²⁵ See for instance Guideline 2.5; 3.5; 3.9; 8.3.

²⁶ FAO, *Basic Texts Volume I*, Rome 2006, Preambular paragraph of the FAO Constitution, as amended in 1965.

²⁷ Gerald Moore and Margret Vidar, “FAO and the Right to Adequate Food,” in *Notes et Documents*, 56, nouvelle série, septembre-décembre 1999, Institut International Jacques Maritain /Centre International d’Etudes et de Recherches.

²⁸ FAO, *Rome Declaration on World Food Security*, Report of the World Food Summit, part one, Appendix, FAO, Rome, 1997, paragraph 1.

²⁹ FAO, *International Alliance Against Hunger*, Declaration of the World Food Summit: five years later, Rome, June 2002, Report of the World Food Summit: five years later, part one, Appendix, preamble.

³⁰ FAO, *The Right to Food in Practice: Implementation at the National Level*, Rome 2006

³¹ FAO, *A Primer on the Right to Adequate Food*, E-learning course, Lesson 7: The Right to Food in Practice, 2007, available on CD-ROM and online at http://www.fao.org/righttofood/index_en.htm

³² International Covenant on Economic, Social and Cultural Rights, Article 2:2. International Covenant on Civil and Political Rights, Article 2:1.

³³ Margret Vidar, *State Recognition of the Right to Food at the National Level*, UNU-WIDER Research paper no 2006/61, June 2006, pp. 6-8.

³⁴ See also FAO, *Guide on Legislating for the Right to Food*, 2009, online: http://www.fao.org/righttofood/publi09/guide_on_legislating.pdf

³⁵ *PUCCL vs. Union of India and others*, Writ Petition (Civil) No.196 of 2001, available at www.righttofood.com

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³⁷ FAO, *Guide on Legislating for the Right to Food*, 2009.

³⁸ Ibid.

³⁹ FAO, *A Primer on the Right to Adequate Food*, E-learning course, Lesson 1: Human Rights-Based Approach to Development, pp. 13-14, 2007, available on CD-ROM and online at http://www.fao.org/righttofood/index_en.htm

⁴⁰ FAO, *Justiciability of the Right to Food*, paper prepared for the Inter-Governmental Working Group on Right to Food Guidelines, FAO doc. IGWG/RTFG/INF. 7, reproduced in FAO, *The Right to Food Guidelines: Information Papers and Case Studies*, Rome, 2006, p. 72.

⁴¹ Ibid. p. 82.

⁴² Government of the Republic of South Africa v. Grotboom, 2001 (1) SA 46 (CC).

⁴³ *The Right to Food*, Report by the Special Rapporteur on the right to food, Mr. Jean Ziegler, submitted in accordance with Commission on Human Rights resolution 2001/25, UN document E/CN.4/2002/58, 20 December 2001, paragraph 58.

⁴⁴ Malcolm Langford, *Right to Food in International Law: Obligations of States and the FAO*, LLM Thesis presented to the European University Institute, Florence, 1 October 2001.

⁴⁵ Right to Food Campaign India website, Legal Action, <http://www.righttofoodindia.org/>.

⁴⁶ *PUCL vs. Union of India and others*, Writ Petition (Civil) No.196 of 2001, available at <http://www.righttofoodindia.org/>

CHAPTER XIV

THE RIGHT TO DEVELOPMENT: THE EXPERIENCE OF INDIA

M.S. SWAMINATHAN

The UN Millennium Development Goals constitute a global common minimum programme for human security and wellbeing. The very first of these goals relates to reducing hunger and poverty by half by 2015. Unfortunately the midterm appraisal made during 2007 of the proportionate progress achieved during the first seven and half years has not been satisfactory in many countries in Asia and Africa. The goals themselves are extremely modest and hence it is a matter for regret that even these goals are not being reached. I would like to concentrate on the question of right to development in the areas of agriculture and rural development. A majority of the population of most developing countries is still rural, and rural poverty is higher than urban poverty. Rural poverty again results from inadequate progress in improving the productivity, profitability and sustainability of the major farming systems of the country concerned. Agriculture, comprising crop and animal husbandry, forestry, and fisheries is still the backbone of the livelihood security system of rural communities in most developing countries. The right to development therefore in these countries should be measured in terms of the right to rural and agricultural development. I would like to illustrate what can be done in conferring this right to development among rural families by taking the case of India.

A few days prior to his assassination in January 1948, Mahatma Gandhi said, "Forget the past, Remember every day dawns for us from the moment we wake up. Let us all, every one, wake up now." The growing violence in the human heart we are witnessing now is in part due to the jobless economic growth happening now, devoid of commitment to gender and social equity.

Farm families in India constitute over two thirds of the population. Since farmers are also consumers, the sharp distinction often made in industrialized countries between the interests of farmers and consumers, is not valid in the Indian context. Detailed analyses of the causes of food insecurity in rural and urban areas have revealed that the major cause of under- and malnutrition among children, women and men is the lack of adequate purchasing power to permit access to balanced diets and clean drinking water. Therefore, a three-pronged strategy needs to be introduced to ensure the economic well-being and nutrition security of rural families. First, families possessing assets like land, livestock or fish ponds will have to be assisted to enhance the productivity of their resource endowments in an environmentally and economically sustainable manner. The smaller the

holding, the greater is the need for marketable surplus. Hence, the highest emphasis has to be placed on increasing output per units of land, water, nutrients and labour based on technologies which are ecologically and economically sound. For this, we need more research on the development of eco-technologies based on blending traditional ecological prudence with frontier technologies like information and biotechnology and space and renewable energy technologies.

Second, nearly a third of the rural population and a large proportion of women earn their livelihood through wage employment. They have no assets like land or livestock or fish ponds and are also often illiterate. The challenge in the case of landless agricultural labour is enhancing the economic value of their time and labour by bringing about a paradigm shift from unskilled to skilled work. A massive effort in the area of knowledge and skill empowerment of the women and men constituting the landless labour work force is essential if economic value is to be added to their time and labour. They will have to be enabled to take to skilled non-farm employment through market-driven micro-enterprises supported by micro-credit. Self-help Groups (SHGs) of assetless women and men will have to be made sustainable through backward linkages to credit and technology and forward linkages with markets. Common property resources will have to be developed and managed in a manner that they can provide essential support systems in areas such as fodder and feed for stall-fed animal husbandry as well as fuel wood. At the same time, land reform including the distribution of land to assetless families should be attended to with speed and commitment.

The third group comprises rural artisans working in the secondary and tertiary sectors of the economy. Their skills will have to be mobilized to enhance the competitiveness of agriculture through value-addition to primary products and diversification of livelihood opportunities. The strategy for the technological upgradation of rural professions should be based on the principle of social inclusion. For this purpose, Rural System Research (RSR) involving concurrent attention to on-farm and non-farm employment should be promoted.

Thus, the three pronged strategy consists of improving the productivity of land, water, livestock and labour in the case of asset owning farm families, converting unskilled agricultural labour into skilled entrepreneurs engaged in organizing market-driven non-farm enterprises, and enhancing the skills of families involved in the secondary and tertiary sectors of the rural economy, so that they are able to assist in improving agricultural efficiency and competitiveness and in ending the prevailing mismatch between production and post-harvest technologies.

CONVERTING THE RIGHT TO DEVELOPMENT INTO A MISSION FOR RIGHT TO FOOD

A useful definition of the “Concept of Food and Nutrition Security” is the following

- that every individual has the *physical, economic, social and environmental access* to a balanced diet that includes the necessary macro- and micro-nutrients, safe drinking water, sanitation, environmental hygiene, primary health care and education so as to lead a healthy and productive life.
- that food originates from efficient and *environmentally benign production technologies* that conserve and enhance the natural resource base of crops, farm animal husbandry, forestry, inland and marine fisheries.

The above comprehensive definition of food and nutrition security provides guidelines for developing an effective operational strategy for achieving the goal of freedom from hunger. Hunger has three major dimensions.

- a. *Chronic or endemic hunger* resulting from poverty-induced undernutrition;
- b. *Hidden hunger* arising from micro-nutrient malnutrition, caused by the deficiencies of iron, iodine, zinc and vitamins in the diet;
- c. *Transient hunger* caused by disruption in communication arising from natural or man-made disaster. A sustainable national nutrition security system should cover all these three categories of hunger.

Similarly, *availability* of food at the household level depends upon (a) food production and / or imports; (b) *access* which depends on livelihoods / purchasing power and *absorption* which is influenced by access to clean drinking water, environmental hygiene and primary health care.

Thus, nutrition security involves concurrent attention to both food and non-food factors. Cutting across all these issues is the overriding need for ensuring the stabilization of the human population. India is likely to overtake China by 2030 in the size of its population. Human numbers even now are far in excess of the population supporting capacity of the ecosystem. We also have nearly 20% of global farm animal population, to sustain which adequate land will be needed for grazing and for the production of the feed and fodder.

HUNGER-FREE INDIA: COMPONENTS OF ACTION PLAN

- a) Restructure the delivery systems relating to all nutrition support programmes on a life cycle basis, starting with pregnant women and 0-2

aged infants and ending with old and infirm persons. An illustrative list of the programmes which will benefit from a life-cycle based delivery system is in Table 1.

Table 1: Current Status of Interventions

S.No	Stage of Life Cycle	Intervention / Action
1.	Pregnant Mothers	Food for Nutrition to avoid maternal and foetal mal- and under-nutrition resulting in LBW children
2.	Nursing Mothers	Support needed for breast feeding, for at least six months
3.	Infants (0-2 years)	Not being reached by ICDS
4.	Pre-School Children (2-6 years)	Integrated Child Development Services
5.	Youth going to School (6-18 years)	Noon Meal Programme
6.	Youth out of School	Not being attended to
7.	Adults (18-60 years)	Food for Eco-Development (Sampoorn Gramin Rozgar Yojana), PDS, TPDS, Antyodaya Anna Yojana
8.	Old & Infirm Persons	Annapoorna and Food for Nutrition Programmes
9.	Emergencies	Food during natural calamities

- b) Promote community food security systems based on an integrated attention to conservation, cultivation and consumption.

Gene Bank Seed Bank Water Bank Grain Bank

This programme should be based on the principle “store grain and water everywhere.” The Community Grain / Food Bank system will help to widen the food security base by including a wide range of millets, grain legumes and tubers.

- c) Promote the growth of community water security systems based on a five-pronged strategy consisting of:
- *Augment supplies* through mandatory water harvesting and conservation;
 - *Curtail demand* by eliminating all sources of unsustainable use of water and promoting “more crop per drop” methodologies of crop cultivation;
 - *Harness* new technologies relating to improving domestic water use efficiency, de-salination of sea water, breeding of drought and salinity tolerant crop varieties, bioremediation, etc.;
 - *Promote seawater farming through integrated agro-forestry and aquaculture* production systems in coastal areas;
 - Pay attention to *water quality*. The quality of drinking water is deteriorating due to pesticide and bacterial contamination in ground water. As much attention should be paid to the improvement of drinking water quality, as to the augmentation of water supplies. Bioremediation techniques will have to be used for removing arsenic and heavy metals from tube well water.
- d) Eradicate hidden hunger caused by micro-nutrient deficiencies based on natural food cum food fortification approaches. For example, salt fortified with iron, iodine, minerals and vitamins, coupled with the consumption of beta-carotene rich sweet potato or vegetables will be very helpful to fight hidden hunger. Nutritious biscuits can also be made by local self-help groups. Nutritional literacy should be promoted at the school level.
- e) New Deal for the Self-employed: the unemployment rate on current daily status was about 9.21 percent (34.85 million) in 2001-02 in rural areas. Unemployment among rural youth increased from 9 percent in 1993-94 to 11.10 percent among males and 10.60 percent among females in 1999-2000.

Rural employment grew at 0.67% and agricultural employment at 0.02% during 1999-2000. According to the 55th round of the survey of NSSO, the share of self-employed in 1999-2000 was about 53%. Of the share of self-employed in total employment, 58% (133 to 134 million) were in the primary sector, i.e., agriculture and allied activities.

Detailed analysis of the causes of food insecurity in rural and urban India have revealed that inadequate purchasing power due to lack of job/livelihood opportunities is now the primary cause of endemic or chronic hunger in the country. Since opportunities for employment in the organized sector are dwindling, we have to create a policy environment which enlarges opportunities for remunerative self-employment in rural India in order to avoid an era of jobless economic growth.

Agriculture, comprising crop and animal husbandry, fisheries, forestry and agro-forestry and agro-processing is the largest private sector industry in India, providing livelihood opportunities for over 650 million women and men. There is need to intensify efforts to create more opportunities for gainful livelihood opportunities in the farm and non-farm sectors.

The menu of income earning opportunities for the self-employed needs to be enlarged. NCF has already recommended that all the existing Krishi Vigyan Kendras (KVKs) should be provided with a post-harvest technology wing. In addition, there is an urgent need for at least 50 SHG capacity building and mentoring centers in every State, to enhance the management and marketing capacities of members of the Self-help Groups (SHGs). Such centers can be established in existing institutions like Agricultural, Rural and Women's Universities, IITs, institutions operated by NGOs, etc. Village Knowledge Centres can provide SHGs with e-commerce facilities. Accounting software will have to be introduced. SHGs will be sustainable in the longer term only if they have backward linkages with technology and credit, and forward linkages with management and marketing. Sustainable Self-help Groups (SSHGs) will emerge only if we build the capacity of the key members (both women and men of SHGs). The SHG Capacity Building and Mentoring Centres may be financially supported by the Union Ministry of Rural Development. This will be an essential component of the New Deal for the Self-employed.

- f) **Enhancing the Productivity of Small Holdings:** Nearly 80% of the land holdings are below 2 ha in size. Unlike in industrialized countries where only 2 to 4% of the population depend upon farming for their work and income security, agriculture is the backbone of the livelihood security system for 2/3rds of India's population. Therefore, farmers constitute the largest proportion of consumers. The smaller the farm, the greater is the need for marketable surplus in order to get cash income. Hence, improving small farm productivity, as a single development strategy, can make the greatest contribution to the elimination of hunger and poverty.

Indian soils are both hungry and thirsty. Hence, soil health enhancement and irrigation water supply and management hold the key to the enhancement of small farm productivity. The following steps are urgently needed.

- National network of advanced soil testing laboratories with facilities for the detection of micro-nutrient deficiencies. As a single agronomic intervention, supply of the needed micronutrients in the soil has the greatest impact on increasing yield. Hidden hunger is as widespread in soils, as in human beings. In fact, the two have causal relationships.
- Million Wells Recharge Programme
- Restoring Water bodies and promoting mandatory water harvesting.

- Establishment of 50,000 Farm Schools to promote farmer to farmer learning.
- Organisation of Small Farmers' Horticulture, Cotton, Poultry and other Estates, to promote group farming and to confer the power of scale to small producers both at the production and post-harvest phases of farming.
- Proactive Advice on Land and Water Use:

Farming is becoming a gamble both in the monsoon and the market. Farmers urgently need proactive advice on land and water use. Land use decisions are also water use decisions. The Every Village a Knowledge Centre Movement will help to give farmers dynamic advice on meteorological and marketing conditions.

Designing and introducing a Food Guarantee Act

In India there is over a century of experience in organizing relief work (under the provisions of the Famine code in the Colonial Period) and Food for Work programmes. It is clear that our agriculture has reached a stage when farmers will grow more only if we can consume more. Hence, a National Food Guarantee Act, combining the features of the Food for Work and Employment Guarantee Programmes, will represent a win-win situation both for producers and consumers. Women, in particular, prefer a combination of grains and cash as wage, provided the food grains are of good quality.

A National Food Guarantee Act should lead to a decentralized network of grain storage structures and would help to prevent panic purchase of food grains during periods of drought or flood. They will also help to prevent distress sales by producers at the time of harvest. In addition, it will help to enlarge the composition of the food security basket. Brazil, Kenya and a few other countries have announced "Zero Hunger" programmes. India can take the lead to give meaning and content to the zero hunger concepts by developing a National Food Guarantee Act.

Providing every individual child, woman and man with opportunities for a productive and healthy life is the fundamental obligation of governments. Where hunger rules, peace cannot prevail. As pointed out by the Roman Philosopher Seneca, "a hungry person listens neither to reason nor religion nor is bent by any prayer."

Situation in the Asia-Pacific Region

The Asia-Pacific region is rich in natural resources but ironically is also the home of millions of malnourished and under-nourished children, women and men. An analysis conducted by FAO this year on the occasion of the mid-point towards achieving the UN Millennium Development Goal relating to reducing poverty and hunger by half by 2015, reveals that the

proportionate progress made by most countries in the region, except China, is inadequate. How then can countries in this region achieve the goal of food for all and forever by 2015?

Organisation is the greatest human invention of all time. Organization is the social technology through which human beings accomplish together far more than can be accomplished individually. The Asia-Pacific region has rich experience in organizing agricultural production programmes based on a win-win situation both for the environment and food security. What policy makers should never forget is that if farm ecology and economics go wrong, nothing else can go right in agriculture.

In most countries in this region, a famine of sustainable livelihood opportunities, rather than availability of food in the market is responsible for household food insecurity. Therefore, a major effort is needed to create skilled non-farm employment opportunities, which are market-driven. Starting from the Industrial Revolution in Europe, the rich-poor divide started to grow because of the technology divide. Today, the technology, genetic, digital and gender divides are widening among and within nations. If technology has been a prime-mover of economic divide so far, the challenge now is to enlist technology as an ally in the movement for social and gender equity. Social inclusion in access to relevant technologies should be the bottom line of technology development and dissemination policies. I would like to cite one example to illustrate how this can be done.

Can Science and Technology Feed the World in 2025?

A combination of improved genetic strains, appropriate agronomic practices, irrigation facilities and assured and remunerative marketing opportunities led to the birth of the green revolution in many parts of Asia. This resulted in the growth rate in food production exceeding the growth rate in population. However during the last decade there has been a deceleration in food production growth rates largely due to a combination of adverse meteorological, ecological and marketing factors. This has been referred to as the “fatigue of the green revolution.” The challenge now is how to reverse the decline and ensure that there is adequate food for the growing population.

By 2025, the world population is likely to exceed 7 billion. About 2 billion tonnes of food grains will be needed to meet the needs of this population. This is not difficult since there is a large untapped production reservoir available in countries like India even with the technologies currently on the shelf. If these technologies could be transferred to farmers’ fields through appropriate packages of services and public policies, the food needs in physical terms can be met. However, even today the food security challenge is not just increasing production but providing jobs or livelihoods which can lead to economic access to food. In general, where there is work, there is money, and where there is money there is food. Therefore, it

becomes important to look at agriculture not just as a food producing machine, but as an important source of livelihood generation both in the farm and non-farm sectors. Enhancing small farm productivity and profitability, as a single step, will make a major contribution to reducing hunger and poverty. This in turn will depend on the ability to assure remunerative prices for their produce.

In industrialized countries, farmers constitute 2 to 4 per cent of the population. The per capita income of farmers is high both because of the size of the farm operated and the extensive support extended by government. They are technology, capital and subsidy rich. Public policies concurrently promote conservation, cultivation, consumption and commerce. Extensive support is given to promote conservation farming. The collapse of the Doha round of negotiations in agriculture is an indication that farming cannot survive in industrialized countries without substantial support from public funds to ensure its economic viability.

What then is the future for farmers and farming in developing countries? The following four areas need urgent and integrated attention: technology, training, techno-infrastructure and trade. Technological, ecological and management upgradation of small farms is the need of the hour.

TECHNOLOGY

Technologies which can help to enhance land, water and labour productivity are urgently needed. They should lead to an evergreen revolution in small farms, i.e., an increase in productivity in perpetuity without associated ecological harm. The smaller the farm, the greater is the need for marketable surplus in order to generate cash income. The small farm can lend itself to higher productivity and profitability, provided the small farmer is enabled to overcome his/her handicaps arising from lack of capital and credit and access to appropriate technologies and inputs and remunerative markets. There is need for a small farm management revolution, which can result in conferring the power and economy of scale on small producers both in the production and post-harvest phases of farming; if this does not happen, mounting debts arising from adverse economics will continue to affect them. Cooperative farming, service cooperatives, stakeholder companies, formation of compact production and processing Estates by Self-Help Groups and farmer-centric contract farming can all help to improve the economics of small holdings and thereby foster improved management.

At the production end, there is need for integrating frontier technologies like biotechnology, information and communication technologies, space and nuclear technologies and renewable energy technologies such as solar, wind, biogas and biomass based energy systems with traditional ecological prudence. Bio-energy based on pyrolysis and gasification of biomass can be a decentralized source of energy. Bio-fuels

also offer scope wherever ecological and economic conditions are favourable. Biomass is an under-utilized resource. Bio-Parks can be promoted in every block to convert the available biomass into a wide range of economic products, including energy and manure.

Conservation farming and green agriculture are the pathways to an evergreen revolution. The greatest problem with applying conservation agriculture concepts in dry land areas is the lack of adequate quantities of crop residues. The removal of crop residues for alternative uses accelerates the already fast decline of soil organic matter content in dry land areas. Long term sustainability of dry land soils may be significantly enhanced by reduced tillage that leaves more crop residues on the soil surface. Green Agriculture involves the development and adoption of environmentally beginning technologies like integrated nutrient supply and integrated pest management.

Besides enhancing soil fertility and soil organic matter, the need for the economic and efficient use of irrigation water cannot be over emphasised. The average yield of cereals can be increased by 30 to 60% annually in dry farming areas by increasing crop water use by 25 to 35 mm. This can be readily achieved by conservation agriculture. High input costs, uncertain rainfall and poor income lead to widespread indebtedness. The younger generation will be reluctant to take up farming as long as income prospects are poor. Declining terms of trade between farm and non-farm sections is a matter of concern.

It is in this background that we have to examine the opportunities opened up by new technologies. New agriculture technologies like genomics and information technology together with improved agronomic management should form the cornerstone of increasing agriculture productivity and profitability of small farms both in irrigated and rainfed areas as well as in problem soils and coastal areas. Recombinant DNA technology has already resulted in the breeding of crop varieties possessing tolerance to salinity and drought as well as to serious biotic stresses caused by the triple alliance of pests, pathogens and weeds. It is however essential to have a professionally and socially credible National Biotechnology Regulatory Authority. The bottom line for any biotechnology regulatory policy should be the safety of the environment, the well being of farming families, the ecological and economic sustainability of farming systems, the health and nutrition security of consumers, safeguarding of home and external trade, and the biosecurity of the nation.

The Village Knowledge Centre (VKC) based on the integrated application of the internal and community radio or mobile phone will help to bridge the growing gap between scientific knowledge and its field application. It will also facilitate the removal of many intermediaries from the marketing chain.

Wholesale fruit and vegetable markets are likely to lose their importance under the growing influence of contract farming and direct supply relationships between producers and major market chains. Changes

in intermediary relationship will occur as internet-based marketing tools are adopted by both producers and suppliers. Knowledge connectivity is vital in addition to physical connectivity through roads. As a single step, the VKC will bring about a transformation in the economic conditions and social relations in our villages. Bridging the digital divide is a powerful method of bridging the gender divide, since rural women master the ICT technologies with ease. The last mile and last person connectivity will be through FM / community radio and / or mobile phones. The internet – radio – mobile phone synergy is a very powerful tool for social inclusion in access to all the needed information, including warning of impending natural disasters. Villagers give priority to health and marketing information. In addition, an Entitlements Database can empower them with information on all the government schemes designed for their well being. Gender-specific information is equally important. Every farmer in the village should be issued with an Entitlements Pass Book.

We are thus on the threshold of both a biotechnology and information technology revolution. Biotechnology does not imply only GMOs. Non GMO applications are many, such as tissue culture for multiple elite germplasm, bio-fertilizers, bio-pesticides and bio-remediation of ground water as well as marker-assisted breeding. In the case of GMOs, safe and responsible use should be ensured. Organic farming procedures permit the use of varieties developed by marker-assisted breeding.

The third technological revolution relevant to agriculture is the ecotechnology movement. This involves the appropriate integration of frontier sciences with the ecological prudence of farming communities.

The ecotechnology revolution underpinning the ever-green revolution movement has many pathways as indicated below.

Green Revolution: Commodity-centered increase in productivity	Ever-green Revolution: increasing productivity in perpetuity without associated ecological harm
Change in plant architecture, and harvest index	<i>Organic Agriculture:</i> cultivation without any use of chemical inputs like mineral fertilizers and chemical pesticides
Change in the physiological rhythm-insensitive to photo-periodism Green	<i>Green Agriculture:</i> cultivation with the help of integrated pest management, integrated nutrient supply and integrated natural resource management systems

For most small farmers, green agriculture will be the most feasible form of eco-agriculture. Crop-Livestock integrated systems of production will be ideal for organic farming. More research is needed on nitrogen-

fixing tree species and shrubs, as well as green manure plants. Our soils are hungry and thirsty and they need both nutrients and water.

In addition to BT, ICT and Ecotechnology, there are opportunities in space application, nuclear techniques and GIS and GPS based precision farming. What is important is the training of Farm Science Managers (at least 1 woman and 1 man) in every village, so that there is a new dawn in agriculture, which capitalizes on both traditional wisdom and frontier science and technology.

Also, like the Silicon Valley, Biovalleys could be organized in mega-biodiversity areas to enable the local population to convert biodiversity into bio-wealth. We can then end the irony of the co-existence of the prosperity of nature and the poverty of people. Organic farming also requires support from strategic research in the areas of feeding for high yields and pest management. An area of technology of great importance to the survival of small scale agriculture is proactive advice on land use based on anticipated meteorological and marketing conditions. A Land Use Advisory Service, using the latest meteorological and computational tools is badly needed. We cannot abandon farm families with small holdings to their fate in a globalized economy without adequate support services based on the best in modern science. A Market Intelligence Service should be set up which can monitor crop trends in the country and advise farmers what to plant in the coming season, so as to prevent gluts and price crashes. This can be disseminated through the Village Knowledge Centre.

Training

How can such a technological, ecological and managerial upgrading of small farm agriculture be brought about? This is where training, re-training, re-tooling and redeployment of both farmers and farm graduates become important. India has 47 Agricultural and Animal Husbandry (including Fisheries) Universities. Nearly 20,000 farm graduates including about 7,000 postgraduates become available each year. There is a vast chain of National Research Institutes and Centres, National Bureaus and All India Coordinated Projects under ICAR. There are also a growing number of R & D institutions in the private sector and a number of civil society organisations working on agricultural issues.

Training of farm and home science graduates also needs revamping. The major mission of Agricultural, Veterinary, Fisheries, Rural and Women's Universities should be to help every scholar to become an entrepreneur. They can then organize Service Co-operatives, Stakeholder companies, Agri-clinics, Agri-business centres, Bio-Parks, Food-Parks and other enterprises which can help to improve the efficiency and economics of farming. Home Science Colleges could be restructured as Colleges of Human Sciences, where both men and women learn the science and art of nutrition, agro-processing and home economics.

Service cooperatives by farm and home science graduates can help to upgrade speedily the efficiency and economic viability of small farms, since they can facilitate highly productive decentralized production supported by key centralized services. Cooperatives should be organized on a stakeholder rather than on a shareholder principle.

