QUESTION CONCERNING THE UNIVERSALITY OF HUMAN RIGHTS: A COMPARATIVE EXAMINATION OF THE WORKS OF DONNELLY, NINO, AND FERRY AND RENAUT

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ABSTRACT

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From the 18th century when the idea of human rights has been first articulated in the history of humankind to our age, the adherents of this idea have generally asserted that these rights have a universal, thus an ahistorical and transcultural, character in their scope of validity. However, even a superficial review of the recent human rights literature is sufficient to give one the insight that the question of the ground of this universality is the most crucial issue in the current theoretical debates on human rights. Taking granted that 'a conception of human rights without universalism' is as adverse as to eclipse the very meaning of the idea of human rights itself, this thesis endeavours to develop an understanding of a theoretical-philosophical ground upon which the universality of human rights is both conceivable and defensible. This endeavour is carried out within the framework of a textual and comparative examination of three pro-universalist theoretical projects developed within the contemporary human rights literature.

These projects are Jack Donnelly's liberal-conventional approach, Carlos Santiago Nino's Kantian Moral Constructivism, and Luc Ferry & Alain Renaut's Critical Humanism. As to Donnelly's approach which is examined first, I argue that in so far as it associates the moral grounds of human rights to Western liberal tradition and relies on an implicit moral relativism, his approach is caught with certain implicit controversies in the grounding of the universality of human rights. In line with this, the remaining chapters of the thesis respectively examine Nino's meta-ethical theory and Ferry & Renaut's political philosophy, which present two contemporary versions of Kantian approach bringing out a strong alternative to the inconsistencies and vulnerabilities embedded in the liberal-conventional understanding of the universality of human rights. In the light of a reading of Nino's and Ferry and Renaut's theoretical projects as mutual complementaries, the conclusive argument of the thesis is: the universal validity of human rights is conceivable and defensible on the Kantian moral ground of the idea of autonomous human moral subject and the ideal of autonomy.

Keywords: Right(s), Human Rights, Modern Subjective Rights, Natural Right, Universalism vs Relativism, Dogmatism vs Scepticism, Kantian Moral Constructivism, Critical Humanism.

ÖZ

İNSAN HAKLARININ EVRENSELLİĞİ SORUNU: DONNELLY, NİNO, VE FERRY VE RENAUT'UN ÇALIŞMALARI ÜZERİNE BİR KARŞILAŞTIRMALI İNCELEME

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İnsan haklarının tarih sahnesine çıktığı 18.yy'dan içinde bulunduğumuz döneme değin, insan hakları fikrinin yandaşları genellikle bu hakların geçerliliğinin evrensel dolayısıyla da tarihüstü ve kültürüstü niteliği haiz olduğunu ileri sürmüşlerdir. Diğer yandan, günümüz insan hakları literatürünün yüzeysel bir taranması bile, insan haklarının evrenselliğinin temellendirilmesi sorununun kuramsal tartışmaların merkezine oturtulduğunu kavramak açısından yeterlidir. Bu tez, evrensellik iddiasından soyutlanmış bir insan hakları anlayışının insan hakları fikrinin kendisini dahi anlamsızlaştırabilecek ölçüde sorunlu olduğu düşüncesinden yola çıkarak, insan haklarının evrensel geçerliliğine ilişkin iddiayı anlaşılır ve savunulabilir kılacak kuramsal-felsefi bir temele ilişkin bir arayıştan ibarettir. Bu arayış, günümüz insan hakları literatürü içerisinde geliştirilen evrenselcilik yanlısı üç çağdaş kuramsal projenin karşılaştırmalı olarak metinsel incelemesi çerçevesinde yürütülmektedir. Tez boyunca incelenen bu üç çağdaş

kuramsal proje Jack Donnelly'nin liberal-konvansiyonel yaklaşımı, Carlos Santiago Nino'nun Kantçı Ahlaki Konstrüktivizmi ve Luc Ferry ve Alain Renaut'un Eleştirel Humanizmidir. İlk olarak incelenen Donnelly'in kuramsal çabasına ilişkin olarak, bu tür bir yaklaşımın insan haklarının ahlaki temellerini Batılı-liberal geleneğe bağladığı ve örtük bir ahlaki görececiliğe yaslandığı ölçüde, insan haklarının evrensel geçerliliğini temellendirmek açısından önemli sorunlar barındırdığı öne sürülmüştür. Bu iddiadan hareketle, çalışmanın sonraki bölümlerinde liberal-konvansiyonel yaklaşımın tutarsızlıklarına ve zayıflıklarına karşı güçlü bir alternatif ortaya koyduğu düşünülen Kantçı yaklaşımın iki ayrı çağdaş versiyonu olarak Nino'un meta-etik kuramı ve Ferry ve Alain Renaut'un Renaut'un politik felsefesi sırasıyla incelenmiştir. Nino'nun ve Ferry ve Renaut'un birbirini tamamladığı düşünülen kuramsal projeleri ışığında, tez şu temel vargıyı ortaya koymaktadır: insan haklarının evrensel geçerliliği iddiası, Kantçı özerk ahlaki insan özne fikri ve özerklik ideali temelinde anlaşılabilir ve savunulabilir.

Anahtar Kelimeler: Hak(lar), İnsan Hakları, Modern Öznel Haklar, Doğal Hak, Evrenselcilik-Görecelik karşıtlığı, Dogmatizm-Şüphecilik karşıtlığı, Kantçı Ahlaki Konstrüktivizm, Eleştirel Humanism.

To My Dear Parents

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CHAPTER ONE

INTRODUCTION

In our times, it seems that the idea of human rights has acquired, at least *de jure*, a worldwide acceptance. The fact that 1948 Universal Declaration of Human Rights has been recognized by almost all nation states of the world signifies that an "international normative consensus on human rights" has been reached in our age. This fact may be conceived as one of the greatest achievements in the history of humankind, and read as a sign of progress in this history. Hence, looking back retrospectively in the light of the idea of human rights, it may be argued that our age stimulates "an optimism about the future of humanity". Yet, it should also be maintained that this is only one of the janus-faces of the same age which is also unable to close the door to a deep feeling of "pessimism about the present". The latter is due to the fact that the most of the members of humanity are still far from enjoying the political, social and economic conditions for "a life in accordance with human dignity" which universal human rights aim to achieve for every member of humanity. It has been commonly observed that human rights violations arising out of directly infringing actions or omissions are still a reality in our age. The unpalatable phenomena of human rights violations disclose that there remains much to do in our age for both sustaining the universal respect for the idea of human rights and actualizing the ideal envisioned by this idea. In other words, these unpalatable phenomena, indicating the incompleteness of the attained level of human progress,

should be considered as a calling for human activity at the practical and theoretical levels.

Motivated with such an insight, this thesis aims at a modest theoretical endeavour concerning today's one of the major debates in human rights theory, namely, the debate on the universality of human rights. To explicate initially, this thesis consists in a quest for an answer to the following question: on what theoretical ground are human rights conceivable and defensible as *universal* rights?. Now, let me explain briefly why *the universality* of human rights has been deemed so important that the whole endeavour of this thesis is devoted to find a theoretical ground for it.

In the monumental texts such as 1789 French Declaration of the Rights of Man and Citizen and 1948 Universal Declaration of Human Rights, human rights are inscribed as *universal rights.* For instance, Article I of Declaration of 1789 states: "*men* are born and remain free and equal in rights": thus, not only Frenchman, but every man is the subject of the recognized (or proclaimed) rights. Similarly, Article I of the Declaration of 1948 decrees: "*all human beings* are born free and equal in dignity and rights". Then, it follows in Article II: "everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Hence, in the letter and spirit of these texts, the universality is the necessary logical conclusion of the premise that human rights are the rights which human beings are entitled only by the virtue of being human.

On the other hand, even a superficial review of the current literature on human rights is sufficient to give one the insight that the question of the universality is the

most crucial issue in the theoretical debates[1]. In fact, as it is generally known, both the idea of human rights, in general, and the assertion that these rights are universal in their validity and scope, in particular, have been exposed to serious critiques from the very beginning when the idea of universal human rights was declared in the end of the 18th century for the first time[2]. Yet, what distinguishes the current intellectual climate is the fact that the (not all but many) adherents of the idea of human rights are reluctant to defend the universality of them[3]. While the authors of the 1789 Declaration referred to "simple and incontestable principles" as the universal ground of the rights of man and citizen; such a universalism, which is now considered to have originated from the self-confident foundationalism of the Enlightenment Rationalism, seems to be indefensible and outmoded in our age (Mendus, 1995: 12-24). It is generally emphasized in the current intellectual discourse that a universalist approach to human rights is radically at variance with the truth at least in two aspects: (I) Both human rights and the principles underlying them are historically specific in that they pertain to a specific period in the history of humankind; and, this historicality evidently contradicts with "transhistoricality" implied in the notion of universality. (II) These rights and their grounding principles are also socially (culturally) specific in that they have not only been articulated in the modern-western

[1] Among many others, see, Ken Booth, 1999; Otfried Höffe, 1999; Osvaldo Guariglia, 1999; Adamantia Pollis, 1999; A. Pollis, 2000; Mary Midgley, 1999; Micheal Freeman, 1994; Bhikhu Parekh, 1999; Alison Renteln, 1998; John J. Tilley, 1998; John Charvet, 1998; Micheal J. Perry, 1997; Jerome J. Shestack, 1998; John O' Manique, 1990; Pheng Cheah, 1997; David Campbell, 1998; and, Simon Chesterman, 1998.

[2] For a general overview of the philosophical history of the idea of human rights, see Kenneth Minogue, 1990: pp. 3-17; and Walter Laqueur & Barry Rubin, 1990: pp.58-97. For the most influential critiques of the idea of universal human rights in the history of political philosophy, see J. Waldron's *Nonsense upon Stilts* (Waldron, 1987) where the critiques of the rights of man by Burke, Bentham, and Marx are reproduced with a commentary.

[3] For instance, see Richard Rorty, 1993; Susan Mendus, 1995; Neil Stammers, 1995 and 1999; Chris Brown, 1993; David Chambell, 1998.

societies but also reflect the prominent values of these societies. Furthermore, by proceeding from "these evident truths", many authors converge on making the point that the universalistic outlook, which elevates the particular features of modern western societies to the status of the universals, would not be desirable after all. For them, rather than serving for the ideal of an emancipated humanity, a *universalistic* idea of human rights may probably serve to veil the western domination over the rest of humanity.

Hence, in our age, many proponents of the idea and practice of human rights agree with their opponents in that human rights are not founded on universally valid principles but derive from historically contingent and socially specific values and beliefs. In this vein, the authors such as Richard Rorty argue that we (i.e., the proponents of the idea of human rights) need not the universal foundations which are neither possible nor desirable but our own passions and the courage of our convictions (Rorty, 1993). I will not present a fully-fledged examination and discussion of such "conceptions of human rights without universalism" proposed by Rorty and many other authors in the recent literature. Instead, I will shortly mention two basic predicaments of these non-universalist or anti-universalist approaches to human rights.

(I) From the angle they provide, human rights become vulnerable to denial. As it is clear with Rorty, these approaches are established on the basic premise that all we have are our contingent and particularistic convictions and prejudices as the mere grounds on the basis of which we *can* and *should* act. What is crucial here is that this is also the major premise grounding the cultural relativist positions which oppose the idea and practice of human rights. Hence, the very way of argumentation which the

authors such as Rorty provides for human rights is also a way of argumentation for the denial of these rights. It is true that a historical and cultural validity may be assigned to human rights on the basis of the foregoing premise; but it is also true that the same premise may be used to assign a cultural and intellectual support to the beliefs and practices which radically contradict with human rights. In the absence of the universals, Rorty's motto decreeing "let's have the courage of our own convictions and fight for our simple beliefs" becomes appealing for the "counter-camp" which has its own "reservations" and "sensitivity" with respect to human rights. This is why Micheal Freeman wisely remarks that: "faced with oppressive governments and their cultural relativist apologists, the doctrine that human rights is a precarious historical contingency is a gift to tyrants" (Freeman, 1994: 497).

(II) While these non-universalist approaches criticize the universalistic vision of human rights, as it may be misused to veil western dominance over the rest of humanity; it may be argued that the particularistic vision of human rights provided by them are much more vulnerable to abuses. Because, associating human rights with the historically contingent and culturally specific beliefs and values of a particular community (i.e. "western community") inevitably leads to, at least, privileging that community in the human rights discourse. The result is the foreclosure of communication among human communities. In such a situation, the right to speak of, and act for human rights is titled to "those who own the values and beliefs underlying these rights"; while an *aphonia* (loss of voice) persists on the part of those who are assumed to be alien to human rights. To demonstrate how such particularistic visions of human rights are vulnerable to abuses, it is sufficient to recall Rorty's aforementioned motto. This motto suggests that, when we (i.e., the proponents of

human rights) feel that our beliefs and values are being damaged, we should take over the courage of fighting for our own convictions against those who cause the damage. The crucial problem with such an adherence to human rights is that the struggle for human rights is not "our fight" against "others" and their convictions. In so far as these rights are *human* rights, the struggle for them cannot be considered as a *fight* within humanity. In fact, this is a struggle (which is for humanity, of humanity, and by humanity) to replace the forms of oppressions, which humanity suffers in its segregated existence, with the conditions of a free and equal existence for every member of humanity. Such a struggle cannot be pursued by the courage of fighting for our convictions, but only by the use of forceful argumentation and communication for overcoming the age-old polarizations originating from the convictions of "us" and "them".

Hence, taking granted the implausibility of "a conception of human rights without universalism"; I aim at presenting a quest for a theoretical ground on which the universality of human rights is conceivable and defensible. My quest will consist in an interpretation of three pro-universalist endeavours in the contemporary human rights literature. I will focus on the extent to which, we find in them, an internally consistent and defensible ground for the idea of *universal* human rights in our age.

The chapter II will be devoted to Jack Donnelly's endeavour defending a liberal-conventional approach to the universality of human rights in the face of "strong cultural relativism". Donnelly's liberal-conventional approach will be problematized in that, while it argues for a moral universality of human rights, it does not account for "what is moral" in universalistic terms. I will argue that Donnelly's approach is

far from providing an internally consistent and defensible ground for the universality of human rights because a relativistic understanding of morality underlies it.

In line with this, I will turn, in the chapter III, to an alternative contemporary approach provided by Carlos Santiago Nino's Kantian Moral Constructivism. Nino's theoretical project consists in the attempt to demonstrate the thesis that human rights as universally valid rights are explainable and justifiable on the basis of certain transcendental aspects which moral discourse inheres. How and to what extent Nino succeeds in demonstrating this thesis will be elaborated and discussed in this chapter.

Then, in the chapter IV, I will consider another Kantian endeavour which is presented by Luc Ferry & Alain Renaut's Critical Humanism. I will focus on the authors' defense of the Idea of autonomous human subject as the philosophical ground of universal human rights, in the face of the anti-modern-humanist charges brought about by the influential figures of the 20th century political/juridical philosophy.

The chapter V will be the final one where I will consider whether or not the question "on what ground the universality of human rights is conceivable and defensible?" has found an answer in the light of Nino's meta-ethical theory and Ferry & Renaut's critical humanist political philosophy. My conclusion will be that, contrary to Donnelly's liberal-conventional defense, these two endeavours meet the ends of this thesis's major question, by demonstrating that the ideal (moral) universality of human rights are explicable and defensible on the Kantian ground of the idea of autonomy.

CHAPTER TWO

A LIBERAL/CONVENTIONAL DEFENSE OF THE UNIVERSAL HUMAN RIGHTS: DONNELLY'S CONSTRUCTIVIST THEORY

In his *Universal Human Rights In Theory and Practice*, Jack Donnelly develops a constructivist theory of human rights which aims to explicate and defend an account of human rights as universal rights. The label of "constructivism" defining his theory indicates that both human rights and human nature grounding them are human constructions. More exactly, Donnelly's constructivist way of theorizing is based on the following premises: (i) human rights as a form of social practices arise out of human actions; and (ii) moral human nature (which grounds human rights) is continuously reshaped (reconstructed) by these social practices. In his book, Donnelly pursues two different lines of argumentation considering the question of the universality of human rights. First, he presents a conceptual account of the way human rights function in our language and political practices. This is a descriptive (analytical) method which discloses how the idea and practice of human rights appeal to the universal moral rules derived from a vision of moral human nature. In the second line of argumentation, he engages in a normative defense of human rights in the face of what he calls "strong cultural relativism". In this defense, he further elaborates the theoretical implications of his descriptive account of human rights, and he accepts the historically specific and contingent nature of human rights. Yet, against "strong cultural relativism", Donnelly aims to prove that the historical particularity of human rights is only apparently contradictory to their universal moral

characteristics. Hence, the central motivation of Donnelly's overall theoretical attempt is to demonstrate that the moral universality of human rights is not incompatible with their historical particularity.

In the first part of this chapter, Donnelly's descriptive (analytical) theory will be examined. It will be argued that by referring to a moral (ideal) human nature, Donnelly's analytical account discloses a theoretical ground which might justify the universality of human rights. Yet, it will be maintained that because Donnelly is reluctant to substantiate a defense of that moral human nature as a transhistorical and transcultural one, his thesis of the moral universality of human rights remains unfounded and circular. Afterwards, in the second part, I will examine Donnelly's normative defense of human rights in order to disclose the degree of concession he has to give to cultural relativism, by refusing to substantiate a theory of universal moral human nature. I will claim that his normative defense of human rights as the legacy of a particular tradition (i.e., "western tradition") whose normative propositions cannot be directly defended in the face of external criticisms of the competing traditions, undermines the idea of moral universality of human rights. As a result, it will be concluded that his overall theory culminates into an inconsistent position with regard to the question of the universality of human rights, oscillating between universalist and cultural relativist positions.

II.1. A Descriptive Theory of Universal Human Rights

II.1.1. The Concepts of Rights and Human Rights

Donnelly's conceptual analysis begins with the component of "right" in the phrase of human rights. The first step to understand what human rights are, he argues, is to

distinguish two meanings of the word of right[4]: morally and politically, the word signifies both "rectitude" and "entitlement" (Donnelly,1989: 9). The first sense of the word refers to what is meant when people speaks of something or some action "*being* right". In this sense, claiming that something is right or it is right thing to do is to claim that it matches (accords with) a moral "standard of rectitude" which prescribes an obligation or duty for an agent situated in certain circumstances. Thus, although the standard of rectitude prescribes for an agent certain acts with respect to her/his relations with other agents, or the outer world in general, this first meaning of right does not *directly* refer to a relation between two or more actors. More exactly, it does not initially presume a relation of correspondance between two agents, ie., between a duty-bearer and a right-holder. For instance, it may be said that it is *righteous* for a wo/man who has an abundance of food to share with the persons who starve. Hence, although this standard of rectitude places that wo/man under the obligation to share, it does not give a *right* to famine victims, in the sense we understand human rights and, more generally, modern rights. In this case, the actualization of righteous action depends on the potential benefactor's (duty-bearer's) obedience to the appealing standard of rectitude.

On the other hand, second meaning of right as "entitlement" refers to some*one* *having* a right or right*s* in plural. Here, "rights are *titles* that ground claims of a special force" and, "to have a right to X is to be specially entitled to have and enjoy X"(1989:9). This meaning of right(s) defines initially a relation between right-holder and duty-bearer, in which the former directly controls the relationship. For instance, let's assume that one's sharing food with the famine victims is not only a righteous

[4] It should be noticed that equivalents of the English word of "right" in many other contemporary languages display the same dual senses. It is also true for the Turkish equivalent word: *hak*.

action, but also that human beings *have the right* to substantial nourishment. In such a context, if someone suffers from famine, which means that s/he does not *enjoy* her/his right, and that the duty-beares have failed to respect that right, the famine victim as the right-holder can *exercise* (*claim*) her/his right. This right-claim activates (must activate) the duty-beares' obligation to respect the right at stake. In the words of Dworkin, the right-claim functions in a way that "trumps" all other considerations regarding the duty-bearers' action (1989:10). That is to say, while the first meaning of right does only permit, on the part of right-holders, to call attention to a standard of rectitude, and to *appeal for* their actions' being in comformity with that standard; the second meaning of right gives to the right-claims of "victims as the right-holders" a power of *reminder* that "makes things happen", which, in turn, results (must result) in the right-holder's enjoyment of the object of her/his right.

Donnelly underlines two further points with regard to the meaning of "right as entitlement". First, it is evident that having a right, or being entitled to a right, requires a specific context of social practices, which Donnelly calls "a field of rule-governed interactions centered on the right-holder"(1989:10). This context specifies persons as right-holders, and certain persons and institutions as duty-bearers. Hence, it may be deduced that rights are "social practices" within a certain social matrix of rules and regulations.

Second point is called "the possesion paradox". He argues that the language of rights "have their real place and value, only when their enjoyment is in some way insecure", and "rights are put to use, claimed, exercised only when they are threatened or denied" (1989:11). This is why he distinguishes three forms of interactions within social contexts where "rights as entitlements" are practiced: (i)

assertive exercise of a right; (ii) direct enjoyment of a right; and, (iii) objective enjoyment of a right. The last two forms define the interactions in which a right is enjoyed without recoursing to the exercise of (claim for) that right. In an objective enjoyment, a right is *spontaneously* enjoyed as the result of a mutual interaction accorded with rules and regulations of a social matrix based on rights; in an direct enjoyment, the right-holder enjoys a right as the result of duty-bearer's respectful behavior. It may be said that in an objective enjoyment, the society as a whole (or the state) takes immediately the responsibility for individuals' enjoyment of their rights, while in a direct enjoyment, the responsibility of the society as a whole is not an immediate one, so that the enjoyment of rights depends on individuals' mutual respect for their respective rights.

On the one hand, Donnelly maintains that in the social contexts based on rights, the objective enjoyment of all rights by all right-holders must be the norm; and, the assertive exercise and even the direct enjoyment must be the exception. On the other hand, he underlines that the assertive exercises of rights, which should be very exceptional in social contexts based on rights, are crucially important in that they mark the distinguishing feature or function of rights as *entitlements*. According to him, "unless one can claim something as a 'right (entitlement)'- that is, unless assertive exercises are ultimately available - one may *enjoy a benefit* but one does not *have a right*" (1989:11). Thus, only in the situations in which the enjoyment of a right is threatened and denied, the language of rights finds its proper and actual role with an assertive exercise of the right at stake. Then, "the possesion paradox" is: "'having' [i.e., being entitled to] and 'not having' [i.e., not enjoying] a right at the same time, the 'having' [i.e., being entitled] being particularly important precisely

when one *does not* 'have' [i.e., enjoy] it" (1989:11). That is to say, any right-claim consists of the paradoxial assertion that I do, in fact, have what I do not actually have. Accordingly, this paradoxial assertion calls for a *necessary enforcement* of the right that was not respected in the situation of right-claim. It also reveals the special status of rights as entitlements, which is absent in the simple enjoyment of a benefit or being the (right-less) beneficiary of someone else's obligation.

Donnelly's analysis of the general concept of rights is followed by a specification of rights as entitlements with respect to their different grounds. He makes the point that a social matrix of rules and regulations based on rights (i.e., in his own words, a field of rule-governed interactions centered on the right-holder), illustrates a complexity which allows and requires rights being claimed on different levels by resorting to different grounds. In line with this, he distinguishes two main groups of rights as "legal rights" and "moral rights". The first group consists of rights which are legally recognized and, therefore, find their expression in positive law as their *immediate* ground[5]. In accordance with the status of legal norm grounding them, legal rights are composed of various sub-groups that constitute a system of legal rights in which "rights as legal entitlements" are systematically enforced when they are threatened or denied. Therefore, a legal right may be claimed as a constitutional right, or an international legal right, or a right resting on an executive order, or on a court order, or on a contractual order. These sub-groups are different "levels" grounding legal right-claims.

