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Marta Cartabia

The Age of “New Rights”

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The Age of “New Rights”

By Marta Cartabia*

Abstract

The end of the cold war started a new era of human rights. It is an ambivalent one. Whereas many countries are still struggling for the very basic rights, in western countries rights are thriving: new rights, new agencies of rights, new rights holders, new charters and conventions of rights and at the same time new worries and criticism about rights.

The purpose of this paper is to sketch the main characteristics of the age of “new rights” moving from some examples taken from the contemporary western practice. While discussing some practical cases the paper examines questions like: “Who is the subject of new rights?” “Which are his/her most important traits?” “What is the link between the multiplication of rights and the ideal of justice?”

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

(M. Kundera, *Immortality*, 1991)

Introduction

Human rights stand at an ambivalent conjuncture.

At the end of the Second World War, a *new world*¹ was expected to take shape on the shared basis of the Universal Declaration of Human Rights. More than half a century later, however, the most elementary rights are still being altogether denied to defenseless people in many parts of the world. In many countries, even the most basic rights are ignored or insufficiently implemented or even blatantly trampled upon. Leaders of repressive regimes sometimes pay lip service to the ideal of human rights while ignoring them in practice. For a large number of human beings, the effectiveness of the human rights consensus is being undermined due to factors such as lack of resources and a low rate of democratic performance in many countries.

On the other hand, in western countries assertions of rights are thriving: they have become the yardstick by which we measure human progress², and they have contributed to putting the human person at the center of social and political life³. The rights project has been

¹ This expression is borrowed from the book by MARY A. GLENDON, *A WORLD MADE NEW* (Random House 1991), on the origin of the Universal Declaration of Human Rights, referring to the words of Eleanor Roosevelt.

² NORBERTO BOBBIO, *L'ETA' DEI DIRITTI* 255 (Torino: Einaudi, 1990), describing individual rights as a sign of hope for humanity, a sign of a clear trend of the evolution of humanity towards "the better" (for the English translation of the book see N. BOBBIO, *AGE OF RIGHTS* (Blackwell Publisher 1996). The same opinion is expressed in L. HENKIN, *THE AGE OF RIGHTS* (Columbia University Press 1990).

³ M. A. Glendon, *Justice and Human Rights: Reflections on the Address of Pope Benedict to the UN*, 19 EUR. J. INT'L. L. 925 (2008), analyzing the Pope's address to the UN of April 18, 2008. The address highlighted the contribution of the UDHR "to place the human person at the heart of institutions, laws and the workings of the society", to converge a plurality of cultures around a fundamental nucleus of values, while at the same time offering

endorsed by public institutions and civil society – as demonstrated by the flourishing of NGOs - to the point at which an inflation of rights talk is now growing out of control.

Want of rights on the one hand, and overgrowth of rights on the other, affect different parts of the world.

This paper is intended to focus on the rights discourse in western countries, where a new human rights era has been heralded in, under the influence of international institutions, especially after the end of the Cold War - an era of expansion of activities undertaken under the flag of human rights⁴.

To be sure, in North America, especially in the United States the ‘rights revolution’ began some decades in advance, dating back to the sixties of the past century. In Europe, a pervasive rights discourse has “landed” more recently.

A distinctive feature of European legal systems has been for centuries the fundamental balance between two basic elements inherited from the Roman and medieval tradition - *lex* and *iura*. On the one hand, *lex*, the objective rules enacted by the political power by means of legislation; on the other hand, *iura*, the subjective rights, describing the faculties or claims due to each individual for the sake of justice⁵. The idea of *jus* - right - has traditionally been considered complementary and interactive with *lex*, suggesting that the legal experience is the result of a complex interconnection between multiple elements⁶. As a consequence, the European way of protecting human rights has followed a distinctive pattern –one that is usually known as the “dignitarian” interpretation of human rights as opposed to the “libertarian” one – where individual rights are not only consistently balanced with one another, but also subject to limitations set by the legislature in order to pursue other public interests and the common good⁷.

elements of constructive criticism, noting the challenges of cultural relativism, legal positivism, utilitarianism, lack of foundations, expansion of rights, selectivity, individualism, lack of responsibilities, dogmatic secularism.

⁴ An overview of the proliferation of rights and of some of the debates surrounding the new rights is offered by CARL WELLMANN, *THE PROLIFERATION OF RIGHTS: MORAL PROGRESS OR EMPTY RHETORIC?* (Westview Press, 1999).

⁵ For an historical account of the emergence of the idea of *jus* – in the double meaning of *justum* (the object of justice) and of subjective rights see BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS* 50-77 (Scholar Press, 1997). For the distinction in Roman law see FRANZ WIEACKER, *RÖMISCHE RECHTSGESCHICHTE I* 267-287 (Munich, Beck, 1988).

⁶ The duality of the legal experience in the European tradition and its different expressions over the centuries, from Antigone to the contemporary constitutions, was recently spelled out by GUSTAVO ZAGREBELSKY, *INTORNO ALLA LEGGE 5* (Einaudi 2009).

⁷ The libertarian and dignitarian version of human rights are described in MARY A. GLENDON, *RIGHTS TALK* 61 (Free Press, 1991) The same dichotomy is expressed in EDWARD J. EBERLE, *DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES* (Praeger 2002).

The text of many European Constitutions and of the European Convention of Human Rights carry this structure: each paragraph of theirs consists of both, the statement of a subjective right and the list of the objective interests that can justify a limitation of the subjective right on the part of the legislature and under the scrutiny of a judicial body. Overtime, all distinctions between the different legal components of the legal systems have become blurred, even in Europe⁸. The most recent evolutions tend to conflate *lex* and *iura*, under the influence of a libertarian interpretation of individual rights now pervading the continent. More specifically, the content of contemporary positive legislation (*lex*) in Europe often consists of, or at least includes some, individual rights (*iura*), so much so that not only has legislation invaded all the areas of human existence, but most new pieces of legislation introduce “new rights”. Moreover, courtrooms are overloaded by new and unprecedented pleas, either calling for new rights, or for broad and creative interpretations of the old ones. The result is a sort of “Europe of rights”⁹, where the distinctive features of the dignitarian tradition are fading¹⁰.

Thus, the identification of individual rights as the apex of progress has become a common feature¹¹ and sign of convergence between contemporary Europe and America.

⁸ PAOLO GROSSI & LAURENCE HOOPER, A HISTORY OF EUROPEAN LAW 39 (Wiley-Blackwell, 2010) showing that ever since the French Revolution the idea of law has been oversimplified and reduced to positive legislation enacted by the political bodies.

⁹ The fact that Europe is going through an “explosive proliferation of justiciable human or fundamental rights” is widely noted. See for example Daniel Kelemen, *The EU Rights Revolution: Adversarial Legalism and European Integration*, in THE STATE OF THE EUROPEAN UNION: LAW, POLITICS AND SOCIETY 221-234 (Tanja A. Borzel & Rachel A. Cichowski eds., 2003).

¹⁰ Under the influence of the jurisprudence of the European institutions, and in particular the European Court of Human Rights, even those European countries like Germany and Italy that traditionally ascribe to a different conception of the human person are now abandoning their national constitutional traditions and are adopting an individualistic libertarian idea of rights. Much of this evolution has taken place in the last 10-15 years. I will return to this point in par. 4.

¹¹ The historical reply to the excesses of individualism deriving from the modern liberal tradition has been the declaration of social rights and the construction of welfare institutions. Well aware of the limits of liberalism, European polities, rebuilt in the twentieth century after the two World Wars, have put at the heart of their constitutional foundation the value of solidarity, along with that of liberty. However, though social rights may attenuate the harshness of modern liberal societies, they are unable to heal the root problem or “original sin” of an individualistic culture, that of producing selfish and unconcerned human persons. They may be able to cure the symptoms, but not the disease. More rights, even more social rights, do not automatically generate solidarity and responsibility. Social rights are not a synonym for solidarity. They bestow a mediated form of support among strangers, but they nevertheless remain strangers. MICHAEL IGNATIIEFF, THE NEEDS OF STRANGERS 9-10 (London 1984). Paradoxical as it may be, social rights and libertarian individualism can go hand in hand. And more rights, even more social rights, are not able *per se* to remedy the reductionist understanding of the human person that an individualistic culture is inclined to bring with it. See for example ELIZABETH HANKINS WOLGAST, THE GRAMMAR OF JUSTICE 77 (Cornell University Press, 1987), and Charles A. Kelbley, *The Socius and The Neighbor*, in HISTORY AND TRUTH 98 (Northwestern University Press 1965).

On a more attentive analysis, however, even within the scope of the North Atlantic western world, one cannot help but notice a creeping sense of unease.

Undoubtedly, human rights have met with an unexpected degree of success and human rights institutions are prospering. However, some reasons of concerns about human rights can be detected in the murmurings of politicians, scholars, human rights activists and common people, for many different reasons. In western countries, rights are at a crossroads between success and concern: a growing attraction towards human rights goes hand in hand with a growing discomfort¹². In some sense, rights are running the risk of becoming victims of their own success. In fact, the very success of rights regimes encourages the framing of new grievances as rights issues, so much so that in today's world, human rights are becoming a pervasive political idea. But the more human rights proliferate, the more voices of skepticism proliferate as well.

It was more than twenty-five years ago when warnings first emerged that the proliferation of rights may threaten the credibility and authority of the human rights tradition¹³.

If the category of human rights is abused, their legal teeth may be diminished and their force impoverished. The inflation of rights devalues the currency. Moreover, new rights may impair the overall balance of values implied in the human rights project. The greater the number of rights recognized, the more likely they will begin to contradict one another¹⁴. The adoption of new rights always has a price: any expansion is made at the expense of the traditional rights and even at the expense of the human rights project as such. It is for the sake of the human rights project itself that even undisputed advocates of human rights sometimes maintain that the rhetoric of rights should be mitigated.

So far, however, these warnings are yet to be taken seriously.

The aim of this paper is to look into the tension that apparently affects human rights in western countries, while inquiring about the cultural causes of the present ambivalence that

¹² CHARLES R. BEITZ, *THE IDEA OF HUMAN RIGHTS* 3-7 (Oxford University Press 2009); MARIE-BÉNÉDICTE-DEMBOUR, *WHO BELIEVES IN HUMAN RIGHTS?* (Cambridge University Press 2006), whose analysis results in a "nihilistic approach to human rights", at 274 ss., quite distinct from the thesis set forth in the present paper. For an historical overview of the fortune and misfortune of human rights from the Universal Declaration of Human Rights to the present era, see Jochen von Bernstorff, *The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law*, 19 EUR. J. INT'L. L. 903 (2008).

¹³ Philip Alston, *Conjuring Up New Human Rights: A Proposal For Quality Control*, 78 AM. J. INT'L. L. 607 (1984).

¹⁴ This assumption is widely shared in European constitutional scholarship. An account of this position can be read in LORENZO ZUCCA, *CONSTITUTIONAL DILEMMAS: CONFLICTS OF FUNDAMENTAL LEGAL RIGHTS IN EUROPE AND THE USA*, xi (Oxford University Press 2007).

rights are going through. Whereas the scope of the analysis will be limited to western countries, no distinction will be drawn between international human rights, constitutional fundamental rights, legislative rights, judge-made rights or rights originated from other legal formants. Although each of these categories of rights is supposed to play a different role and undergo a specific legal regime, for our purposes it might be useful to look at rights as a whole, in a comprehensive picture.

As a matter of fact, the underlying fundamental question that will lead our inquiry will be: “How do new rights impinge upon our understanding of the human person?” Our focus will be on the *subject* of rights and on the legal image of the human person that is being shaped by the language and the practice of rights. From this perspective, the substance of rights is more relevant than their formal features, and therefore the difference between different levels of protection of individual rights can be here overlooked.

Moreover, in our global society, an intense intercommunication between the institutions involved in the protection of rights tends to surpass all boundaries drawn by particular legal forms. Rights migrate in all directions, from the international to the local level and vice-versa, from country to country, from continent to continent, from constitutional acts to the legislative ones, from judicial decisions to legislative measures and back again. For our purposes, a macro analysis of the phenomenon – albeit punctuated by certain specific examples - provides the most appropriate method with which to examine these trends.

1. Total rights.

The starting point of our inquiry is the simple fact that in western countries, rights are becoming the main protagonist of political debates and the most popular instrument for legal actions. Individual rights have been tirelessly expanded and their proliferation can be observed from several vantage points.