A reorientation in the mindset of farm graduates can be brought about only by innovative changes in curricula and courses. In all applied areas, business and financial management should be added to the disciplinary training. For example, a course in Seed Technology can be restructured and designated as "Seed Technology and Business." Similarly, nutrition courses could be reorganized as Food Safety and Nutrition Security programmes. Courses in Agronomy could be developed into Agronomy and Agri-business Programmes. If the business, financial and trade aspects are integrated with disciplinary training, such courses will give the farm / home science graduates the self-confidence essential for embarking upon a career of self-employment. Attention should be given to imparting a business orientation to all the applied courses in Agricultural Universities. A large number of graduates are now being trained in the field of biotechnology. However, many of them are not able to utilize their training after taking degrees due to lack of appropriate employment opportunities. Agricultural Biotechnology is an area where there are considerable opportunities for remunerative self-employment. It would therefore be appropriate that support is extended to the creation of a National Association of Genome Entrepreneurs who could be supported with Venture Capital Fund in order to enable them to convert the rich knowledge available in government institutions in the field of functional genomics into commercially viable products. They could also undertake work for other countries in the area of preparation of genome maps of the crops of interest to those countries. Mainstreaming entrepreneurship and business skills in all applied courses, rather than keeping Business Management Course as a separate entity is essential, if small farm agriculture is to become economically sustainable and educated youth are to be attracted to take to a career in agriculture.

Another urgent need is the establishment of a chain of Regional Institutes for Food Safety and Security. They can be established in appropriate Agricultural, Veterinary or Fisheries Universities. Home Science Graduates can be employed in such Regional Institutes to launch a movement for food safety including awareness of codex alimentarius standards. They should also spread quality literacy among farmers through Gyan Chaupals.

Training of all engaged in agricultural administration in the basic principles and economics of farming is essential. In the United States, practicing farmers often occupy leading positions in Agricultural Departments for specific periods. It would be useful to begin posting active and accomplished farm/fisher women and men as Directors in State Departments of Agriculture, Horticulture, Animal Husbandry, Fisheries, etc

on a 5 year tenure. Unless there is an upgrading in the practical knowledge of those responsible for developing agricultural programmes and policies, there is no hope for developing country agriculture in a globalised economy.

TECHNO-INFRASTRUCTURE

Post-harvest infrastructure, particularly for perishable commodities, is extremely weak in most developing countries. Unless this is attended to on an urgent basis, farmers will not be able to get adequate return for their labour. Similarly facilities for food safety, water quality, sanitary and phytosanitary measures and biosecurity need to be improved.

Facilities for soil testing, particularly estimation of micro-nutrient status also need considerable strengthening. Unless more investment is made in strengthening the support services needed by farmers for the scientific upgradation of farming, the average productivity will continue to remain low and youth will not be attracted to farming. Simple but safe storage bins need to be popularized on a large scale, along with low cost refrigeration facilities for perishable commodities. A Livestock Feed and Fodder Corporation, a Land Use Advisory Service, an National Trade Organisation, Living Heritage Gene Banks to conserve unique local breeds of farm animals, internationally recognized certification agencies for organic farm products, an Agricultural Price Stabilisation Fund, integrated insurance products like the Parivar Bima Policy and other essential support services are needed to help increase the productivity and profitability of small farm agriculture. There is need to upgrade the technological, ecological and management aspects of culture and capture fisheries on the one hand, and rainwater harvesting, conservation, sustainable use, aquifer recharge, more crop and income per drop of water and other steps relating to sustainable water security on the other.

TRADE

A producer-oriented market holds the key to remunerative and sustainable farming. Quality and trade literacy should receive high priority in VKCs. Facilities for Farmers' Markets need to be expanded rapidly. In commodities essential for maintaining the Public Distribution System (PDS), the procurement price should be the market price at the time of purchase. Those providing essential commodities for the PDS should be recognized through the provision of Smart Cards, which will entitle them to certain benefits while purchasing essential farm inputs, including agricultural implements and machinery.

In population-rich but land and water hungry countries, the development strategy should relate to maximizing farm output per every unit of land and water. This will call for an Evergreen revolution leading to the enhancement of productivity in perpetuity without associated ecological

harm. Dr. E. O. Wilson (2002), endorsing my concept of ever-green revolution, made the following observations in his book *Future of Life*.

The problem before us is how to feed billions of new mouths over the next several decades and save the rest of life at the same time, without being trapped in a Faustian bargain that threatens freedom and security. No one knows the exact solution to this dilemma. *The benefit must come from an evergreen revolution.* The aim of this new thrust is to lift food production well above the level obtained by the green revolution of the 1960s, using technology and regulatory policy more advanced and even safer than those now in existence.

Seemingly impossible tasks can be achieved by mobilizing the power of partnership. Modern industry and the pattern of economic growth largely results in *jobless growth*. Agricultural and allied occupations in contrast promote *job led growth*. We need to marry the techniques of mass production and production by the masses in an appropriate manner in different countries and, in many cases, in different regions of a country. The right to development, therefore, should be tailored to specific socio-economic, socio-cultural and agro-ecological factors. We can achieve this goal provided there is a blend of political will, professional skill and people's participation. This will then confer on nations and communities the benefits of environmentally, economically and socially sustainable development. The right to development should involve concurrently the obligation to conserve the basic life support systems of land, water, biodiversity, forests and climate. Development will then lead to an era of biohappiness where the sustainable and equitable use of natural resources in work and income security for all.

CHAPTER XV

THE RIGHT TO A HUMAN ECOLOGY

STÉPHANE BAUZON¹

Due regard is to be given to the interconnection between human beings and other forms of life, to the importance of appropriate access and utilization of biological and genetic resources, to respect for traditional knowledge and to the role of human beings in the protection of the environment, the biosphere and biodiversity.

Universal Declaration on Bioethics and Human Rights (UNESCO, 2005), Article 17: “Protection of the environment, the biosphere and biodiversity”

INTRODUCTION

It is a fact that human rights constitute an arsenal of arguments that may be used in defence of almost any cause. With “the right to a human ecology,” are we in the presence of a new category of human rights, doomed to remain a dead letter? We think not. But in order to defend the negative answer to this question, it is important to examine its meaning in order to measure its importance or originality. First, note that, unlike other human rights (e.g., both those of the ‘first generation,’ such as the right to freedom, and of the second generation, such as the right to strike) which relate to individual human *subjects*, the human right to live in a healthy environment concerns all *things* that constitute the environment. Note also that these things that constitute the environment have an impact on the dignity of man: can access to drinking water, for example, become a human right? And how are we to guarantee such a right? This point is of primary importance if we know, taking the above example, that the consumption of polluted water is the leading cause of mortality worldwide.

The protection of the environment is not a new obligation; the great monotheistic religions systematically encourage their followers to respect the environment, which is the creation of God. Today there is, however, an exaltation of ‘natural’ nature and a condemnation of the nature that is the ‘human world.’ These currents in contemporary ecological thinking, which can be described as ecocentric, cut man off from any transcendence.

RELIGION AND ENVIRONMENTAL PROTECTION

Monotheistic religions systematically encourage their believers to respect the environment, which is God's creation. Thus, Islam defends the protection of things created by God: "all property that you received are only usufruct" (XLII, 36). From this follows the idea of a necessary balance between the various components of creation. In the Qur'an, the interweaving of God's creation is associated with a hierarchy in which man, at the top, is entrusted with the management. In the Judeo-Christian tradition, the Bible begins with the book of Genesis, where the first story about the creation of the world contains the famous injunction to "... be fruitful and multiply, and fill the earth and subdue it, have dominion over the fish of the sea ..." (Gn 1, 28). The terms "submit", "dominion," should not mislead; they emphasize accountability, the management of the world by humans: to live in the house (domus-domination) that man will establish on this earth. The second text of Genesis, later, follows a pagan Babylonian story of the creation of man out of clay. Happy with his creation, God entrusted the care of his work to man: "God took the man and put him in the Garden of Eden to till it and keep it." In the Catholic tradition, we note the emblematic figure of Saint Francis of Assisi, who proclaims peace with all creation.

Christianity puts humanity at the summit of creation, but one should not be too quick to see this as anthropocentric, at least if one accepts the Thomistic perspective. Without reducing humanity to its biological organization, Thomas Aquinas recognizes its insertion in nature (i.e., the theme of man-microcosm). Article 1 of Question 91 of the Prima pars of the *Summa Theologiae* takes as its starting point the assertion that God, by creating, diffuses his goodness at every level of reality: "Since God is perfect, he, in his works, gave to all things the perfection which suited them" (art. 1, resp.). Man participates in the divine creation in an eminent though imperfect way. His eminence over the rest of nature is the result of the substantial unity of nature which finds in humanity its ultimate structure: "... one calls man a microcosm, for all creatures in the world are in some way within him" (ibid.). However, knowledge in man begins with sense perception, and never covers the whole of reality: "... (man) does not possess in its natural knowledge the idea of all things of nature." (Ibid.).

Following Aristotle, Thomas Aquinas takes up the theme of the immanence of nature in man, which he transcends by his mind. The preeminence of man over other creatures is well established because he is the only one of all living beings on earth to have a conceptual understanding of himself and the world. From this follows an anthropocentric approach to nature that does not, however, cut man off from the material. This monistic approach indicates the interdependence of man and nature, which requires him to move from the habitability (i.e., a passage from the state of nature to that of the world) to the viability of his existence in nature. Thus, the extent of his insertion in the world is located at the intersection of the requirements of the spirit and the prerequisites of nature. Without abandoning the primacy

of man *in* nature, Thomist thought draws from its ontology the responsibility of man *over* nature: man cannot just make nature habitable without worrying about the rest; he must ensure its viability. This question of responsibility is based on the monistic view of Thomistic ontology.

In contrast to the dualistic approach of Descartes, Thomistic thought about creation does not focus on making matter subject to the mind. In addition, it does not claim to hold that the laws by which God created the world can be identified with scientific truth. This connection made by Descartes between God's work and the scholar's scientific research undoubtedly promoted the development of science, but it is now limited by the excessive conquest of nature. The anthropocentric approach to nature in Descartes is radically different from that of Thomas Aquinas. Cartesian ontology exalts the role of the mind that becomes a dominion over matter, as is indicated in his famous injunction to make us "master and possessor of nature." If one holds to the modern contraposition of mind and nature, then (as Hegel developed in his *Philosophy of Nature*²) it must be seen as a spirit who becomes naturalized in man (the theme of *Naturgeist*, spirit nature). In this perspective, the mind or spirit moves down (from mind to nature) and not up (from nature to mind), which in turn puts man in a naturalistic ontology, as described in evolutionary scientific discourse.

Darwinian discourse rejects the preeminence of man in nature. In a reversal of the Cartesian thesis, all living beings are biologically equal. Humans and other animals (especially monkeys) have a common evolution that differs in its *gradualism*; there exists a common ancestor. This representation of evolution (called a "branch process" in English) implies that, over time, the individuals of a species change to the point of giving birth to a new species. More than a gradual evolution, one can speak (following Darwin) of "descent with modification." Thus, humans and the large primates are of the same lineage. These "changes" are the various advantageous ways that, over time, have allowed some organisms to surmount others in the fight among themselves to appropriate what is necessary to survive; what Darwin called "natural selection" or "survival of the fittest."³ In this context, man must be assured of protection of his life in order to enable his survival in an environment that he tends to destroy. This ontology aligned with the material (or with genetics, to use a more current term) places man in the immanence of life, but it also robs him of all transcendence. It confuses man and nature, and this is ultimately to reduce human beings to the status of an ordinary animal, whereas it is currently the exception which proves the rule. Without the naturalness peculiar to man, there would never be any world, only nature. Nature here is not just material made available to the mind, as Descartes says, but rather its opposite: man must now put himself at the disposal of nature.

This exaltation of 'natural' nature and the loathing of the natural 'world of men' lies at the heart of much of the current thinking in ecology that can be described as ecocentric.

ECOLOGY AND NATURE

The ecocentric view of nature aligns the human with the animal and plant kingdoms, but here, too, variations exist, between what the Anglo-Saxons call “Deep Ecology” and “Shallow Ecology.” Shallow Ecology and Deep Ecology share the view that human beings, animals and plants are part of the same community of life. The difference between the Shallow Ecology and Deep Ecology is that the former does not ascribe intrinsic value to nature while the latter would. Shallow Ecology is a term that itself includes different approaches. For example, one such current is based on utilitarianism, and gives power to humanity over the natural community of living beings and their interests.⁴ Another current of Shallow Ecology emphasizes individual rights and the guardianship of species and ecosystems which have rights as living subjects in general.⁵ Deep Ecology is not content to give a justification for the protection of nature; this school of thought insists on the crisis existing between man and nature, which can be solved only by extolling the values of nature of which man is just one element. Its founder is A. Naess (who is also the origin of this distinction between Shallow Ecology and Deep Ecology), who advocates a holistic perception of nature.⁶ This approach emphasizes the balance of nature, endowed with intrinsic values. It derives from this the need to respect this balance fully. For M. Serres, there would be a “natural contract,”⁷ an agreement between man and nature based on a balance between our current power and force of nature.

These authors derive from Darwinism the idea that nature is a living autoprocesus, its own project. The use of the word ‘Biosphere’ refers specifically to that living object that is the global in nature. The word ‘biosphere’ is ecocentric. It is used in the context of the Gaia hypothesis – named after the Greek goddess of the earth – beginning in the 1970s with James Lovelock.⁸ He claims that the earth is a living planet with an environment that functions as a gigantic machine. The explanation begins with the banal remark that the Earth, suffering because of human action, may thereupon, in a reflex of self defense, take revenge on humanity by natural disasters (cyclones and the greenhouse effect, for example). Economic growth is then denounced as a purveyor of destruction⁹ and carrier of artificial values (with, as its target, the consumerism that leads to extravagant automobiles, and even steak dinners).

Without accepting the theory of the thanocracy of economic development (which sees technology as a barbarism that needs to be combatted before it destroys us), it is indisputable that environmentalism or ecologism has become familiar to us with its idea of protecting nature. Finally, we are all more or less convinced that we must now be *master and protector of nature*.¹⁰ The spectacle of the degradation of the environment and the statistical proof of the disappearance of species contribute to forging a common awareness more sensitive to the protection

of nature.¹¹ It is certain that today humanity no longer looks at technical progress with unbridled enthusiasm. As Jean-Pierre S  ris writes:

technological risk continues to haunt not only the thoughts of men, but their history. The names are in all our memories: Bhopal, Chernobyl, Torrey-Canyon, Seveso, and so on. The big "accidental" catastrophes, along with those which we learn later that we have barely escaped from, have made the accident a familiar reality which we must take account of. ... It is as if the technology had developed an alliance, in turn tacit and explicit, with the death instinct.¹²

One may find a relation between ecocentric thinking and the thought of Hans Jonas who claims that, in man, nature has disrupted itself, and so one finds a *heuristics of fear* of the destruction of our world, in the sense that it assigns to man a strong (and primary) responsibility: the protection of nature. The purpose of this protection is to ensure that future generations of humans do not lose the wealth contained in nature which is threatened by human activities; Jonas writes: "Act so that the effects of your action are compatible with the permanence of an authentically human life on earth ... and ... are not destructive to the future possibility of such a life."¹³ But he does not deny the human phase of the transformation of the biosphere; he wants to take responsibility, if you wish, with an ethical spirit of solidarity: thus, there is a moral imperative of "to let be" every living covered by the famous Convention on Biodiversity of Rio (1992). Such an action of man on nature is *reasoned* by the mind (this is called the noosphere) and is also *arraison  e* by technique (what we can call the technosphere). Nature is a house (*domus*) that we manage; it is the home of being, of which Heidegger speaks.¹⁴ The Greek etymology of the word "ecology" teaches us that it is a discourse (*logos*) on the house (*oikos*). But what kind of discourse and what kind of house do we want? The answers to these questions give us the sense to the term "rights to a human ecology."

For followers of ecocentrism, man lives 'naturally' on Earth and does not have to humanize it. They see in the action of man a 'denaturing,' leading to the destruction of the species. Ultimately, they adopt the viewpoint of nature, reducing the human world to an animalistic immanence, which loses all transcendental dimension. The constitutive defect of ecocentrism is to think that man has finally discovered himself to be an inhabitant of the Earth, and that all his activities (economic, but also cultural) should be consistent with the requirements of nature. Ecocentrism abandons the contraposition of Spirit / Matter to focus on a materialistic monism. In the Gaia hypothesis, man no longer has any ontological dimension as such; the concern for self is identified with a concern for the Earth. Man is at the service of Gaia, because she is acting on our deepest aspirations. A new pantheism is at work here! Ecocentrism leads us to

believe that the souls of men are part of a vast world soul. Discourse, then, takes the shape of a new mysticism (sometimes called *New Age*) that breaks radically with Christian transcendental ontology. To oppose this new thinking, let us begin by saying that man does not violate the Earth when he lives in his world!

The ethos (habit, habitat) of man finds its meaning in the liberty he takes with nature: his responsibility is, as we have already seen, now double. He must inhabit the Earth in order to make a world of it (and to do so, he rejects nature, as shown, for example, by the control of one's sex drive¹⁵), and must also ensure its viability (for a world that is no longer habitable would be a non-world, an *Unwelt*, Heidegger would say). One may desire an unspoiled nature, left to its own rhythms, in order to preserve biodiversity (for example, with parks). One may want to avoid a disproportionate exploitation of energy resources and pollution (and seek the development of renewable energy). You can also call for a change in the methods of production (with, for example, fish farms, rather than open-sea fishing trawlers). We may want all this (and other things besides) to be truly masters and protectors of nature, but we must do so without wanting to attribute *rights* to nature (and animals, trees, valleys, etc.)! A right to a human ecology makes sense to humanity if it removes the ambiguity that the term implies. We must first get rid of the thesis of ecocentrism, and refuse to believe that nature has its own rights, against those of humanity. Humanity has the right to live in a sustainable world, but this right is in no way an attribute of those objects that surround us.

CONCLUSION

The right to a human ecology not only needs to be clarified, in order to avoid losing all humanity, but it must also be able to be applied. An example can be drawn from the French legal system. In 2005, an Environmental Charter was adopted, which has a constitutional value on a par with that of the Declaration of the Rights of Man and the Citizen of 1789 and the preamble to the Constitution of 1946. This Charter is presented as a third step in the assertion of rights and freedoms, following the texts of 1789 and 1946. It contains rights such as those articulated in Article I, which states that "Everyone has the right to live in a balanced and health friendly environment." It also refers to duties, such as those in Article IV: "Everyone must help repair damage caused to the environment, under the conditions defined by law." On the basis of Article IV, on January 16, 2008, the 11th Criminal Chamber of the Tribunal de Grande Instance of Paris handed down a decision in the trial of the Erika (the name of the tanker that, in 1999, caused an oil spill polluting 400 kilometers of French coast and killing 150,000 birds). For the first time in France, environmental damage as such was recognized: "the territorial collectivities that receive from the law a special competence in environmental matters giving them a special

responsibility for protection, management and conservation of a territory, can seek redress of harm caused to the environment in the territory.”¹⁶

This ruling gives substance to the right to a human ecology. It is hoped that this establishes a juridical precedent. The outrageous domination of the environment is thereby condemned. The quite brutal discovery of the degradation of our environment places modern man before the limits that nature imposes on his transforming action.

NOTES

¹ The opinions expressed in this article are exclusively those of the author.

² Hegel, *Philosophie de la nature*, Paris, Vrin, 2004, n° 251.

³ “The preservation of favourable individual differences and variations, and the destruction of those which are injurious, I have called Natural Selection, or the survival of the fittest,” in C. Darwin, *The Origin of Species*, New York, 1970, p. 44.

⁴ See J. Passmore, *La nostra responsabilità per la natura*, Italian translation, Milano, Feltrinelli, 1986

⁵ See T. Regan, *I diritti degli animali*, Italian translation, Milano, Garzanti, 1990. L. Battaglia, *L’etica diventa primaria*, in *Globalizzazione*, 2008, pp. 51-61.

⁶ A. Naess, *Ecology, Community and Lifestyle*, Cambridge, Cambridge University Press, 1989.

⁷ M. Serres, *Le contrat naturel*, Paris, Flammarion, 1992.

⁸ J. Lovelock, *Les âges de Gaïa*, Paris, R. Laffont, 1990.

⁹ S. Latouche, *Le pari de la décroissance*, Paris, Fayard, 2004. Against the idea of a humanity necessarily destroying nature, see D. Folscheid, *Pour une philosophie de l’écologie*, in *Ethique*, n°13, Paris, Editions Universitaires, 1994.

¹⁰ To echo the title of the book edited by F. Guéry and A. Roger, Paris, Champ Vallon, 1991.

¹¹ In this sense, see E. Sgreccia et M.-B. Fisso, “Etica del’ambiente”, in *Medicina e morale, rivista internazionale bimestrale di bioetica, deontologia e morale medica*, Roma, Università Cattolica del Sacro Cuore, (suppl.), n°3, 1997, p. 5.

¹² J.-P. Séris, *La technique*, Paris, PUF, 2000, p. 308.

¹³ H. Jonas, *Le principe responsabilité*, Paris, Cerf, 1990, p. 30.

¹⁴ M. Heidegger, 'La question et la technique', in *Essais et Conférences*, Paris, Gallimard, 1980.

¹⁵ J. Freud, *Malaise dans la culture*, Paris, PUF, 2000.

¹⁶ *Le Monde*, 18 janvier 2008.

CHAPTER XVI

HUMAN RIGHTS AND THE ENVIRONMENT

*AMEDEO POSTIGLIONE*¹

INTRODUCTION

The environment, at first glance, would seem to be extraneous to human rights, since it existed much earlier and in a separate way. Still, while it is true that the historic genesis of the human right to the environment is rather recent, nevertheless, as a result of the worsening of the environmental crisis, the relationship between human rights and environment becomes clearer.²

A degraded environment certainly does not foster the full exercise of human rights, including social and economic rights. On the other hand, in a world incapable of protecting human rights, the environment is also harmed, because destructive forms of egoism and abuse of power are vented upon it and because the potential of the individual and civil society is humiliated. This paper is an attempt to illustrate the relationship between human rights and the environment and the importance of recognizing the environment as an autonomous human right. Today, the cause of human rights has also become an environmental cause and vice versa.

The path to the protection of human rights is crossed by that for the protection of the human right to the environment, as this paper will set out to demonstrate:

1. We have passed from a cultural promotion phase to the construction of a solid positive legal base for the human right to the environment;
2. Recognition of an active procedural role of every individual and of the human right to the environment has been acquired: with information, participation and access as rights;
3. Social and cultural awareness of the environment has grown and, therefore, the need to ensure not only formal but substantive protection of the human right to the environment has occurred (or should occur) in a necessary and indivisible way for other human rights;
4. Due to the economic, cultural, technical and scientific effects of globalisation, the international dimension also regarding the protection of the human right to the environment considered as commonly referring to the individual and the oneness of the living system on earth is an acquired datum;
5. In the same way, there is a need to ensure that there are proper guarantees at the international level, permanent and shared guarantees, still missing today for both human rights and the environment;
6. The universality of protection, a typical demand of all human rights, necessitates receptiveness in time and space towards present and future

generations and, above all, towards an examination of a common philosophy of duties, in order to bear the costs that the effective exercise of human rights presents.

THE “CRISIS” OF HUMAN RIGHTS

The Universal Declaration of Human Rights, solemnly adopted and proclaimed by the United Nations General Assembly on 10 December 1948, is already more than 60 years old. Meditating on human rights (including one of them which relates to the environment), after so much time, in a profoundly changed historic context, we have, in our opinion, to realise that there is a grave “crisis.” There needs to be realistic awareness raising, given the continuation of very serious violations of human rights in various regions of the world and the inadequacy of forms of protection.³

Threats to Human Rights

The “utopia” of the universality of equal rights, linked to a common human nature, remains a very important and shared inalienable objective but it seems to be seriously threatened by some supervening objective data:

- the rash economic globalisation, following the increased role of the big powers, like India and China, and the absence, for now, of adequate rules for control and mitigation: for example, human rights relating to labour cannot be sacrificed in those countries without creating political and economical imbalances in the rest of the world, as we see occurring now⁴;
- the failure to develop the African continent (with its 53 countries) and the substantial abandonment of its populations (scarcity of water, lack of food, illnesses, impoverishment of resources, mass migrations, conflicts, etc.): what positive meaning does the philosophy of universal human rights have for Africa, if nothing has changed, except for “solidarity” in terms of occasional and always inadequate aid?⁵;
- the unforeseen reaction of some sectors of Islam against human rights and values, accusing them of being “Western” in nature, and their exportation opportunistic. It is not sufficient to repeat that the Universal Declaration of Human Rights was drafted with the contribution of thinkers coming from every corner of the world and not only the West (among them, Gandhi and Tagore) if the sectors of Islam (eight countries, including Saudi Arabia and Pakistan, refrained from signing the Declaration of 1948) do not recognise one of the mainstays of the document, namely, the reciprocity of some of the common universal values. This was the decisive point to be discussed with the moderate countries, isolating violent fundamentalism, but this has not happened⁶;

- the supervening of grotesque ideologies of death and hatred, without an adequate reaction from global governments and institutions: here, we are referring to the explicit and repeated threats of the physical destruction of Israel by the leaders of the theocratic regime of Iran, accompanied by nuclear rearming; we are referring to the phenomenon of the so-called “kamikazes”, or human explosive devices planned, prepared and used for slaughtering innocent civilians, indiscriminate death machines legitimised in the name of Allah: this phenomenon has been undervalued and, at times, justified without a strong condemnation of its intrinsic godless nature and its manifest characteristic as a very serious crime against humanity. How can we not talk about the crisis of universal human rights when faced with such a phenomenon and the betrayal of these values through the inertia of so many people, even in the West?⁷;
- the persistent weakness of the United Nations model, incapable of a strong and new initiative on human rights, in the sense of promoting a Charter of Human Duties, in the name of reciprocity. Human rights – in our opinion – will remain just a noble utopia if not strictly linked to human duties and if not accompanied by a realistic consideration of the “costs” of implementing them. A costly and elephant-like bureaucratic administrative structure, weak leadership, and a continual incapacity towards democratisation and realism, are objective obstacles in the path towards building consensus, as set out in the Resolution of 13 August 2004 of the United Nations General Assembly.⁸

It is easy to state the principles, offering them to the “do-gooders” at the time, but it is much more important to define, in a responsible way, those who have to bear the economic and social costs of human rights and how to equate rights to their duties, in the name of effective reciprocity. The United Nations whose model risks coming to the same inglorious end as the League of Nations for its inability to prevent and find solutions to conflicts, including the current danger of nuclear rearmament, has not given sufficient signs that it can face this urgent task. This is very serious because the world has become much more interdependent and globalised compared to 1945.

HUMAN RIGHTS AND THE ENVIRONMENT

The 1948 Universal Declaration of Human Rights

The worrying considerations mentioned earlier do not doubt the central role of the United Nations and the huge value of human rights for all humanity, after the tragic experiences of the world wars of the 20th century. To recognise equal dignity of all members of the human family is the strong philosophical and legal nucleus of the Universal Declaration of Human Rights of 1948: the individual as such is recognised not only as the object of

legal protection, but also as an autonomous legal subject, directly involved in the protection of his/her personality.

In a parallel sense, the Declaration (but with less emphasis compared to the wording of the rights) states that *every individual has duties towards the community*, in respecting the rights of others in a democratic society, within the framework of the principles and values of the United Nations.

