Alastair Davidson

The Immutable Laws of Mankind

The Struggle For Universal Human Rights

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"Democracy is two wolves and a lamb voting on what to have for lunch. Liberty is a well armed lamb contesting the vote" (Benjamin Franklin, 1738?)

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For Kathleen

Acknowledgments

It has become a fashion to thank everyone met in the corridor and to redouble one's gratitude to the great, often seen afar at an academic conference. As "the sere and yellow leaf", I owe an enormous debt to hosts of men and women, teachers and colleagues, who taught me history, sociology, political theory and law over more than fifty years. I will, however, despite that debt, only name one because it has become clear to me the enormous debt this book owes to his influence. Norberto Bobbio was more than a teacher, a colleague and a mentor. He was an inspiration. When, about fifteen years ago, I became fascinated by universal human rights, I was drawn back to his work on the subject.

My interest in human rights was aroused after Peter Leuprecht, then head of the Commission for Human Rights at Strasbourg, arranged for me to spend some time observing how the European Court of Human Rights worked. It was one in-house cyclo-styled paper by his deputy Pierre-Henri Imbert that really started me on the quest that led to my writing this book. The paper introduced me to an European way of looking at human rights – so different from the stuff taught in law school. It made clear how human rights connected with my Left political affiliations; how they added to my earlier scholarly interest in citizenship and cross-cultural communication, and, how I had to return to that tradition if I wanted to understand what he and others were working for at Strasbourg. Each step took me away from human rights as law and political theory to their history and sociology. This led me to Marc Agi, whose work and suggestions about the contribution of René Cassin and the origin of universal human rights in the French Revolution led me to ferret around in the Archives nationales and Bibliothèque nationale in Paris. I am duly appreciative of their help. Going back to France also led me to ask Michel Troper to comment on my work. He wrote reams of thoughtful criticism. I do not think he liked what I had written and I have tried to meet his valuable comments.

The other source of universal human rights identified by Pierre-Henri Imbert was the Christian and, more broadly, the religious tradition, in which the source of universality lies in a belief in a submission to the absolute other of the godhead. To resolve knotty problems concerning that tradition in Latin America, I turned to Emma Martinell at the University of Barcelona who, with one list of suggested

readings, almost clarified my confusions about communication across difference embodied in the term *malinchismo*. Two years, first at the Human Rights Program of the Institute for Advanced Study, Princeton and, then, as Wallenberg Professor of Human Rights at Rutgers University, allowed me to put all my preliminary ideas together, stimulated by colleagues who came to the problem from different disciplines and perspectives. I particularly appreciated Matt Matsuda's support at Rutgers. Writing a book is a lonely business, punctuated by discussions with this or that colleague. My dear friend, Boris Frankel, read and re-read drafts and subjected them to the needed critical correction from a sociologist on the Left. An anonymous reader for Cambridge University Press, which did not want this book, made invaluable comments and sustained me in my approach by directing me to the work of Peter Blickle. After another false start and a period of feeling checked, I met, and read the work of Gregorio Peces-Barba Martinez, chancellor of the Carlos III University of Madrid, and his team, whose combination of socialist politics and erudition in human rights history confirmed in me the belief that I was on the right track in writing a victims' history. We met, by the way, at a conference in honour of the 100th anniversary of the birth of Norberto Bobbio, closing a circle in my itinerary. Kathleen Weekley provided her incisive comment and editorial skill over ten long years of talk, discussion and dispute when the rest of the world had gone to bed.

Finally, I would like to thank Thomas Geisen, without whose help this book would not have seen the light, becoming another manuscript left "to the gnawing criticism of the mice".

Obviously, all errors of fact are mine. For my judgment, I am indebted to all those people for what I learnt from them. I hope that I have not betrayed them in any way.

Alastair Davidson

Contents

Prologue

Contents

This is a book about *one* solution to the terrible social ills that beset us as individuals. Undeniably, it competes with other solutions; but in recent years it has emerged as the most plausible as the others have increasingly been found wanting. The solution is to make universal human rights a reality. This book is concerned with how and why humans arrived at this particular answer to oppression.

The book shows that far from wanting those rights, in most places, at most times, most human beings did not. Universal human rights were made *against* the wishes of most people. It is a comforting self-deceit that, throughout history, everybody wanted them. In fact, some people wrenched human rights for all from those with power, usually the majority of citizens, from states, societies, nations, their laws, their ideologies and their beliefs, all of which *victimised* them. So, the book must be the *victims*' story of centuries of struggle for universal human rights, since the victimisers clearly had no desire to create human rights for all. Neglect of the victims' story is what has allowed abuse of universal human rights by the myriad who speak in their name and a consequent scepticism by many who should be fighting for their implementation.

A victims' history emphasises just what individuals were and are against in order to make sense of what was achieved when universal human rights were won. It is concerned with the centuries of struggle by individuals for the "rights" that were denied them by states, communities and other individuals with more power, through the rule of law. Our victims are within a world of many sorts of victims, but they adopt a solution that is particular and often in contradiction with what the majority of other oppressed groups support as the best solution.

For the victims who are the focus of this book, alternative solutions did not work. When, ultimately, universal human rights were established as a world-wide standard in 1948, the protections they established for all individuals revealed not only the nature of the experiences they had gone through and the threats they had endured and persisted, but also why they had still been killed, tortured, enslaved and otherwise had any possibility of fulfilment and happiness obliterated.

The victims' story has remained nigh invisible despite the fact that little understanding of human rights can be reached until we acknowledge that we have those rights mainly because of an ongoing struggle by victims against the prevailing power and its law. Only the history of the struggle of those who made the principles of human rights *universal* allows us to understand their import.

The Sparrow's Eye View

To write a victims' history is to adopt a "sparrow's eye view"; to see what exists and is created "from below", rather than the Olympian eagle's view, which sees history "from above". It is also to see it from "outside" rather than "inside". The same events and achievements – the milestones in the official story – look quite different and the "collective consciousness" or memory is different when seen from below or by outsiders. Herbert Marcuse wrote many years ago of the different object that a worker and a factory owner see when they both look out at the same factory through a train window, a simple insight repeated by Italian poet Nello Risi when he wrote: "La nostra fabbrica. L'operaio preferisce tacere" ("Our factory [says the owner]. The worker prefers to keep his mouth shut"). This history adopts that insight and seeks to make the silenced voice heard.

The record shows that practically every group of humans has been both a perpetrator and a victim of slaughters at some time in history; nor has there ever been a period when victimhood has not been recorded. A recent book about genocide (Kiernan 2007, 2–3) notes archaeological remains of a Neolithic "genocide". The Bible and the Koran report genocides and "war crimes". The first biography of Mahomet relates that the Jews plotted to exterminate all his followers (Ibn Ishaq, [AH 85-AH 151] 2003, 119) and that Islam emerged in self-defence. A victims' history is therefore never, except contingently, the history of Jews rather than of Muslims, Asians rather than Africans, women rather than men. Indeed, the role of perpetrator and victim can rapidly reverse, so that where one event has Christians slaughtering Muslims, the next will have Muslims slaughtering Christians. The Arab accounts of the murder of all Muslims and Jews when Jerusalem was taken in 1099 by the Crusaders, whose horses (in a telling contemporary metaphor) waded in blood to their knees, recount similar atrocities by Arabs against Christians shortly after.

Nevertheless, the story that diverse victims of such deeds tell is quite different from that their perpetrators. Perpetrators and their heirs have been obliged sooner or later, as the facts come to light, to acknowledge "from above" that they committed terrible crimes against their victims, but they have nearly always tried to minimise their scope. Two accounts, widely separated in time, reveal how even "facts" differ depend on who is looking at them. The Christian Chronicles state that the number slaughtered in Jerusalem in 1099 was 40,000. Accounts by the Arab victims state that it was 70,000 (Amin Malouf 1984, 50; Gabrieli, ed. 1989, 10–11). Elie Wiesel, on returning to Auschwitz, was shocked into silence at reading the official German figures for victims, which were greatly understated (Abramson 1985, I, 95).

Whether the victims' or the official statistics are "true" does not matter so much in a history of the development of a belief system or ideology. What matters is what the victims believe is true and how they understand universal human rights in consequence. Overall, victims tell a darker story than others about the deeds that drive them to seek protection through rights. Theirs is a world where slaughter, torture, war crimes are ubiquitous and have nearly always been explained away by some higher purpose. Notably, victims see, behind the individuals who make them suffer, states and the societies on which they rest – those with power – as the perpetrators. As we show, individual offence can be offset by private justice; that of vast, publicly-endorsed crimes against myriad victims cannot. So their story must also tell the story of those states and societies, as the meaning of universal human rights cannot be understood without keeping that background in mind. Any history seeking to make sense of universal human rights must tell the story of suffering and who imposed that suffering. Victims never needed to be told that they were being killed, tortured and enslaved because they differed from the majority either by choice of belief or, more drastically, because they differed naturally by a different physiognomy or skin colour. The latter could never conform; they could never share the rationalisation of the treatment meted out to them by states and majorities, that they had no right to differ.

We can be sure that the core rights sought by victims are to protect them from worlds where others can with impunity kill, torture, enslave and otherwise render them objects. They may not, once those core rights are attained, limit the list to such rights. But what concerns them in their struggle through history is not any grab-bag use of "human rights" that enables states to instrumentalise them by trivialising their meaning. So the victims' stories we tell do not concern whether the human rights of the inhabitants of Lesbos have been infringed because homosexual women are allowed to call themselves lesbians. This trivialises human rights.

It is a striking fact that human rights protecting human beings from death, torture, enslavement and deprivation of a right to think, express or organise opposition to such deeds, have existed for some people, not all, for a very long time in history. But they covered only those humans who were considered worthy of life, liberty and the pursuit of happiness by those who had power. Victims want existing protections for such humans to extend to themselves

We can trace back the right not to be killed, if not to the Ten Commandments, then at least to Hobbes' recognition (1651) that a social contract requiring submission to the law would always exclude the right of the sovereign to kill, as no person would make such a deal in the name of protection (see Bobbio 1996, 18, 68; Hobbes 1985 [1651], chs14, 190, 192, 197, 199 and 21, 268); or to the code of the autocrat Joseph of Austria, where by 1788 the death penalty had been abolished following enlightened principles. We might add that it was nominally abolished in the French Revolution and later became one of the rights established in 1848. To continue with the prohibition on torture, we might note that the jury and evidentiary system of the common law ended torture in England in the seventeenth century; but that Prussia was first to ban it in 1754; that after condemnation in Voltaire's *Treatise on Tolerance* [1762] and Pietro Verri's *Osservazioni sulla tortura* [1768], the Austrians followed

suit in 1776 and the French absolute state gave it up in 1780; we might then add that Article 9 of the Declaration of the Rights of Man and the Citizen of 1789 banned it. If we then consider the arbitrary imprisonment that we associate in our literary imaginations with pre-1789 France and the Count of Monte Cristo, where hapless victims were dropped into memory holes, we would note that it had already ended in England through the Habeas Corpus Act of 1679, itself supposedly based on sections 39 and 40 of the Magna Carta of 1215, and was certainly prohibited in both the United States Bill of Rights of 1791 and the French Declaration of Rights of 1789. We might further trace the right to believe what we want; to organise and act democratically to attain them and protect the right to life and liberty, back – after acknowledging the long tolerance of polytheist India and China that puzzled monotheists when they made their "discovery" in the fifteenth and sixteenth centuries – to, say, the Edict of Nantes of 1572, and thence to the Toleration Acts of seventeenth-century Holland and England, to the first "emancipation" of the Jews, again in France in 1789, to the US Bill of Rights, Article 1 (1791) and that of Catholics and Quakers in Britain in 1829–33. As we went looking for the milestones in the road to democracy, we would note its first formal adoption in the French Revolution; its real introduction in 1848, again in France; and how it was a feature of Australian colonies after 1857, before finally making it into law in the US and Britain by the twentieth century. Ultimately, looking back for social services – the economic and social underpinning needed for active citizenship to be more than a farce – after a brief genuflection to the religiously imposed charity of Muslims and Hindus, we might recognise that it was a feature of the Jacobin Declaration of Rights of 1793 and taken up as a cornerstone by the followers of Gracchus Babeuf in the 1848 proposals of Louis Blanc and a new declaration of rights, before becoming a feature of many Western countries by the early twentieth century in a plethora of laws.

But, we would also have to note that even in 1948 the right to life was reinterpreted not to exclude death but only "unlawful" execution, and that today it is practised by many states that have signed the 1948 Declaration. Turning to the absolute prohibition on torture, we would have to note that despite its prohibition by the United Nations in 1975, it has been on the increase since 1948 (see e.g. Peters 1999, ch5) and was flagrantly made lawful by the United States during the Bush administration's "war on terror". Again, it is a fact that both imprisonment without trial and denial of freedom of belief have again become common practice in all Britain, Australia and the USA in recent years under their Terrorism and Patriot Acts. Finally, when we consider democracy and the social state that is required to make it function adequately, we are obliged to note that the social state is usually today a matter for nostalgia and that "democracy" without the accompanying social rights has been revealed a mixed blessing, as we discuss further in this book.

Two matters are quite clear from a list of human rights restricted to some individuals or peoples that were won *before* 1948. First, the establishment of a particular human right for nationals had nothing to do with what sort of a polity existed, whether it was a monarchy or a democracy. Second, what was won was also taken away, whether the rule was by one person or by all citizens. Practically, they never

had a higher status than any other "rights" as components of the national rules of law. They can be and have regularly been taken away by the existing legal power even from the people who enjoyed them. For victims, who are by definition those excluded from such protections, they were not enough, however satisfactory they were for the people who enjoyed them and the states that protected them. A feature of their history is the continuing struggle for their extension to the individuals they excluded.

What is notable is that the list of core protections sought does not change greatly over history. We can see this if we compare the human rights enumerated above, whose history is long, with the list in the United Nations' Universal Declaration of Human Rights which, after two centuries of struggle by victims, established ultimate norms that must be observed by all states and all other humans. One hundred and ninety-four states currently subscribe to its principles. The Declaration is only five pages and twenty-nine articles long. These can be read as three linked rights of different natures that together reveal what the main crimes against victims had been. The Declaration creates sacrosanct core rights to "life, liberty and the pursuit of happiness". Then it establishes the democratic right for all those individuals to make the laws under which they will live as a community, that is, outside the sacrosanct area, and finally, it creates economic, social and other "positive" rights. The crimes that it bans are the imposition of arbitrary death, torture and enslavement that are the lot of many millions of people, and the denial of freedom even to dream of better world, much less seek it in word and deed, that is the fate of even greater numbers to this day. These crimes are the continuing refusal to let individuals decide their own fates, and the wilful deprivation of their elementary needs by starvation, famine and ill health.

Universal rights are the rights of all to life, liberty, security of person and property; to have a family and a nationality; and to freedom of movement in and between countries. All humans have the right not to be tortured, enslaved or arbitrarily imprisoned. All sanctions everywhere must come after due process of law. A human being is entitled to think and believe what she or he wishes; to practice and express such beliefs alone or with others; to organise in order to attain rights and "to take part in the government of a country directly or through freely chosen representatives". Any individual may hold public office. All these core rights in the Declaration are *negative*; they state that all declaratory states and their law will refrain from interfering with individuals in certain areas.

To these negative rights are added four *positive* rights that "bring the state back in". These guarantee economic, social, and educational conditions necessary for the active exercise of the democratic rights listed above, like the right to fair and equal pay, guaranteed employment, elementary education and opportunity to participate in cultural life as well as in the trade unions and organisations needed to obtain those conditions. These rights require the intervention of a state or some other power. Finally, the declaratory states promise to ensure that no person or group will be allowed to destroy or take away those rights. These are human rights with global reach.

The list in the Declaration of universal rights is not greatly different from an aggregation of accumulated human rights established over centuries. As this suggests,

for victims, the length or contents of the list is not crucially important. In fact, many commentators show that it has been greatly extended and is potentially infinite in extension. *The number of the humans to whom they apply is novel*. In 1948 they were extended to all human beings. Finally, no one was excluded. Nor could they ever be taken away in the name of some higher interest.

All previous, national, human rights had excluded many individuals from their benefits either permanently (because, say, they were Jews or Muslims or Christians), or occasionally when the majority became fearful about the loyalty to its values of certain groups of people. The 1948 Declaration contains rights that *all* states promise to *all humans* and not just some states to the aggregate of their citizens. This is why those who excuse a *realpolitik* in the name of human rights, or screech about an offence against their human rights when someone treads on their cultural toes, and victims of real human rights abuse often concur that the notion they have in their heads is what is found in the Universal Declaration of Human Rights adopted by the new United Nations in 1948. They see it as both the culmination of a long history and the beginning of a new era. More importantly, the Declaration differs from earlier documents about human rights because it states that *all* human beings have the rights it lists regardless of "…distinctions of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origins, property, birth or other status." This ends any different treatment on the grounds that an individual is different. No-one should be victimised because they are different in any way from the majority. Its essential point is that it ends exclusion from rights on the basis of difference of any sort. That is what makes them *universal: All* humans have the items in the list, regardless of any attribute or merit.

Moreover, the Declaration says that no state or, we will show, community or other power, ever has the right for any reason to take those rights away. This too is completely new. Universal human rights are a domain in which the rights of any and all individuals cannot be trumped by any other consideration. If the nature of the solution of universal human rights is found in the Declaration's insistence on this, it provides the clue to why the other solutions had failed to protect the victims who are the focus of this history. The real problem for victims has been their divergence from majority norms. It is this that makes a victims' history of universal human rights not primarily a history of the drive for a particular list of human rights, which have no value whatsoever for those excluded from them because they do not conform, but of the drive for and attainment of rights that protect victims against even right-laden majorities who might take away more limited protections on some ground of higher interest. No difference, physical, racial, social, ethical or moral can justify the removal of universal human rights.

But this meaning is contested by states who believe that general community interest should trump any rights of an individual and the struggle to defend what was won in 1948 is ongoing. The victims' battle was never won once and for all. The crimes that have been committed against them throughout history have become more frequent and more extensive over the last three centuries.

Methods

There are two main difficulties in writing a victims' history. First, the direct source material is often limited, especially for the early periods when the humble and meek, who comprised most of the victims, could neither read nor write and have left us almost no records of their hopes and ideas for ending the suffering imposed on them. On the other hand, no sense can be made of universal human rights unless we set their stories in the economic, social, intellectual and political histories within which they evolved. No story that merely traces evolution from one human rights "document" to another can make any sense of them, much less of a victims' understanding. Recounting in depth that background history is essential, no matter how tenuous the connections we make between items of evidence and the social and political realities within which we understand them. Universal human rights is pushed to "grand narrative" in order to make sense of a victims' history.

To circumvent that "archival impasse" the book adopts a certain methodological approach. It starts from the unavoidable premise that what makes victims is the type of power that can and does deny them their potential humanity by death, captivity, or social obliteration and oblivion. We cannot understand who the victims are without understanding what that power is in any place at any time. There is a vast literature about such power and its structures, which provides us with a Janus-face for a story about victims. Gradually, various threads can be woven with occasional other items of evidence "from below" into a tapestry. Thus our knowledge of power at any time throws light on the bits and pieces that come from victims. This drives a victims' history back to consider what power is, since only those with power can perpetrate the acts that victimise.

We have only ever known humans in society. It is impossible to identify a society without the power that makes it cohere, that is, without its rules of association. We do not know how the first society/power emerged. But by definition and in reality there are individuals at the bottom of any social and political pyramid. They are put there by the power system. This truth is captured in the words that Ignazio Silone puts in the mouth of a peasant from southern Italy in 1930: God is at the head of everything, under him, the prince, then the lords, then the lord's armed guards, their dogs, then nothing, nothing again, and again, and finally the peasant (Silone 1977; compare Chardin 1983 [1686], II, 79). Social order resting on law maintains such hierarchies. Power is primordial; power means rules and rules mean law, no matter how much power appears brutal force. Even the vendetta systems described in the Norse Sagas (1300 CE) or Beowulf (c700 CE) or during the Dark Ages (476–918 CE), and that still exist today in five European countries and in many parts of the Middle East and Asia, are primitive rules of law, albeit "wild justice" (see Kelsen 1961, 334–364) So the premise for our approach is that power means a rule of law, whether it is that of Draco, Solon, Hammurabi, the Ten Commandments or the Code Napoleon. The power that makes victims is that of legal rulers. Aristotle's celebrated distinction between the rule of laws and the rule of men should not mislead us.

For states, and the societies on which they rest, universal human rights can be, and have been, identified as an extension of the rule of law, which equals "state" written large, as the French term for the modern liberal democratic state, *état de droit*, reveals. The consequence of this understanding of human rights may be illustrated in this way: every night on the television news we see one or other world leader unctuously proclaiming that to defend human rights – usually "democracy" – we are obliged to invade this or that country and that the thousands who die and weep as a consequence are collateral damage. This gives human rights a sense that most victims do not share. They are having the bombs rained down on them because another nation-state sees universal human rights not as the defence of individuals against death and destruction but as the imposition of a different or wider rule of law. If you are among those individuals killed in the name of extending a rule of law, it is almost common sense that the states and peoples who kill and maim you embody the enemies of human rights.

The people placed by law at the bottom of the pyramid have often been seen as the victims of the system of social relations. However, that does not make them victims in our sense. They may not like the worlds they live in but they do not *therefore* seek, much less work politically for new, universal rights. On the contrary, as many theorists from Aristotle to Bobbio have pointed out, most humans seek a rule of law to establish regularities that allow planning and protection, to protect themselves from the slings and arrows of outrageous fortune, natural and human. Both power or state and society are seen to mean such law. Not all individuals feel that the rule of law is oppressive until applied to themselves; indeed, for the majority, it is the formal expression of social rules that make their lives possible and convivial. The law itself rests on their consensus in it and it would have no power without their support. The cover of the first edition of Hobbes' *Leviathan* (1651) illustrated that verity by depicting an image of the monarch, the embodiment of supreme monarchical power or sovereignty, made up of many tiny figures, like pixels in a computer image. These show that the monarch and a "people" are the Janus-face of power. The rule of law is inconceivable without majority – or at least significant mass – consensus. A state as a rule of law can be regarded as a "majority solution" to the ills of the world.

In this book, we identify three main types of power in history: feudal, monarchical-constitutional or mixed, and democratic. Each has its own sort of rule of law resting on mass popular consensus. In each situation, our victims are victims of that rule of law. When feudal states are the norm, what the victims struggle against is feudal power expressed as rule(s) of law. When the national monarchical or "mixed" state emerges as the ultimate authority in the seventeenth century, and disputes occur between the state claiming ultimate authority over rights and justice, and individuals, usually accused of treason, the victim is against the injustice of that "constitutional monarchical" rule of law. Finally, as we make clear in this book, when democratic states become the norm or a major form of power, victims are against their rules of law.

If power always implies a rule of law, however brutal, then it follows that we can find much of our evidence in the records of courts of both the treatment that created victims of the state and the arguments they put against that rule of law and for

human rights. For example, where torture is a general practice of legal systems and courts, as it was until the nineteenth century, details about torture reveal much about why victims would want certain changes and certain rights; why such "justice" was incomprehensible and unacceptable. However, until written records of legal decisions became general, usually not much before the fourteenth century, there are not many of these sources either. Most records from the Middle Ages (918–1494 CE) are about property, land and marriage, matters of private law, or, at most, disputes between the church and the monarch about division of spoils. In Europe until the emergence of the absolutist state in the fifteenth century, the disputes were usually between the Catholic church, the ultimate authority on justice, and individuals accused of heresy. Those of the Inquisition have been used to great effect by Le Roy Ladurie in his famous account of the trial of the Perfects in medieval Languedoc and by Carlo Ginzburg in his examination of the defence made by Menocchio, a miller accused of heresy in Italy in the fifteenth century, to reveal what victims of state and community thought about human beings, their rights and justice (Ladurie 2005; Ginzburg 1980). The trial of the Knights Templar early in the fourteenth century has also proved a useful source for some historians. To this we can add records of trials of celebrated heretics like Giordano Bruno, Tommaso Campanella, and Galileo Galilei in the sixteenth century. We find no proposals for universal human rights in this feudal period. Indeed, even the Magna Carta (1215) is no statement of the "rights of men', as legal experts have long made clear (Maitland 1941, 15–16).

With the emergence of monarchical constitutional power, the records of the state trials such as those of Sir Thomas More in 1535, or Walter Raleigh and the Gunpowder Plot conspirators early in the seventeenth century, reveal almost as much about the views of victims as the state trial of Charles I in 1649, not to mention those of his own judges a decade or so later. Extensive research in the Le Nain collection of trial records in France back to the fourteenth century has allowed us to flesh out this skeletal story in common law states for civil law systems. In sum, after the sixteenth century, courts, trial records and judicial decisions become a major source for a victims' history. The ultimate rule of law is still found thereafter in the courts or in parliament and the constitution, but its source in the ideologies of a sovereign people that empowers such institutions in state theory and practice starts to move to the centre of our concerns. While there are more and more individuals concerned that rights be established for those still excluded from them, it is clear that the mass and the state it comes to empower are still satisfied with human rights for national citizens only, or those who belong within the monarchical constitutional states that had emerged after the fifteenth century. In this period, we still do not find universal human rights proposed as a solution, though we hear some voices that tend that way. They emphasise the limitations of the innovations of the Dutch "Magna Carta" of 1576 and the English Bill of Rights (1 Will. and Mar. Sess 2, Cap. 2. 1689).

After 1789 new national democratic polities emerge. They are based on the direct support of the majorities within nation-states where before that any consensus had been indirect. The national popular voice is heard loud and strong, where it had been marginal in previous eras. Its beliefs and values become the source and rationalisation for the exclusion of new minorities of individuals from the human rights that citizens

enjoy. The focus in the history of universal human rights thus shifts to a consideration of dominant ideologies and the values they bear, which illustrate the consensus of masses of men and women about right and wrong that underpins both court decisions and the polity itself. In sum, where the victims were always mainly against the state and remain so, henceforth they are quite clearly individuals deemed to oppose popular or community values.

It is thus significant that it is only in the period characterised by the dominance of democratic polities that we find the proposal and adoption of universal human rights as a solution. Following Lucien Febvre's genial idea that there is no history without a problem, our problem thus becomes why and how democracy, understood as "power from below", created enough victims to ensure the adoption of the solution of universal human rights. I show that while in earlier forms of state power oppressed minorities and individuals had remained insufficient in number and influence to make their clamour for human rights a mass movement, with the emergence of the nation-state based on direct popular power "from below", death, torture, enslavement and denial of freedom to think or express different views gradually extended from such minorities to everyone who threatened national unity through difference from the ideal. That difference was identified as difference not only in belief, expression, and organisation but also in nature. Only once that was realised, did large numbers of people begin to consider human rights for all, rather than just for "people like us".

The second consequence, then, of writing a victims' history is that once we have identified their ideas of universal human rights, rights from which no-one can be excluded by any other power, we must show how and how far such ideas became hegemonic in any particular time and space. Our object is to paint the picture of how they construct a hegemony or counter power to the power of this or that state as a rule of law.

Since life has contradictions and many people experience hardship and suffering, the central point about power is how those who exercise it ensure continuing support for a system that creates even more victims than those about whom we write in this book. Particularly important is popular support not only for a rule of law but also for a particular expression of rule of law. Our approach thus imposes a method which explains from the facts we have how the solitary voices of protest – our paucity of evidence – became mass ideologies and took on new and further meaning in that transformation. *Universal* human rights is one solution to tyranny and oppression among the many proposed. Its history is the history of its being identified and taken up by a sufficient majority through an organisational or institutional struggle, obtaining hegemony.

The theory of hegemony seeks to explain how the power of both state and oppositional groups rests on the popular consensus of a sufficient majority which is constructed in the practical organisation of all aspects of productive life. It starts from the reality that all individuals are born into a particular social world. The structure of that social world constrains and produces all their understanding, their remedies and, sometimes, their very dreams of what is possible for humans. The organisers of social life in its multiple dimensions, those that give it shape and meaning, from the

factory to the university seminar room, create the real – because lived – ideology or belief system of any time. That worldview is adapted and changed to resolve the conflicts that come from the contradictions of life either gradually or in "passive revolutions". The latter create radical shifts in views while ensuring the continuation of the dominant and directive power, and avoiding radical social transformations. Any alternatives to that "official" view of the world and the "official" solutions, that is, those held by the state and its hegemonised majority, can only become more than voices in the storm when the conditions emerge or are created that allow masses of people to believe them. Hegemony thus explains why the exploited of a social order continue to support its law and notion of rights. Though they might be seen as victims, such people do not correspond with our victims since they support the rule of law that exists while ours do not.

However, the most sophisticated theoretician of hegemony, Antonio Gramsci (1891–1937) developed an argument that we use extensively to show how our victims' voices could become hegemonic over four centuries, after being marginal. He focussed on how the "common sense" or everyday view of the world of the mass of humans was changed into "good sense", typified by him in this way: Everyone is born into any already-existing social structure and conforms to the views of the world of this or that group within it. Despite the contradictions and injustices of that world, if their common sense learnt from their lived lives is not made coherent in a political activity, then it will combine the most bizarre ingredients born of personal experience, transmitted folk wisdom and the teachings of traditional authority figures: the parish priest, the witch and the frustrated petty local intellectual. It cannot transcend the frontiers of the languages and terms that express that view of the world (Gramsci 1975 Q 11 (xviii) in *QC II*, 1375–77). This common sense thus cannot automatically become coherent or critical of the existing power system no matter how oppressive and unjust. This becomes crucial when an individual seeks to translate the experience of life's contradictions into an alternative view. The tendency is to express the separate view in the old "official" terms. This is not hypocrisy. It simply means that a social group that has its own world view, even embryonic, that shows itself in action, and thus in an occasional and uneven (*saltuariamente*) fashion

> …When it…moves as an organic whole, it has, for reasons of intellectual subordination or submission taken up a conception that is not its own but borrowed from another group and this it confirms in word and even believes it is following, because it follows it in "normal times"…when its conduct is not independent and autonomous, but rather is subordinated and submissive. That is why we cannot separate philosophy from politics and we can show that the choice and the criticism of a world view is itself a political fact (Gramsci 1975 Q11 (xviii), *QC II,* 1379).

To escape from incoherence, a new view must replace the old imposed language (organisation of practices of rights and justice) by a new theoretical understanding with a new language, or grammar, in this case, of universal human rights. For victims to join in a struggle for human rights, they must move outside any majority consensus that supports an existing rule of law. If they did not, they would be both perpetrators of the rule of law and victims of it.

So, what is required for a victims' point of view to emerge is not only a coherent practical critique of the existing power and its rule of law *and* the social and political conditions underpinning it, both of which must be re-organised and given a new order, but also an awareness of its novel and distinct status in relation to previous systems of rights. Gramsci regards the ultimate place of consensus in a power system as its legal system (Gramsci 1975 Q 6 (viii), *QC II*, 757; Q 6 (viii), *QC II*, 773–4). Students of common law will recall the myriad cases in which judges concur by pointing out that without popular support, a court and its few officials would have no authority. But Gramsci also notes that at particular times, for example just before the French revolution of 1789, a popular view of natural justice came from below and sought expression (Gramsci, 1975, QC, 27 (xi) *QC III*, 2314–6). It is at such moments that a critique can become a mass ideology with political power. Natural justice is asserted against what masses feel is a defective rule of law.