[5] That the *immediate* ground of legal rights is positive law does not mean legal rights are irrelevant of moral considerations and justifications. Likewise, a specific right-claim may simultaneously recourse to legal ground and moral ground. (see, 1989:12).

Donnelly invokes the idea that a system of legal rights - more generally, that of rights - functions as "a ladder of rights". Usually, right-claims are made through resorting to the lowest step of the ladder, which provides systematic enforcement of the right at stake. For instance, someone who is faced with a racial discrimination on the job resorts to her/his employment contract if it covers a provision against racial discrimination. In the absence of such a provision in the employment contract, s/he can walk up the higher levels of the ladder of legal rights, like civil law or constitutional law or international legal law, which would probably include a provision providing a legal right to non-discrimination. Yet, here, the question is: what will happen in the absence of any such a legal provision in any level of legal system? In this case, according to Donnelly, the moral step of the ladder and, thus, human rights come to the scene.

He argues that human rights as "moral rights of the highest order" are directly recoursed "only where legal and other remedies seem unlikely to work or have already failed" (1989:13). The very special function of human rights is that "they [are to] be claimed precisely when they are unforceable by ordinary legal and political means" (1989:13). Hence, they are the peak of the ladder of rights, that is, the final resort in the realm of rights. "They are also likely to be a last resort in the sense that everything has been tried and failed, so one is left with nothing else" (1989:13).

Donnelly's foregoing remarks explicate the *legal unenforceability* of human rights. Yet, they also imply three closely related characteristics Donnelly attributed to them: *extralegality*, *self-liquidating nature*, and, *institutionality*. The fact that human rights are the rights which have not *yet* been provided with the systematical legal

enforcement by a legal norm of any level, and, that their ground cannot be found in positive law, points out their extralegality. The principal aim of human rights-claims as extralegal rights is "to challenge or change existing institutions, practices, or norms, especially legal institutions" (1989:14), when they fail to satisfy the conditions in which the objects of human rights are enjoyed. A human right-claim (exercise) means to demand that a right devoid of systematical enforcement is to be enforced (its enjoyment to be guaranteed), and, hence, that an existing social practice or institution should be changed. Recalling the French Declaration of the Rights of Man and Citizen and the American Declaration of Indepence, Donnelly maintains that this extralegality precisely made possible the sense of natural rights-claims which are antecedent to human rights.

The self-liquidating nature of human rights, which is, in fact, the reflection of the possession paradox of human rights, was already implicated in the foregoing arguments. If the ultimate aim of human rights is the establishment of new institutions where human rights will be systematically enforced as legal rights, the political success of a struggle for a specific human right means that human beings will continue to *have* that right, but there will be no need or occasion to *use* it as a *human* right. In such circumstances, the claims for the same entitlement will recourse to legal rights, and, no longer to human rights.

The last but not less important characteristics of human rights is their institutionality in moral and political senses. Politically, "human rights are a standard of political legitimacy; to the extent that goverments protect human rights, they and their practices are legitimate" (1989:14). To make his point, Donnelly recalls, among others, Locke's and Paine's social contract theories which conceived the criterion of

legitimacy as the sovereign's ensuring the legal enforcement of what was then called natural rights. Afterwards, he maintains that, in our contemporary world, human rights are equivalent of natural rights.

As is clear in the reference to Natural Rights theories, this political institutionality of human rights is closely related to, or indeed, requires an institutionality of rights in a moral sense. That is to say, political institutionalisation of human rights depends on their recognition as *moral entitlements* of human beings. This again makes the very crucial point that human rights are claimed to "make things happen": "[they] express not merely aspiration, suggestions, requests, or laudable ideas, but rights-based demands for social change"(1989:15). Human rights-claims are potent of "making things happen" because they are the expressions of moral entitlements which are at stake within the realm of social and political practices. As such, the institutional nature of human rights reveals that they cannot be reduced to their component of "the manifesto sense for political change". Because, in the social contexts where human rights are morally institutionalized, "to claim a human right is [considered] to claim a (human) right one already has"(1989:15).

At this point, to avoid misunderstanding, the following point should be made: in Donnelly's account, the moral and political institutionality is a characteristic of the language of human rights in general, not a characteristic pertinent to all particular human rights. In fact, the institutionalisation of all particular human rights is an ideal. Without this qualification, the institutional nature of human rights would appear contradictory to their extralegal nature which indicate that the principal aim of human rights is to challenge the existing institutions, practices, and norms. Hence, within social contexts based on human rights, the concept of moral rights as distinct

from positive (legal) rights would be meaningless, and human rights as moral rights of the highest order could not be claimed. Accordingly, Donnelly maintains:

> the familiar distinction between positive or legal rights and moral rights.....simply specifies two different sources of human rights and *two different sets of social institutions* within which they are emdedded. Neither is more truly or less truly a right than the other. Positive rights arise from legal enactment (or custom) and are backed by the force of law. Moral rights arise from *the principles of morality* and are backed by the force of morality[6] (1989:16).

Distinguishing moral institutionality from the set of institutions constituted by legal and customary practices, Donnelly's foregoing remarks indicate that, unlike the set of positive institutions, the moral institutionality is not a fully positivized one. Instead, it is always an institutionalising process directed by the regulative force of the moral principles. In this regulative process, whole set of positive institutions is continuously revised, reformed, or transformed, in the light of the moral principles. Therefore, the institutional nature of human rights means that overall institutional structure of a society is based on the principle that when a human right is claimed, this right claim has a directive force for changing that institutional structure which failed to enforce systematically the right at stake.

II.1.2.Human Nature as the "Directly Indefensible" Source of Human Rights: The Circularity in Donnelly's Descriptive Theory

Having clarified the status of human rights as "moral rights of highest order", Donnelly should response to the basic question concerning the source of these moral rights. He replies the immediate question that "from where we get human rights as moral rights?" in a classical way well known from Natural Rights Doctrines: the proposition that human rights are the rights one has simply because one is a human

[6] Italics are mine.

being, already points out their source as "humanity, human nature, being a person or human being" (1989:16). Yet, as he notices, this response should also tackle with a second (derivative) question: "how does human nature - how can being a human being - give rise to moral rights?". In answering the latter, Donnelly diverges from the Natural Rights Doctrines and follows an original path which can be called *a constructivist theory of human nature*. In the following, his account of moral human nature will be explained in detail in order to discuss whether his constructivism may sufficiently provide the idea of human rights as universal moral rights with a theoretical justification.

First of all, Donnelly maintains that although the sources of positive rights are objectively definable "facts" such as statutes, customs, or contracts, human nature does not constitute such a self-evident fact as a source. Human rights require a philosophical account of human moral nature that explicates "why do human beings have rights?" and "what are these rights?". This is why, Donnelly thinks, human needs in themselves cannot be referred as a sufficient ground for human rights[7] (1989:17). His objection to human needs as the source of human rights draws on two points. First, he argues, "the pseudo-scientific" notion of human needs is "almost as obscure as human nature". Because one's understanding of human needs is relevant to her/his understanding of what it means to be a human being. Second, and more importantly, the real theoretical issue concerns the reason why human beings are so valuable that their needs are (must be) recognized as their intrinsic rights.

[7] In the following criticism of human needs as the source of human rights, Donnelly certainly has in mind the "Basic (Human) Needs Approaches" which focus on determining a minimum standard of the requirements for the satisfaction of basic human needs as basic (human) rights. These approaches disregard, or regard as a secondary issue, the philosophical considerations ("philosophical wrangles") on the relation between moral human nature and human rights. For a critical evaluation of "Basic Needs Approaches", see, Johan Galtung,1999: pp.70-121.

In line with the latter, Donnelly asserts that "human rights are needed not for a life but for a life of dignity", that is, "for a life worthy of human being" (1989:17). Therefore, human nature grounding human rights can be nothing but "a moral posit" pointing towards a specific human possibility. Any scientific account of needs can, at most, specify the limits of the realm of human possibility with respect to natural, social and historical conditions. On the other hand, *moral* human nature, which is only loosely connected to the former, corresponds to the selection of a specific vision of human being from that realm of human possibility. In Donnelly's own words, "the scientist's human nature says that beyond this we cannot go [while] the moral nature that grounds human rights says that beneath this we may not permit ourselves to fall" (1989:17).

Donnelly emphasizes that this moral vision of human nature is not a *thing* given to human beings by an external standard of rectitude such as God, Nature or physical facts of life. Instead, it is human beings who *self-assertively* identify themselves with this specific ideal (moral) human nature selected from the realm of human possibilities. Precisely because of this, "human rights arise from human action" guided by this selection (1989:17). Thanks to this self-assertion, human rights arise as demands (in the strong sense of "making things happen") for a new matrix of social practices which *promises* the actualization of the foregoing ideal (moral) human nature. Therefore, it may be said that the underlying ideal (moral) human nature is a "social project" proceeded with human rights practices that promise (but not guarantee) to realize a dignified life worthy of human beings, which is envisioned by the underlying moral vision at first.

In line with the foregoing arguments, Donnelly's constructivist theory locates the idea and practice of human rights within a "constructive interaction between the ideal and the real, between moral vision and political (social) practices". The way this constructive process works is as follows. On the one hand, the ideal (moral) human nature and human rights derived from it reshape the existing structure of social practices in the direction of the actualisation of the ideal. On the other hand, the historical and social circumstances of human beings require the further specification (i.e., the substantialization) of the ideal for its actualisation. It is crucially important to hold in mind that within the process of constructivist interaction, moral human nature is not only an aspiration to be realized in future, but also a description of human beings. This description ascribes inalienable (human) rights to actually living individuals. In more precise words, the language of human rights grounded by a moral vision not only announces that "if you treat a person like a human being, you will get a human being", but also decrees that "here's how you [shall] treat someone as a human being" (1989:19).

Therefore, the underlying moral vision attaches two features to the language of human rights: a utopian component and a realistic component. Donnelly indicates this when he declares that "human rights are a short of moral prophecy" (1989:19). They promise that their effective exercise will make the grounding ideal a reality by transforming the actual social reality and reshaping human beings. Then, he draws the conclusion of the foregoing arguments: the relationship between human rights, grounding human nature and social (political) reality is a dialectical one in which "human rights shape political reality, so as to shape human beings, so as to realize the

possibilities of human nature, which provided the basis for these rights in the first place" (1989:19).

As one probably notices, Donnelly's analysis clarifies "how a moral vision of human being functions as the source of rights in the language of human rights" but his view says nothing substantive about the grounding human nature. Indeed, here we come to the ambiguous and puzzling part of Donnelly's theory of human rights as universal moral rights. Donnelly first makes clear that he deliberately forecloses a substantive account of grounding moral human nature. He argues that a *direct* philosophical justification of a substantive vision of moral human nature is beyond the scope of his analytical theory which explains descriptively the way human rights works in actuality. Then, he further comments that such a direct defense is neither desirable nor necessary for a theory of universal (moral) human rights (1989:21-23). According to Donnelly, it is not desirable given that the moral human nature is the most controversial and intractable topic in moral and political philosophy. For instance, the theoretical competition between Aristotle's account of man as *zoon politikon* and Kantian view of human being as a rational being guided by the moral law expressed in the categorical imperative seems inconclusive to Donnelly. Because, he thinks, the understandings of human moral nature in all these philosophies are much more like axioms than theorems: they are assumptions which may be defended only indirectly. Also, a direct defense of the substantive moral human vision underlying human rights is not necessary for a theory of universal human rights, because an indirect justification is possible in our age thanks to "a remarkable international normative consensus on the list of rights combined in the so-called

International Bill of Human Rights[8], a list that is based on a plausable and attractive theory of human nature" (1989:23). For him, unlike the philosophies of substantive moral human nature, International Bill of Human Rights and his theory which is based on a constructivist reading of this bill can provide an account of human nature which "is compatible with many but not all theories of human nature" (1989:23).

Now, with these arguments, we face the following puzzle: Donnelly, who formerly argued that *moral* universality of human rights derives from a philosophically defined moral human nature, is now claiming that any substantive account of this moral nature is indefensible in a direct manner. How can one defend the thesis that human rights are universal *moral* rights if he finds their universal moral ground indefensible? As we saw, Donnelly's response is to introduce what I will call "consensus argument" which is based on "the international normative universality of human rights in our age". Introducing this argument, he simply suggests that his inability to defend a specific substantive account of human nature is not a serious problem, because the widespread international recognition, or, at least, the verbal acceptance of the International Bill of Human Rights demostrates "a *prima facie* indication of the attractiveness of the underlying moral vision" (1989:24). Yet, "the consensus argument" stimulates major drawbacks revealing the internal inconsistency and circularity of Donnelly's analytical theory.

Above all, we saw that, for Donnelly, one fundamental characteristic (or function) of human rights is to challenge the existing structure of social practices. This characterictic is closely connected to his assertion that human rights makes sense when the enjoyment of rights are threatened or denied in practice. Indeed, these

[8] By the phrase of "International Bill of Human Rights", Donnelly refers collectively to the Universal Declaration of Human Rights and the International Human Rights Covenants.

arguments from which Donnelly derived his theory of constructive interaction presupposes a gap between the ideal and the real on which human right-claims function as a bridge. In other words, in the name of an "ought to be", human right-claims demand the change of the existing practices, institutions and beliefs which have been *conventionally* held as valid. For this reason, what makes this special function of human rights possible is the fact that they are "justified" by a standard referring to an ideal (an "ought to be") in a way which is independent from, and superior to positive normativity (legal and customary practices) in the actual world (conventional and "natural" reality). Yet, to introduce "international [positive] normative universality" as the justification of universal human rights evidently contradicts with this line of argumentation. Because, "the consensus argument" recourses to the historical reality in order to deduce and justify "the ideal", while Donnelly holds that the basic function of human rights is to challenge the historical reality.

Against my foregoing criticism, it may be legitimately argued that Donnelly's "consensus argument" is a more qualified than the one for which my foregoing criticism assumes to be valid. That is, it may be recalled that Donnelly does not refer to "the international normative universality" as a justificatory source of human rights in itself, but as a *prima facie* indication of the attractiveness of their source which is the underlying moral vision of human rights. Yet, even in this qualified sense, "the consensus argument" is still a problematic argument, leaving the moral universality of human rights unfounded, rather than providing an indirect justification of it.

First, recall that Donnelly's pragmatic shift from the inconclusive philosophical debates on human nature to "the international normative universality" is based on the

premise that the latter is compatible with many accounts of human nature. However, insofar as the author considers that this international normative universality provides a ground for an indirect justification, his consensus argument itself presupposes that a specific moral vision of human nature underlies "the international normative universality". This is why he thinks that to defend "the international normative universality" is to defend indirectly its underlying moral vision[9]. Likewise, he claims that "virtually the entire list of rights in the Universal Declaration can be easily and directly derived from such a conception" (1989:24). Hence, his attempt for indirectly justifying a particular moral vision of human nature by recoursing to the International Bill of Human Rights evidently contradicts with his claim that the international normative consensus is a safe harbor (protected against philosophical wrangles) owing to the fact that International Bill of Human Rights is compatible with many accounts of human nature.

Second, "the qualified sense of consensus argument" discloses in all its clarity the circularity inherent to Donnelly's theory: In defending the moral universality, Donnelly refers to the international consensus as a last resort. Yet, when one faces with the violations of human rights in practice and their cultural relativist apologists in theory, that is, with the weakness of the consensus he lays confidence; nothing remains in hand, other than appealing to the moral univesality which he dangerously left unfounded. Therefore, it may be argued that Donnelly's descriptive theory is a vicious circle between moral universality and historical consensus, each of which is supposed to repair the failure of the other.

[9] As we will see later in detail, according to Donnelly, that moral vision is the particular western-liberal vision, the only vision which views "human beings as equal and autonomous individuals who are entitled to equal concern and respect" (1989:24).

II.2. A Normative Defense of Human Rights and Their Particular (Western-Liberal) Origins

In the preceding part, we saw that a circularity with regard to the assertion of the universality of human rights arises out in Donnelly's descriptive theory. It was argued that this circularity and concomitant inconsistencies arise out as a result of his omission of substantiating a philosophical defense of the grounding moral human nature, and his "consensus argument" to which he recoursed as a life buoy in the absence of such a direct defense. In this part, I will try to disclose that Donnelly's aforementioned omission and his consensus argument is, in fact, concomitant with his acceptance of the basic cultural relativist thesis. This thesis is based on the premise that moral human nature grounding human rights is one among different historical and cultural conceptions of human nature. From this factual premise, a normative premise is also deduced: that the validity of a specific conception of moral human nature is pertinent to particular determinations of human beings living in specific historical and social contexts. I suspect that Donnelly's normative defense of human rights as the legacy of a particular tradition reflects his acceptance of the foregoing cultural relativist thesis.

In the following, I will first examine Donnelly's arguments on the contextuality (historical and social particularity) of human rights. Then, his arguments against "strong cultural relativism" will be discussed. Finally, we will be able to see better whether Donnelly's own theory itself is too relativist to provide a secure and well-articulated ground for the universality of human rights in the face of cultural relativist challenge.

II.2.1. The Historical Particularity of Human Rights : A Necessary Connection With Western Liberalism ?

As stated at the beginning of this chapter, Donnelly thinks that the universality of human rights is compatible with the historical particularity of the idea and practice of human rights. This is so, because, he argues, moral universality does not require "that all societies have human rights notions, that all societies cross-culturally and historically manifest conceptions of human rights" (1989:49). In line with this, he maintains, the idea and practice of human rights are historically and culturally particular in that it is "a western discovery" as a response in the west to modern conditions of existence. He also makes the point that the counter-arguments claiming that all societies have a conception of human rights confuse the notion of human rights with that of human dignity. For him, although the former is inherently connected with the latter[10], these are two distinct notions and there are numerous conceptions of human dignity that do not imply human rights. Hence, it is arguable that all societies have a conception of human dignity[11] and aim to realize it; yet, human rights are peculiar to the societies based on "a specific understanding of human dignity which conceives each person as an equal and valuable human being endowed with certain inalienable *rights* (in the strict sense of titles and claims) that may be claimed even against society as a whole" (1989:52).

While arguing this particularity thesis, it is evident that Donnelly draws upon his conceptual analysis of rights and human rights we examined above. Here, his point is: the modern sense of rights as entitlements is irrelevant to the conceptions of human

[10] The International Human Rights Covenants degree: "human rights derive from the inherent dignity of the human person".
[11] It does not mean that all societies have a conception of *inherent* human dignity.

dignity found in non-western societies, like African, Islamic and Chinese, and pre-modern western societies[12]. In the cultural and political traditions of these societies, either the concept of right is entirely absent or does it make only the sense of "the standard of rectitude". These traditions conceive (human) dignity as derived from a divine or natural order of things, so human beings are seen dignified only in so far as they accord with the divine or natural prescriptions. This is why from the conceptions of (human) dignity in these traditions we can basically derive "duties", but not "rights as entitlement". These duties are determined by elites in the name of a divine or natural ruler. In turn, human beings' due discharging of their duties may give rise to their enjoyment of *social benefits* or *privileges*. Yet, the enjoyment of a benefit or privilege is, of course, very different from one's unconditional possession of a human right. The former is conditional to one's due action or status as a member of society while the latter is the inevitable effect of the simple fact that one is a human being.

Donnelly finds the illustrations of his arguments in the societies of Soviet Union as well as in the contemporary non-western Islamic, African and Chinese traditions[13]. Despite the significant differences between these traditional societies and Soviet Union, Donnelly maintains, the latter illustrates a very similar case to the former in its conception of human dignity and in its doctrine and practice of rights. He makes the point that Soviet approach grounded on the premise of the organic unity (fusion) of duties and rights reduces (human) rights to "social grants" (1989, pp.55-57). Thus, all "rights" in Soviet Union are contingent on the individuals' performance of their duties: human rights as unconditional titles of human beings makes no sense in the Soviet Union context. Indeed, what a Soviet citizen *enjoys* is what is permitted to him

[12] For a counter-claim, see Höffe:1999.
[13] At the time 1989 published, in 1989, USSR had not collapsed yet.

by the state agency in accordance with her/his merit, i.e., her/his discharging of civil responsibilities.

Accordingly, Donnelly claims that "the key difference between the modern (or 'Western') and the traditional (or 'non-Western') approaches to human dignity is the much more greater individualism of the modern/Western/human-rights approach" (1989:57). He argues that the individualism underlying the structure of the social practices of modern-western societies have arisen within these societies as a response to the political and social changes stimulated by the modern state and modern capitalist economy. The major effect of these changes has been the separation of individual from the small and supportive traditional community, which had formerly guaranteed a "dignified" life for its members. Hence, contrary to the traditional (pre-modern) man whose dignity had been under the protection of his community and to whom his community had provided a place in the world, her/his society appears to modern individual as an oppressive and alien power, in the form of the modern state and capitalist economy, assaulting people's dignity. In such circumstances, human rights as a specific set of social practices oriented to protect individuals "appears to be a 'natural' response to changing conditions, a logical and necessary evolution of the means to realize human dignity" (1989:60). Metaphorically speaking, human rights have arisen out as the "seatbelts" in western societies where the "cars" (the modern state and capitalist economy) have been invented[14] (1989:64).

However, according to Donnelly, the label of "modern (western) approach" is too abstract and general to define this "natural response to changing contidions". The

[14] In line with foregoing arguments, Donnelly maintains that since "cars" (modern states and markets) run amok on the street in other (non-western) parts of the world in our age, "seatbelts" (human rights) now acquires "a near universal contemporary relevance" (1989:64).

latter demands to be specified by a more precise origin: "the western liberal tradition of political thought and practice". He claims, it is western liberalism which provides the substantive conception of human dignity underlying the idea and practice of human rights. In more precise words, for him, from the very beginning, there has been a necessary philosophical connection between the idea of human rights and liberal conception of dignity, and a necessary structural connection between the practice of human rights and the liberal regimes[15].

First of all, Donnelly asserts, liberalism is the recognition of separate individuals as possessing special worth and dignity in themselves. It regards each individual as having "an equal, irreducible moral worth, whatever his or her social utilty" (1989:68). Since each human being is seen as a distinctive and discrete individual, liberalism considers the realization of human dignity - which is conceived as the result of human beings' proper fulfilment of social roles by non-liberal traditions - as individuals' autonomously creating and unfolding their unique individual existence. In Donnelly's view, this explains why, together with the notion of natural rights, the values of autonomy and equality have been the principal commitment of liberals from Locke to now (1989:90), and the equal respect and concern for every individual have been the principles defining genuine liberal regimes represented by European welfare

[15] As Donnelly explicates in the chapter 5 of his book, the liberal tradition which he evaluates as necessarily connected to human rights is a specific variant of liberalism: "'radical or social democratic' conception of liberalism" (1989: 89-106). This radical/social democratic (egalitarian) variant of liberalism is incompatible with the alternative strand of liberalism (libertarianism) which he calls "conventional or minimalist" liberalism. Donnelly underlines that in its overemphasis on "negative liberties" - especially, on the right to property - at the expense of "positive rights", conventionalist/minimalist liberalism represented by Nozick, Hayek and Von Mises is also incompatible with human rights (1989:90). According to Donnelly, radical/social democratic (egalitarian) liberalism traces back to Locke's *Second Treatise*, which has conventionally and unjustly been interpreted as one of the standard sources of conventional/minimal liberalism, and runs through Paine's *Rights of Man*, towards contemporary theorists such as Rawls and Dworkin (1989:96). Also, the author considers that this variant of liberalism has been embodied in the contemporary social democratic welfare states of the western Europe (1989:96).

states. Referring to Ronald Dworkin's account of the basic tenets of a (liberal) regime taking rights seriously, Donnelly considers that a genuine liberal regime realizes both individual autonomy with "the principle of equal respect for all" viewing human beings as capable of forming and acting on intelligent conceptions, and formal equality of opportunity with "the principle of equal concern" viewing human beings as capable of suffering and frusturation (1989: 68-71).