The framework offered by the Universal Declaration of Human Rights is fascinating and very articulated, because it embraces both *traditional political and civil rights* (those of the English and American constitutional traditions), and *economic, social and cultural rights*, in a vision that we can all share of the role of the individual, family and society, in which the human personality develops.⁹

The season of human rights progressed further only two years after, under the influence of the spirit of renewal that grew out of the pain and the tragic experience of the Second World War: in Rome (a universal city par excellence), an *ad hoc* international instrument was signed re-enforcing the model of human rights (the 1950 Convention), that a specific judicial organ of protection, the Court of Human Rights in Strasbourg, even if only for a regional area (that of the Council of Europe, with about 47 member countries) was added to the (non-exhaustive) list of rights. Additional protocols (14 have been signed, including that contemplating direct access of individuals to the Court), and the coming into effect of the Court have enabled an original and unique experience of the jurisdiction over human rights to be realised in the sense of their more precise definition and their of effectiveness.¹⁰

It is significant, for example, that some human rights (although not “expressly” provided for), like the *human right to the environment* that we shall discuss later, are already recognised and indirectly protected in a reasonable number of decisions, demonstrating the creative and evolutionary work of jurisprudence in a recent legal discipline, not unlike that which occurred in constitutional jurisprudence in Italy and other countries.¹¹

The Historical Evolution of Human Rights

If we look objectively at the historical evolution of human rights, it will not escape us that the basic nucleus is constituted by the value placed on the individual and on the right to freedom. This great value is still valid. Freedom, as a right-duty, the expression of the human personality, within the political and social dimension and within a spacial projection, finds a limit in the freedom of others, around a set of common values. Historic experience – here we have in mind the emblematic collapse of the Soviet regime – has proved that the mortification of the value of freedom in a sector as important as the economy, ends up by sweeping away other human rights (freedom of expression, political freedoms, etc.) in illiberal systems.¹²

Today, the temptation to place excessive restrictions on free enterprise still exists based on an ideological prejudice with regard to poverty in the South of the planet. In order not to repeat the mistakes of the past, it seems advisable to establish a realistic comparison of the *culture of human rights* (that is, not only western ideas), in the sense of asking ourselves what is the “cost” of their universalisation (necessary due to the nature of the individual, all equally worthy). This fundamental aspect needs to be faced with realism, shying away from superficial moralism, and going to the heart of the causes and solutions.

Some human rights meet religious and cultural obstacles from some sectors of Islam, for example, with relation to the dignity of women and their essential social role, or in relation to religious freedom, denied under the penalties of criminal sanctions and without any guarantee of reciprocity. Other human rights (e.g., the right to food and the right to the environment) involve *costs* in order to fulfil them and a concrete model of reference for solving the problem has still not been found (without doubt, different rules have to be found for international trade, for the activities of multi-nationals, for the financial market, etc.).

Today, the existing rules are unbalanced because they do not provide sufficient space for general “dutifulness.” Not even the remedies are proportional. So, for example, the path towards the elimination of the debt of the countries in the global south, in our view, is not enough, because it does not touch on the causes of degradation. It is necessary, with common but different paths, to ensure a dual level of the economic effectiveness of the global system and of local systems, with reciprocal integrations (at the level of technology, education, training, on-site assistance, the improvement of typical cultivation and relative global market outlets, control of the phenomena of desertification, control of the use of water, targeted and controlled funding, activation of democratic mechanisms *in loco* for resource management, etc.), without, at the same time, hindering globalisation.¹³

Faced with the difficulties of ensuring that economic, social and cultural rights (in their substantive nature) are effective compared to political and civil rights (procedural rights), the temptation may be to deny the dignity to the former category, recognising only their ideal, programmatic and political nature. If it is true that, above all in Western culture, the tree of human rights was planted and grew, the universality of these rights demands that the West does not pull back from making an effort towards genuine co-operation with poor countries in order to give real content to these new rights. Therefore, for example, the enunciation of human rights and the denunciation of their violation are no longer enough but the model of co-operation with governments needs to be reviewed, so that real mechanisms of democratic control of the populations concerned can be installed.¹⁴

Thinking about it carefully, a dual element can be distinguished in each human right: a substantive and a procedural element. The former, in a

certain sense, relates to a kind of recognised “standard” (e.g., on the right to work, the Declaration of Human Rights provides, as we have seen, a series of substantive but undeniable implications that the worker has some procedurally active rights and duties, including information as a right, participation as a right, access as a right). In this case, the “standard” of the substantive content of the right is defined – in a more or less detailed way – by the norm and made more precise by jurisprudence. It has to be recognised – and we should not be surprised – that, for other new rights (given that they are more recent), there is a margin of ambiguity, so it is necessary to define their “minimum content” (e.g., the right to food; the right to a healthy environment) which policy and the law have to state more precisely.

Therefore, regarding the human right to the environment (that we agree with in principle) whilst the procedural element is clear and extremely important (information, participation and access), it is difficult to define its “substantive” content (such as the “acceptable” quality of the air and water and food). The “minimum” substantive content does not exclude in principle the possibility of reconciliation with other public interests, without prejudice to the procedural elements.

In conclusion, we believe that it is wiser to maintain the dignity of fundamental human rights for all those rights already ratified in a formal way and even for those that have recently been recognised in jurisprudence and legal authority, always keeping in mind their interdependence and that they constantly refer to the individual, not only as a person but also as part of society. This is also in line with the United Nations’ approach (see Commissioner Ksentini’s 1994 Draft containing a preamble and 27 principles on human rights and the environment).

The “Value” of Human Rights

Coming more specifically to the question of the “value” of the environment, the failure to explicitly mention it in the 1948 Universal Declaration of Human Rights can be explained by its emerging importance within a subsequent space of time.¹⁵ However, there are already explicit statements of principle in the Declaration that present the cultural and legal substratum of the new form of the human right to the environment: we are referring, for example, to the right to life, the right to health, the right to work, the right to social security, the right to a proper standard of living, with regard to food, also in the recognition of the right to property, as an inalienable attribute of individual dignity and liberty.

Almost simultaneously, in individual countries – even though with different rhythms – economic development together with available technologies produced a common “dis-value”: pollution of resources, with the relative negative effects on the quality of the resources and the quality of human life. In parallel, the growing population occupied spaces belonging to nature, subtracting them from the plant and animal species, likewise

determining an excessive consumption of resources. The origin of the environmental question arose out of these problems common to different countries and they called for an institutional response. Gradually, the environmental interest was perceived as a “common interest” that had to be taken into account, also because it was canalised by the most sensitive social organisations (the NGOs) towards the institutions.

The institutional opening in various countries brought with it recognition of the environment as a “new public interest,” entrusted to the care of special central bodies (the Ministries of the Environment), as well as to the responsibility of regional and local bodies. The complexity of the concept of the environment and its strong relationship with the economy determined the gradual affirmation of environmental law in the objective sense, encompassing the regulation of some sectors that were thought to be priorities.

Even in the absence of an all-embracing concept of the environment, environmental law, in the different legal orders, acquired an autonomous space, based on some common principles. It is not surprising that the effort to construct environmental law at a national level was assisted by international law, given that the environmental question presented similar characteristics on a global scale and that State policy could not ignore the demand for common rules coming from civil society, the scientific world and the economy itself (in relation to growing globalisation).

For the principle of the dynamic integration of legal systems (in a horizontal and vertical sense), a consensus was created on some common principles that had a dual objective:

1. to assist in the protection of natural resources and promote their equitable use;
2. to enhance the role of the individual.

This latter aspect, closely linked to the former, allowed the still more important role of civil society, indeed of the single human being (in terms of rights-duties) to be associated with the necessary role of the institutions. This means that the concept of the environment is extraordinarily complex not only in practical terms (which sectors objectively deserve consideration), but also in theoretical terms, so it seems not only difficult but also impossible to define it once and for all. It is not even easy at a scientific level to penetrate the mysteries of the sustainability of life on earth, as can be seen from the persistent uncertainties about climate change, biodiversity, and marine balance. The environmental impact of human activities is for its nature interdisciplinary and it can produce even long and medium-term effects, whereby the precautionary principle cannot be ignored.

Human beings still seem to make development their priority, in the hope that there will be a positive outcome arising out of the effort of the

mitigation of new technologies. This is an internal cultural process within the human personality, that needs analysing realistically, by accompanying it with the wisdom of the “sustainable humanisation of nature,” that is, of a human ecology.

The concept of the environment cannot, therefore, leave out of consideration the cultural, political and social role (without anthropocentric degenerations) of the single human being, as the subject of rights and duties, deriving from his or her specific nature, without, obviously, forgetting the link with the community and institutions.

Among the most interesting principles of environmental law, one has originated, in depth, within the different legal orders: how to associate the human being with the role of the defence of his or her life, indissolubly linked to that of the overall living ecosystem. This is a process of theoretical elaboration and jurisprudential experience still in course. This process sees in the environment an integrated reality: a triple dimension (personal, social and public); a link with other public interests for an inspired policy for the sustainability of development.¹⁶

A GLOBAL PHENOMENON: THE WORSENING OF THE ENVIRONMENTAL CRISIS

As predictable, some global phenomena gradually became evident (like climate change due to human activities strongly denounced by the scientists and experts of the United Nations, the loss of biodiversity, the water crisis, etc.). We should note that the response of the law (while praiseworthy) has not so far been sufficient to guarantee the sustainability of development. Evidently, the bottom line of the worsening environmental crisis continues to operate, as there are no strong rules for the global economy in relation to new production and consumption models. Scientific uncertainties (real or instrumental), the marginal role of the social corpus, the serious deficiencies in the underestimation of the common environment by ethical, religious and cultural institutions, and the responsibility (even if differentiated) of governments weigh negatively.

In our modest opinion, there is a more profound cause that realistically should be stressed: individuals, whilst declaring that they are sensitive towards and alarmed for the environment, live for today, giving priority to development (even if in the hope that it will be sustainable) rather than to the highest imperative of the sustainability on life on earth.¹⁷ This substantial “removal” of the environmental problem, if it exists, can be explained and needs to find its necessary remedies in terms of education and culture. To invoke, therefore, the role of human rights for the environment is not improper, because it indicates a trend that may produce – under certain circumstances – good results at a global level (which is the proper level for human rights). The environmental crisis is worsening because it is not perceived as such in the consciousness of the majority of people nor perceived adequately in order to give a collective response.

If the living terrestrial ecosystem were seen as a comprehensive common corpus and people as monads living in syntony with life in a community, we have to recognise that there is still no active communication for an effective reaction. The urgent need arises out of this to define the human right to the environment as a primary duty of every person, and the need of the whole social corpus from its very bottom to take responsibility. This is only possible after there has been a profound cultural and ethical evolution regarding the problem.

THE HUMAN RIGHT TO THE ENVIRONMENT: HISTORIC GENESIS

We have already talked about the 1948 Universal Declaration of Human Rights and the fact that it contains some valuable principles for elaborating a right to the environment (although not expressly stated in it). We have also mentioned the 1950 European Convention on Human Rights: also in this case, there is no explicit mention of the right to the environment, but creation of the Court in Strasbourg has permitted the initial jurisprudence on the human right to the environment, as an attribute of the personality to appear. The propulsive role of the United Nations in environmental matters, in defining common legal principles, is demonstrated by three principle events:

1. The 1972 Stockholm Conference on the Human Environment
2. The 1982 World Charter for Nature
3. The 1992 Conference of Rio de Janeiro on the Environment and Development.

The relation between environmental protection and human rights was explicitly recognised for the first time in Stockholm in 1972: it is significant that the object of the Conference was “the human environment” and that Principle No. 1 proclaimed that “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.” In the Preamble, it stated that “man is both creature and moulder of his environment” and that environmental protection is “essential to his well-being and to the enjoyment of basic human rights; even the right to life itself.”

A codification of a new human right is clear (even though it is not precisely defined in its substantive content) and also the solemn duty of protection within the time span of future generations.

The World Charter for Nature, approved by the United Nations General Assembly on 18 October 1982, after having stated that “mankind is a part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients,” emphasises in

Art. 23 that “All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation.”

The perspective in the Declaration of Rio de Janeiro adopted on 14 June 1992 is slightly different, in associating the environment with development, in a political effort to also involve third world countries. The express statement of a human right to the environment is avoided, with preference given to procedural aspects (Art. 10), by recognising the right to information, participation and access to justice of “each individual”. It recognises that “human beings are at the centre of concerns for *sustainable* development.”

On a substantive level, it recognises that “they are entitled to a healthy and productive life in harmony with nature” (Art. 1). A “right to development” (Art. 3) constitutes a controversial innovation, even if it is mitigated by the principle of intra- and intergenerational equity. The emphasis on “national sovereignty,” on resources (also mitigated by the responsibility of the States for transboundary pollution) and on the role of women and developing countries, are pointers towards a political compromise between the needs of the environment and the demands of development.

Whilst praiseworthy, the impetus of the United Nations has not been able to ensure a universal and legally binding formulation of the human right to the environment, and it has had to take note that development (even if sustainable) is a priority as a right compared to the sustainability of life on earth (an issue that remained in the background). Efforts for fully recognising procedural rights (information, participation and access) have to be considered as positive and legally acquired. Reference should be made to the Conventions (above all, the global conventions relating to biodiversity and climate change signed in Rio de Janeiro) and two specific conventions (Espoo, Finland, 1991, Convention on Environmental Impact Assessment in a Transboundary Context, and Aarhus, Denmark, 1998, on information, public participation in decision-making processes and access to justice concerning the environment).¹⁸

THE HUMAN RIGHT TO THE ENVIRONMENT: INDIVIDUAL OR COLLECTIVE RIGHT?

Generally, the question of the legal right to human rights is posed in two different ways: the “personalist” view of the liberal and also Christian tradition, developed mainly in the West; the community-based view that favours the collective cultural context of being able to relate human rights to the individual, but only as far as they are received by the cultural community of reference. A part of the Muslim world leans towards an insular view of human rights, substantially in polemics with the West; the

same thing also seems to occur with the environment, concerning the right to development in the 1992 Declaration of Rio de Janeiro. These are issues of radical importance on the level of principles. It is not a matter of refusing to recognise the opportunity for “adaptations” regarding specific socio-economic situations or for fighting discrimination against minorities but evaluating whether there is or not a need to anchor human rights to the individual because he or she possesses his or her own legal and cultural value apart from the group or community he or she belongs to. Whilst legitimate, cultural diversities cannot undermine the single common value of the human being, namely, the fundamental nucleus of human rights or, in other words, their universality (in time and space).

If human rights become relative, taking into account globalising cultural diversities (as for part of Islam) or of socio-economic underdevelopment in some parts of the world, it becomes extremely difficult to propose a real dialogue inspired by reciprocity and an effective institutional model of protection in a globalised world.

Taking these considerations into the realm of the environment, there should be fewer theoretical difficulties from an objective point of view of the protection of the common environment, through legislation and the institutions. From the subjective point of view, it seems to us that the *personal* dimension of the environment is not entirely in contrast with the collective point of view (environmental associations, local communities, etc.), and that the *public* dimension can or should integrate the role of individuals and civil society. Certainly, the human right to the environment has basic legal ownership (by the single human being), but, equally, it is the owed to civil society in which human beings take part. Therefore, there is no contrast between the individualistic and community-based view if we accept that the environment is a priority value for every culture, also superordinate to socio-economic development with respect to the living ecosystem of the planet.

Jurists have come to define the category of individual rights not as a “closed list” but as one open to new social needs and demands. This is already very significant. For example, the right to privacy has been recognised after a slow evolution in jurisprudence and legal authority even in the absence of a precise reference in the texts and it has been added to the already recognised individual rights. Similarly, it seems the right to the environment can be granted. If individual rights are fundamental rights, the individual constituting “their very heart,” their necessary and indispensable minimum content, it cannot be denied that *today* the environment is essential for every human being: some individual rights like physical well-being and health are based on environmental protection.

This is where the qualitative leap comes in: with the recognition of a right to the environment as an individual right, while, on the one hand, the legal object of personal protection is widened, on the other, a positive and active mechanism for environmental protection is introduced. The right to the environment is not only a right not to suffer restrictions of one’s

individual rights, but a right-duty to positively intervene to protect assets that are essential for the community, in the spirit of social solidarity. Interest in a healthy environment cannot be set within traditional legal institutes like property which presuppose external disputes in relation to the use and division of assets, because the owners of the assets are equally victims of the environmental degradation which affects the air we breathe, the water we drink, the soil, the sea, the very structure of our daily lives including food, hazardous substances and chemical production, pharmaceuticals, noise, etc.

The Right to the Environment: Individual or Property Right?

The objection is that, while traditional individual rights have as their object rights and freedoms inherently relating to the 'person,' the right to the environment seems to have as its object something outside the person or, in other words, natural resources, and in this sense, it should be acquainted to property rights. It should not be an individual right but only a collective interest. A convincing answer needs to be found on this issue:

1. Firstly, the legal object of a subjective right may also be "a non material asset" internal to the person, if it is defined as such by the legislator: it is true that tradition and a wide range of property rights have accustomed us to consider as the object of a right material assets separate from the holder of those rights, but this characteristic of some categories of rights cannot be generalised without denying protection to new social demands that cannot be referred to a special relationship between an individual and something external to him or her.
2. Secondly, the concept of "domain" that is assumed to be essential for a subjective right and an obstacle for the definition of individual rights when looked at carefully does not even apply to property rights that still always consist of a legal relationship between persons and not between a person and the thing because it is material.
3. The human being is part of nature, not outside or above it, whereby the environment cannot be defined as an exterior relationship of the domain, being an internalised value of the human personality: the right to the environment involves, to the highest level, individual dignity and responsibility.
4. The environment is not a generic term, but only a synthetic one for indicating a situation of vital equilibrium (not only for plants and animals but for human beings) that human behaviour may preserve or destroy: we must not pretend to ignore that human beings are their own real enemy as well as that of their fellow men or women and that damage to the environment is mainly and in its essence damage to the human personality. Natural resources, especially air and water, are in such a continuous and intimate relationship with human survival and well-being (or, rather, with basic values of the individual) that it is

unimaginable on a logical level to sporadically defend them based on traditional property-type relationships, what is more, difficult to define; their “legal nature” lies in a rational and consistent use of the law in confrontations with other consociates. The benefits that come from natural resources can properly constitute assets in the legal sense for other relationships, but for the purpose of our discussion they constitute only “an indirect means” for the protection of the human personality.

5. Therefore, without denying any of the concrete nature of the things of a nature external to us, we can argue, equally positively and truthfully that the environment is legally a value, an asset, a fundamental attribute of every human being: a space of the soul, a way of being typical, physical and moral all put together.

It has rightly been observed that the type of relationship that exists between the individual and the environment has particular characteristics with regard to the traditional relationship regarding relations between individuals and assets. Protection, in fact, pertains directly to the person because only a healthy environment allows him or her to live a dignified existence and to develop normally his or her personality. The realisation of the right, the enjoyment that its possessor has through the respect of the protected interest, is different and autonomous from other forms of relationship (of a property kind) that can be defined in relation to assets and to which the right to the environment is not proposed as an alternative or as being excluded. The relationship between the possessor and the asset does not include appropriation in an exclusive form, like in the rights of enjoyment, but becomes substantiated in the power to control the ways it is used by another party.

The question of environmental protection cannot be put in terms of “exclusivity,” but in terms of the rational use of resources. The criterion of reference to take into consideration is always an objective right that insures the equal opportunities and duties of every person. The existence of a right to the environment means that any behaviour that comes into conflict with this right can be defined as an “act in violation of the right” and justifies its possessor in taking action to ensure that the unlawful act ceases.

The Right to the Environment: A Limitless or Limited Right?

Other objections to the doctrine of the right to the environment as an individual right are made regarding the absolute nature of that right: but this objection can be overcome by distinguishing “absoluteness” from “unlimited.” Like other individual rights, if the right to the environment is absolute (in the sense that an *erga omnes* defence including public authorities is possible), it is not unlimited, having to coexist with other rights and interests of constitutional importance. Like the right to privacy is limited by the freedom of the press, so the right to the environment could be

limited by other public interests according to the degree of protection offered by the legal order.¹⁹

The International Court of Justice at The Hague, in its Advisory Opinion of 8 July 1996 stated: “The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.” It should be noted that, on the logical level, only a “collective” and non “personal” concept of the right to the environment could not justify the establishment of procedural rights (right to information, right to participation, right to access) that are typical of the individual (as well as civil society) and that often disregard particular advantages of a property nature.

THE HUMAN RIGHT TO THE ENVIRONMENT: RESPONSIBILITY FOR PROTECTION

In the right to the environment of every person, the element of “duty” is not only a natural part of the right but – in our opinion – to be considered prevalent. Procedural aspects (information, participation and access) are, above all, common duties that are not to be considered prevalent in terms of the protection of the individual over the benefit of all. Even the protection of the minimum substantive content (healthy environment, psycho-physical and, therefore, spiritual well-being) is a right-duty, because the protection of a differentiated interest indirectly benefits the common well-being. Those who have the “duty” of protection are, therefore, those who claim the right, that is, single individuals and society. Obviously, the duty of protection of institutions relates to their public nature and their principal task of ensuring the common good, in accordance with a serious, courageous and well-balanced view of environmental protection in the balance with other public interests. The same “sovereign right to exploit their own resources” belonging to the States does not exclude environmental responsibility under international law, because the environment is a value which surmounts frontiers (see Principle No. 2 of the Rio Declaration on the Environment and Development).

Today, greater emphasis on “duties” appears necessary to make human rights more concrete and effective. This is especially so for the human right to the environment that involves a rightful dynamic of service to the community. The exercise of a human right to the environment from the procedural point of view objectively benefits the entire ecosystem because it guarantees transparency and the preventive control of the social corpus. Access to justice through procedural rights always benefits the ecosystem, even apart from the positive spin-off for the single individual. The exercise of the human right to the environment in the substantive sense of legally remedying harm to the private sphere also indirectly benefits the environment as a collective asset because it allows attention to be paid to an anti-legal situation of a social nature.

The role of the governments is, instead, to guarantee environmental protection in an objective sense and the protection of the human right to the environment, of individuals and society. This duty of public protection, above all, in terms of prevention, is absolutely necessary because the human right to the environment is absolute in a technical sense (that is, it is valid *erga omnes*, including public parties), but it is not unlimited, having to find a proper equilibrium and balance with other public interests, within a balanced view of economic and social development. The legal model of the responsibility of governments is set out in the 27 legal principles of the 1992 Rio Declaration.

THE HUMAN RIGHT TO THE ENVIRONMENT AS A PROCEDURAL RIGHT

The legal basis of the right to environment in its procedural aspects has become more certain and strong internationally as well as regionally (European Union): information, participation and access are considered an expression of a right of every individual which the states have the legal obligation to recognise and enforce in their practical application.

The 1998 Convention of Aarhus

The procedural rights mentioned above originated in parallel with the evolution of international environmental law and they have, above all, developed more recently with the Convention of Aarhus adopted in Denmark on 25 June 1998. This Convention picks up one of the principles of the 1992 Rio Declaration (Art. 10) and makes it the object of specific and consistent regulations that are mandatory at international level. It should be noted that the Convention of Aarhus:

1. explicitly refers in its preamble to Principle 1 of the Stockholm Declaration on the Human Environment of 1972, that is, it makes reference to the human right to the environment;
2. links procedural rights to the substantive protection of the environment (Art. 1) and the human right to the environment.

Procedural rights are, therefore, not considered in an abstract fashion or, in other words, as legal obligations distinct from that guaranteeing the substantive protection of the human right to the environment, but as a fundamental instrument for the effective protection of it, in an integrated humanistic approach, typical of individual rights. If these procedural rights are theoretically very important and have great political potential it is because they adopt humanity and the service to humanity in a vital way linked the future of the environment, part of the common human heritage as a common value.²⁰

It should also be noted that whoever has had a real experience in the practical exercise of the rights-duties of information, participation and access, understands very well the difficulties met in exercising them, because information touches environmental “truth.” If it is serious, participation is not only an eventual and marginal ritual (but making a constructive contribution albeit distinguishing and respecting the role of the decision-making authority), access to justice is the necessary consequence of that which the individual has acquired as information and through participation. It should also be stressed that the procedural rights mentioned above, precisely because they pertain to human rights, must be recognised and protected by the states and cannot be withheld even in a wider international dimension with regard to the single national legal order.²¹

THE HUMAN RIGHT TO THE ENVIRONMENT AS A SUBSTANTIVE RIGHT

We have already said that the right to the environment has an important, indeed decisive, content for the destiny of the planet, in procedural rights relating to information, participation and access. It is a deep river that flows from individuals and society under the banner of “environmental responsibility” in ethical, religious, civil and political terms. Obstacles in the way of this philosophy are mainly political, as there is a realistic concern for not fostering an out of control or even violent pan-environmentalism. But, if the institutions adopt high profile serious policies, society will accept the necessary sacrifices for guaranteeing the continuity and quality of natural resources. The philosophy of the human right to the environment also has, therefore, a profound political significance, because it tends to shift onto individuals and society the weight of the even painful choice that governments are unwilling to make.

Still more delicate is the “substantive” concept of the human right to the environment. The healthiness of the environment, understood not only as minimum biological survival but also the enjoyment of the fundamental needs of human beings, with reference to economic and social rights is rightly supported. To avoid uncertainty, it seems advisable to point out that every person should be able to defend him or herself – in the name of his or her right to the environment – from pollution (in its different forms) when it exceeds the minimum standards established by law. At the same time, every person should be able to defend him or herself, with legally peaceful means, against public authorities when they adopt illegal measures, by taking the necessary actions before the ordinary and administrative courts.

Another aspect relates to the right of non-interference in the private sphere (by the State or other persons), and also the right of obtaining positive services from public authorities. Which positive services? Every person has the right to demand clean air, clean and sufficient water, edible

food essential for living, minimum means for him or herself and his or her family (clothes, house, work, medical assistance, education, etc.).²²

Our prudent opinion is that the content of the right to the environment cannot be expanded beyond a reasonable level both because there would be an overlapping with other socio-economic human rights, and because public authorities cannot “concede” services, but only create conditions so that each person can find work, a house, in order to live, etc. Human rights must remain “fundamental freedoms,” although with the necessary opening for social “solidarity.”

Equity and the Use of Resources

It would be unrealistic to expect to solve big environmental problems in terms of the individual socio-economic demands, linked to the environment. Apart from pollution (that allows an objective definition in terms of standards), a serious dialogue has to begin on quantitative standards in the equilibrated use of common resources: in this case, the right to the environment has to have as its object the principle of equity.²³ In the law – at various levels – a series of principles have gradually been built up that express the philosophy that underlies the environment. For example, in the 1992 Rio Declaration, after its important Preamble in which it reaffirmed “the Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm on 16 June 1972, seeking to build upon it and after having stressed the need “to protect the integrity of the global environmental and developmental system” and the “integral and interdependent nature of the Earth, our home,” proclaimed some principles for helping to focus on the content of the human right to the environment and, in parallel, to establish the duties of the states and of the international community. The personal content of the right to the environment includes the right to “a healthy and productive life” (that is, a wider dimension of environmental health) and the right to development, that is understood as an active principle of responsibility in accordance with equity, towards environmental needs and the demands of the development of present and future generations). The content of the right to the environment in substantive terms translates into the right-duty to satisfy one’s vital needs, according to a criterion of sustainability typical of nature, transferred into the economic, social and political world. Intragenerational and intergenerational equity itself becomes the content of a personal duty in life style, given that, without equity, the sustainability of life on earth seems completely impossible.