In sum, power rests in the last analysis on majority support or acquiescence. *Universal* human rights is a counter-power. The division is between perpetrators and victims. Universal rights develop as the victims establish a rightful space for themselves against the existing power to harm them. The division may start with an individual, like Antigone, who defied the "laws of the city" in ancient Greece to bury her brother in a way she thought fit, and was killed for her temerity. But to write a victims' history consists of explaining how these solitary figures or minority voices, speaking for myriad silent victims who "suffered and endured", won more and more support for their claims to a point where the "laws of the city" could not run, a space where "higher principle"*, raison d'etat*, or community interest could no longer trump the individual right to life, liberty and the pursuit of happiness. Usually the victims were weaker and more fragile than their oppressors, and had to piggy-back their own claims on other, more powerful movements. And since human rights for all were not a central concern, they were easily ignored or trampled upon.

An important consequence of this is that their history is not a search for a utopian world where all injustice and unhappiness would be ended by the magic wand of universal human rights. It is a defensive history. Our victims seek to defend themselves against power as a rule of law with majority consensus. The victims' drive to universal rights against existing legal power with its defeats, ups and downs, and contradictions, makes their attainment an eminently practical matter and, without further political development, in no way a utopia or cure-all. It involves no revolution in humans or their institutions. The "sparrow's eye" seldom sees a big picture. It seeks to cut out a limited protected realm in a continuing world where the majority of people will continue to be as they ever were: victimisers and perpetrators of crimes against their fellow human beings. The victims will hide behind the shield that collectively they hold up. It follows that we do not argue the thesis that universal human rights is a new (last) utopia. It is not by studying other utopias, starting with a kingdom of Heaven that is as old as society, that we will understand the sense of universal human rights. Indeed, far from being a new cure-all like revolutionary projects for social engineering, universal human rights builds on the problems of such beliefs in total social regeneration through a new order. As we show, universal human rights are a defensive, piece-meal solution of minorities fearful of the harm

done to those who do not fit into the popular schema. They assume the continuation of a rather nasty humanity that shores up states that persecute outsiders, but universal human rights are at least a legal shield against such action. They are eminently practical and mark the end of dreams of utopia in the lived reality of millions.

We will make quite clear that the end point in this history is the Universal Declaration of Human Rights, although we go a little beyond it. This is because the Declaration is a statement against which all state and community acts will be measured and, today, sometimes sanctioned. The Declaration's undertakings to humanity at large make it the essential point of arrival for any discussion of universal human rights. While since 1948 there have been an estimated 20,000 further statements of human rights by states, regional organisations and the UN itself, at least one of which, the European Convention on Human Rights (1950), is much more effective within its jurisdiction, the Universal Declaration is the document that 99% of all the states of the world have subscribed to. No other statement has that global scope, all others being limited to countries, areas or regions. By definition, their rights cannot be for all humans.

Periodisation

Where in time and space should a victims' history start? The history of universal human rights as a solution seeks to unite the development of an idea and the way that it won sufficient mass support to become an ideology and be transformed into institutional practice. Both idea and mass ideology are treated as changing and developing. Universal human rights may or may not come from the rights that preceded or surrounded their emergence; historical investigation is required to decide if that was the case. Given these preliminary observations, this book is careful to distinguish the thirst for security of person and place, for peace, regularity and justice, from the solutions found. That thirst may be as old as mankind; the solutions have been kaleidoscopic in variety. In our era, it seems that the preferred solution is democracy everywhere.

Of one thing we can be sure: Until human beings *en masse* regarded universal human rights as practically attainable, they remained mere ideas. It follows that in some social conditions, neither rights, nor human rights, much less universal human rights as we understand them today, are considered possible. The solutions then subjectively adumbrated and proposed, which look like universal human rights and have often erroneously been placed at the beginning of the history of human rights, have nothing to do with their history as a practical solution.

So, where to start a history of universal human rights as a victims' solution?

The question is not easily answered by looking at the pre-1997 English-language debate on universal human rights and taking off from some of its strengths as history. There are, of course, myriad manuals of the documents of the United Nations and texts for use by lawyers, who were obliged, on occasion, to nod towards the Declaration. None are much concerned with the history, preferring to make a "literal"

reading of the Declaration. In their defence, we note that common lawyers faced with a statute were, until recently, trained to do just this. Since it is a "mere" declaration, without any statement that it is a binding law, the common law cynics of the robe often dismissed it as "pie in the sky", without force or effectiveness in national courts. There is also much "rights talk" among philosophers and political theorists in the Anglophone world. This also strips universal human rights of force as multiple, mutually contradictory arguments are advanced about the logical implications of the concept. Their major question is how we can have rights without duties (which, as we will show historically, victims claimed universal human rights to be). Between them, lawyers and philosophers have brought any politically fruitful debate about universal human rights to an impasse.

The silence about universal human rights among historians lasted until about 1997, when many histories of universal human rights started to appear in English. Lawyers and philosophers frequently took as common sense the notion that democracy was part of or a complement to universal human rights. But how it fitted with the other rights was discussed "logically". What explained the sudden need to understand this history was the crisis of the national-popular, democratic project, a view stated most clearly in Samuel Moyn's *The Last Utopia Human Rights in History* (Moyn 2010). By the democratic project we may understand grosso modo the ideology that has dominated humanity, particularly in the West, over the last two hundred years, that if all communities establish democratic polities then the maximum of social ills will be avoided. The notion goes back to two key concepts in the work of Jean-Jacques Rousseau (1712–78): that freedom is living under laws of our own making and that we, the people, are ultimately always seeking the good of all humans. The earliest protagonists of that view were the French, but by the middle of the nineteenth century and up to this day, the United States of America has been the major exponent, ready to impose democracy by force in places where it does not exist. Moyn's point, which seems incontrovertible, is that the project has had serious problems and often seems to have failed completely. While we propose a different periodisation from that of Moyn, who puts the date of the transition from democracy to universal human rights as the solution par excellence around 1977, we demonstrate the essential correctness of Moyn's view that ensuring democracy everywhere is a solution – a premise for universal human rights – that has reached its use-by date. Indeed, this book argues that the experience of democracy has been the spur to the victims' drive for universal human rights because it reinforced a state whose object was protection of community interest against all threats by Others, internal and external. Since democracy is necessarily communitarian and, moreover, grew up with mass nationalism and thus the nation-state, it has no place for outsiders. Outsiders to the democratic nation are victimised by it. So universal human rights have a history that is coeval and in opposition to the democratic project. The latter started by common agreement in 1789.

Moyn's perceptive thesis establishes for us where our starting point should be, back with Jean-Jacques Rousseau, France and then the USA in the eighteenth century. Indeed, the bulk of this book is devoted to the period when mass democracies emerged after 1789, because the failure of those democracies to prevent the horrors

perpetrated on millions ended trust in that system. It also galvanised increasing mass support for a universal human rights that no democratic community interest could overrule. However, the particular intellectual and social conditions of history before 1789 go far to explaining the form that the history of universal human rights took after 1789. So the first third of this book considers their prehistory when three essential conditions for even thinking of universal human rights emerged. They did so roughly in an arc from the thirteenth to the eighteen century. Before that there existed a terrifying, mafia-like world, which is the subject of our first chapter.

The three conditions that establish that there is little justification seeking the origins of universal human rights before the middle of the eighteenth century, are of a sociological nature. First, the mass of humans must believe that they are subjects who can make their own destinies and are not just the objects of the forces of nature and society, or of God. Second, they must have established rules of law that make some sort of justice possible for individuals. And third, they must know that a real universal humanity exists in all its variety. The first condition could not and cannot exist for humans engaged in exhausting subsistence agriculture like that of the overwhelming majority in the whole world in the Middle Ages and practically 40% of humanity today. The second could only emerge when the few individuals who had dreamt of a world of humans able to make a just society had won a sufficient constituency. This only emerged with mercantile capitalism in the fourteenth to sixteenth century in tiny areas of Europe. Most importantly, the rest of the world was only "discovered" after 1492 and was not really known until the eighteenth century by the populations who had established the first two conditions. Up to then, the notion of universal mankind like that addressed in the great religions in terms of all men being God's children, did not amount to real knowledge of very different human beings as subjects. Since it is sometimes argued that the universal already existed in the notion of a Godhead, absolute Other to whom we submit, it is important to insist on this last point. *The idea of universal human rights required seeing all others as possible subjects with rights*. They therefore must exist as real humans, not as beings so unfamiliar that they might be inhuman, or monsters, as was the preached by all the religions who proclaimed their creeds of justice as universal. Indeed, the evidence we have suggests that the majority of the population believed well after the eighteenth century that Others – meaning the unfamiliar – were probably inhuman and to be exterminated. On the tympan of the basilica of the Madeleine at Vézèlay, humans are portrayed as the monsters they were seen as in the Middle Ages.

Once these three conditions were united and a search for universal human rights became possible, supporters of them sought for earlier expression of such ideas both within their own cultural traditions and elsewhere. Then they excavated many apparently similar projects and made them into documents of humanity's drive to universal rights. This was completely instrumental. Undoubtedly, protagonists of the idea of universal human rights have been justified in going back to find antecedents in some of these documents. Some authors have seen in the Book of Esther (400 BCE) and in Sophocles' (495-405 BCE) *Antigone* early examples of similar ideas. These artefacts and documents are often relevant and help us understand universal human rights in some of their dimensions as they do contain some similarities with the essential

ingredients of universal human rights as an idea (Cassese 1988, ch8). The best, like *Antigone*, are accounts of an attempt to achieve a justice that is divine and higher than any law of the city, or community. They provided justification in a struggle to make them real. The most significant pre-1789 source in the West was Christianity and we recount at length the rediscoveries during the sixteenth century in Christian teachings of universal human rights.

The instrumental use of earlier thinkers was fruitful in some cases but in others was a distortion of the development of universal human rights as a challenge to oppressive rules of law. The latter uses merit discussion in a victims' history only to highlight how they promote misunderstanding and misuse of the ideal. When the idea of universal human rights became prevalent, the most bizarre claims were made. One of best was by Iran, then ruled by a murderous Shah who had filled his prisons with anyone who demanded human rights. In 1968 a conference was organised in Tehran by the UN, then firmly under the aegis of the USA, the Shah's ally, to discuss the idea. It was argued by his representatives that the Cyrus cylinder, a little object covered with difficult-to-read hieroglyphs, first proclaimed such rights in about 539 BCE. Cyrus had apparently allowed Jews to return to Jerusalem from their Babylonian captivity instead of killing them out of hand, as was the norm. Recent research by one of the heads of the British Museum, where the cylinder can be seen, has scotched the Persian claims. But, while not limiting our story to the post-1789 story, we do not discuss these earlier sources extensively here. They are used more often as lessons on why not to start a history so far back in time.

More subtle and more contentious for a victims' history is the serious work that argues unilaterally that the origin of universal human rights lies in national traditions of human rights and rules of law. An approach that stresses continuities with earlier national statements of human rights can lead to a whitewash and to minimising the view of the victims of the heroic nation. The goodies always seem to be one's compatriots and the baddies "over there".

Thus, the history of human rights that Moyn recounts assumes a continuity in which universal human rights develop out of American national rules of law and values up to the break he dates in 1977. He emphasises the US contribution to the idea, especially in its 1776 revolution and its promotion of the idea in the early United Nations. Again, A.C. Grayling's*, Toward the Light of Liberty The Struggles for Freedom and Rights that made the Modern Western World* (2007) thesis is that the British (as part of a greater European tradition) founded the idea, even if the French took it up. The possibility that trends in the US, what happened and happens there, might be the problem rather than the solution for victims, is necessarily not really considered by Moyn, although, as his colleague Samantha Power points out (2003), the US was responsible for the failure of universal human rights to become established for several decades after 1948. Practically any European text quickly makes clear that if universal human rights appeared still-born by the 1950s, the US was to blame as much as the USSR. Again, just as Moyn's national focus means that the US as the great Satan is absent, so Grayling's book completely forgets the tradition of genocide of other races that started with the Iberians (discussed by Las Casas) but which was a feature of British rule in Ireland when Milton wrote. The

Milton who wrote in favour of press freedom, also supported Cromwell, who was a tyrant for European supporters of human rights and remembered as a butcher in Irish folk memory. So, sometimes, writers see the origin of universal human rights in ideas expressed by men and women, who, in the context of rights for nationals may be seen as progressive, but from the victims' point of view frequently reinforced an exclusionary state. They also vary greatly in who and where the sources are found. Grayling makes figures like John Milton and Servetus, who get no mention at all in Moyn, of major importance.

Even when writers do not find the source of universal human rights in a progressive side to national history and take instead a global perspective, they often present them as developing out of earlier attempts to establish rules of law rather than in opposition to them. For example, Micheline Ishay's *Human Rights Reader* (2007, 27–8) contains extracts from the Indian *Arthashastra* (200 BCE), a legal code that provides for punishments involving burning alive, torture to death and being gored to death by an elephant. It is not made clear that this is intended as a negative example.

My book argues that the main problem of seeking universal human rights far back in earlier systems of rights for nationals or evolving legal codes – typical of English-language histories – is that it tends to blind their authors to the possibility that there is a revolutionary, ruptural quality to universal human rights, how they mark a rejection of the traditions of national rules of law, even the most progressive, that preceded them. While the major European theorist in this domain argues that the French revolution was like a "Copernican revolution" when it created universal human rights (Bobbio) and the only major history of the subject that is adequate (because it is in eight volumes), also argues a similar thesis (Peces Barba Martinez (ed. 1998), the existing English-language literature does not, at least up to Moyn.

This book argues that the lineage of the Universal Declaration as the culmination of a victims' history can only be convincingly traced back to certain conditions at the time when the "Dark Ages" (476–918 CE) of Europe's civilisation started to end. We begin in about 1000 CE, though this date is pushed back or forwards depending on what region or culture we are examining. We do not go back beyond about 1000 CE except chiefly to explain how horrible life was for most humans then and why the average person might seek a more just order. Even when we reach 1500 CE, where our history becomes more detailed, we continue mainly by way of negative example, that of the rule of law as oppressive. We agree with other authors that these rules of law were national and limited to a very few Western states.

This history is a victims' history of universal human rights. Victims were everywhere. Our anti-heroes are the nameless millions who made universal human rights a movement and gave them their practical sense. It tries, since victims are met at all times in all places, to avoid a national parochialism both in its approach and its source material. It insists that as a movement there were no heroic nations leading by example. Rather, victims from all over the globe cobbled together the Universal Declaration of Human Rights. But they took up ideas that were proposed by particular people in particular places at particular times and turned them into mass forces. This book like all others identifies those ideas in a particular way.

It is correct that universal human rights did have to start somewhere as a political programme, as a practical solution. The idea is undoubtedly the product of Western traditions and not, except distantly, (viz Confucius), of Asian or African traditions. But, as we stress, they marked a revolutionary rupture with earlier "national" expressions of human rights and a rejection of the great exponents of human rights for co-nationals only. Because the three preconditions discussed above were only united as theory in the context of certain economic, social and political conditions in France in 1789, the book does argue, using the methodological approach we have adopted, that universal human rights as law were first proclaimed in France in 1789. It also leads to the view that France (and maybe the United States) remained the sole protagonists of the idea from 1789 up to the Second World War. It is not alone in this view.

Before the Beginning

Implicit in the choice to go back only to 1000CE is an assumption that the continuous history of our world goes back to about that time. The older civilisations of Rome and Greece may have started developing something like humans as subjects with rights – particularly among the Christians, who suffered the frightful persecution described by Eusebius (2011, [324/5 CE], chviii) but they had been destroyed by the time our continuous history starts. The first 500 years of the Christian era was the period when the great Greco-Roman civilisation imploded, leaving its material traces in ruins still visible across Europe and north Africa and the Middle East. The causes of that collapse do not concern us, though we note that they were internal as well as external. It left a sort of vacuum in a vast space after a great millennial civilisation – a centralised imperial power traced out by roads, viaducts and walls, built on trade, rich, literate, cultivated according to its own standards, and crowned by political and legal institutions that remained immortal – collapsed and Rome itself became a dirty little town. In its place Europe was reduced to a world of illiterate serfs (from the Latin *servus*, slave) eking out their lives on the land, in a road-less, viaduct-less, world of isolated hamlets, ruled by local warlords in which there was no comparable trade to that of Rome.

Traces of former glory remained and were reasserted by 1000 CE. Charlemagne had himself crowned Roman Emperor in 800 CE. The shattered remnants of the Eastern Empire acknowledged his status. Roman law survived in manuscript form in libraries and would later be glossed on for new purposes. But as a structure that world had ended and in its place a new civilisation, that of the feudal regimes that emerged from the Dark Ages, began. It was in this relative backwardness of Europe, its barbarity, that starts the tradition that can be traced to universal human rights. Certain matters had to be thought anew precisely because it was a world of the "war of all against" that made life "nasty, brutish and short". Indeed, while it is too abrupt and un-nuanced an assertion, this victims' history tends to shift to Asia as the mass victims of barbarity move eastwards, and Asia and the rest of the world force myopic European eyes to see a new way of thinking about humans, rights and justice. But

we hope that the end point we reach is that universal human rights as a practical reality is a solution of myriad men and women who came from nearly all the places on the globe and who today are being joined by those who were not yet there in 1948. They believe that "the world community needs to return to the audacious vision of those who dreamed of the Rights of Man and the Citizen and drafted the Universal Declaration of Human Rights" (UNDP 2000, 13).

Chapter 1
A World Without Rights

Everyday Life in the Middle Ages

One thousand, or even 500 years ago, what did men and women think a human being was? How big was the world on which they based that idea? How did they put together their notions of the universal, the individual and what they could claim as their rights? We need some answers to those questions in order to decide whether the claims to rights they made (before they called them "the Rights of Man") have anything to do with the rights expressed in the 1948 Universal Declaration of Human Rights. Unfortunately, we know little about the views of most of humanity in that time. The Chronicles that passed for evidence about the "known" world in that era recount the marvellous deeds of the great. Often invention, such Chronicles are usually unreliable even as stories of the tiny elite whose "derring-do" they recount. In them, the people and their lives are almost absent (Given-Wilson 2004, 94–7, 201, ch5 passim). Practically every historian writing about those "Dark" and "Middle" ages prefaces the account with the warning that there is little evidence and no firm conclusions can be reached; all is tentative. Fortunately, the research of the *Annales* school of historians, who established themselves in the 1930s after 30 years of exclusion by the academy, laid the grounds for a good general picture of the economic, social and material life of the bulk of humans in 1000–1500 CE. Their work spawned today's "scientific" history that constructs a "truer" story than that in the written record, from archaeology, geography and medical analysis of remains and artefacts. It complements what we know from the richer accounts of the tiny elite of lords and clerics, and allows us to reach some sort of a jumping-off point to answer our questions.

The Annalists reached their conclusions by judicious use of "unconscious" evidence about life in those far-off times. Looking at geography, archaeology and architecture, as well as records of land holdings, births, deaths and marriages, and legal disputes, often in a primitive form of statistical comparison, they reconstructed a picture of everyday life that is remarkable. For example, they compared tithes paid to monasteries in order to learn about crop production; paintings of glaciers and records of wine

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harvests to do the same for climate; even what was found in the quarters of shields to establish how people worked, what they ate and wore (see for example, Duby 1977, II, 247; Ladurie 1991; Braudel 1979, I, 118, 119ff, 131ff). Moreover, they showed how what we mistakenly regard as a way of life that gradually disappeared everywhere by 1500 CE (which it did not even in western Europe), continued to exist for the great majority of people in many places right up to the nineteenth century, and still does in parts of Africa, Asia and Latin America (Braudel 1979, passim). Graeme Robb's brilliant *The Discovery of France A Historical Geography from the Revolution to the First World War* (2007) reminds us that in one of the largest countries of Europe, conditions like those of the Middle Ages existed until almost our own day. What matters today is the proportion of people who still live like the population of that era.

Using the Annales' account, we can start to build a tentative understanding of the view "from below", what they called collective mentalities, including what humans thought about themselves, justice and their rights. With the Annales' concern for the long-term and, in the writings of their latest *chef d'école*, Ferro (2001), the universal and the global, their work provides us with a good place to start a history of human rights. Like all generalisations, exceptions must be made and will be where required as the story unfolds.

Apocalyptic Horseman I: Famine

We do not know (a phrase often repeated in this chapter), but historians calculate that universal humanity comprised about 250–300 million people in 1000 CE, and about a quarter more in 1500 CE, that is, about a tenth of the world's population when the Universal Declaration of Human Rights was promulgated and less than a twentieth of what it is today. Over 220 of those 250–300 million can be divided into thirds: (1) those who professed the great monotheist religions which covered Europe, east and west, including Russia and the Middle East into Africa and northern India; (2) the Hindus, the largest proportion, who lived in the Indian sub-continent and its islands, and (3) the Confucians who lived in the greater Chinese cultural world, which included Japan, north Asia and southeast Asia. They comprised the world known to each other. Of the rest, about nine million lived in the Americas; a residue, often animists, lived in Africa; and a tiny minority in Australasia and the Pacific (see Braudel 1979, I, 23ff). Almost none of 220 million others knew that the Americans and Australasians existed.

For most of these people, life was as Hobbes described it. Until 1800 CE it remained so except in two or three core countries of western Europe and even in 2000 CE it remains so for about one-fifth of all people in developing countries (see UNDP 1993, 27; UNDP 2000, 147–60; UNRISD 1995, 24). In other words, the conditions we associate with the Middle Ages still exist for great numbers of people. So this chapter, while beginning in the period up to 1500 CE and in Europe, also shows in "fast forward" how what was general in Europe in 1000 CE was common

there in 1900 CE, and was still general in China and India even later than that. Until a century ago, not even by thinking spatially could we relegate the conditions of the European Middle Ages to what only still happened "over there". Karl Marx reminded us of that when he wrote in 1853, "Hindoostan is an Italy of Asian dimension" and "the Ireland of the East", a perspective and comparison endorsed by Vochting, the great German student of Italy, in his description of southern Italy as a European China where peasants still lived "almost in the Middle Ages" in the 1950s (Marx 1953, I, 312; Vochting 1955, 65, 68ff, 79, 132, 267. Compare the descriptions of seventeenth century China in Chap. 3 of this book below).

Thomas Hobbes had used the words "nasty, brutish and short" in 1651 to describe what he called the state of nature, where humans were in a constant state of war with one another, where strangers were killed on sight. In such a world, a mass belief in a universal humanity where every individual had equal rights to life, liberty and the pursuit of happiness was impossible, by definition (Hobbes 1965, 85). Hobbes regarded this brutish world as still existing among North American Indians but as a thing of the past among "civilised" peoples. His greatest critic, Baron de Montesquieu (Charles Louis de Secondat 1689–1755), noted wryly nearly a century later that he was really talking about his own world (Montesquieu 1964, 531).

Between 1000 and 1500 CE, "nastiness" started from living "close to nature". Certainly, "the men of the first two feudal ages [roughly 800–1400] were close to nature – much closer than we are" (Bloch 1978, I, 72). As I suggest later, being close to nature made impossible a general belief that all humans could or should be treated equally, much less that there might be *universal* human rights.

Nearly all human beings were involved in a desperate struggle to wrest from the soil in endless, exhausting labour, sufficient to eat. There were few towns and they were small. Life was literally a fight for existence, using primitive tools. The main crop raised in Christendom and Islam was wheat; in Asia it was rice; and in the Americas, corn. Only when they started to trade directly with each other in the sixteenth century did they plant more diverse crops. In all cases the harvest remained meagre until the nineteenth century. From their crops they made a sort of gruel or porridge that they supplemented with the occasional vegetable or acorns and berries collected in the forest. This was practically all they ate. This gruel was the *bouillie* described by Prion in seventeenth century France; the *gom* eaten in Persia and the Caucasus when Chardin travelled through it in 1654 and the "rice" in "insipid water" that was the staple in China 50 years after (Prion 1985, 43; Chardin 1983, 147–8; Vissière and Vissière 1979, 104). It is still the staple in most of Africa. In 2012, one million Darfurans fight to get their "mealies" every day.

The yields were small, though rice produced the most per acre. Almost everyone was a peasant, engaged in subsistence farming, though surpluses were grown and markets slowly developed over the five centuries. At times of sowing and harvest, the work was prodigious; as late as the eighteenth century all hands were required to work, even among the richest peasant families of Europe. Thus, Rétif de la Bretonne's father recalled :"Two times a year we had holidays [from school] for the harvest and the picking of the grapes, only a few pupils came back after the harvest, most waited for the heavy work to end" (de la Bretonne 1978, 8). In slower periods,

the peasants gathered fruit and honey, and scavenged in the forests in a way that had not changed since "the first ages of mankind" (Bloch 1978, I, 72). The harvest was stored against days of dearth and eked out as the staple gruel (see de la Bretonne 1978, 191 for the difference in diet between a poor and a rich peasant in eighteenth century Burgundy). Today in the white world, we only find something similar in Lucca's luxury restaurants, *farro*, or in five-star Asian hotels where congee, duly enriched in a way unknown in 1000 CE, is on offer at breakfast.

After the backbreaking labour, they returned in the evening to what – even in late nineteenth century Italy – were "foul, fetid, hovels" without sanitation or light. These were of mud and thatch throughout the world, although where it was cold they had, by 1400, been replaced by the solid houses we see in hilltop villages of southern Europe today (see for example, Ralph Fitch (1583–) in Foster 1985, 16, "The houses are made of lome and thatched"). A description of a house in Mingrelia (today's north-west Georgia) in 1654 could apply to all peasant housing from 1000 to 1900: "ordinary houses consist of one big room in which masters, servants, men and women live together without being separated from one another. There is always a fire in the middle of the room and since the walls are of wood and the roof of straw, no-one can guarantee that the house will last a day" (Chardin 1983, I, 153). Of course, on the great plains, the steppes and in North Africa a minority of nomadic pastoralists roamed over vast spaces, pitching tents that were flimsier and scarcely less evil smelling than the peasant hovels. But even native Americans lived not so differently from their fellows in France in 1300 and Asia in 1700. Peoples who in myth are hunter-gatherers often were not. They, too, were usually grain-growing peasants. The dwellings of the Indians of Brazil in 1503–05 were described as "hamlets of 30, 40 or 50 shacks, made as an enclosure of stakes fixed in the ground, joined to each other and filled in with grass and leaves…there is a hole for the chimney" (de Gonneville 1981, "Voyage au Bresil 1503–5" in Cartier 1981, 51). On his third voyage to Canada (1535–6) Cartier reported native American "towns" of 50 houses, each 50 by 15 ft, made of wood, bark and furs with a big room in which "they have their fire and live communally", although unlike Europeans they had separate rooms for husband and wife (Cartier 1981, 197–9). Folktales recorded by Henry Schoolcraft early in the nineteenth century reveal how important grain was to the folk memory of peoples who have become wrongly synonymous with buffalo hunting (see Schoolcraft 1997, 295–303).

They lived in thousands of hamlets; they had practically no connection with others except those of immediately proximate hamlets. Two or perhaps three "families" lived together; "the true wealth of those times must be seen in the 'family'" (Duby 1977, II, 78). These families were clans with core blood-related groups extended by marriage and fictitious kinship ties to "aunties" and "uncles". In the early period in Europe, such families would live under one roof and sometimes numbered, with hangers-on, up to 60 people. This continued long after in parts of Asia, where multiple wives meant large groups. By the fourteenth century, the families had become much smaller in better off areas of Europe (see Klapitsch and Demonet 1976, 45; Bloch 1978, I, 139 reports households of 50 persons in Bavaria in the eleventh century and 66 in fifteenth-century Normandy). The houses were often grossly overcrowded.

The unifying force was the need to maintain an efficient and sufficient work unit. Each person had his task and a place decided by that task. Usually, the group was headed by a patriarch who ruled with an iron fist and saw to it that the unit was replenished with labour power by the right marriages and alliances. This became particularly central as families grew richer and had several parcels of land. Then judicious out-marriages were planned, as we see from the letters of the Paston family in the fifteenth century (Barber 1981, 44) .Where endogamy was the rule at the beginning of the Middle Ages, Braudel (1986, 131) even notes a village in France where it still applied late in the nineteenth century. Rétif de la Bretonne's father was simply told whom he must marry to ensure the continuation of the farm and was thrashed for his temerity in thinking that he might decide for himself (de la Bretonne 1978, 55–7). Such use of humans as goods in exchange meant the subordination of any individual wishes to the interest of the collective. No dependant had the right to make decisions for himself or his children. Even less could a woman dispose of herself. This remained true until the eighteenth century in Europe and is still true in many parts of the world. Equality of treatment was non-existent and was seen as dangerous to the collectivity.

We should not think of these families as havens of the heart, no matter what the social status. Rétif reminds us that in his area in the eighteenth century, the word "fear" was still used when speaking of "loving" one's father or the Father ("Le mot craindre…est pris pour aimer…c'est l'usage du pays" (de la Bretonne 1978, 6). Their relations were based on the power of the strongest and thus were violent and brutal at all levels. Women and children were thrashed as a matter of course. Among the lords, sons regularly killed their fathers and siblings in order to gain control and when a lord left the area he made his kin swear not to usurp his place, as Richard Coeur de Lion did with King John – who broke his promise – or as Zumurrad did with her son the sultan Ismail, who had his own brother tortured to death (Ibn al Qalanisi cited in Maalouf 1984, 120–1).

Where land means life, people cling tenaciously to what land they have. Without it there would be no food at all. Since that was nearly always in short supply, often because there was insufficient labour power to open new areas up, a cold snap, a plague of locusts, a flood or a drought was calamitous. Each could and did bring famine and death with monotonous regularity. George Duby recounts that in Ypres early in the fourteenth century, one-in-ten people died of starvation and that there were seven major famines between 1334 and 1450, about two every generation. Famine continued to be a scourge much later in India. Van Graf wrote in 1670:

> We saw nothing but poverty and misery among the country folk. Scarcity and famine were greater than had ever been known within the memory of man. The cause was the failure of the rice crop and the inundations of the Ganges. The people died in heaps and their corpses remained extended on the roads, streets and marketplaces, since there was no-one to bury them or even throw them in the river. These corpses were torn and devoured by wild horses, tigers, wolves and dogs. We even saw some poor wretches who still had in their mouths, grass, leather and such like filth. Slaves could be bought for next to nothing (cited in O'Malley 1944, 13).

He estimated that in Patna 91,000–103,000 died in one year. In 1876–79, in one of the worst famines in Indian history, millions died, and many were driven to cannibalism (Davis 2001, Part I, Part II, ch5).

Already in the sixteenth and seventeenth centuries, some Europeans were horrified at such suffering, though it still happened in their own areas. One of the few voices "from below", a "shepherd" who could write, recalled the 1709 famine in France:

> Prion…saw the misery and popular death toll of winter 1709, where he saw half of its inhabitants die through the flail of famine. The Abbot, his master, set up each day for four months, a great cauldron on a fire, to make "*bouillie*" [porridge] with unsifted oat flour, for distribution to these poor people who were dying of hunger, who hung around his door in hundreds. We found families of unknown people dead on the roads and in the stables…old men and young children who still had the grass they were eating in their mouths (Prion 1985, 43).