First there has been a proliferation of *sources* and *declarations* of human rights¹⁵. At the *international* level the body of treaties and conventions on human rights is constantly expanding and every broadening of the international instruments yields a further enlargement of the scope of human rights doctrine. For one prominent example of this multiplication let us consider that

¹⁵ D. Kretzmer, *The UN Human Right Committee and International Human Rights Monitoring*, paper presented at the International Legal Theory Colloquium, NYU Law School, March 10, 2010; available at <http://www.nyuStraus.org/calendar.html>

the original Universal Declaration of Human Rights generated two Covenants in the sixties, which in turn gave birth to several specific Conventions, further enriched by new Optional Protocols¹⁶. Meanwhile, at the *regional* level, several continental systems have emerged for the protection of human rights, such as the American Convention on Human Rights, the African Charter on Human and Peoples' Rights, the European Convention of Human Rights and, most recently, the Charter of Fundamental Rights of the European Union. At the *national* level, domestic Constitutions and legislation provide an abundant and unlimited source of rights. More recently in Europe, even *sub-national* political entities - communities, *länder*, regions, and municipalities - have committed themselves to specific *charters* of rights, the best known and debated of which is the 2006 *Catalan Statute*¹⁷ in Spain.

The mosaic of sources of rights is complex and diverse. Not only is it multilayered, but it is also non-homogeneous given the diverse nature of the acts involved: *administrative*, *legislative*, *constitutional* and *judge-made* instruments compete on the same ground, together with legally binding and non-binding declarations, only some of which are fully justiciable.

Second, institutions for the protection of rights have expanded in number and type. Most regimes for the protection of rights have their own enforcement bodies which expound the interpretation of the texts and very often take a dynamic attitude toward the protection of old and new rights. The body of decisions of the Courts and the Committees of Rights constitutes another source of human rights, alongside the written rights entrenched in the international, regional, national and local legal instruments. The nature of these bodies is diverse. The typical post World War II model of protection of rights was based on courts and judicial bodies entrusted with the power of protecting rights, over and above the democratic process. Nowadays, the implementation of human rights has taken on a variety of forms¹⁸. The universe of the institutions of rights today encompasses not only courts and tribunals, but also, councils, committees, bodies, agencies, at all levels: international, regional and national, not to mention

¹⁶ All the UN Treaties can be retrieved at <http://www.bayefsky.com/tree.php/area/treaties>

¹⁷ An English version of the text can be retrieved at http://www.parlament-cat.net/porteso/estatut/estatut_angles_100506.pdf The Statute has been challenged before the Spanish Constitutional Tribunal and the case is still pending. The problem of compatibility of the declarations of rights issued at the local level with the aspiration to universality of human rights has been discussed in particular in Canada and Spain. On this point see DIVERSITAD, DERECHOS FUNDAMENTALES Y FEDERALISMO (Jose Maria Castilla Andreu and Sébastien Grammond eds., 2010).

¹⁸ CHARLES R. BEITZ, THE IDEA OF HUMAN RIGHTS 13-47 (Oxford University Press 2009), describing current human rights practices, and the evolution from juridical implementation to various political forms of implementation of human rights in national states.

the increasing importance of NGOs. Whereas in the European context rights and courts are still faithful partners¹⁹, in other contexts human rights have become mostly a matter of policy²⁰. This evolution in the institutional architecture of human rights is of the greatest importance to appreciate the transformation of the human rights project as a whole. Human rights were meant to have a counter-majoritarian character, because the national political bodies had proved to be unreliable throughout the entire first half of the twentieth century. Rights were meant to *counter power: rights against power*. The judicial review of legislation was introduced in most western democracies to control the outcomes of the political process and the international protection of human rights was the response to the political involutions of the States towards totalitarian regimes. In other words, both at the constitutional and at the international level, human rights were conceived as “other” in respect to political powers. In the age of their proliferation, however, human rights are losing their “otherness”. In a way they have been hijacked by power and are themselves becoming subsumed into political tools²¹: *rights as power*.

Third, the category of human rights has spun out of control because the *number* of rights has mushroomed. New social needs, new achievements of technological development, rapid evolution in human condition of living as well as globalization more generally, have generated new threats to human dignity, and consequently new requests pressuring the legal orders. The search for solutions to new (and old unresolved) problems constantly returns to the field of human rights, resulting in a multiplication of “new rights”. To mention just a few of them: the right to a clean environment, the right to peace, rights related to bioethical issues, and the right to security - declared by some courts in the post-9/11 era. These are but a few examples, with many additional new rights waiting in the lobby of human rights institutions, because in the present “age of rights”, framing or reframing some issues as rights has a strategic value²². It might be

¹⁹ In most European countries a dramatic developments are taking place under the influence of the European Court of Human Rights as well as the European Court of Justice, moving even the most traditional civilian legal systems towards “fundamental rights regimes”. For the French case, see MITCHELL LASSER, *JUDICIAL TRANSFORMATIONS* (Oxford University Press 2009) and for the case of Italy see I DIRITTI IN AZIONE (Marta Cartabia ed., 2007), and Marta Cartabia, *Europe and Rights*, in 5 EUR. CONST. L. REV., 5 (2009),. For a general overview of European countries see A EUROPE OF RIGHTS (Helen Keller and Alec Stone Sweet eds., 2009).

²⁰ Philip Alston & J. H. H. Weiler, *An ‘Ever Closer Union’ in Need of a Human Rights Policy: The European Union and Human Rights*, in THE EUROPEAN UNION AND HUMAN RIGHTS (Philip Alston ed., 1999).

²¹ See D. Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J.101 (2002), stressing that human rights were meant to be weapons for the critique of power and are now becoming part of the arsenal of power. I will revisit this point at the end of the paper, part 8.

²² I will revisit this point later, in part 6. For a different evaluation of the proliferation of rights see Clifford Bob, *Introduction: Fighting for New Rights*, in THE INTERNATIONAL STRUGGLE FOR NEW HUMAN RIGHTS 13 (C. Bob ed.,

useful to recall an extreme but illustrative example taken from the academic discussion: in front of the ominous risk that entire populations of small islands – like the Maldives, for example – are forced to leave their countries since their territories are at risk of sinking because of the climate change, the case has been made for a new moral and legal “right to a safe haven”, implying the rights of the affected individuals to resettle in another people’s or another state’s territory²³. Undoubtedly, the problem is serious and frightening. However, it is doubtful that such a problem lends itself to being handled by explicit reference to individual rights.

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

Fifth and finally, perhaps most importantly, the types of relationship to which human rights are meant to apply is expanding. Traditionally, human rights used to entail a “vertical” relationship between state and citizen, or between public institutions and the citizen. Today, rights are claimed within all sorts of social and personal relationships, often involving “horizontal” relationships among private partners: rights are claimed against multinational companies, against the spouse, the parent, the teacher, and the doctor. The shift is not only from a vertical relationship to a horizontal relationship, but from professional and more impersonal relationships to more personal and intimate ones: at the extreme, even the idea of rights among friends has been advanced²⁴.

2009), where the case for creating new rights for some neglected categories of peoples, like children born of wartime rape, LGTB people, Indian untouchables, people with HIV/AIDS, and so on, is made strongly. In his view, advancing an issue as a human rights question is just a matter of strategy, merely seeking to exert greater pressure to solve a problem. In this view, any criticism to the proliferation of rights is simply misplaced.

²³ K. M. Wyman, *Sinking States*, paper presented at the NYU Law School Faculty Workshop on April 26, 2010.

²⁴ See M. J. Meyer, *Rights Between Friends*, 89 J. PHIL. 467 (1992).

Rights are penetrating all corners of human experience, and their quantitative multiplication impinges upon their overall function in social life. Are we moving towards a system of total rights?

2. Calls for a new lexicon.

Most of these expanding ramifications of human rights have been welcomed with open arms by opinion makers, people in general, political parties and political and judicial institutions. Under human rights the individual person with her needs and desires becomes the central motif. Human rights are meant to inject ethical standards in political life, in order to improve the quality of life and political decision making. So, it is a common implicit assumption that the wider the numbers of rights, the better off our society. The trust for a moral progress of humanity has been put in the hands of human rights. And yet, at least in some instances someone suspects that this trust appears to be misplaced. Why should an excess of rights be a cause of concern, if rights have made such a significant contribution towards putting the human person at the center of the public life?

It is worth noting that rights are questioned in countries where they are, on the whole, successful - not where they are trampled on. This paradox is rooted in the success, not the failure, of rights. If Europe and America are considered the champions of rights, the “lands of rights” in the “age of rights”, why do inhabitants of these continents start doubting them?

It is interesting to note that whereas in the past the only reasonable question appeared to be how to secure the complete implementation of human rights instruments, now, in the era of the great success of human rights, a new question is looming: are human rights always right? For a long time, facing the striking gap between the rhetoric of rights and the grim realities of human existence, the only reasonable answer seemed to be a restless and incremental enforcement of the rights proclaimed in the founding documents accompanied by their seemingly boundless evolutionary interpretation at the hands of Courts. Now a different and more radical problem is emerging: are rights always appropriate?

For a start, one might wonder whether rights are suitable to cope with the challenges of the global world. The vanguard rights of the new generations encompass a right to a clean environment, the rights to peace and security, the economic and social rights and the right to

development, but the individual rights language sounds disproportionate to the dimension of some problems. It is interesting to observe that every evolution in social life, whether problematic or promising, generates its own ‘armour’ of rights. The terrorist attacks have suddenly sparked a debate around the right to security, any new war is accompanied by the quest for a right to peace, the improvements of technology require us to bolster the rights to data protection, not to mention the rights surrounding the biomedical debates and the right to a safe and healthy environment which is pronounced whenever the problem of climate change is addressed. These are just some of the many examples that could be taken from contemporary debates. The dimension and the complexity of the questions do however bring to light certain structural limits of the language of rights, pushing the search in a different direction.

A fundamental limit of “rights language” is that rights always adopt the perspective of the recipient²⁵ while “shadowing” the agent. By consequence, more rights produce more recipients, but cannot generate a single agent. In a way, the entitlement to rights may create an expectation for solutions to be handed down by institutional actors. But sometimes solutions are simply beyond the capacity of institutions owing to the dimension or nature of the problem in question. A sense of powerlessness on the part of institutional actors prompts a new quest.

This point is the pivotal argument of a recent document wherein the British Government has urged a new agenda, a new vocabulary and a new set of concepts in order to face the challenges of the present era of turbulence. Surprisingly enough, the Government’s Green Paper²⁶ assumes that the language of rights suffers from intrinsic limits and proposes to recover the noble and ancient tradition of the language of responsibilities and virtues, dating back to Aristotle and Cicero, and entrenched, though neglected, in many constitutional documents²⁷. Therefore the Green Paper proposes a new bill of rights and responsibilities, more comprehensive than the existing Human Rights Act of 1998.

²⁵ See ERNEST L. FORTIN, HUMAN RIGHTS: VIRTUE AND THE COMMON GOOD 22 (Rowman & Littlefield 1996),; NICHOLAS WOLTERSTORFF, JUSTICE 8 (Princeton University Press 2008), stressing that when we speak of duty, obligation, guilt, benevolence, virtue, rational agency and the like. we focus on the agent dimension, whereas when we speak of rights and of being wronged, we focus on the recipient dimension. This is the specific contribution, as well as an inherent limitation, of the language of rights.

²⁶ Ministry of Justice, Rights and Responsibilities: Developing Our Constitutional Framework, 23 March 2009, available at <http://www.justice.gov.uk/publications/rights-responsibilities.htm>

²⁷ The Green Paper recalls several provisions of the Universal Declaration of Human Rights, of the European Convention of Human Rights, of the Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights, the American Declaration of the Rights and Duties of Man, the African Charter on Human and Peoples’ Rights, and several national constitutional documents.

The basic assumption of the Green Paper is that many urgent problems cannot be solved only with the adjudication of particular rights. Among them, significantly, the British Government mentions environment, education and family life, and the well-being of children, healthcare and housing. The culture of rights has produced - following the British government assessment - an atomized, selfish and hedonistic society, but institutions alone cannot cope with the problems of the contemporary world. Consequently the Green Paper calls for a more active participation of citizens in political and civil society through voting, jury service, reporting crimes, paying taxes, etc.