The Right to Development

In some ways, the right to development (referred to individuals, civil society, populations, indigenous communities and local communities) is linked in an indissoluble manner to the human right to the environment: the

sustainability of development itself becomes the dimension and the content of an individual right-duty (that is, sustainability is not only a political concept connected with states). Human beings can indeed ask states to eliminate “poverty,” an indispensable requisite for sustainable development, but they are obliged to act positively, observing environmental standards without causing harm to others (the “polluter pays” principle). Human beings benefit by the states’ role as guarantors, called upon to create new levels of co-operation and “a new and equitable global partnership” (principle of the equitable use of resources; the principle of not causing damage to the environment of other states or to areas beyond the limits of their national jurisdiction; the duty to reduce and eliminate unsustainable patterns of production and consumption; the duty of prevention; the duty of precaution; the duty not to transfer risks; co-operation and help in the case of emergencies and, in relation to new technologies; duty to provide protection for the environment in times of armed conflict and to cooperate in its further development; etc.). It should be stressed that the Rio Declaration (Principle 12) commits the states “to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation.” It should also be stressed that free enterprise is viewed favourably in a globalised world without ideological prejudices.

THE HUMAN RIGHT TO THE ENVIRONMENT: ITS COST IN TIME AND SPACE

To ensure the “sustainability” of development (something that has not yet been accomplished) and to guarantee the effective protection of a universal human right to the environment, it is certainly not enough to state with cultural foresight that the environment is a human right. It is necessary to keep in mind the economic and social “cost,” in the broad sense, that has to be paid for reaching this great objective. Starting from the realistic assumption that the globalisation of the economy is an unstoppable phenomenon [in implementing the principle of free enterprise that is also a human right and the “right to development” in accordance with the 1992 Rio Declaration], it is necessary to give an *economic value to nature*, making those working in the economy and even those simply benefiting from mass consumption pay the marginal social costs that are unloaded on the quality and quantity of natural resources and the quality of life of human beings.

Polluter Pays Principle

Legal systems have for almost half a century been engaged in establishing growing “restrictions” on economic development through the legal rules of “command and control” (permits in advance, plans and programmes, civil, criminal and administrative sanctions), inspired by the “polluter pays”

principle and the prevention and remedying of environmental damage, understood as an unlawful act with economic implications that have to be remedied, preferably through restoration or its equivalent.

The system of the European Union (now embracing 27 countries) is emblematic for its overall articulation, as set out in Directive 35/2004/EC on environmental damage (that very precisely states in Annexes 3 and 4, objectives, costs, and means for the effective remedying of environmental damage by those responsible for it) and in the more recent trend to introduce mandatory criminal sanctions for environmental crimes.²⁴ Aware of the need to use economic and fiscal instruments also, there is a trend within the European Union, not only to implement the polluter pays principle but also to encourage overall economic ecology in enterprises, in products, in the management of water, waste, air emissions, broadening the obligation to adopt the best available technology in relation to energy efficiency.

Not only has private property taken on a social value, but also environmentally-oriented insurance and taxation, as well as the system of funding, have become normal tools (consensual and at times mandatory). The still serious difficulties that exist in the European system (by way of example, the delay in implementing the Kyoto Protocol, the limitation of environmental damage only to some aspects of nature, the limited success in relation to biodiversity, the condition of the marine ecosystems) become even more evident in the international sphere.

Protection of Natural Capital

The most difficult problem is the protection of the “common resources” that fall outside the jurisdiction of the States (seas and oceans, climate, biodiversity), due to the institutional lack of articulation of about 180 countries and the absence of strong super-national organisations, required for giving an effective response. The human right to the environment plays a positive role regarding its procedural aspects because it widens the ambit of operation of the democratic instruments of information, participation and access. Optimism about the human right to the environment diminishes if we look at it from a substantive point of view with a broader approach in terms of space (to guarantee an acceptable quality of life for present generations, including those in the global south) and time (to guarantee the life of future generations) in mind. The capacity of the earth is limited. The economy must not only take into account the capital and labour produced by humans but also the natural capital that is not inexhaustible and does not have an unlimited capacity of absorption and regeneration. It is, therefore, necessary to invest in the reasonable conservation of the existing natural capital, developing scientific research in all sectors relating to the sustainability of the biosphere. Without conflicting with the economic principles of free enterprise, it is possible to correct some aspects of the current economic world, inserting the environment as a fundamental

element and also encouraging a new social ethic inspired by solidarity between generations.

World governance of the environment, in the sense of real control, should identify gaps in the system, giving economic value to equity between present and future generations and to the concept of the environment as the common heritage of humankind.²⁵

THE HUMAN RIGHT TO THE ENVIRONMENT: GUARANTEES FOR EFFECTIVENESS

Regional Courts

Today, there are some guarantees for human rights in general and also – in a limited sense – for the human right to the environment. There is a *European Court of Justice* in Luxembourg that works for the implementation of Community law, including environmental law, in relation to the obligations of the Member States (now 27). The jurisprudence of this Court is very significant because it operates within the logic of harmonised law supra-ordered in its objective and subjective aspects.

The *European Court of Human Rights* in Strasbourg, created on the basis of the 1950 Rome Convention, that groups together about 47 countries, is specifically for human rights. Also, in this case, there has been an evolution through its jurisprudence on human rights, including that relating to the environment – even if only indirectly. The recognition of standing for individuals should also be noted. On a regional basis, there is also the African Court of Human Rights and the Inter-American Court of Human Rights. It is very important to begin to examine the comparative jurisprudence of these courts.

Is there a Need for an International Court?

There is no World Court of Human Rights, which is an absolute priority due to the nature of these rights which, fundamentally, cannot receive different guarantees based on the continents where individuals live (Asia, Africa, America, Oceania). For this purpose, we propose a new Convention on Human Rights, for updating the 1948 Universal Declaration, and, at the same time, the institution of a single universal court. Standing for individuals and NGOs could be accorded, but it would be prudent to have a filter in order to avoid inflating the system with irrelevant cases.

The *International Criminal Court*, instituted with the Rome Conference at FAO in 1998, is an innovation. This Court is already in operation at The Hague for certain crimes against humanity committed by individuals.²⁶ The Statute provides that a majority of the parties can add new crimes, so it would be possible to use this new institution for the most serious environmental crimes on a global level. A proposal in this sense was already made by ICEF (International Court of the Environment Foundation)

to coincide with the 1998 Rome Conference, during a special international seminar in Rome. The International Criminal Court is a permanent court, going beyond the earlier view of *ad hoc* courts (the Arusha Court for Rwanda, and the Criminal Court for the ex Yugoslavia).

For the environment, an *International Tribunal for the Law of the Sea* was created at a global level and has been in operation in Hamburg since 1997. It is a specialised institution for a large environmental sector that integrates the system of guarantees offered by the *International Court of Justice* at The Hague. The Statute of the International Court of Justice provides active and passive standing only for states, so it would not seem to be suitable for protecting a human right like that related to the environment. The question cannot be surmounted with a "special" chamber so it is realistic to promote an International Court of the Environment as a specialised body, also accessible to individuals in accordance with the ICEF project, presented at the Rio Conference of 1992.²⁷

The United Nations, through UNEP, although aware of the problem, moves very carefully, at present favouring, for political reasons, the enforcement of existing environmental law in individual countries. Unlike the 1992 Rio Conference, at the 2002 International Conference in Johannesburg, UNEP involved the Supreme Courts of various countries in a specific meeting for the purpose of pinpointing the actual state of enforcement of environmental legislation. This initiative was followed by another meeting in Nairobi in 2003, and, at regional level, a network of Forums of Judges for the Environment are being established to foster better information and collaboration, always aiming at the effectiveness of environmental law. This effort by UNEP has been encouraged by the European Commission and various private organisations such as IUCN, INECE and ICEF.²⁸

FOR A PHILOSOPHY OF DUTIES: THE SUSTAINABILITY OF LIFE

As we all know, human rights originated as a reaction to the absolute power of the state. Gradually, the working bourgeoisie and then the citizens as such, under the influence of new ideas, claimed and obtained greater freedom for themselves, which is now consecrated in the constitutions of many countries.

In the United Kingdom and the U.S.A., the process has been more gradual and less ideological, without the need for violent revolutionary explosions like France in 1789 and Russia in 1917. The two world wars in Europe (1914-1918 and 1939-1945) marked the decline of the role of Europe compared to the U.S.A. (here we are thinking of decolonisation) whilst the Soviet revolution subsequently imploded due to the substantive denial of human rights (amongst them, free enterprise). The fear of a nuclear holocaust that characterised the Cold War and the division of the world into two blocks faded. New fears were on the horizon.

The Clash of Civilisations

The “clash of civilisations” between the West and some sectors of Islam (which in our opinion cannot be denied) emerged for many reasons. It is not without significance that some Arab countries (that is, 8 of them) did not sign the 1948 UN Universal Declaration, but recognised, at least in part, the 1981 Dhaka Declaration on human rights in Islam, in the name of religious, cultural and political diversity, and the 1990 Cairo Declaration on Human Rights in Islam. Fewer implications are involved in some Asian currents that identify themselves in the right to development (the 2005 Bangkok Declaration), seeing that the priority of economic development (undertaken in Japan, China, India, South Korea and other countries) in a globalised way will increasingly lead to the emergence of the node of the human rights of single human beings.

Also in the West, there needs to be some serious soul searching. Very complex new questions are raised concerning:

1. the origin of life and the ways human beings are born (medically assisted procreation, abortion, embryo experimentation, discrimination of genetic stock, etc.);
2. death (euthanasia, living wills);
3. forms of cohabitation different from the family (non-marital relationships, homosexual marriage, adoption by homosexuals);
4. the need to stem the flow of serious phenomena on a planetary scale, linked to the trafficking in organs, the exploitation of child labour, pornography, trafficking in human beings, prostitution, drugs, etc.

Human Rights and Natural Law

Considering the cultural pluralism prevalent in the West, the problem arises of establishing the criteria for deciding which laws are just or unjust. We believe that reference should be made to the principles of natural law or, in other words, to a rational, non-denominational criterion. Only in this way, can we contain some of the excesses committed in the name of the freedom of human rights that have actually fostered a war of one right against another, discrediting the idea of human rights (that are not infinite and devoid of any measure, in the objective sense, that is, entrusted merely to the judgement or whim of individuals or groups).

It, therefore, seems advisable to refer to duties and to the natural foundations of human rights, as observed by Jacques Maritain in his work “The Meaning of Human Rights” (Conference of 21 February 1949 at the Brandeis Lawyers Society of Philadelphia) in which he states that, as human rights are based on natural law, which is the main source of rights and duties – since these two concepts are correlative – it is appropriate to add that a declaration of rights should normally be completed with a declaration of the

individual's duties and responsibilities with regard to the community to which he or she belongs, and especially with regard to the family, society and the international community.²⁹

In truth, Art. 29 of the Universal Declaration of Human Rights of 1948 points out clearly and distinctly that "everyone has duties," identifying in the first place those "to the community" and, subsequently, those to others, according to the principle of reciprocity. There is an equality of rights and also an equality of duties. Rights and freedoms encounter restrictions (and, therefore, duties), not only in the relationship among persons exercising their common individual rights but further social restrictions imposed by the law for "meeting the just requirements of morality, public order and the general welfare in a democratic society." Tolerance and inertia in reacting to new forms of discrimination against women, against religious freedom, against security within society (following the terrible practice of terrorist blackmail) must, in our opinion, be surmounted by invoking the previously-cited Universal Declaration of Human Rights. We should not allow the breaking up of so-called Western human values within our own communities by using, without reciprocity and respect, the guarantees offered by our legal orders to millions of immigrants.

There is no denying the diversity of the philosophical and cultural motivations that have led to Universal Declaration of Human Rights, but this solemn and practical agreement can only be improved by making a new and strong commitment stressing, above all, common duties. Crimes against humanity like those that continue to be tolerated through the planning of mass murder make no sense when faced with the very serious problems of people in Africa, of the lack of water resources for millions of people, of the devastating effects of desertification and climate change, of the loss of biodiversity in the oceans. The environment – the reason for this article – can offer causes for hope for re-meditating human rights. The human value of the environment draws individuals and peoples closer together, in justly being concerned about guaranteeing life on the planet and in equitably using natural resources.

The Role of the Environmental Movement

For this to be realised, in our view, it is necessary for further cultural maturity regarding the value of the environment within the so-called environmental movement and, that is, without failing to acknowledge the merits this movement has acquired in awareness raising among the public and in fighting some positive battles (those for the constitution of a network of parks, reserves and wetlands; for the protection of biodiversity; for saving cultural heritage and the landscape). However, the radicalisation of some positions in political and ideological terms does not, in perspective, help the cause of the environment, because it is not understood nor shared by the community in general.

It does not help the environment, for example, to talk in repetitive slogans, confusing the role of science with sometimes erroneous technological applications, expanding beyond a reasonable level the precautionary principle, refusing to discuss possible evolution in the peaceful use of nuclear energy, also for the community, the negative prejudice against infrastructures for modernisation (forgetting the needs for mobility typical of a globalised world), always demonising biotechnologies, only considering waste as a “criminal” problem rather than as an economic and technical opportunity and resource for the purpose of its recycling, even for energy. If environmentalism turns into a political lobby, its exploitation becomes inevitable, resulting in a closure towards the rest of society. The risk is that the extraordinary potential of the human right to the environment will be restricted by marginal positions lacking accountability.

Religion and Ethics

We would also like to briefly mention the religious and ethical values that strongly condition the concept of human rights, including that of the environment. Religious communities can play a fundamental role within an inter-religious dialogue and on the basis of common values, in favour of human rights. In a globalised world, it is necessary to guarantee the necessary *universality and reciprocity* of human rights, including the human right to the environment.³⁰ It is also necessary to imagine an international framework of guarantees on a global basis for both human rights in general and for the human right to the environment: in fact, there is no universal Court of Human Rights or International Court of the Environment. Human beings have recognised rights for which there is no real possibility of protection at international level. This is typical of human rights.³¹

It should be stressed that the universality of human rights and religious freedom cannot leave aside a *positive concept of “laity”*, meaning the expression of the depth of being in one’s conscience, with its rightful social projections. The concept of laity originates with Christianity or, in any event, has received an original and decisive contribution thanks to it.

We profoundly believe that the idea of the individual in the Christian tradition not only does not conflict with the legitimate principle of laity but is its guarantee. Being of a single heritage, it links the human being with God by virtue of the incarnation of the Son of God. It links the body to the spirit, in a deep relationship of equilibrium. In this concept, the oneness of the individual avoids, on the one hand, the de-personalisation of the body and its reduction to a pure biological, hedonistic and eugenic datum and, on the other, places responsibilities on the spirit to truly respect the freedom of conscience of all persons and of their choices. Human rights also require courage and strength to be “recognised” and not “granted” by public powers. Today, the rediscovery of the deep and singular values of Christianity seems to us necessary to serve the magnificent cause of human

rights, including the right to the environment. The cause of human rights is also the cause of the human right to the environment.

CONCLUSION

We have taken the liberty to put our cultural position on human rights into words because the environment as a human right also feels the effects of the different conceptual views that are in conflict today. The German Chancellor Angela Merkel, in her role as the President of the European Council, on the 50th anniversary of the signature of the Treaty of Rome in Berlin on 25 March 2007, courageously declared that humankind's greatest strength was "the power of freedom, freedom in all its manifestations" and that "the individual is paramount" in accordance with a concept based on "Europe's Jewish-Christian heritage."

Having failed to make a reference to the Jewish-Christian roots in the European Constitution was, in our opinion, a very serious mistake, not due to a secular but to a secularistic view of Europe, clearly deriving from the anti-religious Enlightenment: reference should have been made on the basis of a current and living historical and cultural datum that is to be respected but not in the least implying religious exclusivity. Within the heritage of the Christian faith, we find the basic idea of human rights: the fact that they originally resided in the conscience of every person, the respect of their sacredness even by God, the non-imposition or submission to an external authoritative rule, freely and consciously taking on duties for the common good, the culture of respect, and other limits. In fact, we find a distinction in Christian thought between Caesar's realm and the kingdom of God, the idea that religion is within the innermost conscience and not in a particular place; the absolute respect for the freedom of religion, including the right not to believe; respect, and indeed, love for every person, including one's enemies; the new idea of justice that never passes through hate and violence; the dignity of women; the natural value of the family; the value of peace; the value of pain as a message of hope and redemption, in harmony with a God the father of all humankind and with the Son who took on human dignity as his own identity. Also for non-Christians, after many centuries, this message has received the maximum consideration in relation to human rights and values because it liberates these rights from every form of ideological or authoritarian control. Also, room for further analysis opens up for the environment as a human right, in accordance with this view, because it links the joint responsibility and duty to conserve the gift of the creation and it enables its equitable use for the common good.

To reach a wider consensus, it seems to us that it is essential to move towards a greater cultural broad-mindedness, but with a realistic outlook. In the following, we present some considerations, useful for a discussion and further study.

To Put the Foundations of Dialogue with Islam on New Bases

There is the global challenge of Islam to which the West has not, up until now, known how to give an adequate and constructive answer: Europe appears weaker than the United States of America, not only in scientific, technical and economic terms, but also in cultural terms. We do not understand what Europe's answer is. For example, the Charter of Fundamental Rights approved in Nice in 2000 (that became obligatory with the Treaty of Lisbon on 13 December 2007) elevates some interests that are without any real anthropological or ethical foundation, completely contrary to the Christian tradition to the level of human rights. In our opinion, certain basic principles of the European Charter running counter to Christian principles cause perplexity:

- there is no explicit reference to the family understood as a natural union between a man and a woman (Arts. 9 and 33), whilst the "right to marry" is generally confirmed;
- the principle of non discrimination is rightly referred to sex, race, religion, political opinions, etc., whilst it is not comprehensible why it should also concern "sexual orientation," providing a legal basis for unions between homosexual couples;
- the correct reference to the right to life (Art. 2) and the exclusion of the death penalty do not appear to be balanced by similar consideration of the protection of life from the time of conception;
- the right to the integrity of the person (Art. 3) within the fields of medicine and biology is subject to the free and informed consent of the persons concerned, without any evaluation of the implications of euthanasia;
- there is a reference in Art. 22 to cultural, religious and linguistic diversity, but it requires specifications;
- the general prohibition against collective expulsions (Art. 19) conflicts with the need to protect the cultural and religious identity of Europe and collective security: it would have been better to specify some safeguards for the protection of the individual;
- the human right to the environment is not expressly mentioned in relation to the individual human being.

This certainly does not help dialogue with Islam on common values. Dialogue with Islam, also on the part of important sectors of the Catholic world, was perhaps too superficial and substantially mystificatory and, that is, beyond good intentions: there was a fear of touching on the substance of the real problems (for example, the legal role of women in a globalised world; the real exercise of religious freedom; etc.). Inter-religious dialogue, which in our opinion is impossible with Islam, is confused with dialogue between cultures that is, instead, urgent because it revolves around the verification of whether or not there are rights, as a common measure in a

globalised world. It makes no sense to give fundamental rights to some people and not to others. A fundamental right cannot stop in some geographical areas, on the basis of a premise that that specific place is "sacred" (e.g., Saudi Arabia). It is not possible any more to imagine a peaceful and just world if there is no reciprocity between rights and duties on essential aspects of a human being, such as, for example, his or her relations with the environment. If there is truly a desire to attempt to install an inter-religious dialogue with Islam, it is necessary to avoid vague and inconsistent similarities (we are all monotheistic; we are all children of Abraham; the religions of the Book) and to look towards the substance, that is, the idea of God that is radically different, with strong cultural, social and political implications. Islam clearly negates the three Christian dogmas of the Trinity, Incarnation and Redemption in favour of a God that has created a world which has no need of "redemption" but only of the observance of some immutable rules set out in a book, which place the individual in a submissive role. A God-Judge, without love and mercy, outside the historical and painful saga of humanity; a jealous and warrior God who encourages and justifies the holy war against all non-Muslims, including Christians, whose "privileged" destiny would be to become "dhimmi," that is, persons having some rights that have "benevolently granted" and not simply due because they individuals. The challenge of global Islam is talked about, because there is not only a social, cultural, political and religious awakening (although with some differences), but also an extremely worrying violent element. There is a galaxy of terrorism fighting a real war against the West. The moderate Arab world has verbally dissociated itself from a series of brutal massacres in the U.S.A., Spain, the United Kingdom, and various other parts of the world. This verbal disassociation has not prevented the phenomenon becoming even more serious in Palestine, Lebanon and Afghanistan. The fact that terrorism menaces the world with terror, a threat that has already become reality for millions of people in their daily lives, regardless of whether massacres occur, should not be ignored. It should also be strongly emphasised that the philosophy of the kamikaze (trained and financed by dark forces) have all the characteristics of absolute viciousness, casting a mark of dishonour and discredit on all of Islam. The question is whether the West is able to and should defend itself with the means permitted by international law. We believe that it has no choice except to accept the challenge by using the arm of human rights against authoritarian and non-democratic societies and by demanding reciprocity in political and legal terms. It needs as soon as possible to free itself from being blackmailed for oil and put a reasonable brake on the massive Islamic invasion, not in the name of Christian religious values but of legal principles that are inescapable in a globalised world.

The responsibility of the institutions is to guarantee social order and peace, not with a do-gooder approach or pacifism, that are ineffective, but with strong, truly democratic instruments, among which reciprocity for the universal protection of human rights is fully entitled to be a part of. To be

even more precise, Europe has to find the necessary strength and authority towards regimes like Saudi Arabia, Iran, Syria and the Sudan, in order to obtain substantive compliance with human rights. There are 56 mainly Muslim countries that make up part of the Islamic Conference, and doubts arise about their substantive compliance with democratic principles.³²

To Update the 1948 Universal Declaration of Human Rights

It seems realistic to start from an existing legal act that has already existed for more than sixty years: its updating must (at least formally) leave aside agreement regarding the cultural and religious values of reference, giving priority to positive and limit consent. It would be useful to add a Charter of Human Duties, correlative to the rights, in that way liberating the cultural view from an overly individualistic concept: the restriction of human freedom is not only the individual liberty of others but also the common good (with reference to the whole international community).

The philosophy of the 1948 Declaration is still valid but requires integration with duties under the banner of solidarity. In effect, with scientific, technological, economic and social globalisation, it is possible to gamble on cultural globalisation regarding human rights and duties, without disavowing traditional liberalism that has the merit of having linked rights-duties to individuals as such, notwithstanding the place or cultural community they come from. This problem is not to be posed in an abstract sense but rather in an historical and practical sense, by experimenting with new models of protection.

To create new Instruments for Protecting Human Rights in General

The right to humanitarian intervention has already proved a positive experience. It needs to be followed up by remodelling this intervention so that it is permanent and multilateral in accordance with more open and commonly shared policy criteria. Secondly, the question of the constitution of an International Court of Human Rights using the experience of the regional courts created in Europe, Africa and America, can no longer be deferred. Only jurisprudence, in certain circumstances, can enable the evolution of the concept of human rights to be verified because it is linked to concrete cases. In the meantime, on a cultural level, the recent resolution of the United Nations for a moratorium on the death penalty is to be strongly applauded.³³

To create new Instruments for Protecting the Environment as a Human Right

The environment also needs protection at the international level. Today, this protection is completely lacking, so it is legitimate to ask how sincere and profound a certain kind of environmentalism is (made up only of slogans

and messages) which does not comprehend the necessity and urgency of this strategy.

If environmental justice, also in the name of human rights, is needed, the time has come to open access to individuals and civil society, because the United Nations model made up of almost two hundred sovereign States appears to be inadequate while the living ecosystem is only one. If the concerns over climate change and the scarcity of water and food in different parts of the planet are well-founded, even if only partially, the creation of a specific permanent court seems to be necessary and urgent: there is a need for a real International Court of the Environment. There is already in existence a very articulated and also realistic project for such a Court, but a political route needs to be taken. In the meantime, a role can be played by the already existing International Criminal Court for some types of international crimes against the environment.

NOTES

¹ The opinions expressed in this article are exclusively those of the author.

² On the relationship between human rights and the environment see: Maguelonne Dejeant-Pons and Marco Pallemas, *Droits de l'homme et environnement*, Strasbourg, Council of Europe Publishing, 2002; Michele Greco, *Diritti Umani e Ambiente*, Rome, Amnesty International, 2000. For a general overview of human rights, see: Michael Haas, *International Human Rights*, Routledge, 2008; Todd Landeman, *Studying Human Rights*, Routledge, 2006; Bernard G. Ramcharan, *Contemporary Human Rights Ideas*, Routledge, 2008.

³ It is sufficient to mention here the terrible experiences of the Nazi prison camps and the no less terrible Soviet gulags as well as the persecutions in Maoist China during the cultural revolution and the bloody Cambodian regime of Pol Pot. Violations of human rights have occurred during ethical and religious conflicts and exist in all dictatorships. Humanitarian intervention of the international community has been very limited and only covers some cases: Iraq, 1991; Somalia, 1992; Bosnia, 1993; Haiti, 1994; Rwanda, 1994; Kosovo and Serbia, 1996; Afghanistan, 2003. There are still complaints about violations of human rights in North Korea, China, Burma, Cuba, Iran, in some Middle Eastern countries and in Africa, in particular, in Darfur and Zimbabwe. Some serious violations of human rights have been defined and classified with the consent of the international community through the establishment of the International Criminal Court (whose Statute was approved in Rome on 17 July 1998): genocide; the so-called crimes against humanity in various forms (murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment, torture, rape, sexual slavery, enforced prostitution, enforced sterilisation, apartheid, etc.); war crimes in times of armed conflict (also including attacks against buildings dedicated to religion, education, art, science or

charitable purposes, historic monuments and widespread, long-term and severe damage to the natural environment). The range of human rights violations (still not standardised or under the jurisdiction of the Criminal Court), is obviously much broader, because it should also include aggression, the use of kamikazes against civilians, the trafficking by organised crime of illegal immigrants and, in particular, international crimes against the environment. On religious discrimination, see: Neil Addison, *Religious Discrimination and Hatred Law*, Routledge, 2006. On the condition of women, see Robyn Emerton (et alia), *International Womens' Rights Cases*, Routledge, 2005; Bernadette McSherry and Susan Kneebone, "Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights", in *The International Journal of Human Rights*, Vol. 12, No. 1, 2008, pp. 67-87.

⁴ Globalisation provides an opportunity to expand markets on the basis of common interests, beyond a country's own national and cultural circle, by counting on an impersonal institutional structure (a common framework of guarantees). It is not only the strong powers but also the millions of small and medium-sized economic parties that aim at broadening the market to their advantage. It is difficult in this context to shut oneself into a closed community whilst it is advisable and urgent to accelerate the progress of a more advanced international order of justice and peace. Free enterprise as a human right can open the doors to dialogue and to the peaceful coexistence. It is perhaps an optimistic prospect but realistic. It is not globalisation as such that is an evil but the deficit of democracy, security, rules and real governance. Arnold Toynbee, with a considerable capacity to be ahead of his times, has, in various important works, written on the deep historical roots of globalisation. These include: *Il racconto dell'Uomo*, Garzanti Editore, 1977 and *Cities on the Move*, London, Oxford University Press, 1970. According to this illustrious author, globalisation, as the "unification of the Ecumene," is not a recent phenomenon, because its origins can be found in the period between 1400 and 1652, following the scientific and technical discoveries (especially those of Copernicus and Galileo) and the great geographical explorations (Columbus, Vasco de Gama, Magellan): he believed that the traditional mental image that humankind had of its habitat and its place in the universe underwent a transformation on the way towards this unification. Globalisation is a real, unitary, inexorable phenomenon that, through peaceful means, calls for humanisation with regard to justice and equity, as stressed by Pope Benedict XVI in his *Message for the Celebration of the World Day of Peace of 2007*. Inequality in access to essentials like food, water, shelter, health can be overcome without, in an ideological sense, criminalising the economy and science. It is necessary to work towards a profound change in the conscience and heart of the new generation, as proposed by Christianity, linking the environment and life on earth to the fight for human values. Marginal phenomena like the no global

movement have proved to be ineffectual and phoney. “The so-called Seattle protesters go around the world spreading rot about capitalism and globalisation, without understanding that their cause should be that of saving the earth, and with it, themselves” (see Giovanni Sartori, in “Le illusioni dell’ambiente,” *Corriere della Sera*, 15 August 2007, p. 1).