Apocalyptic Horseman II: Plague

With great numbers of sick and of rotting corpses, it was an unhealthy world. When Prion fell into the river he became very ill. Plagues were frequent. The most notorious in our period was the Black Death of 1348–9 that devastated town and country in all of eastern and western Europe. This plague, which had sequels for 100 years after, killed from one-third to one-half of the population around the Mediterranean. Overall Europe's population may have gone down by 50%. In areas close to Africa, where it became endemic, like Seville, there were plagues every 20 years between 1507 and 1649 (Braudel 2000, I, 227–8; Braudel 1979, I, 65). This situation continued for centuries. The Great Plague struck England in 1665, during which 97,306 people died in London and the home counties out of a total population of about 250,000 (see Bell 2001, xxiv and passim). It had been preceded by outbreaks in 1593, 1603, 1625 and 1636. In the plague of 1625, more than 35,000 people are estimated to have died. In Marseilles in 1720, about 50,000 people, half the population, died (Prion 1985, 152 fn 2, 154). Millions still were dying from plague in India between 1896 and 1940.

It used to be believed that the bubonic plague was borne by black rats coming from outside Europe. While that is now discounted as the main cause, it is clear that diseases from Asia were brought back to Europe with the development of trade, in particular, cholera. In India and China, cholera epidemics had killed hundreds of thousands and epidemics in 1817–18 spread rapidly into Iran and Russia. An observer wrote in 1798 that in India up to three-quarters of a large city would die (see O'Malley 1944, 133–5, citing W. Tone in the *Asiatic Annual Register* for 1798–9). As recently as 1973 there was a cholera outbreak in Naples. The more the world became interconnected, the more diseases caused havoc among populations with no secular immunities or cures. Thus "Spanish" influenza spread in the early twentieth century from the West to Asia and then the Pacific, killing an estimated seven to thirteen million people.

The vast numbers killed by plagues were accompanied by high infant mortality and death in childbirth. So the nasty lives were indeed short. Even in the most prosperous areas, life expectancy had risen to only 35.5 years by the eighteenth century (less than that in Zimbabwe at the beginning of the twenty-first century, with the lowest life

expectancy in the world at 37 years), though those who survived in the Middle Ages did often live to a ripe old age approximating the Biblical three score years and ten. Moreover, just as life expectancy started to increase in Europe it decreased in India and China. The shortness of this life and endless labour to keep from starving, did make humanity brutish. One of the rare accounts we have from a *popolano* who could read, states that the very object of the Sacrament was that humans "should not be like beasts" (Ginzburg 1980, 11). It is invaluable because it shows that the descriptions made by the middle class, who could write, were not completely unshared among the people they described. Thus we have La Bruyère (1951, 333; see also Funck-Brentano, 259ff) writing in the seventeenth century (probably describing what he saw before 1688):

> We see certain wild animals, male and female, spread over the country, dark, livid, tanned by the sun, clinging to the soil which they dig and turn up with invincible perseverance; they have some sort of articulate speech, and when they rise to their feet they display human faces and are, in fact, men. They retire by night to their dens where they live on black bread, water and roots; they spare others the trouble of sowing, ploughing and gathering their daily bread, and in this way do not deserve to be lacking in what they have sown (compare Robb 2007, 17–18, chs5 and 6).

Similar observations were made by one of Giuseppe Garibaldi's lieutenants in Italy in 1860, who noted that the Sicilian *picciotti* (peasants) who marched with the famous Thousand appeared like great beasts (G. Abba cited in Pattarin 1959, 411–2). To these descriptions we add those letters of Father Premaré SJ, a missionary in China in the early eighteenth century:

> We know that extreme misery leads to terrible excess. When a person is in China, and one sees things oneself, one is not surprised that mothers kill, or leave to die many of their children, that parents sell their children for next to nothing; that people are self-seekers (interessés) and that they are great thieves. Rather, we are astonished that something even more dreadful does not happen, and that in times of famine, which are not so rare here, when millions of souls perish from hunger, without having recourse to the ultimate violence that we read about in Europe…a Chinese passes his life turning up the earth with his bare arms, often in the water up to his knees, and in the evening he is happy to eat a little bowl of rice and to drink the tasteless water in which it has been boiled, that is his everyday food (in Vissière and Vissière 1979, 104).

As if famine and plague were not enough, there was the flail of constant warfare also, Hobbes maintained, typical of the state of nature. Since without land a person was doomed, all social life revolved around getting it, keeping it and increasing it. As a French observer of Russia reported in 1861, "The great difficulty [in freeing up land as private property] comes from the idea innate in the peasant that he is inseparable from the earth, in the sense that the land belongs to him and he belongs to the land." The Russian serfs "entire code" was "our life belongs to you, you can take it, but you have no right to move us from the land that belongs to us" (Venturi 2001, 69). All wealth and value was associated with it; people therefore constantly tried to take it from others. To help us understand why wars were so savage and vicious, Fletcher (2003, 59) writes of pre-1066 Britain: "The only form of wealth that was secure and permanent was land". Family structure, marriage, population control, war and foreign policy were explicable by the need and desire for land.

Apocalyptic Horseman III: War

Thus from 1000 to 1500 CE – and arguably to this day in some places – life was a war for territory of all against all, even within blood-related families. In the villages of the Middle Ages in Europe (and much later elsewhere), it probably took the form of theft of crops and animals, usurpation and brawls between rival groups. We discuss this below. But at the level of the ruling groups of society, the lords, clergy and their retainers, it was deadly and almost incessant. A contemporary and undeniably hostile description of the Norman who became lord of Lombardy and then the Puglia and Sicily, emblematic of how power was acquired in the Middle Ages, runs:

> this Robert was Norman by descent, of insignificant origin…and as he would not endure any control, he departed from Normandy with only five followers on horseback, and thirty on foot all told. After leaving his native land, he roamed amid the mountain ridges, caves and hills of Lombardy, as the chief of a robber band. Thus the prelude of this man's life was marked by much bloodshed and many murders…he came under the notice of Gulielmus Mascabeles who was then ruler over the greater part of territory adjacent to Lombardy [and] attached him [Robert] to himself, and betrothed one of his daughters to him. The marriage was completed and [Mascabeles] had even given him a city as kind of wedding gift. However Robert grew disaffected and meditated rebellion…while professing friendship… He was secretly preparing a terrible scheme…in order to capture all of Mascabeles' towns, and make himself master of all his possessions…Robert indicated the place where they would meet for discussion [but instead] attacks him with murderous intent…Mascabeles was taken bound and a prisoner of war to the very fortress which he had given as a wedding gift…And it will not be amiss if I enlarge on Robert's cruelty. For when he had once got Mascabeles in his power, he first had all his teeth pulled out, and demanded for each of them a stupendous weight of money. He did not leave off drawing them until he had taken all, for both teeth and money gave out simultaneously, and then Robert cast his eyes upon Gulielmus' eyes, and grudging him his sight, deprived him of his eyes…In a short time he was nominated Duke of all Lombardy (Comnena 2003, 27–30).

Even legendary figures like William the Conqueror and Richard the Lion Hearted were so frightful that their enemies and victims sometimes used their names to terrify naughty children. William the Conqueror shared fully the general characteristics of other Norman monarchs: "…they were all in varying degrees personally repellent, cruel…and unscrupulous. They were all men of great ability and vastly ambitious" (Douglas 2002, 6). William has passed into history as the man who cleaned up an England where "they hanged men up with their feet and smoked them with foul smoke. Some were hanged up by their thumbs, others by the head, and burning things were hung onto their feet. They put knotted strings about men's heads and writhed them until they went into the brain…" (Green 1920, 103, citing the contemporary English Chronicle). Yet William, despite the hagiography, had won his power in Normandy before crossing the Channel to win at Hastings (1066) at the battle of Val-es-Dunes (1047) where he had "terrified [his enemies] with the slaughter" (Douglas 2004, 47).

If that was how the bold rose to lordship in 1047, the middle-class Pastons' letters are all also about incessant attacks on and seizures of their houses by this or that rival local gentleman. Local notables took full advantage of changing forces and

attached themselves to whoever they thought was the winning side (*The Paston Letters,* 1924, II, 1–25; Barber 1981, 32, 35, 59, 69, 83). The *Damascus Chronicles* of the Crusades (Gibb 2002) tell an almost identical story for the Middle East in the twelfth century. Above the regional, there were "national" wars, increasingly fought by mercenaries such as the warrior castes of India. To parallel the Hundred Years' War in Europe (1337–1453) there were the incessant incursions over five centuries after 1187 from the east and south into Russia, made legendary by the violence of Genghiz Khan. To the Moghul conquest of India (see Fray Sebastian Manrique's description of 1621 in Manrique 1967, 1, 53) we can add the 80 Years War in Java (Carey 1997, 711–34). Even in the early modern period, war was endless. Tilly estimates that the Dutch were at war four years out of five during the seventeenth century, and the French 57 times between 1489 and 1802. The British were similarly bellicose (Tilly 1993, 65; 110–12; 146–7).

In nearly all cases, these wars were really about getting control of land and its products, and in order to obtain cheap, often slave, manpower. As Heer (1998, 24) writes, in the late Middle Ages in western Europe: "apart from some tiny and much debated areas…there were no longer any completely free peasants". They were vicious "take-no-prisoners" affairs in which the victor routinely slaughtered his enemies (see document cited in Fletcher 2003, 53; Maalouf 1984, passim; Gibb 2002, passim). They even occasionally took their scalps, well before the "savages" of North America. The wars were often dressed up as being required by honour to avenge a kinsman or an insult to a woman of the family. But since "honour" literally meant "land" until late in the Middle Ages, what was claimed under such words was a right to property and to show that a person was not too weak to defend it (see Muchembled 1991, 61). The Crusades of the twelfth and thirteenth centuries were dressed up as wars of religion and were preached as such at Vézèlay and elsewhere, but for many crusaders they were about territorial conquest; after the Crusaders were finally defeated, they left a host of "warrior monks" in fiefs along the littoral of what are now Palestine and the Lebanon, as well as in Sicily, Cyprus and Malta, and in eastern Europe, where the Teutonic knights were even more brutal than the rest. The first Crusade was in fact a rabble of simple men and a few knights, while the subsequent marches to the East were knights and their retinues and peasants morally blackmailed or bribed in many cases into taking up the cross by the promise of land and riches.

The most recent history suggests that crusades continued for centuries afterwards, hard to gainsay after George W. Bush's pronouncements about the nature of his wars in the Middle East (see Tyerman 2006, chs25, 26). From the Muslim point of view, they united the faithful in a continuing hatred of those they considered frightful animals (Maalouf 1984, 39, 261–6; Gibb 2002, 42, 44–8, 78). Since they were horrifying progresses involving the sack and massacre of the populations met along the way, peasants were frequently killing peasants in brawls among Crusaders and Defenders of the Faith of different nations. But after the first Crusades, the war of all against all usually no longer took the same form. By 1200 CE, peasants were usually no longer fighters in larger territorial wars or in conquests as they had been earlier. Wars were fought by warlords and bands of mercenary thugs whom they

retained (Bloch 1978, I, 156, 234–5). They were expensive affairs that had to be paid for. The way to do this was by exactions from the person next below in power until in the end the mass of peasants ended up paying for everything. Of course, the average peasant who heard the arriving hordes tried to hide what grain he had and melted into the forest with his family until the marauding armies had passed (Duby 1977, II, 232–3; Maalouf 1984, 40). This did not always work as supply trains settled in, and lords became crueller and more skilled at making their victims disgorge the few pennies they had. In Asia the exactions of mercenaries and warrior castes were terrible for the average person. In a Hindu memoir of 1867 we have an account of what happened when a Maratha governor held a "durbar" at the head of his troops to exact payment of his "dues":

> No horses, slaves, or cattle could be sold, no cloth could be stamped, no money could be exchanged, even prayers for rain could not be offered, without paying on each operation its special and peculiar tax. In short, the poor man could not shelter himself, or clothe himself or earn his bread, or eat it, or marry, or rejoice, or even ask his Gods for better weather, without contributing separately on each individual act to the necessities of the state" (O'Malley 1944, 38; compare Bloch 1978, I, 258; Gibb 2002, 78).

And even if there was no attempt to avoid handing over what might make the difference between life and death, torture was systematically used to squeeze the last drop of blood from the stone (O'Malley 1944, 35).

Where it appears that simple people might have regarded famines and plagues as inexplicable acts of God along the lines of Prion's "this sickness among the people was a scourge of God which ravages peoples who have raised his anger" (1985, 154) and thought that the only solution was flight or smearing oneself with magic potions, they did not regard fiscal exactions and the effects of baronial wars in the same way. It was these that frequently broke the camel's back (Duby 1977, II, 179–181, 233; Ladurie 1987b, ch5, 218–220, 241). There was a close correlation between wars and the passage of fighting men, and later, fiscal exaction by the state and peasant revolts, while only on occasion, as in Russia in 1832–5, did the cholera provoke the same resentment and reaction. Today, faced with the argument made by Mike Davis (2001), it is wise to consider whether famine and plague were crimes of the ruling classes or the socio-political system. But those connections were not apparently made in societies like those of the European Middle Ages.

The fiscal exactions and the freebooting of mercenaries and other armed dependants of the lords provoked constant revolts and retaliation – woe betide a straggling soldier (see the painting from Jean de Wavrin's "Chroniques d'Angleterre, XVème siècle" reproduced in Braudel 1979, II, 442). Probably, most were tiny episodes, not recorded to history. Others were more important and there are records. The overburdened peasants, provoked by too much theft, rape, torture and savagery, simply rose up. In each case it was as if a slumbering monster had been awoken. Having been reduced to "brutes" by the life they led, the people avenged themselves in great slaughters against the imaginary and real slights to which they had been subjected. In Europe, these became known as *jacqueries* after the name of one early leader, Jacques Bonhomme, but they usually started as "spontaneous" revolts. Froissart reports in his *Chronicles* that in 1358, "without leaders" the peasants of the Beauvaisis

in France decided to kill all "gentlemen". "They broke into the house and killed the knight, his lady and children, big and small and burnt it." In another place they pack-raped the pregnant wife in front of the knight and then killed the entire family. They were "without mercy, like enraged dogs". "I do not dare write about or recount the horrible things that they did to women", but Froissart informs us that they roasted one knight and made his wife eat him. Then came the reprisals of the "gentlemen" who got together with others from neighbouring areas of Brabant, Hainault and Flanders. Together with such "strangers" they "cut to pieces these evil people without pity…they hanged them as they found them". In one day, 3,000 peasants were butchered. In those days care about statistics was not strong and figures were often greatly exaggerated. So we can discount Froissart's estimate of a total of 100,000 peasants killed. But his description of "villeins, black and badly armed" being "harvested like animals" until the knights were "tired out" certainly comes close to the truth (Froissart in *Chroniqueurs*, 1952 [1912], 389–93). His report of the Wat Tyler rebellion of 1381 in England is borne out by other sources. The villains "felt that they were being kept under like beasts" by the exactions of the lords. They listened to "foolish priests" like John Ball, and Wat "the tiler", and started clamouring for wages for (in Ball's words) "the pain and the travail; rain and wind in the fields; the labours [whence] they kept their estates." "We be called their bondmen and without we readily do them service we be beaten; and we have no sovereign to whom we may complain, nor that will hear us or do us right." So he urged them to go to the king and "we shall have some remedy, either by fairness or otherwise."

They marched south to London. With "good reason" the knights and squires were terrified. Again they beat, burnt and massacred. "Foreigners," mostly Flemish, were all killed when found. "Enraged and mad, they did much sorrow". The king, on advice, acceded to their demands for freedom from bondage, but plotted that once they had returned home he would "slay all these unhappy people while they were asleep; for it was thought that many of them were drunken, whereby they could be slain like flies". Deceived by his promise of amnesty, most dispersed. There followed a massive slaughter, hamlet by hamlet, in which around 1,500 people were executed. Tyler, who had wished to press on despite regal promises, was split in two by the mayor for speaking out of turn before his "natural lord" (Froissart 1963, 133–58, Froissart in *Chroniqueurs*, 1952, 640–65; "Anonimalle Chronicle" in Oman 1906, 186–205; Walsingham 1874, II, 32–4; on the reliability of these chronicles, see Given-Wilson 2004, ch1).

These risings had their equivalent in the south and east. In Sicily the horrors of the massacres at Vespers in 1282 passed into art in Verdi's opera. They were provoked by the excesses of the passing soldiery of the king of France on their way to the Crusades. Mack Smith (1968, I, 71–2) relates: "Every stranger whose accent betrayed him was slaughtered, and several thousand Frenchmen were said to have been killed in a few hours. Monasteries were broken open and monks killed, old men and infants butchered, and even Sicilian women thought to be pregnant by Frenchmen were ripped open. Christian burial was often refused. This was not a feudal revolt but popular revolution…it was particularly barbarous" (note the date that Mack Smith ends the "mediaeval" period in Sicily, 1713 CE). In Russia there

were mass revolts such as those led by Bolotnikov (1606–7), Stenka Razin (1670) and Pugachev (1773–4), at roughly 50-year intervals. This rate accelerated in the nineteenth century, when there were 88 revolts in 1826; 96 in 1830–4; 79 in 1835–9; 138 in 1840–4 and 207 in 1845–9 (Venturi 2001, 64).

Despite being major risings, all revolts in Europe before 1400 were local events, though Froissart notes that had the rebels of 1381 succeeded in their aim of destroying the nobles of England, the revolt would have spread to "other nations". Like most wars today, they did not directly affect people living outside a particular locality. It is, therefore, notable that the peasant revolt in central Europe in 1525 was a "national", not a "local" event. It marked a significant shift in power relations between people and lords as Swabian peasants united around 12 Articles calling for a "godly practice" in their treatment (whose implications are dealt with in Chap. 2 below) (see Blickle 1981, 91–3, 139). Here, we simply note the similarities between it and earlier revolts.

Engels relates in his famous essay *The Peasant War in Germany* that "no matter whose subject the peasant was" everyone treated him "as a thing, a beast of burden, or worse".

> The lord did as he pleased with the peasant's own person, his wife and his daughters, just as he did with the peasant's property. He had the right of the first night. He threw the peasant into the tower when he wished, and the rack awaited the peasant there just as surely as the investigating attorney awaits the attested in our day. He killed the peasant or had him beheaded when he pleased. There was none out of the edifying chapters of the Carolina [Charles V's legal code AD] dealing with "ear clipping", "nose cutting", "eye gouging", "chopping of fingers and hands", "beheading", "breaking on the wheel", "burning", "hot irons" "quartering" etc., that the gracious lord and patron would not apply at will. Who would defend the peasant? It was the barons, clergymen, patricians and jurists, who sat in the courts, and they knew perfectly well what they were being paid for. After all, every official estate of the Empire lived by sucking the peasants dry.

When they rose and took their "terroristic revenge", it was merciless and so was the repression that eventually came: 5,000 of 8,000 rebels were slaughtered. One leader, Thomas Munster, was tortured on the rack and then beheaded. He fared better than the Hungarian leader, Georg Dosza, who was roasted alive on a red hot throne when captured and had his flesh eaten by his followers, as it was a condition on which their lives were spared. The litany of horrors, particularly of the suppression, goes on and on: impaling, beheading, burning alive (Marx and Engels 1975, X, 422–73, esp. 409, 439; Blickle 1981).

In China and India, even greater major peasant revolts were reported until the eighteenth and nineteenth centuries. Rival lords, backed by peasants in some cases, constantly attempted to overthrow rulers; and there were great equivalents of jacqueries. In 1130 there was revolt in Chenkiang, leading to general warfare; the leader reportedly uttered words that we find frequently repeated in such revolts across the world: "The law separates the high and the low, the rich man and the poor man. I shall publish a law ordering the high and the low, the rich man and poor man, shall be equal" (Gernet 2002, I, 135). And then there was the rebellion that overthrew the Mongols and began the Ming dynasty in 1368. The latter were also deposed in massive and brutal peasant revolts after 1627, leading to the success of the Manchus

in 1644. Notable rebellions also occurred two centuries later. That of the Taiping (1850) was the greatest popular revolt recorded in history and matched only in significance by the Boxer rebellion in 1899 (see Gernet 2002, II).

In sum, it was a world whose violence is admitted by the major historians (see for example, Chap. 1 of Huizinga's *The Waning of the Middle Ages*). The evidence is overwhelming that 1,000 years ago the average human being had no real right to life. Before the Norman conquest, even those who pretended to be kings of England were murdered or executed with impunity (see the tree in Fletcher 2003, 76, which shows that five of six of the "issue of Uhtred" were killed between 1016 and 1076). The peasant was alive at the whim of those more powerful. There was no freedom of movement. All land was held by a grant that tied the peasant producer to the land. So, the lords would not permit walking off the land. Moreover, that option was viable only for the bravest of souls, who were ready to take to the forest, to be "outlaws". There was no freedom of conscience or expression and any dissent could lead to the fate met by Giordano Bruno (1548–1600), who had a stake driven through his lips on the way to being burned alive, in order to prevent his speaking to the crowd. Even in 1655 this was the fate of the Waldensian heretics:

> A servant of Jacopo Michalino of Bobbio received divers stabs with a dagger in the soles of his feet and in his ears…Mandolin cut off his privy members, and then applied a burning candle to the wound, frying it with the flame…so that the blood might be stopped, and the torments of that miserable creature prolonged. This being done to their mindes, they tore off his nayls with hot pincers, to try if they could be any means force him to renounce his religion…and then binding his head about with a cord, they strained and twisted the same with a staff until they wrung his head from his body (Morland 1658, 341; see generally Scott 1995, 56ff).

In 1500 CE peasants – the bulk of humanity – had no right to make the national laws under which they lived; there was no debate and no elections, except in the limited sense discussed below. The lords and masters made the law. The ancient Sardinian saying runs: *Chie cumandet, fazet lege*. And finally they had no right to food, health or education. If those boons existed, it was through charity. But, in all these revolts we see that the mass of men wanted equality – at least of opportunity – to get away from the burdensome dues and exactions of the feudal system, and, as we shall see, they sometimes also wanted justice, a rather different notion that did not necessarily come from equality of opportunity.

The Mafia World of the Middle Ages

What was a poor peasant to do to survive in such a world? Here again we have some sure answers. The first was to get a protector sufficiently strong to ensure continued right to the land on which life depended. For that, a *quid pro quo* had to be paid in kind or in cash. The world of the European Middle Ages, the so-called feudal world, was thus a world in which everyone became some more powerful person's "man" in an act of fealty; where above a certain level they paid homage to their lord, promising

to become his man in exchange for certain dues and services. Usually, a peasant was tied to the land that his "lord" granted him. So society was a hierarchy; in a symbolic way it extended the patriarchal family. The lords and the kings were appealed to and referred to as fathers. At first, these recompenses were direct. The lord was a sort of itinerant, who went from place to place where he could exert final control, living off the land. Thus, until fairly late in the period 1000–1500 CE, depending on which country we examine, even the king was no more than such an itinerant, travelling with huge retinues of soldiers and others. On the way, he demanded and renewed pledges of loyalty. He took his cut from the local lords, who in turn recuperated from below, and so on down the line. In the early period, direct military service (*scutage*); direct work on the lord's land (*corvées*); direct payment of part of one's crop (*tithes*) and so on were paid by peasants. One even paid to marry, especially to marry out (*formariage*). They even paid the *ban*, or a sum for the "peace" that the lord guaranteed. Direct services gradually became transformed into monetary payments in the eleventh and twelfth centuries as lords replaced levies of peasants with mercenaries and hired labour (see generally Bloch 1978; Duby 1977, II, 80–4). So, not only was society based on inequality and status, but it was also a system in which favours were done for favours. If the peasant could pay up as required – which was certainly not always the case, particularly when great lords and kings engaged in ruinous wars like those conducted by King John to retain his French possessions late in the twelfth century – and keep his head down, then it was possible to establish some sort of continuous possession of a piece of land.

The peasant majority emulated its oppressors when it could with those weaker than itself, but mostly it remained bent over and staring at the earth that was life because it was folly to oppose those more powerful. Where anyone more powerful could take your land, it was essential to have a protector. In all these societies, the inferior went down on his knees, for to stand up was to die. Humans lived in perpetual fear when alone. If the monster from the forest did not get you, a rogue lord well might. Everyone had to have a protector. This is what rule meant. We can see that there is a double symbolism in the act of homage and fealty that the henchmen and subordinates made to their superiors in all these societies, going down on their knees to swear loyalty to a lord, or kow-towing to the Emperor (for the Middle East see Chardin 1983, I, 161, "It is a universal custom in these northern countries, never to deliver anything to a superior, except kneeling. You do not speak to him except in that posture…It is what they called *adoration* in the Greek imperial court"). In Persia in the seventeenth century , the courtiers called themselves "slaves of the King" "as the mark of perfect devotion" (Chardin 1983, I, 161; II, 43). Power kept men staring down, averting their eyes from those of their terrible lords, the source of power and all "rights". The generalised obsequiousness was about the only way for most to survive and if it was a fragile relation built only on the ability of the most powerful to coerce through terror, it brought benefits that otherwise would not ever have materialised. Since all was a fight for land and manpower which was tied to the soil by reality and by force, even relatively undisturbed use depended on keeping one's head down.

Thus we can best understand social relations in the Middle Ages as a sort of vast protection racket, a mafia system, where once a peasant who was at the bottom of the pyramid paid his dues and shut up, he would be protected. This thesis was restated recently by Bisson (2009, 11, 13, 21, 45ff), repeating that of Patterson 20 years ago (Patterson 1991, ch20). Indeed, provided we observe F. W. Maitland's stricture that looking at modern examples of particular social phenomena tells us *where* to look, not *what* we will find in feudal society, the study of today's Sicilian mafia becomes particularly useful. This is not fanciful. Anton Blok's work on the mafia starts from Bloch's understanding of feudal society: "Where there is no effective State, in particular in the absence of physical protection for people, and because there is no stable monopoly of the means of violence, individuals arise and present themselves who are capable of offering protection – against some recompense – to individuals who need protection…It is a protection based on the use of violence" (Blok 1993, 25; Blok 1974, esp. 179–80). As Blok states, a mafioso is also a "manutengolo", someone who holds your hand. In the Middle Ages the most brutal and often charismatic would emerge as the leading protectors and enjoy widespread support until their exactions became too much. It was a delicate balance. The son of the Robert Guiscard described above, Bohemund, the Norman lord who conquered Antioch in 1098 after his forebears had conquered Sicily and laid waste to southern Italy in search of land, was such a figure. This giant with flashing eyes had a "general air of the horrible" (Comnena 2003, 347). Bohemund became a sort of mercenary for Christ. On his different campaigns to the East he swore fealty to both the pope and the emperor in Constantinople and others, only to betray all by seizing Antioch for himself. He was renowned for his slaughters (see Douglas 2002, 71, 433, 436); Comnena (2003, 322) writes that "at the mere name of Bohemund they lost their wits".

Such men could command extraordinary loyalty from their "men" while they provided booty and land. But if they lost their land or if their middle men who extracted dues from the peasants became too hungry, then the system would go into crisis as there was no longer any benefit from knowing one's place. Mostly, peasants simply taught their children that the way to cope with life was through fatalism and resignation – the "submission" about which Engels wrote. Children were taught total obedience and thrashed into it. Elizabeth Paston, whose father was a local middle man who spent much of his time brawling at the head of his retainers over pieces of land, was thrashed twice a day by her mother (Barber 1981, 44). And we have this telling story of Rétif de la Bretonne's father who, after being whipped about the face and denied the right to marry the woman he wanted, was told: "You weep. But you obey; I am not a tyrant, my son, your future happiness in this world and the next depends on this". Rétif writes: "It is impossible to express (my father often told us) what passed through at this speech of this haughty and proud father, who had become so tender. I was drunk. I would have married the most hideous monster; I would have adored her if my father had ordered it at that moment" (de la Bretonne 1978, 57–8). All this to keep the farm viable. And his father went further by stating the rule in a society based on everyone knowing their place: "Blessed is the son or daughter who obeys their father at the expense of what they want" (de la Bretonne 1978, 57).

The hegemonic idea battered into children and the weak was that the best solution to life was submission and obedience. Revolts were proof that on occasion this was impossible at a collective level, but it was inculcated at a personal level. In a society like that of the mafia, with the crucial difference that belonging to it was not illegal but required for survival, humans constantly swore oaths of fidelity to each other, to their confraternities, to their lords and so on. Since only the lords who had scribes could do so in writing, most of these were in oral form, but the lords drew up their undertakings in semi-contracts, on pieces of paper, called *carta* (in English, charters). Many of these documents survive. Since all new rights in the hierarchical society derived from such undertakings, any innovation was conceded as a grant from above to below. The possessor gave a right away, usually for a time. So all new mediaeval towns with freedoms were established by charters and nearly all land transactions of substance were made by such transactions (Favier 2004, 68).

What these charters do is establish the relative positions or rights of the parties *vis-à-vis* each other. The famous charter of the rights and liberties of Englishmen that Henry I was obliged to grant to his barons at his coronation in 1100 in order to consolidate a shaky hold on power is simply a list of the feudal rights that they asserted *vis-à-vis* the new monarch .While it is overstating the case, in the Middle Ages all "liberties" had that connotation: they were what you were allowed to do with the land and humans the monarch granted to you, against a sum of money. We find these deals throughout the feudal world. Thus Holt lists the Edict of Conrad II (1037 CE); the treaty of Constance (1183 CE); the concessions of Charles VI at Salerno (1203 CE); the ancient Norman Custumal (ca. 1200 CE); that of Alfonso of Leon (1183 CE). In each, the monarch or most important lord promised not to wage war without the approval of his barons; nor to depart from the ancient usages of the past; nor to deny anyone judgment except by his peers, or some combination of such promises (Holt 1992, 75–9). Henry swore to his laws in 1100 CE and his successor Edward did as well.

If we regard these charters as agreements between barons and other leading men and women ending demarcation disputes, and perpetually challenged thereafter, and if we remember that they were all made against promises of payment or some compensation, they are quite understandable as part of the overall inequitable feudal system. It is important to insist on placing them in mediaeval context because of the importance that one of the myriad such documents, the Magna Carta that King John was forced to concede to his barons and churchmen in 1215, has taken in lawyerly and ideological discussions of the origins of human rights. According to this tradition, the overall history of the fight for liberty from the twelfth century onwards in both Britain and its American colonies, had been, as James Madison wrote, a popular fight "sword in hand" to establish justice in the face of state tyranny. Civil wars supposedly took place in 1215, 1642–7, 1688 and 1776 to attain the liberties of Englishmen. Each time the populace revolted, its will was transformed into a legal order by the leaders of the populace. Yet, the account continues, those leaders used a different language, that of law, not justice, and the new law became a betrayal of the objects for which the populace had fought. This forced renewed revolts to obtain yet new and extended rights. This is too ideological an approach to be accepted without making some careful distinctions.