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

For a number of reasons that I hope to make clear in the following sections of this paper, I do not think that the solution to the structural inadequacy of human rights in addressing some basic human needs, can be fixed by issuing a “charter of duties”. It is not at all clear that the British Government is right when it says that “the articulation of responsibilities [can] offer security to those who can feel intensely vulnerable [...], an anchor for people as we enter a new age of anxiety and uncertainty”. Nonetheless the British Green Paper is interesting, firstly because it captures and represents a widespread debate on the limits of human rights presently going on in Britain, crosscutting all political and ideological boundaries²⁸; secondly because although the proposed solution might be disputable, the paper is certainly relevant in so far as it detects a problem that has been so far underestimated in European public discourse: at times, rights may be not the right answer.

Clearly, human rights remain essential to the foundation of our democratic polities. Nobody wants to get rid of them and the British Government’s proposal endorses the age-old commitment of its country to individual rights and liberties. Individual rights are a treasure of our civilization and they have proved to be an essential defense of the human person against all form of power and abuse of power, starting with political totalitarianism. However, rights are not

²⁸ The Green Paper was proposed under Gordon Brown’s government, but at the same time similar debates have involved the opposition. A synthetic vision of the current debate in the UK can be found at <http://www.guardian.co.uk/commentisfree/libertycentral/2010/mar/25/human-rights-act-bill>.

a panacea. Sometimes they are ineffective; sometimes they might even produce detrimental outcomes.

To an American reader these kinds of arguments may prompt a sense of *deja-vu* - a classical ‘duties *versus* rights’ proposal aiming at recovering an ethic of duties and responsibilities as opposed to the project of rights. The temptation to quickly dismiss the problem is difficult to resist. After all, whereas Europe is going through an era of “rights enthusiasm” - with the outstanding exception of the UK - on the other side of the Atlantic, the mood is more diverse.

For decades, various warnings about human rights have animated the public debate in the United States, even among human rights supporters. Just to recall some of them, the human rights debate is characterized by many polarities, each of which has multiple nuanced variations on a single theme: communitarianism *versus* liberalism, universalism *versus* particularism, juristocracy *versus* democracy, centralization *versus* federalism, natural rights *versus* contractualism, and so on²⁹. Most of these critiques track back to the legacy of many classical critiques of the rights of the XIX century, such as Burke, Bentham, Marx. This represents a part of the liberal debate that, in contrast to American culture³⁰, was broadly overlooked and underestimated in Europe³¹.

In recent years, some of these critiques have been dropped, whereas others are gaining prominence. In contemporary concerns about human rights there is much more than the simple re-edition of the trite American critique to human rights. After all, debates on rights now engage a social texture very different from that of the fifties or sixties. For better or worse, the rights revolution has already produced its fruits: many inequalities and discriminations are named and shamed, a great number of victims have been empowered, traditional bonds have been loosened, and so on. The historical background has dramatically changed: although only a few decades have passed, the social context has quickly and considerably evolved. It is with this profound difference in mind that many scholars are raising questions as puzzling as: “What kind of human

²⁹ An account of some of these criticisms can be read in Mark Tushnet, *An Essay on Rights*, in 62 TEX. L. REV. 1363 (1984) ; Cass R. Sunstein, *Rights and their critics*, 70 NOTRE DAME L. REV. 727 (1995) ; David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101 (2002).

³⁰ The debate is collected and refreshed in the current context in ‘NONSENSE UPON STILTS’ – BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN (Jeremy Waldron ed., 1987).

³¹ In Europe, the critique of human rights is still very limited, or altogether absent, as pointed out Grainne De Burca, *The Language of Rights and European Integration?* in NEW LEGAL DYNAMICS OF THE EUROPEAN UNION (Gillian More & Jo Shaw eds., 1995). A remarkable exception is the book by MARIE-BÉNÉDICTE DEMBOUR, *op. cit. supra* note 13, analyzing the European Convention of Human Rights and the case law of the European Court of Human Rights in light of classical critiques to human rights: Marxist, utilitarian, feminist, realist, etc.

persons is the human rights project shaping?” - “What kind of humanity is implied in the human rights discourse?” - and, to put the point more finely - “Is our society more human thanks to the success of human rights?”

Let us listen to some witnesses.

In his recent lectures on hate speech, Jeremy Waldron makes the case that in a well-ordered society people need to rely on ‘provisions of assurance’, meaning that they must be able to be sure that when they leave home in the morning they can reasonably count on not being discriminated against or humiliated or terrorized. They need to feel secure that they can enjoy the fundamentals of justice: respect for equality and dignity. But - here comes the most relevant part of his argument to our purposes - “society does not become well-ordered by magic. The expressive disciplinary work of law may be necessary as an ingredient in the change of heart on the part of its citizen that a well ordered society presupposes”³². However, the general and diffuse assurance to all inhabitants about the most basic elements of justice is a matter of public good: “like street lighting, it is a public good that redounds to the advantage of individuals ... but unlike street lighting, which can be provided by a central utility company, *the public good of assurance depends on and arises out of what hundreds or thousands of ordinary citizen do singly and together*”³³. So, on the one hand, Waldron urges a regulation and a limitation of one of the most basic classical rights of the liberal tradition, the freedom of speech. The assumption is that hundreds of years of free speech without limitations and constraints have generated a “society which has been far from well-ordered – indeed hideously ill-ordered – so far as the basic elements of justice and dignity are concerned”³⁴. The high rate of protection of an individual right has not *per se* generated a more well-ordered – let alone more hospitable - society. On the other hand, Waldron’s conception of a well-ordered society implies the active and whole-hearted contribution and responsibility of each and every citizen. If the citizens do not play their part, the goal of improving social life for all lies well beyond the reach of governmental action³⁵.

Looking to the other side of the western world, Joseph Weiler goes even further. Not only do human rights not magically generate human societies, but they sometimes have just the opposite

³² Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. LAW REV 1597 (2010), at 1623.

³³ J. Waldron, *Dignity and Defamation: The Visibility of Hate*, *ibid.*, at 1630

³⁴ J. Waldron, *Dignity and Defamation: The Visibility of Hate*, *ibid.*, at 1646, where he recalls the shameful era of slavery, discrimination, and segregation that have marked American history

³⁵ The same quest for a more responsible, considerate and attentive citizenship is the leit-motif of Jeremy Waldron, *The Image of God: Rights, Reason, and Order*, in, CAMBRIDGE COMPANION TO CHRISTIANITY AND HUMAN RIGHTS, (John Witte and Frank S. Alexander, forthcoming)

effect. His analysis is focused on Europe, where the insistence on human rights has not resulted in a warmer and more caring society. Weiler's accusation against the European Union is harsh: the practice of the European institutions is corrupting the values on which the European project was founded – democracy, human rights, rule of law, solidarity and peace - and it even encourages a personal disposition inimical to those values. Weiler stresses that although it should be made clear that “our commitment to constitutionally protected human rights should be without compromise ... the culture of human rights may produce unintended consequences on that very deep ideal... that places the individual at the center and calls for redefinition of human relations”.

Following Weiler, the purpose of human rights has always been to put *the individual at the center*, but unfortunately, the result is a society of *self-centered individuals*. According to his view, there are two major downsides of the culture that human rights have produced in Europe. First, the culture of human rights “demands very little of all of us who believe in them... it is not conducive to the virtues and sensibility necessary for real community and solidarity”. Second, “the culture of rights, want it or not, undermines somewhat the counter culture of responsibility and duty”. The result is the advance of “personal materialism, self-centeredness, Sartre style ennui and narcissism in a society which genuinely and laudably values liberty and human rights”,³⁶.

Why this contradiction? Why does a project that is genuinely based on the intent of promoting and protecting the human person produce such a desolate result? The problems seem severe because they arise in contexts, like Europe and the US, where the human rights project is generally successful. This renders the critique all the more puzzling, because it suggests that the problem does not arise from its insufficient implementation.

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

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

³⁶ J. H. H. Weiler, *Europe – Nous coalisons des Etats, nous n'unissons pas des homes*, available at <http://www.iilj.org/courses/documents/2009Colloquium.Session9.Weiler.pdf> at. 31 ss.

This kind of inquiry cannot proceed in a void. On the one hand, it can take advantage of a line of reflections well developed in American scholarship. On the other hand, it can profit from the outcomes of longstanding and well-established practice throughout the world. The cumulative experience of more than sixty years of human rights protection offer many useful examples in order to better understand the power and the limits of human rights ideals.

3. *The cloven rights-holder.*

One of the most commonly shared critiques argues that the human rights discourse suffers from an “original sin”, that of individualism. It is commonly assumed that human rights originated in the eighteen-century liberal philosophy of Hobbes and Locke, and consequently that they mirror - and at the same time promote - an individualistic, egoistic and atomistic understanding of the human person, separated and isolated from other human fellows. The state of nature is the environment where the original liberal rights to life, property and liberty were conceived, and by definition the state of nature is a place of distrust where men have no social bonds and are concerned only by their own egoistic interests. *Homo homini lupus.*

This line of critique goes back to Karl Marx, who was the first to note in *On the Jewish Question*, 1843³⁷, that the implicit image of the man of rights is that of an isolated monad, an individual separated by his social context withdrawn into himself. In the Marxist view, the critique to liberal rights is conflated with a more general and encompassing critique to liberalism. Overtime that view has been rejected in so far as it aims at dissolving the individual into the group, in the class, in the social structure to which he is ascribed. The human person is devalued in that context. This criticism of individual rights has eventually developed into an attack against liberal democracy as such, with major undesirable spin-offs. The end of the Cold War has unveiled the aberrant results of an idea of society that is not grounded on the unique worth of each and every human being as such. This in turn provides grounds for dismissing the line of criticism of liberal democracy in so far as it is conducive to a reductive comprehension of the human person, considered as an interchangeable unit of a group or an undistinguished element of a social flow, with no specific and individual value.

³⁷ An overview of the Marxist critique to human rights and the text by Karl Marx can be read in Jeremy Waldron, *NONSENSE UPON STILTS*, *op. cit.*, *supra* note 31 at 119 ff.

In a way this line of criticism is based on a similar shortcoming as that implied in the individualistic culture that it seeks to critique. Both of them endorse a partial understanding of the human person, the one being focused only on the individual without any concern about her relational dimensions, and the other assuming a holistic vision of society, where the single components are considered to be of no value, other than as part of a whole. Both visions have a blind spot. They set up a sort of dichotomy, opposing the unique value of each “I” against the relational constituencies of each human person as a “we”. The same dichotomy recurs over time under different labels and looms for example in the dispute between the libertarians and the communitarians³⁸, both of which asserts partial truths and in the end promote a reductionist anthropological understanding incapable of encompassing the entire complexity of the features of the human condition, where individuality and relationality are intertwined.

The grotesque result of all theories developing one, single, albeit valuable aspect of human personality, is well described by the Italian novelist, Italo Calvino, in the allegoric story of “The Cloven Viscount”. A young Italian nobleman, Viscount Medardo of Terralba, is split in two by a cannonball while fighting the Turks. Each of his two parts survives and each of the two parts pretends to be the real Visconte Medardo. Their names are eloquent: Gramo (the Bad) and Buono (the Good). The Gramo displays a egoistic and even perverted and evil nature, shown especially in his penchant for splitting things into two parts. Buono lives happily in the forest and returns home only after long wandering. At home Gramo causes damage and pain, Buono does good deeds. What is interesting in the novel is that eventually the villagers dislike equally both viscounts: Gramo's malevolence provokes hostility as much as Buono's altruism provokes inexplicable uneasiness. Both halves cause damage and are difficult for the community to accept. Bewilderment and distress in the village are caused not only by Gramo, as might be expected, but also by Buono. Both of them are simply *inhuman*. It is not until the two parts challenge each other to a duel and are severely wounded, that a doctor takes the two bodies and sews the two

³⁸ In the same vein, see E. H. WOLGAST, *THE GRAMMAR OF JUSTICE*, *op. cit.*, *supra* note 12, at 25-26: “the atomistic model has important virtues. It founds the values of the community on private values; it encourages criticism of government ... it limits government’s powers, as they may threaten to interfere with the needs of atomistic units ... it gives us a common ground in the values of freedom, autonomy, respect, equality, and the sanctity of desires ... But it leaves a great deal out... In it one cannot picture human connections or responsibilities; we cannot locate friendliness or sympathy in it... The atomistic person is an unfortunate myth.” Under a different perspective the social atomism has been criticized also by MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (Cambridge University Press, 2nd ed. 1998).

sides together. The Viscount is finally made whole and the life of the village community is restored to peace and prosperity.

However true and genuine might be the single aspects pictured, if the focus is too narrow, the overall effect is that of a caricature, instead of a real human person.