He underlines that, as the commitment to both autonomy and equality illustrates, a genuine liberal understanding of human beings is not a vision of man in his isolation (i.e., an atomized man), but a more complicated one that captures two distinct dimensions of individual human being. On the one hand, liberal vision of moral human nature takes man as a social animal due to the fact that fuller realization of his potential autonomy requires a social context, i.e., civil society. On the other hand, contrary to the traditional or communitarian view that entirely absorbs man within his social context, liberals also find in man a transcendental dimension that cannot be captured by his community or social role. This dual dimensional view of human beings reflected in the principles of autonomy and equality prescribes certain forms of social practices as legitimate practices. These prescriptions are expressed by "human rights which are morally prior to and superior to society and the state, and under the control of individuals, who hold them and may exercise them against the state in extreme cases" (1989:70).

In the light of all these arguments, it is not surprising that, Donnelly argues, there is "a near perfect fit between liberalism and the standard list of human rights in the Universal Declaration of Human Rights" (1989:71). In Donnelly's view, this "near perfect fit" is an evidence of how human rights are essentially connected to the liberal

vision of human nature in theory, and of why a liberal regime is *sine qua non* for the international human rights standards[16]. Again, all these are due to the historical and social particularity of human rights.

II.2.2. Universalism Versus (Strong/Radical) Cultural Relativism: The Difficulty Donnelly Leads Us

Having defended the particular origin of the idea and practice of human rights in western liberal tradition, Donnelly faces the cultural relativist challenge concerning the universality of human rights. More exactly, he aims to present a theoretical refutation of "strong cultural relativism" which is unable to grasp the compatibility between the historical particularity of human rights and their moral and international normative universality. However, we will now see that instead of demostrating the compatibility between historical particularity of human rights and their moral universality, Donnelly's arguments on universalism versus cultural relativism leads us to an impasse concerning the claim that human rights are moral universal rights.

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[16] In this thesis, I will not interrogate the relation between human rights and liberalism because my intention is to reveal the implications of Donnelly's association of human rights with the western-liberal tradition, on the one hand, and his contradictory claim that human rights are morally universal, on the other hand. These implications will become explicit in his arguments "against" strong cultural relativism. Yet, at this point, I want to refer, at least, to Neil Mitchell's legitimate criticims regarding Donnelly's contestable identification of liberalism with the principles of autonomy and equality (see, Donnelly, R. E. Howard and N. Mitchell, 1986: 221). Mitchell notices that, simply stipulating a set of values and calling them liberalism, Donnelly then "shows" that these values are compatible with a conception of human rights (Donnelly, Howard, and Mitchell, 1986: 221). He further argues that this is "not a compelling method of argument": "without clearly specifying the origins of liberalism, then, one is left with the suspicion that the method of constructing the plausible standard reading of the liberal tradition is to first read the universal declaration, and then pick, choose, derive, and discard as necessary" (Donnelly, Howard, and Mitchell, 1986: 221). It may be argued that Mitchell's criticism that Donnelly does not specify the origins of liberalism does not hold, given Donnelly's reference to the "radical or social democratic" variant of liberalism originated from a specific interpretation of Locke and running through Paine. Yet, it is still not evident whether Donnelly interprets this radical liberal tradition on the basis of the Universal Declaration. Also, Donnelly's implication that other strands of modern political thought has not (considerably) contributed to the principles underlying the Universal Declaration is simply wrong. For an elaboration of the relations between various modern ideologies and the idea of human rights, see L. Ferry & A. Renaut, 1992: pp.73-109.

Indeed, this difficulty stems from his insistent moral relativism underlying the whole structure of his theory.

Arguing that "cultural relativity is an undeniable fact; *moral rules* and social institutions evidence an astonishing cultural and historical variability"[17](1989:109), Donnelly distinguishes two extreme positions: "radical (strong) universalism" which holds that culture is irrevelant to the validity of moral rights and rules, and "radical (strong) cultural relativism" which holds that culture is the sole source of a moral right or rule. He devalues both of these extreme positions as indefensible and offers the plausible position: "relatively strong universalism" (or "weak cultural relativism") which both "initially presumes universality" and "holds that culture may be an important source of the validity" (1989:110). As such, weak cultural relativism takes the relativity of human nature, communities, and rights as a check on potential excesses of universalism.

With regard to radical universalism, Donnelly presents two practical reasons to renunciate it: first, there is a risk of "moral imperialism" inherent to radical (moral) universalism; second, it overlooks all moral communities other than the cosmopolitan moral community, ignoring that moral rules, including human rights, exist (are embedded) within a moral community. Thus, unless radical universalism is bridled, it culminates in "the complete denial of national and subnational autonomy and self-determination"[18](1989:111). According to him, the fundamental theoretical obstacle

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[17]Italics are mine.

[18] It should be acknowledged that although Donnelly uses ambiguously the label of "radical (moral) universalism" as an umbrella term referring to all moral theories based on an universalistic understanding of human beings, his definition that "radical universalism holds that culture is irrelevant to the validity of moral rights and rules, which are universally valid" best fits to the deontological moral theories following Kant's moral philosophy. Yet, having acknowledged this, the following remarks are necessary: Although it is true that deontological moral theories conceive moral *principles* as independent of cultural variations and give priority to an aspired cosmopolitan (universal) moral community over national and local communities, it is not fair to claim that they have

that stimulates these risks is the blindness to the fact that human nature is culturally relative (1989:111). Recalling his arguments on the constructed characteristics of human nature, he argues, "human nature – the realized nature of real human beings – is a social as well as a 'natural' product" (1989:112). This product is so densely shaped by cultures that human nature is relative not only in a moral sense, but also in a biological sense (1989:111).

Given the cultural variability of human nature, Donnelly thinks that we would be obliged to accept radical cultural relativism which implies that there can be no human rights because there is no such a universal thing as human being in the sense the language of human rights referred to her/him. In his view, this thesis would be "perfectly coherent" (1989:112) and "logically impeccable" (1989:113) if we would not have been so fortunate to articulate two arguments on the basis of which radical cultural relativism is refuted on behalf of a weak cultural relativism:

First, as one may probably predict, he employs the international normative consensus on human rights as a case which makes radical cultural relativism

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the totalitarian impacts of moral imperialism and leads us to the denial of the ethical autonomy and self-determination. Because the grounding principle of deontological moral theories is that of autonomy. In fact, from a deontological view of morality, Donnelly's foregoing arguments can be seen as the evidence of his confusion between the concept of autonomy and that of authenticity. As Osvaldo Guariglia explicates in a Kantian fashion (Guariglia, 1999:36-40), "autonomy" is an attribute presuppossed in moral human subject, which means that her/his acting upon the moral principles s/he positied her/himself as universally valid. As such, the concept of autonomy combines the ideals of freedom, responsibity and self-determination within the moral human subject. On the other hand, "authenticity" is one's or a group's pursuing in their own specific way a life they individually or collectively selected (Guariglia, 1999:36-40). Thus, although both of them implicate the idea of self-determination; "autonomy" is an attribute of only moral human subjects while "authenticity" may be held both individually and collectively. Drawing this distinction is vital because it makes us aware that they are rarely compatible with each other: though "authenticity" as an individual and collective choice is sometimes the way by which the idea of autonomy (self-determination) may be actualized, it may also be disguising the abolition of autonomy as a possibility in the empirical world. Consequently, contrary to Donnelly's view, only a radical universalist position (i.e, a deontological moral theory) which gives priority to "autonomy" over "authenticity" is capable of recognizing the autonomy and true self-determination of human beings. These will be substantiated in the next chapter where C.S. Nino's Kantian meta-ethical theory is examined.

indefensible in our age. He says that "even if this 'consensus' is largely the compliment of vice to virtue, it does reveal widely shared notions of 'virtue', an underlying 'universal' moral position that compels at least the appearance of assent from even the cynical and corrupt"(1989:122).

Second, he maintains that radical cultural relativism is actually without bases today. Because, he argues, the traditional culture assumed by cultural relativism has already been penetrated and weakened to the point of extinction by the expansion of modern conditions of existence into the non-western world, as the result of ages-lasting westernisation and modernisation. The fact that not only westerners but nearly whole humanity is faced in our age with the modern threats to human dignity brought by the modern state and capitalist market economy requires the universal acceptance of "the natural and necessary response". Such response needs to be articulated in human rights.

Indeed, these two arguments are the only foundations of Donnelly's weak cultural relativism (or relatively strong universalism) which conceives human rights in a "paradoxial phrase": "relatively universal" (1989:124). Unfortunately, it seems that the paradoxial phrase "relatively universal" is the best formulation of the theoretical position into which Donnelly culminates with regard to the question concerning the universality of human rights. In order to explicate the way he leads us to this difficult position, a brief review of what we examined up to now will be convenient.

On the one hand, in his conceptual analysis of human rights, Donnelly detects that the universal scope of human rights stems from their underlying moral vision of human nature. Yet, he is reluctant to directly defend this moral vision, since he considers that any substantive philosophical account of moral human nature is

directly indefensible. He is also convinced that the plausibility and attractiveness of the underlying moral vision of human rights, which is compatible with many accounts of human nature, may be indirectly defended on the basis of international normativity. Hence, in his conceptual framework, he leaves the assertion of the moral universality of human rights circular (bereft of a foundation), promising that it is not necessary, as well as not desirable, to recourse to a substantive account of moral human nature.

However, on the other hand, he still "strives for greater theoretical rigor" (1989:45) and aims to present a normative defense of human rights and their particular "origins" at the same time. In this normative defense it becomes evident that *his* constructivism is indeed identical to the logic of historical relativism which aims to deduce normativity from positivity (historical reality). This is best illustrated with his two objections to the strong cultural relativist position. In both objections, his historicist relativism (or, in his own terms, "his relativist universalism") is an attempt to refute "strong cultural relativism" on the basis of historical factuality: first, there *is* at least an apparent international consensus on human rights; second, modern relations of power have penetrated almost whole globe. Yet, neither of these counter-arguments in themselves justify universal human rights unless the moral vision that attributes an *inherent* dignity to each human being is itself justified[19]. In fact, this is why he is obliged to recourse to western liberal tradition which provides a ground for the *inherent* dignity of human beings. Yet, since he entirely undermined any "radical" moral universalist claim that there is a universal moral human nature and a moral law

[19] I have already explained the deficiency of the first argument ("the consensus argument") in the first part. The following question reveals the difficulty in the second argument: why a non-western/non-liberal tradition that does not attribute an *inherent* dignity to individuals should feel itself obliged to response to the modern conditions of existence by means of human rights which protect individuals' *inherent* dignity against the modern state and capitalist market economy?

which is universally valid, his whole theory relies on the following tautological argument: in the given historical circumstances, western liberal moral perspective is historically valid, since only this perspective promises to realize the underlying moral vision of human rights, which is, in fact, the particular moral vision of western liberalism attributing *inherent* dignity and moral entitlements to human beings.

In brief, Donnelly leads us to an impasse concerning the endeavor for grounding the universality of human rights, because his relativist (contextualized) understanding of morality is simply incompatible with his own claim that human rights are morally universal. By reducing the morality which grounds the idea of universal human rights to a property of the western-liberal tradition, Donnelly portrays it as a particular conception of morality among different conceptions each of which has its own historical and cultural validity. In this way, he relativizes the idea of universal human rights so crucially that this idea loses almost all meaning and force[20]. Because the idea of universal human rights itself is culturally and historically particularized by Donnelly, his theory provides indeed no moral ground for referring human rights as universal principles trumping competing sets of values.

Given the failure of Donnelly's weak universalism (or weak cultural relativism) in grounding the moral universality of human rights, it seems necessary to consider the

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[20] In fact, the position into which Donnelly's theory culminates at the end is close to the "conceptions of human rights without universalism" mentioned in the introduction part of this thesis (see, pages 4-6 of this thesis). As I argued there, by proposing such conceptions, the authors such as Richard Rorty hold that our convinctions (values that are held valid) are the sole and sufficient bases for our human rights practices. What differentiates Donnelly from them is his insistence that the notion of universality is a fundamental part of his own set of values: "We [westerners] simply do not believe that our precepts are for us and us alone.....For most of us [liberal westerners], morality is inherently universalistic and egalitarian" (1989:116). In this line, he further argues: "our [liberal westerners'] precepts are *our* moral precepts. As such, they demand obedience of us....[Therefore] no matter how firmly someone else, or even a whole culture, believes differently, at some point we simply must say that those contrary beliefs are wrong" (1989:116). This latter quotation is very striking: Donnelly who accused radical moral universalism -which holds that any morality deserving the name of morality is inherently universalistic without qualifications such as western or liberal- of inherent risk of moral imperialism is making these arguments.

alternative presented by the kind of approaches that he denounced as "radical universalist". To do this, in the next chapter, I will engage in an examination of the Kantian approach to the idea of universal human rights, which has been elaborated by Carlos Santiago Nino in his book *The Ethics of Human Rights*.

CHAPTER THREE

A KANTIAN APPROACH TO THE MORAL UNIVERSALITY OF HUMAN RIGHTS : THE WORK OF CARLOS SANTIAGO NINO

Having presented and discussed the conventional-liberal approach to the universality of human rights as presented by Donnelly, now I will turn to an alternative contemporary approach which follows the Kantian ground of moral philosophy: Nino's *The Ethics of Human Rights*. It may be first argued that the basic motivation of Nino's foregoing work is to demonstrate that the idea of universal human rights can be explicated and justified on the basis of Kantian Moral Constructivism[21]. According to Nino, universal human rights are founded by certain moral principles which accord with the structural aspects (formal requirements) of moral discourse. These structural aspects which involve the aspect of the universality are deduced by "the transcendental method" that aims to disclose what presuppositions constitute the conditions of possibility of "moral experience". In turn, they provide us with the criteria for the justification of substantive moral principles such as those underlying human rights.

In this chapter, I will first examine Nino's assertion that human rights originate from moral principles. Secondly, I will present his account of Kantian Moral

[21] The fact that the label of constructivism also defines Donnelly's theory examined in the previous chapter needs clarification. Indeed, both in Donnelly's theory and in Kantian Moral Constructivism, this label points out the same feature of morality: that morality is a human artifact (construction). Yet, as we will elaborate on throughout this chapter, unlike the former, the basic tenet of the latter is to refute not only moral dogmatism but also moral scepticism (relativism) by relying on the formal characteristics of moral discourse. In that, Nino seriously departs from Donnelly.

Constructivism as the meta-ethical outlook that trumps both ethical relativism and ethical dogmatism. In this way, we will have seen the structural aspects of moral principles, which constitute (or, function as) "moral facts" and, thus, determine the validity ("the hypothetical acceptability") of substantive moral principles. Then, I will present and discuss his formulation of the substantive moral principles underlying human rights and his justification of them on the basis of Kantian meta-ethical outlook. At the end, I will reflect on the extent to which Nino succeeds in providing us with a fully-fledged theory of universal human rights.

III. 1. Human Rights, Law, And Morality

At the beginning of his book, Nino argues that the idea of human rights has been so deeply involved by a moral theory that a complete characterization of the concept needs the explanation of the basic features of that moral theory. He adds that it is necessary to advance a clarification concerning the basic nature of concept, at first. Such a clarification should answer the question whether human rights are of legal or moral character, since the answer to this question determines the ground where the human rights should be established (Nino,1993: 9-10).

With regard to the question whether human rights are of legal character, Nino's answer comes immediately. He argues that although it is true that in some historical contexts human rights are conceived as legal rights, this is usually not the case (1993:10). As is evident from the historical struggles for the recognition of human rights, we usually refer them as the rights that are logically independent of the accepted legal norms, with the purpose of criticizing and evaluating the positive legal systems in the name of the supreme standards of rectitude whose formulations are embedded in these rights.

Hence, it is not surprising that the idea of human rights have sometimes been associated with natural-law theory which points to the "natural law" as the ground of human rights. As distinct from positive legal systems, "natural law" in this theory is a normative system whose validity does not depend on its recognition, but on its intrinsic justification. Also, it is not surprising that legal positivism which denies "natural law" is usually associated with the denial of human rights. However, according to Nino, both of these associations are the result of a conceptual confusion whose clarification is necessary to understand where the ground of human rights lies (1993:11). This controversy between natural-law theory and legal positivism is connected to two different conceptions of law. On the one hand, natural-law theory adopts a normative concept of law according to which law is the set of standards that the judges *ought to* recognize, or that the legislators *ought to* enact. On the other hand, legal positivism uses a descriptive concept of law, which points out to a social phenomenon. The latter refers to the rules and principles which judges do actually accept or derive from an accepted master-rule. For further clarification of what is confused in this controversy, Nino introduces the following basic theses that are generally associated with natural-law theory:

> (a) that the principles which determine the justice of social institutions and the rightness of actions, are valid independently of their recognition by certain individuals or organizations, and
> (b) that a normative system, even when actually recognized by organizations with access to the state's coercive apparatus, cannot be deemed legal if it does not satisfy the principles mentioned in (a) (1993:11).

Nino argues that, among these theses, the thesis (b) certainly makes the distinguishing mark of natural-law theory. Adoption of a normative concept of law makes possible for the natural-law theorist to assert that any legal order which does

not recognize the fundamental principles of justice (from which human rights are deduced) does not deserve the name of law. On the contrary, a descriptive use of the concept makes such an assertion impossible; hence, legal positivists reject the thesis (b). However, for Nino, what is usually misunderstood is that the rejection of the thesis (b) does not necessarily involve the rejection of the thesis (a). In fact, the latter is the case only in the ideological variant of legal positivism which stems from the glorification of fact and force in the name of law. Yet, this has nothing to do with conceptual legal positivism. This can be easily demonstrated by noticing that the ideological legal positivism does not use a descriptive concept of law but a normative one which reduces illegitimately the principles of justice into the arbitrary will of certain individuals and organizations. Therefore, it should be grasped that the controversy between natural-law theory and (conceptual) legal positivism is not over the question whether there are principles that are valid independently of their recognition by someone, but over the question whether those principles are the part of law. Natural-law theory holds that those are the supreme part of valid legal systems, while legal positivist excludes them from the sociological definition of the legal system.

This clarification has also the virtue of showing that, contrary to the widespread belief, not only a normative use of the concept of law, but also a descriptive usage is compatible with the recognition of human rights as the formulations of principles of justice (i.e., as the supreme standards of rectitude). Indeed, as Nino claims, the following assertion we usually make is possible only via the descriptive use of the concept: when *a law* (i.e., a positive legal order) does not recognize human rights, this does not mean that these rights do not exist. All that is needed for the consistency of

such an assertion is the acceptance of the thesis (a). Then, the pertinent question is "why it is necessary to resort to the principles of justice (whose validity is not based on their acceptance by a legal system) in the case of human rights assertions?"; and we should take this question seriously in order to explicate the ground of these rights.

To answer the foregoing question, Nino begins with the basic characteristic of the human rights assertions: that they pertain to the realm of *practical reasoning*. That is, they are the expressions of "reasons for actions, attitudes or decisions". Hence, "propositions about human rights are not normally theoretical but have a practical dimension [in that] they involve a call to action" (1993:16). To understand what is meant by "practical reasoning" and reasons for action", it is necessary to distinguish two sorts of reasons: explanatory (subjective) reasons and justificatory (objective) reasons. Explanatory reasons identify the motives of actions, explicating what mental states are casual antecedents of actions. More exactly, they *explain* what a combination of beliefs and desires leads (or have led, or will lead) to a certain action. Such kind of explanations are irrelevant to the second sort of reasons. Justificatory reasons, rather *evaluate* an action, i.e. "determine whether it is good or bad from different points of view, such as the moral, the prudential, and the legal" (1993:17).

Referring to John Raz, Nino indicates that the justificatory reasons constitute the raw material of practical reasoning. They are "the premises for reasoning which leads to an action" (1993:18). Hence, it may be said that practical reasoning is the human activity that consists in inferring evaluations for our actions, and guidance for our future actions, from justificatory reasons. It may be also said that the output of practical reasoning whose raw material is justificatory reasons is "normative (ought) judgements". The fact that a practical reasoning concludes in a normative judgement

explicates, in turn, the basic nature of justificatory reasons: that these reasons themselves must include a normative (ought) judgement. Because, as is expressed by the Humean principle, "a normative judgement cannot be derived from purely factual or descriptive premisses" (1993:19). In order to make this point more clear, Nino refers again to Raz who distinguishes between "operative reasons" and "auxiliary reasons" in the following manner:

> a complete reason is constituted by the set of non-superfluous premisses of practical reasoning; an operative reason is the [normative] premiss which could be itself a complete reason for action; an auxiliary reason is a factual judgement which indicates a means to satisfy the operative reason (1993:19).

Raz's distinction shows that in practical reasoning, factual (descriptive) premises may have only a secondary (auxiliary) role that consists in making particular practical syllogisms between normative justificatory (operative) premises which are *sine qua non* for any particular practical reasoning such as those asserting a human right.

Both the question "why we necessarily resort to the principles of justice in the case of human rights assertions" and the question "whether human rights may be grounded on law or morality" may now be answered through an examination of the process of legal reasoning in the light of foregoing arguments. As Nino shows by an example in his book[22], a typical legal reasoning seems to involve three basic components: (1) a reference to a set of standards; (2) a reference to a factual situation as relevant to one of the norms of that set of standards; (3) a *normative* conclusion that relevant standard *should* be applied to the particular situation at hand. With regard to this schema of

[22] Nino gives the following example to illustrate the (extremely simplified) schema of legal reasoning: "1. The law of the land rejects conscientious objection as a basis for exemption from military service or from punishment for desertion
2. John deserted from military service solely on the basis of conscientious objection
3. *Ergo*: John should be punished as a deserter" (1993:21)".

legal reasoning, Nino argues that legal reasoning would be caught with an oddity if the referred set of standards were defined merely by *the fact* that they are accepted by judges, or that they are enacted by the legislator whose enactments judges happen to accept. Because, in such a case, legal reasoning would infringe the Humean principle, deducing a normative conclusion (premise 3) from two factual premises (premises 1 and 2). This oddity can be prevented only if the first premise of legal reasoning is conceived as a normative one, i.e., only if the referred set of standards is conceived as that which judges *should* accept. However, in the latter case, we are faced with subsequent questions: "what are these standards?", and "why should they be accepted?". As Nino underlines, in order to respond to these questions, there is nothing to do other than walking towards the realm of morality which establishes the ultimate (operative) justificatory reasons for action[23]. Therefore, if a justificatory nature is to be attributed to legal reasoning, there must always be a moral reason which initiates and grounds it[24]. That is, legal reasons can provide a ground for human rights only if they are seen as combinations of moral judgements and descriptions about factual situations. In the view of Nino, this is nothing, but another way of saying that legal reasons as such are indeed a sub-class of moral reasons (1993:23-24). In (justificatory) practical reasoning, their validity depends on more basic moral principles from which they derive. Hence, legal reasons can play only a

[23] The reason why this is so will be exactly clear only after the examination of the structural aspects of moral reasons. Nevertheless, the following remarks may be illuminating at this point. In fact, our practical reasoning involves different kinds of reasons such as aesthetic or prudential or moral reasons. All of these different kinds of reasons are indeed, bases for the justification of our actions. Yet, moral reasons constitute the highest level and trump other kinds of reasons when different kinds of reasons come into conflict in the evaluation of a particular action. Therefore, only moral reasons may be the ultimate justificatory reasons for actions (See, 1993: 21 and 72-73).