Certainly, in 1215 King John of England ruled as a tyrant of extreme brutality in an already savage world. Historians debate whether he was really a worse tyrant than his lords or other later kings of England, most of whom tortured to death or otherwise murdered with relative impunity weaker people in a society that was emerging slowly from a world of the vendetta (see for example, Maine 1959[1861]; Taswell-Langmead 1886; Poole 1951, chsxiii, xiv; Church 1999). Taswell-Langmead (1886, 105) probably expressed the ruling opinion until 1950: "In disposition and character John was an oriental despot, a tyrant of the worst sort". What gave most offence at the beginning of the thirteenth century was his attempt to levy troops or money from his barons in order to fight a losing war to retain his French possessions. This had provoked a threat of excommunication and deposition by the pope for his treatment of the clergy, which would effectively have made the king an outlaw.

In these circumstances an armed "movement of all the freemen of the realm, led by their natural leaders, the barons" (Taswell-Langmead 1886, 101–2) forced King John to draw up a treaty with them at Runnymede to call off their aggression (Glasson 1881–3, 52; Boutmy in *Nouvelle Revue historique du droit*, 1878). His object was to buy time. It is notable that the majority peasant or servile population of England was not part of this movement of rebellion. The charter was couched in terms of a grant or concessions (its first article ran: "We grant to all free men within our realm, for ourselves and our heirs forever, all the liberties awarded and held below, to them and their heirs from us and our heirs") made by the monarch to his freemen, the minority who were not "tied" to their land, and this is of utmost importance to understanding its relevance to universal human rights. John conducted his negotiations with the victorious rebels through Stephen Langton, the archbishop whom the pope had imposed on him by threatening his deposition. It is probably due to the moderation and alliances of Langton that the "treaty" ended up containing more than the selfish baronial objects of securing traditional privileges. It is, nevertheless, overwhelmingly a list of rights to private property and jurisdictions.

But Magna Carta did create the possibility of two very important innovations for "freemen", although for centuries they existed only in theory. As late as 1765 Blackstone regarded all English "liberties" as encapsulated in these innovations (Blackstone 1979, I, 123ff). The two key articles were 39 and 40. In 39, the monarch pledged that: "No freeman shall be taken or imprisoned, or disseised, or outlawed, or exiled, or in anyways destroyed; nor will we go upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land"; and in 40 the pledge was made: "To none will we sell, to none will we deny or delay, right or justice". These two articles became the basis for the emergence of *habeas corpus* (1679) and for trial by jury over the next three centuries, ultimately ensuring freedom from arbitrary imprisonment and punishment. At first, they were ignored and despite successive restatements of the Charter, were used infrequently and regarded as extending only to barons. Well after Magna Carta even barons could not be sure that they would not be beheaded without trial. One example is this: In 1450 Lord Say (James Fiennes, Lord Say and Sele) made a vain claim of peerage .

> Than upon the morne, being the third daye of July and Frydaye, the sayd capitayne entered again the cytie, and causyd the lorde Saye to be fette from the Tower and ladde unto the

> Guyldhall, where he was arreyned before the mayre and other of the kynges justices… Then the lorde Saye…desired that he myghte be judged by his pyers. Wherof herynge, the capitayne sent a company of his yunto the halle, the whiche perforce toke hym from his officers, and so brought hym into the standarde in Chepe, where, or he was helfe shriven, they strake off his hede (cited in Thompson 1948, 391, see also 73ff).

Commoners could expect similar short justice until well after the eighteenth century. Magna Carta was seen as a charter of concessions to barons and freemen, not as applying to all people. For centuries it was reproduced only in Latin or court French, never intended to be read by or to serve the common man. The law's general inaccessibility was still a cause for resentment four centuries later. Yet, as serfdom started to end, the numbers of "freemen" were gradually extended to the majority of Englishmen, though not, we note, to those people they conquered in Wales, Scotland and later the rest of the British empire.

Magna Carta became a constant point of reference for barons defending their feudal and other privileges in the thirteenth century; this was what it had been drawn up for. But it did not last long as a binding document even between king and barons; within a year, King John had fought back and his successors challenged the barons for a century before settling down to a sharing of power with them. Fifty years after John's death a song was sung whose words ran: "*Dicitur vulgariter "ut rex vult, lex vadit"*, *Veritas vult aliter, nam lex stat, rex cadit"* (cited in Poole 1951, 477). It had a practical quality that began in 1216, when it was first revised, of building support against the rebellion fomented by King Louis of France (Powicke 1953, 4–8). So, throughout that century it was posted on episcopal orders in the churches, where the average man and woman could see it and marvel at it, since it could not be read or understood by him or her. As the choice of languages suggests, it was a treaty or contract between king and barons and in the first French version (1216) it specifically limited itself to "francs" (see Holt 1985, 239–57). Nevertheless, what one's lord obtained in a society considered as a family was akin to a grant to one's father, and thus a gain by all his dependants as a community. Too fine a distinction should not be drawn between the perceived interests of the lords and the peasants. When the lord regained rights to the forest that the king had been usurping, the benefits could flow down the line. Only cruel reality would disabuse peasants of such hopes – as it did by 1381, by which time feudal society was collapsing in England (Poole 1951, ch6; Powicke 1953, 4–8; Oman 1906).

The notion that Magna Carta was a point of reference before the sixteenth century for popular rights or justice has little meaning if we take the view "from below" of the Anglo-French peasant. What is important about it is a quality that was implicit in many of these documents, not only the British *carta*, but also other European charters. In recognising the ancient rights of the barons, they conceded that there was an obligation on the monarch and the state to the people, understood as a community that was heir to particular past traditions. As the expression of the laws that lay ultimately in a folk, the monarch quite unconsciously opened the way to the development of democracy, and thus, to an immanent reference point for ethics (Sabine, 1938, ch. xi "The Folk and its Law"). To some degree, papal hostility to such a deal – on paper – can be explained by a sense that morality and

ethics were thus being shifted away from the Church. We return to all this in later chapters when we examine how the Magna Carta was excavated by individuals and groups at the beginning of the shift towards an immanent ethics. Here, we note that for 300 years the charter meant little for the common people despite at least 35 restatements as the barons reasserted their privileges against the king over the centuries (Thompson 1948, 68–100). From 1300 to 1629, when Magna Carta was cited by lawyers, it was almost exclusively in cases concerning private matters, about the rights or privileges to real and personal property. Moreover, where it was cited in favour of public rights or of natural law and reason, it was in texts like St Germain's *Doctor and Student* (1531), which were decried by the common law as what was not good law, just as the former began to take on its distinctive character (see *Calvins Case* 7 Co. Rep. 2a 77 ER 379 at 399–400; Thompson 1948, 83ff, 175–7 and passim).

In sum, it is only as a basis for law as "the Courts and the writs" which emerged after the seventeenth century, that we can trace back to these two articles a developing procedural justice (Brooks 1998, 59). We have thus reached a point where we can suggest what collective mentalities and attitudes were held in societies like those of the European Middle Ages: a world of subsistence agriculture with a strict social hierarchy and no expectation of social mobility for any but those who chose the route of Robin Hood.

Human and Beast: Worlds of Similitude

We need little more than common sense to realise that with material lives like theirs, the peasants had little time for reflection or reconsideration; for dreams of justice. But there were moments of relative idleness between harvests and above all, as Braudel reminds us, during long winters when the family was kept inside (Braudel 2000: I, 216ff; Robb 2007, 74–9). Even the wars had to stop – snow and tempest saw to that. Then began what have descended to us as the "*veillées*" when, led by the patriarch, the family gathered around the fire and told tales. When only clerics could read or write, oral traditions, rhymes, songs and collective memory of events prevailed. In Europe, as some learnt to read and write – definitely by the fifteenth century – and records of what they read to the others have been discovered, we have the following word picture from the sixteenth century of the spurs to reflection:

> On the dresser with its two shelves, the translation of the Bible ordered by Charles V two hundred years before, the Quatre fils Aymon, *Ogier le Danois*, *Melusine*, le *Calendrier des Bergers*, la *Legende dorée* or le *Romant de la Rose*.
>
> He began a fine story, about the times when beasts could speak (two hours ago), about how Renard robbed the fishmonger of his fish…of the Crow who by singing lost his cheese, about Melusine, the were-wolf, Annette's leather, about fairies, who often spoke to each other with familiarity, how in the evening when travelling the sunken road he had seen them dancing close to the Cormier fountain" (cited in Giovanni Dotoli 1991, 19; compare de la Bretonne 1978, 217ff; Funck-Brentano 1970: 264–5; also see Dotoli 1991, 36 for the reading of a peasant, a miller, a baker and others).

Certain values were being imparted as all these works contained a moral tale. Charles Perrault's fairy tales of 1697, nearly all repeating earlier fables going back to Aesop, ended with an explicit moral message. But which ones? What, roughly, did they believe? We have no explicit records of what most humans thought before 1500 of their place in the world, as almost no-one could read or write. Even the middle class, like the Pastons (1460-) used scribes and Prion still wrote for his master in 1744. In 1740 only 40% could sign their names even in Britain, the European society furthest from the conditions of the Middle Ages. Almost no man of the people left a written record of what was thought of their place in life; about life and eternity; about individuals and the community or about their rights. The tiny literate class of clerics – even nobles often could not write in the early Middle Ages – have left us accounts of what they thought peasants thought, but these are the words of their enemies, or people who had to be reminded that "I have a heart too", as the Sicilian replied to the officer who asked him why he was marching with Garibaldi's Thousand in 1860 (Pattarin 1959, 412; Clanchy 1981, 21 and passim). On occasion, brilliant use of surviving trial records, sometimes of a single document, makes sense of what a single individual or village thought about the matters that concern us in a history of human rights: human beings and their views of justice and their rights (for example, Ladurie 2005; Ginzburg 1980). But the authors are careful to warn against drawing too many generalisations from the views of single individuals. So we are even worse off for facts where collective mentalities are concerned than with the material, economic and social history provided by the first and second generation of Annales historians, and are too often forced to reconstruct mediaeval collective mentalities on the basis of generalisations about their material lives.

To compensate for the lack of information about what the average person believed, a third generation of Annales historians suggested that a careful study of what folklore and books were recited or read by the people could lead to some understanding. As expressed by Roger Chartier, the approach was an application of the serial method to books and reading. Summarily, these historians suggested that the ideas in those books would have trickled down to become the average person's attitude (Chartier 1987); or alternatively that there was a popular language voiced by spokes-people (Bollème 1986, esp. Part III). To have value for the Middle Ages, this requires accepting that the conditions that prevailed in post-sixteenth century Europe, when more and more simple people could read to the mass of illiterates, had not really changed since before the fourteenth century. The real problem here is that it is assumed that what was read was absorbed as a belief system and became a guide to action. Yet, since almost no mediaeval peasants could read, this approach cannot work completely for before 1500 CE. The best we can do to discover how they viewed themselves, their rights and others, is to identify the folk tales, songs and sayings in the vernacular that we know were sung or recounted by travelling folk-tellers and supplement them with visual relics that required no literacy. It is reasonable to assume that those that were popular expressed some popular attitudes and hopes, especially if they spoke of the material worlds a peasant knew.

A more valuable approach, and the one that we will follow, despite its own problems and limits – which we will indicate – is that adopted by Carlo Ginzburg and endorsed

by Giovanni Dotoli. It is also the approach – without the theoretical refinements – of Robert Darnton (1998) in his explicit corrective to Chartier, Bollème and others (see Bollème 1969, 1986; le Goff 1965; Darnton 1995, ch6. The refinements within this debate need not concern us). Broadly, Ginzburg, Dotoli and Darnton adopted the approach of Antonio Gramsci to the relation between common and good sense. Gramsci had argued that at all times power is maintained through a dominant hegemony that seeks to impose an "official" view of the world like that found in, say, the Bible and Church glosses on its teachings, through intellectuals whose task it is to make sense of how the world works. But that teaching is only adopted after it is altered and "translated" by a popular idiom or common sense – today we might call this street wisdom – by the people whose world view also comes from the world of that common sense. This they learn from life, through folklore, primitive religion and the inherited views of their forebears. A popular view of the world is, thus, a bizarre combination that affects and changes the "official" view as much as vice versa, both making sense of each other and functioning through "passive revolution" to reproduce the social system. Gramsci wrote:

> When a conception of the world is not critical and coherent but occasional and disaggregated, a person belongs simultaneously to a multiplicity of mass men, and his personality is made up in a bizarre fashion. In it are found elements of the cave man and the principles of the most up-to-date and advanced science; prejudices coming from all crudely localistic past stages of history and intimations of a philosophy-to-come that will be that of all human beings globally united (Gramsci 1975, *QC* II (Q 11, xviii), 1376).

Ginzburg illustrates how these insights (the one direct reference to Gramsci is at Ginzburg 1980: 129–30; see also Dotoli 1991, 12, 32, 79) can be used in his story of Menocchio, a sixteenth-century miller whose mental universe he reconstructs from ecclesiastical records of his trials for heresy. He shows the "good sense" in Menocchio's "common sense" about getting by in a world whose harsh reality cannot be denied. Menocchio could read. He had a Bible, and perhaps a Koran, but most of his references were to a mediaeval Catalan work, *Fioretto della Bibbia*, a strange mixture of myth and information. These and other works probably influenced his view of the received wisdom of Christianity. What is important is how he translated them in terms of his own common sense. The garrulous miller expatiated views to his fellows (witnesses) that while not Anabaptist remind us of a Protestantism (see Chap. 2) whose Lutheran form he regarded benevolently. This got him into trouble in 1583 and eventually he landed before the ecclesiastical courts, in 1598.There he talked a lot. What he said shows how he refashioned the ideas in books and "heresies" in terms of the oral culture into which he had been born. To explain his views to his inquisitors, he drew on the world he knew and its words (he was a strong critic of the use of Latin by the Church). Thus, to explain the "chaos" whence he said the world was born, he used the image of the worms that appear as a cheese matures. In talking of the Creation, he described the elements making it up as "an egg where you see the yolk which has albumen around it and the shell outside it…the yolk corresponds to the earth, the albumen to the air, the thin tissue that is between the albumen and the shell to the water, the shell to the fire; and they are joined together in this way, so that cold and heat, dry and moist may work on each other"

(Ginzburg 1980: 69). Here we see how ideas from above, of "intellectuals", were translated and adapted in homely terms by the miller. We can reasonably hypothesise that the same would have happened in our average peasant. He or she would adopt proffered ideas, refashioning them, accepting some and rejecting others, in terms of the nasty, brutish and short lives that were their lot.

A peasant knew the harsh world of nature and that it was peopled by predators. Men and women were not far removed from beasts like the wolves, bears and tigers that terrified humans even in the seventeenth century (Prion 1985, 95). They also knew that monsters like two-headed calves existed. So a world in which beasts and men were interchangeable, or one was seen as having the characteristics of the other, was easily accepted. The beast was in mankind and mankind in the beast. Among the best known and most popular fairy and folk tales sung by itinerant *jongleurs*, was the *Roman de Renart* (1174–7), (*renart* here is the mediaeval spelling of *renard*), which recounts the adventures of a fox who transforms into the lord almost at will. Peasants of the Middle Ages would have had no difficulty seeing their lords as beasts – all men were that, even priests like Pierre Clergues, who could not help committing adultery (Ladurie 2005, ch9 passim). In the *Roman de Renart*, the group's internal relations are characterised by "ribald sexuality", lust, adultery and rape. No-one trusts even his wife and Renart (as the Lord) mistreats his peasants, typified as a "stinking people". The latter are described with cruel realism. There is Baudoin Portecivière "qui fout sa fame par derrières"; Trousseannesse, who stinks (*Le Roman de Renart*, 1970: 19–20, I, verses 657–68). Monks, whether "white" (Benedictine) or "black" (Cistercian) are all thieves, lazy and avaricious. Practically everyone bears false witness, and women cannot be trusted, though they are often caught in the toils of their own invention. The confessional is presented as a place of lies where when Renart confesses it is a cheap exculpation for sins that he has no intention of not repeating (*Le Roman de Renart,* 1970: 38–9, verses 1175ff). Not even the threat of excommunication seemed to hold any fear.

Renart has a devil-may-care approach and a readiness to run away into the forest and challenge the world of rules. Le Goff has noted that the man of the forest was a fantasy (my word, not his) figure much present in peasant imaginary. The forest and the desert are places of refuge where one can hide from sanctions. In Chrétien de Troyes' *Yvain ou le chevalier au lion* and in *Tristan and Isolde*, both popular stories, the knights regress to "nature" and to the beast. Yvain becomes "an archer, savage and naked, who eats raw meat", but he comes slowly back to the world because he is not really a savage. Such beings could be heroes. Moreover, he meets a real forest man, a real savage "with hideous mien, covered with hair, wearing animal skins, who commands wild bulls". So, Le Goff argues (1985, 70–2), the forest is the sort of case limit for human animality, where men can be mistaken for beasts but in the end are not quite. The forest itself is half-known as it is there that peasants take their pigs to eat acorns (also see Braudel 1986, 127–30). It has been observed that real animals – those the peasants knew – were usually portrayed as selfish and evil. It was "fabulous" animals that were good, that is, those that did not exist in reality (the *Roman de Renart* can be usefully compared with Kanika's story in the Mahabharata, chanted throughout India and southeast Asia for centuries before 1000 CE (see Radice 2001, 249–59)).

So, at some very basic level, we see that men and women saw humans as different from animals even if they believed that they tended to slip back. On the other hand, people were hypocrites and frequently monstrous. Men-monsters are presented as really existing "over there", as the tympan at Vézèlay's basilica shows. Thus, Marco Polo (1979, 256) reported as a truth that he had seen men with tails a foot long in China. He also peopled his account of his travels with many beasts like unicorns (probably rhinos), though in this case, because he suggested that China was a much greater empire than any in Europe, his stories were dismissed. The East was truly Other (Le Goff 1985, 37). We should also remember that when men and women met unknown creatures and worlds they could only describe them metaphorically or in words from their own worlds. On first meeting a crocodile or *lagarto*, for Elizabethans it became a serpent with a pig's face (Hortop 1970: 82). The Middle Ages are full of images of human beings fighting and destroying monsters, starting with the favoured image of St George and the dragon and, even earlier, that of Beowulf and Grendel. Mediaeval churches are covered with monstrous gargoyles doing lascivious things. Parallels can be found in the Indian images and sagas. There we find that just as animals became human, so gods became human. We recall in parentheses that Richard the Lion Heart boasted that he was the son of the devil because Plantagenet legend claimed descent from Melusine. In India there were 6,333 deities known as gandharvas, half-God, half-human, sometimes horses. In Italy in the 1930s, southern peasants also believed in half human-half beasts (Levi 1965, 136)They periodically came down to pass among us as human. But they were not. One had to be on one's guard.

A black, violent and horrible world made stories of the black, violent and horrible much more likely to find adherents than any positive view of a human. The peasants' life was an endless struggle against an evil that was (their) nature. And it was much easier to imagine God the father as a punisher and to imagine hell than a wonderful heaven. Le Goff informs us that the main mediaeval figure is Satan. "Satan is the orchestra conductor of feudal society" (Le Goff 1985, xviii). His hell is depicted in all its horrors in the great vernacular epic, Dante's *Inferno*, with its frequent references to the other *chansons* and fables recited throughout the mediaeval world. And that place was always imminent just as death was. The four horses of the Apocalypse were seen every day in famine, pestilence, war and death. Moreover, the Bible itself was understood to promise the Apocalypse 1,000 after the death of Christ. One of the characteristic warnings would be the arrival of Satan himself in human form, the anti-Christ threatening Christendom. Every time the villagers of Autun passed under the portico of their cathedral the carvings reminded them of the horrors awaiting sinners when the Apocalypse took place. The tortures of this life would be unending. This fear became a mighty spur to join in a crusade.

As this suggests, the church and the clergy fostered bleak and fearful views of life. They did so in their preaching, through the confessional, an explicit control mechanism where men could be manipulated after revealing how beastly and sinful they were, and even in their architecture.(Delumeau 1990) It was a world in which one had to make amends all the time. If men were on a scale that led from such natures towards heaven, they could only get there by submission and by buying

themselves salvation. Given the need for hierarchy and obedience in the family, it is not improbable that they accepted that to be human was to tame the passions and to become submissive. The austere monastic life rested on the notion that the seven deadly sins had to be rejected and mastered. A good man was a person who refused this life and withdrew from it, not one who engaged in it.

Filial piety was thus not only the cornerstone of Confucianism in China and runs through the Indian sagas as the highest virtue, but it was central to mediaeval imagery in Europe. The first lines of the *Analects* (1987, 59, Bk I, 2) run "It is rare for a man whose character is such that he is good as a son and obedient as a young man to have the inclination to transgress against his superiors…being good as a son and obedient as a young man is, perhaps, the root of a man's character". And similarly, the story of King Yayati's adultery in the Mahabharata contains the lines: "The best son is one who obeys his father and his mother" (Mahabharata in Radice 2001, 197–212, esp. 212). These great "Bibles" of Asia date back to six centuries or more before Christ and continue to this day to be espoused as guides about ethics. They too confuse man and beast, and the Indian tales are full of slaughters and horrors: what we might call the real world that called for a submissive ethic. But they also express what we have seen was the practice within families in Christendom. To be a good human was to obey one's superiors and above all the community. Thus in mediaeval Bestiaries (books of beasts, real and mythical, which abound), one good "beast" is the bee. The view spread in fourteenth century fables was that "the bee is a hard worker, a team player, and will lay down his life for the King. Furthermore, it maintains a chaste and communal existence" (Hassig 1995, ch5, esp. 55).

Overall, we have reason to think that life was seen as incomprehensible. Its horrors should have made the notion of winning a better place in the next world attractive. It was nigh impossible to work out what was the right thing to do. The greatest popular epics in the vernacular in Europe, Chaucer's *Canterbury Tales*, Boccaccio's *Decameron* and Rabelais' *Gargantua and Pantagruel* all started from everyday realities like fleeing the plague or famine or making a pilgrimage and made a mockery of the clergy, whose corruption and duplicity, was a central theme in all of them (also see William Langland, *Piers Plowman* [1398]; Francois Villon, (1431?-??) *Complete Works*). But they also, in their description of world that was beastly, ribald and in which the peasants or, more often, fate, turned the tale on the exploiters (as in the Pardoner's Tale of Chaucer), and ended up promoting a philosophy of life that suggested that all one could do was laugh at its contradictions (Chaucer 1965, 71–2; 75; see also Villon, Testament in *Poésies*, 1984, 120). Any reasoned solution was caught by unforeseen complexities. Above all, those who preached were mocked. In *Piers Plowman*, a late text, each time Piers preaches the virtues and unity of the Church or mankind as "blood brothers", the average man mocks his views and tells him that it would be crazy to live that way (see Langland 1999, 207, 214, 221, 223; Heer 1998, 32–3).

So we begin to have a picture of collective mentalities in the Middle Ages. A human being tended towards beastliness and if he could get away with it like Renart that was a giggle, but the real way to salvation in this life was not through rebellion but submission. Acceptance and austerity were what made a person human.

If someone preached certain things – the "oughts" of this world – as religious institutions did, then you might not believe them all but you submitted or paid lip service. The part you accepted was that which conformed to your negative view that men were really beasts who would be punished for their sins in another world. You did not believe that you would be pardoned if you paid for the indulgence.

What then did they think rights were within the limited worlds of people that they regarded as humans, like themselves? Again we start from the practical reality: what happened in the places or courts that they got their "rights". Could they have learnt that higher standards of justice or fairness were possible? Overall, the answer is no. The average peasant could not have learned a positive sense of justice from the court system or the law. Rather the opposite, as *iustitia* came to mean what went on in those courts.

Asking Questions: The Courts and Torture

Worlds as violent and merciless as these, where survival on all levels depended on assertiveness and brutality towards the weaker, and submissiveness and mildness to the stronger, resulting in protection systems throughout society, meant a very limited notion of justice, or rights, or law. The last, as a dressed-up system of a direct power to oppress – as a legitimation – certainly existed by 1000 CE. It had grown out of a general system of vendetta in earlier centuries illustrated in the Norse Sagas, where everyone was expected to wreak revenge for a certain list of offences committed by a peer, an equal. Such offences, for example, rape, might be considered rights of those higher up, like the *ius primae noctis*, and call for nothing but acceptance when committed against subordinates. Theorists of law regard these vendetta systems as having all the characteristics of law, particularly that an offence is a debt to the victim (see Kelsen 1961, 17, 196, 327, 334ff). Gradually, following the evolution of social relations, vendetta allowed monetary compensation for lesser offences. This was eventually extended to cover even killing, as in the *murdrum* of Norman England. Since the main concerns of a peasant community were land, women and manpower, this evolution to less violence was accompanied by the development of real property law, which in its common or customary law form reflected the social reality that all a person really had was possession, not property, of the land (see generally Bloch 1978, I, 109–16, 120–4).

All peasants learnt to adapt to, submit and to circumvent arbitrary rule and an insouciant nature. Our metaphor of people whose gaze was downwards on the soil did not mean that certain wisdoms were not being learnt there. Without doubt the main one was that of adaptation: when harvest time came everyone turned out, children were brought home from school to bring in the wheat before the rain. Nature taught that weeds had to be eliminated and berries and acorns searched for at certain times; that the "forest" was always a threat because of its tendency to encroach on the cleared land, especially when there had been a great loss of life. Humans had to unite in certain ways to defeat chaos. Within the family the repulsion of

chaos was expressed as patriarchal power demanding total submission. For thousands of years young Chinese learned a version of the Confucian exhortation to that effect (see Chap. 3 below), replicated in all these cultures in one way or another.

Given the isolation of villages and hamlets, this natural pattern was replicated in thousands of little disputes about rights, which were almost exclusively about land and manpower. Provided the peasants paid whatever those more powerful extorted from them (they frequently could not), they were left to manage their affairs as they thought best. Where the parties were roughly equal and rough rules of revenge for certain offences like cutting down an olive tree or taking a woman in an unaccustomed manner, as in the celebrated Orgosolo Code of Sardinia in the eighteenth century, had been observed, the elders of the village would appeal to local memories and customs to reach some peaceable solution between parties. Since they were all illiterate, the whole process was oral and would change frequently depending on the real power relations. This became a sort of customary law, a folkloric law. It still exists today in the *droit de coutume* of French Polynesia. It too could appear as naked power, since it began with bloody brawls and vendetta, and failure to observe the brokered solution would lead to draconian sanctions being imposed by village headmen. Thousands of such customary systems existed and practically none extended beyond the village well. They were allowed to exist by those with more power and therefore with control of more land than each peasant community. These were the "lords" of mediaeval literatures who ruled and made the law according to the ancient Sardinian folk wisdom: *Chie cumandet fazet lege*. The starting point for their power was simply that they were more terrible than the usual.

Yet, depending on the place and date, the lords gradually allowed the villages to police (e.g. through the frankpledge; see Potter 1943, 83) and administer their own justice provided they paid their dues. To parallel the system of Western Europe, typically the shire moot of England, there was the *obscina/mir* system of Russia; the *panchayat* of India and the equivalent *li chia* in China (see Gernet 2002, II, 411). Broadly speaking, these village authorities administered a common or customary law in what today are civil matters and misdemeanours, though it appears that in Asia as well as Europe, the lords made villagers pay fines for brawls.

Because almost all peasants were illiterate and villages were small, disputes were solved by appeal to oral memory – often expressed by individuals who had status because of age or seniority – and then put to a body that resembled a popular jury or *turbes*, its continuing form in France. The procedure was fluid and much like that of the palaver of customary law systems in the Pacific today, where everyone has their say about anything considered relevant. The whole system worked only among peasants who would abide by the communal memory, at least temporarily. If a lord took back common land, as became increasingly the case in Europe after the twelfth century, there was nothing to do. Even a prior grant of common land in the form of a charter could not be read by illiterates, if it could be found at all.

There were as many customary laws as there were villages. It is estimated that in France in 1200 CE there were 700 officially recognised *droits de coûtume* and they changed from day to day until in 1453 they were written down (Weill and Terré 1979, 89–90). A commentator writes that they were "an infinite mosaic…fluid and

summary and lacking in cohesion" (Garrisson 1984, ch3, 42–3). In the absence of case-law, no consistency could be attained and decisions were often challenged if they did not go the way a party wanted. On the other hand, while they were varied and flexible and changed according to relations of power, they had an abiding quality. Since they emerged from systems where one made one's own justice, and the ultimate sanctions were those of the vendetta whose violence they sought to compose, they all wanted compromise. Even a killing could be compensated for with money or women. Though sometimes there was a ritual wounding or an execution, most commonly the sanctions were those of shaming and banishment, the celebrated *honni et banni* of our mediaeval legends and escutcheons, which separated a person from family and land in what could be a death sentence, since no-one could simply move elsewhere onto someone else's land. That usually meant death. Vagabonds and wanderers were regarded and treated as dangerous criminals, a notion that passed early into state legislation. No-one should move without the authority of the lord and or the law. Village life was permeated through with the values that still existed when Edward Banfield wrote about amoral familism among southern Italians in 1958 (Banfield 1958).

One could appeal to the baronial court from a village decision, but that was expensive and required lawyers, too often bought by the richer party and already detested. Among the first victims of the rebels in Wat Tyler's and other revolts were lawyers and the law. ("They went into the Temple Church and took all the books and rolls and remembrances…which belonged to lawyers, and they carried them into the highway and burnt them" (see the "Anonimalle Chronicle of St Mary's, York " in Oman 1906, 193–4)). Moreover, the procedures were in Latin and, in any case, incomprehensible to litigants who were illiterate in any language.

We should avoid the temptation to see in self-administered village "justice" any significant virtue. While the customary system seems democratic, like all systems that refer to "time-immemorial" rights, it replicated the inequities already built into the system (see Bloch 1978, I, 113).

When a peasant matter was offensive to lordly superiors, summary retribution was normal, but as time went on this was sometimes dressed up as a decision of the "seignorial" or "baronial" court (qv Bloch 1978, II, 369). These were jurisdictions farmed for a fee by the greatest lord, by 1000 CE usually the "king". So on top of, or beside, the customary system, there was the baronial system of courts concerned with disputes among the higher sort of people and serious criminal matters, especially any that threatened paternal authority, as well as being a place of appeal from the village. The king's courts was a variant of that system until the twelfth century. There were many such systems, for example, 60 around major centres in France, and therefore as many "justices" as courts. They were seen as sources of revenue by both the barons and the king. As Duby points out, until the thirteenth century in Britain, their object was to make money by selling justice (Duby 1977, II, 87–8). Indeed, they were mainly legislative bodies for the whims of the monarch and his retinues. Their punishments for crimes against paternal authority, in particular those deemed seditious, were frightful. So the emergence of courts superior to those of the villages – in the earliest case, that of Britain – did not entail a notion of rights based on justice.