⁵ See: Branwen Gruffyd Jones, *Explaining Global Poverty*, Routledge, 2006; Laura T. Raynolds, Douglas Murray and John Wilkinson, *Fair Trade*, Routledge, 2007; Desmond McNeil and Asuncion Lera St. Clair, *Global Poverty Ethics and Human Rights*, Routledge, 2008.

⁶ See: Bernard Lewis, *The Muslim Discovery of Europe*, W.W. Norton, 1982; Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order*, Simon and Schuster, 1996; Shahrbanon Tadybakhsh and Anuradha Chenoy, *Human Security*, Routledge, 2006.

⁷ See Magnus Raudstorp and Paul Wilkinson, *Terrorism and Human Rights*, Routledge, 2007.

⁸ On the United Nations’ system for the protection of human rights, see: Stewart F. Ngozi, “International Protection of Human Rights: the United Nations System”, in *The International Journal of Human Rights*, Vol. 12, No. 1, 2008, pp. 89-105.

⁹ In the Universal Declaration, we find, apart from the list of rights, the explanation for their foundation: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” Unfortunately, there are no organs or procedures for guaranteeing “recognised” rights in the legal sense, although mention is made of “progressive measures, national and international, to secure their universal and effective recognition and observance” in the sense of a system open to integrations when necessary. The “common understanding” and “the common standard” to which the Declaration inspires are at the basis of the enumeration of a detailed list of fundamental rights that is not closed but open:

1. the right to liberty, equality in the law, brotherhood
2. the right to life, liberty and security of person
3. absolute prohibition against every form of slavery, torture or cruel, inhuman or degrading treatment or punishment
4. the right to recognition everywhere as a person before the law
5. equality before the law and non-discrimination
6. effective possibility of access to justice for the protection of human rights

7. prohibition against arbitrary arrest, detention or exile
8. the right to a fair and public hearing
9. the right to be presumed innocent until proved guilty, not retroactive any act or omission which did not constitute a penal offence at the time when it was committed
10. prohibition against arbitrary interference with a person's privacy, family, home or correspondence and against attacks upon his honour and reputation
11. the right to freedom of movement and residence within the borders of each state, to leave any country, including his own, and to return to his country
12. the right to seek and to enjoy in other countries asylum from persecution
13. the right to a nationality and to change nationality
14. the right to equal rights between men and women
15. the right to a family considered "the natural and fundamental group unit of society"
16. the right to property
17. the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance
18. the right to freedom of opinion and expression
19. right to freedom of peaceful assembly and association
20. the right to political participation and access to public office
21. the right to democracy ("the will of the people shall be the basis of the authority of government") through universal and equal suffrage and secret vote
22. the right to social security founded on the economic, social and cultural rights indispensable for his dignity and the free development of his personality, thanks to national effort and international co-operation and in accordance with the organisation and resources of each State

23. the right to work (and just and favourable conditions of work as well as equal pay for equal work and remuneration for himself and his family)
24. the right to form and to join trade unions for the protection of his interests
25. the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay
26. the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care
27. the right to special care and assistance for motherhood and childhood
28. right to education (free in the elementary stage) promoting tolerance and with the priority right of the parents to choose the kind of education that shall be given to their children
29. the right to cultural freedom
30. the right to an order upholding international peace.

¹⁰ The Rome Convention chose the advanced line of the “justiciability” of human rights, making it possible for any person to directly petition the Court, breaking the State-centric (that is, only available to the States) taboo of access to justice before international courts. This is a strong precedent for the evolution of all of international law and very important for the environment also, as we shall explain later. The regional European system of human rights took care to guarantee political and civil rights in the first phase, but has evolved into guaranteeing even economic, social and cultural rights through the European Social Charter of 1961 and the creation of an *ad hoc* organ of guarantee, that is, the European Committee of Social Rights. Given the profound link, indivisibility and interdependence of all human rights, the trend in the Court is not to separate human rights (e.g., *Airey v Ireland*). Also the Inter-American system (1988 Convention), the Pan-African system (the 1981 African Charter with its relative Court of Justice) and the Asian system (the 2005 Declaration of Bangkok), show the trend towards a common universal vision of the legal protection of human rights. Some progress regarding social rights is being made in Europe. In the European Union of 27 countries, a *Charter of Fundamental Rights of the European Union*, containing a Preamble and 54 Articles, was adopted in Nice in December 2000. This document not only covers the traditional political and civil rights but also the social and economic rights guaranteed by the European Union. Within the wider domain (47 States) of the Council

of Europe, there are: a) a *European Social Charter*, adopted in Turin on 18 October 1961, subsequently revised and amended (1 September 1999). Rights relating to health, education, work and social rights are protected in it. A revision with the inclusion of the environment is hoped for from the procedural point of view and with regard to a minimum standard regarding the quality of life; b) the *European Committee of Social Rights*, made up of experts in an advisory role; c) the *Commissioner for Human Rights*, whose tasks involve promotion, education and awareness raising; d) the *European Court of Human Rights*, with its headquarters in Strasbourg, which is a permanent court (with a judge from each High Contracting Party of the Convention). The court deals with all human rights since 1998, after the European Commission of Human Rights was abolished. Protocols 11 and 14 recognise access to individuals, but with the addition of appropriate filters (manifestly ill-founded applications, repetitive applications, applications with no relevant new information).

¹¹ No article in the Rome Convention for the Protection of Human Rights and Fundamental Freedoms expressly recognises the right to the environment. However, the Court has rightly held that it is a “living instrument” that has to be interpreted in the light of current conditions. Thus, the right to the environment was held to fall under the concept of the “respect for private life” under Art. 8 of the Convention. See, for example, the following cases: *Tanira and Others v France*, of 4.12.1995, relating to French nuclear experiments in the Pacific Ocean; *LCB v the United Kingdom*, decision of 21.05.1998, relating to the lack of information about the risk of leukaemia given to a British soldier who had taken part in nuclear tests in the Pacific from 1957 to 1958; *Goumaridis and Others v Grecia*, decision of 21.10.1998, in which Arts. 6, 8 and 13 of the Convention were applied with reference to harm caused to private and family life by the building of a road. The Court has held a case admissible, in principle, that involved the application by the owner of a house who claimed that his right to the environment had been infringed through noise coming from Gatwick airport: the case was not decided on the merits due to a settlement between the parties (*Arrondelle v United Kingdom*, Appeal No. 7889/77 and the procedural decision in favour by the European Commission of Human Rights of 15.07.1980). A similar case (*Baggs*) dealt with noise and vibrations from Heathrow airport: the Commission decided to allow the appeal on 16.10.1985, but the parties reached a settlement before the decision on the merits. Also in this case, the environment was evoked in the name of a violation of the right to respect of family life and the home (Art. 8 of the Convention). Still on the issue of noise pollution from Heathrow airport, in *Powell and Rayner v United Kingdom* (Application No. 931/81, decision of 21.02.1990), the Court precluded its jurisdiction in favour of the national court in consideration of the balance of private and public interests (the latter were considered prevalent, given the international importance of

the airport). The application was deemed to be admissible but was rejected on the merits, as no violation of Arts. 6 and 8 of the Convention was found. Two important cases, one in Spain and the other in Italy, dealt with the violation of the right to the environment of individuals (always giving a wider meaning to harm to the quality of private and family life) due to forms of waste pollution (the *Lopez Ostra* case, decision of 23.11.1994) and the chemical industry (Enichem of Manfredonia, the *Guerra* case, decision of 19.02.1998). In both cases, the Court in Strasbourg recognised the violation of a human right regarding the environment and the state was held responsible and had to pay damages. It is interesting to note that, in the *Guerra* case, the Court recognised the importance of the right to environmental information and the legal obligation of states to adopt preventive measures for protecting the health and safety of individuals as such.

¹² See Note 3.

¹³ See, Roberto Papini, *Globalizzazione: solidarietà o esclusione?*, Naples, Edizioni Scientifiche Italiane, 2001.

¹⁴ See Amedeo Postiglione and Antonio Pavan, *Etica, environment, sviluppo. La comunità internazionale per una nuova etica dell'ambiente*, Naples, Edizioni Scientifiche Italiane, 2001.

¹⁵ Before the institution of the UN in 1945, only a few international conventions dealt with the environment: the Convention for the Protection of Birds Useful to Agriculture, Paris, 1902; the Convention Respecting Measures for the Preservation and Protection of the Fur Seals in the North Pacific Ocean, 1911; the Migratory Birds Convention of 1916. An arbitration decision was also very significant (the *Trail Smelter* case of 1941): a smelter in Canada produced sulphur dioxide emissions in America. The Arbitral Tribunal, set up in 1935 with the agreement of the interested parties, recognised, for the first time, the principle of the illegality of harm caused by transborder pollution and the resulting obligation to pay compensation. The Charter of the United Nations that came into force on 24 October 1945, proclaimed respect for human dignity and rights that are part of it, closing an epoch of conflict and moving towards hope in the future. In the background, there were still the spectres of the use of the atomic bomb against two Japanese cities and the Nuremberg trial for the Nazi genocide. The creation of the United Nations proved useful for the environment, also because it was accompanied by other related bodies (UNEP, FAO and UNESCO).

¹⁶ As we shall explain better later, the impulse at international level came from the United Nations, through the Conference of Stockholm of 1972. An important contribution was also made by the Council of Europe and by the European Economic Community (now the European Union) during the

same period. But it is, above all, at national level that, beginning in the 1970s, the need to place the environment at the highest level of legal consideration, in national constitutions, was expressed with special emphasis on the individual: Constitution of 1976, Art. 20 in Albania; Constitution of 1973, Art. 141, in Bavaria; German Framework Law of 1976, Art. 2; Bulgarian Constitution of 1971, Art. 31; Constitutional Law of Quebec (Canada) of 1978, Art. 19a; Chinese Constitution of 1978, Art. 11; Law of Colombia of 1973, Art. 112; Constitution of the Comores Islands of 1978, Art. 30; Danish Law of 1973, Art. 1; Spanish Constitution of 1978, Art. 45; US Federal Law of 1969 (NEPA), Art. 101; French Law of 1976, Art. 1; Greek Constitution of 1975, Art. 24; Hungarian Constitution of 1972, Art. 57; Indian Constitution of 1977, Articles 48 and 51; Indonesian Constitution of 1982, Articles 3,5 and 6; Italian Constitution of 1948, Articles 2, 9, 24, 32; Japanese Constitution of 1946, Articles 13 and 25; Constitution of Panama of 1972, Art. 103; Constitution of Paraguay of 1967, Art. 132; Constitution of the Netherlands of 1982, Art. 1; Constitution of Peru of 1979, Art. 118; Constitution of the Philippines of 1973, Art. XIV; Polish Constitution of 1952, Art. 12; Portuguese Constitution of 1976, Art. 66; Korean Constitution of 1978, Art. 32; Constitution of Vietnam of 1980; Romanian Law of 1973, Art. 1; Constitution of Sri Lanka of 1978, Art. 27; Constitution of Sweden of 1977, Chaps. 1 and 8; Swiss Constitution of 1974, Art. 22 quarter; Czech Constitution of 1960, Art. 15; Thai Constitution of 1978, Art. 65; Constitution of the Soviet Union of 1977, Articles 18, 42, 67, 68, 73, 131, 147; Yugoslavian Constitution of 1974, Articles 85 and 86; General Law of Venezuela of 1976, Art. 1. These documents are published by Erich Schmidt Verlag in 1976. Their Italian translation can be found in A. Postiglione, *Il Diritto all'Ambiente*, Rome, Lito-Aurelio, 1986, within the ambit of the initiatives promoted by the "Ecology and Territory" Working Group of CED, Italian Supreme Court. The constitutional texts and the Articles referred to are included in Annex 1.

¹⁷ The sustainability of life on earth was considered the main argument in favour of an International Court of the Environment, in A. Postiglione, *Giustizia e Ambiente Globale*, Giuffrè Editore, Milan, 2001. On page 15 et seq., the ambiguity of the concept of sustainable development is declared. On the concept of sustainable development (as a socio-political and objective concept of a lofty policy for environmental protection as well as a human right with substantive content), see Johan Hatting and Robyn Atfield, "Ecological Sustainability in a Developing Country such as South Africa? A Philosophical and Ethical Enquiry", in *The International Journal of Human Rights*, Vol. 6, No. 2, 2002, pp. 65-92; World Commission on Environment and Development, *Our Common Future*, Oxford University Press, 1987, p. 43; M. Decleris, *The Law of Sustainable Development: General Principles*, Luxembourg: European Communities, 2000.

¹⁸ Nor should the general international legal framework provided by other Conventions and instruments of international organisations and non-governmental organisations be ignored. We have in mind the United Nations Charter adopted in San Francisco (USA) on 26 June 1945 (above all, Art. 55 on international economic and social co-operation); the International Covenant of Economic, Social and Cultural Rights, adopted by the United Nations General Assembly on 16 December 1966 (especially, Art. 12 on the improvement of all aspects of environmental and industrial hygiene); the International Covenant on Civil and Political Rights adopted by the United Nations General Assembly on 16 December 1966 (Art. 19 refers to rights and the protection of health); the Convention on the International Trade in Endangered Species of Wild Fauna and Flora, adopted in Washington (USA) on 3 March 1973 (with special reference to information available to the public under Art. VIII); the Convention to Combat Desertification, particularly in Africa, adopted in Paris on 14 October 1994 (that in Arts. 3 and 10 stresses the role of information, participation and access of local populations, farmers, pastoralists, non-governmental organisations, and women, as well as the importance of implementing capacity building and developing human resources *in situ*); the Convention on the Law of the Non-navigational Uses of International Watercourses, adopted in New York (USA) on 21 May 1997 (that introduces the principle of non discrimination with Art. 32 for persons who have suffered transboundary harm regardless of their nationality or residence and the right of access to judicial procedures in order to claim compensation); the Report of the World Commission on Environment and Development: Our Common Future, created on the basis of a proposal of the United Nations General Assembly in 1987 and that is an extremely important document which in its Annexe 1 contains general principles, rights and responsibilities, including the assertion that “all human beings have the fundamental right to an environment adequate for their health and well being” and the express provision of access to justice; Resolution 45/94 on ‘the Need to ensure a healthy environment for the well-being of individuals,’ adopted by the United Nations General Assembly on 14 December 1990 (welcoming Resolution 1990/41 of the Commission on Human Rights of 6 March 1990, the principle that “everyone has the right to an adequate standard of living for his or her own health and well-being” is expressly recognised); the Declaration of The Hague (Netherlands) on the protection of the atmosphere, adopted by Intergovernmental Conference on 11 March 1989 (which maintains that “the *right to live* is the right from which all other rights stem. Guaranteeing this right is the *paramount duty* of those in charge of all States throughout the world”); to a series of Decisions of the Commission on Human Rights of the United Nations Economic and Social Council (ECOSOC) from 1989 until 17 April 1997, having as their object the relationship between the environment and human rights. On this point, also see: in M. Dejeant-Pons and M. Pallemarts, *Droits de l’homme*

et environnement, Strasbourg, Council of Europe Publishing, 2002, where we find many articles on human rights, including documents by ECOSOC's Human Rights Commission, decisions taken and resolutions issued over a 10-year period having as their object the relationship between the environment and human rights. The working methodology favoured the political and cultural profile of the general principles and the main substantive concerns linked to the idea of justice and equality (water, food, clothing, shelter, protection from poverty, etc.) as well as aspects relating to the democratic participation of individuals in defending the environment where they live (information, participation and access). In particular, Resolution 1994/65 stresses that the destruction of the environment risks producing negative effects on human rights and on the exercise of the right to life, health and an adequate standard of living. In the same volume, there are scientific contributions by members of NGOs, such as IUCN-*International Union for Nature Conservation*, IDI, *Environnement sans frontieres*, *Cousteau Society*, *Tribunal Permanent des Peuples*, *Tribunal International de l'Eau*, and the ICEF (*International Court of the Environment Foundation*).

¹⁹ See Amedeo Postiglione, *Diritto all'Ambiente*, Naples, Jovene Editore, 1982, p. 7 ff. For European and international aspects, important contributions have been made by Alexander Kiss, Konrad von Moltke, Amado Tolentino, Dorothy Nelkin, Benoit Jadot, Mohammed Ali Mekouar, Jean Paul Jacquis, Audrzej Makorewicz and Pascale Kromarek.

²⁰ An important contribution asserting procedural rights has been made by various civil society organisations, like the International Union for Conservation of Nature (IUCN), the Institut de droit international (IDI), the International Court of the Environment Foundation (ICEF), *Cousteau Society*, International Institute for Human Rights, Environment and Development (INHURED), *Environnement sans frontieres*, etc. A very important role has also been performed by UNEP, the Council of Europe and the European Union.

²¹ On access to justice, see Catherine Redgwell, "Access to Environmental Justice", in Francesco Francioni, *Access to Justice as a Human Right*, Academy of European Law, European University Institute, Oxford University Press, 2008, pp. 153-175.

²² See Marco Borghi and Letizia Postiglione-Blommestein (eds.), *For an Effective Right to Adequate Food*, Fribourg, Switzerland, Fribourg University Press, 2004; Ana Gonzales-Pelaez, *Human Rights and World Trade*, Routledge, 2005; Amanda Cahill, "The Human Right to Water. A Right of Unique Status", in *The International Journal of Human Rights*, Vol. 9, no. 3, 2005, pp. 389-410; I. J. Alvarez, "The Right to Water as a

Human Right”, in Piccolotti and Taillent (eds.), *Linking Human Rights and the Environment*, University of Arizona Press, 2003, p. 2.

²³ Edith Brown Weiss, *In fairness to future generations: international law, common patrimony and intergenerational equity*, Dobbs Ferry, NY: Transnational Publishers. 1989, pp. 23-38.

²⁴ On environmental damage in the EU, see G. Cordini and A. Postiglione (eds.), *Prevention and Remedying of Environmental Damage*, Bruylant, Bruxelles, 2005; on environmental crimes, see the recent EU Draft Directive on “Protection of the Environment through Criminal Law.”

²⁵ On this, see G. Cordini and A. Postiglione (eds.), *Towards the World Governing of the Environment*, Pavia, Gianni Iuculano Editore, 1996, and Proceedings of the International Conference on the same subject held by ICEF (*International Court of the Environment Foundation*), in Venice, 2-5 June 1994.

²⁶ The International Criminal Court, situated in The Hague (Netherlands), constitutes progress in the protection of human rights in a frontier sector (an effective system of international criminal law). On 17 July 1998, the Statute of the Court was approved in Rome and came into force on 1 July 2002. It is a permanent institution, with power to exercise its jurisdiction over individuals with regard to the most serious crimes of international concern (Art. 1) such as genocide, war crimes and crimes against humanity. Later, other types of crimes may be added to the powers of the Court, in accordance with the mechanism set out in Art. 121, namely, by a majority of the states (for example: international drug trafficking, terrorism; paedophilia; trafficking in human beings; crimes against the environment). There is, therefore, a possibility for the international criminal system that has been introduced to evolve and to become stronger. Criminal action is taken by the Prosecutor or, in other words, a public party, on the referral of the Security Council of the UN or of a State.

²⁷ The idea of an International Court of the Environment and of an International Environmental Agency originated from the widespread conviction that in order to ensure the full and free exercise of the “right-duty” to the environment inherent in all human beings, either existing international institutions must be strengthened or new institutions created. By according standing to the individual, the International Court of the Environment would protect the right, including the associated procedural rights to environmental information, participation and access to justice.

For the bibliography on the Project for an International Court of the Environment, see *Giustizia e environment globale. Necessità di una International Court dell’ambiente*, ed. Amedeo Postiglione, Milano, Giuffrè

Editore, 2001. For information about the ICEF Foundation go to its site at: www.icef-court.org.

²⁸ See A. Postiglione, *The Role of the Judiciary in the Implementation and Enforcement of Environmental Law*, ICEF, 2003.

²⁹ Jacques Maritain, *I diritti dell'uomo e la legge naturale*, Milan, Vita e Pensiero, 1991, p. 130. Against the new ideologies founded on purely voluntary choices without any reference to natural law, see the position of Jakob Cornides, "Human Rights Pitted Against Man", in *The International Journal of Human Rights*, Vol. 12, No. 1, 2008, pp. 107-134.

³⁰ On the question of reciprocity – which we consider decisive – see the Universal Declaration of 1948 that defines the notion of equality on the basis of two key concepts: the dignity and the rights of every person. Equality in human dignity requires – as a parameter of basic common reference – the claiming of these rights. An equality generically affirmed in human dignity would be a source of misunderstandings and selfish instrumentalisation if it were not anchored to precise human rights and duties (wherever the individual may be found and whatever community he/she belongs to). Equality in human rights requires reciprocity because every right *per se* requires proper recognition of its content towards other persons having the same human dignity and the same right. Reciprocity in human rights – as expressly stated in the text of the Declaration – due to the ontological link between rights and duties, must be strongly called for today, if we want to ensure that there is peace and justice in the world. Those who deny in theory and practice the reciprocity of human rights, are, in effect, conservative enemies of the *order internazionale di pace* that the Universal Declaration of 1948 talks about. Long ago, the ancient Romans understood the essence of human rights. Cicero considered natural law to be that which all people consented to – "*consensio omnium gentium lex naturae putanda est*"; Gaius saw in the element of reason the foundation of natural law – "*jus gentium est quod naturalis ratio inter omnes homines constituit*"; Seneca explained that certain laws, although not written, are more secure than those that are written – "*quaedam jura non scripta sed omnibus scriptis certiora sunt*". Equality in human rights cannot be considered an abstract notion but must be verified in reality in the different continents and single countries. See the research done by various authors in *The International Journal of Human Rights*, Vol. 11, no. 1-2, March 2007.

³¹ Precisely because there is no single court at international level, states resort to so-called humanitarian intervention. Humanitarian intervention (the so-called Mitterand doctrine) for the protection of human rights, that is, the use of force by some states under the auspices of the UN in the case of serious violations – equivalent to threats to peace and international security – has to be considered not only lawful but also rightful. Whilst awaiting the

establishment of a permanent international police force under the UN, the international community has to be given the possibility to make an operational contribution, with regard to the previously mentioned “*parcere subiectis et debellare superbos*” of the ancient Romans, for the purpose of securing a common international order. Despite an undeniable political aspect, humanitarian intervention has been used in many cases: in Iraq (1991), Somalia (1992), Bosnia (1993), and Haiti (1994), all interventions authorised by the UN Security Council. Subsequently, a broad interpretation of the theory also resulted in the NATO attack on Yugoslavia to bring an end to the violence and the persecutions of the Albanian people in Kosovo and the invasion of Iraq by the United States and United Kingdom, which the United Nations did not authorise but later backed. Above all, in Africa, humanitarian aid, even with the use of force, is thought to be necessary in Darfur and in Zimbabwe to order to prevent further genocide like, unfortunately, that which occurred in Rwanda. To avoid exploitation, the Security Council should compile a uniform code of conduct. On the role of human rights in foreign policy, see Berthany Barat, *Human Rights and Foreign Aid*, Routledge, 2007; Ray Murphy and Katarina Mansoon, *Peace Operation and Human Rights*, Routledge, 2008.

³² The history of the confrontation between Islam and other cultures suggests that we should be especially prudent:

- It was Muhammad himself in 630 A.D., after Mecca surrendered, who punished the Jews with pillage, massacres and slavery for their failure to convert to Islam, personally giving his followers a “bad example,” in contrast to the founders of Buddhism and Christianity (see A. Toynbee, *Il racconto dell’uomo*, Garzanti, 1977, p. 376).
- The expansion of the Islamic State was also justified for religious reasons (the holy war or jihad). This is something quite different from a spiritual war against each other, as a minority argues. The wars of the early caliphs (three out of four were killed by their religious brothers) were justified by the promise of great possibilities of “booty” and by a specific dogma often imposed by the Qur’an that war should be waged against the unbelievers – Jews and Christians – who do not believe in the truth. They should be fought until they pay the price and are humiliated because Allah supports the war against these liars who should be killed or enchained as prisoners... As a reward, Allah will put the souls of his martyrs in the hearts of green birds who will drink from the rivers of Paradise.
- The Byzantine and Persian empires did not provoke the Arabs, but were attached with extreme determination and violence: the Persian empire disappeared and the Byzantine empire lost Egypt, Syria and Palestine. The warlike tide did not stop, overwhelming the whole of North Africa

and then Sicily and Spain. It should be stressed that for centuries the coasts of the Mediterranean were scourged by Saracen and barbarian piracy. It was not simply the usual war of conquest but it was also an ideological and religious war, deeply inspired by the principle of the subjection of all peoples to one God, Allah (Islam means submission).

- In a speech at Regensburg on 12 September 2006, Pope Benedict XVI cites the reply of the Byzantine emperor Manuel II Paleologus (1350-1425) to a Muslim intellectual: “Show me just what Mohammed brought that was new, and there you will find things only evil and inhuman, such as his command to spread by the sword the faith he preached”. The concerns of the emperor were expressed a short time before the fall of the Byzantine Empire (1453) when, unfortunately, the Occident left him on his own.

The controversy created by Pope Benedict XVI's *lectio magistralis* demonstrates a raw nerve of Islam and the endogenous nature of Muslim intolerance that a politically correct version tries to hide. The opinion remains that the Crusades were a war of aggression and not, instead, a legitimate reaction (against the caliph Al Hakim who had begun a policy of persecution in holy places and had destroyed the church of the Holy Sepulchre). Certainly, even the Crusades in almost two hundred years in the Middle East are branded with similar misdeeds to those of the Muslims but it makes no sense today to, *ex post*, seek pardon in order to erase the memory, as it makes no sense today to proclaim a holy war against Islam. It should be noted – as a demonstration of the aggressive and expansionistic nature of Islam – that, after Jerusalem was recaptured (1187) by Saladin, and with the end of the Crusades, the conquering wave did not end but continued with the conquest of Constantinople and with repeated attempts to occupy Vienna. The Crusades cannot be blamed for these subsequent events. It was only possible to stop the advance with force (at Poitiers in 732; at Lepanto in 1571; at Zenda, on the doorstep of Vienna, in 1697). The secular trend towards expansion, momentarily halted after the First World War, began again after the Second World War due to various forms of decolonisation (Nasser-type nationalism, Khomeinism in Iran, the armed fundamentalism of Bin Laden and his followers, penetration through mass emigration in Europe and the financing the taking root of religion through multiplying the number of mosques. Jacques Ellul (in the book “Islam e Cristianesimo: una parentela impossibile”, Turin, Lindau Ed., 2006, p. 35), realistically explains this mentality, stating that numerous Islamic governments have attempted to combat the Islamistic current, namely, the idea of the Jihad – but to succeed they would need to completely change the mentality and, at the same time, achieve a de-consecration of jihad; an auto-critical awareness of Islamic imperialism has to be understood, together with the acceptance of the secular nature of political power

together with a rejection of some dogmas of the Qur'an. After everything that we have seen occur in the Soviet Union, this is not inconceivable, in his view, but its realisation implies that there must be a global change, a change in the course of history and the reform of a religion that is extremely solidly structured.

³³ See Eric Neumayer, "Death Penalty Abolition and the Ratification of the Second Optional Protocol," in *The International Journal of Human Rights*, Vol. 12, No. 1, 2008, pp. 3-21.