I will come back to the reductionist visions of the human persons and to the undesirable consequences they produce in the legal realm. Suffice it for the moment to note that one of the most deeply rooted critiques to human rights has as its ultimate target the liberal extreme individualistic mentality that is assumed to be at the origin of the individual rights, rather than human rights as such. In a way, criticism of rights is sometimes indistinct from a criticism of the possessive individualism pervading our western societies.

Here, I think, a clarification is required. Is the ultimate target of the critique really human rights *per se*, or rather the extreme individualistic understanding of the human person that is often associated with human rights claims in contemporary practice? Are rights a primary or a secondary target of the critique, being involved in the dispute because they are instrumental to the extreme individualism of some widespread and perhaps dominating interpretations of rights?

The connection between human rights and the liberal philosophy of Locke and Hobbes is in general taken for granted, and in a way rightly so. Locke and Hobbes have displayed a major influence on the American and French declarations of rights at the end of the eighteenth century, and in turn those declarations have been the model of many contemporary international and constitutional charters of rights.

What instead is improperly taken for granted is the nature of the tie between the individualistic culture and human rights. The question should be asked whether the connection between human rights and the individualism assumed in the liberal Anglo-Saxon philosophy, is contingent or essential. Phrasing it differently, one would ask: is the idea of subjective rights the cause and the source of the intense individualistic mentality of modern western society, or is the language of rights is rather just susceptible - or perhaps particularly prone - to be adjusted to the intense individualism pervading modern western culture? Are the excesses of individualism really present in the DNA of individual rights?

The most common narratives³⁹ of the history of individual rights consider that they are the offspring of philosophical individualism of the Enlightenment era. Following this account, there is an intrinsic dependence of rights on liberal individualism, because rights are considered to be the first fruits of that philosophy. A more accurate analysis of the philosophical and legal history of ideas, however, shows that the notion of human rights has been incrementally singled out thanks to the contributions of many different traditions along the centuries and is far from having been invented all of a sudden by a single mind, in a given year of human history. Traces of the idea of subjective rights can be found long before the age of Enlightenment, back to the late medieval era and the Renaissance. It has been convincingly proved that the idea of human rights precedes the liberal philosophy, having been used long before for example by Francisco de Vitoria and Bartolomé de las Casas⁴⁰ who defended the rights of Indians to the full ownership of their lands and who took advantage of - and further developed - the language of subjective rights that crept into the legal document of the medieval age. From the historical point of view, the twelfth century is the cradle of subjective rights: long before Locke and Hobbes, it is in the medieval discussions of the decretists of the twelfth century, starting with Gratian's *Decretum* around 1140, that we retrieve the initial concern for subjective rights⁴¹. In fact, one of the central concepts of Western modern political theories first grew into existence almost imperceptibly, in the obscure glosses of the medieval jurists.

This clarification is consequential not only for the sake of historical accuracy, but – more to the point – because it sheds a different light on the cultural backdrop of human rights: if the idea is to be dated back to the late Middle Age, this implies that the subjective rights were not necessarily nourished by an individualistic anthropology, they were not based on simple greed or self-serving egotism; rather they derived from a view of individual human persons as free, endowed with reason, capable of moral discernment, and still belonging to social groups, well aware of the multiple ties that bound individuals to one another, and more generally of the relational dimensions of the person⁴².

³⁹ An illuminating account of the relationship between modern talk of rights and the ideas of the Enlightenment see ALASDAIR MCINTYRE, *AFTER VIRTUE* 68-70 (Notre Dame University Press 1981); MICHEL VILLEY, *LES DROITS DE L'HOMME* (Presses Universitaire de France 1983).

⁴⁰ MICHELINE R. ISHAY, *THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA* (University of California Press 2004); P. Carozza, *From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights*, in 25 *HUM. RTS. Q.* 281 (2003).

⁴¹ BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS*, *op. cit.*, *supra* note 5, at 54ff.

⁴² *id.*, at 77ff.

Subjective rights are not the intellectual property of single thinker, nor were they first invented by the modern liberal philosophers. Royalties, if any, should be shared among many unknown jurists of the Middle age, of the renaissance and, of course, of the Enlightenment. Multiple intellectual and cultural currents concurred to give shape to the framework of individual rights.

The fact that the modern liberal tradition marked a new stage of human rights⁴³ and eventually dominated the legal and political discourse does not imply that the only possible construction of rights is that which is solely based on an understanding of man as solitary and antagonistic, aiming at assuring self-preservation and security in a land of wolves.

The Universal Declaration of Human Rights of 1948 is perhaps the clearest proof that other options have been tried and tested in history. A diverse plurality of philosophical and anthropological ideas concurred in the discussions and are reflected in the final text of the Universal declaration; among those ideas, the typical liberal modern philosophy was tempered and enriched by the contribution of Judaic and Christian anthropology, by the insistence on social and economic rights on the part of the representative of the Latin American and socialist countries, and by the specific sensitivity of eastern cultures⁴⁴.

Nevertheless a written document alone cannot do the entire job. The language of rights is oftentimes loose and open-ended, so that depending on the anthropological premises that the rights talk assumes, human rights can be tailored on a rich and comprehensive understanding of the human person, or on an impoverished and therefore distorted one. The decline of human rights into an intense, excessive form of individualism⁴⁵ is one of the most widespread temptations of present western society. History shows that when human rights hinge upon an individualistic view of the human condition, they show some major downsides that require to be taken seriously. No surprise: human rights speak about human beings, so that when they interact with a reductionist understanding of the human person, they picture and promote an impoverished image of the human condition and they are bound to result in a society of strangers

⁴³ ERNEST L. FORTIN, HUMAN RIGHTS: VIRTUE AND THE COMMON GOOD, *op. cit.*, *supra* note 26, at 19ff and 201ff.

⁴⁴ MARY A. GLENDON, A WORLD MADE NEW, *op. cit.*, *supra* note 2, describing all the interactions among the fathers of the Declaration among whom Rene' Cassin, John P. Humphrey, Jacques Maritain, Charles Malik, Peng Chung Chan and indeed Eleonore Roosevelt, president of the Commission.

⁴⁵ NICHOLAS WOLTERSTORFF, JUSTICE, *op. cit.*, *supra* note 26, at 388: "An ethos of possessive individualism distorts our ways of dealing with rights ... An ethos of possessive individualism employs the language of rights for its own purposes. But for the origin of the ethos we have to look elsewhere...".

and enemies, a society where “no man knows or cares who is his neighbor, unless his neighbor makes too much disturbance”⁴⁶.

Following this path, the inquiry needs to be directed towards the subject of rights. Who is the “human” of human rights in dominant contemporary practice? What are her/his traits when (s)he acts as a rights holder? What are the effects that the contemporary practice of human rights produces on the understanding of the human person, as an individual and in relation to others?

4. Who is the subject of new rights? Privacy cases in American law.

In order to approach these challenging investigations, let us consider some of the “new rights” originated from the matrix of the right to privacy, one of the most prolific legal concepts in our time. It is no surprise that many new rights have sprung from privacy: there is an attractive aspect of privacy rights, because they aim at emancipating and liberating the individual from all legal and social hindrances, so that his or her freedom appears highly valued. It is in the new rights born under the privacy penumbra that the individual seems to be at his zenith. It is precisely because of the high value attached to the individual autonomy that privacy rights began expanding in the sixties and the seventies of the last century and today they have become by far the “trump”⁴⁷ of the current debate on human rights. In light of privacy, the individual appears liberated from all constraints and empowered to be the master of his own life. There is a strict connection between the high value that privacy confers to the individual as master of her life and the fact that many “new rights” are offspring of it. For this reason, privacy is becoming one of the *pass partout* for new rights – the other being the principle of non-discrimination.

Whereas at their origin privacy rights were but a libertarian “dialect” of the human rights talk, at present they are fast becoming the mainstream legal Esperanto⁴⁸ of western societies. Privacy rights first appeared in American legal culture⁴⁹, and only after some decades did they also become the common currency in the European system. After their first debut in cases on

⁴⁶ T. S. ELIOT, *THE CHORUSES FROM THE ROCK* (1934).

⁴⁷ The theory of rights as trumps is developed by Ronald M. Dworkin, *Rights as Trumps*, in *THEORIES OF RIGHTS* 153 (Jeremy Waldron ed., 1984), and Ronald M. Dworkin, *TAKING RIGHTS SERIOUSLY* 269 (Duckworth 1978).

⁴⁸ The expression is borrowed by J. Klabbers, *Glorified Esperanto? Rethinking Human Rights*, in *Finnish Yearbook of International Law*, 2002, at 63 – 77.

⁴⁹ The idea was invented by Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, *HARV. L. REV.* 196.(1980).

contraception and abortion⁵⁰, privacy rights are now blooming on the fertile soil of bioethical disputes, regarding the edges of life. On this ground, a whole new generation of rights is developing as an outcome of the value of individual privacy. Let us first consider some examples taken from the American case law, and then turn to some European examples in order to have a flavor of the developments of privacy rights in the western world.

Cases can be read in many different lights. Very often cases are read in order to discuss the method of interpretation, to assess the coherence with the previous case-law, to unveil the political view of the judges, or simply to criticize the final outcome of the decision. Our goal is a specific one: we want to get acquainted with the subject of rights. So, let us try for a moment to focus on a slightly unusual question: what kind of human being is implied in the court reasoning? Is he or she a real human being that might be met in the street? What kind of humanity do the new rights disclose?

For our experiment we will try to contrast two cases of the Supreme Court of the United States, the first asserting a new right under privacy and the second denying the claimant request and both related to one of the most hotly debated issues in Europe and in America: termination of life. We could have taken other cases from the European case law or other western countries⁵¹ on the same issues: they all follow the same line of reasoning. We shall use the American cases because the image of the human person is more clearly sketched.

The two cases are Cruzan and Glucksberg, two legal yardsticks of the “right to die” in U.S. law. In Cruzan⁵² the US Supreme Court traced from the right to privacy the patient’s right to refuse unwanted medical treatment even when it is life-saving, provided that the family proves with clear and convincing evidence that the person would want withdrawal of life saving treatment. In Glucksberg⁵³ the US Supreme Court decided that under the American constitution there is no right to assisted suicide. A clear legal line has been made between assisted suicide and withdrawal (or refusal) of lifesaving medical treatment by prohibiting the former and permitting

⁵⁰ An insightful historical narrative of the right of privacy is in MARY A. GLENDON, RIGHTS TALK, *op. cit.*, *supra* note 6, at 48 ss, showing how John Stuart Mill’s *On Liberty* influenced Warren and Brandeis and later the case law of American courts, even up to the Supreme Court, with the decisions of *Griswold v. Connecticut*, 381 U.S. 479 (1965) on contraception and *Roe v. Wade*, 410 U.S. 113 (1973) on abortion.

⁵¹ At the European level see European Court of Human Rights, 29 April 2002, *Pretty v. UK*, n. 2346/02, denying the right to assisted suicide under art. 8 and 14 of the European Convention; in Canada the Supreme Court, September 30, 1993 *Rodriguez v. British Columbia*, also denied the right to assisted suicide, but the issue is at present under debate.

⁵² U.S. Supreme Court, *Cruzan v. Director, Missouri department of Health*, 497 U.S. 261 (1990).

⁵³ U.S. Supreme Court, *Washington v. Gluckberg*, 521 U.S. 702 (1997).

the latter⁵⁴. Setting aside all the difficult issues implied in the question relating to euthanasia and all the distinctions about active and passive euthanasia, competent and incompetent patients, and many other delicate issues, let us try to re-read the two cases in the aforementioned light.

In Cruzan, the main legal problem for the Court was to ascertain the true and pure will of the patient. The case was hard because the patient was an incompetent person. How to be sure that the patient's will was genuine? What kind of evidence should the family bring to the Court? Considering that the decision to be taken would have irreversible effects, what standard of evidence should be required? The Court decided that a very high standard of evidence was required for permitting the withdrawal of a life saving treatment and for that reason the decision was criticized⁵⁵. What is interesting for our purposes is that in the understanding of the Court the right bearer is defined by his/her will. The free will of the person is the only aspect the Court is interested in. The difficulty of that case was to piece together shreds of evidence about the will of the person. No doubt, however, that the pivot of the Court's reasoning was the patient's freedom of choice and therefore her will.