Indeed, their procedures could not create any feeling of justice. The system of "ordeal" of the early Middle Ages had become converted into the widespread use of torture, quaintly known in Latin as the "question", to extract the "truth". In some extreme cases it was applied to all concerned, even witnesses (Maitland 1941, 131, 221; see Peters 1999, ch2). Indeed, the continual use of torture (the British are a little coy in denying its use by the state although it had little formal place in a jury system – the lash was generally used, as were thumbscrews, racks and other devices – and witches were still drowned and burned in the seventeenth century) meant that justice was not expected from such courts. This ubiquitous violence extended to ecclesiastical courts, which still had great power throughout Christendom in 1500. Pope Innocent IV had authorised torture in a Bull (see Peters 1999, Appendix 6) in 1252, recognising a general practice based on supposed authority on the Old Testament. The church, particularly some orders, believed not only in the need to torture to extract confessions, but also in the horrible practice of burning all those considered to be heretics. Campanella (1568–1639) remembered that "My veins and arteries were broken, and a vice broke my bones, the earth drank up 10 Ibs of my blood, having recovered after 6 months, I was then buried in a ditch where there was neither light nor air but blackness, stench and humidity and cold that lasted forever" (see de Sanctis 1958, II, 777). Menocchio, the miller, was tortured (with the *strappado*) by his inquisitors at roughly the same time. Machiavelli underwent the *strappado* 17 times. Matters were perhaps worse in India and China. Matteo Ricci, one of the first missionaries to visit China, Japan and southeast Asia in the sixteenth century, noted with horror (1615), that the courts were used simply to extort money and impose the magistrates' tyranny. They were feared by everyone, extracting money and goods from all by use of torture that often resulted in death. The poor were so afraid of that treatment that they gave their all. The worst that had happened to a magistrate responsible for the death of 20 or 30 such unfortunates was that he was removed from office (Ricci 1911, 1,78–9).

At this point it is important to hammer home that such suffering is a necessary but not sufficient motive for a drive to more human rights. Let me in parenthesis refer readers to the account of the burning of Dr Hooper in Gloucester in 1555 and the reaction of the crowd: "…even when his face was completely black with the flames and his tongue swelled so that he could not speak, yet his lips went till they shrunk to the gums, and he knocked his breast with his hands until one of his arms fell off, and then continued knocking with the other while the fat water and blood dripped from his finger ends…soon after, the whole lower part of his body being consumed, he fell over the iron that bound him, into the fire, amidst the horrid yells and acclamations of the bloody crew that surrounded him. This holy martyr was more than *three quarters of an hour consuming*…his nether parts were consumed, and his bowels fell out some time before he expired" (Henry Moore, 1809 in Ridley-Scott 1995, 159–60). Living, seeing and fearing such horrors did not necessarily make the average person a seeker of rights for all.

The final place of appeal once the lord's "justice" proved too unjust was the court of the king. After 1000 CE, the baronial jurisdictions began to be replaced by royal and then national courts in some Western countries. In Britain, they assumed a dominant position in a structure of courts, above all as a place of appeal against baronial

injustice. Rights in Britain slowly became what the royal courts decided. The king would hold talks (*parlements*) with his lords and legislate or make laws. These then became the nation-wide norm. It took time for the king's courts to move away from the inequitable practices of all baronial courts in the feudal system. Even late in the Wars of the Roses it was clear that for lawyers huddled around these courts, decisions were seen as an extension of the war for land (see Barber 1981, 41–3; 69–70;73). The humble observed the way that they functioned was as places where those who exploited them had their right to exploitation, *their* rights, confirmed.

What concerned these courts were mainly disputes about land and manpower but at a higher level than that which concerned the average peasant. In England's first system of writs that emerged to summon a case to the royal jurisdiction nearly all referred to matters concerning land: possession, use, trespass, exclusion (Potter 1943, 94ff; Glanville 1963, passim). Peasant disputes practically never made it to the royal courts unless "removed" there by writ, even though these courts often made their way around the country to local centres to hear appeals.

In sum, while the system continued, the attitude of the peasant towards rights was that they did not exist for him. The higher courts' decisions were used as rubber stamps for land grabs and politically motivated. In no way were they seen as places for justice. Herzen's famous description (1851) of the servile peasant before the law courts of the Tsar sums this verity up:

> In order to appreciate the real position of the Russian peasant, you need to see him before one of these courts of law: you have only to see for yourself the sad, frightened eyes, the sullen set of the jaw, the anxious searching look he turns on all around him, to realise that his position is no better than that of a captured rebel brought before a court martial, or that of a traveller facing a gang of brigands. From the first glance, it is quite clear that the victim has no trust in these cruel, hostile, implacable creatures who interrogate him and torture him and finally mulct him dry. He knows that if he has any money, then he will be acquitted, and if he hasn't, he will be condemned without mercy…When he speaks, he uses a somewhat antiquated Russian: whereas the judge and his clerks use the modern bureaucratic language… as to be barely intelligible…He leaves the court in the same wretched state whether he has been condemned or whether he has been acquitted. The difference between the two verdicts seems to him a matter of mere chance or luck…The Russian peasant has no real knowledge of any form of life but that of the village commune; he understands about rights and duties only when these are tied to the commune and its members. Outside the commune, there are no obligations for him – there is simply violence (Herzen 1963, 182-3).

Little could be learnt about rights in the sense needed for human rights through legal procedures. Courts were places that used and accepted torture; where "justice" was bought; whose procedures were conducted in another language and incomprehensible to the peasant. The parties were in no way equal and there was no conception of human dignity. Because of their history and continuing function, all rights were considered to be contractual among all participants. To obtain rights, one fulfilled duties to another, which, where blood money could be paid, meant no real distinction between fines and bribery.

If human beings were really bestial and had no dignity and if rights, in the sense of being given one's due, did not exist, then even more absent from the average mental universe in 1000–1500 CE was a sense that all humans should be regarded as deserving of equal and humane treatment.

A Myopic World: Humanity Stops at the Stile

Wherever we look in this world, humans almost never left their valleys. Even those of the next village were foreigners, rivals and enemies. The world was thousands, perhaps millions, of tiny worlds that stopped at the village stile. So rare were those who ventured further that they were legendary and a trifle frightening, against the order of things. In other words, it was a world of invincible ignorance. The thousands of Australian Aboriginal languages spoken by neighbouring clans were as different as English and Chinese. It is helpful to think of the Middle Ages along those lines, though not as extremely in Europe as in Asia. There were 200 languages in India, perhaps more in China. Nevertheless, in the Middle Ages dialectal differences were so strong in Europe that incomprehension started with the next region. Even neighbouring villages "spoke funny" and Prion found it worthwhile noting such differences as he travelled around France (Prion 1985, 61; compare de la Bretonne 1978, 50–1 fn a).

This amounts to saying that their worlds had very restricted horizons, going little beyond the next village. The common admonition found in folk sayings and other sources to welcome and be hospitable to strangers (see Hersch 1968) in practice did not mean what to do to the people in the next village. Its guide to action towards complete strangers is found in many communities today that are otherwise brutal and based on the vendetta. Probably, it mostly applied to pilgrims, who, in their hundreds tramped across countries to holy places, whether it was Jerusalem or Mecca, or just Canterbury. Such people were not radically different from your *familia*: they shared the same faith; a sort of *lingua franca*, at least at the beginning of the period, and were of similar phlegm. Folk sayings usually counselled a short term welcome as there was little to spare, to feed extra mouths. Being so ignorant, for the peasant any novelty was something at which one marvelled. Mediaeval records are full of the marvellous, Marco Polo's account of China being called the Book of Marvels. But in a society where identity was decided by a status within a rigidly hierarchical and immobile community, the community overrode any fascination with what was strange. We have seen how when revolts took place, peasants slaughtered all "strangers", meaning in the case of the Sicilian Vespers anyone who could not pronounce chickpea with the local accent. And it still begged the question of who fell outside such recognisable beings? Were some human beings radically Other, bordering on the monstrous? Certainly, no human was automatically an equal. Women and children were not. While women appear to have enjoyed high status in literature in India and in, say, the image of the Virgin, in Christendom in practice they were definitely not considered the equals of men and were on occasion depicted as headless, that is, having no brains (Dotoli 1991, 96 plate 14). Solitary or unprotected women were prey and a constant source of revenge killings. Women were regarded as close to the Beast and on occasions a frenzied killing of "witches" took place, particularly in Protestant states in 1550–1650. It has been estimated that in that century 40,000 killings took place, mostly by burning, often to assuage popular alarm about crop failure or plague. Despite their supposedly superior status in Hindu

culture, the obligatory self immolation of "widows" in suttee is traced back to BCE. Their inferiority was stated as a principle in the Koran and the Torah. As an aside, we note that such horrors are still common in Africa, again suggesting that we can understand society of the Middle Ages as something like the Africa of "failed states" in the twenty-first century.

There appeared to be little or no recognition that people of other faiths were fellow human beings. Rather, anyone not of your faith was probably the anti-Christ and a monster. This attitude was reciprocated by peoples of other faiths. Radically different people by race, sex and above all religion, had no right to exist. Peasants defined themselves as Christians, or Muslims or Hindus or Jews. Thus the word for peasant in Russia was *kristiany* and the formula at baptism throughout southern Italy was a version of "make this Moor a Christian". Muslims divided the world into the *umma*, those of the faith, and the rest. Those of other religions not only had no equal status but were regarded as not really individuals who shared a common and equal humanity. Jews had lived for centuries in ghettos in different parts of Europe. Though tiny minorities, they were ostracised and persecuted and are portrayed as hyenas in the Christian bestiaries. *A priori* they should be treated as enemies and were probably beasts, bestial in their alleged child sacrifice and cannibalism. These attitudes prevailed despite the fact that there was often no direct contact with the religious Other and no knowledge of their cultures or beliefs. Attempts were seldom made to communicate or debate with other religions. Jews learnt this in episodes like that when, on being invited to debate their faith in the Cluny monastery, their leader said he did not believe that a virgin was the mother of God and was promptly run through by a knight. When the abbot remonstrated, the knights told him he was crazy to have called the debate. The "saintly" King Louis agreed with them .Only clerics should argue such matters and knights should run those who insulted Christianity through the stomach (de Joinville in *Historiens*, 1952, 212; see also de Joinville, 1908, 148). On occasion, a Jew might be "converted" to Christianity (see, e.g. "Of the Jew who took as surety the Image of our Lady" in Mason 1942, 133–45) and St Bernard gave instructions to convert, not slaughter, Jews when preaching to Crusaders (see Douglas 2002, 464). But, in fact, this reduced itself to a choice between converting to Christianity or death. Jews were constantly massacred en masse in all European countries, blamed for plagues, famines and practically any mishap; typical was the infamous slaughter of Jews in Germany in 1349. The slaughter of Jews by the first Crusaders became legend.

But the massacre of Muslims was even more ferocious. The average Christian, though not, significantly, the Normans of Sicily who for a century had traded with Muslims, regarded Muslims as inhuman. They became the ideological Other: anti-Christ and enemy, doubly hated and feared because they could not be beaten. The famous and popular *chanson de Roland*, sung by a *jongleur* when William the Conqueror won England at Hastings in 1066, portrayed the Saracens as the enemy par excellence against whom Charlemagne's champions had fought and fallen at Roncevalles to save Christendom. In that battle Archbishop Turpin is reported to have killed 400 Saracens: he had shown mercy to no-one. Why? Because "Pagans are wrong and Christians are right" (see de Riquer 1956, 24, 91;

Chanson de Roland, verse 1.015). In fact, the enemy at Roncevalles were Basque Christians and Muslims were in alliance with the defenders of the pass. Furthermore, Muslims were presented as pagan polytheists in the *chanson*. In sum, not only were Muslims beyond humanity, but what they believed was ignored. In fact, Islam is the least polytheist of monotheisms.

St Bernard, on preaching the Second Crusade, gave these directions: "We utterly forbid that for any reason whatsoever a truce should be made with these peoples either for money or tribute until such time as by God's help they shall either have been converted or wiped out" (Scott-James 1953, 467), letting loose a genocidal slaughter. When Jerusalem was temporarily reconquered in 1099, perhaps 70,000 of its inhabitants were massacred in one of the infamous crimes of history, never forgotten in the Muslim and Jewish worlds. Christian chroniclers gleefully reported blood up to their horses' knees as they bashed infants' brains out, raped and mutilated the women and burnt Jews alive (Tyerman 2006, 157–8; Gibb 2002, 48–9). Similar stories were told about Muslim slaughters of Christians (Gibb 2002, 136). Richard the Lion Heart was so merciless during the Third Crusade (1189-), cold-bloodedly murdering thousands of Muslim captives, that already in Joinville's *Chronicles* of the Crusades (1309) the author reported that Muslim mothers warned their children: "*Que quant li enfans aus sarrasins braient, les femmes les escrioient e leur disaient; 'Taisez vous vez-ci li roi Richart'"* (Joinville 1952, 217).

But neither Jews nor Muslims were saints. The Moghul conquest of India was also genocidal in the scope of its anti-Hindu slaughters. By the fourteenth century, the principle of *jihad* also meant that infidels also usually only had a choice of conversion or death when the Muslims arrived. The present religious division of the former Yugoslavia into Christian and Muslim goes back to that choice, made after the battle of Kosovo (1389 CE). Fear of Islam became ever greater as it conquered Eastern and southern Europe until finally halted in the *reconquista* of Spain in the fifteenth century.

For Muslims, the Koran forbade apostasy on pain of death and they had been taught from childhood, mainly in retaliation for secular persecution by the other peoples of the Book (i.e. Christians and Jews), to kill all infidels (*Koran* 2003, 127, verses 8, 12). So, when Christian peasants started to leave their valleys and for the first time in great numbers saw the "marvels" of Constantinople and the East, their contact with Islam was brutal, and the slaughter of the Other when they met was mutual. The Christians not only thought that Muslims were not part of humanity, but were also the "anti-Christ", though we note that the Kurd, Saladin, who reconquered Jerusalem after the first Crusade (1187), and merely decapitated all Christian knights taken in the famous battle of Hattin, which marked the beginning of the end for the Crusades, earned the reputation for mercy (see e.g. Maalouf 1985, ch10 for how much more magnanimous victorious Muslims were against Christians than *vice versa*).

We can be sure that the notion of a universal humanity with equal rights did not exist in the popular mediaeval mind. The only mass Other that Christians ever met were Muslims and they had decided that Muslims probably had no souls. The Jews were a tiny persecuted minority. The same limits applied when Islam

faced Christianity, and when the conquest of India and China began. There was no tolerance for any ideas but those of one's own faith and even more hated than other faiths were heretics within your own. The worst atrocities of Crusaders were against the Albigensians and the worst Muslim atrocities against the Ismailis (Tyerman 2006, ch18 and passim; Lewis, 2007, 52–3 and passim; Gibb 2002, 145–8). What we call war crimes today were general and applied to the Other, defined primarily by his or her belonging to another religious community

Germs of an Idea: Universal Humanity

So, if it is well-nigh impossible to find the roots of a conscious striving in the mass of people for universal human rights in mediaeval societies, whether Western or Eastern, was there an unconscious striving for it? Were there tiny minorities or individuals in whose recorded views we can show that it is not completely unjustified to see early beginnings of a new ideal? After all, does not the religious legacy of Europe's Middle Ages start from the Biblical exhortation: "Thou shalt love the Lord thy God and thy neighbour as thyself. What shall it profit a man if he shall gain the whole world and lose his own soul?" (see Powicke 1926, 23–4).

Provided that we keep firmly in our minds the mass of men and women who knew the world as the hypocrisy of local priests who, like Pierre Clergue, were beastly in their lusts and who screwed even their sisters without remorse; austere saints like St Bernard who preached murder and vengeance, and a papacy that fomented war, and that the observers would have scant respect for the professions of universal love of a church of such horrible practices, we cannot deny early traces of what would become all-important as the conditions of the Middle Ages disappeared.

These traces started in the desire of sorely oppressed peasants for a more just world. That desire was more often but an incoherent appeal than a well-articulated idea. What they thought was saintly had little to do with standards like those demanded in 1948. And the peasants mostly did not understand that justice was something that could emanate from themselves. It would come from some higher authority who acted for God, and who, unlike themselves and the people they knew, did not slip back constantly into beastliness and sin. They were often betrayed in their hopes and trust but the hope remained.

There were multiple strands to these developments, mostly independent of each other. Their originators were concerned with completely different matters from those that would concern the conscious supporters of human rights, yet together they can be seen as laying some foundations for its history. We can distinguish two broad themes. The first, and in the end less significant, was the emergence of a sense, on both sides, that the monarch and state depended for power and the right to decide what was just, on a nebulous category: the People or the Commons. They therefore owed it to that people to take its desires, needs and rights into account. There was little structurally new to this view. The community or commons exacted a *quid pro quo* from the power in return for fulfilling certain obligations, in

a contractual notion of rights and duties, as in all feudalisms. But if the notion of contract was not new, the parties and the contents sometimes were. The novelty lay in the direct relationship with the law-maker or sovereign, where under feudalism it had been dispersed in the massive fragmentation of that society. This innovation had both positive and negative effects for human rights. It is essential to remember the negative dimension, which is one of the themes of this book. Briefly, we are at the start of a system where all members of the *community* will have rights. When they become citizens the problem for *universal* human rights is that like all communitarian systems, the non-citizen is excluded from them. This is discussed at length in later chapters. The second, and finally more important, theme was the emergence of a notion that there was a justice higher than that of any community, which transcended the contract between the ruler and the people. Where rights in the contractual form were inward- and backward-looking and exclusionary because of its communitarian premises, the concern with a higher justice looked outward and forward for its inspiration. This was quite novel and broke entirely with the feudal reality, whatever the claims of organised religion. We note too that the first development marked an attempt to derive all law, rights and justice from this world – it was immanent in nature, finding authority in history and law. The second was individually "religious" as it derived its views from the belief that there was something divine in men and women. It found authority in religion and philosophy.

For the purposes of this book, the story of the change to a social contract can be started in Britain. One of the characteristics of the peasant rebellions of feudal times was a general demand for justice in the face of exploitation and oppression. Typically, the demand was made in the name of the Lord and both at large and specifically to the king. The latter was separated in the peasant appeals from his evil courtiers and barons who supposedly mal-administered or used his law for their own selfish ends. For example, in Wat Tyler's rebellion in 1381, injustices are attributed to "traitors to him and his Kingdom". Contrarily, the peasants swore that they adhered to "King Richard and the true commons". They asked him to get rid of the evil courtiers and grant them freedom, what "free men" had. Tyler "asked that there should be no law in the realm save the law of Winchester, and that henceforth there should be no outlawry in any process of law, and that no lord should have lordship save civilly, and that there should be equality among all people save only the king…. And he demanded that there should be no more villeins in England, and no serfdom or villeinage, and that all men should be free and of one condition". The king swore to do this in a charter like those discussed above. Then, as frequently happened, he broke his word, fulminating "Serfs you were and serfs you are: you shall remain in bondage, not such as you hitherto have been accustomed to, but incomparably viler" (see Hampton 1984, 53–68). He then had the rebels butchered. A similar fate befell Jack Cade when he led another rebellion in 1450, seeking much the same goals.

It is pathetic that with a record like this the population continued to pin their faith in the monarch, who reacted like most barons had and would react thereafter. There is, however, a reason for such blind faith in the state and in the king's justice. The king at his coronation promised to observe a higher justice. Charlemagne had made this a formality at his own coronation in 800CE. William the Conqueror

continued it when crowned king of England. The oath went two ways. First, it was to the papacy which crowned the monarch through its delegate, or in some cases by the pope himself. This symbolically made the king subject to the church and to its highest teachings (see Favier 2004, 337ff, 724). It implied that he was divinely appointed by God. As Favier writes: "The fact that king was crowned (*sacré*) placed him apart in mediaeval society. That unction conferred on him, with the sanction of the Church, a charisma that placed him outside the feudal-vassal pyramid. However great his vassals, they were not anointed" (Favier 2004, 337). Moreover, we read of episodes like this: The "saintly" King Louis of France had been told by a monk that he, the monk, had read the Bible and knew that princes only lost their power by not observing the law. "The King did not forget this lesson but governed according to God 'as you will hear'" (*Historiens* 1952, 212–3) Louis is reported to have consulted his lords frequently and made quick decisions in disputes. He warned clergymen against seizing goods on spurious grounds. In most of the anecdotes designed to show his virtue, we see praised his refusal of arbitrariness and a readiness to make concessions for peace. There is nothing apart from that which departs from the mores of the time, even those of private justice. In one case, three of his own "sergeants" had robbed people in the street. One day they denuded a clergyman, who went home, took up his trusty bow and scythe and killed all three, splitting two in half. He was taken before Louis who said: "Sire…you have stopped being a priest through your prowess and because of that I will take you overseas with me [on the Crusade]…I want my people to see that I will not support them in their wrongdoing" (*Historiens* 1952, 226–7). But, governing in a "saintly" way did exist and was noticed.

Second, the coronation, with its symbolic regalia, implied undertakings to the people and this was usually formally expressed in a charter. The king was a sort of transmission belt bringing justice to his people. Since such undertakings were broken all the time, even by high churchmen, we might expect the average man to have been as sceptical about the monarch as he apparently was about his more immediate lords. But here the barons, to their own advantage, opened up an avenue for the king to seek his advantage by allying himself with a wider group of people than themselves. As we have seen, in the Magna Carta the barons, churchmen and freemen demanded rights for all "free men". These were granted. Specialists in legal history note, within the general consensus that none of the charters or oaths introduced anything novel at the level of content, that a document like Magna Carta (1215) or the Statute of York (1322) spoke of the monarchy as an office embodying and continuing the laws of England (and parenthetically) its people as well as of the monarch with particular rights (Holt 1985, ch8 esp. 212; Powicke 1953, 67–8). It became in the monarch's interest to play off those freemen against the barons to maintain his own untrammelled power, or prerogative(s). Thus, he shared the desire of people like Tyler to exclude the barons from any jurisdiction. When, to secure his objects, the monarch started to suggest that among the freemen there had been traditionally "the commons", whose assent was required for money matters of state, he was opening up a new dimension for understanding rights: the idea of the monarchy as office and the people as community (compare Lapsley 1951, chV; see esp. 153–4).

Only in England did the theoretical alliance of monarch and people or community change matters much in the thirteenth century. There we saw the establishment of an exclusively royal jurisdiction and the disappearance of the vestiges of baronial jurisdictions. One person slowly emerged in the law as having rights and justice inherent in his person – the male monarch. (Female monarchs, who existed, usually only had rights because they were bearers of the line, that is, some male's mother or daughter). As recounted, the form his justice took was by the issue of writs from the royal courts. These summoned individuals to answer why they had acted this or that way on an ever larger number of issues, starting above all with those affecting land. One of the most significant was the *quo warranto* (1274 CE), by what warrant someone claimed to exercise jurisdiction. Failure to show grant by royal charter ended any claim to a baronial jurisdiction or freedom. Sometimes, even after this, new franchises were granted, but overall in criminal matters, it marked the end of baronial franchises that had existed since Anglo-Saxon times. Since their jurisdiction had been restricted to civil matters even before this (1230 CE), legal feudal power was disappearing. What the monarch was particularly concerned with was criminal matters. The king had started to oversee the earlier County Courts, where criminal proceedings initiated by a tourn, akin to a grand jury, had been heard, late in the twelfth century. The importance of the Norman sheriff then declined with the growth of the Assizes, the travelling courts of the monarch. These became really well established under Henry II (1133–1189 CE) and were conducted by two judges of the Kings Bench, which had become a separate branch of the court by the fourteenth century, although there was a chief justice from 1268. Its initial appellate jurisdiction gradually broadened in that period to cover cases at first instance.

The common law system has been summed up as the courts and the writs. Certainly it was that. But what was important for the future of rights and the development of human rights was that centralisation of "justice" required a consistent set of legal principles or laws to be applied in similar cases. Only once there was a semblance of this could there exist anything approaching a rule of law, whose predictability would prove more attractive than the "rule of men", with all its arbitrariness. This gradually took place in England. Usually the process is dated from Glanville's *Laws*, drawn up c 1187, which give their own rationale as:

> The laws of England, although not written down, can be called laws without absurdity, because the maxim: "what the prince wishes is law" is also law. This is so for laws that, in order to decide in doubtful cases, were promulgated on the advice of the Great and with the authority of the prince.
>
> [And he continued in lines that demolished the claims of customary law]: The Court that is presided over by his Highness is so equitable that no judge would be so rash, presumptuous or have the temerity to depart in the slightest way from justice or leave in the slightest way the way of truth…The King does not disdain either the laws of the kingdom nor the customs introduced *by reason* and long observed, nor, even more praiseworthy, the opinion of men, albeit his subjects, that he knows are eminent by their seriousness and their morals, their perfect knowledge of the law and customs of the realm, the distinction of their wisdom and their eloquence, and their promptness in deciding matters by means of justice and bringing to an end cases, as seems fit to them, through either severity or mercy (Glanville 1963, 2–3, emphasis added).

Glanville therefore wrote down "the general laws most often used by the court as an aide to memory in a simple language useful for practitioners" (ibid.; see also Allen 1946, 176).

It would be centuries before the case law was sufficiently developed for there to be little chance of departure from earlier decisions, but Glanville had started the process, emulated soon after in other parts of Christendom, of making the law written, consistent and an object of study. This necessarily placed it in the hands of the literate and "clerk" quickly came to mean more than clergyman. The law became the preserve of lawyers, a new profession who knew their Latin, who started to swarm in fifteenth century England and Scotland. By that time Glanville had been supplemented by Henry Bracton's *Treatise on the Laws and Customs of the English* (c1260) (Bracton 1964), described by Maitland as "the crown and flower of English medieval jurisprudence" (Pollock and Maitland 1968, I, 206). Such texts are notable for their importance in establishing a rule of law and also, as their titles show, ensuring that its basis would be historical and national. Bracton, in particular, was responsible for the development of the notion that the king could not legislate without consent of the freemen and had to do so in accordance with the traditions of the country and for its peaceful administration (Lapsley 1951, 206–7). The king was under God and the law (see Sabine 1937, 195–6). Rights and justice lay in those written-down laws.

The common law would not be confused with any general or universal norms. Already the idea was growing that the common law was the law of "our ancestors" and it was quite entrenched by the time of Magna Carta. We deal with the myth of the ancient constitution in later chapters, but it is worthwhile quoting here some lines from Goodrich: "the image is of old England, an England that is eternal…it is a purely internal history, the history of the exclusion or repression of all forms of foreigness (sic)…it is nature in the sense that it is given and indisputable…In the end it is a family history… What is English…is first and unquestionable" (Goodrich 1990: 217). This is not to deny that this law also often applied in Norman France for some time. Normandy and England shared monarchs and ruling classes: Richard and John spoke French rather than English, and in replying to the rebels of 1381, the king referred to himself as king of England and France. It also does not deny that with the Normans had arrived Roman law, especially that of Justinian, with its insistence on codification, and the writing down of rules. English authors directly derived their views on the division of laws into civil and criminal from the Roman law that had arrived with the Normans and Cistercian clergymen.

Too much should not be made of these developments of the rule of law. The peasants did not flock to the king's courts because they thought that they would get justice there. As Jack Cade said in 1450: "the law serveth nought else in these days but for to do wrong, for nothing is sped almost but false matters for colour of the law for mede, drede or favour, and so no remedy is had in the court of conscience in no wise…" (Gairdner 1880: 94–6) They were summoned to do so, so that the monarch could increase his power, control and through fines, forfeitures and seizures, his wealth. As elsewhere, the law was something to dodge and the traditions of harshness of earlier days did not disappear. But we cannot avoid the trace of something new

beginning in the relation between the people and rights. There were places, what lawyers would later call "our books", in which to seek and find one's rights. And rights could lead to justice.

Pie in the Sky

We can be reasonably sure that not much was being learnt directly about justice for individuals in those courts, and the development of the laws "of the folk" had dire implications for any idea of universality. Yet, we are still left with the question whether the nature of humans and their rights or justice had not been raised as problems among isolated individuals or groups who had different views from the majority, even if sometimes contradicted by the lesson they gave practically?

The answer is most certainly yes. We do have documentation about the ideas of these minorities. But the ideas and activities that interest us came from the tiny clerical classes, hidden away and cloistered in monasteries that would often not let outsiders through the doors. Whether monks, mandarins or Brahmins, all considered by mediaeval observers to be religious and scholarly men, they had a common characteristic. Not only were they removed from the commoners' lives, but they all spoke or wrote a language that the average man did not know: Latin, Mandarin, Arabic, Persian. Nothing they said or wrote in those languages was or could ever be shared with and by the peasants. So what follows, which is most important for the later development of the pre-conditions for a movement for *universal* human rights, is simply the story of tiny minorities who, however much they reflected the mediaeval worlds around them – and it was mainly by rejection – in no way countered the lessons of lives that were nasty, brutish and short and that made impossible any popular belief in the universal dignity of mankind.

The first remark is that the horror of mediaeval society had resulted in the emergence of an austere ethic, like that of Cistercian or Franciscan monks, and a withdrawal of many "tender souls" to monasteries. They comprised both men and women in significant numbers. Thence they left to establish new houses throughout Christendom, whose borders they also extended (e.g. Flavier 2004, 146ff). Many made pilgrimages and joined the Crusades, and were brought face-to-face with the extraordinary libraries and knowledge that came from Afro-Islam. The most fruitful cross-over point where they met these new worlds was in Italy and the new universities like Bologna and later, Oxford. There began a reconsideration of what the relation between Man and God was and what it was to be a human being; the exhortation to "love thy neighbour as thyself" was broached in a new, albeit indirect, way.

Already in the twelfth century some had restated what had been cardinal point among the ancients, that the universe, what they lived in, was an entity. Duns Scotus, one of these monks, started to used the word *universitas* (*rerum*) in the sense of a living whole that God permeates. God is in nature and nature in God (see Chenu 1968, 5–7). A friend of St Bernard, Arnold, Abbot of Bonneval, re-read Genesis in this way:

> God distributed all the things of nature like members of a great body…Nothing is confused in God, and nothing was without form in primordial antiquity; for physical material, as soon

> as it was made, was forthwith cast into such species as suited it…By God's moderating rule diverse and contrary things meet in the unity of peace, and static and erratic things are brought into orderly lien…The entire fabric of the world –consistent thought made of such dissimilar parts, one though composed of such diverse things, tranquil though containing such opposed elements – continues in its lawful way, solid, harmonious, and with no dread prospect of ruin (cited in Chenu 1968, 9).

The world of nature in its rich variety became the object of study. There began the study of causes, provoking great antagonism from those who "want us to believe like peasants and not to ask the reason behind things" (Chenu 1968, 9). Monks, locked away in their communities, increasingly concerned themselves with mechanical and agricultural sciences. And as they proceeded in their study of the cosmos, they arrived at a view that Chenu calls "Man as Microcosm". In the world as cosmos, with God at its head, all humans were seen anew as being drawn up towards the divine by the superior force. Matter had a divine nature. So humans, in their struggle to meet God, find themselves in nature and part of it: it is the context for the cosmic struggle. Man, though composed of four elements like the macrocosm, had a soul. Myriad twelfth century treatises proclaimed this. This creature was both capable of being the master and the artist of nature and discovered himself through that study and mastery (Chenu 1968, 39). This marked a radical breakthrough for the understanding of humanity: one in which all humans could be seen as equal in dignity.