CHAPTER XVII

THE CONCEPT OF THE RESPONSIBILITY TO PROTECT

ROBERTO GARRETÓN

If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica, to gross and systematic violation of human rights that offend every precept of our common humanity?
– Kofi Annan

THE DEBATES ON HUMANITARIAN INTERVENTION

One of the most frequently debated topics since the end of the Second World War has been the protection of at-risk populations. The United Nations Charter announced: “We the peoples of the United Nations, determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person”; consistently with this, its primary purpose was “to maintain international peace and security, to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.”

However, immediately below, Principle 7 states: “nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”

During the Cold War, this Principle was at the heart of the divergences between the so-called “humanitarian” or “protectionist” states and the “statist” or “sovereignist” ones, which were staunch advocates for non-intervention. Thus, member states proscribed intervention in matters of domestic jurisdiction with great stringency until 1989. Socialist countries were at the forefront of this position, as were weak states with low human rights standards, which were terrified at the thought of intervention by large powers. The sole unilateral intervention that met with public approval in most of the world was Vietnam’s involvement in Cambodia in October 1979, which succeeded in putting an end to genocide, but which several states considered inappropriate precisely on account of the aforementioned Principle 7.

The end of the Cold War ushered in the hope that the UN, *we the peoples*, would take a stand side-by-side massacred populations. This was aided by the impressive development of human rights as an issue and its political, legal, international, cultural and moral impact, undreamt, perhaps, even by René Cassin when the Universal Declaration of Human Rights was framed.

One of the sponsors of a change in paradigm was Bernard Kouchner, the founder of Doctors Without Borders, later the French Minister of Foreign Affairs. Kouchner accused sovereignists of endorsing an “archaic theory of the sovereignty of states, consecrated in the protection of killings,” and justified humanitarian intervention in cases of profound distress.

The debut was promising, as in August 1991, albeit for reasons of peace and security rather than protection, the Security Council both legally and legitimately authorized armed action to restore Kuwait’s right to territorial integrity and sovereignty.

Nevertheless, several sovereignist states continued to uphold their positions. In fact, there never was entire agreement as to what humanitarian intervention should actually be about, and even the International Committee of the Red Cross never accepted the use of humanitarian protection allegations to justify armed intervention. While many states, and especially the powerful international movement of social and human rights organizations, demanded effective and timely protection for the distressed populations, other states – usually those accused of human rights violations – protested against any attempt at intervention. Besides, it was often feared that obscure political and economic interests might be concealed beneath humanitarian arguments.

On the few occasions in which humanitarian reasons were claimed, controversy arose. In the cases of intervention in Somalia or Bosnia Herzegovina (by decision of the Security Council), or Kosovo (without Security Council involvement), criticisms were made on account of the way in which action was taken. However, disapproval was likewise present in the absence of intervention, as was the case of Rwanda or presently Sudan, in the Darfur region. Deep down, the scene had hardly changed since the Cold War.

Actually, in Somalia, many members of the operation forces were killed in 1993 as a result of evident errors at the UN which were duly observed by the Italian delegation, which had extensive knowledge of the area on account of its having been an Italian colony. The failure led the UN to consider refraining from further intervention in domestic armed conflicts.

The inquiry made by the United Nations on its responsibilities in Rwanda concluded that “the responsibility for the failings of the United Nations to prevent and stop the genocide in Rwanda lies with a number of actors, in particular the Secretary-General, the Secretariat, the Security Council, UNAMIR and the broader membership of the United Nations.”¹ As to the Rwandans who had planned the genocide of their fellow citizens,

and who had incited and perpetrated it, all necessary measures had to be taken for their prosecution at the International Criminal Court for Rwanda and at the Rwanda national courts. The causes of the utter failure of UN action before and during the genocide in Rwanda were summarized in the report as “a lack of resources and a lack of will to take on the commitment which would have been necessary to prevent or stop the genocide.”

In Bosnia Herzegovina, the UN was unable to prevent ethnic cleansing, which became so ferocious in 1995 that the bloodiest of all episodes – amounting to approximately 8000 killed – took place in the presence of the United Nations, in Srebrenica, a protected area guarded by about 400 Blue Helmets.

Kosovo received intervention by NATO, a non-United Nations organization, which stepped in without authorization by the Security Council (which only assessed the situation),² declaring – as always – a just cause, i.e., the protection of civilians, and producing results that at best seemed to be as serious as the reason motivating the intervention. At any rate, there is relatively generalized agreement around the idea that despite its shortcomings, intervention, though not legal, was legitimate.

These notorious failures must be added to one involving a forgotten war, which, surprisingly, has been the bloodiest in the world after the Second World War, and which has been called the first world war ever to be waged in Africa: the combination of two wars in which Rwanda and Uganda attacked Zaire, at present the Democratic Republic of the Congo, the first to be led by a rebellious Congolese. Neither the people nor the authorities of the Democratic Republic of the Congo were ever able to understand why the UN would not protect their population from both attacks (1996 and 1998), which were duly announced by the author of this article, then Special Rapporteur on human rights in Zaire/Democratic Republic of the Congo.³ The Zairians/Congolese always thought that there had been intervention in Bosnia Herzegovina and Kosovo because the victims there had been “white.” The belated and unsolicited arrival of MONUC (1999) was interpreted as a triumph of the aggressors – Rwanda and Uganda – , as the mandate did not authorize their banishment despite the widespread opinion that viewed MONUC as a way of protecting those that profited from the riches of the Province of Katanga, an area that was considered by Europeans to be a “geological scandal.” Furthermore, the Congolese had always felt insulted by the Security Council, whose resolutions referred to the Rwandan and Ugandan attackers as “uninvited forces.”⁴

Striving to reconcile the idea of protection with respect for the sovereignty of states was Kofi Annan’s overriding concern. In his report for the Millennium Conference, he raised the question that I have used to introduce this article⁵, which reasserts the concern that he expressed the year before at the General Assembly of 1999.

THE PRINCIPLE OF THE RESPONSIBILITY TO PROTECT

The government of Canada – one of the states that have most contributed to peace operations – decided to address the crisis and called on twelve experts to create a Commission whose very name takes into consideration the duality of this issue: International Commission on Intervention and State Sovereignty (ICISS). After an entire year of work, sessions and round tables in twelve cities across the world, ICISS produced a fascinating report in December 2001, when the whole world was still shaken by the 9-11 events. The Commission was co-chaired by former Australian Minister of Foreign Affairs Gareth Evans and by renowned Advisor to the UN Secretary-General Mohamed Sahnoun. The idea was to adopt decisions thinking about *we the peoples* who are in need of protection, rather than the states interested in intervening, and always in consideration of the fact that it is each state that is chiefly and primarily responsible for delivering protection to its citizens.

It was ICISS's achievement to move away from the debate on humanitarian intervention, coining, instead, the concept of *responsibility to protect*, or R2P in its abbreviated form. The term had already been used in the report by the UN Secretary-General evaluating the events in former Yugoslavia in connection with the fall of Srebrenica, where he concludes that an arms embargo by itself did not entail the responsibility of protecting Bosnia and Herzegovina, adding that humanitarian aid would be incapable of preventing ethnic cleansing “without a political/military solution,”⁶

This new conception, as opposed to the idea of the so-called *right* of states to exercise “humanitarian intervention,” has been brought forth not only as a way to address international armed conflicts, but also, and more particularly, as an approach to domestic discord – ethnic conflicts, separatism, guerrilla warfare, collapsing states, etc. – , which accounts for over 90% of all armed conflicts witnessed in the 1990s, and which is responsible for producing the largest number of civilian casualties.

The ICISS report underscores three big advantages of the “responsibility to protect” over the hardly-ever legitimized concept of “humanitarian intervention”:

Firstly, the fact that the main concern about massacre-producing crises should be focused on the perspective of those asking for or needing help, such as at-risk communities, ethnic or other minorities, women – who may eventually become victims of systematic rapes – , and hungry children, rather than those that might be considering intervention.

Secondly, this vision recognizes that the primary responsibility pertains to the relevant state, and only when “states are either unable or unwilling to protect their own people” will it be incumbent upon the international community to step in and take action. For this, it is necessary “to strengthen, not weaken, the sovereignty of states, and to improve the capacity of the international community to react decisively when states are either unable or unwilling to protect their own people.”⁷ The failure of a

government cannot pass unnoticed in the eyes of the international community. In the words of Juan Garrigues, “sovereignty becomes a conditional right” for the state, and if such a state does not honor its obligation to protect, “it loses its right to invoke sovereignty” as a way of forestalling international intervention.⁸

Thirdly, R2P includes two key dimensions, namely prevention and rebuilding. The former had never been really put in practice, whereas the latter had already made its way into intervention agendas in 1992.

Evans adds one fourth advantage, because in his view “the new language helps to smooth things over in the political debate,” overcoming that of humanitarian intervention, “which has caused so much division and rejection because of the association of the word ‘humanitarian’ with belligerent activity.”⁹

The *first dimension* of the responsibility to protect is to enhance prevention and exhaust prevention options before rushing to embrace intervention. These are two areas that the Commission admits “were constantly recurring themes in our worldwide consultations, and ones which we wholeheartedly endorse,”¹⁰ and they constitute “the single most important dimension of the responsibility to protect.”¹¹

Prevention includes several aspects, importantly that of addressing the “deeply-rooted causes” of insecurity, such as poverty, illiteracy, discrimination, massive and systematic human rights violations, forced displacements, etc. It is against this background that some time after the ICISS report, on occasion of the tenth anniversary of the Rwanda genocide, the then UN Secretary-General submitted before the former Commission on Human Rights a five-point plan, which included preventing armed conflicts as they provide a favorable context for genocide – a concept which he later developed under the name of “systematic prevention”, and which comprises measures to address risks on a worldwide basis – ; protecting civilians during armed conflicts, and instructing peace operations to that effect; doing away with impunity through the involvement of both national and international courts; triggering a fast and clear alert in cases susceptible of giving rise to genocide through the establishment of information agencies, which led to the creation of the Special Adviser position (nowadays Special Representative) on Genocide Prevention¹², and subsequently an Advisory Committee to the Representative¹³; and finally, adopting “fast and decisive” measures uninterruptedly, which might be conducive to military action.

Naturally, taking action on the deeply-rooted or underlying causes of potential armed conflicts does not preempt acting on their triggering events.

The report underscores the direct prevention measures that are indispensable when the party bearing the primary obligation to protect has failed. Some of these measures pertain to the international community, chiefly the UN Secretary-General (through personal intervention, and by deploying inquiry missions and establishing linkages with groups of friendly countries or influential personalities) and the Security Council, an

agency whose most precious mandate is precisely conflict prevention, which is the basis for peace-keeping.

In the field of prevention measures, inquiries by the human rights mechanisms of the United Nations have proved to be highly credible, although there is no generalized acceptance of their effectiveness within the Security Council, as became evident during the Rwanda case in 1993 and 1994.

The *second dimension*, i.e., reaction, arises when prevention has failed, and it is the one stirring the most heated debates. Intervention measures may be exercised through political, diplomatic, economic or judicial channels, and finally “in extreme cases – but only extreme cases – they may also include military action.”¹⁴ At all times “less intrusive measures” should be applied first, e.g., those alluded to in Article 41 of the UN Charter: the interruption of economic or commercial relations or communications through whatever means, the disruption of diplomatic relationships, etc.

The ICISS report explores questions such as how to define an extreme case, where the line may be drawn between an extreme case and a non-extreme case, and above all, who should evaluate and decide on it. For this, it puts forward six criteria that are acceptable in moral terms, feasible in political terms and viable in practical terms.

The *first criterion* has to do with the presence of a just cause threshold concerning the risks of either a current or an imminent event which may be halted or averted by no other means: massacres either real or concretely foretold (as was the case of the Rwanda massacres, which were announced several years in advance); the actions by a state or by armed groups with or without genocidal intentions, but leading nonetheless to countless deaths, abductions, ethnic cleansing campaigns and other similar atrocities, indiscriminate onslaughts on civilian populations, etc. As Gareth Evans clearly explains, although not every massive violation of human rights is a just cause, massacres and extermination policies, among other wrongs, are. As well, massacres and ethnic cleansing campaigns committed several years before, as claimed by the US as a reason for invading Iraq, cannot be invoked as just causes either.

Regarding proof – which is no doubt necessary, but is especially required in these cases, particularly because sovereignists at the Security Council always claim that there is no evidence – ICISS correctly attributes credibility to United Nations organizations on human rights and refugees, to the assessments conducted by other international and non-governmental organizations for their own purposes, and to the mass media.

The *second criterion* is the right intention criterion. Painstaking efforts should be made to clearly understand the purpose of the potential intervener, which should ideally be free from any suspicions of having spurious interests. A good antidote against this risk is multilateral, or at least collective, reaction. Ideally, the opinion of the people that the interveners claim to intend to protect should not be ignored.

The *third criterion* is that military action should really be used as the last resort after having exhausted all other alternatives and preventive measures.

The *fourth criterion* makes reference to the issue of the proportionality of the means that will be used to undertake armed intervention to forestall or halt the atrocities justifying it. The damage caused by intervention should not be greater than the damage intended to be averted.

The *fifth criterion* has to do with the reasonable prospects of achieving the desired effects.

The *sixth criterion* is based on the legitimacy of the agency making the decision, the UN Security Council being the most appropriate one in ICISS's view. The report also proposes that, should the Council not assume its responsibilities, it should be the General Assembly that ought to make the decision (as set forth in Resolution 377 of the General Assembly, adopted in 1950 and known as "Uniting for Peace"), or failing that, a regional agency within its own scope of action.

The *third dimension* of R2P is the responsibility to rebuild. ICISS ascribes great importance to it, because among other reasons, it effectively reflects *the right intention* of the actors above and beyond other interests. Rebuilding entails resources and a reasonable timeframe, and must be targeted on averting the repetition of conflict and war. The responsibility to rebuild must strive to attain physical, economic, political and cultural reconstruction. In addition, it must consider that often domestic warfare is triggered by persistent poverty, discrimination and abuse, which have closed down other pathways. In these cases, the peace process cannot content itself with putting an end to war (as if the war had been waged with the sole purpose of signing the peace), ignoring the deeper causes of the conflicts. Rebuilding must endeavor to make the post-conflict country better and fairer than its pre-conflict counterpart. New military, judicial, political, police and security structures must be designed and implemented to effectively cater to civil, cultural, economic, political and social rights.

A fundamental factor for healthy rebuilding is putting an end to impunity for the wrongs committed against persons during war or dictatorships. Transitional justice, which has generated a new dimension in the human right to justice consecrated in all human rights declarations and treaties, is being extensively developed: it has to do with the right to truth, justice and redress on account of serious violations of human rights. Genuine and enduring reconciliation will not be possible if societies recovering from confrontations see the new democracy only as a moral draw in which yesterday's butchers become today's democrats without ever having been punished. The end of impunity for serious, massive and systematic violations of human rights should include all forms of impunity: *judicial or criminal impunity* (the lack of criminal punishment for the crimes committed against human rights and international humanitarian law, as applicable); *political impunity* (the lack of disablement for those in

positions of political responsibility while rights were being violated, regardless of their potential criminal responsibility); *moral impunity* (honorary recognitions bestowed on the perpetrators of the atrocities); and *historical impunity* (monuments, street names and squares named after human rights offenders).

The need for rebuilding as a factor inherent to any peacekeeping mission had already been understood by the United Nations after the fall of the walls. Security Council Resolution 693/1991 – which served to create the United Nations Observer Mission in El Salvador (ONUSAL) to follow up on peace agreements between contenders and maintain the peace – established, for the first time ever in UN history, that the operation would comprise three components: military, police and human rights. Later, in Cambodia, the Council established UNTAC (United Nations Transitional Authority in Cambodia), with peacekeeping and exactly the same goals as a mandate, together with electoral assistance.¹⁵ The same happened in Guatemala and the MINUGUA mission,¹⁶ as well as all subsequent operations to date.

A NEW DIMENSION OF SECURITY

The ICISS report properly ties R2P with security, which is yet another demand that *we the people* make on states and international organizations. In fact, the Millennium Summit (September 6-8, 2000), which coincided with the creation of ICISS, apart from deciding “to make the United Nations more effective in maintaining peace and security by giving it the resources and tools it needs for conflict prevention, peaceful resolution of disputes, peacekeeping, post-conflict peace-building and reconstruction,” took it one step forward when it focused on security not only from the standpoint of the state, but also from the perspective of persons.¹⁷ Thus, on the initiative of the Government of Japan, the Secretary-General created an Independent Commission on Human Security, co-chaired by former High Commissioner for Refugees (UNHCR) Sadako Ogata and 1998 Nobel Prize Laureate in Economics Amartya Sen.

This Commission considered that mankind needs a “new security paradigm” with a people-centered focus and according to which the state remains the fundamental purveyor of security, admitting, nonetheless, that as “it often fails to fulfill its security obligations – and at times has even become a source of threat to its own people,” security must be people-centered: hence its claim that human security “consists in protecting the vital essence of all lives in ways that enhance human freedoms and human fulfillment.” The Commission emphasizes that demands for human security involve a broad range of interrelated areas “concerned with conflict and poverty, protecting people during violent conflict and in post-conflict situations, defending people who are forced to move, overcoming economic insecurities, guaranteeing the availability and affordability of essential

health care, and ensuring the elimination of illiteracy and educational deprivation and of schools that promote intolerance.”¹⁸

The ICISS report contends that human security includes “concern for human rights, but [is] broader than that in its scope,” and recognizes that although this new dimension “is far from uncontroversial,” it is becoming more and more widespread.¹⁹ However, neither of the above-mentioned reports is built on “the human right to security” consecrated in all human rights instruments both declaratory and conventional.²⁰ Despite the fact that it is a recent and developing concept, the human right to security has already garnered significant recognition both from the academy and the world of politics, more specifically at the United Nations. Thus, the Report of the High Level Panel on Threats, Challenges and Change designated by the Secretary-General with the purpose of seeking to satisfy the aspiration proclaimed in the Charter of delivering collective security to all, contends that

it is necessary to distinguish between situations in which a state claims to act in self-defense; situations in which a state is posing a threat to others outside its borders; and situations in which the threat is primarily internal and *the issue is the responsibility to protect a state’s own people*. In all cases, we believe that the Charter of the United Nations, properly understood and applied, is equal to the task: Article 51 needs neither extension nor restriction of its long-understood scope, and Chapter VII fully empowers the Security Council to deal with every kind of threat that states may confront.²¹

The Panel concludes by endorsing

the emerging norm that there is *a collective international responsibility to protect*, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent (Paragraph 203).

Later, the Secretary-General’s Follow-up to the Outcome of the Millennium Summit – *In Larger Freedom: Towards Development, Security and Human Rights for All* – alludes time and time again to the duty of R2P, contending that “we must also move towards embracing and acting on the ‘*responsibility to protect*’ potential or actual victims of massive atrocities. The time has come for Governments to be held to account, both to their citizens and to each other, for respect of the dignity of the individual, to which they too often pay only lip service.”²²

From a political point of view, special note should be given to General Assembly Resolution 60/1, which endorses the 2005 World Summit Outcome Document and proclaims that “the international community, through the United Nations, also has *the responsibility* to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, *to help to protect* populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”²³ This resolution is very important, both because it was adopted on a consensus basis by over 150 delegations, and because Russia and China – both members of the Security Council and two countries that had previously expressed some reservations – were among them.

Later, in Resolution 1674 of 2006, the Council “*reaffirms* the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”²⁴

Another groundbreaking milestone was Security Council Resolution 1706 of August 31, 2006, which concerned the situation of Sudan (in Darfur), and which was the first to allude to the *responsibility to protect* in a specific case. Acting in accordance with Chapter VII of the Charter, the Council decided to authorize the United Nations Missions in Sudan (UNMIS) to use all the necessary means in the areas where their forces had been deployed and to the extent possible, in order to

protect United Nations personnel, facilities, installations and equipment; to ensure the security and freedom of movement of United Nations personnel, humanitarian workers, assessment and evaluation commission personnel; to prevent disruption of the implementation of the Darfur Peace Agreement by armed groups, *without prejudice to the responsibility of the Government of the Sudan*; to protect civilians under threat of physical violence.

Although it does not refer explicitly to R2P, Paragraph 19 of Security Council Resolution 1812 of April 30, 2008, alludes to it implicitly, and constitutes a breakthrough with respect to the preceding resolution, as it supports UNMIS’s intent to strengthen its conflict management capacity by developing and executing an integrated strategy to support local conflict resolution mechanisms, in order to maximize *protection of civilians*. The text transpires that the decision to protect, rather than being direct, would be made through the programs enabled by local mechanisms.

A PENDING ISSUE

On presenting its report in December 2001, ICISS could not remain aloof from the tragic events of September 11, 2001. Despite the fact that the document was nearing its final version, it was only reasonable that the

Commission should have refused to remain silent on the matter. The attacks on New York City involved the subject of security at its deepest. For this reason, ICISS added one comment, stating that this was a different problem: ICISS's mandate was always in connection with protecting the human person in states different from a state suffering a terrorist attack, and it did not concern protection of civilians in the latter, which the UN Charter, in Article 51, endows with "much more explicit authority" to give a military response.²⁵ However, ICISS understands that its proposed criteria might be useful for the responses that the state under attack may intend to provide.

A TEMPORARY BALANCE

Undoubtedly, the inaction characterizing the Cold War era could not endure any longer in a context in which, for one part, the culture of human rights pervaded all spheres of public activity, and for the other, the international civil society was powerfully consolidating its presence as a result of the moral credit attained through its credibility and sincerity. As well, humanitarian intervention had never succeeded at attaining the legitimacy that it needed to assert itself in the sphere of international relations.

The responsibility to protect will still need to come a long way before it acquires significance in a world where even the regimes that have committed the most despicable atrocities against their citizens continue to receive international support from various actors, including the Security Council. This is so to such an extent that the ICISS report itself proposes a precautionary principle consisting in precluding "military action against any one of the five permanent members of the Security Council" even in the presence of all the other conditions for intervention.

In addition, the larger world powers are not without reservations: although having voted for the resolutions alluding to the responsibility to protect, they have not been too enthusiastic about the concept. Moreover, even though in the academy there is hope that abstention from acting against undeniable atrocities will eventually come to an end, there are critical voices such as that of María T. Serrano de Vidales,²⁶ who contends that this concept strives to contain refugee flows so that individuals in search for refuge as displaced persons may be made to stay in their own countries.

Even so, the progress made thus far seems to be consolidating. Although we are on the right track for the principles and criteria summarized above – excessively, perhaps – to attain robustness as principles of customary international law, no progress has been made beyond the *lege ferenda* status. But is it possible to envisage an alternative formulation that may actually authorize legitimate protection of the populations that have been victimized by atrocities? I believe that it is up to states, non-governmental organizations, academics and human rights defenders to act assertively in order for the consistent application of the

responsibility to protect to become a useful mechanism for peace building and maintenance.

Besides, intervention as an obligation entails being held to task on account of non-fulfillment, which is doubtful in the case of failure to exercise an alleged right to intervene. I view this as decisive.

NOTES

¹ Report of the Independent Inquiry into United Nations Actions during the 1994 Rwanda Genocide, also named Carlsson Report after Ingvar Carlsson, Chairman and former Prime Minister of Sweden, S/1999/1257. UNAMIR: United Nations Assistance Mission for Rwanda.

² No intervention project was submitted, as a potential Russian veto was feared.

³ Regarding the first war, E/CN.4/1995/67, par. 274: “The current level of tension and the tribal and regional rivalries that have been stirred up, and have been further inflamed by the huge inflow of Rwandan refugees, give reason to fear this (warlike outbreak) may occur. The international community, and in particular those countries with responsibilities in the region, cannot disregard a situation of this scale. The Special Rapporteur’s conscience would not be clear if he failed to express his opinion in this respect. Preventive diplomacy is urgently required, although the Special Rapporteur believes that any such diplomatic measures cannot be aimed at reinforcing the status quo, as there is no certainty that an irreplaceable guarantor of stability exists.”

With regard to the second war, E/CN.4/1997/6/Add.1. July 6-14 1996 Mission: “the Special Rapporteur is alarmed by the reports he has received, and warns of the possibility that what has recently been taking place in Northern Kivu may recur in like vein in Southern Kivu” (par. 116), and “the only possible way of preventing the violence from spreading is to dispatch military observers to the region” (par. 129). Nothing was done and the invasion of Rwanda took place 40 days later and through Southern Kivu.

⁴ S/RES/1234 (1999), operative paragraph 2. The French version is as irritating as its English counterpart, as it makes mention of “*forces non invitees*.”

⁵ Secretary-General Report A/54/2000, Par. 127

⁶ A/54/549, par. 490 and 491, November 15, 1999

⁷ ICISS Report, par. 8.31.

⁸ Juan Garrigues, *The Responsibility to Protect: From an Ethical Principle to an Effective Policy*. Fundación para las relaciones internacionales y el diálogo exterior, 1997.

⁹ *NATO Magazine*, Winter 2002.

¹⁰ ICISS, par. 3.1.

¹¹ ICISS, Synopsis, and par. 2.29.

¹² This position was initially filled by Juan Méndez, the former President of the Inter-American Commission on Human Rights, and later by Francis Deng, former Special Rapporteur on Internally Displaced Persons.

¹³ Presided by Dr. David Hamburg, Colonel and now Senator Romeo Dallaire, former Co-Chair of ICISS Gareth Evans, Mónica Anderson, Desmond Tutu, Sadako Ogata, Juan Méndez, Ibrahim Zakari and the author of this article.

¹⁴ ICISS, par. 4.1

¹⁵ Resolution 745/1992.

¹⁶ Resolution 1094/1997.

¹⁷ General Assembly Resolution 55/2.

¹⁸ *Human Security Now* (a United Nations Publication) New York, 2003. Doc. ISBN 0-9741108-0-9.

¹⁹ ICISS, par. 1.28.

²⁰ Article 3 of the Universal Declaration and Article 1 of the American Declaration, alongside life and freedom; Article 9 of the International Covenant on Civil and Political Rights and Article 7 of the American Convention; Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms; and Article 6 of the African Charter on Human and People's Rights, in these cases alongside freedom only.

²¹ A/59/565, December 2, 2004

²² A/59/2005, March 21, 2005, par. 132, 135 and Annex

²³ Resolution 60/1, adopted on October 24, 2005, on the UN's Sixtieth Anniversary: par. 138 and 139.

²⁴ Operative paragraph 4.

²⁵ Foreword, page viii.

²⁶ *¿Un nuevo concepto de seguridad?: la responsabilidad de proteger de la comunidad internacional ante los conflictos armados de la posguerra fría.* ("A New Concept of Security?: the International Community's Responsibility to Protect In the Presence of Armed Conflicts in the Post-Cold War Era").

CONCLUSION

THE RIGHT TO DEMOCRATIC CITIZENSHIP: IDEAS FOR A REASONABLE COSMOPOLITANISM

LUIGI BONANATE

SOME PREMISES (OR PROMISES?)

I will argue a thesis that is far from taken for granted: the future development of human rights (which I will refer to here meaning in a general sense the set of rights included in the Declaration of 1948) will derive not so much from our direct and insistent commitment to promoting them and the success of a work of persuasion that is increasingly intense and impactful, but from the revealing of a new aspect of the contemporary world (which is anyway closely connected to human rights) which I do not see as the bearer of values (rather I take as given that human rights are a good and constitute a value as such for the whole of mankind whether it welcomes them in their totality or not), but which has the extraordinary characteristic of promoting the conditions for a universal coexistence by bearing on the nature of international relations.