The legal image of the person implied in Glucksberg is different: the focus shifted towards the concrete circumstances of the rights bearer. Whereas in Cruzan the protagonist of the case is the personal autonomy of the individual, the pure free will, in Glucksberg the Court is concerned also about the real factual situation of the individual. In Glucksberg the Court takes into account some relational, personal, factual and social factors that did not appear in Cruzan. For example in Glucksberg the Court stresses that often times people who ask to be assisted in suicide are neither wealthy nor healthy. They might be vulnerable; they might be poor, elderly, disabled persons. All that considered, the Court went on to say that the disadvantaged must be protected against the risk of abuse or of subtle coercions and undue influence on the part of the physicians, the medical staff or even the relatives. An insidious indifference towards the terminally ill or other disadvantaged people coupled with a cost saving mentality might produce undue social and moral pressure and push vulnerable persons to take unwilled decisions⁵⁶. The very same reasons are at the origin of the Concluding Observations of the UN Human Rights

⁵⁴ U.S. Supreme Court, *Dennis C. Vacco v. Tomothy E. Quill*, 521 U.S. 793 (1997).

⁵⁵ Ronald M. Dworkin, *Assisted Suicide: What the Court Really Said*, 44 N.Y. Rev. Books 40-44 (1997),.

⁵⁶ The practice of euthanasia in the Netherlands shows a high percentage of cases of euthanasia without an explicit request on the part of the patient.

Committee regarding euthanasia in Netherlands⁵⁷: considering the high numbers of cases of euthanasia occurring in the Netherlands and the risks of abuse and misuse of euthanasia, the Committee has expressed serious concern about the pressure that could lead people to ask or to accept euthanasia, about insensitivity towards and routinization of a practice that by definition should only regard extreme cases and about the risk that newborn handicapped infants have their lives ended by medical personnel. The right to privacy (or to self-determination in the European legal language) is seen in the possible concrete situation of the rights bearer and on this basis the Supreme Court rejects the request of stating a new fundamental right to assisted suicide under privacy.

The right holders in *Cruzan* and *Glucksberg* are different subjects: an abstract individual in the first case, a real person in the second. A great contrast opposes the protagonists of *Cruzan* with that of *Glucksberg*. In the first cases the (wo)man of the rights is regarded only in her capacity of free choice, with no emphasis on her needs, wants, distress, concerns: an unencumbered self⁵⁸. She is detached from all relationship. She is a subject made of a pure will, in some way a noble, though abstract, prototype of the human species: to paraphrase Descartes, “I will therefore I am”, is the image of the rights holder reflected by *Cruzan*. In the second, the picture is enriched: the (wo)man of the rights is an historical, real, concrete person, living in specific social and personal conditions, who might undergo unwanted interference from other people, an *homme situe*’, to borrow a famous expression by George Burdeau.

Unlike *Cruzan*, *Glucksberg* takes into account the context of situation and relationship in which the individual lives, a context of facts, circumstances, affections and relationship which might play a role both in the elaboration of the individual choice and as to the consequences of the decision to be taken. Carefully read, *Glucksberg* challenges the basic assumption of the very idea of privacy, i.e. that privacy rights cover personal decisions that are not affected by others and do not affect others⁵⁹. In a way *Glucksberg* suggests that, for better or worse, the free will of the individual is always affected by the *de facto* conditions of life and by the personal interactions with others; moreover *Glucksberg* warns about the risk that in vulnerable subjects –

⁵⁷ CCPR/CO/72?NET/ 27 august 2001, reiterated in CCPR/C/NLD/CO/4 25 August 2009.

⁵⁸ See MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE, *op. cit.*, *supra* note 41, at 178-183 for a very helpful discussion about the differences in the process and results of deliberation of an unencumbered individual (pure preferential choice), and a person qualified by constitutive attachments, history and circumstances.

⁵⁹ Although taking an overall liberal approach to the “right to die” this assumption is challenged by G.U. Rescigno, Dal diritto di rifiutare un determinato trattamento sanitario secondo l’art. 32, co 2., Cost al principio di autodeterminazione interno alla propria vita, in *Diritto Pubblico* 2008, at 101 ss.

sick, elderly, kids, disabled, poor, etc. – the individual “free will” may be artificially induced, even manipulated, and consequently vitiated.

Two different understandings of the human person lead to two different conclusions.

Privacy rights are appealing for the emphasis they put on free-choice, an important component of human freedom, indeed. The strength and the merit of rights under privacy is that they want to protect the individual from all forms of coercion on the part of public and private powers. Their intent is to empower and emancipate every individual. But, after reading some cases on privacy we are led to ask: “at what point does emancipation becomes abstraction?” A matter of discussion should be whether the holder of rights is treated as a real person, or rather as an abstract image of an airy individual, made of a pure will, living in a no-man’s land, unencumbered and disentangled. Every personal choice is a process that takes place in a given context made of personal, social, cultural, relational conditions that wittingly or unwittingly play a role for a decision to ripen. The question is momentous and subtle, because an abstract individual – as shown in the US Supreme Court examples - has the appearance of an independent subject freed by all constraints, but as a matter of fact might be an easy prey of all sorts of insidious undue power. A nuance of idealism looms in the picture of an individual defined only by his own pure free will. This tendency for privacy rights to focus too narrowly and exclusively on free will requires attentive consideration because it may jeopardize the very promise of liberation that those rights entail.

5. Who is the subject of new rights? Privacy cases in European law.

Although it is indisputable that privacy rights derive from an American origin, they have now landed in Europe under the label of the new “rights to self-determination”, copiously springing from article 8 of the European Convention of Human Rights. Privacy and self-determination are productive sources constantly inspiring new rights with a distinctive libertarian hallmark – with bioethical disputes being the fertile soil for new privacy rights also in Europe. The “dignitarian tradition” of human rights that used to be entrenched in the old continent is rapidly yielding under pressure in favor of the libertarian flow of privacy rights: the “Europe of rights” of the new millennium is quickly developing under the influence of the libertarian judicial culture, in many cases mediated by the international institutions. Sometimes one may

wonder whether the old continent has even leapfrogged the homeland country of individual freedoms on the road towards individual autonomy, free choice and privacy rights.

Let us repeat our experiment by inquiring into the identity of the subjects of rights as they result in the decisions of the European Court. A case on medical assisted fertilization – we now shift to the beginning of life - recently issued by the European Court of Human Rights offers a clear example of the steady move from the “dignitarian” towards the “libertarian” tradition of rights that is taking place in Europe.

In *S.H. and others vs Austria*⁶⁰, the European Court of Human Rights was asked to decide a case concerning the medically assisted procreation. In particular, the focus was on a provision of the Austrian law prohibiting some techniques of artificial procreation using ova and sperm from donors. The Austrian legislation strictly regulates and almost bans heterologous fertilization and those restrictions were considered in breach of the right to privacy and of the principle of non discrimination by the plaintiffs. They assumed that the decision of a couple to have or not to have a child is an expression of the right to privacy and that all limitations to the use of some types of artificial fertilization set by the national legislation area cause of discrimination between couples suffering different types of impediments to procreate. In the plaintiffs’ reasoning, the right to privacy associate to the non discrimination principle should conduce to remove all legal barriers to the techniques of artificial reproduction.

The reasons underpinning the restrictions – as explained by the Austrian institutions – the Government and the Constitutional Court – and shared by other intervening states like Germany, were based on a “dignitarian” understanding of human rights, where individual rights and freedoms are never absolute: each right has its own limitations in order to guarantee the rights of others as well as other general interest necessary to a well ordered society. In our case, the limitations imposed by the Austrian legislation were meant to protect some public values and interests competing with the individual wish to have a child.

First and foremost the law wanted to prevent the forming of unusual parental relations such as a child having more than one biological mother, in order to protect the right of each child to a biological identity. On the other hand, the law aimed also at preventing the exploitation of women and the commercialization of ova, sperm, embryos and uterus. A further goal pursued by the national legislation was to avoid the risk of artificial fertilization being used for selective or

⁶⁰ ECHR, Decision 1 april 2010, application n. 57813/00, S. H. and others versus Austria

eugenic reproduction. For all these and other reasons the Austrian legislation – akin to some other national legislation in Europe – maintained a cautious approach to heterologous fertilization, in particular when the donation of ova and surrogate motherhood is involved. In the Austrian legislation the “wish of a child” – to use the European Court’s wording - was valued and supported and still it was not considered as an absolute or trumping interest: it was rather treated as one out of many elements to be balanced against one another.

By contrast, animated by different concerns, the European Court decided that the right to privacy, under article 8 of the European Convention of Human Rights – read in conjunction with article 14 stating the principle of non-discrimination - encompasses “the right of a couple to conceive a child and to make use of medically assisted procreation for that end” and therefore held that the Austrian limitations to the use heterologous procreation were in breach of the European Convention and could not even be justified in the name of the margin of appreciation that the European system would traditionally concede to member states. The European Court’s reasoning was focused on the parents’ “right to have a child” and on the non discrimination issues, whereas all the other interests and values were overshadowed: following a typical libertarian approach to human rights, the Court stressed only individual freedom, diminishing the relevance of all other goods and values at stake. The reasoning of the European Court departs from the traditional path where the first step is to appreciate if a national measure interferes with a right protected by the European Convention of Human Rights, and the following steps discuss whether such a interference is justified by other general interests necessary to a democratic society and abiding by the principle of proportionality. In this case, after the first step, the majority opinion shift the reasoning towards the non discrimination principle, omitting the usual test concerning the justification of the limits to the rights protected by the Convention and the requirements of proportionality. The result is a decision that overlooks all the contextual and relational dimensions of the human person: not only did freedom of choice of the parents have the upper hand but it also overshadowed all other rights and interests potentially at stake.

In a way there is something both tragic and ironic in this decision, because while asserting a new right to have a child - the content of which is constitutive of a relationship, the most fundamental among all human relationships – at the same time it is concerned only with the parents, and doesn’t take into consideration all the consequences that the child might eventually

suffer: one of the poles of the relationship is neglected. Even when dealing with an unequivocally relational issue it uses an individualistic approach.

Make no mistake: the issue that was brought before the Court is a veritable conundrum and does not have any easy solution. Every other alternative response would have had its own costs and downsides. Nevertheless, however disputable would have been every other option in front of the judges, the arguments and the answer given by the European Court appear as an oversimplification of the matter. In the decision the focus is on the right to have a child, the emphasis is only on the wishes and desires of parents, whereas all possible repercussions on the child are simply ignored, let alone all other common interests.

This decision is a good example of the ongoing evolution in the European law of human rights, in which we can identify three major features. First, unlike some decades ago, it is now not unusual that “new rights” are introduced by the legislation or by the case-law: the present example even takes for granted the existence of a “right to have a child”, which is instead an expansion of the right to privacy, unforeseeable only few years ago. Second, most of the new rights are grounded in article 8 - right to privacy (often read in combination with article 14 – non-discrimination) of the European Convention of Human Rights, so that in most cases new rights promote and nurture an individualistic understanding of the human person. Third, the new individualistic rights are an essential component of a uniform legal culture pervading the whole continent, the expansion of which is gradually wiping out all the rich plurality of legal traditions belonging to the different European countries. The expansion of new rights, the development of an individualistic libertarian portrayal of the human person, and the centralization of a common understanding of human rights, are the three concurrent components of the current European brand of human rights.

6. From an impoverished subject to a diminished agency in privacy rights.

So, after examining some examples taken from the American and the European legal experience we can now go back to our research question: what is the legal image of the man and woman of the new individual rights in western countries, on both sides of the Atlantic? What are her characteristics and what does she lack?

The American examples on the right to die show that new rights run the risk of disconnecting the individual from all contexts, underestimating the real and concrete dimensions of the human

condition, and their impact on human self-understanding. In the European example, neither the general interests nor the relational dimensions of human life are properly considered, the stage being taken exclusively by the freedom to realize one's own desires – in our case the commendable desire of a couple to have a child.

Disconnected and abstract, the new libertarian rights offer a poor portrait of the human subject, an image where the historical, factual and relational dimensions of the human condition are screened.

These flaws have rested within the right to privacy since the origin. Meant to define an inviolable private sphere, where the single person was protected, out of the reach of the government and out of the reach of other people - the right to be let alone - privacy rights developed an absolute paradigm of liberty, pulled out of the idea of property. The result is a set of rights⁶¹ which nurture a culture of sovereign individuals, lonely persons, disentangled from all relationships and from all constituent factual circumstances. Privacy rights reduce the individual to a pure capacity of freedom of choice - to procedural freedom, to use Sen's terminology⁶². While this is surely a relevant trait of human liberty, just as certainly it fails to capture the whole complexity of the human person. Looking at the human person through the lens of privacy rights means taking a partial perspective and ultimately overlooking some important human features. It is not fortuitous that the extreme judicial expression of the culture of individualism – the expansion of the right to privacy and its progeny - the values of autonomy, separation and, ultimately, loneliness - have opened a discussion that is far from settled.