Against this background, we can understand the importance of the reconsideration that came from being faced during the Crusades with the Arab knowledge of Aristotle and the other Greek philosophers and scientists. The church view of 1210 was that works on nature and mankind by such heathens should be banned. But their contents made them too interesting. So began the study and adoption of Aristotle's works on nature and, especially, of the re-discovered *Politics*, by different monks and clerics. One branch took their lead from the Arab scholar Ibn Rushd, known in Christendom as Averroes (1126–98 CE), who lived in Spain and who translated the Arabic version and then attempted to create a pure Aristotle by purging the work of Arab accretions. This "pure" Aristotle, as expounded in his main work, took a scientific, demonstrative, approach to philosophy. Its truths came from the material study of nature. Therefore, Averroes argued, theologians were incapable of being adequate philosophers. In Aristotle, society itself was seen as an organic body, something that Averroes insisted on. His approach was adopted by Marsilius of Padua, who had sided with the emperor in a dispute against the pope's claims to be superior to the emperor, to be the source of his power and the sole person who could anoint him Holy Roman Emperor. Marsilius' choice to side with the layman obliged him to flee Italy and he spent most of his life in exile where he wrote his famous *Defensor Pacis* (1324). This book argued that the power of the emperor came not from the pope but from the community that he expressed. He should therefore be chosen not by the pope, but by a general council drawn from the magnates of the society. In a way, Marsilius was expressing views not too far removed from those discussed above in relation to the Statute of York in England. Such views began an argument that the monarch's and state's power came from fulfilling its obligations to the organic community, a concept Marsilius took straight from Aristotle.

Obviously, they led to an exclusion of the church from temporal concerns and a notion that ethics were practically rooted in this world. They were "anti-Christian" because they rendered unto Caesar what is Caesar's and to God what is God's. The logic was similar to that advanced by Protestants two centuries later and taken up by an anti-religious Enlightenment in the eighteenth century.

More palatable to the church than the views of Marsilius and his near contemporary William of Occam were the views of St Thomas Aquinas, who was a Papalist. For Aquinas, the *Politics* were particularly important. But where the Averroeans argued that the domains of revealed truths belonging to the church and to reasoning human beings were separate, he argued that man combined in himself not only the practical reasoning capacity that was at the centre of Aristotle's work, but also faith. So, while we again had the understanding of society as a community in which each part and activity was necessary to the other, a rigid hierarchy was established with the teaching of the revealed truth by the church most important. Like Marsilius, Aquinas argued that a ruler's power and moral authority rested on his defence of peace, order and harmony in that community – indeed, if a tyrant, he had to be overthrown. But he found the justification for such rebellion not in the immanent realm of practice but in divine law as revealed in scripture. Reason and faith were not separate. Natural law or reason was something all humans had as it was in the immanent order of things; divine law added to it. Theology, a preserve of the church, sat on top of all other knowledge, completing it and necessary to each part of science and nature. In effect, this meant that where Marsilius flatly denied the papacy the right to depose of or to choose a monarch, St Thomas thought that a monarch could be deposed for breaching a revealed truth, or what we might call a divine rule.

All these thinkers, together, shifted thought about what human beings were and should be. None gave up the notion of God or a higher truth. But their problem was how that accorded with nature or what existed in this world. Whether they thought that divine wisdom was incomprehensible and therefore should not be part of reason, or that despite that, it should be part of reason, their study of humanity, or what they called the *universitas hominum*, led to the notion that there was something divine in humans. They still thought of humanity as a *universitas*, or community or corporate body, a mediaeval notion par excellence. The natural world which they tried to square with that of God's divine law was the community that they knew.

But this too was susceptible to further and unexpected development. In the thirteenth and fourteenth centuries there began the new humanism and the "new science". In this, Plato's ideas about humanity and community, already known, say, to Averroes who translated the *Republic*, replaced those of Aristotle. The significance was this: Aristotle had pointed the way to the study of mankind as community and suggested that from the practical reality of the way humans governed themselves might be derived an ethics. His theory was practical and therefore pointed away from the individual to societies that had been constituted and within whose organisations individuals lived. No time was wasted on wondering what a human might be outside society, or his or her attributes; the person "without hearth or home" was not really human. Plato offered something much more personal, a contemplation of the self and thus of the individual. The monks who had fled the horrors of feudalism,

or who lived with them in an uneasy compromise, wished for a contemplative or scholarly life. The great communities of Cistercians and Benedictines that emerged everywhere in Western Europe in the twelfth century are emblematic of that side of the ethic. It doubtless co-existed with warrior monks and the principle of dying for one's faith. But monks intent on a contemplative life looked inwards to themselves and thus to individuals. As feudalism collapsed and the Catholic church started a violent persecution of any critics, these monks became spokesmen against its pretensions to be the sole interpreters of God's laws. They began a "new" humanism, science and philosophy in brave defiance of the institution.

In the work of Giordano Bruno and Tommaso Campanella, both excommunicated Dominican clerics, we see what the new humanism meant in its neo-Platonist form. Bruno started in an apparently very Aristotelian vein: the proper study of mankind is man as he lives in communities. But he was driven by his contemplative character to see the "practical" Aristotle as "almost an enemy" (de Sanctis 1958, II, 744). Condemned as a heretic, his first work was about the world as an incomprehensible place, not unlike the Rabelaisian vision. Then, he became a materialist, regarding material as what remains when all the forms it takes disappear and pass into something else. But he came to think that the power "to do" came from giving form through the mind or intellect to all that was material. God still remained, but he was beyond our ken, the all-powerful. What was left to understand was the divinity in the infinity of things; to give them sense. Thus, his views have been proclaimed the "most radical negation of medieval asceticism", whose basis was in what was not of this world (de Sanctis 1958, II: 754). The views of Bruno focus on the mind making sense, not the materiality itself. Bruno's views concerning the individual are summed up in these lines from his *Degli Eroici furori*, I, 3 (Bruno 2002, I, 570–1):

> From being in most vile subjection I become a God
> I change from an inferior being into a God.

Where all this emphasis on the divine quality of humans was leading was clear in Campanella. He went through an almost identical progression to Bruno from materialism *à la Aristotle* to a neo-Platonic view, one in which Prometheus robs the fire of understanding from Job and brings wisdom back to earth. This was a grave burden that constantly dragged humans back to earth but did not prevent them spreading their wings again. So his starting point was humans as mind or as self-consciousness, the only innate quality in man, that, when coupled with *amor di se*, turned sense perception into an aspiration to change matters on earth. In this, man differed from animals .He was the sole being with a religious sentiment and a desire to recreate what he thought was heaven on earth. This divine drive could not be killed: "S'ei vive, perdi [ignorance], e s'ei muore, esce un lampo di Deità dal corpo…" (cited in de Sanctis 1958, II, 786). It was thus man's nature to fight the greatest evils: tyranny, sophism and hypocrisy and, eventually, through "love of our common father to which he rises, to consider all humans brothers and take joy with God in their well-being" (Parallelo del proprio e comune amore, verses 9–13, cited in de Sanctis 1958, II, 788). Campanella's belief in the brotherhood of man led him to propose in his greatest work the creation of a heaven on earth, the *City of the Sun* (1602),

whose communistic principles he did not see as in contradiction with the principles of the church. Rather, the latter as the supreme expression of reason and wisdom should seek such outcomes.

Campanella was truly a man whose contemplation led to practical proposals for justice and rights in this world. But he knew that the church did not approve and that the average man would agree with the church and not with him. If the wise man were free, the people "is a great, variegated beast, that does not know its strength. All belongs to it, as it stands between earth and heaven, but it does not know that, and if someone tells it that, it kills him and brings him back to earth" ("Delle plebe", *Sonnets*, verses 12, 12–13 cited in de Sanctis 1958, II, 787).

Hunted out of Italy by a church on the defensive in its claim to be the sole power to transmit from heaven God's teachings, thinkers like Bruno and Campanella carried their views into the rest of Christendom. Similar views, whether directly inspired by their doctrines or not – and most times they remained unknown – spread like wildfire in the sixteenth century monasteries of France, England and southern Germany. Dozens of books and tracts were written with the theme that God was in nature, in men's nature, and that was what made men lift their eyes to heaven and dream of a better world. All other beasts had their eyes turned earthward. In these books the theme of the dignity of mankind was strong and so was that of the brotherhood of all human beings. So while the church burned men like Bruno for supposedly supporting the Turks and, on a mass scale, hundreds like Menocchio whose view of paradise was of a world of feasting and houris, in French and English monasteries words like these were pouring forth:

> The beast is accustomed to looking down, but the gaze of man goes heavenwards
> To look upon the place of eternal life
> Whence he has got his essential principle.
> Men through science and virtue rise to immortality, the sovereign good
> Scorning life and knowing themselves well, through knowing only justice and God" (author's translation) (see Sozzi 1982, 14).

The theme of mankind as a microcosm, "erectos et sidera vult" (Sozzi 1982, 31, 34) and therefore ready to work for a heaven on earth, favoured the growth of the notion of humans as both *homo faber* and *homo sapiens*, constantly seeking novelty and new horizons, ready to accept the shackles of history and received principles only on certain conditions. It was accepted that technology and knowledge accumulated over the ages. In one favoured author, the Jewish writer Philon, the role of man was seen as that in Genesis I, 26, where he is described as an honoured guest in the Lord's already created mansion (Sozzi 1982, 35). But this view was translated into the notion of a human who, acquiring knowledge, started a voyage through land, seas, and space and sought and found in it harmony, like that of musical spheres (ibid.).

So, by the sixteenth century there were a multitude of books asking questions like that in René Fame's *Divine Institutions* (1558–9): Why did God make man; why was man made with his face turned upwards and why was wisdom given to men, all grouped under the heading the "dignity of mankind"? Perhaps the most famous expression was Pico della Mirandola's, *On the Dignity of Man* (1480c).

> Grande, droite et admirable est la vertu, raison et puissance de l'homme, pour lequel Dieu as fait le monde et tout ce qui est, et luy a fait tant d'honneur qu'il lui a baillé la superintendance de toutes choses, en tant que lui seul pouvait estimer et priser les oeuvres de Dieu (Liv.de la recomp: chi iii).
>
> Dieu a fait tant d'honneur à l'homme qu'a cause de luy il a forgé le monde,il l'a garni de sapience, et l'a fait maitre de toutes choses vivantes et l'a aimé comme son filz (cited in Sozzi 1982, 34).

These ideas were limited to Europe, but as we see in Chap. 3 below, equally rich notions had emerged in monastic China and India.

Justice Is Nowhere

To dream of a just world was to dream of "nowhere", or "utopia", like the place described by Thomas More in 1518 (More 1918). Such dreams of utopia were written about in the Middle Ages, again only by scribes and clerics. But to dream and then suggest the idea of a decent society governed by a rule of law and not of men led for most humans to being thrashed by one's parents, imprisoned, even executed or burned alive by the lords or the church, as More discovered himself in 1535 when he was found guilty of treason by his lord. Thomas Munster's utopian hopes of "all things in common" led to a horrifying death after the 1525 peasant revolt (Blickle 1981, 148). Aristotle's views about the benefits of a rule of law were banned as impious and heretical. So absolute and arbitrary was the power of lords that should they be bitten by ideas like those of More, they could forcibly make them realities. So Vasco de Quiroga established a society like that of Utopia in Mexico. It was short-lived because it was so inappropriate to the reality of life that practically everyone with power tried to destroy it (Green 2004, esp. 151, 164, 214, 281).

Even in such sources about the possibility of a different, more decent world with rights, the structures of the Middle Ages and peasant society remain the starting point. Above all, these works advance a family model of society which merges private and public worlds in a simple hierarchy where paternal power rules and most are in tutelage. Humans are not seen as autonomous individuals who can challenge the community or society. Their task is to serve the general interest. These utopian dreams thus all maintain as the ultimate good a family that for women and children was a living hell ruled by the naked fist. The greatest social virtue preached is meekness and submission. As Piers Plowman said in 1375c: "You must start by way of meekness, men and women alike…" (Langland 1999, 57). Dreams "from below" were not preached even by this most advanced sage of his time: "the unlearned had not the judgment nor the jargon for what should gain them justice, But must suffer and serve" (Langland 1999, 6; see also Campanella 2007, 183).

In the Middle Ages, when there was neither information nor visitor from afar, even utopians thought of unknown people as enemies to be destroyed. The world ended at the stile and the purpose of an ideal community was to make it strong enough to repel all outsiders. Nevertheless, they made clear that humans dream of better worlds and that utopia might some day become a galvanising political force.

Conclusions

Within a history that has some continuity with what continues today, a mass espousal of *human* rights was simply impossible until social relations took a certain form. While, because of the structures of social power, human beings continued to eke their lives from the soil, in endless and backbreaking labour, their lives remained like that of beasts. They appeared to themselves and to literate observers "more beast than man". Pico della Mirandola wrote ca 1486, "if you see a man given over to his belly and crawling upon the ground, it is bush not a man that you see" (Mirandola 1998, 6).

The Middle Ages were worlds in which the bulk of humanity were the constant victims of what later would be known as war crimes and genocides (see Kiernan 2007); where they had to accept as their daily lot starvation, illness and brutish lives imposed by a social system that worked for the benefit of tiny minorities and where the dignity of man was practically never recognised. It was a complex and contradictory world in which the gap between profession and practice made hypocrisy one of the worst evils. And yet its very incomprehensibility rested on a general ignorance, which meant that there was little to do but to throw up one's hands and laugh at all those who preached the sorts of views we have just described. It was madness to hold to them, but entertaining to watch their advocates being burnt to death for not holding their tongues. It was a world whose horrors could be laughed at by Boccaccio but not really criticised: it was life.

If, as Campanella said, challenges to the claims of a church to be the sole institution to make moral and ethical sense of the world were not supported by the average man, they were now being written in the vernacular tongue as well as Latin. This meant that these novel views about humans and how they might make a more just world were accessible to the average literate man by the sixteenth century. For change, they still needed to galvanise mass forces. What is surprising is that it took so long for that to be happen.

Chapter 2
Eyes Turned Heavenwards

Continuity and Change

The average person in the Middle Ages had no expectation of right to life, freedom of movement, freedom of thought or expression or organisation, to even basic levels of health, food and education. That person's very existence was at the whim of the more powerful, above all those people who incarnated the state (see Bisson 2009). What we today call genocide, war crimes, torture and deprivation of liberty were common and everyday experiences. Yet, except for a tiny minority of execrated individuals, human beings then had little sense of individual dignity, of individual rights and certainly no sense that humanity as a whole should have certain equal rights. We wonder why humankind had not developed a mass movement for goals akin to human rights. The probable answer is that while the germs of such views existed in monasteries, before they could be translated into ideas capable of galvanising sufficient numbers of humans to make them more than impossible dreams, certain preconditions for that translation had to exist: There had to be a generally held belief that humans were individual subjects capable of changing their world; that they had rights; and, above all, that all humanity was entitled to certain things that could never be taken away for any reason whatsoever.

The pre-conditions began to emerge in England, Holland, and parts of France, Italy, Germany and eastern Europe in the thirteenth and fourteenth centuries. These were tiny pockets in an otherwise unchanged world. England had 3.75 million inhabitants and Holland 1.25 million; the others, combined, had slightly more. Yet in that tiny part of the world, more stable conditions of land tenure saw the emergence of private property in the thirteenth, fourteenth and fifteenth centuries. More and more peasants became free owners of their land. There was surplus to be sold in markets and parts of Europe became dotted with market towns to which peasants went to sell food. The womenfolk became producers of cloth and other items of clothing. Trade became centralised in certain great entrepots like Antwerp, and brave spirits like the Flemish crossed the Channel to establish themselves in Norwich and elsewhere as wool merchants. Great merchant leagues like the Hanse operated

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out of the northern German ports into the east and Scandinavia. Mostly, the items traded were simple: the Hanse built its fortunes partly on the dried fish trade. Small, free-market towns had existed under feudalism, but now the city rose to rival the power of the lords (see Braudel 1979, II, 63ff). England and Holland, both with significant seafaring traditions and relatively little land, were particularly involved in trading ventures (see the petition to Charles V in 1548 reprinted in Boxer 1977, 5). Almost half of Dutch shipping was in the grain trade with the Baltic and systems of joint venture, where several small investors got together in what was called a *rederij*, became widespread. After the disaster of the Black Death, there was a growth in population by the fifteenth century. All this meant a surge in production that had already been intimated before the temporary setback of 1348. Trade required banking and credit systems, and some families in Italy, like the Bardi and the Peruzzi, became bankers to not only merchants but also states. The Fuggers rivalled the Florentines in the north of Europe.

As noted, under feudalism, towns were usually established by a grant of liberties. They considered themselves separate communities that had purchased freedoms which, while often administered by an elite of merchants, sometimes maintained the fiction that they were republics, concerned for the common good of all their inhabitants. In fact, despite the emerging commercial, entrepreneurial sense within them, they still emerged while the robber baron ethic of the lords prevailed. Even in England and Holland, until 1700, peasants remained half the population. So, in most European states, the feudal ethic and the world of murder, torture and genocide lingered. Indeed, with the schism in Christianity that we discuss below, those considered the anti-Christ to be burnt alive or tortured to death extended even further than before, as Catholics burnt Protestants and vice versa. The town mob's resentment and hatred of the rich bourgeoisie had become obvious when they were let loose in the St Batholomew massacre of 1572. In Paris and other major towns, about 10,000 hapless Huguenots were brutally murdered, thrown out of their windows, drowned in the Seine. Foreigners were mercilessly exterminated and bookshops were burnt. A ditty of the time runs:

> Montpellier may have good doctors
> We've got good surgeons
> To suck the blood out of them
> To Hell with Huguenots
> Exterminate them
> Annihilate them
> Exterminate them (Ferro 2001, 177).

The same horrors occurred during the Fronde in 1630. These were akin to the last episodes of the disappearing *jacqueries* of the Middle Ages because they took place in the great merchant cities before a real rule of law was established. In the hundred years that followed, such violence continued, but it was mainly in a few rural areas.

So, into the seventeenth century great merchant and banking families still needed protection from marauding lords and great families like the Fuggers, and those in Italy and France married into or were co-opted into the nobility. At a lower level, the

townsman retained connections with the country, whence until the nineteenth century all wealth appeared to come through the middle peasant who came to market with his surplus. Change was slow and dominated by rural relations.

Yet merchants and towns-people more generally were self-conscious of themselves as a group different from the feudal communities, so there was a proliferation of diverse communities within the overall feudal model. Commerce meant contracts proliferated and debts to banks grew. The merchant class therefore sought more careful records and regulation. Literacy increased more rapidly in the towns than the country as a result. States also started to account carefully for revenue, indeed, the state apparatus emerged as an accounting system alongside that of coercion. Where William the Conqueror left behind the Domesday Book that recorded all landed property in England (1086 CE), what reflected the emergence of the new financial and commercial world was the *Dialogus de Scaccario* (1176–7 CE), the records of payments from the King's Exchequer (see generally Johnson 1950, II vols). It meticulously recorded the financial and manpower transactions of state on notched tally sticks, and was, of course, published in Latin. There was thus already in the late twelfth century England a change to a more complex state system based on recording and accounting. This was followed by the invention in Italy of the double-entry book-keeping system that soon was adopted throughout the commercial world. It went back to the twelfth century but was first recorded as used by Aldo Manucci a century later and elaborated in a book by Luca Pacioli in 1494.

Merchants involved in commerce could not heed the Church bans on usury which had left those transactions mainly in the hands of Jews and Armenians in the early feudal period. They were themselves engaged in making money from money and believed in self-reliance rather than obedience to church prohibitions. Bacon's "On Usury" (1597) sums up a new more tolerant position (Bacon 2002, 146–51) It is not surprising that as a class they started to adopt views like those we have seen in the views of outcasts like Campanella and Bruno. Such "heresy" had by the early sixteenth century taken the forms of Lutheranism, Calvinism and a new individualism which in the face of church teachings argued that "justification came by faith alone", not by performing the works that the church demanded (see Kerr 1943, 98–106; Marty 2004, 68), often paying a sum of money to it for this or that. This "Protestantism" made the individual responsible for his actions and their results in a way not generally recognised in feudal society.

The Reformation and the Individual

The immense battle of the sixteenth century that is today known as the Reformation and Counter-Reformation opposed the new Protestants to the Roman Catholic church. It was marked by quarrels, excommunications, wars and massacres on both sides. These culminated in the containment of Protestantism to England, Holland, Switzerland, parts of France and parts of Germany and eastern Europe.

Protestant doctrines require noting in a history of human rights as a continuation of the views about the dignity of man discussed above. They argue that individuals can do without ethical guidance from Rome. There is little substantial difference in their views from those of Catholic heretics like Campanella and Bruno. But the views of the latter were held by practically no-one within the Catholic church, whereas those of the Protestants were adopted by millions.

The most important of Protestant beliefs is that pronounced by Martin Luther (1483–1546), who argued: "All depends on faith. He who does not believe is like one who must cross the sea, but is so timid that he does not trust the ship; and so he must remain and never be saved, because he does not embark and cross over". Significantly, he describes faith in words easily recognisable by the merchant townsfolk. "When we are dealing with words and promises, there must be faith, even between men here on earth. No business and no community could long exist if no one was willing to take another's word or signature on faith. Now, as we plainly see, God deals with us in other ways than by his holy Word and the Sacraments, which are like signs and seals of His Word" (see Kerr 1943, 99–100). To follow such teachings could lead to the belief that individuals, guided only by their own reading of the Bible, were the arbiters of the ethical. The Bible was finally translated into the different vernaculars in the early sixteenth century and could therefore be read by any literate person. And for many their social relations were by contract, resting on trust.

In Luther, who was no social radical or friend of the peasantry (see Marx and Engels 1975-, X, 419), that reading ended in teaching submission to community and the monarch instead of the church. Jean Calvin, his French-born contemporary (1509–64), preached a second doctrine that was even more attractive than that raising the possibility of a personal responsibility. He argued that all was predestined by God; that no-one could be saved even by faith; and that the only possible sign of grace was to be materially successful in this life. This could be misinterpreted to mean that getting rich was good. Like Luther, he too believed in an autocratic state and his rule by the elect in Geneva proved so tyrannical that he was expelled after attempting a social experiment of his doctrines in that city.

What is significant in both thinkers is that, unlike their Italian contemporaries, their belief in the dignity of man was overridden by a demand for submission to the local ruler. They preached doctrines of moral submission coupled with a murderous attitude towards the main enemy, Catholicism. Luther left little doubt about this when he published these words: "If the raging madness (of the Roman Churchmen) were to continue, it seems to me no better counsel and remedy could be found against it than that kings and princes apply force, arm themselves. Attack these vile people who have poisoned the entire world, and put an end to this game once and for all, with arms, not with words. Since we punish thieves with the halter, murderers with the sword, and heretics with fire, why do we not turn on all those evil teachers of perdition, those popes, cardinals and bishops, and the entire swarm of Roman Sodom with arms in hand and wash our hands in their blood?" (Marx and Engels 1975-, 416, citing from Zimmerman, *Allgemeine Geschichte des grossen Bauernkrieges*; compare Kerr 1943, 213–32).

Such extremism was diluted in their successors, who also developed a following, in particular Jacobus Arminius, professor at Leiden in the Netherlands. Faced with the fiery doctrines of the Dutch preachers (*predikanten*) who followed Calvin, some of the local burghers preferred Arminius' watered-down views that human beings were not conditionally predestined and only the elect saved. Rather, it was their faith that made them elect.

For the first time in the sixteenth century, these views became a mass ideology held either as a faith or as a coerced lip-service among at least, if we combine the formally Protestant populations, ten million people. What was common to all three was the association of their emphasis on the individual making his or her destiny, with the view that this could best be attained by support of the state power. They were ideological sources for a merchant belief that the best way to attain burgher dignity was through alliance with the monarch against the outsider, universalist pretensions of Rome.

The notion of a new "historic bloc" of the monarch and merchant capitalist class was expressed by theorists of rights of a new sort, though often they continued to be clerics and to write in Latin. This theory gave a fillip to the idea that empowerment of those individual subjects "below" could come through the creation of a nation-state that allied the people as community with the monarch in a new social contract.

Two notable figures were the Dutchmen, Desiderius Erasmus (1466–1536) and Hugo de Groot (Grotius) (1583–1645). They are notable in our present context as they both belonged, or were close to, the new merchant elite of Protestant persuasion. Erasmus was a transitional figure between the humanist Pico della Mirandola whose *Dignity of Man* influenced him, and the new Protestantism. He remained a cleric in name and cut his teeth by replying to Luther's doctrine of salvation by faith alone. To this he countered the view that justification by faith alone was a denial of mankind's capacity to reason and to find salvation through each person using his own head. So against submission to an even harsher god than that of Rome, he promoted the neo-Platonic notion of man as the thinking head. Yet he continued to write in Latin and his most famous work, *In Praise of Folly*, (1625), like the earlier work of Rabelais, also sought to show "the absurd in man" (Erasmus 1971, 144–5). In the context of *universal* human rights, we are justified in thinking of Erasmus as still on the cusp of the Middle Ages and the early modern world. This made his doctrines more appealing than rigid Calvinism to the better-off burghers of the early sixteenth century and to those who held power and yet wanted no directives from Rome. His doctrine embodied continuity and change. On his extensive journeys through Europe he frequented Henry VII of England and knew the young prince who would become Henry VIII. It was rather genteel to be a humanist, as Henry VIII pretended to be, and certainly less demanding than being a Calvinist. The followers of Erasmus – the Renaissance humanists – were the "chardonnay socialists" of their world, too intelligent to be fervid. Their main interest for human rights lay in their appeal to antiquity, Greece and Rome, as well as to the Bible for authority. But without them and their generation it would be difficult to understand de Groot.

De Groot was a lawyer, a Remonstrant and strong ally of Dutch Protestant leader Johann van Oldenbarnevelt. In 1612 he was sent to England to argue the Dutch case against a monopoly of the spice trade. As someone associated with the Dutch East India Company, the sub-title of one of his most important works showed the practical nature of his concern with the rights of trade: *The Right which belongs to the Dutch to take part in the East India Trade*. There could be no more succinct a statement of the confusion of rights with national interest and national interest with the commercial interests of the new bourgeoisie. We return to the content of this work below.

The emergence of a Protestant Holland by 1609 cannot be understood without the rise of the Dutch as merchant town-folk in the previous century. Already in 1500, half were in trade or artisans. When, led by the Calvinist "Sea beggars", they finally defeated their Spanish overlords after a long war of religion, the different Dutch provinces set up a states-general, a sort of coalition of different leaders of provinces and towns of the Netherlands. While not united, they shared a common commercial and trading ethic.

One faction had as their political champion in the states-general, Johann van Oldenbarnevelt, a Protestant who followed Arminius, and combined strong religious principles and a merchant bent. This was expressed in his founding the Dutch East India Company (1602), whose object was to establish a monopoly of the spice trade in Asia. It was followed by the West India Company that focussed on sugar and the slave trade. When Johann van Oldenbarnevelt was assassinated in 1619, de Groot was also sentenced to life imprisonment for treason. There, he produced his greatest works on international law and on freedom of the seas.

The New Social Contract

Such an unholy combination of God and Mammon became important for the history of rights when kings and princes adopted views like those of the burghers and made them state policy. This came above all from their desire and need to get their hands on the immense riches accumulated by the church, not from any real religious fervour. But it made sense for them to line up with the new Protestant merchant class. The state endorsement of Protestantism brought a nearly century-long war against the papacy and its supporters. The Netherlands were at war for nearly 80 years to free themselves from Spanish domination (1619) and the English fought off supporters of the papacy throughout the century before defeating the Spanish Armada in 1588. There emerged in the course of the religious wars of the sixteenth century the policy of *cuius regio ejus religio*, that each state should have its own religion, and international divisions should be along religious lines, but between states. Once the hard-line Dutch Calvinists and the less fanatic British had finally defeated the French and Spaniards, the Dutch Reformed Church and the Church of England became "established". Catholicism was proscribed on both national territories.

The best exemplar of the new national stance was Henry VIII of England, who used Protestantism to justify a seizure of the monasteries and their riches and a

refusal to acknowledge the moral authority of the Pope that had characterised feudal ideology. While he saw himself as an absolute monarch, he needed a rubber stamp for actions that were still redolent of the robber baron arbitrariness of the Middle Ages. Evoking a tradition that went back to the parliament of 1265 associated with Simon de Montfort, he would summon his freemen and burghers to a parliament to have them rubber-stamp his plans for raising money (see Maitland 1960a, 46–80 for the nature of such early "parliaments"). Since he sought to extract it from the rich, mainly the Roman Catholic church, rather than the poor, the parliaments usually did as required. They were also blackmailed into acquiescence in most cases where they were reluctant to do so.

To win support for his policy of seizure of the monastic wealth, Henry VIII called nine parliaments during his reign and one sat for 7 years during his expropriation of the monasteries and establishment of the national Church (1529–36). Under his three successors they were even more frequent. Each time, they were packed with supporters and called upon to legitimate their actions. The House of Commons started to overtake the House of Lords as the basis for royal assertions of the principle of national religion. The numbers of burgesses in these parliaments grew greatly in the last 50 years of the sixteenth century. Edward VI added 48; Mary 21 and Elizabeth 60. Henry even had large numbers added to his personal council. They brought with them into national politics the new Protestantism and new commercial values of their worlds (Maitland 1941, 239). The assertion that the monarch was also head of the church (of England) and that all English teachers of ethics and morality, clergymen, school teachers and so on, had to subscribe to certain articles of faith decided by his church on pain of death or lifetime imprisonment, had two effects. First, ethics, justice and rights were now decided by reference to national traditions rather than in accord with universal principles. Second, the principle of all power was henceforth increasingly seen as the national community. In the place of the *sacre* of feudal times, the monarch was crowned by representatives of his own people.

Not that Henry VIII intended this growing power of the people. He intended to use parliament's laws as window-dressing for sanctions of his avarice. In fact, he ruled, as did his children, through minions like Thomas Cromwell and an administration that terrified parliaments into servility. He aspired to be an absolute monarch and by using a secret service and kangaroo court, the "star chamber", created by his father Henry VII, saw to it that the relationship between himself and the people remained one-sided. His father had stated when the chamber was created that "the true way to stop the seeds of sedition and rebellion at the beginning" was through an institution that was devised to use laws "against riots and unlawful assemblies of people, and all combinations and confederacies of them by liveries, tokens and other badges of factious dependence…" (cited by Taswell-Langmead 1886, 376). In fact, under both his father and himself, the lawyers "turned law and justice into wormwood and rapine" (ibid: 377–8). Expanded treason laws were used to rid himself of any inconvenience, including his hapless wives, Catherine Howard and Ann Boleyn. His reign saw the beheading and or burning of many of his greatest advisers, including some who had had the luck to survive a similar fate at the hands of his father.

Yet the autocratic qualities of all the Tudor monarchs were undermined by their reliance on parliament and beneath it, on the "people", to empower what were generally regarded by contemporaries and by historians as "despotisms". If either parliament or the people actually turned, like the proverbial worm, the state faced the reality that it had built its power and role on them. There were occasional intimations of this in the early sixteenth century. Once, when Henry VIII sent his creature Thomas Wolsey to demand that parliament approve exorbitant taxes, it refused and sent Wolsey away with less than expected and the reminder that the king needed the goodwill of his subjects.