I am referring to democracy which in its turn is also intertwined with peace.¹ This implies first of all that the privileged plane for the discussion of human rights is the international plane; secondly, that a sort of universal transitive ownership supports my choice: democracy needs peace and in this way it fosters human rights. It would be slightly more complicated to modify the order of facts, given that it is not very likely that human rights precede peace and democracy², whereas it is more likely that a condition of peace fosters democracy, which fosters human rights. However, the assumption of Norberto Bobbio is in itself striking: in a world without peace no one would respect human rights (because war, also, does not recognise them) and between states that are at war democracy does not exist: the mutual incremental relationship of peace and democracy is therefore even taken for granted. But there is a point which makes the difference and it is that whereas peace is an existential condition (much more and beyond being political), indeed human rights are a good that involves a moral obligation to respect them which is incumbent on all human beings, democracy is something that is much more modest given that it is – in a way that I will argue below – nothing else but an instrument: not a good but an artefact.

I do not in the least wish to devalue the idea of democracy: I would like to make clear first of all that in these pages – *rectius*, in the logical context of my argument – I will refer to only two dimensions that are

normally ascribed to it. Between substantial democracy (which refers to those ends pursued with methods such as elections and principles such as freedom of thought and expression, respect for minorities, etc.) and formal democracy (which exclusively refers to a set of procedural rules that derive from a previous agreements), I will only look at the latter. For two reasons: one that is merely technical (international life ill-sustains the hypothesis of an analogy between the state and the international system) and a more qualitative one which discusses whether – and if it does in what way – political subjects such as states (at the most two hundred, whereas there are millions of human beings) can have democratic relationships with each other. This is a point that can be addressed exclusively in neutral terms, and procedural democracy³ has the advantage of not having that apparatus of values which normally leads most people and even governments (even those that are not very, or are, democratic) to declare their preference for it beyond any other kind of political regime.⁴

In this approach nothing can corroborate or contradict the famous statement of Churchill (democracy is a very bad regime but less bad than others) because no evaluative connotation accompanies it. The argument concerns simply a possible solution to the problem of political conflict, which is often violent: from international war to civil war. Before continuing, it is advisable to clarify the terms of my reference to democracy, whose principal and notorious characteristics I will not discuss, considering them all as taken, but which are not always applicable to the planetary context in which, objectively, the question of human rights (which is both cosmopolitan and universalistic) is projected. I will not perorate at all, to be clear, a reform of the statutes of the UN which would allow the citizens of the whole world to exercise their right to vote to send their representatives to the General Assembly of the UN. In addition to being obviously impossible for the contemporary world, this hypothesis would even be extraneous to these statutes which never contain within them the word ‘democracy’ even though in the preamble they evoke human rights, the dignity and worth of the person, equality and justice, social progress, freedom, tolerance, peace and economic progress – all qualities which, where they are respected together, lead specifically to democracy. As magnificent as it is improbable, there is no point in talking about it, just as in this kind of analysis assessing acceptable levels of democracy is of no account, such as for example as one does when one monitors the requirements of free and regular elections – which is obviously fundamental but not applicable to the approach adopted here which more simply looks for *techniques* as a result of which we could (I do not say: we will be able) to see respect for human rights grow through the strengthening of democratic forms of life in a world that is largely peaceful. Lastly, the fact that the Universal Declaration of Human Rights itself does not contain any reference to ‘democracy’ (the word does not appear in it) confirms that the character that was wanted for it at the outset: able to be understood as an instrument, a procedure, a method, and not (at least in the world as it now

is) an end, a point of arrival. Less fascinating, procedural democracy possesses, however, an extraordinary virtue which Bobbio expounded in the clearest way I know: “what is democracy if not the introduction of the non-violent method for resolving conflicts.”⁵

PRIOR TO THE CONSTRUCTION OF A PLANETARY CIVIL SOCIETY

The principle that I will argue can, therefore, be formulated in the following way: since all human beings have the same universal entitlement to dispose of all the rights that are normally indexed in any *Declaration* and given that an analysis of the facts tells us not only that absolutely nothing close to a fair distribution of rights exists in the world, but also that historically its legal-planetary organisation has divided human being into different – and internally diversified – classes of beneficiaries, so that to be born in the United States of America or in Sierra Leone makes a great difference without anybody being responsible or guilty for this state of affairs, the only hope that things will change in the world is represented by what one could see as *the victory of democracy*, namely the shared and jointly participated-in universal belief that democracy is the only (because of what we know about it hitherto) means that can foster the pathway of human rights, which cannot be achieved without peace. Naturally, this does not mean that the struggles for food and health, for water and for security, have to be put to one side in order to concentrate all our forces on the struggle for democracy, but, rather, that these struggles will be won thanks to this last struggle. What is at stake – and at the same time the condition of what is at stake – is democracy itself: what one party achieves must be done in a non-violent way. And in opposing fashion: what is won violently is not democratic.

The facts of our questions can be expounded in the following way: 1) those who are entitled to human rights are *individuals*; 2) to govern inter-individual civil life (with a pathway that I will not describe but which could be evoked by referring to the Hobbesian model of the formation of civil society) the state has been raised up, everywhere in the world, transforming individuals into *citizens*; 3) who, overall, become for each other *co-citizens* inasmuch as they have the same rights and the same aspirations within the same world and share the same existential experience,⁶ which is conditioned by the planetary unification of *life chances* and ‘regulated’ by what we call international politics but which it would be better to re-baptise ‘world internal politics’,⁷ if only to escape the prejudice which holds that to move out of state frontiers is the (exclusive) competence of governments.⁸ More than half a century ago Jacques Maritain understood the horror not to be engaged in: “The fully political theory of world organization goes the right way, because it pursues the same analogy in the perspective of the basic requirements of political life and freedom.”⁹ Habermas now makes a distinction between *citizens of the world* and *national citizens*,¹⁰ but these last are also citizens of the world because all human beings are involved in

the same ‘problematic regime’ (understood as a problematic issue-area that must receive attention, a search for solutions, a spirit directed towards compromise and convergent cooperation) which sees them involved at multiple levels. The political-moral fabric, lastly, has a plot that is not inter-individual or inter-state or cosmopolitan: it is made up specifically of the intertwining of all of these three levels creating what seems to me to be one of the most extraordinary and fascinating approaches of Kant: since

a violation of rights in one place is felt throughout the world, the idea of a law of world citizenship is no high-flown or exaggerated notion. It is a supplement to the unwritten code of the civil and international law, indispensable for the maintenance of the public human rights and hence also of perpetual peace.¹¹

The foundation of a *public law in general* constitutes my approach, understanding this law as that law which traverses – in order to regulate them – all the various possibilities that human beings have of interacting, from peace to war, and from individuality to totality.

Now, it is clear that this approach must be able to count on the fact that a ‘victorious democracy’ is established at all three levels – a programme which is not easy to implement and which is also not included in approaches such as that of Rawls which looks at democracy as an already given fact of the original position from which the society of liberal peoples moves. It is true that we can no longer dwell upon, and ask ourselves, how and why each part of the planet earth has been fated to be fortunate or unfortunate, rich or poor, fertile or arid, developed and advanced or underdeveloped and backward, that is to say (generally) democratic or authoritarian, but we cannot, however, pretend that this ‘original position’ on the planet is not matched by an immensely high level of ‘natural’ inequality. The states that exist – or have existed – have had ‘things from nature’ (we should say: from chance, *rectius* from accidental and involuntary circumstances, that is to say not determined by somebody’s will but not for this reason do they not have a direct influence on the fate of a oil-producing or gold producing, island or continental (etc.) country), a certain location in the economic-political stratification of the world of each historical age, since to observe that today Great Britain is an ‘advanced’ country because its democracy was able to develop a long time before Indian democracy, specifically because Great Britain only allowed this last to happen after a long period of domination, would be both ungenerous and useless because the two countries did not have the same original position – indeed the former decided that of the latter.

Thus included in what an ‘original position’ of states should consist of (and this seems to me to be the only sensible point of departure for an analysis that in philosophical terms is founded on the nature of states), we should add that it, too, has its historicity determined by the different ages of

states. Whereas amongst individuals one presumes that the classes of age and generations are by definition always to equal to each other because their life cycles are always reproduced in the same way, as regards states we have to strive to think about them in an *original* way rather than in terms of their origins (Rawls). This would offer us ‘information’ that has never been taken into consideration in the analyses that try to place together the internal reality and the international reality. Yet human beings are ‘equal’ whereas states are not.¹² States and individuals are not equal. We cannot apply the same analytical categories unless we find ones that can apply to both contexts, and this is what Habermas tries to do when he evokes “a non-state idea of an internationally constituted community” which “obliges national states to have peaceful trade with each other” and “authorises them...to protect the fundamental rights of citizens on the territory for which they are responsible.”¹³ We can refer to this system as the equivalent of what we call ‘civil society’ within a state, that is to say that *setting* in which takes place every day the interdependence of human societies (‘inter-state civil society’?), organisationally sub-divided into bureaucratic divisions known as sovereign states (from many points of view, the adjective is superfluous if one only thinks that of how many *reciprocal interferences*¹⁴ have taken place between states), which we imagine should live peacefully as prevalently happens in inter-individual civil society as well. As regards this last, to conclude, we also know that conflicts can arise within it and that to regulate them mankind has had tried to equip itself with instruments of prevention, sanctions and reparations to guarantee its own survival beyond individual conflicts.

This is exactly what we would like to see with states. One fact is certain: states – as such – are the key to the whole system because they impinge on both sides. We cannot abolish them – this is too easy to be true (and this is the point where Kant could be seen as being utopian); but equally we cannot exalt them (we have seen the consequences of this in the past). They should be seen for what they are, their foreseeable permanence and their function of being a transmission belt between the inter-individual and inter-state levels, which cannot do without their mediation. For that matter, has such not been the case in the past, that is to say since five centuries ago when the state has decided about everything (will we inconvenience Carl Schmitt and his exceptional state?), both moving inwards and regulating the lives of its citizens and moving outwards and deciding (on its own, with others or against others) on peace and war in the world? The problem now is to bring out the links that have been established between individuals, states and inter-state society so as not to fall into the rhetorical trap of ‘citizens of the world,’ which in practice means nothing if a setting (*agorà*) to which this citizen can refer does not actually exist.

The first clue concerns the size of states, that is to say the lines of their frontiers: these have *no justification* other than a bellic one. Frontiers do not exist in nature, they are products of historical evolution and of geographical chance (like the course of certain great rivers or the presence

of a natural barrier, etc.). It follows from this that no citizen anywhere can boast the right of reserved dominion over what has happened to him because of pure chance and not supported by any foundation. But frontiers still define spheres of sovereignty and cannot be 'forgotten about'; one can only base an analysis of the possible modalities of a planetary organisation of coexisting and peaceful subjects (and democratic, that is to say respectful of human rights which are the same for everyone) by taking them into account (at least provisionally). Employing a highly evocative metaphor Habermas proposes "the mental experiment of a "second state of nature"",¹⁵ making use of the same constitutional principles that are typical of the state (elected chambers, governments, etc.). As we know, going beyond the (Hobbesian) state of nature is the pre-condition for each and every kind of civil society (including democratic civil society). As regards moving out of this 'second state of nature,' Habermas looks to the instruments that have been typical of the formation of states over the last two centuries (after the French Revolution): from the state to the constitution; from the constitutional state to democracy. Here however – as I have pointed out – the unrealistic construction of a planetary state is not the subject of discussion but, instead, the achievable compatibility between very many states that *decided to live together peacefully* by moving out of their particular kind of 'state of nature,' forgoing the reciprocal state of a 'war of all men against all men.' Now, the notorious and boring criticisms of the Hobbesian model, which is said not to know how to explain how materially one can move from anarchy to a pact of association and then to another subjection (from total war to total peace), will be abandoned not only in the theoretical terms of the introduction of an intermediate and provisional pact of 'non-belligerence' (intended specifically to manage the transition from the state of nature to civil society) but also, and more, in terms of proceduralism, that is to say a reasonable attempt by states to achieve a result such as that of being a state that creates a civil society even if far from being perfect.

Do not the most sensitive problems in all transitions (whatever form they may take) relate specifically to the modalities of a shift from one condition to another? In imagining that the two extreme limits are those of total war or absolute peace, very many and diversified intermediary possibilities will come forth whose contents will depend on the procedures that are adopted.¹⁶ How can one imagine a planetary society in which all individuals respect each other equally, accept the same laws, and obey the same established power? Even before arguing in favour of the theoretical reasonableness of such a project, it should be said that here we are not in a utopia because the requirements that have just been observed are exactly those to which the European Union has over time attained – and I would like to add (and perhaps this is the most important observation) that this extraordinary result is only an intermediate passage on the pathway of coexistence; the journey of the European Union is far from complete but what has been achieved has enormously distanced the countries that today

belong to it from the typical situation of that 'international state of nature' that realistic thought has also seen as being insuperable. One is dealing, that is to say, with an experience that can truly provoke a certain optimism: Europeans are not perfect, it is not the case that they do not break laws, there are abuses and severe abuses, imperfections, examples of neglect and crimes. But European civil society is becoming an authentic civil society, endowed with a constitutional system,¹⁷ with private law (which is that of the daily lives of each one of us, and which is being born from the harmonisation, and joint penetration, of the various European legal traditions), and with criminal law which has been consolidated beginning with bilateral and multilateral treaties of the past to tend towards a necessary and possible uniformity (as can be seen from the facts). Indeed, human rights no longer present a problem here – nothing is better than the disappearance of a need.

It is not sufficient to say that the world will know how to do as Europe has done, nor should we forget that Europe was only able to begin this journey at the end of two frightening world wars. Indeed, this example suggests to us to the small extent to which the mechanism that was adopted – in substance the acceptance of a daily incremental approach, step by step, without great successes but also without breakdowns – can be reproduced. The technique to do this must clash with structural differences, the first of which is the planetary dimensions and the number of adherents; the second, their socio-cultural and historical heterogeneousness; the third, the enormous economic and social gap that divides individuals. But that constitutional, private law and criminal law principles can steadily become homogenised is not only possible, it is what is (moderately) taking place.¹⁸ Habermas observes: "international law and state law have already begun to conform to each other at the level of validity."¹⁹ We could add that if the procedures are changed and agreement is reached on the legal principles, then it is very likely that an inter-state civil society will be formed – all of this optimism does not conceal that even after taking these great steps forward there will be failures, or to be clear, violations of law and rights: this is no more and no less than what happens every day in the most civil and peaceful states of the world.

DEMOCRACY AT EACH OF ITS LEVELS: A CASE WITH THREE EXAMPLES

Too good (or easy) to be true, one could conclude. And to tell the truth, such a conclusion appears as very far from being unfounded, especially if we look at the affairs of the world from the perspective of the worries that it generates. There are those who for decades have warned us that next world war will break out roundabout the year 2020.²⁰ There are those who remind us of the rooting of certain ethnic or historical incompatibilities (who will ever make China and Japan, and France and Germany, agree?); there are those who observe that because of its backwardness Africa will only be able

to imitate the models of development of the West and thus its leap forward will only be able to take place following a major continental war; and there are those who recall, lastly, that revealed religions are intrinsically incompatible with each other and will always and forever obstruct each and every project of religious pluralism (that which 'one believes' cannot be a matter for negotiation) and thus of peace *tout court*.

These and other proclamations are such as to make our veins and heartbeats tremor. It is therefore advisable to strive to break down these concerns and analyse them in their parts in the light of the hypothesis that was initially formulated that only democratic proceduralism can offer us hope in addressing them serenely. I take up here the formula of Bobbio which makes democracy the first application of non-violence to the solution of conflicts: it implies – side by side with the mature and thoughtful *forgoing* of all and any excessive democratic *pride* (which often leads the West to declare in a presumptuous way that it is *superior* to those parts of the world where democracy is not yet widespread) – that we take into due account the fact that the replacement of democracy by violence (that is to say: a ballot in the ballot box rather than a pistol shot) bears upon the procedures to reach a decision without bearing upon its *contents* by radically transforming the context of the decision: those (in the 'first' state of nature) who won because they were non-violent cannot be winners in the 'second state of nature' as well which will have been freed from violence because a democrat by *definition* cannot be violent²¹ and this other state of nature will have had to have been civilised, that is to say *democratised!* Democracy understood as non-violence (voting rather than shooting) means (so to speak) that all people survive the political decision, even at the price of a *bad* decision, which is always preferable to one that has been taken because it is *right* but taken in a wicked way, that is to say a violent way. At each of its levels, the 'democratic style' innovates political life in an extraordinary way. And thus, albeit with the most explicit awareness that the proceduralist pre-condition is a necessary but not sufficient *pre*-condition (at the end of this essay I will discuss what this 'sufficient' pre-condition is) for the construction of a both internal and international democratic civil society, I will now try to illustrate its capacities with three examples taken from teach level: democracy and universal society; law and inter-state democracy; and immigration and democracy.

a) The clash of civilisations which is so much spoken about in our epoch is a good (negative) example of what wars of religion have been in the past as well as of the inter-ethnic hostility that is still expressed today through religion. We will now observe how the nexus that connects religion and democracy (which will lead on – I immediately anticipate – to the nexus that connects democracy and human rights) takes concrete form. The dominant idea of the Western (more developed, rich, etc.) world is that an agnostic (to use this word means to suggest an approach which is very different and more incisive than 'secular') is (also) a democrat given that he or she, in refusing to take a position, replaces quality with quantity, *right*

with *greater* (the greater number) so that in a democratic state those who gain access to power are not the *best* of all but those who obtain *more* votes than others. Religion, instead, cannot entrust itself to voting or to majorities in order to deal with a decision of a theological kind. For example: should one follow the *sunna* or the interpretation of the imam who descends from Mohammed?²² What is right or good does not depend on majorities but on Scriptures or tradition, prophecies or hermeneutics. Democracy 'does not know about' truth, it has no foundation but discussion (with peaceful deliberation), and it is by definition anti-fundamentalist. Religion without foundations does not exist. And thus, even though in general (all or almost all) religions preach inter-religious tolerance, dialogue and mutual understanding, it is impossible for them to agree on principles. And where principles diverge there is only 'separation', schism, in the best of hypotheses, or war, a war of 'religion', in the worst of hypotheses. We cannot, for that matter, forget that religion (at different moments each religion is affected by this) is also a vector of social struggle, of the promotion of oppressed classes, of liberation, both theological and dictatorial. How can we conceal from ourselves, furthermore, that the approach to politics (if not directly to democracy) is still extremely diversified in the various religions?²³ We could broaden the terms of the question further and tell ourselves that the point is not democracy but politics *tout court*, in the sense that it is not only democracy that has problems but politics as such. Expressed more brusquely: religion has been made to bend for *exploitative reasons* to the needs of politics, of certain kinds of politics which have seen in it a device by which to unhinge the defences of the enemy (the whole of the secular and political history of the Papal States bear witness to this). Where is the proof of this? The clash between Sunnites and Shiites – say the specialists – is a very useful instrument in the hands of the West to keep the oil-producing countries separate, supporting at the same time Sunnite Saudi Arabia and supporting the Shiite population in countries such as Iraq. Another good example (good as regards its symbolic importance but not as regards its clarity or the sadness that it induces) is that of the Lebanon which has been lacerated by constant inter-religious convulsions which, however, are political in character – and of the worst kind: friend-enemy, of the purest, that is to say primitive, nature.

Democracy can be criticised from a religious-centric perspective because of its excessive materialism as well, for the preference, that is to say, that it has for a minimum result as long as this is safe (but a little base) compared to the pursuit of an ideal, which is more difficult and uncertain as regards its attainment but more heroic. If one does not want to forgo the affirmation of democracy, this means that religions must adapt their *worldly* action to this dimension. That religions should accept that they should take into account the historical, social and cultural context in which they act is not an excessive request: far too often one neglects how much democracy is connected with religious freedom or with freedom of religious thought and

what valuable service it has rendered to them. It thus has the right – having always supported everywhere and in all circumstances the principles of freedom of thought and thus those of religious freedom as well – to ask all religions to commit themselves in their turn proceduralistically to dialogue, abandoning opposition and wars (whether holy or otherwise). For centuries or millennia –and this applies to every religion – adherence to this or that faith was for the masses the result more of tradition, of inertia, at times of oppression and compulsion, than the product of a free and aware choice. But this was a result of ignorance, of the absence of individual freedom, of poverty, and also of the oppression of the weak and defenceless by the powerful. The principle *Cuius regio eius religio* can be read as the upholding of the separation of faith and politics but also as proof of the absence of religious freedom. In these conditions, for each human being who appeared on the stage of religious choice this was almost always taken for granted inasmuch he or she could only recognise that of his or her ancestors and accept it. The ‘scandalous’ modernity of eighteenth century revolutions also, for that matter, disturbed this picture: with freedom and then democracy (goods that are not won in a day but over decades) individuals discovered the plurality of religions (as well as the plurality of ideologies) and thus the possibility of choosing those which most satisfied them. Together with other freedoms, religious *freedom* was thus born which is not a pure and simple conservative measure designed to safeguard the prerogatives of a faith (as was largely believed) but, rather, the initial element of a dialogue between religions, between ethical approaches and then also between economic, political, etc. approaches. When the mass of subjects were subjected to the (authentic) ownership of their sovereigns they did not *embrace* a religion, they obeyed it, convinced – as it led them to believe – that their oppression was even the will of God and that the political and social order was immutable! The irruption of democracy onto the world stage not only broke the chains of patrimonialistic and sovereign absolutism but also freed consciences which could finally adhere to the religions that they preferred.

There is obviously no need to observe that unfortunately religions have been for centuries the vectors of clashes, wars and abuses, or that no single religion exists that is ready to forgo its absoluteness in favour of democracy. But to see how much democracy has been able to broaden religious freedom itself is a proof of the intrinsic force of the choice in favour of its peaceful methods as compared to violent methods.

b) Although religions bear on the individual level (and should never have borne on the political-institutional level), there is no doubt that it is the task of the state (as a level) to assure (to continue the example) religious freedom. This is to say that democracy is not an end in itself but has as its task that of spreading or strengthening – as I am trying to demonstrate – something else: the right to one’s own religion or to freedom of thought and expression. These are immense goods which occupy a primary position in the catalogue of human rights. But this allows us to understand that a state

has an almost total responsibility for what happens within it. Let us not forget that for centuries every state has upheld its reserved dominion, its autonomy and the absoluteness of its power in relation not only to its citizens but also to everything that exists within its frontiers. In this situation, the relationship between public authority and the private is strongly skewed, in the sense that the first – having totalised the obedience of all its citizens – can even send them to war and to die for the homeland. Homeland: more or less a synonym for nation and both of them are identity symbols that uphold the uniqueness and the separateness of each people compared to all others.²⁴ To everyone it is evident that at the moment when a nation and democracy for any motive clash, it is the first that would win because the spiritual cohesion of a people ends up by being privileged in the eyes of extrinsic and non-rooted values (that is to say not connected with identity (a democrat is by definition without a homeland) which is what democratic values are.²⁵ The nascent Italian democracy after the end of the First World War demonstrated this in a very clear way. To move to our time, on 27 June 2008, the French Council of State denied citizenship to a Moroccan woman – who was married to a Frenchman, was resident in France and had three children who were French citizens – because of her “behaviour in society which is incompatible with the essential values of the French community” caused by the “radical practice of her religion.” This was a case which if it were not true would have an extraordinary capacity to exemplify the intertwining that I am discussing.²⁶ Religious freedom (which as I have pointed out is due to the democratisation of societies); cultural integration (which forms the basis of the Hobbesian ‘contract’ signed by *fellow citizens*); and freedom of thought (which cannot be denied even to those by their own wishes wish to wear a burka): all of this brings out a possible discontinuity between the public and the private, between the will of the individual and a decision of the state. The (human) right of this woman to live her religion in her own way comes into conflict with the public right of the state in which she lives: obviously the state is stronger than that woman but the argument employed to deny her ‘Frenchness’ was that of the ‘essential values’ of the community, whose identification is, to say the least, extremely uncertain and susceptible to manipulation. The resurgence of nationalisms, especially in their ‘micro’ version, is for that matter on the agenda in our post-bipolar world, that is to say in very many states the feeling has spread that each state could reacquire that identity which the age of politics on the edge of the nuclear abyss had taken away from it (the example of Serbian nationalism is too facile, especially when one remembers that before the crisis of Kosovo the democratic opposition to Milosovic had emphatically condemned his expansionist expansions). That these attitudes are, in addition to being anti-democratic, also intrinsically inhuman is demonstrated by the impossibility of contributing to the creation of an ideal world code of human rights: how can we *assimilate*, in fact, in a single catalogue, human rights that are the same for beings that see themselves as different?

The sphere of belonging introduces elements of separation such as 'citizenship,' understood both in the historical and legal sense and in the more recent sense of political science: whatever the case, citizenship implies a process of 'inclusion' (entrance/admission to a certain environment) which consequently produces separation if not exclusion to the injury of all those who are not *included*, which is therefore a sign of behaviour that is anything but democratic.²⁷ The democratic model I am thinking of is, instead, that which, albeit respecting all autonomy of thought, is committed to obtaining equal conditions (not of departure but of arrival) for everyone so that they can participate in the drawing up of decisions in parity. In essential terms, one is not dealing with "overcoming old identities, tenaciously intertwined with the events of national historical formation."²⁸ The burka is not an evil in itself but a distinctive element that does not *foster* equal participation in social and political life, not only within a community but in the cosmopolis in which those who wear it live. One could easily deduce from the example in question that the clash is transferred to the level of the relationship between *democracy as respect for singularity and human rights which are universal*, where a contradiction could be seen. But my goal is specifically this: to make individuality and universality coexist. To express this in a more schematic way: can a (religious) culture that does not know democracy ever allow the development of human rights? If the sharia envisages heavy penalties in the form of corporal punishment (which are clearly incompatible with the culture of human rights), could it ever accept democratic principles which in the end would certainly end up by modifying Islamic penal law? Once again the democratic response will be to build a minimal base (a sort of multiple common minimum)²⁹ of fundamental or elementary rights, beginning with the right to life, the right to health and the right to food, which no legal system can deny or not base itself on in so much as they cannot be abandoned: in a world of by now circular and unstoppable immigration such rights are destined to be established thanks to the pure and simple 'mixing' of races, of religions, of ethnic groups and of cultures. The overcoming of both ethnical and theological particularisms is unstoppable and only the state can manage this. It is therefore evident that the state must be the privileged setting for democratic proceduralism through the management of the possibilities of compromise that democratic debate offers.

c) Is it more important for a state to uphold its prerogatives or engage in a recognition of racial and ethnic heterogeneousness, not limiting rights (and even less elementary rights) to its 'citizens' alone but extending them everywhere? Either rights are for everyone or they do not exist at all, and the only subject of which the protection of this principle can be demanded is the state, which does not exclusively have the task of guaranteeing equality in the treatment of all those who live on its territory: it must also do everything possible to ensure that the same rights (if they are such) are made available to other citizens of other countries, in addition, obviously, to making them always available to anybody who lives in that

country. This does not appear to be an excessive request or a threat of interference: public opinion is always concerned with other people's affairs. What is mobilisation against the carrying out of a death sentence in Alabama, for example, if not an attempt by the citizens of many countries to interfere in the affairs of that American state in order to ensure that respect for human rights is implemented in it? The very well known story of Caryl Chessman, who was executed in California in 1960, made the abolition of the death sentence more than a quantity of sophisticated studies of its unjustifiable character. We are faced with public opinion. It would be sufficient to reflect on the fact that one of the most important motives that leads terrorist groups to commit their crimes is not so much the killing of certain specific individuals or the destruction of buildings or possessions as, rather, the spreading of terror in an indiscriminate way, that is to say the 'construction' of public opinion for the purposes of political struggle to understand how important it is: everything is done for public opinion. Those studies, in their turn, which have in recent years concentrated on deliberative democracy,³⁰ derive from the same perception: the most important decisions are not always those – which are stylised and ritual – that are taken in often dozy parliaments but those that derive from a broad, popular and participatory debate and which allow all those who so wish to intervene in the shaping of that decision.