No surprise indeed that the most influential and controversial offspring of the right to privacy – *Roe v. Wade*– has prompted a deeply divisive and never-ending debate⁶³ responding to certain undesirable consequences at the social level of this understanding of the human condition. If one rehearses carefully the debate around the privacy rights of the seventies and eighties, a serious cause for concern emerges, one that should be taken into consideration when enlarging the number and the scope of the new privacy rights. Not only do the liberal individual rights impinge

⁶¹ For an overview of the rights developed in the context of the right to privacy see R. Standler, *Rights Under Privacy*, available at www.rbs2.com/priv2.pdf

⁶² Amartya Sen *Elements of a Theory of Human Rights*, 32 *Philosophy and Public Affairs* 315 – 353 (2004), and *Id.*, *THE IDEA OF JUSTICE* 286-290 (The Belknap Press of Harvard University Press, 2009)..

⁶³ See MARY A. GLENDON, *RIGHTS TALK*, *op. cit.*, *supra* note 6, at 47-75, spec. 58; ELIZABETH FOX-GENOVESE, *FEMINISM WITHOUT ILLUSION* 83 (University of Carolina University Press 1991). For a general overview of the feminist critique to *Roe v. Wade*, see CARL WELLMANN, *THE PROLIFERATION OF RIGHTS: MORAL PROGRESS OR EMPTY REHORIC?*, *op. cit.*, *supra* note 4, at 85ff.

upon our understanding of the human being, offering an impoverished image of the *human subject*, but they also affect our *human agency*, our social behavior: being centered on the recipient, liberal rights de-center the agent⁶⁴.

In her passionate and powerful criticism to the libertarian individualistic dialect of human rights which invaded America in the second part of the twentieth century, Mary Ann Glendon⁶⁵ has convincingly shown how the insistence on privacy and individual liberty cultivates a society of lonely people, waters down all sense of responsibility and disrupts all sorts of social ties that at the time of the foundation of the United States were taken for granted in social life. All the relational dimensions of the human person are disregarded and dispersed and with them all idea of being responsible not only for one's own individual success, but also for the common good.

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

Although the idea of relating rights to a male sensitivity and care to a female one is not convincing⁶⁸, this analysis acknowledges some limits of the rights approach to human

⁶⁴ NICHOLAS WOLTERSTORFF, *JUSTICE*, *op. cit.*, *supra* note 26, at 176-179.

⁶⁵ See MARY A. GLENDON, *RIGHTS TALK*, *op. cit.*, *supra* note 6, at 47 -144

⁶⁶ CAROL GILLIGAN, *IN A DIFFERENT VOICE*, (Harvard University Press 2 nd ed 1993).

⁶⁷ *id.i*, at XIV, quoting Robert Frost's poem.

⁶⁸ Mary Brabeck, *Moral Judgenemt: Theory and Research on Differences between Males and Females*, in *AN ETHIC OF CARE* 33 (Mary Jeanne Larrabee ed., 1993).

experience, urging the integration of justice with care and responsibilities, so that the human drive to autonomy and to interconnection be united within an enlarged and more adequate conceptual framework. “The dialogue between fairness and care gives rise to a more comprehensive portrayal [...] of human development and *a more generative view of human life*”⁶⁹.

A generative capacity in social life is an aspect of human personality that individual liberal rights are bound to miss. This is the outcome of the impoverished understanding of the human being which is at the origin of the concerns about the misuse or the abuse of the language of rights, recalled above⁷⁰. Rights require not hurting others, but they do not prompt a positive move towards others: they fall short of encouraging care and concern about others. Because of this inherent limit, the structure of rights cannot be constitutive of social life⁷¹. They have an important fallback function to perform when the constitutive elements of human relationship fall apart. In some way rights are available to be claimed in cases of human failure and are actually activated when relationships break up. They help, but do not have any power to generate or to regenerate human relationship. Unlike the man of rights, the man of responsibility⁷², agency, needs, desires and virtue often acts in nonstandard, non-prescriptive ways. Man takes chances in regard to the way things will turn out and on the way will look to others; he is driven by something more than avoidance of misdeeds. To be sure, rights have been and still have an important function to perform, but it is a limited one: they provide a sort of background guarantee or insurance for human deficiencies. As the recalled feminist critiques clearly point out, rights are unable to cover a good portion of human experience, nor are they adequately equipped to solve all social problems. As Joseph Weiler observes⁷³, rights do not prompt human agency, and might even depress it.

More than thirty years later, the *ethics of care* critique to rights is still topical. The ‘rights revolution’ of the second part of the past century has shaken the traditional social institutions – family, local communities, religious communities, etc. – in order to disencumber the individual and to exalt his autonomy. In the post-modern society of the new millennium, the historical

⁶⁹ CAROL GILLIGAN, IN A DIFFERENT VOICE, *op. cit.*, *supra* note 68, at 174.

⁷⁰ *Supra* par. 2 referring to a UK Government proposal and to the works by Jeremy Waldron and Joseph H.H. Weiler.

⁷¹ J. Waldron, *When Justice Replaces Affection: the Need for Rights*, in JEREMY WALDRON, LIBERAL RIGHTS 370 (Cambridge University Press, 1993).

⁷² E. H. WOLGAST, THE GRAMMAR OF JUSTICE, *op. cit.*, *supra* note 12, at 145.

⁷³ J. H. H. Weiler, *Europe – Nous coalisons des Etats, nous n’unissons pas des homes*, *op. cit.*, *supra* note 38, at 34.

context looks very different: already the bonds have been unleashed and most of *de facto* constraints have been rendered potentially removable. In this context, a different set of problems arise, the problem of preserving individual autonomy without disestablishing the social fabric any further, but rather while reconstructing disrupted social connections. To this purpose liberal rights are not self-sufficient.

In the contemporary context of western societies, the limits of the liberal rights understanding of the human person and of human agency should not be easily overlooked as a trite conservative or nostalgic kind of “neo-Victorian” critique of rights: the awareness of the limits of the liberal rights is relevant for everybody, regardless the political orientation, especially in an era where the default position of judicial and political institutions is to expand and multiply those rights. In some cases, the appeal to new individual rights is necessary to come to terms with new challenges to human liberty. In other cases, however, new rights are inappropriate or a mere rhetorical device. Sometimes, “new rights” may even produce a detrimental effect.

To further develop this insight, let us zoom into a specific case: that of the rights of children. There are many reasons why this case might be interesting: first and foremost, a recent evolution in the international rights of children shows some potential implications of the forthcoming expansion of the liberal understanding of rights within family kinship; second, although the UN Convention of Rights of the Child has been almost universally signed and promptly ratified – not yet by the US, its implementation is still an ongoing process, far from been completed. The debate over the content of children’s rights is not over: given that the Convention has different components and it is open to a variety of interpretations, a deeper awareness of the advantages and the limits of the liberal rights discourse in this field might be beneficial for any further developments of children’s rights.

7. Who are the children of new rights?

The rights of children offer a good example of the present trends in human rights in western countries because they have recently been tinged with a touch of liberalism, unprecedented in this field. Children are not newcomers in human rights. The protection of children is rooted in a long constitutional and international tradition. However some recent ramifications of children’s rights insist on their freedom of choice, their autonomy and their independence. The “new

children's rights" echo the same emphasis on liberty and autonomy, typical of the new generation of liberal rights of adults.

This new approach to children's rights has been heralded by the UN Convention of the Rights of the Child approved in 1989, and since then a fervent debate has animated the issue.

The approval of the Convention *per se* has not been very controversial. It has been welcome as one of the most relevant advances in the field of human rights. Together with the Convention on torture it is one of the first virtually universal human rights convention, having been signed by 194 states; it is one of the most widely ratified treaties in history and it has been considered as a turning point in the struggle to achieve justice for children. Quite unsurprisingly it has been welcomed with great enthusiasm, since it draws upon a widespread general sensitivity towards children. There is no question that children must be protected as the most valuable and pristine expression of humanity. No one doubts that serious problems exist and that it is necessary and urgent to confront them and oppose the persistent and shameful practices of child trafficking and sexual exploitation, child abuse and violence on the part of adults, child labor, child soldiers, as well as the many other forms of abuse to which children are exposed, that remain far from being defeated⁷⁴. If there is anything that provokes a universal sense of indignation, it is wrongs and violence committed against children. Wrongs against innocents undeniably exist and are unanimously blameworthy. For this same reason, keeping a distance or, worse, criticizing the rights of children sounds obnoxious. Such a stance against the *rights* of children might be misread as a stance against, or indifference to, *children themselves*. All this can easily explain why the Convention on the Rights of the Child has been cheerfully welcome as a potential source of well-being for children. And actually the Convention has indeed been such a source, insofar as it has contributed to give primary consideration to the best interest of children⁷⁵, to strive against some of the shameful widespread abuses against children and to mobilize governmental and non-

⁷⁴ See the data reported in BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS* 310 – 311 (Cambridge University Press 2009).

⁷⁵ The best interest of the child is sometimes a shaky concept and can be used to impose on children a parents' point of view or other adults' interests, as contended by J. EEKELAAR, *FAMILY LAW AND PERSONAL LIFE* 158 (Oxford University Press, 2007). See further, *THE BEST INTEREST OF THE CHILD: RECONCILING CULTURE AND HUMAN RIGHTS* (Philip Alston ed., 1994).

governmental institutions to engage resources to improve children's living conditions around the world⁷⁶.

However, the story of the Convention is not one made only of success; it is curiously uneven. After a first glorious chapter, a more problematic one followed. As time passed, some parts of the Convention have brought about a diffuse sense of bewilderment⁷⁷. The USA has not yet ratified the Convention, nor is it likely to do so in the short term, as if it was having second thoughts about this international instrument. This may be a result of the divergence of certain parts of the Convention from the American legal mainstream addressing the treatment of children⁷⁸. The American attitude is simply one of the most evident signs of the hesitation that has emerged overtime. Many reservations on the part of several signatory States are a further proof of a torn attitude towards the rights of children, in particular towards some "new rights" of children included in the Convention.

On a careful reading, the Convention reveals two 'souls'⁷⁹. Many of its fifty-four articles reaffirm and restate longstanding UN commitments to improving the lives of the world's children. Beyond reaffirming fundamental needs of children - health, nutrition, physical sustenance, education, etc., the Convention addresses issues of drug abuse, child neglect, children in armed conflicts, and special needs of disabled children, child labor and other forms of exploitation. The importance of family and parental relationships are recognized as "the natural environment for children growth and well-being"⁸⁰. All this, and much more, are the ingredients of a well-established legal tradition that considers children as a specific class of people, who deserve an additional measure of protection, taking into account their vulnerability and their sensitivity. Let us name this first one the "special protection approach" to children's rights. Alongside all of this, a second, competing vision is endorsed in some parts of the Convention, a vision aiming at children's empowerment, emancipation and autonomy, including adult-style

⁷⁶ As to the effects of the CRC on the concrete conditions of life of children, see BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS, *op. cit.*, supra note 76, at 318 onwards, dealing with the problems of child labor, immunization and child soldiers.

⁷⁷ A sharp critique to the Convention is made by Lynne M. Kohm, *Suffer the Little Children: How the United Nations Convention on the Rights of the Child Has Not Supported Children*, 22 New Int'l. L. Rev 57 (2009).

⁷⁸ CHILDREN'S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW (American Bar Association 1990); Bruce C. Hafen and Jonathan O. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on The Rights of the Child*, 37 HARV. INT'L. L. J. 449 (1996).

⁷⁹ This dichotomy is assumed for ex by PHILIP ALSTON AND JOHN TOBIN, LAYING THE FOUNDATIONS FOR CHILDREN'S RIGHTS (Unicef 2005); David B. Thronson, *Kids Will Be Kids?* 63 OHIO ST. L. J., (2002), at 979 ss.

⁸⁰ UN Convention of the Rights of the Child, Preamble.

civil rights such as freedom of speech and religion, freedom of association and assembly and indeed the right to privacy⁸¹. Let us call this second one the “autonomy rights approach”. This notion is unprecedented and for this reason the UN Convention on the Rights of the Child has been mainly interpreted as a turning point, even a paradigm shift⁸².