[24] Accordingly, Nino expands his previous example of typical legal reasoning in such a way which makes explicit that legal reasoning is, in fact, initiated by a moral reason which justifies judges' adherence to the referred set of standards (For the expanded version of the schema of legal reasoning, see, 1993:22).

derivative (auxiliary) role for grounding human rights. Likewise, Nino concludes as follows: "Human rights originate directly or indirectly from moral principles... whose validity does not depend on their formulation or acceptance by any authority... and which prevail over other practical principles except when these are also of moral character" (1993:24).

III.2.Locating Moral Constructivism: Critical Rationalism Versus Dogmatism And Scepticism

Having demonstrated that propositions about human rights are indeed the expressions of moral principles, Nino must encounter the following question: "Do such principles presupposed by human rights assertions really exist?", or "How can one provide a rational foundation for moral judgements?". As the author indicates, these are basic questions of the meta-ethics. Meta-ethics deals with the structure of morality. More exactly, it consists of considerations on the nature of moral concepts and judgements in the manner of grounding them. As we will elaborate in the next part, in order to respond the foregoing questions, Nino follows the Kantian meta-ethical theory which is called "moral constructivism". Yet, before examining this, it will be convenient to give a sketchy account of how moral constructivism should be located in comparison with the alternative meta-ethical perspectives. This requires the clarification of the problematic relation between rationalism, on the one hand, and moral dogmatism and moral scepticism, on the other hand. Such a clarification will disclose the fundamental tenet of Kantian Moral Constructivism: that it is a critical rationalist attitude challenging both dogmatism and scepticism (relativism) in the considerations on morality.

According to Nino, the association of the Enlightenment rationalistic outlook with the recognition of human rights in the 18th century was not a contingent (arbitrary) articulation. Instead, this association may be much more wisely understood if the non-contingent connection between the *criticist* outlook of rationalism and the moral outlook underlying human rights is taken into account. In the words of Nino, what underlies both of them is "the exclusion of every dogmatism, and of arguments from authority"(1993:38). He underlines that, from the very beginning, rationalism have had the implication of undermining the claim of privileged access to truth on the part of those who had held power thanks to the belief in their spiritual and worldly authority. As "an attitude of readiness to listen to critical arguments and to learn from experience", critical rationalism has held that " a belief can be sustained only if it is possible to overcome the arguments in favour of competing beliefs" (1993:38). This means that truth may flourish only if individuals are granted to freedom to sustain and defend their diversive beliefs; so, it also explicates why "tolerance" has been so much valued. As we will see, such an epistemic criterion of truth perfectly fits the basic premise of the moral outlook underlying human rights; because it carries in itself the declaration that the validity of moral judgements cannot depend *per se* on *the fact* of their acceptance by an authority.

Nevertheless, Nino maintains that the connection between rationalism and the moral outlook underlying human rights is not free of hitches. This is especially true in the case of a "non-critical (comprehensive) rationalism". Non-critical rationalism infers the following conclusion from the aforementioned rationalist criterion of truth: that there is no rational method for determining the validity of evaluative (moral) judgements (1993:39). Hence, it culminates not in a critical, but a sceptical attitude

with regard to moral questions. In Nino's view, this sceptical interpretation of the rationalist epistemic criterion is not a reasonable one. He argues that the rationalist epistemic criterion indicates that "the ascription of truth has always a provisional character and there is always the possibility that an error may be discovered by arguments which others can provide" (1993:41). However, he adds, this does not mean that "the truths being sought have a relative or illusionary nature" (1993:41). What we can legitimately infer from the rationalistic criterion is "tolerance to others' beliefs" since they are instrumental to our coming close to the truth. This does not contradict with one's defense of a proposition (such as the one which asserts the principle of tolerance) which s/he holds to be true. Yet, claiming that there is not such a truth, or such a common truth, the sceptic undermines not only the validity of critical debate (moral discourse) but also that of the grounding principle to which s/he adheres, namely "tolerance".

Nino holds that this inconsistency of moral scepticism is concomitant with several faulty assumptions concerning the meta-ethics, i.e., the nature of moral concepts and judgements (1993:51-60). Touching upon the two of these faulty assumptions Nino detected in moral scepticism will be convenient for our purposes in this chapter. Because Nino's arguments against them may provide us with a preliminary insight into the most fundamental characteristics of his Kantian meta-ethical outlook.

According to Nino, the assumption which is most basic and most common to the different variants of ethical scepticism (relativism) is as follows: judgements on values would be rationally demonstrable only if, like empirical judgements, they had factual counterparts which may be somehow accessed publicly (1993:51). Indeed, under this assumption lies the sceptics' main objection to the ethical dogmatism

which holds that there are self-evident moral facts inscribed into the nature of things. These self-evident facts may be apprehended only by an act of faith or by an intuition; hence, they cannot be intersubjectively corroborated. The sceptic challenges this dogmatic argument through a legitimate assertion: that anything which cannot be intersubjectively verified cannot be justified either. Yet, this assertion is associated with a faulty one in the sceptic argumentation: that anything which can be demonstrated must be the part of knowable world. In this way, the sceptic introduces the aforementioned basic assumption as the refutation of the possibility of the moral justification.

In the view of Nino, what is wrong in both scepticism and dogmatism is their understanding of the nature of moral facts. He underlines that moral facts are neither self-evident-facts apprehended by someone's revelation, nor must be empirical as the sceptic argues. This is because the problem of the justifiability of moral judgements is not ontological or epistemological, but conceptual (1993:52). This may be explained in the following way: A moral experience does not consist in "the *cognition* of certain moral facts but in their *recognition* as such" (1993:52). Facts cannot speak of values by themselves, but they are associated with values by human beings who recognize them as good or bad. Yet, this recognition (thus, a moral judgement) is not a purely subjective matter which cannot be subjected to justification or condemnation, as the sceptic would argue. As we will elaborate in the following chapters, moral reasoning is based on some necessary presuppositions whose denial by any alleged substantive moral principle is contradictory since the act of formulating such principles denies the conditions of possibility for their formulation. That is to say, the structure of moral reasoning prescribes certain structural (formal) requirements for moral principles;

and, these requirements establish the criteria of justifying, or condemning a value judgement. Hence, it may be concluded that, although *there are no moral facts in the ontic sense* (i.e., facts derived from (the knowledge of) the factual world), *there are moral facts prescribed by the structure of moral reasoning* (i.e., facts derived from the *intelligible/ideal* world which is a construction of our reason).

In the foregoing arguments, the sceptic's second faulty assumption has already been introduced: that the adoption of a moral principle is merely a matter of subjective emotion or decision whose whole rationality lies merely in the desires and interests of individuals who adopt it (1993:54). It has also been clear that, for Nino, this second faulty assumption is refutable on the basis of the formal requirements of moral reasoning (i.e., the prescriptions of the structure of the moral reasoning) which will be explicated in the following part. Yet, at this point, such an assumption still deserves much more attention in that it is concomitant with a crucial confusion between 'directives' and 'moral principles'. In order to support this second assumption, the sceptic calls our attention to the prescriptive use of language when one articulates a moral judgement. In her/his view, this suggests that a moral judgement is like directives which need to refer no fact other than that of the articulation of a directive by some authority (1993:54). In other words, just like a legal norm or an order of any kind, a moral judgement is a decision which does not imply a belief in the existence of an independent fact (truth), but simply aims to mould the behaviours of the others.

In his response to this emotionalist or decisionalist outlook on morality, Nino first argues that there is some sense of truth in it. The prescriptive use of language in the formulations of moral principles stems from the fact that they are pertinent to the

intention of moulding people's behaviour. However, he maintains that moral judgements are analogous to descriptive statements in a very important respect which radically distinguishes them from directives such as legal norms or orders. Like descriptive statements such as scientific assertions, a moral judgement, indeed, does *not generate* but *express* an original reason to believe that something is (should be) the case (1993:58). For instance, when one claims that the death penalty is morally wrong, s/he does not intend to alter the moral status of the death penalty or to create a new reason against it. Instead, s/he merely points out the existence of moral reasons against it. In line with these, Nino formulates the distinction between moral principles and directives as follows: while directives (i) do not necessarily imply the existence of reasons for action, and (ii) are formulated to generate reasons for action; moral judgements (i) imply the existence of reasons for doing something, and (ii) are not formulated to constitute one of the reasons for action (1993:59).

As Nino notices, this distinction between directives and moral principles points out *the autonomy of moral judgements*, which is emphasized by Kant. The autonomy of moral judgements underlines that moral judgements "are accepted not out of deference to the authority that formulates them, but because of a belief in the prior existence of reasons implied by them" (1993:59). That is what Kant meant by referring to "good will/*guter Wille*" (which is embedded as a potential in all human beings) as the ultimate authority of moral reasoning . Having given an overview of the basic distinguishing marks of Nino's Kantian moral constructivism in comparison to both dogmatic and sceptic outlooks on meta-ethical considerations, we may now engage in the elaboration of the basic tenets of this meta-ethical outlook.

III. 3. Kantian Moral Constructivism

III.3.1. The Nature of Moral Experience & The Question of Validity of Moral Judgements

We should begin by recalling that Nino promises that elaborating the Kantian meta-ethical outlook will disclose the (formal) criteria that must be met by substantive moral principles such as those from which universal human rights are derived. In turn, it will be demonstrable that human rights are universally valid rights, if it is demonstrated that moral principles underlying them accord with those criteria.

In order to understand the meta-ethical theory developed by Nino, the method on which the whole structure of this theory is based should be acknowledged, at first. This is "the Kantian transcendental method" whose application to moral theory may be defined as follows: it begins with actual moral practices and moral principles articulated in them and moves back to deduce the axiomatic premises which make possible the experience that we call moral. In this way, the transcendental method explicates the common core of social practices called moral practices, pointing out what remains invariable in the variation of them among different societies.

In line with these, Nino emphasizes that the beginning of wisdom with regard to morality consists in distinguishing social (positive) morality from critical (ideal) morality. Social morality is the set of practices which are the product of the judgements about ideal morality (1993:64). All social moral systems are constructed by a convergence in the critical moral judgements of people of a particular society. Hence, a social (positive) moral system is the set of rules that defines the actions and attitudes which are *socially held to be* righteous. It is undeniable that these social (positive) moral rules and moral practices depending on them differ from one society

to another one. This is due to the fact that a positive moral system is always conditioned by the spatial and temporal circumstances of the society in which it is constructed.

Yet, it is a crucial mistake to deduce the following conclusion from the fact that positive moral systems vary among particular societies: that the validity of a moral (critical) judgement depends on spatio-temporal circumstances and is determined by its acceptance by (the majority of) a particular society. Such a faulty conclusion ignores the fact that positive moral practices are products of judgements about an ideal morality. In Nino's own words, "without aspiration to act and to judge according to an ideal morality, there would be no positive morality. The rules of positive morality originate in a kind of reasoning in which judgements are formulated which refer, not to those rules, but to ideal principles" (1993:64).

What underlies this remark is the insight that positive moral rules, like legal norms and orders, function as prescriptive facts which cannot constitute operative-justificatory reasons for actions by themselves. At best, they constitute prudential reasons for actions since a person who respects positive moral rules avoids social sanctions against herself. On the other hand, as Kant emphasized, to act morally is to act out of respect for moral law without regard to any prudential concern (Kant, 1994: 57-58). What makes an action or judgement moral is its concern with being in accordance with the dictates of (ideal) morality on the sole basis of which it may be justified or disqualified. This is why Nino indicates, in the remark quoted above, that the aspiration to ideal morality is the common kernel of all positive moral systems in so far as they deserve the name of morality.

According to Nino, the relation between ideal morality and positive morality may be further illustrated by recoursing to the analogous relation between ideal science and positive science (1993:64/65). Ideal science constitutes the set of all true statements while positive science consists of the statements which are believed to be true by a scientific community. As such, there are both a continuous tension (as the result of their always non-perfect fitness) and a continuous "reflective equilibrium" between ideal and positive sciences. On the one hand, since positive science aspires to be an ideal science, it is exposed to the criteria which defines ideal science. On the other hand, the knowledge of those criteria may be deduced only within and by positive science. This is exactly same for the relation between ideal morality and positive morality: the criteria of ideal morality are found implicitly in the basic properties of substantive moral principles which are accepted as valid by positive moral systems. According to Nino, these properties are determined by the functional aspect and structural aspects of moral judgements. Hence, if we understand the structure and function of the moral judgements, we may also illuminate the conditions which these judgements must satisfy in order to be justified.

III.3.2.The Functional Aspect of Moral Judgements

Nino underlines that the question concerning the social function of morality does not seem to cause a matter of great controversy in moral and political thought. Referring to Hobbes and many contemporary philosophers such as Hart, Warnock and Rawls, he argues that the omnipresence of morality and law in diverse social groups can be explained on the basis of elementary circumstances of social life. These circumstances on which afore-named and many other philosophers have agreed are "both 'objective', such as the scarcity of resources, the vulnerability of persons to

attack by other individuals, the rough equality of strength and intelligence; and 'subjective', such as the existence of diverse interests among individuals, the limits of knowledge and rationality, and the limits of sympathy towards the interests of others" (1993:67). As the Natural Law theory explains by reference to human nature, these basic circumstances may both generate conflict and foster cooperation among individuals. In line with this, both morality and law satisfy, in respectively diversive ways, the same function in such circumstances of social life: to diminish conflict among individuals and to facilitate social cooperation (1993:67). On the one hand, law performs this function basically by two means: *coercion* and *authority*. In the case of coercion, law provides merely prudential reasons for actions. In the case of authority, in addition to prudential reasons, law must be supported by moral reasons since no authority (i.e., social power that is assumed to be legitimate) can depend merely on the state coercion. However, in both cases, law aims to determine only the external behaviour of individuals, i.e., to lead them to do certain things and not to do certain things. On the other hand, morality performs the function of diminishing conflicts and facilitating social cooperation not by merely flourishing the tendency to do (or not to do) certain things, but flourishing the tendency to do (or not to do) them because of the belief that there are reasons in favour of them (1993:68). Therefore, instead of being merely a matter of directly determining human persons' external behaviour, moral discourse is a matter of internal adoption of reasons for action by human beings. Contrary to what law primarily does, morality aims to converge human persons' actions and attitudes in a *discursive* way, that is, through creating *coincidences of beliefs* in moral reasons (1993:69). What makes these coincidences of beliefs possible within discursive moral activity is every moral person's necessary

adherence to certain (formal) rules which Nino calls "the structural aspects of moral judgements".

III.3.3. The Structural Aspects of Moral Judgements

In considering the structural aspects of moral judgements, Nino first maintains that the elucidation of the most basic features of morals is Kant's great contribution to moral philosophy. He argues that the fundamentals of morality explicated in the *Foundations of the Metaphysics of Morals* are (i) the autonomy of morals, (ii) the universality of morals, and (iii) the unconditionality of morals with regard to desires and interests of agent[25] (1993:69). Then, Nino engages in presenting his own account of some structural aspects of morality, which is supported by the inspirations provided by contemporary authors such as Baier, Frankena, Hare, Richard, and Rawls who have had original contributions to Kantian Moral Constructivism (1993:71).

Accordingly, Nino reemphasizes autonomy as the most fundamental aspect of morality. In line with his previous arguments, he asserts that moral discourse excludes

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[25] It would be worthwhile to present Kant's own account of the formal features of moral reasoning, in his *Foundations of the Metaphysics of Morals*. Yet, the extent of my work does not permit me for such a presentation. Nevertheless, this does not detain me from quoting a passage from the *Foundations of the Metaphysics of Morals*. The following passage (which is, I think, illustrative for the sipirit guiding Kant's whole moral philosophy) explicates the idea/ideal of autonomy and two other features (which derive from the former in that they presuppose the human moral persons' capacity to act autonomously) in a condensed way of argumentation:
"When we look back upon all previous attempts that have been made to discover the principle of morality, there is no reason now to wonder why they one and all had to fail. Man was viewed as bound to laws by his duty; but it was not seen that man is subject only to his own, yet universal, legislation and that he is bound only to act in accordance with his own will, which is, however, a will purposed by nature to legislate universal laws. For when man is thought as being merely subject to a law (whatever it might be), then the law had to carry with it some interest functioning as an attracting stimulus or as a constraining force for obedience, inasmuch as the law did not arise as a law from his own will. Rather, in order that his will conform with law, it had to be necessiated by something else to act in a certain way. By this absolutely necessary conclusion, however, all the labor spent in finding a supreme ground for duty was irretrievably lost; duty was never discovered, but only the necessity of acting from a certain interest. This might be either one's own interest or another's, but either way the imperative had to be always conditional and could never possibly serve as a moral command. I want, therefore, to call my principle the principle of the autonomy of the will, in contrast with every other principle, which I accordingly count under heteronomy" (Kant, 1964:100).

"arguments and techniques of motivation which resort to some authority, human or divine, to treats of harm or offers or benefit, or to misrepresentation or conditioning" (1993:71). Such claim re-underlines that morality as a social institution (i.e., 'morality concerning the intersubjective realm' or 'morality as a discursive social practice') can work only via consensus.

For Nino, this most fundamental aspect is followed by five more aspects whose satisfactions by moral principles make possible the convergence of actions and attitudes through free acceptance of those principles. These five aspects are as follows: (i) the publicity, (ii) the priority over other reasons to act, (iii) the generality, (iv) the superveniency with regard to facts, and (v) the universality (1993:72-73). Let me look at them briefly.

The aspect of publicity is closely relevant to the aforementioned assertion that moral judgements and principles are expressions of the beliefs in the existence of reasons for action. It suggests that everyone must have access to moral principles since secret principles or principles that have been revealed only to some persons cannot be the bases of the convergence of beliefs in the existence of reasons for actions (1993:72).

The second feature, the priority of moral principles over other reasons for action, is connected with the structural characteristic of practical reasoning. The fact that practical reasoning consists of different kinds of reasons such as prudential, aesthetic, or moral runs out the following risk: since different kinds of reasons may come into conflict in the evaluation of particular actions or situations, our practical reasoning may remain inconclusive in such cases. This means that even if everyone has accepted same moral principles, their actions and attitudes would not converge simply

because they could act in accordance with reasons other than moral ones (1993:73). The aspect of priority of morals avoids such risks, providing the integrity of practical reasoning. It points out that practical reasoning is structured in such a way that different kinds of reasons are ranked in a hierarchical order whose highest rank is constituted by moral reasons. Hence, it prescribes that in the cases of a conflict between a moral reason and a reason of different kind, the former must override the latter which belongs to a lower rank within the structure of moral reasoning. It may be said that the aspect of priority of morals over other reasons to act is what Kant already pointed out by the argument for the unconditionality of morals with regard to interests and desires of individuals.

The third aspect, the generality, has to do with the content of moral principles. It determines that moral principles must not subscribe to particular names or definite descriptions but to generic properties of relevant situations (1993:72). Because, while particular situations may generally involve accidental properties which require special treatment of the exceptional features; moral principles aim to converge human persons' actions and attitudes through creating expectations for regular normative treatment. Closely related to this aspect is the superveniency of moral principles with regard to facts[26]. This leads us to the point that generic features, which distinguish particular situations with respect to the application of moral principles, must have a factual character so that everyone can assess which situations give rise to what moral solutions (1993:72).

Lastly, the aspect of universality requires our particular attention since the universal scope of human rights stems from the aspect of universality of moral

[26] Supervenient: something that comes or occurs as additional, extraneous or unexpected.

principles underlying them. According to Nino, although the aspect of universality is usually assumed as being involved in that of the generality, the former should be grasped independently, since there is something in universality, which may escape from the definition of generality (1993:72). While the aspect of generality basically defines a requirement which must be satisfied by the content of any moral principle, the aspect of universality is characterized by a requirement concerning the application of moral principles to factual cases (1993:72). For Nino, the latter prescribes that if one accepts a moral principle as valid in the evaluation of a certain action or attitude, the same principle should be held valid in all similar cases (the cases whose generic-factual features do not distinguish from each other so significantly that those features supervene the moral principle at hand) without regard to by whom the conduct is performed or by whom the moral principle is appealed (1993:72).

At this point, it will be convenient to recall Kant's first formulation of categorical imperative which covers the combination of what Nino points out through the aspects of universality and of generality: "Act only according to that maxim whereby you can at the same time will that it should become a universal law" (Kant, 1964:70). The first formulation of categorical imperative which is also known as the supreme principle of morality may be explicated as follows: According to Kant, in moral reasoning (i.e., when we are concerned with the ultimate justification of our actions), we presuppose in ourselves a capacity to get beyond our particular existence in the empirical world. In this way, we assume ourselves as legislators in a completely rational (ideal) world which is constituted of norms derived from our free wills. In legislating such norms, we will that they become general rules binding for all. Yet, since a general rule must bind, by definition, ourselves too, we must first be certain about whether we can

really (or consistently) will a certain norm as a general rule binding us as well as other persons. Now, let's ask ourselves whether we can will consistently the following principle as a general rule: that different persons should be bound with different rules in any defined case, i.e., in any situation which has distinguishable generic properties. It is evident that no person who engages in moral reasoning can consistently will this principle as a general rule. Because the acceptance of such a principle would mean that formulation of no other principle as a general rule is possible, and that moral reasoning is, in fact, a vain attempt. As a result, moral subject would culminate into a contradictory situation in which s/he rejects what s/he previously presupposed: that s/he is a legislator capable of formulating substantive moral principles. This is why Kant points out the universality as the supreme principle of morals by his first formulation of categorical imperative which is also called "the formula of universal law".

Having pointed out these five formal aspects of moral principles, Nino argues that such an account should be completed with the explanation of the defining characteristic of moral activity. He notices that while it is evident that the aforementioned aspects of moral principles have the negative effect of disqualifying some alleged moral principles, the fact that they also have a positive contribution in advancing moral discourse through the common acceptance of moral principles would remain blurred without explicating the special point of view defining moral activity (1993:73-75). This special point of view adopted necessarily by every person in participating moral discourse is "the moral point of view" which is characterized by "impartiality (impersonality)". This underlines the point that a moral person must accept the principles which would be accepted from an impartial perspective, even if

that person is inclined to reject that principle from his own perspective which magnifies her/his interests in comparison to others' interests (1993:73).

In this way, we finished our examination of Nino's account of the basic aspects of moral principles. Recall that in deducing these aspects, Nino's constructivist theory did not simply indulge in a normative claim that such and such features must be met by moral judgements. Instead, it followed a conceptual (transcendental) method that aims to disclose which presuppositions are the conditions for possibility of the experience which we call morality. According to Nino, such a method leads us to the acknowledgement of aforementioned functional aspect and structural aspects which must be satisfied by any substantive moral principle. That is, it shows that a justifiable moral principle is the one which can diminish conflicts and facilitate social cooperation since it is acceptable by any moral person as the ultimate and universal reason for action by the virtue of its structural aspects. Nino calls this as "the hypothetical acceptability" of moral principles (1993:76). Similar to what Rawls calls "the procedure of construction", "the hypothetical acceptability" demarcates the conditions which verify moral principles, i.e., the "moral facts" that justify the substantive moral principles. Disclosing the knowledge of the standards justifying principles on the bases of which we act, the criteria pointed out by "the hypothetical acceptability" also show us "the appropriate bridge" which *we can and should construct* to jump over the abyss that separates "is" and "ought" (1993:77).