But in this way we have shifted onto the third level of the 'democracy, peace and human rights' project, that relating to states in their mutual relationships, once they have been *placed outside the traditional dimension of international relations*, or rather above them,³¹ in the sense that they will have to include in their approach not only institutional and diplomatic relations between states but also those between countries that are nothing else but geographical segments of a single world, the same world, in the whole of which rights have a single set of contents and the same set of contents. Habermas analyses this dimension in institutional terms, imagining a kind of large-scale architecture made up of a constitutional Charter, a representative general assembly and a special Court of Justice,³² which, however, runs the risk of falling a victim of the short circuit that burns that function of being a mediator between individuals and the international system that is performed by the state. In reality the state is a *greater* quantity than the sum of its citizens which, however, is *smaller* than the international system (or inter-state society). The state has relations with all of its citizens, with all other states and with their citizens. Since each state has the same duty to defend human rights *wherever* this is required and not only within its frontiers, how could one accept that citizens of a state were all healthy, well educated, peaceful and serene when they had to live surrounded by masses of sick, hungry, aggressive and unhappy other people (which is precisely the condition of the contemporary world)? The doctrine of globalisation³³ tried to provide an answer – which is insufficient, ineffective, as well as full of ideologisms. This doctrine suggested, almost surreptitiously, that as the rich expanded their range of activities

increasingly, new and larger masses of individuals would have benefited in their turn, almost without injury: it was said to be enough to be swept forwards by that great tumultuous but in essential terms beneficial river of the homogenisation of the world. A similar response to this is that which makes civil society (within the state) the pure and simple setting for social interactions that do not involve any kind of institution (neither states nor organisations; neither war nor peace). On the one hand: everything that is not structured or legally regulated; on the other: everything that is, with a scission which, however, does not correspond to what takes place within the state, from which, for example, war and peace are excluded, and everything that is useful is 'ordered' and belongs to an idea of comprehensive organisation.

This approach stumbles when it is transferred to international life, as though this last did not have its specific connotations and were a simple extension of internal life, and the summing together of two hundred (internal) civil societies formed an international (or global) civil society. An error that explains why the composition of all these societies only led to an anarchic approach which for about four hundred years was seen as the indelible sign of international relations. One wants a very different theorisation of that sphere (I will not give it a name in order to avoid misunderstandings) in which the lives of billions of people organised into states intertwine in order to understand the importance of the innovation we are touching upon: what does all this create? Is it possible, or sensible, first of all to ask oneself if their co-presence creates something that is original and autonomous? The 'school of global civil society'³⁴ imagines in a way that is anything but foolish, in truth, that in the sphere of social exchanges typical of 'civil society' (*tout court*) a kind of immense lattice work (like that of the Web) is formed in which everyone can interact with everyone and (almost spontaneous) general coordination is offered by a 'democratic cosmopolitan law' that should 'shape and limits to the decision-making process'.³⁵ The hiatus that separates the *internal* and the *external*³⁶ once again is filled by applying (in an imitative way) to the second the rules of the first, which, however, transported to the *external* level does not have any possibility of functioning except in a chaotic or anarchic way because it encounters a 'non-coercive,' that is to say, obviously, 'non-state' environment. Otherwise, there would be no need for a definition different to that of (public or private) 'international law' to speak about it. Just as (over the centuries) we have had a general theory of the state, we will now need a general theory not only of international relations (which anyway will continue to deal with institutional relations between states) but of international/inter-state civil society. Just as individuals convinced themselves that they should leave the state of nature to create a civil society, so we must make states and their societies civil.

The carrying out of this project will be nothing, lastly, but the achievement of the *sufficient* condition of democracy which will be applied when it knows how to raise itself above pure procedural technicism (the

necessary and not sufficient condition). It will have to be constituted as a large and universal system of planetary public opinion,³⁷ involved, that is to say, in a single and the same civil society (so to speak in a world single market). 'International civil society'³⁸ is not without instruments for punishing actions that are performed within it but this can only take place on the basis of agreement. If following a Hobbesian model this took place thanks to the bestowal of all the power of all the newly-appointed 'citizens' (which, however, were then still subjects), what will the condition to be applied to today's world? What is the new Leviathan? The social and international political contract (the one that Rousseau would have liked to have written)³⁹ has not yet been written but we are in reality already living in a world that tumultuously presupposes it. The somewhat chaotic experiments of organisations that are very different from each other, such as the World Trade Organisation or Amnesty International, the G8 and the ecologist movements, the 'coalition of the willing' which invaded Iraq or international solidarity at the time of the tsunami of 2004, the UN and all its specialist agencies, are a pale simulacrum of this: there are a thousand examples of this scaffolding in which the public and the private, the institutional and the spontaneous, the authoritarian and or the libertarian, intertwine. This picture – obviously enough – does not have a formal element which strengthens in world public opinion the institutional recognition of membership of a single civil society and the same civil society shared by everyone.

A DEMOCRATIC 'NEW WORLD'?

For the first time in history – I use this phrase, but try to avoid rhetoric – the whole of mankind is aware of a sharing of the same destinies no longer in terms of nuclear destruction but in terms of life circumstances. This does not mean an equality of conditions but awareness of the need that this should be achieved. The American racists who for decades, still during the twentieth century, strenuously defended the white race against the black race were aware of the way history was going – that is to say racial equality would have ended up by triumphing. And the results of these struggles – which at times we end up by forgetting – were extraordinary: racist and violent South Africa was slowly but completely transformed by going beyond the racial question. But the life chances of all American or South African citizens have not for this reason become the same even though they have achieved a legal standard that is at least formally shared. The situation of the world's democratic citizenry is today exactly the same. Not only do we have rich and poor, the fortunate and the unfortunate, the healthy and the sick. We live and share situations of immense inequality and injustice but we no longer blame the nature of things or the facts as they are: we know that these are chance circumstances which are in themselves unjust and unjustifiable, even though we do not yet know how to lead them to equality. In Cicero's Rome, slavery was one of the legal institutions and its existence

was accepted both by free men and by slaves. Only the evolution of customs (that is to say of public opinion) enabled it to be understood, gradually, that this was absolutely unacceptable and that there was no philosophical or moral basis at all that could justify the continuation of this custom.

Today the world is faced with the discovery that the 'chains' that still bind billions of people in the world can be, for the first time in history, broken. We do not ask ourselves how difficult it would be to sustain a world of total equality: we will think about that when the time comes! What we can already say is that human coexistence (membership of one world and the same world) has changed the conditions which for millennia have located humanity on different steps. Nobody any longer manages to justify the inequality of human beings. The step up that mankind achieves with this awareness is so great that it is difficult for us not only to understand it but even to find the words to define it: a new world, destined to address histories and questions that do not have precedents and to be governed for which we do not (yet) have available adequate instruments – not even linguistic ones. One thing everybody, whatever the case, knows (even though it is not pleasant to admit this): all human beings have the same rights and that states therefore, holding dear by definition their wellbeing, have the *duty* to make them practicable for everyone. The journey to be followed is immense: I do not conceal, indeed, that today's world is full not only of inequalities but also of widespread social injustices, of immense disparities in treatment, of forms of endemic violence, of a will to oppression and of abuses. I am describing what the great powers, in history and nowadays, seek to have: the power to direct the affairs of the world. But from this obvious condition (which is known to everyone), and which is in essentials very comprehensible as regards its historicity, wells up a paradoxical and beneficial paradox: although, on the one hand, it is true that the powerful and the rich (to place in one and the same category all those who possess power, and especially political power) have the opportunity to exercise their political, economic, social and cultural control over vast areas of the world, and also try to extend it to those areas that remain, and perhaps will have the power (of a military character as well) to manage to do this, on the other hand (and this is the real novelty) the world that endures these strategies is not anarchical, savage and untameable. It is a planetary society in which models of behaviour are slowly but steadily becoming harmonised and uniform (the fact that one is dealing with centuries-old historical movements does not compromise an understanding of the phenomenon) and in which preconceived hostility and unstoppable aggression no longer have absolute precedence. The ethical dimension of international life thus acquires in it an unhopd-for visibility: when – as we have seen – 'internal' and 'external' cease to be separate one can no longer pretend that individual morality is not transfused into state morality and state morality is transformed into cosmopolitan planetary morality.⁴⁰ It is at this point that that the 'political unification' of the world that Maritain discussed in the last chapter of *Man and the State* is achieved.

It is not at all difficult to accept the thesis of Maritain on the form of a *possible* planetary organisation. He discerns two types: that based upon a 'purely governmental' theory and that based, instead, on a 'fully political' theory. The first is clearly unacceptable or useless, as emerges not only from the words of Maritain but also from the long analysis that has been espoused hitherto in this essay. It assumes that the inter-governability of the world is nothing else but the perpetuation of a world made up of severe abuses, oppressions and injustices, that is to say as it is now, only normalised. The second hypothesis – the 'political unification of the world' – is that which imagines the formation of a 'world Authority' based upon the planetary 'universal or integral' recognition 'of the political corpus or political society,'⁴¹ and illuminates exactly what should be the point of arrival in the search for that 'new world' in relation to which the analysis of this essay is preparatory and not yet resolute. The pathway is *incomplete* for us now because the government of the world, or the governance or 'political unification of the world,' are still waiting for us to move towards their achievement. There can be no doubt that the international system has learned down the centuries, or even during the second half of the twentieth century, to give itself principles of order (which are neither just nor shared – but this belongs to the 'normal' history of all the states of the world) which, whatever the case, have allowed a material increase in peace in the world as well as a significant development of sensitivity as regards respect for human rights. But this has been a *quantitative* change that has not necessarily also involved a *qualitative* change in international life. Having reached this point, we have understood that human beings are the only *necessary* and permanent subjects; that states have, and can still have, a decisive role as the organisers and collectors of human requests; and that the associations and forms of integration that exist between them can strengthen this extraordinary progress of mankind. But it should not escape us that faced with this limit we do not yet know how to behave. Even though we know towards which goal to move, the way this can be achieved is still a matter of doubt. We could achieve a great unification of the planet, even a single universal empire (the Middle Ages had already posited this), but this could not be democratic. We could also see the number of democratic states increase, augment their respect for human rights in the world: but we would remain nailed to the 'purely governmental' approach. Something more is needed.

For all of this democracy is required. The world that I have just described is an unjust world but it is not an anarchical world, a world in which someone (a government or a multinational, a secret society or a party) commands and many others obey, so that a despotic and illegitimate order is formed, but is always such (not in the Pythagorean meaning, obviously enough)⁴² and capable of producing material and administrative obedience. Today in the world all of us know what are the limits and the bonds of our freedom of action. Humanity is still experiencing different and disjointed historical-cultural times. The relationship of the Islamic world

with science and technology takes place at levels that the capitalistic West has already moved beyond or anyway transformed; we have customs, practices and forms of behaviour of various kinds which are often seen as backward by one or shameful by the other (but we very well know how this happened in the past even in areas that were apparently very advanced);⁴³ each part of the world has its cultures and traditions which nobody wants to trample on and which are destined to draw near to each other and to become homogenised. Amongst individuals and this 'new world,' that is to say between the stratum of inter-individual human rights and cosmopolitan planetary society, there is located (provisionally) a single intermediary reality: the state, states. They are the unique and only possible *acting* subjects: every transformation (perhaps also that of the abolition of states) passes by way of them. The dimension in which they are called to exist is that of their duties⁴⁴ which they can only perform by resorting to the only technical instrument available to them – the democracy of conduct, of practices and of mutual relations. *Democratic citizenship* is the only elementary structure that the world can equip itself with: this does not mean that we will all elect the governors of the world but simply that we will adapt our behaviour – as they are already vectored by states – to democratic procedures which are the only procedures that allow an absorption of differences and injustices, leading them to outcomes that exchange their failure to be met with that liberation from violence that they allow. And thus, at the end of my argument, a discovery is made: the anarchy of the world is not a consequence of the absence of government but of its existence, that is to say the bad government that dominates it. It is not that the world cannot govern itself: it governs itself badly because it has not yet introduced sufficient elements of democracy into its procedures.

Doing this is the task of that dimension which we traditionally call 'international relations,' whose goal has shifted from the search for power and assertion through war to the modalities of governance of a world in which international politics count less and cosmopolitan society counts more. The governments of the world have the task today not only – as is repeated rhetorically at every public demonstration – of the safeguarding of peace. They have the duty to *allow* human rights to continue on their pathway by unleashing all that intrinsic 'revolutionary' force that they contain in themselves. That a movement of this kind requires a capacity for control that the world hitherto has not shown that it possesses should not make us forget that the instrument for this exists and that we only need to use it.

International society *writ large* has walked down a long and slow path but one that is extraordinary;⁴⁵ the constitutionalisation of the world (which Habermas links to a legally constituted world society) or its unification (Maritain) are nothing but the result of an epochal movement that was set in motion by the 'international revolution' of 1989 when for *the first time in history* states all became formally equal, with the same right of access to the goods of the world – not taking into account, obviously, the

history of the different heritages that were received. Decisions that had an immense importance for a notable part of mankind and were destined to influence the whole of the world were taken *peacefully*. We are a step away from the *ability to democratise* the world and the indication of this is very clear – *the peaceful end of the third world war which was not fought but won*. The peace that sprung up from this has allowed the (albeit imperfect) establishment of great quantities of political and formal democracy. Together they have allowed the establishment of the rights of individuals who live in countries that have experienced – albeit traumatically (but none of them wants to return to the past) – this great revolution. The circle closes: from peace to democracy, from democracy and rights – and vice versa.

That this project is still far from being complete does not mean that it is not possible. No observation was more suited to our historical condition than Kant's comment to the effect that faced with a just and good project nobody could ever refuse to accept it, not even 'a people of devils, as long as they were endowed with intelligence.'⁴⁶ Why not become *devilish*?

POST-SCRIPTUM

Given that during the whole of the pathway that I have followed to support our common right to democracy through a policy of peace that should guide every government towards the practical upholding of human rights I have had the sensation that I was moving on a wet pane of glass which made me slip at every step, I will now, lastly, try to summarise the arguments that have been used, in the hope that they will be strengthened:

1) Contemporary world society (which I see as world public opinion, the true great future subject of the reality of the planet) presents undoubted elements of novelty or discontinuity compared to all previous ages and markedly as regards a half century of bipolarism, which can be expressed in the fact that it is not possible to contain the new world in the old, as if the complexity of the current world exceeded that of the old world.

2) Whatever the case, it is necessary both to break down that which no longer stands up and to construct something new. What no longer stands up is the idea that world society can remain perpetually anchored in historical inequalities which have always divided it, because the overturning of power relations is inevitable and unstoppable: we all have the right to the same rights. But we do not yet have available new instruments that are really suited and flexible: no longer the UN (except for ordinary political-diplomatic administration) and not yet a world parliament which for now is premature and inconceivable.

3) Half way between these alternatives is located the rise of a planetary society of a new kind created by an extraordinarily increasing human interdependence: societies, cultures, knowledge, traditions, tastes, literatures and artistic perceptions, communications, sport and tourism (even though not for everyone) have given rise to an interculturally open and

original society which appreciates differences rather than homogenisations (whether this is a movement still underway and far from being complete does not bear upon its advance) and which objectively involves an element of sharing that produces an equal treatment of people.

4) All of this cannot take place or advance except in a condition of peace which is therefore the first task of this new humanity (which is shaped essentially by the new generations), which will realise soon enough that the complexity of the government of this new reality lies in particular in the absence of a shared culture of government and in the absolute inexperience of the governing classes as regards a united world which they never conceived of in the past (given that internationalist culture was extremely limited and short-sighted: at the most this was a matter for the politics of power).

5) This 'new world' should be built as a universal civil society which can never be the mere sum of different cultural worlds but a subject which is similar and at the same time different from each one of them, new not only because of its incomparable quantitative dimensions but also, and rather, because of the extraordinary character of its achievement.

To understand all of this is the same thing as raising democracy to a *passe-partout*: only if we are certain that our discussions and our divergences will not give rise to bloody conflicts and wars, only if we learn democracy, will we be able finally to see ourselves as all equal and suited to creating institutions that are not only new but also solid and peaceful.

NOTES

¹ This is said in exemplary fashion by N. Bobbio: "The recognition and the protection of human rights form the basis of modern democratic constitutions. Peace, in its turn, is the necessary premiss for the recognition and effective protection of human rights in individual states and in the international system. At the same time the process of the democratisation of the international system... cannot go anywhere without a gradual extension of the recognition and protection of human rights above individual states" *L'età dei diritti* (Turin, Einaudi, 1990), p. vii.

With respect to the triad peace-democracy-rights, I will prevalently discuss democracy, trusting in the correctness of the insight on the basis of which when democracy grows, peace and human rights should also grow.

² This is one the subjects where I have never been in agreement with Bobbio: cf. his article "Democracy and International System" and my "Peace or Democracy?," in D. Archibugi and D. Held (eds.), *Cosmopolitan Democracy* (Cambridge, Polity Press, 1995).

³ Cf. V. Mura, "Sulle concezioni procedurali della democrazia," *Teoria politica*, XVII, n. 3. On the thought of Bobbio on this cf. P. Meaglia, *Bobbio e la democrazia. Le regole del gioco*, (San Domenico di Fiesole, Edizioni Cultura della Pace, 1994).

⁴ On this see, *amplius*, L. Ferrajoli, *Principia iuris. Teoria del diritto e della democrazia* (Rome-Bari, Laterza, 2007), vol. 2, chap. XIII and chap. XVI.

⁵ N. Bobbio, "Democrazia o nonviolenza?," in Fondazione Aldo Capitini and Movimento Nonviolento (eds.) *Nonviolenza e marxismo* (Milan, Libreria Feltrinelli, 1981), p. 137.

⁶ Individuals, the state, the international system: these are the three levels where the problem poses itself: it is no accident that these three levels are the same that were identified half a century ago by K. Waltz in order to locate the possible responses to the problem of war: cf. K. N. Waltz, *L'uomo, lo Stato e la Guerra* (Italian edition: Milan, Giuffrè, 1998). There is no point in saying that that the confidence that he places in the heuristic capacities of international anarchy (his third image) is totally extraneous to my approach.

⁷ For the origins and the use of this formula the reader may consult my "2001: la politica interna del mondo," *Teoria politica*, XVII, n. 1, 2001.

⁸ One could accept this definition only if all governments of the world were 'already' democratic. Rawls had something like this in mind when he spoke about the right of 'peoples,' even though he did not draw any consequences from this distinction: cf. J. Rawls, *Il diritto dei popoli* (Italian edition: Milan, Edizioni di Comunità, 2001, p. 30 and ss., p. 58.

⁹ J. Maritain, *L'uomo e lo Stato* (1951) (Italian edition: Genoa, Marietti, 2003), p. 202.

¹⁰ Cf. J. Habermas, "La costituzionalizzazione del diritto internazionale, e i problemi di legittimazione che deve affrontare una società mondiale giuridicamente costituita," *Iride*, XXI, n. 53, 2008, p. 7 (I would like to thank Leonardo Ceppa for pointing out this text to me for the first time).

¹¹ I. Kant, "Per la pace perpetua," in *Scritti politici e di filosofia della storia e del diritto* (Italian edition: Turin, UTWT, 1956), p. 305.

¹² This very banal observation is sufficient to understand why the imitative application of the Hobbesian model of the state to international politics is totally baseless. I take the liberty of referring the reader to my by now very dated *Etica e politica internazionale* (Turin, Einaudi, 1992), chap. IV, p. 3.

¹³ J. Habermas, "La costituzionalizzazione del diritto internazionale," p. 8. I would like to take the liberty of pointing out, with reference to the last clarification contained in the quotation, that it is specifically on the *territorial* limit that my analysis will diverge from that of Habermas.

¹⁴ Just to observe the title of a lively but precise survey of the subject cf. P. Moreau Defarges, *Legittime interferenze. Il diritto di ingerenza dopo il 2001* (Italian edition: Milan, Bruno Mondadori, 2008).

¹⁵ In which heterogeneous legal systems cannot exist, a crushing of citizens by a world super-state should not take place, and the defence and the

specificity of nations should adapt to the forms of uniformation requested by super-national obligations: cf. J. Habermas, *op. cit.*, p. 13.

¹⁶ In the proposal of Habermas one should arrive at: 1) a world organisation accompanied by a *Charter*; 2) a general assembly entrusted with forming a will as regards principles of transnational justice; and 3) an institution intended to make principles and rules respected (*passim*, pp. 14-17).

¹⁷ Naturally excluding, at least for now, the failure to approve a unitary constitution!

¹⁸ It would be truly ungenerous to neglect the action that the UN has patiently been engaged in during its half century of life in the various fields of international society.

¹⁹ J. Habermas, "La costituzionalizzazione del diritto internazionale," p. 20.

²⁰ Cf. for them all — but this is an immense and extraordinarily serious literature — J. S. Goldstein, *Long Cycles: Prosperity and War in the Modern Age* (New Haven, Yale University Press, 1988). The date of this book tells us for how long prophecies about a warlike future for the world has been discussed.)

²¹ A democrat who resorts to violence ceases to be democratic (at least for the period when he or she engages in it).

²² I take this opportunity to refer the reader to a book that discusses religion, politics and violence: V. Nasr, *La rivincita sciita. Iran, Iraq, Libano. La nuova mezzaluna* (Italian edition: Milan, Università Bocconi Editore, 2007).

²³ It would be sufficient to explore the terms of the debate on the role of the clergy or the 'religious professionals' (I call them this only as a clue to the worldly use that each religion makes or has made of the control of revealed truth) in by now subjectively secularised worldly societies to appreciate to the full the various encounters that have so far been achieved between politics and religion.

An authentic 'model' for the approach to this subject is that proposed by J. Maritain in *L'uomo e lo stato* (Italian edition: Casale Monferrato, Marietti, 2003), on which see the pages on him by R. Papini in the first two chapters of L. Bonanate and R. Papini, *La democrazia internazionale. Un'introduzione al pensiero politico di Jacques Maritain* (Bologna, Il Mulino, 2003), who is able, as is brought out, to sew an extraordinary inter-religious and intercultural fabric albeit with an explicit recognition of the respective non-negotiability of beliefs.

²⁴ It is no accident that one can speak of this as a civil 'religion'.

²⁵ It is no accident, to give only an Italian example, that G. E. Rusconi in *Se cessiamo di essere una nazione* (Bologna, Il Mulino, 1993) saw the nation as a pre-condition for democracy. See also by the same author "La questione della cittadinanza europea," *Teoria politica*, XVI, n. 1, 2000.

²⁶ Cf. *Le Monde*, 12 and 15 July 2008.

²⁷ This was well expressed by L. Ferrajoli, in “Cittadinanza e diritti fondamentali,” *Teoria politica*, IX, n. 3, 1993, p. 74.

²⁸ J. Habermas, “La costituzionalizzazione del diritto internazionale,” p. 20.

²⁹ I only repeat what Maritain said on the matter: “men have today become aware, more fully than before, but still imperfectly, of a number of practical truths regarding their life in common upon which they can agree, but which are derived in the thought of each of them – depending upon their ideological allegiances, their philosophical and religious traditions, their cultural backgrounds and their historical experiences – from extremely different or even basically opposed theoretical conceptions. ... it is doubtless not easy but it is possible to establish a common formulation of such *practical conclusions*, or in other words, of the various rights possessed by man in his personal and social existence”: J. Maritain, “Sulla filosofia dei diritti dell’uomo,” in *I diritti dell’uomo* (texts brought together by UNESCO) (Italian edition: Milan, Edizioni di Comunità, 1952), p. 87.

³⁰ Cf. for initial information L. Pellizzoni (ed.), *La deliberazione pubblica* (Rome, Meltemi, 2005).

³¹ In the same sense, neither proud nor unilateral, in which Romain Rolland understood this approach, for a re-reading of whom see R. Rolland, *Audessus de la mêlée. Al di sopra della mischia*, ed. by L. Bonanate (Turin, Aragno, 2008).

³² Cf. J. Habermas, “La costituzionalizzazione del diritto internazionale,” pp. 16-17.

³³ See, for a general contextualisation, M. Revelli, “La globalizzazione. Definizioni e conseguenze” and M. Bovero, “Sette globalizzazioni?,” both in *Teoria politica*, XVIII, n. 3, 2002; and L. Bonanate, *La politica internazionale fra terrorismo e Guerra* (Rome-Bari, Laterza, 2004), chap. III.

³⁴ This approach is followed in substantial terms by M. Kaldor, *L’altra potenza. La società civile globale: la risposta al terrore* (Italian edition: Milan, Università Bocconi Editore, 2004) or by J. Keane, *Global Civil Society?* (Cambridge, Cambridge University Press, 2003). More recently see V. Pazé, ‘La società civile globale. Luci ed ombre’, *Teoria politica*, XXIV, n. 2, 2008.

³⁵ D. Held, *Democrazia e ordine globale* (Italian edition: Trieste, Asterios, 1999), p. 272.

³⁶ I take the liberty once again of referring the reader to my “2001: la politica interna del mondo.”

³⁷ A reference to the by now classic work by J. Habermas, *Storia e critica dell’opinione pubblica* (Italian edition: Bari, Laterza, 1971) is here obligatory.

³⁸ This formula does not amount to much but I have kept the aspect of ‘civil society’ for the internistic conception and of ‘internationality’ for the internationalistic conception in order to connote the *con*-fusion of the two.

³⁹ As in R. Derathé, *J. J. Rousseau et la science politique de son temps* (Paris, Presses Universitaires de France, 1950).

⁴⁰ I take the liberty of referring the reader to my by now very old book *Etica e politica internazionale* (Turin, Einaudi, 1992) where I tried to provide a foundation specifically for this kind of question.

⁴¹ J. Maritain, *op. cit.*, p. 199.

⁴² Here I take the liberty of referring again to my short essay *Ordine internazionale* (Milan, Jaca Book, 1995).

⁴³ An example? The crime of honour until a few decades or so ago involved light sentences in Italy on the basis of the sharing of cultural principles which today are defended by no one.

⁴⁴ I discussed this in *I doveri degli stati* (Rome-Bari, Laterza, 1994). In this context international law would become nothing else than a great universal code of civil law subject to a kind of constitution along the lines of the Charter of the UN.

⁴⁵ In the recent theory of international relations even the concept of ‘trust’ has emerged: cf. A. M. Hoffman, “A Conceptualization of Trust,” *European Journal of International Relations*, VIII, n. 3, 2002; A. Caffarena, “Trust in the Age of Fear. Multilateralism After 9/11,” *La Comunità Internazionale*, LXI, n. 4, 2006. How can one not add that during the previous half century it was distrust, misunderstanding and deception?

⁴⁶ I. Kant, *Per la pace perpetua*, p. 312.

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Today there is urgent need to attend to the nature and dignity of the person, to the quality of human life, to the purpose and goal of the physical transformation of our environment, and to the relation of all this to the development of social and political life. This, in turn, requires philosophic clarification of the base upon which freedom is exercised, that is, of the values which provide stability and guidance to one's decisions.

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