The typical “special protection approach” was taken on by early international documents such as the Declaration on the Rights of Child of 1924, the Universal Declaration of Human Rights of 1948, the Declaration of the Rights of the Child of 1959 and at the national level by the majority of national constitutions of the world. Following this approach, children are considered within the context of their relationship with the parents and the emphasis is on their special needs of protection and development. These documents speak coherently using the language of rights as well as that of responsibilities: they assume that the proper bedrock of the flourishing of children is a healthy relationship with their parents (or other adults) and for this reason they give great relevance to the responsibilities of the adults and to the obligations of the society and governments in respect to the children. Material needs as well as intellectual, affective and spiritual needs of children have been incrementally spelled out in these international and constitutional documents⁸³ as the content of the most relevant responsibilities to be faithfully performed by parents, legal guardians and social institutions.

Along this evolution, the UN Convention on the Rights of the Child of 1989 intends to move a step beyond, granting children all the old as well as a series of new unprecedented rights. The Convention has a very comprehensive scope, encompassing all the major classes of children’s interests: basic needs, developmental needs, and autonomy⁸⁴. It addresses all these classes of interests with a long list of social, economic, civil and political rights, included some aspirational rights, like those to an adequate standard of living and some atypical ones, for

⁸¹ UN Convention of the Rights of the Child, Preamble, art. 13-16.

⁸² PHILIP ALSTON AND JOHN TOBIN, *LAYING THE FOUNDATIONS FOR CHILDREN’S RIGHTS*, *op. cit.*, *supra* note 81, at. 7-8.

⁸³ For a history of the developments of the child rights idea SEE PHILIP E. VEERMAN, *THE RIGHTS OF THE CHILD AND THE CHANGING IMAGE OF CHILDHOOD* (Martinus Nijhoff Publisher 1992). For a general overview of several Constitutions and of all the relevant international documents in PHILIP ALSTON AND JOHN TOBIN, *LAYING THE FOUNDATIONS FOR CHILDREN’S RIGHTS*, *op. cit.*, *supra* note 81, at 2ff and 23ff.

⁸⁴ J. Eekelaar, *The Emergence of Children’s Rights*, 6 *Oxford Journal of Legal Studies* 161 (1986), noting that in contrast to the general consensus around basic and developmental interests - the satisfaction of the necessary means to sustain a child’s healthy life, psychological well-being and developing capacities - autonomy rights remain contested.

example the right to leisure, play and recreational activities⁸⁵. Among such a rich list of rights, a new “autonomous choice rights approach” introduces some tensions among different parts of the Convention.

The “autonomy choice rights approach” looms, for example, in article 13 of the Convention: “The child shall have the right to freedom of expression; this right shall include freedom to seek, *to receive and impart information and ideas of all kinds, regardless of frontiers*, either orally, in writing or in print, in the form of art, or *through any other media of the child’s choice*”. The extent of the freedom of expression accorded to children seems hardly compatible with their specific vulnerability, especially in the contemporary social and technological context where an uncontrolled use of the internet can expose children to inappropriate images, video, and texts, not to mention the risks related to pedo-pornography. Although some restrictions to children’s freedom of information can be imposed by law - article 13 recognizes the need to protect interests like the reputation of others, national security, public order, or public health or morals, on the whole this article reproduces the general frame of provisions on freedom of expression that can be found in many international documents or national constitutions and are addressed to adult rights holders. Its wording makes little allowance for the peculiar condition of children, or for the special need of protection for their sensitivity.

Another, and probably even more telling, example of the “autonomy choice rights approach” endorsed by the convention is article 16 addressing the right to privacy. The language here is very loose: “No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honor and reputation. The child has the rights to the protection of the law against such interference or attacks.” The question arises whether this right to privacy of children is to be interpreted according to the evolving understanding of the right to privacy of adults. Does it encompass all the freedom of choice in ethically disputed issues that are usually related to privacy rights for adults? Does the right to privacy for children encompass also abortion, contraception, assisted reproduction, the refusal of medical treatment, even life saving treatments, the right to die, etc.? Moreover, against whom can those rights be claimed? Are they meant to protect children only

⁸⁵ UN Convention on the Rights of the Child, art. 27 and art. 31 For an overview of the rights included in the Convention see T. Hammarberg, *The UN Convention of the Rights of the Child – and How to Make It Work*, 12 HUM. RTS. Q. 97 (1990), and Stephen J. Toope, *The Convention On The Rights of the Child: Implication for Canada*, in *Children’s RIGHTS: A COMPARATIVE PERSPECTIVE* 33 (Michael Freeman ed., 1996).

against the state, or do they also run against parents? After all, the parents' relationship with a child is also part of their private and family life; likewise, a child's bonds with a parent, or any caregiver, are also part of its private and family life to be protected under their rights to privacy. Pushing child autonomy too far may have a rebound effect.

Oftentimes the move from "special protection rights" to "autonomy rights" is presented as an uncontroversial progress towards the well-being of children. It is often said that whereas the old-fashioned protectionist approach is paternalistic, under the new approach children are regarded as individuals⁸⁶ with unique personalities and dignity. Some voices, however, offer a different view⁸⁷.

The main reason why the "autonomy rights approach" to children is not universally supported derives from the contrast between the factual condition of dependency of children and the idea of autonomy and individual choice entrenched in the liberal rights discourse. The language of autonomy, self-determination and independence as introduced in children's rights, hardly reflects the constraints imposed on children due to their stage of intellectual, psychological and personal maturity, and the suffering involved with particular exposure to all sort of pressures, as well as children's natural instability resulting from their lack of competence in appreciating mid- to long-term goals⁸⁸.

In so far as the emphasis on autonomy aims at recognizing the individual personality of each child and her dignity, no questions arise⁸⁹. However, an adult-like idea of autonomy seems unsuitable to children, because it overlooks their ontological peculiarities. A sharp shift to the idiom of liberal rights would miss the deepest reality of being a child. The same blind spot that affects the liberal rights of adults and obscures the relational structure of the human person, shows its paramount consequences in relation to childhood. Children, even more than adults, illustrate the dilemmas of freedom *within* relationship, and independence *within* connections.

⁸⁶ T. Campbell, *The Rights of the Minor: As Person, As Child, As Juvenile As Future Adult*, in CHILDREN, RIGHTS AND THE LAW 1 (Philip Alston, Stephen Parker and John Seymour eds., 1992); M. Freeman, *Taking Children's Rights More Seriously*, in *Id.* 52-71.

⁸⁷ See among many: John. E. Coons et al., *Puzzling Over Children's Rights* BYU L. REV. 307 (1991). L. Marie John and M. E. Lawrence, *Sex at Six: the Victimization of Innocence and Other Concerns Over Children's Rights*, 36 BRANDEIS J. FAM. L. 361, at 369.(1998); B. Bennett Woodhouse, *Child's Custody in the Age of Children's Rights: the Search for a Just and Workable Standard*, 33 FAM. L. Q. 815 (1999) ; *Id.*, *From Property to Personhood: a Child Centered Perspective on Parents' Rights*, 5 Geo Journal of Fighting Poverty 313 (1998).

⁸⁸ J. EEKELAAR, FAMILY LAW AND PERSONAL LIFE 156 (Oxford University Press 2007).

⁸⁹ Legal history shows that children used to be treated as the private property of their parents or their legal guardians. In this historical perspective an emphasis on the single unrepeatable individuality of each child is necessary.

Children live and flourish in the context of a healthy relationship with adults. Outside a relational context they cannot develop, they can hardly survive. Given that children's lives are entrenched in a web of relationships, a certain caution is called for when expounding new "autonomy rights" for them: paradoxically, some of the new children's rights might be "wrong rights"⁹⁰.

First, individual rights have an adversarial structure: they are claims⁹¹ and therefore claims tend to break relationships or to impair them. The difficulty of putting rights in the hands of children is that those against whom rights are to be claimed and exercised are adults upon whom children depend. Rights are tools necessary to handle problematic and pathological situations: it is true that oftentimes rights do not initiate conflicts but they just translate them into legal terms⁹². However, rights can amplify existing conflicts or encourage antagonistic attitudes that may have disruptive effects on children.

Second, childrearing experience shows that independence, autonomy and liberty are not the result of an early separation, but the fruit of healthy relationship with adults⁹³. Connections with others are preconditions for, rather than obstacles to, a child's autonomy and individuality⁹⁴

Moreover, it is usually assumed that the emphasis on children's autonomy can bring a breath of fresh air following the old-fashioned paternalistic attitudes towards children, attitudes that depress children's individuality and human potential under a protectionist vision of their life. There is, of course, some truth in this. However, in order to claim rights against their parents, children have to trust other adults, so much so that the move from parent paternalism to children's autonomy may become illusory and may in fact turn into a move from parents' paternalism to state paternalism⁹⁵. What is meant to be a process of emancipation might result in a road from one dependency to another – not necessarily better one. In most cases the question is *on whom* will children depend, not *whether* they should be dependent or autonomous.

⁹⁰ E. H. WOLGAST, *THE GRAMMAR OF JUSTICE*, *op. cit.*, *supra* note 12, at 28 ss. considers the rights of patients and the rights of children as clear examples of wrong rights.

⁹¹ Even when they claim "to", this often implies an "against". On this structure of rights see JOEL FEINBERG, *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY* 148, 155 (Princeton University Press 1980): "All rights seem to merge entitlements to do, have, omit, or be something with claims against others to act or refrain from acting in certain ways".

⁹² Martha L. Minow, *Interpreting Rights: an Essay for Robert Cove*, 96 *YALE L. J.* 1860, at 1871 (1987), ..

⁹³ Even children's right supporters recognize the precondition of relationship for the development of the self and that the core of the self develops relationally. *Id.*, at 1882-84

⁹⁴ Onora O'Neill, *Children's Rights and Children Lives*, 98 *Ethics* 445, 462 (1988).

⁹⁵ The point is clearly made by Bruce C. Hafen and Jonathan O. Hafen, *Abandoning Children to Their Autonomy*, *op. cit.*, *supra* note 80, at 483 ss.

Finally, the rights language is not able to capture things that are vital for children: kindness, love, care, attention, involvement, good feeling are goods that cannot be dispensed through rights. “If there is an important right for children it should be the rights to be given good parental care, but it is the parents that are responsible for giving such care. The alternative of giving children a right that they may claim is no substitute”⁹⁶. There is no individual right that can secure these goods. “Cold, distant or fanatical parents and teachers, even if they violate no rights, deny the children “the genial play of life”: they can wither children’s lives”⁹⁷. What is essential for children’s well-being is not a matter of right. It is no mere accident that one of the main concerns of the British proposal⁹⁸ discussed above is to promote children’s well being, a task which is out of the reach of the rights language.

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

8. At the crossroads between justice and power: for a tempered approach to human rights.

Who is the human of new human rights?

During this journey over the cornerstones of the “new rights” we have met several rights-holders, have got acquainted with some of their characters and noticed a recurrent flaw: most cases sketch partial, although important, aspects of the human condition while missing the

⁹⁶ E. H. WOLGAST, *THE GRAMMAR OF JUSTICE*, *op. cit.*, *supra* note 12

⁹⁷ Onora O’Neill, *Children’s Rights and Children Lives*, *op. cit.*, *supra* note 96, at 451

⁹⁸ Apparently the problem is disputed, being the Parliament more inclined to endorse the UN Convention on the rights of children approach and the Government more reluctant. For the Parliament’s position see Joint Committee on Human Rights, Twenty-fifth Report of 2008-09, Children’s Rights, available at <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/157/157.pdf> and the Government’s Responses available at <http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/65/65.pdf>

whole. Most privacy rights spotlight freedom of choice and autonomy while leaving obscured other dimensions of the human experience. The result is oftentimes a reductive legal image of the human subject, where the rights holder appears somehow artificial, misrepresented.

At this stage, the inquiry prompts us to look for the reasons of this unfortunate side-effect of new rights. I would suggest that an endemic ambivalence affects the contemporary expansive practice of human rights, a practice which is at one time elicited by the never-ending struggle for justice and exposed to be hijacked by political powers and interests groups. What is more attractive in the idea of human rights is the fact that they possess at the same time a strong moral appeal and an unquestionable political strength⁹⁹. Human rights are located at a crossroads between justice and power and this is their seductive side. This fortunate mix of qualities not only makes rights a necessary component of all polities - national, local, supernational, international -, but also accounts for their unrestrained expansion. Rights proliferate as a tentative reply to the aspiration to justice; rights proliferate also because they have proved to be powerful political “trumps”. Rights growth is a tentative reply to the unquenchable thirst for justice, at the same time being a convenient easy-pass amidst the convoluted and time-consuming paths of politics.