Queen Elizabeth (1558–1603), who also aspired to absolute rule, experienced that contradiction as she appealed again and again to the English people and their traditions to defeat Catholic Spain. Faced with rebellion and a Papal Bull excommunicating her, she had passed an Act in 1571 which stated: (1) that it was high treason to affirm that Elizabeth was a heretic, schismatic, tyrant, infidel or usurper; (2) that the queen, *without the authority of parliament,* could not make binding laws about her succession. The state that she incarnated thus openly acknowledged that the source of its authority was parliament. When Fortescue CJ made a similar assertion, in *De Laudibus Legum Angliae* (ca 1460) it was "from below". One hundred years later, the state itself proclaimed it, a massive shift for the notion of where rights originate. Since the rights of the people thenceforth had the force of law backed by the state, they existed in a way that not even a conservative legal positivist could easily deny. Rights for all nationals were no longer "pie in the sky".

So in sixteenth century England, the principle that power emanates from the people and that of constitutionalism and rights for nationals grew together. The burghers or freemen of the commons were happy to endorse state policy in return for protection of their interests, especially commercial. The feudal principle of rights requiring a *quid pro quo* certainly still continued to exist, but it involved different and a much larger number of people. On the one hand there was the monarch and the state, and on the other the people, increasingly being identified as a nation. In both Holland and England, and particularly the former under Oldenbarnevelt, the emerging nation-state was conceived on city-state principles. It was seen as a republic, concerned with the interests of all its members, and the latter found its limits in the national community. But because the terms were monarch and people, the possibility was opened up of a redefinition and extension of the vague term people to more and more individuals who could establish that they belonged in that category; that they too should be consulted in the making of new laws and the creation of new rights. Already by 1589 Thomas Smith, secretary of state to Elizabeth, had intimated how far the notion of power emanating from the people might be understood. According to him, not only was the highest power in England the parliament that made and unmade all rights, it also represented the power of the whole realm. "For every Englishman is intended to be there present, either in person or by procuration and attorneys, of what pre-eminence, state, dignity or quality soever he be, from the prince, be he king or queen, to the lowest person of England. And the consent of Parliament is taken to be every man's consent" (cited in Maitland 1941, 255).

These new political principles provided the basis for a future empowerment of the hitherto right-less people against eventual tyrannies of state and would develop

into the democratic nation-state over the seventeenth and eighteenth centuries. Gaining control of the state by the popular collectivity, "from below", would after 1603 become the main emancipatory theme in the history of the West. However, we emphasise that it entailed empowerment for the national community, only for those who belonged. Individuals seeking rights had as a precondition for enjoying them to be regarded as co-nationals. Indeed, in the place of the unity felt by all Christians under feudalism, there emerged a belief that even other Christians could be outsiders as Catholic and Protestant "nations" started to massacre each other with as much savagery as Christians had Muslims at the time of the Crusades. Moreover, all rights stopped at national borders, beyond which was authorised anarchy. For example, a feature of Elizabeth's rule was an increasing national unity within England, accompanied by the emergence of rule by laws not men, and the continuation outside the borders, on the high seas, of the old feudal robber baron world, epitomised in the state-sanctioned privateering of Sirs Walter Raleigh, Francis Drake and John Hawkins (see Ronald 2007).

A National-Popular Rule of Law

Who had the right to rights? This was the new question at the beginning of the seventeenth century. The new merchant/artisan townsfolk wished for a rule of law, at least where commerce and fellow-nationals were involved. The monarch agreed provided he was somehow above those rules as the sovereign whence they emanated. In a way, the new rule of law that united both was symbolised in two new courts created by the first Tudor monarch, the star chamber, which was little more than an extension of Henry VII's private council, and worthy of a despot, and that of Chancery to provide a law of "trusts" – trust, we recall, being the key category of Protestantism as Luther saw it. The first barely was abolished in 1640; the second went from strength to strength and the chancellor became a pre-eminent legal figure in the seventeenth century.

In sum, in the 1500s there developed alongside the feudal land law the law of contract, which proliferated to dominate all social relations involved in production and consumption. With it came new courts to enforce it and lawyers who became increasingly skilled in ensuring its regularity and predictability. While the establishment of such rights was driven by material concerns and inconsistent in many domains, they had a novel quality. Again, this was often unconscious. The new rule of law was certainly only about those rights that the bourgeois classes wanted. When it was confused in discourse with justice, it was what they thought it was, not what other groups thought.

The process of establishing a rule of law as a social standard was still uncertain. But a century later it was quite clear that the rule of men or private justice was regarded as beyond the pale in the Protestant pockets of the world. Even prelates and bishops of the thirteenth and fourteenth centuries regarded it as their right and obligation to wreak revenge on anyone who offended by breach of this or that (thus we have the words of the monk Bardello: "Vengeance is a sweet thing. It gives

infinite satisfaction" (cited by Gabriel Maugain 1935, 146); these lines from Montaigne's *Essays*: "Vengeance is a sweet passion, natural and serious" (in ibid: 31); and these about revenge in Florence in 1295, "The stain left by an enemy's blood is a cause for joy. He who does not avenge an injury, commits and injury" (Gautheron 1991, 65). But by 1597, the official view in England was that expressed by Francis Bacon, lord chancellor, in "On revenge". It should be stamped out as it "putteth the law out of office" (Bacon 2002, 14–15).

To solve one's problems, one went to law. This became the rule in England and Holland in 1500–1600. So much had it become believed that the English proceeded by their common law that when Robert Kett led one of the last peasant rebellions (1549), the landowners were tried before a sort of court under a spreading oak tree and condemned to death by a jury of the whole. Fortescue's book had already shown how juries were becoming those who ascertained the facts rather than acted as witnesses in the feudal style.

Even more notable was France, because it was much more populous than Britain, at about 20 million people. There, the practice of going to court had become so widespread by the middle of the seventeenth century that Francois Bernier, when he observed the vengeance or private justice that still existed in India wrote:

> In France the laws are so reasonable, that the King is the first to obey them; his domains are held without the violation of any right; his farmers and stewards may be sued at law, and the aggrieved artisan or peasant is sure to find redress against injustice or oppression. But in eastern countries, the weak and the injured are without any refuge whatsoever; and the only law that decides n all controversies is the cane and the caprice of a governor (Bernier 1968, 236).

And

> …timariots, governors, or contractors, have an authority almost absolute over the peasantry, and nearly as much over the artisans and merchants…and nothing can be imagined more cruel and oppressive than the manner in which it is exercised. There is no one before whom the injured peasant, artisan, or tradesman can pour out his just complaints; no great lords, parliaments, or judges of local courts exist, as in France, to restrain the wickedness of these merciless oppressors, and the Kadis or judges, are not invested with sufficient power to redress the wrongs of these unhappy people (Bernier 1968, 225).

Consonant with the centrality of the "people" in the new historic bloc, the emergent rule of law based itself on the supposed traditions of the former, most obvious in the common law, but also true in Dutch law and that of the pays du *droit de coûtume* of France. In England the lawyers turned to the sources they had. The first was Littleton's *Tenures* (1481) which attempted to consolidate the law already in the *Yearbooks*. The *Yearbooks* of case law went back to 1295 and were a source unmatched even in Holland. They scarcely amounted to reliable case law – it would be three centuries before that developed – but constant appeal to their authority showed the mind-set of common lawyers by the end of the sixteenth century (Maitland 1960b, 231–52). A book of 1599, Fulbecke's *Parallele*, contains these words:

> And I have had a very great desire to have some understanding of law, because I would not swim against the stream, nor be unlike unto my neighbours, who are so full of law points, that when they sweat it is nothing but law; when they breathe it is nothing but law, when

> they sneeze it is perfect law, when they dream it is profound law. The book of Littleton's *Tenures* is their breakfast, their dinner, their tea (boier) their supper and their rare banquet (cited in Goodrich 1990, 81).

Another source was Fortescue's *De Laudibus Legum Angliae* whose title sums up beautifully the nationalist turn of the law, the contents being a paean of praise for the common law tradition compared with that of the continent. There were rival texts but these were quickly derided in favour of praise for the system of relying on previous judgements. We discuss some below. Within England, the newly-nationalised church's leaders also came out in favour of the popular tradition against the pretensions that England should adopt the views of Roman law. Even Cardinal Reginald Pole, *bête noire* of King Henry and Thomas Cromwell for his defence of the Catholic church and condemnation of the actions of the former, did no more than argue for the codification or standardisation of national laws to minimise the difference in decisions influenced by some silver-tongued advocate (Goodrich 1990, 79). The chapbooks of the new lawyer class, in particular Fortescue, also stated quite clearly that monarchical government in England was political and not merely regal. The king could neither change the inherited laws of the land nor impose laws without the consent of the people (Taswell-Langmead 1886, 364–5). By the end of the century all the major textbooks on law and justice, from Hooker's *Ecclesiastical Polity* (1594) to Thomas Smith's *Commonwealth of England* (1589) and Harrison's *Description of England* (1577) were asserting roughly this position of Hooker:

> The axioms of our regal government are these: *Lex facit regem* – the king's grant of any favour made contrary to the law is void – *Rex nihil potest nisi quod jure potest*…what power the king hath he hath it by law; the bound and limits of it are known, the entire community giveth general order by law how all things publicly are to be done…The whole body politic maketh laws, which laws give power unto the king; and the King having bound himself to use according to law that power, it so falleth out that the execution of the one is accomplished by the other (Hooker 1594, bk 8, ch ii, 13).

In England, by the end of the century, the myth of the ancient law that had been usurped by the Normans (and thus the landowning baronage) became widespread. It could be found even in popular verse.

The content of the law and its backward-looking quality, searching for authority on what had "always" been decided in like cases, was limited. But the novelty was that with it went a mass of new legislation from parliaments and similar bodies whose objects were novel and nationalistic, and which necessarily gave a twist to what rights had been. The common law was used to interpret and place a limit on such legislation, again ensuring continuity and change. So there were many more rights, and different kinds of rights, after 1500, because there was much more regulation within national territory – as was obvious in the developing common law of England over that century, say in the novel notion supposedly rooted in national traditions, of an undertaking (*assumpsit*) and consideration, a promise once exchanged against a promise amounted to an enforceable bargain. Under feudalism, contract had involved the notion of a *quid pro quo*, a material debt, and only sums or value certain (usurped land, stolen animals and so on) could ever be recovered. Against that backward focus of the law, contract law brought with it the notion of a

bargain into the future. Rights could be created between individuals for a future performance. What counted was the responsibility of an individual to keep trust with another. Significantly, the rights outside that territory on the high seas and between nations remained limited, if they existed at all.

This new English world of the rule of law and the growth of rights, even as parody, was limited by its historical approach to law and the discovery of rights in the inherited law that had supposedly been overthrown by the imposition of the Norman yoke. It limited the notion of rights to a rediscovery of those of the national community, past and present. It thus reduplicated the structural inequities of the existing system. This, no doubt, suited the new merchant classes who were identified as the source of national well-being in public and private documents.

In reply to the question "who has the right to reason about rights?" English common law placed the discovery of rights in the hands of a new class, lawyers, who replaced the old monopolists of what was just, the priests and monks. Lawyers were beneficiaries of the expulsion of the latter and destruction of their riches, and usually adhered to the new Protestantism. This meant that they were not immune from the influences coming from the cult of reason of the latter, at least in its less rabid forms. The sixteenth century thus also became a century of a battle between those who thought that not only rights but also justice were discovered by an appeal to received tradition or history, and those who thought that they were discovered by reason and an appeal to natural law. The first approach tended to place decisions about justice in the hands of lawyers, the second in the hands of philosophers. In Britain, the first won and France the second, with Holland in an intermediate position. We consider British developments at length in the next section as developments there are most significant and served as a model for other countries in the eighteenth century. Dutch and French developments are discussed after that, the French mainly in Chap. 4. They are more important for the history of *universal* human rights than developments in England, which blocked their emergence.

The Common Law

The history of England in the seventeenth century was marked by the triumphant assertion of a national community's right to make the laws that suited it. We thus arrive at the beginning of a first model for achieving human rights. It builds on the view that rights and justice can be attained when the people as a whole, the national community, together with the monarch, is sovereign. This was usually seen at the time as requiring not direct decision-making by the populace but a government for their benefit and, in the case of England, entrusted to their representatives. But in seventeenth-century England, there was also raised for discussion the important question of who concretely decides what a right is, who has a right to speak or discuss such things? After all, it is one matter to say that the state can only create a right with the assent of the people as nearly all the Tudors did, or for those monarchs to say that they did so, having the best interests of their people at heart. It is entirely

another for that people to tell the monarch what is acceptable "in the national interest" and what is not.

A strong notion of individual human beings as subjects with rights had emerged in the English bourgeoisie by 1603, after Elizabeth died. Thereafter, they increasingly arrogated to themselves the right to discuss and make laws through parliament, laws supposedly made in the interest of all according to values then officially held by Protestantism. The adherence of the mass of the people, whom they claimed to embody or represent, to that system was to be obtained in theory and in practice by what I will call an "admission" policy. All who belonged to the people had equal rights before the law as their birthright. I note that this does not mean equal rights in the law. Individuals outside the people, by definition right-less, could seek admission and acceptance into that privileged group. It was obvious to the burgesses of the seventeenth century that a prerequisite to having rights was to be part of the national community. For those seeking to enter the territory corresponding with the national space, what mattered was how easy this was to do. Put another way, how high were the barriers set by "their" parliament to those outside seeking entry? The doorways to admission were many but they can be summed up as showing in thought, word and deed that the person seeking entrance belonged to the national community, merited belonging to the "city", in sum, could be a good citizen. Their status was obviously different from those already deemed part of the people since it had to be granted them, where the rest had it by right. What exactly "people" meant and who exactly it comprised became important, as did, consequently, those who controlled the mass understanding of the national identity. Those authorised to speak about the national history and able to decide what it was to be English, what the national character was, became of key importance. Eventually, the implications for human rights of that debate about the national identity and the meaning of its terms became clear in the American colonies.

In the 1500s, the average man – still usually a peasant – did not often support or adhere to the capitalist values of the burgesses and townsfolk. Moreover, only a minority were Protestants. Most Dutch and English reputedly supported Catholicism until after the middle of the century. Protestants worshipped in private. Nearly always, the towns encroached on common and other land and their main source of wealth, wool, led to enclosures of land throughout England. Popular literature is a litany of complaints about this process and hatred of the classes doing it. It is accompanied by a pathetic nostalgia for a rural England that was being transformed by private property relations. An early sixteenth century poem runs:

> Commons to close and keep,
> Poor folk for bread to cry and weep,
> Towns are pulled down to pasture sheep:
> This is the new guise.
>
> Envy waxeth wondrous strong,
> The Rich doeth the people wrong,
> God of his mercy suffereth long
> The devil his work to work
>
> The towns go down, the land decays,
> Of corn fields, plain lays

Great men maketh nowadays
A sheepcote in the Church (Hampton 1984, 90).

Another spoke of the drain of all substance from "farmer and poor to the town and the tower" (ibid: 97).Great numbers of people became jobless. When Kett's rebellion took place in Norfolk even a hostile description had to report that what drove it was: "The lands which in the memory of our fathers were common, those are ditched and hedged in, and made several" (Ibid: 113).

On the other hand, many peasants had been getting richer over the previous generation and some had risen to high office and been admitted to the new "historic bloc". Hugh Latimer was a striking example of this. He was a leading Protestant cleric, Bishop of Worcester, who alternately was in and out of favour with Henry VIII. Perhaps it was the bluntness that we see in his sermon preached before Edward VI (who succeeded Henry VIII on 8 March 1549) that got him into trouble. He started by stating that his father had been a yeoman (before 1485, when Latimer was born) and that with his small holding he then ran 100 sheep and 30 cows and provided work for "half a dozen men". He sent his son to school "else I had not been able to have preached before the king's majesty now". He had money to spare for his family and for charity. But the farm that then cost 4 or 5 pounds rent cost four times that by 1549 and there was nothing to spare. Latimer warned the king not to take so much or the yeomanry would no longer be able to educate their sons to rise in the world and it was on them that "the faith of Christ hath been maintained chiefly."

While few would have risen to Latimer's eminence, which eventually saw him burned at the stake, great numbers bought land expropriated from the monasteries. James Harrington could write in 1659: "The lands in the hold of the nobility and clergy of England, till Henry VII, cannot be esteemed to have overbalanced those in the hold of the people less than four to one. Whereas in our days, the clergy being destroyed, the lands in the hold of the people over-balance those in the hold of the nobility, at least nine in ten" (cited in Wootton 1986, 399).

So there was increasing class differentiation in the country despite sufficient numbers rising in economic condition and social status to have a stake in society as it was and to support the proffered notion of the people. Only in 1648 was the question first broached whether the people themselves should decide on the law and rights in a democratic system rather than have the magnates and burgesses decide for them what rights the nation should have. This was the most important development in the history of human rights to this date.

The Dutch Model

In the seventeenth century, England offered the most advanced model for obtaining human rights for nationals. By the eighteenth century, European progressives pointed to it as the path to follow, and complacent Britons even in the nineteenth century claimed it was the only country in Europe that was not despotic (Macaulay 1980, 19). However, seventeenth century Britons had themselves had a model, the

system already affirmed by the Low Countries, whose principles are summarised in what has been called the Dutch Magna Carta, The *Short Exposition of 1587* (van Gelderen 1993, xviii; see also Israel 2003, 105–63; Israel 1998, Introduction, chs10–12). This document was a rebuke to Queen Elizabeth of England, to whom the Dutch had turned for help as a fellow Protestant monarch but who had revealed her absolutist nationalism in her dealings with them.

It stated that for 800 years the ruling counts and countesses of the Low Countries had been charged by the nobility and burgesses with the government of Holland and Zeeland and no policies had been adopted "without the advice and consent of the nobles and towns of the country, each being then convened and assembled [as States]" (van Gelderen 1993, 230). Princes could do nothing without these states and when they abused their power they were removed (van Gelderen 1993, 231–2). So, in the last instance the states were sovereign. They were more than the 30 or 40 people who made them up. "To ascertain the origin of the authority of the States, it should be realised that the Princes who have ever legally governed, not only started their government at the pleasure and with the approval and consent of the inhabitants, but have also continued to govern in such a way that all members of the body, at whose head they were established, remained inviolate, unreduced and uncurtailed" (van Gelderen 1993, 233). These inhabitants were divided into two estates, nobles and towns, only the first having that right by birth or seigniorial right. The towns were governed by notables in councils that were as old as the towns themselves "for there is no memory of their origins". These councillors were only on oath to the town, not to the prince. They served while they had citizenship or were replaced by the council "at its discretion". These councils appointed all administrative and legal officers and administered justice. "Normally the college of aldermen meets to administer justice in criminal as well as civil cases. Their oath is to promise to administer right and justice in accord with their own conscience, to which they are admonished by the officer or the Lord." The prince never interfered although he appointed the bailiff who carried out their judgments.

So, together nobles, councillors and magistrates "represent the whole state and the entire body of the inhabitants" (van Gelderen 1993, 235). They ruled through deputies who were convened to deliberate on "notable affairs". Thus, in times of war, the delegates had always received a general charge "to advise and resolve upon all the matters concerning the welfare and preservation of the state of the country…in particular to maintain the rights, freedoms and privileges of the country and to avert and resist all infraction. Thus, united with each other, these delegates represent the states of the country .They are not the states in person or on their own authority; they represent their principals only by virtue of their commission" (van Gelderen1993, 235).

The *Short Exposition* asserted that in 700 years, citizens had never opposed or rebelled against their decisions, above all because their proceedings were totally transparent. Deputies could bring as many from the town councils as they wished to any meeting. It was folly and treachery to oppose such a system. If a prince did so he would go against his "very People" who were embodied as a "community" in the states (van Gelderen1993, 237). The states and popular sovereignty were one.

This was a succinct statement of social contractarian constitutionalism made nearly 100 years before the similar development in England. Its contents were

sometimes "pious hopes" and it sinned in claiming undivided popular support. The country was then emerging from a typical feudal regime, and the nobles and burghers had gone into alliance precisely to contain popular excess by Calvinists.

The lords of the Low Countries – as bloodthirsty, brutal and luxurious as any others – had paid homage to distant overlords for centuries. The latter had conceded rights to towns in charters and these had passed into convention. A historically symbolic charter was granted to Brabant in 1356, to which the monarch swore fidelity on taking power in a "Joyous Entry". Vlekke describes it thus in his classic history of the Dutch nation: "When Wenzel of Luxemburg succeeded on the ducal throne, the States of Brabant forced their ruler to grant a great charter…the Joyeuse Entrée was a formal contract between the princes and the States with clearly defined rights and duties on the former. The Prince swore to preserve the integrity of the State and its 'national' character, to refrain from appointing foreigners to office; from alienating any ducal revenue and to recognise the authority of the States in matters of taxation." Finally, the charter gave the states the right to revolt if the prince broke his oath and violated the agreement (Vlekke 1945, 65). In fact, Brabant had the whip hand because its bankers funded the prince. While they continued to do so, they remained more powerful than he was.

In 1555 all these little principalities and counties saw their overlord, Charles V, the Hapsburg Emperor, abdicate in favour of his son, Phillip II of Spain. Charles V spoke both French and Dutch, languages that were then becoming established in place of the dialects and linguistic fragmentation typical of feudalism. His lords wept at his departure. Phillip II spoke no Dutch. He was much more "foreign".

Charles V had condemned Luther's works at Worms in 1521 and brutally opposed the peasant revolt in Germany. But in the distant Netherlands, a practical tolerance had prevailed. The new overlord, Phillip II, intended to extirpate all "heresy". In edicts for the Netherlands he ended the latitudinarianism and the episcopacy that had allowed it. Against tradition, he replaced the bishops with his own men. In following years there began a campaign summed up in a famous description of the time: "From the very young infants they pulled their hose from their legs, they deflowered by course one after another…the chaste matrons and virgins, and at length in most cruel wise set them to open sale. At the sound of the drum they put many to death, burning them little by little with small flames, and with their swords opened the wombs of matrons great with child" (*A Defence and True Declaration of the things lately done in the Low Countries* [1571] in van Gelderen 1993, 44).

This suppression of "heresy" showed little change from Christian treatment of heretics and Muslims in earlier centuries. It would continue in yet worse slaughters during the 30 Years War (1618–48) of religion in the next century. Victims made the usual supplications and appeals to the states, reminding Phillip that he had sworn to accept their power in his Joyeuse Entrée in 1549. This got nowhere and they forced to rise in self-defence, as allowed by that pact. The nobles and states of the southern principalities (roughly today's Belgium), nearly all still staunch Catholics, were fearful of the Protestant rage which then expressed itself in an iconoclastic fury – Church relics and images were thrown out and burnt. But the *Defence* reminded them that the population expected the states to defend the rights and liberties established for

centuries and "all the ancient laws and customs of the kingdom". Initially, they preferred to support Phillip's viceroy in a brutal suppression of the Calvinist "beggars", hoping he would go no further.

Phillip and his deputy the Duke of Alva were not satisfied. He was a feudal monarch from a country whose culture would remain feudal until the late nineteenth century and he intended to become an absolute monarch. He decided to end the traditional system of rule. This finally turned the towns and nobles against him and changed the religious dispute into a war over political systems, provoking a fierce local assertion of a republican social contractarian vision of rule and rights. To protect their traditions and their very lives, princes like those of the House of Orange were forced into adopting this view (van Gelderen 1993, xix). Thus began the rebellion of the local lords, hitherto loyal to their overlord. An appeal that was made to them in 1576 to unite to defend ancient privileges contained the following proposals. It reminded them that to defend the "fatherland", a nationalistic term more and more in use, they should unite with Holland and Zeeland against the "stranger" and "resurrect the old privileges and laudable customs of the country"… just as "they had been left us by our ancestors". Provided they were tolerant of the Calvinists, ("the beggars who seek loot and booty") they would bring peace to the fatherland and to the monarch. The traditional rights of the states should be maintained by "all possible means". Never, it reminded the public, had the Netherlands been under the rule of an absolute monarch but

> on the contrary, the country has always been managed and administered, with right and justice, through a republican or rational civic policy, in such a way that the lord of the country has been like a servant and professor of the country's rights, laws and regulations. Indeed, like a father of the fatherland, whose task it is to serve all, be they rich or poor, noble or common, with equal laws, justice and judgement. The lord should tend the communities like a shepherd, governing not at his pleasure or will, but following the precepts of their rights, freedoms, privileges and old customs, by which he swore most sacredly upon his arrival, and by which he was inaugurated and accepted, committing himself with a grave oath not to deviate from them in any point, and especially never to do anything at will, but everything by right and order (van Gelderen 1993, 81–5).

This document laid claim to a continuity with rights in a long list of feudal charters back to 1354. It was a constitution that guaranteed traditional national rights, but it added greatly to the list of parties and beneficiaries to the contract. Rule remained through a representative body but it was on behalf of the generality of the community: "to defend and advocate the privileges and rights and freedoms of the community and the country in every possible way, without any connivance or regard for persons." The distance from the feudal relations between "persons" was enormous. The states of nobles, townsfolk and clergy listened to arguments from all interest groups, not just some, to "everyone's opinion and advice", and transmitted these views to the monarch in accord with the "common good and benefit". Their jurisdiction covered foreign affairs and war, and all changes to law and taxation, which was never raised without their consent. Under this rule, all individuals would be treated in "accordance with the right of his town" and "by right and justice" (van Gelderen 1993, 85–93).

Moving to an exhortatory tone, the *Appeal* asked what "our forefathers would say" if they saw the Spaniards looting, raping and extorting? They would have opposed such "infractions" by "strange nations". The document stated that when called on to observe the Joyous Entry, Phillip had replied by murdering the leaders of the nation and making edicts without their consent. Under his arbitrary rule he had handed over offices to "foreigners" and "those whose hearts are estranged from the Fatherland". This was intolerable. The estates should unite and lead resistance, to bring the king back from such "foreign tyranny" to reasonable policies. It said that to the monarch should be rendered what was his and "unto the community the things that belong by right to the community."

Yet despite its fiercely exclusionary nationalism, the document was not radical. The author and the estates seemed to have difficulty imagining a polity without a monarch. When, in a dramatic innovation, they decided in 1581 to renounce allegiance to Phillip, they still went in search of another monarch. It was also not democratic, only tiny Frisia having a semblance of democracy in its polity.

The Spanish reaction to such views was furious and forced the estates into ever more radical positions, especially to a tolerance of Protestantism. They knew that they had to unite with Holland and Zeeland and the House of Orange, Protestant areas. They wished to contain the Calvinism but it was growing and the House of Orange increasingly aligned itself with that force. Southern lords knew that the Spaniards would be difficult to beat and the only real success came from the Calvinist maritime provinces where seafaring traditions were strong and the Spanish relatively weak. "The Duke of Alva may have boasted that he would fry them all in the butter of Holland, but forsooth, he has not yet been able to eat very much of the fried fish" ("Address and Opening to make a good, blessed and general peace in the Netherlands, and to bring them under the obedience of the king, in her old prosperity, bloom and welfare. By way of supplication" [1576] in van Gelderen 1993, 117).

To summarise what ensued, the Spaniards conducted a reign of terror with "unspeakable horrors" (Geyl 1970, 102). This united shilly-shallying burgesses and militant Calvinists in a war of attrition with many truces (that after 1609 lasted 12 years). Finally, the Spaniards were beaten into accepting formally what the document demanded, though not until 1648 did they give up all claims to the Low Countries. By then the military leaders and in particular the House of Orange had emerged as a rival force to the estates. The two groups see-sawed in the struggle for dominance. The constitutional republican view dominated under Johan van Oldenbarnevelt until he was judicially murdered by the accomplices of the House of Orange in 1619. The republican middle classes were more tolerant while the followers of Orange, fierce Calvinists, and of the popular classes murdered Catholics with as much savagery as the Spaniards had killed Protestants. William of Orange officially adopted the states' view, but his real object was the "restoration of the Fatherland in its own liberty and prosperity out of the clutches of the Spanish vultures and wolves" (Geyl 1970, 130). He put religious bigotry at the service of nationalism.

In sum, by the seventeenth century, the Dutch had provided the world with the first model of a national-popular state. It was based on religious intolerance of Catholics. Its primary object was revealed in the treaty with the Spaniards.

This guaranteed Dutch freedom to trade and the high seas. This, at least, was a goal shared by burghers, nobles, princes and commoners and as it made Holland rich and prosperous after years of internecine warfare. In 1639 the Dutch destroyed a Spanish armada and, despite occasional challenges by the British, became the world's greatest maritime nation until the end of the century.

Geyl notes that what took place was like Italian Fascism, the important novel movement of his own day. Self-appointed "active citizens" simply identified themselves with the nation (Geyl 1970, 143; see also Vlekke 1945, 162–6). It was no democracy: 10,000 people ruled the Low Countries, but they secured support for a polity that looked less and less like that of the *Short Exposition* as the century progressed. A symbol was the triumphant Admiral Ruyter who rose from cabin boy to burgher merchant (see Ogg 1949, 422). Under John de Witt the burghers flourished and there was a late blooming of the Dutch civic republican tradition in 1653–72 but already the undermining effects of nationalism were clear. In 1672 he and his brother were assassinated by a mob manipulated by the Orangists who played on hatred of the secret agreements made by the de Witts in negotiations to avoid conflict with both Britain and France. These excluded the head of the House of Orange forever from the dignities of his ancestors, precluding an absolute monarchy of the sort to which William III aspired. The overthrow of de Witt left the United Provinces under William III of Orange. Ogg (1949, 434) writes: "In the years 1678–1688 William was an absolute monarch in all but name". The Dutch model no longer existed except as memory.

The triumphs of the Dutch and their national-popular model for obtaining rights were not without contradictions. Its evolution hinted at internal contradictions in all such politics. It had started by adopting old traditions that were national and harnessed to them popular support for new principles. Emblematic was the vaunted Dutch tolerance for others' religious beliefs advanced in 1572 as policy to unite the nation. Certainly, the polity did improve well-being and the Protestant burghers excluded by the Spanish (and later French) were attached to the national cause. Minorities like Jews were accepted in an unprecedented way, the first synagogue being erected in 1597 (see Vlekke 1945, 185–6; Boxer 1977, 129–31; Israel 1998, 376–7, 500–2).

But it was a rabidly nationalistic model and rights for nationals its main object. Tolerance for Catholics ended when Oldenbarnevelt was murdered. The Orangist version of "popular Calvinism" was vehicle for the sort of prejudice that allowed the murder of the rival de Witts. Like all systems that appealed to traditional rights and customs, it continued the hierarchies of Dutch law, where equality before the law did not mean equality in the law, as minorities discovered. Worse, it systematically preserved torture as a traditional judicial procedure. This created *causes célébres* like the Amboina massacres of 1623, in which Britons and others were mercilessly tortured for alleged plots against the Dutch. The fierce defence of freedom of the seas and trade disappeared entirely once the Dutch ruled the seas. In many realms, rights were for Dutch only.