Coming back to the issue of the universality of human rights as the major concern of this thesis, I may argue that Nino's moral constructivism allows us a strong Kantian standpoint in providing the ground necessary for universal validity of human rights. Because his arguments suggest that one may justify human rights as

universally valid norms if one can demonstrate that the substantive moral principles underlying them are hypothetically acceptable principles. In the following part, Nino's attempt for such a demonstration will be examined. However, an earlier remark with regard to this justification seems necessary at this point. As Nino himself did, a general limitation inherent to the nature of moral justification should be acknowledged: it is necessary not to forget that a moral justification is a justification *within* moral reasoning, i.e., a justification from the moral point of view. Any further attempt to justify moral reasoning itself is an impossible attempt (1993:80-82). Because, as we have seen, moral reasons themselves are the ultimate standards of justification which cannot be judged by practical reasons of inferior kinds such as prudential reasons. This means that one can demonstrate theoretically what moral principles are valid; but one cannot give a supra-moral answer to the question that "why must a person act morally once that person accepted the validity of a moral principle?". In fact, as Nino grasps, given the priority of moral reasons within practical reasoning, the foregoing question is an absurd one which asks for: "what moral reason do I have to do what morality prescribes, which is not a reason which is derived from morality itself?" (1993:82).

III. 4. Justifiability of Moral Principles Underlying Human Rights

In order to demonstrate the justifiability of universal human rights, Nino presents a formulation for each of the principles of positive (social) morality which underlie human rights, and offers an outline for the justification of each of them in the light of the moral constructivist outlook. As we will touch upon respectively, these principles are (i) the principle of personal autonomy (the P.P.A.) that establishes the content of human rights, (ii) the principle of inviolability of Person (the P.I.P) which specifies

the function of human rights, and (iii) the principle of Dignity of Person (the P.D.P.) that underlines the dynamic feature of human rights.

Referring to the lists of rights in the current documents of human rights, Nino notices that most of human rights are "rights to do certain things" (1993:130). For him, this suggests that these rights are derived from "a general principle which proscribes interference with any activity, which in turn, does not interfere with the activity of other people" (1993:130). This principle is the P.P.A. that "establishes the value of the free individual adoption of ideals of human excellence and of plans of life based on them" (1993:132). In political philosophy, the P.PA. is generally associated with the principle of neutrality of state with regard to the conceptions of good and the ideals of virtue,. Yet, according to Nino, both the formulation of P.P.A. and its association with the principle of neutrality need qualifications, since the P.P.A. itself is a moral principle which express a moral ideal or good. In line with this, he first differentiates two kinds goods as "social goods" and "personal goods" (1993:135). The conceptions of social goods are "the principles of intersubjective (public) morality" which express the ideals of just order and evaluates human persons' actions on the basis of their effects on other persons. On the other hand, the conceptions of personal goods are "the principles of self-regarding morality" which accounts for what is good in the life of a person and evaluates a person's actions on the basis of their effects on her/his moral character, or on the value of her/his life. Nino underlines that autonomy may be held both as a principle of intersubjective morality (i.e., a conception of social good) and as a principle of self-regarding morality (i.e., a conception of personal good). In the former sense, it defines the ideal of good society as a society in which individuals freely choose and realize their

personal ideals. In the second sense, it defines the personal commitment to the idea that autonomy is the good which most enhances the character and life of a person. Hence, the ideal of autonomy, in the second sense, defines both the basic features of a virtuous life and the essential part of any justifiable set of personal goods, which a moral person should choose. Nino then defends that the P.P.A. *grounding human rights* matches with the first meaning of the ideal of autonomy as a principle of intersubjective (public) morality. Therefore, it may be concluded that: (i) with regard to the principles of self-regarding morality, the P.P.A. prescribes the attitude of neutrality, since what it most values is free adoption of personal ideals by individuals; yet, (ii) with regard to the principles of intersubjective morality, the P.P.A. cannot be a neutral one, since it itself is a principle of intersubjective morality which disqualifies the (perfectionist) principles supporting the inferences by the state or any other agent to the choice of personal ideas.

Justifying the principle of personal autonomy is not difficult, since its connection with the autonomy of morals which is the most fundamental feature of morality is evident. In the sense Kant defined, moral autonomy applies to both what Nino calls intersubjective morality and personal morality. As we have seen, the autonomy of moral judgements points out that moral (discursive) practice does not operate through coercion, misrepresentation, or conditioning, but through consensus. I have also presented that such consensus explicates why there is always a "minimum commitment" among the participants of moral discourse. This "minimum commitment" is the acceptance of the "basic norm": "it is desirable that people determine their behaviour only by the free adoption of principles that, after sufficient reflection and deliberation, they judge valid" (1993:138). The necessary adherence to

"the basic norm" means, in turn, that it is crucially inconsistent to defend, within the context of moral discourse, a principle that denies the value of moral autonomy. As Nino argues, the value of moral autonomy transmits itself, naturally but *prima-facially*, to the actions which are determined by the free adoption of principles prescribing them. Therefore, to will the *enforcement* on others of the principles we hold valid would be inconsistent, even if we are sure about the moral validity of them. Yet, the vitally important point is that both the *prima-facie* value of actions determined by the free adoption of "moral" principles and the prohibition against the enforcement of moral principles is overridden if the actions in question harm the autonomy of other persons (1993:143). Because what the recognition of the autonomy of morals leads is the recognition of the value of the ideal of autonomy *for all moral persons*; and, such actions inimical to autonomy (which are indeed not autonomous since they are conditioned by the interests or desires of the agent) cannot be winked at in the name of respecting the free chosen conceptions of goods.

On this ground, Nino asserts that the foregoing inferences from the aspect of the autonomy of morals are exactly what his formulation of the P.P.A. as a principle of intersubjective morality implies. On the one hand, it demands that whatever their content, the self-regarding ideals (goods) must be freely chosen and realized by individuals since such ideals (goods) do not run out the risk of harming others. On the other hand, it maintains that, in the case of actions which effect not only the agent's but also other persons autonomy, it is fully consistent to disqualify "the principles of intersubjective morality which denies the P.P.A." Hence, Nino's formulation of the P.P.A. disqualifies those hypocritical kind of arguments which aim to defend the

actions that harm others' autonomy on the very basis of the principle of autonomy through claiming that the agents have 'freely chosen' to act in such a harming way[27].

The justification of the P.PA. is certainly concomitant with the recognition of "the objective value of the goods that are instrumental for preserving and expanding personal autonomy in the choice and realization of plans of life" (1993:143). This is vitally important since the content of human rights are deduced to a great extent from these goods (1993:145). Nino notices that this can be easily demonstrated through glancing at the documents of human rights. The most basic rights referred by these documents are as follows: the right (freedom) to perform any act which does not cause harm to other people; the right to conscious biological life; the right to physical and psychic integrity; the right to liberal education; the right (freedom) to express religious, scientific, artistic, political, etc, ideas and attitudes; the right (freedom) to develop private life and intimate relationships; the right (freedom) of association; right to some control of material resources, which involves both access and stability; right to work; and, the right to personal security[28] (1993:145-147). For Nino, it is evident that each of these human rights consists in the protection of a certain good which is necessary for preserving and expanding personal autonomy.

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[27] It should be remembered that, from a Kantian standpoint, such choices of actions which are harmful for the autonomy of other persons cannot be counted as "free choices". Instead, they are heteronomous choices (determined by *natural* interests of man who shares most of them with animals), in opposition to truly free (unconditional) choices which are determined by the truly human capacity for *guter Wille*.

[28] Nino maintains that his inventory of human rights, like any other one which is currently available, is incomplete and tentative. In his view, this is due to the difficulty of determining exactly the scope of goods which are necessary for preserving and expanding personal autonomy. Nevertheless, he thinks that an important gap in his inventory may be filled out through supplementing the P.P.A. with "the hedonistic principle" which values pleasure and absence of pain. He adds that "the hedonistic principle" itself may be justified on the basis of the P.P.A.: it may be argued that suffering pain and discomfort may put difficulties in the way of persons' free choice and realization of their personal ideals (See, 1993: 143-148).

At this point, one should ask the following question: "what does the recognition of the moral value of goods which constitute the content of human rights mean for our practical reasoning?" In fact, such a question is another way of asking "what is the function of human rights?". Nino's theory has a clear response to this question *via* the principle of the inviolability of the person (P.I.P.): "Prohibiting to impose on individuals without their consent sacrifices which do not redound in their benefit" is the function of human rights (1993:149).

Nino argues that the P.I.P. specifying the function of human rights may be understood by referring to Kant's second formulation of the categorical imperative which is as follows: "Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only" (1993:149). Because, depriving some person of a good (which is so valuable that it constitutes the content of a right) without his/her consent and without redounding in her/his benefit means to reduce that person into a means for an end which is external to her/him. In this way, the connection between the second formulation of the categorical imperative and the P.I.P. also establishes a connection between the P.I.P. and the P.P.A.. As we saw, the P.P.A. argues that what is most valuable in human beings is their capacity to freely choose and realize their plans of life. If so, the formulation of the P.I.P. as the prohibition to treat someone as a means through depriving her/him of something valuable (without her/his consent and without redounding in his/her benefit) prescribes, above all, the respect for *each* individual's exercise of autonomy (1993:150).

From Nino's angle, the close connection between the principle of personal autonomy and the principle of the inviolability of the person. is concomitant with a

crucially important distinction which makes necessary to emphasize the P.I.P. as a separate principle determining the function of human rights. The distinction is that the former is an "aggregative principle" while the other is a "distributive principle". An aggregative principle defines some state of affairs as good and prescribes the maximum realization of that good in the actual world regardless of how the enjoyment of it is distributed among human persons. Contrary to this, a distributive principle *entrenches* certain goods *in* persons so indissolubly that persons' enjoyment of them cannot be sacrificed for the sake of the maximization of those goods in the actual world. Accordingly, while the P.P.A. values the maximum actualization of aggregate amount of goods instrumental for preserving and expanding personal autonomy in the choice and realization of plans of life; the P.I.P. establishes the inviolable kernel in the enjoyment of goods by each person, which can never be overridden.

With regard to the justifiability of the P.I.P. which specifies the function of human rights, Nino draws on the argument that the denial of it is incompatible with the plausible interpretation of "the moral point of view" which is characterized by "impartiality". Recall that impartiality requires that the validity of moral principles determining actions should be judged without regard to the identity of the bearers of interests. According to Nino, impartiality underlying the moral point of view is sometimes misunderstood as the conglomerate of the points of views concerned in a state of affairs, as the utilitarians do. In line with this, it is misleadingly deduced that moral persons articulating moral principles should take into account only the aggregative sum of the goods or interests. In Nino's view, the source of this misunderstanding lies in that it implicitly assumes society as an organic unity,

overlooking the "separateness and independence of persons" (1993:150). Inspired by the theories of distributive justice developed by authors such as Rawls, Nagel, and Nozick, Nino claims that "it is one thing for the identity of the bearers of interests to be irrelevant from the moral point of view, but quite another thing for it to be irrelevant whether or not they are identical"[29](1993:159). Therefore, following Nagel, he argues that the moral point of view must be understood as both an *individualized* and an *omni-comprehensive* perspective through which "moral person puts himself in the situation of each one of the people concerned" (1993:159). Accordingly, he maintains that the moral point of view disqualifies the frustration of interests of some persons (without their consent and without redounding in their interests) on the mere basis that their frustration is instrumental for the satisfaction of the greater amount of interests by the others. In this way, the plausible understanding of the moral point of view conveys us to what Nagel calls "rights conception", i.e., the recognition of basic goods and interests as being so indissolubly entrenched in (entitled to) every human person that they cannot be overridden for the sake of the pursuit of common good (1993:161). As we know, this is precisely what Nino points out by the principle of inviolability of the person.

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[29] Having noted that Nino appreciates Nozick as well as Rawls and Nagel in his non-utilitarian understanding of morality, I should acknowledge that Nino appreciates the Nozickian theory of justice and rights in only its non-utilitarian aspect. Likewise, in the 6th chapter of his book where he discusses "the scope of human rights", he harshly criticises Nozickian theory (see, 1993: 186-226). There, Nino asserts that Nozick's conservative-liberal (libertarian) theory, which forecloses any consideration with the aggregative principle of P.P.A. by overemphasising the P.I.P., inheres a distorted understanding of "the moral point of view" as an extremely individualized perspective. This leads, in turn, to restrict the scope of human rights to what is called "negative rights" in his theory. As we will see very soon in the main text, in opposition to this libertarian understanding, Nino defends Rawls & Nagel's egalitarian understanding of "the moral point of view as both an individualized and omni-comprehensive perspective". As he demonstrates in the 6th chapter of his book, this egalitarian understanding expands the scope of human rights through leading us to the recognition of two basic features of human rights that Nozick's libertarianism fails to account for: (i) that rights are basically devices to protect the weak; (ii) that "positive rights" and "negative rights" are the aspects of same rights which preserve the conditions of autonomy for each human person (see, 1993: 217-218).

Up to now, we have seen how the P.P.A. and the P.I.P. constitute respectively the content and the function of human rights. Yet, in the view of Nino, the combination of these two principles is still insufficient for a compete account for the ground of human rights. This is due to the fact that in the light of these principles, human rights seem to be static norms which are fully independent of human will once they are defined. Such a static vision would be in tension with the assertion that human rights are underlined by the purpose of preserving and expanding *human auto-nomy* (i.e., determination of the rules in accordance with which human persons act by human persons themselves). Therefore, Nino introduces the principle of the dignity of person (the P.D.P.) which accounts for the dynamic character of human rights. The P.D.P. prescribes that "human beings should be treated according to their manifestations of will when these belong to their plan of life, whatever it is" (1993:177). Hence, it is the antithesis of "the normative determinist principle" that misleadingly infer the following *normative* conclusion from the *fact* that people's will is conditioned by social, physiological and psychological circumstances: that human beings' will should not be taken seriously into account in normative evaluations of human actions. Contrary to the latter, the P.D.P. ascribes obligations and liabilities to human persons on the basis of their will expressed by decisions, declared intentions, and consent (1993:178). In this way, the P.D.P. establishes that, if a person wills (freely consents) to sacrifice, for the sake others, *some reasonable part of* goods (interests) entrenched in her/him, that person's consent requires to make an exception to the P.I.P. That is, the imposition of a reasonable degree of sacrifice on the basis of person's will does not mean treating that person as a means. Indeed, as Nino suggests, two basic characteristics of human life in societies make necessary such sacrifices on the part of

individuals: First, the scarcity of resources of goods makes impossible the unlimited enjoyment of goods by every individual. Secondly, individuals' plans of life may include external preferences which affect other people[30] (1993:180). Therefore, life in human society always prescribes that "people should relinquish some goods and acquire others, reciprocally accommodating their plans of life by broadening some of their capacities and restricting others" (1993:180). Hence, which goods establish the content of rights should be treated (to some extent)[31] dynamically (i.e., in accordance with the will [free consent] of human persons concerned), as the principle of dignity of person prescribes.

According to Nino, the justifiability of the P.D.P. may be demonstrated in a way which is analogous to that of the P.P.A.. As emphasized several times in this chapter, morality is a matter of the belief in the existence of reasons for actions; and, the social practice which is called moral discourse is based on the free adoption (voluntary acceptance) of moral principles by human persons. This indicates that if s/he is honest, a participator of moral discourse necessarily holds that her/his interlocutors' wills (expressed by their decisions, declared intentions and consent) have a significance regardless of the social and psychological factors conditioning them. In fact, it may be said that a honest participator assigns so great significance to her/his interlocutors' wills that s/he accepts to abide by the principles they offered if s/he considers them valid after due reflection and deliberation (1993:184). If this is so, it is an evident contradiction to defend, within moral discourse, the normative determinist

[30] This means that the distinction Nino previously drew between personal morality and intersubjective (public) morality cannot be a strictly demarcated distinction.

[31] It goes without saying that dynamic treatment of human rights can be considered valid only under a threshold determined, in turn, by the P.P.A. and the P.I.P. It is vitally important to hold in mind that, for Nino, three principles underlying human rights do not surpass, but reciprocally modify each other.

principle according to which human persons' (expressions of) wills should not be taken into account since they are determined by causal factors. Indeed, this is the most crucial inconsistency ever possible within moral discourse: the act of offering this principle as an operative-justificatory reason (i.e., as a moral principle) to other persons whose (expressions of) wills are said to be insignificant, does disqualify the content of the principle offered.

III. 5. Concluding Remarks:

In this way, we have completed the examination of Nino's arguments concerning the formulations and justifications of the moral principles underlying human rights. It must be underlined that Nino's foregoing arguments are programmatic and tentative, which provides only an *outline* for the theoretical demonstration of (moral) justifiability of human rights. Therefore, it must be accepted that an exact understanding and justification of human rights still needs much more theoretical elaboration which may, in turn, disclose that the schema presented by Nino should be revised (or modified).

However, it should also be accepted that, despite the tentative or programmatic nature of his foregoing arguments, Nino succeeds in grounding his basic assertion that human rights are justifiable as (universally) valid moral norms. In line with this, his theory has the virtue of providing a ground for an affirmative answer to our basic question concerning the universality of human rights: the universality of human rights are intelligible in the light of his Kantian moral constructivism which, without denying the fact that morality is a human construction, grasps the universality as one of the basic characteristics of valid moral principles from which human rights are derivable. To put them in a nutshell, what Nino has demonstrated can be enumerated

as follows: that moral reasoning as the highest level of practical reasoning, consists in the attempt to formulate universal (acceptable by all rational beings) rules with which human actions should accord; that moral reasoning as such necessarily presupposes the capacity of formulating universal principles (i.e., the capacity of autonomy) as being inherent to all moral persons (i.e., in all subjects of practical reasoning), regardless of their particular determinations in the actual world; that ideal of autonomy has an objective value which is prior and superior to all conceptions of goods subjectively held by human beings; that the recognition of the objective value of the ideal of autonomy as a capacity inherent to every human moral person is indeed the recognition of universal human rights, since the latter consists in the protection of the goods which are essential for preserving and realizing the autonomy of each human being.

Hence, it seems that Nino's Kantian moral constructivism succeeds in providing an internally consistent and firm theoretical ground for the universality of human rights. Compared to the vulnerabilities of Jack Donnelly's liberal-conventional approach, Nino's achievement depends on grounding his theory on a well-articulated account of what Donnelly calls "a universal human *moral* nature". As we have seen in the previous chapter, Donnelly is reluctant to build his own theory on such an account because he believes that any account of "a universal human *moral* nature" is directly indefensible. In opposition to Donnelly, Nino, by emphasizing that the universal human rights derive from "free will/*guter Wille*" of the autonomous subject of practical reasoning, unhesitantly refers to the autonomous moral subject as the universal human *moral* nature grounding human rights. Also, in his successful defense of this Kantian vision of human *moral* nature in the face of dogmatic and

sceptic approaches, Nino demonstrates that Donnelly's claim concerning the indefensibility of any account of "a universal human *moral* nature" is not a plausible argument.

In the lights of Nino's arguments examined up to now, this Kantian understanding of the autonomous human moral subject grounding the idea of universal human rights may be recovered in a concise way as follows: First of all, the Kantian vision of human moral subject is not a description of man as he exists in the empirical world. Indeed, about the man as he exists in the empirical world, it may be legitimately argued that he is always encumbered with spatio-temporal determinations, i.e., that he is always contaminated by heteronomy. Yet, from the viewpoint of the Kantian meta-ethical outlook, the heteronomous character of man's actual existence never invalidates the idea of autonomous subject as the universal human *moral* nature which, in turn, refers to *man's capacity to judge his spatio-temporal determinations.* Thus, rather than being simply a description of man, the idea of man as autonomous subject is a description of how human beings portray or imagine themselves when they engage in any consideration (or deliberation) for justifying their actions. In other words, it is an idea of man about himself, which makes moral experience as such possible, and which spontaneously actualizes itself in this experience. Thus, Nino underlines that the vision of man as autonomous moral subject needs no proof other than "that it is necessarily assumed when we participate in the practice of moral discourse and that it is an essential part of the underlying structure of the reasoning which we perform through it" (1993:112).

Consequently, I want to repeat that, by grounding universal human rights on the idea of autonomy underlying the whole structure of moral practice, Nino's Kantian

moral constructivism provides us with a solid theory of the universality of human rights. In a consistent and non-circular way, his meta-ethical outlook is able to account for the universal moral validity of human rights as human-constructed devices to fill out indefinitely the gap between man's heteronomous existence with "the idea of man without determination (i.e., the idea of man self-determined by his own will)".

Nevertheless, a certain difficulty remains, at least in our age, for the kind of approaches Nino represents. Let me explain briefly: As the examination in this chapter has disclosed, Nino's whole theoretical project is based on an outlook that gravitates every moral value around human subject and posits this subject as the ultimate authority of his rights. To put it in the shortest way, Nino inevitably adheres to a modern-humanist philosophical outlook in his attempt to ground the universal human rights. However, as we will see in the next chapter, such an outlook in general, and its connection with the idea of right and human rights in particular have been exposed to serious challenges in our age. Even more, it may be argued that these challenges are so widespread and influential that "anti-humanism" is the converging point of the most of "innovative" strands in contemporary political and social thought[32]. Thus, a mere re-invocation of the internally secure foundations of the idea of universal human rights in Kant's modern-humanist moral philosophy may not seem to many contemporary readers as the fully satisfactory way for the demonstration of the universality of human rights.

Having in my mind this current difficulty concerning the main premises and prejudices of modern-humanist philosophy, I will examine the critical humanist

[32] This is especially true for the case of continental political and social thought which has been dominated by the structuralist and post-structuralist approaches for the severeal decades.

theory developed by Luc Ferry and Alain Renaut in the forthcoming chapter. As we will see, Ferry & Renaut's critical humanism consists in an attempt to defend the idea of *universal* human rights and its modern-humanist philosophical foundations in the face of the most radical variant of anti-humanist challenges brought about in political and juridical philosophy[33].

[33] Indeed, the variant of anti-humanisms with which Ferry & Renaut tackle is so radical that it does not simply challenge the modern-humanist outlook, but explicitly aims to destruct the modern idea of rights and human rights.

CHAPTER FOUR

FERRY & RENAUT' S CRITICAL HUMANISM : DEFENDING THE IDEA OF UNIVERSAL HUMAN RIGHTS IN THE FACE OF THE ANTI-MODERN AND ANTI-HUMANIST CHALLENGE

In concluding the previous chapter, I have already argued that there are certain difficulties, in our age, for the kind of approaches represented by C. S. Nino, which grounds the universal human rights in an outlook that gravitates every value around man and posits human subject as the ultimate authority of right(s). Because, it is the widespread convinction nurtured by many influential currents of contemporary social and political thought that such a modern philosophical humanism itself has been the intellectual accomplice of the most dramatic violations of right(s) experienced throughout modernity. According to this prevalent mentality of our age, philosophical humanism has provided the theoretical ground for the modern project of making the man master (sovereign) of his world, and this project has brought about the severe/extreme totalitarianisms which are the evidences of the destruction of every standard (criterion) for human action in the name of this (illusionary) project. More exactly, it has become "a ritual of our age to blame modernity and humanism in the name of *the right*" (Ferry & Renaut, 1992: 29). Even more striking is the argument that defending human rights is now a matter of protecting them against humanist modernity which, as we know, has brought these rights originally into the scene[34].

[34] For instance, see, Pheng Cheah, 1997; David Champell, 1998; and, Simon Chesterman, 1998.