Along the twentieth century human rights have been considered as being “other” from politics, they have been a counter balancing power, based on a duality¹⁰⁰ between rights and politics. In other words, just because of their “otherness” they enjoyed the authority of critical standards or benchmark against which the political action could be directed and corrected.

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

⁹⁹ AMARTYA SEN, ELEMENTS OF A THEORY OF HUMAN RIGHTS, *op. cit.*, *supra* note 64, at 315 – 353.

¹⁰⁰ In this respect, human rights have been a second track, distinguished from the legislative one, and they may be intended as an important component of the rule of law, as understood by G. Palombella, *The Rule of Law Beyond the State: Failures, promises, and theory*, in 7 I-CON 442-467 (2009),..

However, if we move from the ideal of rights to the *practice* of rights¹⁰¹, the more such practices have developed, the more the distinction between human rights and political power has blurred. And although human rights activism still likes to portray itself as a kind of anti-politics, as a matter of fact it shows all the characters of a fully fledged political action. Human rights practice implies taking sides and typically stresses the interests of some groups, dropping the case for other interests and other groups. Proliferation of rights entails a move from rights as counter-power to rights as power¹⁰²: “far from being weapons for the critique of power human rights have now become part of the arsenal of power”¹⁰³.

What renders the history of human rights all the more puzzling is that even in present practice, human rights are not losing their moral appeal. The *practice* of human rights is taking the road of power and politics, while the *ideal* of human rights retains its moral flavor. Therefore rights are still regarded as the most advanced and sophisticated instrument to pursue the ideal of justice; but in as much as they are captured by politics, we realize that even rights may be corrupted and they may even be wrong. They still pretend to be above politics and power, but in reality it is not always the case. To be more precise: the more they multiply the greater the risk that rights disguise sheer interests, becoming grounded on a partial representation of a fabricated human person.

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

Since rights are meant to and actually do serve the purpose of injustice, the most common slippage is to imply that the greater the emphasis on rights, the closer the destination of justice. Rights without limitations and the multiplication of rights are the fruits of this slippage. Absoluteness and multiplication of rights are the two sides of the same coin, byproducts of the

¹⁰¹ CHARLES R. BEITZ, *THE IDEA OF HUMAN RIGHTS op. cit., supra* note 13, at 9 and 102, speaks of rights as “an emergent practice in the international arena”.

¹⁰² *See supra* par. 2. MICHAEL IGNIATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* 9 (Princeton University Press 2001); PHILIP ALLOTT, *EUNOMIA: A NEW ORDER FOR A NEW WORLD* 287 (Oxford University Press 2001), stressing that human rights after 1945 quickly became “perverted” and “degraded”, a “plaything” for governments, diplomats, bureaucracies and lawyers.

¹⁰³ NICOLAS GUILHOT, *THE DEMOCRACY MAKERS: HUMAN RIGHTS AND INTERNATIONAL ORDER* 8 (Columbia University Press, 2005).

same move towards a more “perfect” justice. Absolute and countless rights are indeed victims of their own success: since rights have been effective tools against some major injustices caused by uncontrolled powers, they tend to be reproduced, in order to achieve a better justice. But adding more rights simply does not do the trick. Unfortunately, rights that are unlimited in content and in number are exposed to a utopian degeneration that disconnects rights from the human condition. The result is that they drive fast and without boundaries, but away from their destination.

There is a paradox in human justice, that is easily forgotten: *summus jus, summa injuria*. The ancient wisdom of the Roman law tradition reminds us that that every human journey towards the ideal of justice is bound to end up in a wreck if it does not take into consideration the limits of human means, like in Dante’s Ulysses.

As far as absolute rights are concerned, the point has already been made by Mary Ann Glendon some years ago: “Absoluteness is an illusion and hardly a harmless one. When we assert our rights to life, liberty and property, we are expressing the reasonable hope that such things can be made more secure by law and politics. When we assert these rights in an absolute form, however, we are expressing infinite and impossible desires – to be completely free, to possess things totally, to be captain of our fate, and masters of our souls. There is a pathos as well as a bravado in these attempts to deny the fragility and the contingency of human existence, personal freedom, and the possession of worldly goods [...] Thus, for example, those who contest the legitimacy of mandatory automobile seat-belt or motorcycle helmet law frequently say: “It’s my body and I have the rights to do as I please with it”. However, the paradox of human existence is that “the independent individualistic, helmetless and free on the open road, becomes the most dependent of individuals in the spinal injury ward”¹⁰⁴. Here there is something that logic cannot explain, but human experience can: “*un droit porte’ trop loin devient une injustice*” (Voltaire).

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

¹⁰⁴ MARY A. GLENDON, RIGHTS TALK, *op. cit.*, *supra* note 6, at 45-46.

There are some classical arguments against the multiplication of rights that may be useful to recall, the most relevant of which is that all new rights have to interact with the other “old rights”, which in their turn may find themselves diminished in the balancing assessment of the competing interests: if we insist too much on the right to privacy, for example, freedom of speech may be undermined.

Moreover, as history has proved, the increase in the number of rights has multiplied also the legal disputes and the interpersonal conflicts. Overtime people become more litigious in their personal interaction, making human relationships more confrontational. At the institutional level, new rights overburden the legal system and clog the courts, resulting in intolerable delays before a judicial decision is issued and fundamental rights restored. As the European experience demonstrates, excessive length in judicial procedures may itself become a violation of human rights¹⁰⁵. Delayed justice in most cases is denied justice. There is something ironic in the case-law of the European Court of Human Rights which on the one hand rightly condemns the member states for the excessive length of processes and on the other hand has about 120,000 cases pending before it¹⁰⁶.

Furthermore, the proliferation results in a rights’ congestion that inevitably invites public institutions to cherry-pick, opening the door for an institutional abuse of rights¹⁰⁷. Legal, financial and institutional resources will always be limited, so that promising people a never-ending list of rights is selling illusions: some of them will be prioritized over others, and the generosity of the list of rights prompts expectations that are impossible to be maintained. If resources are devoted to security, they are inevitably distracted from education or health care or administration of justice, just to give an example, and this is true not only for social and economic rights, but for all sorts of rights: all rights cost¹⁰⁸.

¹⁰⁵ A great number of decisions of the European Court of Human Rights are based on article 6 of the European Convention of Human Rights and concern the excessive length of process. Many member states suffer from this endemic problem, especially Italy. The irony here is that the process before the European Court of Human Rights is further and further delayed, as the huge number of complaints brought before the Court by individuals surges.

¹⁰⁶ There were 199,300 pending cases before the European Court of Human Rights in 2009 and in 2010 that number is increasing. See statistics available at <http://www.echr.coe.int/NR/rdonlyres/C28DF50A-BDB7-4DB7-867F-1A0B0512FC19/0/Statistics2009.pdf>

¹⁰⁷ Aandras Sajo, *Abuse of Fundamental Rights or the Difficulties of Purosiveness*, in ABUSE: THE DARK SIDE OF FUNDAMNETAL RIGHTS 29, 49 (Andras Sajo ed., 2006). ,

¹⁰⁸ STEPHEN HOLMES & CASS SUNSTEIN, *THE COST OF RIGHTS* (WW Norton 1999). A veritable “human rights market” is emerging and is being explored, for example by UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* 216ff, 276ff (Oxford University Press, 3rd ed. 2008).

Finally there is a more substantive reason why the multiplication of rights is an illusionary path, a *trump l'oeil*. A right always depicts the individual under a specific angle and insists on some limited, if important, features. The (wo)man of rights is always described as a potential victim or a potential claimant. By definition rights are not capable of encompassing all the constituencies of human experience. Needs and desires, relationships and responsibilities, virtues and care, are all elements bound to fall outside the scope of the rights approach. There is an inescapable blind-spot on the rights' portrait of the human person, as has been visible in the privacy cases. Moreover as a matter of fact, many of the new rights result from a process of fragmentation. In particular, all the rights deriving from the principle of non-discrimination have in common this character. In Europe, for example, a great emphasis on the principle of non-discrimination has brought about an increasing number of special rights, starting with the rights of women, the rights of LGTB persons, the rights of Roma, the rights of the elderly, the rights of migrant workers, the rights of children, etc. The result is a scattered image of the human person, portrayed on the basis of a single, although relevant, feature of her identity. Multiplying rights does not serve the purpose of completing the image. A multiplication of partialities does not make the whole. In the end, the human person is trapped into partial aspects of her human experience and the whole complexity of human personality is overshadowed. In the long term, this strategy falls short of the goal of enhancing freedom and it might even turn into a different and more insidious form of oppression. Clearly, the new rights cannot support a comprehensive and integral development of the human potential, if the image of the human person on which they are based is preposterous and distorted.

“Rights have their place, but their place is limited”¹⁰⁹.

To some, this statement may sound trivial and commonplace - a sort of inconsequential platitude. In the age of the proliferation of rights, however, it is no trivial matter. There is a kind of hubris sneaking into the limitless practice of human rights that renders this proposition all the more relevant. It urges for a *tempered approach to human rights*, based on the assumption that while human rights can be helpful *tools* to redress *injustice* and *facilitators*¹¹⁰ to improve people's conditions of life, they are in no way meant to achieve a *perfect justice*. In the restless

¹⁰⁹ E. H. WOLGAST, *THE GRAMMAR OF JUSTICE*, *op. cit.*, *supra* note 12, at 49.

¹¹⁰ Jan Klabbers, *Glorified Esperanto? Rethinking Human Rights*, in *Finnish Yearbook of International Law* 63 – 77 (2002), *Id.*, *Doing the Right Thing? Foreign Tort Law and Human Rights*, in *TORTURE AS TORT*, HART PUBLIS 553, 564 (C. Scott ed., 2001)

and never-ending pursuit of justice, rights play an important role, but they necessarily leave a great deal out. Moreover, they have to leave a great deal out.

In his recent book on the *Idea of Justice*, Amartya Sen corrects the most popular idea of justice according to some insights of paramount importance. He suggests that the¹¹¹ human longing for justice should elicit an indefinite corrective to injustice rather than a zealous pursuit of a “perfect justice” definable on its own terms¹¹². To remedy injustice is not synonymous with attaining justice. History warns that any idea of justice that does not give due consideration to the limits of human possibilities generates yet greater injustices. The long-lasting wisdom of our civilization reminds us that justice is always exposed to distortion: *fiat iustitia et pereat mundus*, and indeed - Amartya Sen comments - “if the world perishes there would be nothing much to celebrate”. Similarly, there is nothing much to celebrate if “the multiplication of right-defining rules has not reduced, but in fact augmented the risks of violations” and “the denial of rights in the name of rights is spreading”¹¹³. In the age of rights in Western countries, the proliferation of rights and the overstatement of their importance is likely to be the new, seductive expression of the enduring paradox of human justice.

Rights, charters of rights and institutions of rights have their place. They assume an important place because, although we can spend a whole life without claiming a single right, we enjoy them every day. But still, their place is limited. This is not to diminish the role of rights, but on the contrary, to bestow on them the highest value. In a way, a tempered approach to human rights is a realistic approach ever aware that justice is an overarching goal that is always looming and never achieved. Paradoxical as it might be, without a perspective of a beyond, justice is impossible.

¹¹¹ AMARTYA SEN, *THE IDEA OF JUSTICE*, *op. cit. supra* note 64, at IX.

¹¹² A similar approach can be studied in E. H. WOLGAST, *THE GRAMMAR OF JUSTICE*, *op. cit., supra* note 12, at 146. The same preference for an idea of contrasting injustice rather than achieving perfect justice, with a specific reference to rights is found in ALAN M. DERSHOWITZ, *RIGHTS FROM WRONGS* 81-96, 160 (Basic Books 2004).

¹¹³ Gianluigi Palombella, *The abuse of rights and the rule of law*, in *ABUSE: THE DARK SIDE OF FUNDAMENTAL RIGHTS* 5; *op. cit., supra* note 109. In the same direction Lester J. Mazor, *Too many, Too much, Too strong: is there a need for a doctrine of abuse of political civil rights*, in *Id.*, 294-308, at 308 suggesting that even rights may be sources of abuses.