Among the representatives of this ritual, Leo Strauss & Michel Villey occupy a position of exceptional importance in political and juridical thought of 20th century. They develop a radical challenge to modern philosophical humanism in the context of the conception of rights. This is not a challenge that simply problematizes the modern-humanist ground of human rights. Rather, what Strauss and Villey put at the stake is the very idea of rights (and human rights) as *subjective rights*, which is associated with modern-humanist tradition by these authors[35]. In fact, this radical challenge is particularly important for the question of the universality of human rights. Because, as we will see in this chapter, the basic tenet in Straussian/Villeyian attack against both the modern understanding of rights as subjective rights and its modern-humanist philosophical foundation relies on the premise that the modern-subjective understanding never permits us to apprehend the right as a universal (in their own terms, 'objective') criterion for human actions. For Strauss and Villey, the modern humanist valorization of human freedom as the hightest value, which underlies these subjective rights (including human rights), is the fundamental obstacle for the promotion of these 'alleged rights' to the true status of the right as a standard for human action.

In this chapter, I will examine several works authored by two French political philosophers, Luc Ferry and Alain Renaut who aim to provide a modern-humanist response to the prevalent anti-modern-humanism of our age. I will basically focus on two fundamental arguments they developed by discussing the case of Leo Strauss

[35] As it will be elaborated in this chapter, modern understanding of rights as subjective rights depends on the basic premise that the ultimate authority from which rights are derived is human will or reason. Thus, from such an outlook, rights (including human rights) are nothing but expressions/declarations of human will or reason. This modern understanding is strictly at variance with the pre-modern understandings of the right as an 'objective' criterion derived from an external authority (Nature or God) over human will. It may be noted at this point that this distinction between modern and pre-modern understandings is what Jack Donnelly calls the distinction between "rights as entitlements" and "right as a standard of rectitude" (See, pages 10-11 in this thesis).

and Michel Villey: (i) the idea of human rights is inconceivable out of the modern-humanist terrain which is based on the valuation of humanity as subjectivity (freedom); and (ii) as is elaborated by Kantian critical philosophy, a consistent valorization of human subjectivity (freedom) leads us not to the destruction of every insurpassable moral standard for human action, but to the recognition of a universal standard (which finds its diverse expressions in different human rights). Therefore, I will examine Ferry & Renaut's Critical Humanism as a defense of the "Kantian understanding of the moral point of view of human subject" (on which, as we saw, Nino has grounded the idea of universal human rights) in the face of anti-modern-humanist challenge that have become influential towards the end of 20th century.

IV.1. The Idea Of Human Rights Versus The Idea Of Objective Natural Right

In the first chapter of their *From the Rights of Man to the Republican Idea*, Ferry & Renaut begin with a question: what are the political implications of thinking about the idea of right(s) against modern humanism? The authors argue that these implications may be detected in the works of Leo Strauss and Michel Villey who insist on such a way of thinking suggesting to restore the classical/ancient conception of natural right understood as an objective and transcendent standard. In line with this, Ferry and Renaut aim to present an analysis of the ancient/classical conception of natural right, in order to disclose the implications of conceiving rights against modernity and humanism. Their principal motivation is to demonstrate how indissoluble the connection between human rights and modern humanist tradition has been. Concomitant with this, they also aim to demonstrate that human rights are inconceivable through the classical/ancient conception of natural right which was adhered by Strauss and Villey. In this section, I will present and discuss these two

arguments. Yet, before this, it is necessary to examine briefly some of the basic tenets of Straussian critique of modern political/juridical thought. This is necessary because Ferry and Renaut do not include an elaborated examination of these tenets in this volume as Ferry has already done it elsewhere (Ferry, 1990: pp.29/70). It is also important because it brings into light the difficult relationship between natural rights and human rights, as a theme pertinent to our topic.

IV.1.1. The Deepening Destruction of Right: History of Modern Political/ Juridical Thought From Straussian Perspective

In his *Natural Right and History*, Leo Strauss develops the thesis that the modern way of thinking about rights, which is based on the valorization of subjectivity, leads paradoxially to the destruction of every moral standard to judge the actual world. His line of argumentation leading to this thesis may be sketched as follows:

(I) At the beginning, thinking about the right became possible with the invention of *nature* (as the standard determining the good) through ancient political philosophy (Strauss,1953: 81-119). The ancient philosophers used the notion of nature in opposition to *convention* which meant "what is man made", i.e., human artificiality. Over "the conventional" was the nature as a standard which is both objective and transcendent. It was objective because it was inscribed in the nature of things; and, it was transcendent because it preserves its status as a standard determining what ought to be, regardless of the possibility of its actualization (which is determined by "fortune/chance") in a particular time and place.

(II) On the other hand, modern political thought, from its very beginning, but in a deepening way, represents a rupture from this ancient conception of right. With Machiavelli and Hobbes, the modern dissatisfaction with the gulf between "the is"

and "the ought" has started to penetrate political thought. The immediate effect of this dissatisfaction was the "lowering of the standard (the ought)", on the basis of which Hobbes and Locke's theories of natural *rights* became possible (Strauss,1953: 178). The principle concern underlying these modern theories of natural rights may be noted as follows: the standard (the ought) should be somehow realizable within the actual, that is, right(s) for man should be compatible with man's most *natural* passions whose archetype is man's desire for self-preservation (Strauss,1953: 181). In this way, the classical conception of the good which was defined as 'being in accordance with nature (i.e., with an objective cosmic order of things)' was replaced with the modern understanding of the good for man. The latter identified the good with freedom understood as man's *licence* to do whatever he desires. As a result, the ancient conception of natural (objective) *right* which pointed out a *check/limit against man's hubris* was abondoned, and the subjective rights of man were introduced into the tradition of political thought. Then, the question to be solved by modern natural rights theories arose as finding how every man's rights (freedoms) can be made compatible with the rights of every other man. In other words, the problem became how to demonstrate that the modern valuation of freedom as the good for man as such may be considered as the standard for all human societies.

(III) From Hobbes and Locke to Hegel's rationalist philosophy of history, the history of modern political thought is indeed, the history of vain attempts to find a solution to the problem just mentioned. All modern attempts to solve this great problematic were stuck in vanity because the modern rupture from the classics was concomitant with the implicit denial of the two conditions for the possibility of thinking about right as a standard. First, in the attempt to make the ideal compatible

with the real (which was stimulated by the dissatisfaction with the seperateness of these two realms), there was the seed of denying the transcendency of the right over the actual, i.e., the denial of the distinction between the IS and the OUGHT. Concomitantly, in the valuation of human freedom (licence), there was the beginning of the denial concerning a general (objective) standard on the basis of which human actions are to be judged. According to Strauss, it is the great virtue of Hegel that he solved the aporias of all his predecessors in a consistent way, but only by making explicit that modernity is not capable of thinking about right as an insurpassable standard against the actual[36].

(IV) The solution Hegel offered for the aporias of modern political thought lies in the proposition that "the ideal is *necessarily* actualized by the historical process *without men's intending to actualize it*" (Strauss,1975: 91). According to Hegel who identified the rational (the true) with the ideal (the good), the ideal is necessarily actualized by the historical process, because "everything in history unfolds rationally" (Ferry & Renaut,1992: 30). Also, the actualization of the ideal is without men's intending to it: otherwise, the actualization of the ideal (and, thus, the ideal itself) would be a mere illusion since, according to Hegel's theory of the cunning of reason, the ideal (the rational) is actualized in the historical process by the mediation of what seems to be its opposite from the point of view of the historical man.

In this way, what was on the way since Machiavelli has gained its explicit expression and its most sophisticated articulation through Hegelian philosophy of history. For Strauss, this is the (historicist) rejection of any unsurpassable/

[36] In his "Three Waves of Modernity" (Strauss:1975), Strauss elaborates the argument that the first wave of modernity (including Machiavelli, Bacon, Hobbes, Spinoza and Locke) and the second wave of modernity (Rousseau and Kant) both find their natural end in Hegel's rationalist philosophy of history. I will not enter into the details of this argument at this moment.

transhistorical value as a guidance for human action. Because, as Ferry and Renaut put it, Strauss considers that:

> [according to Hegelian rationalist philosophy of history,] the ideal cannot be opposed to the real to judge it: the distinction between the real and the ideal is just a moment which, being such, should produce its own 'supersession' in the process of self-unfolding of the ideal in the real –and this is the sense in which both Hegel and Marx can criticize any notion of 'abstract right' conceived as a transcending authority for the sake of which positivity could be judged and denounced. The antijuridical impact of historicism is thus clear: far from the historical having to be judged by the criteria of rights and of the law, history itself, as we know, becomes the 'tribunal of the world', and right itself must be thought of as based on its insertion in historicity (Ferry & Renaut, 1992: 30-31).

Having sketched the basic tenets of Straussian critique of the whole modern political thought as the preparation of "Hegelian historicism", I should note that it is not my objective at this point to interrogate how plausible such a reading of whole modern political thought is[37]. On the other hand, I want to emphasize that, in designating historicism as an intellectual obstacle (inherent implicitly or explicitly in all currents of modern political thought) for thinking about an insurpassable standard, Strauss establishes a link between this modern negation of standard and the modern totalitarianisms which are nothing but the negations of right at the level of practices in modernity[38]. Then, on the basis of this connnection, he concludes that we must escape modernity in order to restore the idea of right (standard). As Ferry and Renaut argue (Ferry & Renaut,1992: 31), it is not entirely inconceviable why Strauss's radical critique of modern political thought and modernity has evoked sympathy among the

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[37]Nevertheless, it may be convenient at this point to acknowledge that Ferry sees Strauss's reading of the history of modern political thought – as the preparation of "Hegelian historicism" – as crucially reductionist (Ferry, 1990: 52/61). As I will return at the end of this chapter, Ferry points that such a reductionist reading of whole modern political thought (and, especially, of the Rousseauan-Kantian current of it) is based on Strauss's very disputable convinction that there can be no transcendental or insurpassable moral standard deducible from human freedom (Ferry,1990: 52-61).

[38] For Strauss's argument that historicism at the theoretical level brings about Hitler at the practical level, see Strauss,1953:p.42..

defenders of human rights[39]. The suspicion with this modern view of rights can be found in the following question: if the modern project of making man's subjective freedom (conceived as licence) his own standard has led us to the historicist barbarisms of Nazism and Stalinism, what may seem more plausible than Strauss's suggestion to escape this modernity for the sake of the idea of right understood as insurpassable standard?

Yet, in order to decide whether Strauss's (and, also, Villey's) suggestion to escape modernity is as plausible as it seems at first sight, the ancient/classical conception of right, in the name of which this suggestion is made, should be given a closer inspection. To do this, let me present Ferry & Renaut's analysis of the basic characteristics and the ethico-political implications of the ancient conception of right adhered by Strauss and Villey .

IV.1.2. Going Back To the Ancients To Restore the Idea of *Right* ?

IV.1.2.1. Basic Characteristics of the Ancient ("Objective") Natural Right

Ferry & Renaut argue that, in the views of Strauss and Villey, the ancient (more particularly, Aristotelian) conception of right has three characteristics providing what the modern conception of subjective rights cannot provide[40] (Ferry & Renaut, 1992: 32-35). First, as I outlined above, Strauss and Villey maintain that the ancients were capable of referring to a standard over "what is humanly constructed (i.e., the

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[39] For instance, see Claude Lefort, 1986: p.239. There, Lefort argues that Strauss's writings prepare the way for a possible foundation for thinking about human rights.

[40] It should be noticed that what will be examined in this section is an analysis of the ancient conception of natural right *attributed to Aristotle and presented as an alternative to the modern understanding of rights by Strauss and Villey*. As we will see, this is a conception of right based on the idea of imitating 'the hierarchical order of cosmos' in human relations. Yet, whether or not Aristotle himself had such a conception of right concerning human interactions is a debatable question. In fact, a good deal of contemporary Aristotle scholars would not give an affirmative response to this question. For a contemporary approach which reads Aristotle's political philosophy by somehow seperating it from Aristotelian theory of physics based on the idea of 'a hierarchical cosmic order', see Martha Nussbaum, 1988 and 1990.

conventional)'. Thanks to its notion of nature, the ancient thought could uproot the authority of the ancestral (the conventional) right which means "the right sanctioned by history"(Ferry & Renaut, 1992: 32). Therefore, the ancient thought could conceptualize right as a *transcent* standard to judge the real (the positivity). In line with this, Villey argues that the ancient conception of right could account for "the autonomy of right as much in relation to history (as tradition) as to politics" (Ferry & Renaut, 1992: 32). Because, Villey emphasizes that:

> Aristotle [the ancient conception of right] did not reduce the juridical work to the collection and application of positive laws inherited from the past or instituted by political authority (hence neither historicism nor legal positivism), but the source of the law and that which can even intervene to correct the written laws and nuance their application was the consideration of the naturally just (Ferry & Renaut, 1992: 32).

The second characteristic of the ancient natural right, underlined by Strauss and Villey, is its *objectivity* . It is argued that, by anchoring normativity not in subject's reason or will, but in the substantiality (which means 'the cosmic order'), the ancients could consider right as objective, i.e., as independent of human subject (Ferry & Renaut, 1992: 33). More exactly, Strauss and Villey think that the ancient conception of right had the virtue of objectivity, because it was deduced from the observation of the order of nature that lies out there independently of human subjectivity. About this point, Ferry & Renaut argue that the idea of the order of nature (from the observation of which the ancients could deduce right) was underlined by the ancient conception of universe as *cosmos* whose best exposition was displayed in Aristotle's *Physics*. For this reason, the fundamental features of the ancient conception of universe as cosmos should be acknowledged in order to understand more exactly the meaning of objective natural right deduced from the order of nature.

Ferry & Renaut point out three fundamental features of the ancient universe depicted by Aristotle as follows (1992: 33-35). First of all, in opposition to the Newtonian universe which makes every location relative to an observer's place, the ancient universe was a *closed/circular universe* which means that everything (including human beings) is located in a particular place in it. The closedness of the ancient universe is connected with its second feature: the *hierarchical structure of the ancient universe*. Because, the idea of closedness allowed the Greeks to distinguish different places (locations) qualitatively, that is, the places could be ranked as high or low places[41]. In line with this, it is thought that, in this hierarchical universe, everything (including human beings) occupies its own "station (rightful place)" which is determined by its weight, i.e., by its nature. The third feature of the ancient universe was that it was a *purposeful universe* in which the movements of things are determined by the "final cause (*telos*)". What causes a movement within this universe is "an object's tending to regain its natural place (i.e., its station where it realizes its essence perfectly)"; and, a move happens "only if an object has been driven from its natural place by some other object tending toward its own place" (1992: 33).

Having seen the three fundamental features of Aristotelian cosmology, the meaning and the limits of the ancient (objective) natural right may be understood in a broader context. It is deducible from this cosmology that the right (the just) for any object consists in its being in accordance with the natural order of cosmos, that is, its being in its natural place or its tending towards there. In line with this, it is also deducible that injustice, at the level of human actions, is what Aristotle calls "violent

[41] As a classical work comparing Ptolemaic (Aristotelian) universe and modern universe, see, Alexander Koyre, 1957.

movement" against the natural order (1992: 34). Such violent movements consist in driving out others (including other men and other objects) from their natural place in cosmos, and, thus, preventing them from being what they truly/essentially are. Hence, thanks to this (Aristotelian) idea of cosmic order, it becomes possible to maintain a naturalistic vision of right which is "both *objective* (inscribed in the nature of things) and *transcendent* (in so far nature thus conceived is an end, a destination toward which each thing should aim" (1992: 34).

Ferry & Renaut claim that the transcendency and objectivity of the ancient natural right is also connnected to its third characteristic which they call the distributive [differentiated] vision of justice[42] (1992: 34). As the result of their convinction that a given object's natural place is what determines the right for it, the ancients considered the science of right (the art of justice) as a matter of distribution or division[43]. That is, for the ancients, the science of justice consisted in giving each thing its due according to its natural place in the hierarchical cosmic order. At the level of human relations, this means that right for a given person is different from the right for another person whose "station" differs in rank from the former's station. Hence, a differentiated vision of justice necessarily arises out of the ancient juridical naturalism.

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[42] It should be understood that what Ferry & Renaut call "the ancients' distributive vision of justice" is something different than what "distributive justice" means in contemporary moral and political philosophy. As we will see, the former portrays an ancient vision of justice which is grounded by the principle of proportionality, in opposition to a vision of justice grounded by the principle of equality. However, as is seen in C. S. Nino's arguments examined in the third chapter of this thesis, what underlies the most of the contemporary adherences (such as Rawls & Dworkin's works) to the idea of distributive justice is the egalitarian inspiration that the protection of the weak against the strong should be a basic consideration in the distribution of justice (see, page 68 in this thesis). Hence, I think that it is more plausible to designate what Ferry & Renaut mean here by "the ancients' differentiated vision of justice" as "the ancients' the distributive vision of justice".

[43] In Greek, the word *dike* means both "justice" and "dividing".

IV.1.2.2 The Unacceptable Face of the Ancient *Jusnaturalism*: The Incompatibility of the Objective Natural Right with Human Rights

Ferry & Renaut maintain that there is really a charming aspect in the Ancient natural right. They argue that the ancient reference to right as a transcendent and objective standard could preserve the status of right as the tribunal from which the real is judged (1992: 34-35). First, by distinguishing the trancendent ideal from the real, it could establish the dimension of right against what is historically sanctioned or ratified (1992: 34). Second, by anchoring the right in objectivity (nature), the ancient view could avoid reducing the criterion of the validity of a norm to the mere fact that it has been posited (laid down) by a political authority (1992: 35). Hence, it seems that the ancient natural right has two positive impacts which can be called respectively as *anti-historicism* and *anti-legal positivism*.

However, Ferry & Renaut also claim that there is a paradox in the theoretical attitude which seeks a possible theoretical foundation for the idea of universal human rights in the tradition of ancient natural right. Because the ancient conception of natural right is strictly incompatible with the modern idea of human rights on, at least, two points (1992: 37). These two incompatibility may be explicated easily by underlining two ethico-political implications which necessarily follow from the Aristotelian cosmology on which the ancient juridical naturalism was based. The authors call these two implications as "a naturalistic vision of politics" and "an inegalitarian vision of right [justice]" (1992: 37, 38).

As for the ancients' naturalistic vision of politics; it is clear that if one, following Aristotelian cosmology, considers the world as a cosmic order and apprehend the right (good) as being in accordance with this order, s/he must also accept that the

good politics (the right way of politics) consists in the art of imitating the (hierarchical) cosmic order in the matters concerning polis. In other words, insofar as one agrees with the ancients on what naturally right (just) is indeed the opposite of the conventional (i.e., "what is merely human, all too human"), he considers politics not as the art of satisfying human exigencies, but as the art of overcoming the artificiality which men has brought about as a human invention againts the order inscribed in the nature of things (1992: 38). For Ferry & Renaut, such a vision of politics is radically destructive for the modern idea of human rights. Because, it forecloses the idea of humanity underlying the idea of human rights, reducing man into a particular element assigned to a certain station and a certain function in the hierarchical cosmos.

As for the ancients' inegalitarian vision of right; it has already been noticed that Aristotelian cosmology leads to "a differentiated vision of justice" according to which just is an object's occupation of its own proper place. If we combine this differentiated vision of justice with the naturalistic vision of politics, it is not difficult to see why, for the ancient political philosophers, justice in a city required that those with elevated nature should wield power, while those with low nature should only be subjected to authority. From such a perspective, far away from being a grounding principle of justice, the principle of equality is seen as destructive for justice whose grounding principle was the principle of proportionality for the ancients. Of course, concomitant with the acceptance of the principle of proportionality as the ground of justice there was the rejection of a *common* human nature. Here again, the ancients are radically at variance with the modern idea of human rights which assumes the affirmation of a *common* human *moral* nature (1992: 28).

Pointing out the radical incompatibility of these two ethico-political implications of the ancient natural right with human rights is sufficient to discredit the argument that there is too much to learn from the ancients for renewing the idea of human rights in modernity. Yet, as Ferry and Renaut underline, this demonstration of incompatibility of the ancient conception of right with our modern (humanistic) values is in no way sufficient to discredit Strauss & Villey's endeavours concerning the restoration of the right understood as a standard[44] (1992: 39). Furthermore, the attempt to discredit Strauss & Villey by merely protesting them in the name of our modern (humanistic) values is an absurd way of argumentation, since it is the very validity of these values that is put at stake by Strauss & Villey by accusing them as being guilty of the destruction of the right understood as standard in modernity. Hence, in order to respond to Strauss & Villey's criticisms (that is, to save the modern idea of human rights against the ancient natural right), one needs to follow a much more difficult path of argumentation. Such an attempt should begin with the acceptance that, although Strauss & Villey are unacceptable in their proposal to return back to the ancient conception of right, their critical diagnosis concerning the fundamental problems in modern way of thinking about rights has the sense of truth at least in one aspect: the modern valorization of human subjectivity (freedom) does not permit us to think about an *objective* standard. In a similar vein, it should be accepted that modern way of thinking about rights inheres a certain tendency (or inclination) that may lead to the negation of the meaning of the right as an insurpassable standard to judge the real. Yet, having accepted these, it must be demonstrated that this mechanism (through which, Strauss believes, the modern way of thinking about rights culminates

[44] Likewise, as Ferry & Renaut remark, Villey makes it explicit that "pitting the ancient against the moderns is taking into account the 'nonexistence of human rights in antiquity' and admitting that 'inequality is the rule'" (1992: 39).

necessarily into Hegelian historicist denial of right) is in no way an unavoidable result of *any* valorization of human subjectivity (freedom). It must be showed that, in modern (humanist) thought, it is still possible to refer to a *general* (but not objective in the sense Strauss and Villey meant) standard on the basis of which *the universality* of human rights may be grounded and defended. Having these in mind, I will continue presenting Ferry & Renaut's arguments for the possibility of a critical humanism that can avoid the modern inclination to the destruction of right, as detected by anti-modern and anti-humanist critiques.

IV.2. Reconsidering The Challenge: Assimilation Of *Any* Valorization Of Human Subjectivity To The "Imperialism Of Subjectivity"?

At the price of some repetition, it is necessary to put in a nutshell what constitutes, according to Strauss and Villey, the destruction of the right in the modern attempts to think about right. As Ferry & Renaut explicate, Strauss and Villey consider this destructive outlook as constituted through the establishment of subjectivity as the principle of moral considerations and legal evaluations, that is, by the very emergence of modern idea of *subjective right* (1992: 40).

As is depicted by Strauss and Villey, in the modern context of the idea of subjective right which was established in relation to an abstract essence of man as subject, "the right means the individual 'power' or 'freedom' to perform this or that action"[45] (1992: 40). Moderns have declared that the *rights* (as powers or freedoms) are inherent in human subject who would be a simple object without them (1992: 40).

[45]Recall Donnelly's strict emphasis on the modern understanding of rights as individuals' entitlements in opposition to the understanding of right as the standard of rectitude. In this sense, from the viewpoint of Straussian/Villeyian critique, Donnelly is a perfect representative of modern-subjectivist understanding of rights.

In the views of Strauss and Villey, once the subjective power of men is valorized as the constitutent of the rights, an objective *limit* over the subjectivity (i.e., a limit checking men's hubris) becomes inconceivable. Because, it is human subject who determines his own rights (thus, his own humanity understood as subjectivity); and, anything demanded by him can become a right. Indeed, Ferry & Renaut wittily summarize the logic of Strauss & Villey's critique of modern way of thinking about rights:

> [According to Strauss and Villey,] since rights are posited only by individuals' wills requiring what the wills consider the condition of possibility for humanity, 'declaring' a right merely requires the forming of a *consensus* or the agreement of the spirit of the times about the recognition of this or that power as constitutive of subjectivity. Thus, on the very horizon of the notion subjective right, the right could be grounded in *de facto* agreement[46] (1992: 40).

As we know, to ground the right in *de facto* agreement is to reduce the right (the ought) to the fact (the is), aiming to deduce the former from the latter. In fact, this reduction means nothing but the very destruction of the terrain of right on which positivity (the world of the facts) will be judged. In this way, for Strauss and Villey, the modern rejection of the objectivity of the right (which consists in the attempt to establish human subjectivity as the ground of rights) culminates into the negation of the notion of right (as the tribunal in which positivity is judged) altogether. Because the rejection of the objectivity of right as understood by the ancients implies the rejection of the transcendence of right over the humanly constructed positivity[47]. This

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[46]One may notice that Strauss & Villey's critical diagnosis is a correct one in the case of Donnelly's theory of universal human rights, which aims to ground the universal validity of human rights by relying on "the international normative universality of our age" (i.e., through a consensus reflecting the spirit of our time).

[47] At this point, it must be much clearer why Strauss reads whole modern political philosophy as the preparation of "Hegelian historicism" which corresponds to the explicit rejection of the idea of the transcendent/insurpassable right. For Strauss, the modern philosophical projects (such as Kantianism) that explicitly aimed to preserve the anti-historicist distinction between the "what ought to be (the dimension of value)" and "what is (the dimension of the fact)" could preserve this distinction only as a

is what Strauss and Villey see as the inevitable mechanism of the destruction of right inherent in modern theories of rights which posit man as the author and the goal of his own rights.

With regard to these criticisms, Ferry & Renaut argue that what should be questioned is "the lack of nuance they display concerning *any* valorization of human subjectivity" (1992: 42). Authors make the point that, in reading these criticisms, one gets the impression that any valorization of human subjectivity (freedom) amounts to what Heidegger calls "the metaphysics of subjectivity" or "the imperialism of subjectivity" (1992: 42-43). For them, getting this impression is not accidental since Heidegger's critique of modern philosophy as "the metaphysics of subjectivity" constitutes, to a great extent, the philosophical premises of Strauss & Villey's attacks on modernity and modern political/juridical thought. Therefore, one should briefly engage in Heideggerian theme of metaphysics (or imperialism) of subjectivity, in order to understand what Ferry and Renaut indicate in their argument concerning the lack of nuance in Strauss & Villey's criticisms of subjectivity.

According to Heidegger, modern (humanist) thought is essentially caught with a metaphysics of subjectivity which is "based on the subject as the first and only true *subjectum*" taken as the ground and center of reference of being as such, and

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distinction between subjectivity and the objective reality of facts. As a result, these allegedly anti-historicist projects could understand the transcendence of "what ought to be" over "what is" merely as the transcendence of subjectivity (human freedom) over positivity. Strauss believes that such an understanding leads not to the recognition of the right as an insurpassable standard for human actions but only to a relativism of values. Because, there remains no criterion (standard) to determine the right system of values among competing systems of values, since each of these are equally valid as different expressions of human subjectivity (For Strauss's attempt to substantiate this thesis through an examination of Max Weber who had originally developed such an understanding of the distinction between the sphere of values and the sphere of facts, see Strauss,1953:pp.35/80). In the view of Strauss, the relativism of values is the fundamental aporia from which allegedly anti-historicist moral and political doctrines of modernity can never escape; and, among the moderns, only "historicist" Hegel succeeds in overcoming this modern aporia by identifying the validity of values with their effectivity in the historical process.

recognized as the master of nature and measure of all things (Ferry & Renaut,1992: 42-43). Heidegger asserts that modern humanist thought is extremely blind to what he calls "the question of *Being*". For him, *Being* is something that always escapes from human beings' representation of "what is present (*b*eing)"in thought. That is, "*Being* is the portion of mystery and invisibility at the core of everything visible [i.e., everything that is representable through thought]" (Ferry,1992:14). Hence, for Heidegger, "the question of *Being*" reveals the radical powerlessness of man and his thought in the face of enigma (mystery) in the very middle of which he exists. The virtue of man's revelation of his own powerlessness is that it leads to the recognition of the meaninglessness and banality of the attempt to dominate opulance of existence stemming from *Being* (Ferry,1992: p.14). In other words, to think about "the question of *Being*" is to learn to be respectful to 'what cannot be grasped and dominated', ie., to *Being's* freely opening up itself. Hence, through "the question of *Being*", human beings recognize the check/limit (*Being* reveals man's radical finiteness) over themselves.

What modern thought and modernity in general amount to is the abondonment of both "the question of *Being*" and, thus, the respectful attitude (which Heidegger calls "serenity") towards *Being*. Modernity, which has always been obssessed with the humanistic desire to make subjectivity (man) the master of the universe, is a terroristic attempt to expel every sign of *Being* (mystery / *differance* / contingency) from the sight of man. Heidegger calls this attempt as "the domination of all the earth" or "the imperialism of subjectivity" which leads to a banal and meaningless world reigned by technology (Ferry, 1990: 14,15). Through the reign of technology which manifests man's desire for unchecked mastery for the sake of mastery, man as

subject attains its metaphysical fate as an element of the totally organized world which he himself constructed (Ferry, 1990: p.15). Then, the conclusion to be drawn from Heidegger's arguments is: in order to escape modern metaphysics whose inevitable result is not only the terroristic destruction of every sign of *Being*, but also the impoverishment of man himself, one should begin with the renunciation and devalorization of the modern humanist conception of man as *subjectum*.

Although it is cursory, the foregoing sketch of Heidegger's critique (destruction) of modern metaphysics is sufficient to show the similarities with Strauss & Villey's complaints. Ferry & Renaut argue that the type of questioning of universal/modern human rights and juridical humanism which we encountered in Strauss & Villey takes its basic philosophical inspiration from Heideggerian assimilation of any valorization of human subjectivity to "the metaphysics of subjectivity". To put it shortly, "only on the basis of assimilation of any humanism and metaphysics of subjectivity", Strauss & Villey's criticisms of modern way of thinking about rights become understandable[48] (1992: 42-43). However, as I noted above, Ferry & Renaut stress

[48] In order to avoid probable misunderstandings, the following remarks seem necessary here. In arguing that the Straussian/Villeyian political thought is conceivable only on the basis of Heideggerian premises, Ferry & Renaut in no way mean to say that their prespective "is merely an application of Heidegger's ideas to political philosophy, or that its only source is Heidegger's philosophy" (Ferry, 1990:18-19). Rather, being well aware of the irreducible differences between Heidegger and Strauss & Villey, the authors insist that these differences should not overshadow the fact that Straussian/Villeyian political thought was inspired by Heidegger and modeled on Heidegger's deconstruction of modernity as the imperialism of subjectivity (Ferry, 1990: 19). Likewise, in his own work, Ferry points to at least three irreducible differences between Strauss and Heidegger (Ferry, 1990: 6-18): (I) On the one hand, Heidegger's critique of metaphysics as "the blindness to the oblivion of *Being*" is not limited to a critique of modern philosophy. For him, although modern metaphysics as the metaphysics of subjectivity represents the most extreme form of it, metaphysics has been introduced into western thought, at the very beginning, by the Socratics. On the other hand, as we have seen, Strauss's critique of modern humanism is concomitant with a valorisation of this very Socratic tradition which Heidegger denounces as a form of metaphysics. (II)Relevantly, while Heidegger attempts to return to the pre-Socratic thought of Sophists (which he considered as the beginning of philosophy before its culmination into metaphysics) in order to re-introduce (re-invent) the question of *Being* against the fixation (closure) of thought; Straussian political philosophy calls for a return to the Socratic notion of nature as a standard which is certainly at variance with Heidegger's indeterminate and mysterious *Being*. (III)Furthermore, Heidegger's own point of view denounces *any* consideration on the idea of right (no matter whether it is in the ancient

that the question to be asked here is whether this assimilation is plausable. Let me rephrase their question: is it true that *any* valorization of man as subjectivity is necessarily captured by the metaphysical illusion of positing an absolute subject who is not capable of thinking about an insurpassable standard (check/limit) for himself, because he is closed upon himself as absolute (as an omnipotence and omniscience)?

Then, Ferry & Renaut respond that the assimilation of all humanisms to the metaphysics (imperialism) of subjectivity is crucially reductionist. For them, such argumentations veil the fact that, in modernity, there have been philosophical projects which were able to adhere to the *Idea* of human subject "on the very basis of a radical criticism of metaphysics and its illusions (particularly the illusion of a subject positing itself as Absolute)" (1992: 44). The authors call attention to the criticist school of philosophy founded by Kant and developed by Fichte. According to them, Kantian criticist philosophy provides the foundations of a critical humanism which can valorize the Idea of man as subject while, at the same time, escaping the "metaphysico-historicist fate of absolute subject" (1992: 44). As we will see in detail, Ferry & Renaut insist that Kantian criticism has been able to provide a standard which must be recognized as insurpassable by any human being who posits himself as subject, and this standard provides the ground of universal human rights.

In the following section, I will turn to a previous work by Ferry, namely *Rights: the New Quarrel Between the Ancients and the Moderns*, since this work has presented an elaborated articulation of the thesis that a critical humanism (providing a ground for

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way or in the modern way). Because, as we have seen, any form of such consideration must presuppose a distinction (split) between "the ideal" and "the actual", which Heidegger sees as one of the prevalent features of "the metaphysical limitation of *Being*" (For this last point, see, Ferry & Renaut, 1994:150-151).

defending the idea of universal human rights in the face of the foregoing challenges) may be deduced from the Kantian criticist philosophy. Yet, it should be acknowledged that the language and the structure in my forthcoming presentation of some major arguments developed in Ferry's work will be relatively distant from Ferry's own argumentation. For such minor alteration, I have two reasons: (1) to simplify the intensely philosophical language of Ferry's text; and, (2) to avoid certain details which are not directly relevant to our discussion in this thesis[49].

IV.3. A Response To The Challenge: From Critical Humanism To The Idea Of *Universal* Human Rights

IV.3.1. Kantian Foundations of Critical (Non-Metaphysical) Humanism

As is explicated in the previous part, Ferry & Renaut argue that, in order to defend the idea of universal human rights in the face of foregoing anti-humanist challenges, one should first show that, not every valorization of the Idea of man as subject amounts to positing a metaphysical absolute subject. In the second part of *Rights: the New Quarrel between the Ancients and the Moderns*, by drawing on Kant's *Critique of Pure Reason* and *Critique of Judgement* and Fichte's *Science of Knowledge* and *Science of Rights*, Ferry aims to demonstrate how a non-metaphysical adherence to the idea of man as subject becomes possible on the ground of Kantian Criticist philosophy. According to him, Kantian Critical Philosophy provides the philosophical

[49] In fact, in his *Rights:the New Quarrel Between the Ancients and the Moderns*, the most of Ferry's arguments are devoted to an exposition of Fichte's criticist solution of the antinomy between dogmatic idealism (the thesis that the self is an absolute activity) and dogmatic realism (the anti-thesis that the self is an absolute passivity) on the basis of Kant's theory of schematism that recognize a necessary and legitimate use for the ideas (such as the Idea of man as subject) after these ideas are criticized. As I will try to explicate in a much more simplistic way (but without essentially distorting Ferry's arguments) in the following section, Ferry thinks that the criticist (Kantian) solution of this antinomy leads to the conception of a self as an activity necessarily checked by other activities (selves) in the intersubjective realm. And, this conception of self constitutes the ground on which the idea of human rights is conceivable (Ferry, 1990: 85-101).

foundations of such a non-metaphysical adherence, because it could combine a radical criticism of metaphysics with the recognition of the necessary and legitimate use of Ideas after their criticisms (Ferry, 1990: 75-76). What Ferry means may be explicated in the shortest way as follows:

In his *Critique of Pure Reason*, Kant draws a distinction between two forms of knowledge which are *understanding* (which operates through concepts) and *reason* (which operates through Ideas)[50]. According to Kant, in its first form (i.e., understanding), human knowledge is limited to make the phenomenal world around him intelligible. In order to do this, the faculty of understanding employs concepts which are derived from the principles of reason such as the principles of causality and of identity. Concepts gather scattered images of the outer world into a synthetic unity which makes possible to read these images as experience. Therefore, it is clear that our understanding is both receptive (in the sense that our knowledge is the knowledge of a world as the raw material that has been given at first) and finite since our experiences in this world are always limited by and through the dimensions of time and space.

On the other hand, Kant asserts that human thought cannot remain within the limits of understanding. The very mechanism of understanding which is based on the principles of reason leads human thought to a mode of knowledge which assumes itself as transcendent to the bounds of experience. In other words, through the principles of reason, human thought spontaneously exalts itself to the contemplation of extratemporal and extraspatial entities which are nonvisible in experience. For instance, as Ferry argues elsewhere, through the indefinite repetition of the principle

[50] For Ferry & Renaut's reference to this distinction, see, also, Ferry & Renaut, 1992: pp. 123-125.

of causality, human thought leads to the contemplation of an unconditioned cause (Ferry, 1992: 83-84). In this way, reason produces Ideas whose reality in the empirical world remains essentially problematic.

Having distinguished the concepts from Ideas in such a way, Kant defines metaphysics as the attitude of ascribing an objective truth to Ideas, with the attempt for explaining the real through Ideas (not through scientific concepts). More exactly, in the view of Kant, metaphysical illusion lies in the error of identifying the idea (conceived as essence) with the real/the existence (conceived as the manifestation of essence) by deducing the latter from the former (Ferry, 1990: 75). This may be explained by refering to Ferry's example mentioned above: Through the indefinite repetition of the principle of causality, metaphysican produces in his mind the Idea of an unconditioned cause; then, he illegitimately goes from this idea (which he himself produced) to its effective reality, and reads the empirical world as the design of this unconditioned cause (1992: 83-84). Hence, it may be argued that using an Idea to detect its embodiment dogmaticaly into the phenomena is the metaphysical way of employing Ideas, which was radically criticized in the *Critique of Pure Reason.*

However, Ferry asserts that Kant's criticism of the illusionary (metaphysical) use of Ideas is concomitant with his recognition of their necessary and legitimate (non-chimerical) role for human practical and theoretical activities. As is made explicit particularly in the *Critique of Judgement*, after renouncing the metaphysical status of Ideas as claimed to be ontological truths, Kant confers upon Ideas a legitimate status as ideals or regulative principles for human activity (Ferry, 1990: 122-123). That is, although it is illegitimate to assert the identification of the Idea with the real, it is still legitimate and, even more, necessary to use Ideas as "horizons of expectation and

meaning" in the framework within which human activity is performed (Ferry, 1990: 123).

How this 'criticist critique of metaphysics' provides the theoretical foundations of a non-metaphysical humanism (i.e., a valorization of the Idea of man as subjectivity without enclosing him in himself as an essence) is explained by Ferry in the following way. According to him, Kant, who begins with the assertion that man and his understanding are limited by the dimensions of time and space, underlines at the first place the "radical finiteness" of human subject (Ferry, 1990: 75). The fact that spatio-temporal existence is a "givenness" for human subject means that he is always and necessarily faced with an irreducible outside (otherness); and, this irreducible outside plays a determinative role over human subject's own constitution. In other words, autonomy, if it were conceived as an ontological truth that fixates the essence of man as an absolute with no openness to any otherness, does not pertain to man. Ferry also maintains that, in the view of Kant, radical finiteness of man (i.e., man's necessary openness to his other), in no way disqualifies the status of the Idea of autonomous man as a necessary regulative ideal. Rather, he stresses that Kant considers man's finiteness (openness) as the very condition of man's freedom which Kant indissolubly connected with "man's moral point of view". Because, it is precisely the absence of an omniscient understanding (from which the essence of all reality would be visible) that makes necessary for man to elevate himself to "the moral point of view of the world" in order to determine (posit) his own essence (Ferry, 1990; 121-124). His very finiteness makes man essentially "a practical (willing) being" who must himself posit "what ought to be" in general and "what he ought to be" in particular (Ferry,1990: 118). This is the expression of the critical humanist understanding of men's freedom

as "the capacity to posit the goals defining what ought to be and what he ought to be in relation to what is and what humanity is" (Ferry & Renaut, 1990: 209). What is crucially important in such an understanding of men's freedom (autonomy) is that freedom here is conceived as the very opposite of the closedness (fixedness) which is the essential property of things (objects). Autonomy is men's very capacity which points out his indefinite openness to its other (Ferry & Renaut, 1990: 209). By *necessarily* elevating himself to the status of a free (self-determining) rational being, man acquires the capacity both to judge his factual finiteness (i.e., his heterenomous existence) and to determine himself on the basis of his judgement in order to overcome his finiteness.

In sum, according to Ferry (and Renaut), since Kantian critical philosophy refers to autonomous man not as an ontological truth but as man's necessary Idea about himself and a regulative principle which constitutes a horizon of expectation with regard to the future of humanity, it provides the philosophical ground for a critical humanism that valorizes man as subjectivity without closing him upon himself as an absolute.

In this way, Ferry shows that the Heideggerian thesis which assimilates all humanisms to metaphysics of subjectivity is reductionist. Now, what remains to be seen for us is how Kantian critical humanism necessarily conveys us the idea of human rights as the expressions of the standard of humanity. Then, what should be demonstrated is how such a critical humanism disqualifies Strauss & Villey's criticisms that any valorization of human subjectivity (freedom) and modern conception of subjective rights necessarily lead to the destruction of the idea of right

understood as an insurpassable and ahistorical standard which was "available" only in the ancient political theory.

IV.3.2.The Standard Underlying the Idea of Universal Rights: The Principle of Universality as the Check of Subjective Freedom

As is argued before, there is an appeal in Strauss &Villey's challenges to the modern way of thinking about rights: that modern valuation of subjective freedom makes impossible for moderns to consider an *objective* standard (i.e., a standard that is not anchored in human subject). This sense of truth holds also in the case of Ferry & Renaut's Kantian Humanism which recognizes no ethical and political authority over human will. However, this does not mean that the conditions of possibility for thinking about an insurpassable standard is altogether foreclosed in any humanist valuation of human freedom. Rather, according to Ferry & Renaut, it is the basic tenet in the founders of Critical Humanism (Kant and Fichte) that a consistent valorization of human freedom is concomitant with the recognition of an insurpassable (but not objective in the sense the ancients understood) standard for human action. To prove this, it is sufficient to quote Fichte's striking proposition in his *Science of Rights*: "the finite rational being cannot ascribe to itself a free causality in the sensory world without ascribing the same to others, and hence without likewise assuming other finite rational beings outside itself" (Ferry,1990: 120). As Ferry elaborates in his book, Fichte means that if it is necessary that man should posit himself as a free subject in his any activity, it is also necessary for him to consider other finite rational beings (human persons) as a "check (*Anstoss*)" over himself (Ferry,1990: 117-120). Otherwise, he would be inconsistent in his positing himself as a free subject, since his denial of other human being as a check over himself would mean to deny his own

capacity to freedom (autonomy) through denying this capacity in other members of humanity. As the reader would probably notice, what underlies Fichte's foregoing proposition is *the idea of limitation of freedom by the notion of universality (generality)* which he inherited from Rousseau and Kant (Ferry, 1990: 54).

However, in the views of Strauss & Villey, such attempts to limit (to check) human freedom by the abstract notion of universality is still deficient. As Strauss argues explicitly, what Rousseau's principle of the generality of a will, and the Kantian principle of universalizability of maxims (which is the elaborated and radicalized version of the former) can bring out is only a "horizontal limitation"[51] (Ferry, 1990: 45-47). In opposition to the vertical model of standard whose example is the ancient notion of natural law, these horizontal models of standard foreclose any authority over human will, and aim to limit man's freedom (will) with other men's freedom. According to Strauss, the deficiency of these horizontal models lies in that they cannot provide a truly (substantial) ethico-political criterion. He argues: "If the ultimate criterion of justice becomes the generality [or the universality]..... cannibalism is as just as its opposite. Because there remains no mechanism to see cannibalism as unjust if the general will opts for it at some moment in the historical process"[52] (Ferry, 1990: 47, 55). Ferry stresses that, if it is not a piece of sophistry

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[51] In Strauss's terminology, a "horizontal limitation" is a non-transcendent and non-objective limitation which limits a man's will by other mens' will, while a "vertical limitation" is the one "which comes from above" (i.e., from an authority above human subject). See, Ferry,1990: p.47.

[52] As Ferry & Renaut point out in their *From the Rights of Man to the Republican Idea* (1990:43), a very similar criticism has been brought about by Hannah Arendt, who is another representative of Heideggerian school of the critique of Humanism. In her *The Origins of Totalitarianism*, by complaining about the fact that "the absolute and transcendental measurements of religion or the law of nature [i.e., the "vertical standards" of the past, in the words of Leo Strauss] have lost their authority" in the modern context of human rights where "Man himself has been the source of his rights as well as their ultimate goal", Arendt claims that, in such a context, it is "*quite conceivable....that one fine day a highly organized and mechanized humanity will conclude quite democratically – namely by majority decision – that for humanity as a whole it would be better to liquiate certain parts thereof*" (quoted from Ferry & Renaut,1990:p.43). [Italics are mine].

intended to draw a veil over the crucial distiction between what the principle of generality (or universalizability) meant and a *de facto* agreement among human beings (or a consensus reflecting the spirit of times), Strauss's foregoing argument discloses what is fundamentally left intact in the criticisms of Humanist modernity (Ferry,1990: 55). That is, Strauss's argument disploses how "Strauss [and Villey and many others following this line of the critique of modern humanism] missed the full ethical and political significance of the principle of universalizability: that the modern humanist acceptance of this formal principle as the supreme principle of justice leads us to the adherence to the ethico-political spheres which aim to actualize the Idea of a non-reified (non-objectivized) humanity, in opposition to every kind of totalitarianism which consist in the attempt for reifying man by reducing him to a *apriori* determined essence (Ferry, 1990: 55-56).

What Ferry means may be gathered as follows. Unlike the vertical standards of justice, the principle of universality is genuinely formalistic in that the prescriptions and proscriptions for human actions cannot be directly derived from it. It tell us that we should aim for 'the universal', but does not tell us 'what the universal is'. Because human subject's own quest for substantializing a life of his own in accordance with the universal is the very mark of his freedom which the formal principle of universality establishes as fundamental to the considerations of justice[53]. Ferry thinks

[53] For how Kant indissolubly links the principle of universality with human freedom (autonomy), recall the passage from his *Foundations of the Metaphysics of Morality*, which is quoted in the third chapter of my thesis. Let me quote here once again: "When we look back upon all previous attempts that have been made to discover the principle of morality, there is no reason now to wonder why they one and all had to fail. Man was viewed as bound to laws by his duty; but it was not seen that man is subject only to his own, yet universal, legislation and that he is bound only to act in accordance with his own will, which is, however, a will purposed by nature to legislate universal laws. For when man is thought as being merely subject to a law (whatever it might be), then the law had to carry with it some interest functioning as an attracting stimulus or as a constraining force for obedience, inasmuch as the law did not arise as a law from his own will. Rather, in order that his will conform with law, it had to be necessiated by something else to act in a certain way. By this absolutely necessary

that, by the very virtue of its formalism, the principle of universality is able to serve as the constitutive principle of "anti-totalitarian ethico-political spheres". These spheres are understood as "common areas of intersubjectivity as the areas of free communication of equals". (Ferry, 1990: 55-56, 102-117). These anti-totalitarian ethico-political spheres are connected to the notion of right in two senses. First, they are the domains of *rights* understood as specified freedoms of their members. That is, these spheres are the very contexts in which human subjects collectively determine what the substantial content of their equal freedom is. We call this sense of rights as legal rights which are inseparable from their domains. This is because, the contexts in which such rights acquire their content, and the processes for their actualization are provided by these ethico-political spheres. Hence, in the first level of the connection between right(s) and the areas of intersubjectivity, right(s) seems to be reduced to 'the legality (understood as *de facto* agreement among human subjects)'. On the other hand, the second level of the same connection discloses that the meaning of the idea of right as an insurpassable standard is still preserved. This second dimension is constituted by what I will call *the substantial-ethical kernel of the formal principle of universality*: the imperative that each member of humanity must be treated as a non-reifiable end in himself[54]. Thus, foregoing areas of intersubjectivity and their legal

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conclusion, however, all the labor spent in finding a supreme ground for duty was irretrievably lost; duty was never discovered, but only the necessity of acting from a certain interest. This might be either one's own interest or another's, but either way the imperative had to be always conditional and could never possibly serve as a moral command. I want, therefore, to call my principle the principle of the autonomy of the will, in contrast with every other principle, which I accordingly count under heteronomy" (Kant,1964:100). As this passage illustrates, the principle of universality is inseperable from freedom because a moral duty bounding human beings may be considered as unconditional (i.e., universal) only if it is stemmed from their own "free-will", in opposition to any substantive prescription or proscription *conditionally* imposed on human beings by their natural and social interests (i.e., determinations).

[54] Recall Kant's second formulation of the categorical imperative: "Act so that you treat humanity, whether in your own person or in that of another person, always as an end and never as a means only" (Kant, 1964:96).

systems (reflecting to somewhat degree the momentary consensus of their members) are always subjected to the judgments made on the basis of this imperative. Now, we can infer that human rights arise out as the result of such judgments. As such, each of human rights is an expression of our modern humanistic standard of justice, namely the principle of universalizability. This is a standard which we posit as insurpassable and ahistorical by our free will (practical reason), and through the same standard we defend the values of human freedom and equality against any form of denigration of humanity by any kind of totalitarianism and against any act and decision which damages our autonomy.

Hence, it must be maintained that Strauss & Villey's challenge is an unjust charge against both the modern idea of subjective rights (including human rights) and their philosophical foundations. By designating modern valorization of human subjectivity as a nihilistic attempt of man for the unchecked reignity of his capricious desires, these authors argue that, insofar as modern rights and human rights stem from such a valorization, these rights (as the declarations of capricious human desires) are never able to attain the true status of the right understood as an 'objective' (universal) criterion of justice. As we have seen above, the cynicism and disruptiveness inherent in such an argumentation becomes evident when one considers the Kantian approach to human freedom (i.e., freedom as autonomy) and the understanding of rights and human rights that are derived from this approach. It seems that Strauss & Villey's challenge overshadows the Kantian insights on the questions of human freedom and rights, by creating a distorted image of the Kantian critical philosophy as a *vain* (*desperate*) attempt to establish an ahistorical standard of justice within humanist modernity. In my view, Strauss & Villey's impatient judgement concerning the vanity

of the Kantian strand of modernity is a conscious sleight of hand which was necessary for the articulation of their conclusive argument that the idea of the right undersood as a universal standard can be restored only by returning to the ancient conception of natural right. More exactly, in order to be persuasive in their conservative and reactionary suggestion, these authors must have concealed the Kantian-modern-humanist alternative to the pre-modern *jusnaturalism* which has always been radically at variance with modern values of freedom and equality. In the lights of Ferry & Renaut's arguments presented in this section, the basic tenet of this modern humanist alternative provided by Kantian critical philosophy may be summed up as follows: (i) a consistent valorization of human subjectivity/freedom requires to understand freedom as autonomy; (ii) such a consistent valorization of human freedom leads or should lead to the recognition of the principle of universality which prescribes the treatment of every member of humanity as an end in him/herself; (iii) and, this principle, whose expressions are human rights, constitutes an insurpassable and ahistorical standard on the basis of which free human activity is exposed to self-judgment.

IV.4. Concluding Remarks:

In this way, I finished my examination of Ferry & Renaut's defense of modern humanist outlook (which solidifies the ground for the idea of universal human rights) in the face of anti-humanist challenges. Let me put what Ferry & Renaut's critical humanism demostrates in a nutshell:

(I) Human rights are inconceivable without the idea of humanity as subjectivity and the valorization of human freedom which follows from this idea. That is, the idea of human rights (understood as expressing powers or freedoms of the members of

human species) requires the idea of an *abstract essence of wo/man as subject* who ascribes these powers/freedoms to him/herself. This explains why human rights could have not been conceivable in the pre-modern world where neither this *abstract essence of wo/man as subject* nor its valorization had been at the sight.

(II) However, human rights are meaningful only with a *non-naive* valorization of human subjectivity (freedom). Because, human rights can be really effective devices for preserving the conditions for the enjoyment of freedom by individuals in the processes of social interactions, only if the concept of human rights is understood as a synthesis of the dimension of expressing individual powers/freedoms and the dimension of expressing an insurpassable standard limiting these purely negative individual powers/freedoms. For such a synthesis, it is necessary to apprehend exactly what true freedom for human subject means.

(III) As it has been elaborated by Kantian practical philosophy, freedom for human subject is not a condition of *anomie* in which human subject is licenced to pursue whatever s/he desires. Instead, it is a condition of *auto-nomy* in which norms concerning "what ought to be" (in relation to a normatively irrelevant "what is") and "what s/he ought to be" (in relation to an indeterminate essence of human being) are the *construction* of human subject himself. That is, freedom is human capacity to determine his/her own norms and goals in accordance with his/her own will or practical reason. At this point, what is crucially important is that, in order to activate this capacity to freedom (i.e., the capacity to determine "what ought to be" in general and "what s/he ought to be" in particular), human subject should bind him/herself with a supreme principle underlying his own will. This is the principle of the universality which burdens human subject (who ascribes him/herself a capacity to

freedom) with an insurpassable duty for respecting the capacity to freedom in other members of humanity and, thus, for recognizing other members of humanity as a check/limit over him/herself.

(IV) Hence, if human rights are understood in relation to the Kantian understanding of wo/man as the autonomous subject of practical reasoning and the valorization of human freedom as *autonomy*, it will also be understood that *universal* human rights are the expressions of a universal standard derived from human will as well as the declarations of individual powers/freedoms against the imposition of allegedly "vertical standards" (i.e., standards stemming from an authority which is external and superior to human will) over human subjects. For Ferry & Renaut, this is exactly the modern humanist idea of universal human rights to which we ought to adhere if we want to "oppose the values of freedom and equality to totalitarian phenomena" (Ferry & Renaut, 1992: 47).

Consequently, Ferry & Renaut's critical humanism may be considered as complementary to Carlos Santiago Nino's theoretical project in that, in the face of influential contemporary charges, the former provides a defense of the very ground on which Nino has structured his whole theory. By arguing this, I do not mean that these two versions of Kantian moral-political thought are completely compatible with each other. In fact, there are certain points of divergences between Nino's more literal reading of Kant and Ferry & Renaut's reading which considers Kant within a strand of thought running from Rousseau to Kant himself and Fichte. A deeper examination of these divergences far exceeds the extent of this thesis. Neither is such an examination essential in this thesis, even if it is true that these divergences result in

nuances in the understanding of the scope and function of human rights[55]. Because, what basically interests us in this thesis is the question concerning the ground of the universality of human rights; and, as we have seen, these two versions of Kantianism are naturally in complete agreement on their strict adherence to the idea of autonomy as the ground of the universality of human rights. As we saw in the previous chapter, Nino's Kantian Moral Constructivism consists in the successful attempt to demonstate that universal human rights have their ground in the idea of autonomy

[55]Nevertheless, some unpretentious remarks may be introduced here: It seems that the divergences between these two versions of Kantianism arise basically from Ferry & Renaut's adherence to Fichtean project within the criticist school of philosophy. Aiming to articulate an explicitly modern-republican political philosophy in the light of Kant's practical philosophy, Fichtean project revises Kant's original philosophy in certain aspects. The revision which is particularly important for the theme of rights was that Fichte enlarged the space of "intersubjectivity" in the tradition of critical philosophy. By this, his objective was to account for the essential role of "intersubjectivity" (undersood as the network reciprocal social relations based on the mutual recognition of each of its members by other members) in the formation of individual as a moral person who nevertheless is not absorbed by this network and remains as an "independent activity" over "intersubjectivity" (see, Ferry,1990:102-108). This emphasis on "intersubjectivity" (which was inspired by Rousseau) paves the way for the following modern-republican insight: if it is true that "intersubjectivity" is the precondition for moral personality (i.e. for autonomy), ensuring a healthy web of interpersonal relations for human persons is as vital as preserving the integrity of them. Proceeding from such a republican insight, Ferry & Renaut come to the conclusion that "social rights" (which consist in ensuring a healthy process of socialisation for the development of human capacities in individuals) are as equally human rights as "individual rights as negative freedoms" (see, Ferry & Renaut, 1992:73-128). In line with this, against the [classical] liberal understanding of human rights, the authors argue that "individual rights as negative freedoms" and "social rights" do not differ in their rank, but only in the fact that, unlike the former, the latter can be actualized only *gradually*. Now, if we compare such an understanding of human rights with Nino's understanding, it should be noted that Nino is in agreement with Ferry & Renaut's critique of the [classical] liberalism (see, 29th footnote in the page 68 in this thesis). Futhermore, in emphasizing both the dynamic character of human rights and the necessity for some degree of sacrifices on the part of "the strong" (see, the pages 69-70 of this thesis), Nino explicitly approves the expansion of the scope of human rights to what Ferry & Renaut call "social rights". However, insofar as Nino considers "social rights" as an *expansion* of "basic individual rights" (which constitute the core of human rights), there still exists a nuance in the understanding of human rights between Nino's egalitarian liberalism and Ferry & Renaut's modern republicanism. This nuance (stemming from the secondary status of "social rights" in Nino) becomes more explicit when Nino explains the function of human rights only through the principle of the inviolability of person (see, the page 66 in this thesis). Because, it is clear that while this principle perfectly specifies the function of "individual rights as negative freedoms", it is inadequate for explaining the function of "social rights". Because, as Ferry & Renaut underlines (Ferry & Renaut, 1990: 119-120), "social rights", unlike "individual rights as negative freedoms", require a specific reference to the responsibility and need for solidarity/fraternity. Thus, the proper function of "social rights" should be defined in the framework of this responsibility and need. Consequently, I may argue that Ferry & Renaut's understanding of human rights diverges from Nino's understanding at these two points: (i) in defining the scope of human rights, Ferry & Renaut attribute equal value to "basic individual rights" and "social rights"; (ii) in defining the function of human rights, they take into account not only the function of "basic individual rights" (preserving of the inviolability of person) but also that of "social rights" (ensuring the need and responsibility for fraternity and solidarity).

which underlies the whole structure of our practical reasoning as its fundamental principle.

Furthermore, as we have seen in this chapter, Ferry & Renaut's critical humanism consists in defending this Kantian ground of *universal* human rights in the face of charges brought about by "radical" versions of the anti-humanism of our age. The basic insight that Ferry & Renaut's defense provide us against the anti-modern/anti-humanist challenge may be articulated as follows: it is not the adherence to the modern humanist outlook that has brought about the drastic experiences of totalitarianisms (which signify the destruction of the idea of right in modernity), but it was the very abondonment of this outlook in some periods of modernity that brought about these perverse effects. In line with this diagnosis, they argue that re-establishing the idea of right (standard) is a matter of re-valorizing humanity as subjectivity (freedom). But, this revalorization of human subjectivity should be in a non-naive way, so that it can avoid the metapysico-historicist tendencies by which humanism turns out to be a denial of the status of human rights as universal standards. For Ferry & Renaut, this requires the adherence to what has been elaborated in the Kantian criticist school of philosophy as "the moral point of view of the world". They insist that Kantian moral point of view provides the basis for preserving the idea of insurpassable/ahistorical standard *through the idea of universal human rights.*

CHAPTER FIVE

CONCLUSION

In this thesis, taking granted the implausibility of "a conception of human rights without universalism" and the necessary connection between the idea of human rights and the notion of universalism, I have aimed at providing an insight to the question "on what theoretical ground the universality of human rights is conceivable?". My endeavour has consisted in carefully examining three contemporary contributions in human rights literature. Jack Donnelly's liberal-conventional approach and two contemporary Kantian approaches, namely Carlos Santiago Nino's Constructivist meta-ethical theory and Luc Ferry & Alain Renaut's Critical Humanism, have been analyzed with respect to the extent they succeed in developing a solid theoretical foundation for the idea of universal human rights.

First, in chapter II, Donnelly's liberal-conventional approach has been considered. By a conceptual analysis, he first distinguishes the meaning of right as "a standard of rectitude" from the modern understanding of rights as "entitlements". In his view, in opposition to a standard of rectitude, rights as entitlements *directly* refer to a process of social interaction between two or more agents. In such interaction, rights understood as entitlements bestow individual persons as rights-holders with a power that makes things change in those cases where the conditions for the enjoyment of their rights are not preserved or ensured. In line with this, Donnelly also deduces that rights as entitlements require a specific context of social practices which he calls "a field of rule-governed interactions centred on the right-holder". Then, he argues that,

in such rights-based social contexts, it is the basic objective that the enjoyment of all rights by all rights-holders should be systematically enforced by legal institutions.

He makes the point that because it is not possible to achieve this objective completely, there exists the category of human rights as distinct from "legal entitlements". For him, when an enjoyment to which human person should be titled is not systematically enforced in a rights-based social context, the idea and practice of human rights come to the scene. Yet, as the author himself notices, a question inevitably surfaces at this point: while it is evident that legal entitlements have their (immediate) justificatory ground in the positive law, where can we find the foundation of human rights since they do not find any expression in the positive normative systems of societies. To this question, Donnelly gives the answer by referring to actual human rights practices. He asserts that, in these practices, human rights claimants resort to moral assertions which are implicitly or explicitly derived from a vision of human moral nature. Hence, the author underlines that human rights are "moral entitlements". Accordingly, he also emphasizes that, at least from the viewpoint of the human-rights claimants, these moral entitlements are universally valid. Because, their validity do not depend on their recognition and enforcement by political and legal authorities, but rather on universal moral rules derived from a vision of moral human nature.

Having disclosed that a vision of moral human nature functions as the source of human rights, Donnelly introduces a very a surprising twist in his argument (which disappoints the reader in search of a solid ground for universality). He claims that a philosophical defense, which would justify this vision of moral human nature itself, is neither possible nor desirable, and it is even not necessary for a theory of universal

human rights in our age. First, for the author, it is not possible and desirable because philosophical debates between diverse substantive accounts of moral human nature seem inconclusive. Second, he argues, it is not necessary because an indirect justification of the universal validity of human rights is possible on the basis of "a remarkable international normative consensus" obtained in our age.

I have argued that, by fleeing the difficulties of substantiating a philosophical defense of moral human nature underlying human rights and by introducing the foregoing "consensus argument", Donnelly's project aiming to develop a theory of universal human rights turns out to be crucially problematic. First, in the attempt to demonstrate moral universality of human rights, he gets stuck in a circularity that leaves the moral ground of these rights *morally* unjustified. Second, but much more vital loss occurs in the acceptance of the basic moral relativist premise which is certainly at odds with the assertion of the universal moral validity of human rights. This becomes explicit in his way of argumentation based on the claim that any substantive vision of moral human nature is directly indefensible in universalistic terms. His basic relativist premise is: the conception of morality grounding the idea of universal human rights is a particular one among different conceptions of morality each of which has its own incompatible normative validity in the historical and social circumstances in which it prevails. Donnelly's adherence to this relativist premise is particularly evident when, in the face of cultural relativism, he concedes that universalism underlying the moral idea of universal human rights is a value pertaining to the western-liberal conception of morality. Such a position anchoring moral universalism in the western-liberal tradition leads, in turn, to an ambiguous

conception of human rights formulated by the paradoxical phase of "relatively universal".

Hence, I have concluded that Donnelly's liberal-conventional approach can articulate the idea of universal human rights only by relativising it. As a result, in Donnelly's account, true meaning and force of this idea is extremely foreclosed. Because, his liberal-conventional approach locates the very idea of universal human rights into the particularity of a cultural and historical context. Indeed, it provides no genuine theoretical ground for referring human rights as universally valid norms trumping the competing sets of values that are prevalent in different historical and social contexts.

Having criticised Donnelly's liberal-conventional approach, I have turned to the alternative contemporary defense represented by Carlos Santiago Nino. As has been elaborated in chapter III, Nino's endeavour consists in demonstrating that human rights can be explained and justified as universally valid moral norms, on the basis of Kantian moral philosophy.

According to the author, Kantian Moral Constructivism provides a meta-ethical outlook by which it is possible to refer to universal moral principles without denying the fact that morality is a human artefact (construction), i.e., without falling into a dogmatic universalism. In other words, such a meta-ethical outlook provides a "critical" position that trumps both moral dogmatism and moral scepticism by applying "the transcendental method" to ethics. This method may concisely be defined as follows: it begins with actual moral practices and moral principles articulated in them and moves back to deduce the axiomatic premises which make possible the experience that we call moral. In this way, the transcendental method

explicates the common core of social practices called moral practices, pointing out what remains invariable in the variation of those practices among different historical and social contexts.

Following Kant, Nino asserts that, on the basis of the transcendental method, we can apprehend two essentials concerning moral phenomena: (i) that moral activity consists in the human endeavour to formulate universal (acceptable by all rational beings) rules with which human action should accord; (ii) that moral reasoning as such necessarily presupposes the capacity of formulating universal principles (i.e., the capacity to autonomy) as being inherent to all moral persons (i.e., in all subjects of practical reasoning), regardless of their particular determinations in the actual world.

In the light of these two essentials of moral activity, Nino deduces that the idea of autonomy has an objective (universal) moral value which is prior and superior to all conceptions of goods subjectively held (freely chosen) by human beings. Then, he makes the vital point that demonstrating objective moral value of the idea of autonomy as a capacity inherent to every moral person is concomitant with the justification of the moral universality of human rights. Because, these rights consist in protecting and ensuring the conditions which are essential for preserving and realizing every and each human person's capacity to autonomy.

With regard to Nino's Kantian Moral Constructivism, I concluded that it demonstrates an undeniable achievement in providing an internally consistent and firm ground for the idea of universal human rights. By comparing Nino's approach with Donnelly's liberal conventional approach, I argued that Nino's achievement evidently depends on establishing his theory on a well-articulated philosophical account and a remarkable defense of what Donnelly calls "a universal moral human

nature". I underlined that "the Kantian vision of moral person as the autonomous subject" is the universal moral human nature elaborated and successfully defended (in the face of dogmatic and sceptic approaches to ethics) as the ground of universal human rights, in Nino's theory.

However, I also maintained that a certain difficulty for the kind of approaches Nino represents has been left intact in his theoretical project. This difficulty concerns the serious charges brought against such approaches by the influential anti-modern and anti-humanist philosophical figures of the contemporary political-juridical thought. These figures, among whom Leo Strauss and Michel Villey occupy an exceptional and prominent place, claim that such modern-humanist outlook which is followed by Nino's Kantian Constructivism never permit us to apprehend the right as a universal (objective) criterion for human actions since they gravitate every moral value around human subject and posit her/him as the ultimate authority of her/his rights. More exactly, they argue that the modern-humanist rejection of any moral authority over human will is tantamount to the rejection of any check over capricious human desires. And, in turn, this means the rejection of the idea of right understood as a universal (objective) standard for human actions.

Hence, I have maintained that, given the widespread influence and *apparent* strength of the anti-modern and anti-humanist charges in our age, we need something more than a mere re-invocation of the internally secure foundations of the idea of universal human rights developed within the terrain of Kant's modern-humanist moral philosophy. That is, for a fully appealing theory of universal human rights, a modern-humanist response to foregoing charges should be developed. In line with this, in chapter IV, I engaged in an examination of Luc Ferry & Alain Renaut's

defense of the modern humanist philosophical foundations of the idea of universal human rights in the face of the charges brought about by Strauss and Villey.

As has been elaborated in this thesis, Ferry & Renaut's Critical Humanist project begins with underlining the sense of truth involved in the contemporary anti-modern and anti-humanist charges: that the valorisation of human subjectivity (freedom) on which modern humanist outlook is grounded inheres a tendency to negate the idea of right understood as a universal standard. For the authors, this is particularly evident in the historicist and positivist understandings of right, which have been widespread throughout the modernity. However, in opposition to Strauss and Villey, they maintain that such modern negations of right as universal standard can be ascribed only to naïve valorizations of human freedom understood as the unchecked licence to do whatever one desires. They emphasize that such an understanding does certainly not exhaust the alternative approaches to human subjectivity (freedom). More exactly, they assert that it is still possible to articulate universal moral standards within humanist modernity where the alleged "vertical authorities" over human will has been abolished.

In line with this, Ferry & Renaut argue that, if the idea of auto-*nomy* –elaborated as the true understanding of freedom for human subject by Kantian critical philosophy– is correctly apprehended, it will also be understood that a consistent valorization of human subjectivity (freedom) leads us necessarily to the recognition of an unsurpassable moral standard rather than to the historicist or positivist denials of the idea of right as a universal (ahistorical and transcultural) standard. Hence, the authors underline the following point which is vital for understanding the idea of autonomy: In order to activate her/his capacity to autonomy (i.e., the capacity to determine "what

ought to be" in general and "what s/he ought to be" in particular), human subject should bind him/herself with a supreme principle underlying her/his own will. This is the very principle of universality which burdens human subject (who necessarily posits her/himself as a free activity in her/his any consideration on "what ought to be") with an unsurpassable duty for respecting the capacity of freedom in other members of humanity, and, thus, for recognising other members of humanity as a check/limit over her/himself.

In this way, the authors refute Strauss & Villey's anti-modern and anti-humanist charge that any valorization of human subjectivity leads to the rejection of moral standards over capricious human desires by making the judgment of "the conventional" (humanly constructed historical-social reality) impossible. They emphasize that, although any meaning and force for allegedly "vertical standards" has been foreclosed in the political horizon of humanist-modernity, the transcendental dimension of right (the ideal) over the historical reality (the actual) is still preserved in this terrain thanks to the principle of universality underlying the moral point of view of autonomous human subject.

Then, it is not difficult to deduce that the idea of universal human rights expresses precisely this "non-vertical yet unsurpassable standard". Hence, understood from Ferry & Renaut's critical humanist angle, human rights are not only the expressions of human "powers/freedoms" understood in the purely negative manner as licences to pursue desires. In contradiction to what Straussian and Villeyian attack suggests by reducing these rights into powers/freedoms as licences, human rights are also the expressions of an unsurpassable principle checking these powers/freedoms. To put in a concise formulation, *human rights are the expressions of an unsurpassable*

principle of justice derived from human "free will" (i.e., of the principle of universality itself) as well as the declarations of human powers/freedoms against the imposition of allegedly vertical standards (ie., standards coming from an authority external and superior to human will) over human subjects. In other words, in contradiction to what Donnelly's liberal-conventional approach suggests, human rights are not only "rights as entitlements", but also the expressions of a "moral standard of rectitude" which provide the sole ground for justifying and defending these rights as universal rights.

At the end, with regard to Ferry & Renaut's critical humanism, I have concluded that, by defending the idea of universal human rights and its philosophical foundations in the face of the most radical contemporary challenge, it provides considerable insights that we may think as complementing and further solidifying the Kantian theory of universal human rights whose basic structure is fully elaborated by Nino.

Consequently, I think that Nino's Kantian Moral Constructivism and Ferry & Renaut's Critical Humanism are a gratification of my thesis's major question. To my question, "on what theoretical ground the universality of human rights is conceivable?", these authors provide a convincing and enlightening answer by demonstrating that the ideal (moral) universality of human rights are explicable and defensible on the Kantian ground of the idea of autonomy underlying human practical reasoning as its fundamental principle.

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