The English ruling class and radicals followed Dutch developments closely. When Phillip was deposed, the Dutch turned to them for help as another Protestant nation. In 1585 the Earl of Leicester was invited to become governor-general of the

Netherlands. He ineptly aligned himself with the Utrecht-based democratic party against the aristocrats, provoking the *Short Response* discussed above and had to be recalled. The seventeenth century thus began on a sour note and would be marked by a long hostility and maritime rivalry between the two Protestant states. At first, success went the Dutch way but finally the British were the victors, the former losing their North American possessions and meeting economic disaster in Brazil as they lost republican élan (Boxer 1977, ch2).

The British Version

England replaced the United Provinces as the exemplar of the social contract model for attaining rights that the Dutch had pioneered. In 1647, English Protestant radicals proposed for the first significant time that the national-popular way to rights should be democratic. This, they said, would overcome the inequities in the law that had existed when others claimed to rule on their behalf, whether the king or his parliament. While the proposal was rejected and its proponents harshly repressed, it raised an ongoing problem resolved only in the French revolution in 1789, Without democracy, how could there be for all nationals not only equal rights before the law but in the laws?

In 1603 James VI of Scotland had become James I of England, succeeding the childless Elizabeth. In a world where the ruling view was that "subjects were bound to obey" and Satan was behind any rebellion against the monarch, James emphasised the monarch as "a father to his children". He was the head and they were the body. Like a father, he had obligations to them and they had the duties of sons towards him. Adopting the argument of the social contract, James argued that just as a monarch could not take back anything lawfully granted, so subjects could not deny what was lawfully his. Be he ever so tyrannical, rebellion was a private injustice against the lawful magistrate. All humans could do was pray to God for some one better, as any king was better than none. Were there no king, there would be no law at all (*Trew Law of Free Monarchies* (1598) in Wootton 1986, 99–106).

But James' emphasis on the rule of law as the outcome of a social contract between monarch and subject led him to concede, against the claims of right to arbitrary decision of the absolute monarchs, that "no man …will doubt that of all law of any nation, a contract cannot be broken by one party…except that first a lawful trial and cognition be had by the ordinary judge." In the case of tyranny, only God could judge. A king would be judged in heaven for breach of the contract that he had made with his people on his coronation "binding himself…to the observation of the fundamental laws of his kingdom." A king who ruled without regard for law and justice was a tyrant. So all kings should abide by the laws of the realm. James concluded: "I will not be content that that my powers be disputed upon. But I shall be ever willing to make the reason appear of all my doings, and rule my actions according to my laws" (*The Address to the Lords and Commons* [1610] in Wooton 1986, 107–9).

James had taken a fundamental step in the history of rights: all power was under the rule of law. To know those laws he placed himself under, he referred again and again to his judges. Led by Sir Edward Coke CJ, they had not only claimed since at least 1602 to know and be the sole legitimate interpreters of those laws, but also in a series of cases between 1608 and 1612, they made clear that only judges learned in the ancient laws of England could state what they were. Such knowledge required a vast legal historical knowledge. According to famous words Coke uttered in *Calvin's Case (1608)* and in the *Case on Proclamations (1612)*, law and justice could never be arrived at by natural reason, as James claimed, but only through a knowledge of the national patrimony of wisdom found in all the cases that had been decided since time immemorial (*Calvin's Case* 7 Co Rep 2, 77 ER 379; *Proclamations* 12 Co Rep 74; Wootton 1986, 143–5). While James did not like this advice of Coke and sacked him in 1616, the consequences of the dispute were far-reaching. A king might ultimately be answerable to God and to rule by Divine Right but if he was also under the laws, the judiciary asserted this meant under his judges' advice. James wriggled and twisted but could not avoid the implications of his social contractarian premise. It created a rule of law, that of a father of his people. Rights were embodied in national law and not in state reason.

English lawyers argued that their national common law was the "most perfect" and the best for any society. As Sir John Davies stated in 1613, "it is so framed and fitted to the nature and disposition of this people, as we may properly say it is connatural to the nation, so as it cannot possibly be ruled by any other law" ("Le primer report des cases et matters en ley resolues et adiuges en les cours del Roy en Ireland" in Wootton 1986, 133). It would seem to follow that it would be inappropriate in other cultures. But Davies simply asserted that those laws (down to being expressed only by those trained in English Inns of Court) were good for Ireland as well.

It is, however, undeniable that after James, the primacy of a rule of law based on national tradition opened up the possibility of rights for all within the jurisdiction of the English realm. Under Charles I, his successor (1625–49), who wished to be an absolute monarch like Louis XIV of France, James' half-concession that the rule of law was paramount and the king himself under it, became extremely important. Charles attempted to raise money for his wars without the consent of parliament. Such levies, notably that of forced loans adopted in 1627, were resisted on the grounds that they were illegal. When he imprisoned the recalcitrants, the courts pusillanimously upheld his right to do so. Courts could be, and were beginning to be, packed by yes-men. This was a political solution to the assertion of the courts to decide all rights and it put the latter into a clearly political realm. Practically, rights are decided by who has power.

This forced an ulterior development in the social contractarian tradition. Where it had often been asserted that the common law overrode the laws passed in parliament, the failure of the courts to defend the "ancient rights and liberties" they proclaimed, drove parliament to assert itself against the monarch as the place of power where rights were ascertained. Its Petition of Right (1628) to Charles marked a milestone in the history of obtaining rights for nationals. The petition was about the "divers rights and liberties of the subject". It asserted that no tax could be

raised – and no one could be imprisoned for failure to pay – without the consent of all the freemen of the realm, that is, those embodied in their representatives. Charles had breached Magna Carta, ss 39 and 40. parliament thus resuscitated that document as a source of human rights.

Charles foolishly ignored the petition and its contents, continuing to flout the established law and rights of parliament and freemen. This united the lords together with the middle class on whom national unity had been built over a century. A series of disputes, often leading to Charles' arbitrary imprisonment of his opponents, finally resulted in a civil war of extreme bitterness in 1640–45. In this war the nation divided over the kind of polity that should exist, with more extreme Protestants, the Puritans, supporting the parliament's claims to state what rights were. Charles was defeated, put on trial and executed (see below) by the supporters of parliament and the social contract.

Almost immediately their unity disintegrated as argument about the nature of the social contract and parliament's place in it broke out. Many soldiers felt that they should elect the members of parliament and that democratic voting rights should be introduced to allow that. In 1647 they adopted an Agreement of the People whose core, radical proposal was that parliament should be chosen by the people every 2 years. This would make the people sovereign and truly the source of rights. Although parliament would make and administer all laws, certain rights would belong exclusively to the people. Two are important in a history of *universal* human rights. The first was freedom of conscience and worship, and the second that all people were to be equal before the law regardless of birth, degree, estate, tenure or other attribute. These "we declare to be our native rights" (see Wootton 1986, 283–5).

An assertion that democracy was the source of rights and that there were certain equal inderogable rights for all nationals, does not seem to have had a contemporary parallel elsewhere. Clearly, both were understood within the social contract tradition. But the notion that power comes "from below" and should be enshrined in law, was completely novel. It was also unacceptable to parliament and its spokesmen, the Protestant leaders of the revolt against Charles. A debate was hastily convened by them to discuss both claims to democracy and to human rights. The issues were discussed at Putney and Whitehall late in 1647.

The progressive democrats thought that all Englishmen had by birthright the right to choose the representatives who would make the laws, while the conservative constitutionalists argued that only those with property, or an enduring stake in the country, should have the right to vote. Colonel William Rainsborough expressed the first view in words that have become immortal: "I think that the poorest he that is in England has a life to live as the greatest he and…That every man that is to live under a government ought first by his own consent to put himself under that government; and I do think that the poorest man in England is not at all bound in a strict sense to that government that he has not had a voice to put himself under" (Woodhouse 1951, 53). His interlocutor, Colonel Ireton, backed by the leader of the revolution, Oliver Cromwell, replied that never in the history of England and its laws, that is, by the constitution that they had taken arms up to defend and sworn a solemn oath to adhere to, had such democracy been allowed. It would make all

humans, even foreigners, equal in rights with those born in England. Rights came by birth, but to vote a person had also to have shown by his permanent interest and property – be it ever so small – that he belonged and had the interests of the nation at heart. To Rainsborough's counter that God had given every man reason and that the foundation of all laws should be through the use of popular reason, Ireton replied that democracy and the application of the law of nature would give everyone right not only to govern but to share all material goods.

It became very clear in this debate that, like James against Coke, the progressives rested their case on the natural law and were deeply hostile to the national traditions of the Common Law, "an old law that enslaves the people of England". Indeed, one defined the Magna Carta (often the cornerstone of both judicial and parliamentary claims to ascertain rights) as tyrannical. The conservatives simply argued that divine law and the law of nature concerned generalities and could not be used in argument about particulars. Where the first argued that their case could be universally supported, the latter replied that it would not be acceptable in the particular historical and social context of Britain. There was much discussion of the rights that a foreigner might have. The progressives argued that a stranger should have the same rights as a native if he wished, thus placing himself under the same government as the latter (Wootton 1986, 298). Ireton agreed that foreigners should not be repelled or killed out of hand, but insisted that they were guests subject to the laws of the country although they had not made them (Wootton 1986, 298).

We here face one of the major contradictions of even democratic social contract theory: even if free entry is guaranteed, the social contract must deny a different voice to outsiders. There can be either submission to the one majority law of the democratic parliament, or acceptance of the laws of the already-constituted undemocratic majority. This affected claims to religious freedom.

If the leaders would have no democracy, then they were doubly adamant that they would have no freedom of religious belief and expression since that could lead to disunity and disorder. In vain, the progressives argued at Whitehall that in the Netherlands, tolerance, even of Jews, had not led to national disunity and communitarian strife but reinforced the peace and well-being of those communities. Relying on the Old Testament, Ireton and his allies insisted that whatever a person's intimate beliefs, never had there been freedom to express those views, or freedom of worship. Like all other realms, religious expression had always come under the control of the magistrates, who subordinated it to the overall interests of the people. Again, the progressives countered that there was nothing in the New Testament and Christianity that excluded tolerance and that Christians could no longer simply kill Turks and Jews as they had been enjoined to do (Ireton asked rhetorically whether this included idolators?) and that intolerance was what had caused the Civil War. Indeed, the Bible was not a source of right in all matters as the story of Abraham and Isaac showed. But the conservatives stated that what was a sin in the Old Testament remained a sin in 1648 (Woodhouse 1951, 142–64). Again they divided on the source of authority; for the conservatives it was in history and the Bible, and for the others, it lay in reason. No magistrate could look into another person's mind.

Ideological battle lines had been drawn. A temporary compromise was reached that left most power in middle-class hands but proposed an extension of the franchise. Part of the army became so menacing that Cromwell had the parliament purged, he stacked both parliament and the judiciary with supporters, and declared laws disbanding the dissidents and making their democratic positions seditious. He had the king condemned to death and executed in 1649 (we discuss this in detail below). After a 4-year Commonwealth, he was proclaimed "protector" by his parliamentary stooges, assumed a dictatorial role and for nearly a decade engaged in repression of all oppositions. Though parliament was declared sovereign in 1648, in fact nothing like human rights existed any longer for outsiders. The tyranny of 1653–60 was so much worse for them than what had preceded it, that some of his opponents at Putney conspired against him and openly schemed his assassination. One was Edward Sexby (William Allen 1616–58) who at Putney had stated: "There are many thousands of us soldiers that have ventured our lives; we have little property in the kingdom yet we have a birthright…" He warned that he would give it up to no-one (Woodhouse 1951, 69–70). In 1657 he wrote *Killing Noe Murder* to Cromwell with the warning that he should be killed as "in the black catalogue of high malefactors few can be found that have lived more to the affliction and disturbance of mankind than your Highness" (Wootton 1986, 361). Sexby was caught and died in the Tower.

For internal outsiders, pleading the Protestant view that they had right to think for themselves about justice, there began a reign of terror. Roman Catholics would have expected that and in Ireland in particular Cromwell's reign was as repressive and bloody as any we have discussed. A third of the population was either killed or sold into slavery after a brutal military campaign led by Ireton and Edmund Ludlow. In Green's measured words: "No such doom had ever fallen on a nation in modern times as fell upon Ireland…" (Green 1920, 590). But as the army became "our jailers" (Sexby) (Wootton 1986, 362) in England, the victims of a reign supposedly in defence of the national patrimony and rule of law – this was incessantly stated as its rationale – were other Protestants who refused to abide by the norms set by the Protectorate. The most simple of these was compulsory attendance at church and adherence to certain fundamental tenets already laid down in Articles of Faith. Moderate Presbyterian, usually middle-class, views were acceptable but for the others there was persecution. Eight thousand were jailed, 1,500 executed for their beliefs. For many there was the avenue of flight to the Netherlands or to North America, like that chosen by those escaping from Charles I's Anglicanism. Notable among the latter were the Pilgrim Fathers on the *Mayflower* in 1620. We discuss the most significant group for human rights, the Quakers, below.

So hated was Cromwellian rule that in 1660 Charles II was welcomed back as king despite his Catholic sympathies and aspirations to be an absolute monarch. The next 30 years and in particular the decade 1679–89 saw a continuation of the unresolved dispute about parliamentary sovereignty. The reasons given for parliamentary claims were that it represented a nation with shared values, and legal and political traditions. With each success it had, outsiders were excluded more and more as threats to a national hegemony. The principles it proclaimed masked an

extreme religious bigotry resulting in sham trials of supposed Catholic conspirators and bloody repression of any opposition. In 1689 it was established that parliament was sovereign, that it represented the nation; and that the monarch henceforth would only be accepted on its terms, the fundamental of which was that he or she should never be a Roman Catholic. Significant claims to democracy disappeared for a century after 1689 but a national hegemony around parliamentary sovereignty was carefully established.

Belonging to the Church

A continuing problem for monarchs like the Dutch Maurice of Nassau and Henry VIII, who had decided to build their fortunes through an alliance with Protestant burghers, had been that those burghers were "justified by faith alone" and found it in a personal reading of scripture. In 1576 the Estates-General of the United Provinces had urged this. The people thus could arrive at views of morality that were different from that of the monarchy and the state. This could lead to opposition, and, God forbid, sedition. In most cases, there was no problem with the majority; it was browbeaten or bought into conformity. But the job of keeping them acquiescent with the social contract as the monarch understood it was continual.

One example of the dangers of independence of mind was William Tyndale (1496?–1536). Tyndale had been influenced by Erasmus. Intent on giving a "ploughboy" the knowledge of a cleric about morality, he translated the Bible into English and had it printed in 1525 at Worms. On its arrival in England, it was seized and burnt on the orders of the Bishop of Tunstall. But it rapidly went into three editions and sold 18,000 copies. Its readers were from the poorer classes and an intellectual group, the Oxford Brethren, who disseminated its contents. In 1536 Tyndale was captured, strangled and burnt in Brussels on Charles V's orders. Tyndale derived a strong moral view from scripture. He separated humans into sheep and goats, and condemned Mammon in a pamphlet in 1528. It was the cause of "fighting, stealing, lying await…and all the unhappiness". It was unrighteous because it was not used "unto our neighbour's need". Such views were inimical to the social contracting parties. But it struck a chord among the poor who saw common land enclosed as the commercial classes and towns encroached on the countryside while in England the price of foodstuffs increased an estimated 110% in 1500–1550. At about this time a curious new alliance of rural poor and their lords emerged in England, Holland, France against the "town" and the exactions of state (see Ladurie 1987b and Edward Hall, "Chronicle A History from Henry IV to Henry VIII" [1542] in Hampton 1984, 106–7).

So with the growth of wandering hedge preachers and *predikanten* promulgating all sorts of views, the population could and did get out of hand on several occasions. One of the first ways to contain such effects was to establish a national church from whose prayers and rituals no clergyman was to depart and which would be the only public expression of belief, denying freedom of conscience. Starting in Edward VI

reign (1547–53) and again under Elizabeth and the Stuarts, all clergymen and others with moral authority had to subscribe to 39 articles of faith and to follow the Book of Common Prayer. In Holland, the principles of the Calvinist Counter-Remonstrance had much the same function. In England, the King James Bible (1612) was made the official "scripture" and in the United Provinces, the "Staten" Bible (1619) replaced the "ill-translated" versions that existed (Vlekke 1945, 194). In both the "Lutheranism" was expurgated.

Uniformity of Protestant ritual and teaching was imposed in England by acts (1548, 1551–2, 1558–9), nearly all of which contained an oath to be sworn by all clergymen, professors, lecturers, teachers and professional men not to engage in any seditious utterance or deed against the monarch. The hegemonic objects were clear. According to the principle of *cuius regio*, Protestantism was certainly established, but what it taught would be clearly defined by the authorities on pain of sanction. The problem by the seventeenth century was that there was severe tension between that project, stated repeatedly to be what was required for integration of individuals into the national community and to have rights, and the core authority accorded to "scripture" rather than the church by most Protestant doctrine.

When parliament replaced the monarch as the expression of the national-popular view of rights, it did not introduce laws that allowed any liberty or rights to those who disagreed with its views. In many periods it regressed from what had been earlier tolerated. The terrible series of religious wars, both civil and between states that lasted until 1648, saw Protestantism hack out a space for itself through the adoption of a national-popular politics. In the first stages of its success, it banned Roman Catholicism but appeared ready to tolerate many different Protestant views. Then the growing tension between the poor and the merchant classes led to emphasis by each on different parts of scripture; this led to repression of minority Protestants who would not follow the national church expressing state ideology. This was clear in the Putney debates and under Cromwell in ways we discuss in detail below from the point of view of outsiders. Thereafter, nothing changed with regard to freedom of belief. Control in the name of the national-popular tradition became more severe.

In 1662 under the new Act of Uniformity, this oath was administered to all clergymen: "I, AB, do here declare my unfeigned assent and consent to all and everything contained and prescribed in the Book of Common Prayer and administration of the Sacraments, and other rights and ceremonies of the Church, according to the use of the Church of England" (14 Charles II, cap iv, sec IV) .To that oath was added another that any attempt to change the government was unlawful (sec IX). Such oaths make clear that freedom of conscience and expression was forbidden even after the principle of a polity based on the direct representation of the people had been won. By the second Conventicle Act (1670) even private meetings for religious purposes were banned as was any moving around to preach. Failure by an authority to denounce and arrest those at such meetings brought heavy fines. This ended freedom of movement. Finally, there were the Test Acts (1673) that have been called "the Black Charter of Protestantism" and which effectively introduced censorship of all publications

(25 Charles II, ch II). Parliament passed a law overturning Charles' use of a dispensing power to allow Roman Catholics to take up official appointments.

The main object of all these repressive laws supposedly was Roman Catholic belief. Other laws were passed to exclude them from employment. But they also caught all Protestant Nonconformists. As with James and Charles I, Charles II strongly opposed this repression of opposition to the national-popular hegemony. At the Treaty of Breda that ended the war with Dutch in 1660, he had promised to tolerate those of "tender conscience" and in a number of declarations of Indulgence (1672-) he attempted to declare religious tolerance, hoping thus to encourage "strangers to come and live among us" and promising places of worship to all except the execrated Roman Catholics. But the mainstream and parliament, fearful that tolerance of Protestant minorities would allow Catholics a foot in the door, opposed these measures and Charles was forced to back down. His more headstrong successor James II (1685–1689), who was a Roman Catholic whom parliament had attempted to exclude from the succession, imprisoned seven bishops who refused to read a second declaration of indulgence. The courts ruled that the bishops' petition to him not to have to read it was not an offence (Howell 1816, XII, 183). In 1687 he declared "liberty of conscience" that "henceforth…the execution of penal laws, in matters ecclesiastical, for not coming to Church, or not receiving the sacrament or for any other non-conformity to the religion established, or for, or by reason of the exercise of religion in any manner whatsoever, be immediately suspended; and no further execution of the said penal laws, and every one of them, is hereby suspended."

Parliament was not going to have anyone challenge its sovereignty on any matter. James' open effort to tolerate Catholicism finally provoked the Glorious Revolution of 1688 and the promulgation of the English Bill of Rights of 1689. In the previous decade repression had become extreme. Kangaroo courts tried supposed Catholics, denounced by rogues like Titus Oates, and sent them to prison or executed them. Oates' perjury saw him temporarily imprisoned and then pardoned after the Glorious Revolution. The Whigs in parliament fomented a rebellion against the monarch in the name of the people. It was crushed and the bloody repression afterwards made Judge Jeffrey's name notorious. Jeffrey typified a new politicised Bench. He hanged whomever the dominant power holder wanted him to. Notable was Algernon Sidney whose work asserted that nothing was higher than the nation that parliament embodied. Throughout the reign of James II, parliament asserted that it did it all in the name of the defence of the nation against outsiders and alien forces. After the case of the Seven Bishops (1688) who had refused to read James' declaration of tolerance and had the court decide in their favour after the charges against them for sending a petition to the monarch failed, the map had been drawn up. A medal was struck to one of the Seven Bishops when they were released, which read: *Patriota Trimphans* (Taswell-Langmead 1886, 652 fn 3). Finally, attempts by the monarch to introduce some tolerance for Catholics united "the nation" against him and allowed parliament formally to declare him a traitor to the nation and to invite William III of the Netherlands, at least as repressive a monarch as James II, to become king of England.

The removal of the king was made in the Declaration and Bill of Rights of 1689. They recited his offences, took away his crown; listed parliament's powers and offered the crown to William subject to conditions that made parliament the real master.

The Bill of Rights

They were less a list of rights and freedoms than a statement of procedures that would have to be followed to obtain rights in England and Wales. (The separate Scottish parliament passed almost identical Act a month later: the king had "forfeited" his throne because of his failure to observe the law). The core claim was that the representative parliament, which represented the "freemen" of the nation, was the source of the rights whose meaning was decided by the courts relying on precedent. Rights could not be created in any other way. The bill affirmed that the state could not suspend or dispense with laws without parliament's consent; the king's prerogative could not be used to raise taxes or an army; that subjects could petition the monarch without sanction; that, if Protestants, they could bear arms; that the election of MPs should be free and freedom of expression in parliament guaranteed; that bail should not be too high, "nor cruel and unusual" punishment inflicted on anyone; that trial should be by jury; and that "all the true, ancient and indubitable rights of the people of this kingdome" listed in the declaration should be guaranteed by law and observed to the letter by the administration. These were not many. For the average man, they amounted to the guarantee of due process.

All office bearers had to swear fidelity to William and his queen, Mary. This allegiance to the symbol of the nation was not seen as a threat to parliament; it exacted from the new monarch a solemn promise that never would he or his succession be Catholic and that, if it wished, parliament could remove him. No foreigner could ever become king of England. It remains law in the realm to this day. In the Act of Succession (1700) that reiterated and confirmed this submission, the power of parliament was extended. No-one but a "native of this kingdome" could be monarch. Finally, the monarch could not pardon any offence under impeachment before the parliament. No person could ever leave England without its permission.

Parliamentary sovereignty was definitely established by the bill. Despite occasional rebellions fomented by velleitarian Stuart sympathisers, like that of Bonnie Prince Charlie in 1745, never again would its sovereignty really be challenged. In accordance with the common law, it was seen as a contract between monarch and the parliament, and henceforth the sovereign was technically the king-in-parliament, but its bias towards parliament was obvious. Striking is the exclusion of all foreigners, starting with the monarchy itself, from any claim to rights. Under William and George I (contradictorily, a German) laws were passed disqualifying any alien from sitting in parliament or from holding office of state. They could not hold landed property in the realm and were, if merchants, subject to higher taxation.

It was made virtually impossible for them to become citizens. For over a century they were subject to these rabidly exclusive nationalistic rules. All this was justified in the name of the protection of the English people.

It would be pleasing if there were evidence that the "people" or a majority of citizens did not agree with all these new rights for nationals only. But not only had they applauded the murderous decisions denying outsiders rights by a bench known to be packed and promoted by a corrupt parliament, but without them James would not have been so quickly and bloodlessly worsted. Even Puritan victims of the system made cause with all other interests to have him removed so great was their hatred of popery and fear of his attempts to allow freedom of worship. When the hapless Irish rose to reinstate James, William of Orange, already known for his brutality in the Netherlands, crushed them mercilessly. The Battle of the Boyne in 1690 was a mighty slaughter popularly celebrated in England as a national triumph. There followed, despite promises of tolerance, an occupation and ethnic cleansing that drove Irish off their land for the next century. Their poverty was such that by 1729 Jonathon Swift satirically proposed, after seeing the starvation in Dublin, that if some were kept back as breeders, their babies could be eaten. The genocide of the Irish was matched by that of the Scots in the highland clearances that followed the defeat of Bonnie Prince Charlie's supporters at Culloden in 1745. Again, the slaughter of highland clansmen as if they were animals was celebrated as a great English national victory. Then they were "cleared" off their crofts by the foreign victors.

The First Milestone

Despite these facts, the Bill of Rights of 1689 marked the first milestone on the road to universal human rights. It is still, despite historical revision of traditional rosy assessments of what it really signified (see Israel 2003), regarded as establishing that the way to rights was through a rule of law. Many individuals had argued for this before 1689 but it finally became constitutional law in 1689 when the rights of Englishmen were protected by the subordination of the king to a parliament that represented all Englishmen. It was further established that when such political arrangements existed – the sovereign becoming in the celebrated shorthand known to all law students as "the king-in-parliament" – *and* the laws it made were subject to interpretation by a "common law" developed over centuries, they could not but be for the benefit of all the people. It was the adoption of the principle that all men, including the sovereign being, were subject to the law. Astute observers have since noted that this did not mean more than equality before the law, not equality in the law. Indeed, the rule of law established with popular support in 1689 turned within a decade into the rule of law of a corrupt and bloodthirsty gentry who "represented" the people in parliament and had by the end of the eighteenth century created 200 offences for which humans could be hanged for trivial offences against the perceived national interest (Radzinowicz 1948, IV, 343).

Whatever its shortcomings compared with what had been promised by William III of Orange in his declaration; or its internal *contradictions* and rapidly demonstrated gap with political practice in England, not to mention Scotland and Ireland where its professions were so breached that they were laughed at even by contemporaries, it did set an ideal. This was given expression in the work of John Locke (1632–1704), who became the theorist of its hopes and potential. In his work, we see the positive dimension of the new rule of law, as well as limitations that would stimulate further developments to overcome them. In Locke's highly influential two *Treatises on Civil Government*, his main point was that in 1689 the source of all rights shifted to the representatives of a collectivity of individuals or a community, the people (which is not an assertion, as is sometimes argued, that they shifted to individuals *tout court*).

Just as the extravagant Anglo-centric claims made for the Declaration have been subject to critical revision, so it is now accepted that Locke was far from a believer in equal rights for all humans (Israel 2006). Indeed, he was a conservative and was favoured by conservatives of a moderate constitutionalist Enlightenment where universal human rights were concerned. He really could not and did not go further than a commitment to the common law allowed. We see this by comparing his views with those of his predecessor, Thomas Hobbes who, like the Stuarts whom he supported, is revealed to be more important for the history of universal rights than any protagonist of the people.

Neither Hobbes nor Locke could ignore the assertive irruption of the "people" onto the political scene in seventeenth century England .No longer were the latter a mere vagrant mob to be ruled by others; they were seen as the source of all political power. Their role had to be acknowledged and explained. Locke was a supporter of the parliament which was arrogating those rights to itself as representative of the people. So his object was not only to justify the rebellion of 1688 against a sovereign who no longer enjoyed popular consent, but also to shift the power to make rights to a parliament. For Locke the new political arrangements of 1689 rested on a social contract. Without the agreement of reasoning men they could have no legitimacy. But, Locke wished to assert that the "people's" power could only be expressed through the parliament that represented it. On the other hand, he asserted that their consensus in the political system had to be ongoing .If parliament did not secure the goals of government as proclaimed by the victors of 1689 – the right to life, liberty and possessions – they could overthrow it just as they had overthrown the tyranny of the Stuarts.

To reconcile these two propositions, he argued that it was only reasonable that there be rights reserved and protected by the intermediate and separate powers which stood between individual citizen and ruler. He advanced a theory that humans' rights at the time of the social contract existed already in their natures and in nature, thus starting the dominant tradition of rights discourse in philosophy. Life, liberty and property were the object of a constitution because they must, according to reason, have existed in a state of nature. They constituted the basis for rights and stood, so to speak, outside and prior to the constitution whose goal it was to protect them. He started from the celebrated lines: "to understand political power

properly and to derive it from its origin, we must consider in what state men are found naturally, and this is a state of perfect *freedom* to regulate their own actions and to dispose of their own possessions and persons, without asking permission or depending on the will of any other" (Locke 1969, 122). Innumerable glosses have been written on his work; for rights, what mattered concretely was Locke's argument that in their natural state men owned themselves and their labour and, so to speak, made something of themselves by externalising it as property in the state of nature. It was against reason that they would have relinquished any of this upon entering a social contract. So in Locke, property was sacrosanct, indeed, it was his organising concept. Rights were owned, like other things. Conversely, to own was to have rights. So he added to Hobbes' sole reserved right, the right to life, a right to liberty and thus to property. Rights existed not merely in the self but also in the externalities produced or owned by it and required for its wellbeing. This view has become known as a theory of possessive individualism. His formulation of natural rights does sound like a radical individualism, but the problem was the meaning he could give to such natural freedom when it was realised in the social contract. His concern with the reality of everyday rule meant that he had to think freedom as, and within, a social reality. So he believed that after the contract, an individual was the Janus-face of his externalised property relations, or civil society itself, where the natural right to property was transformed into the common law right: as a right to exclusion of others (see also Blackstone 1979, I, 125). The community or society was thus reconstituted as a reality of property-owning and its inequalities, whose notional borders and limits created in- and out-groups, only the first of whom had rights. Locke thus devotes much space to whom and how certain groups are excluded from rights. Among them are children before the age of reason, women, workers and slaves (Locke 1969, 162–4).

In sum, he went beyond a rational political theory based on individuals, by ascribing to civil society certain attributes. It was a structured community based on property and in which rights start, in practice. Locke theorised that world less as rule from the past than rule by procedures in the present and so his theory was different in kind from a theory of paternal or patriarchal power. He was as interested in the nature of the social arrangements within which individuals lived as in the founding moment of the polity. Obedience to law only flowed partly from the meritorious respect one had for a paternal power which lasted until a person reached the age of reason and was based on filial piety. On the other hand, if the submission to what had come before was not total, it remained.

What arrangements were required to guarantee to the people their natural rights to life, liberty and their fruit, property? Locke thought that they required government to be accountable and therefore representative. The chosen representatives of the people should make laws which enjoyed consensus, as they had not under the Stuarts. Thereafter, the obligation of individuals was to submit to the community established by the social contract. "Whosoever, therefore, out of a state of nature unite into a community must be understood to give up all the power necessary to the ends for which they unite into society to the majority of the community, unless they had expressly agreed to any number greater than the majority" (Locke 1969, 170).

Parliament had to be sovereign. In this it acted as a trustee of the people who could overthrow it only if it threatened the objects of the contract, the avoidance of absolute will and arbitrariness. Law was written law, not what was found in the minds of men. It was made by a legislature that could not divest itself of its power to make the law. Combined, acceptance of the national rule of law and submission to a majority consensus made the force of the law much stronger in Locke than, as we show, it was in Hobbes' system, because it had continuing popular, perhaps democratic, backing. Locke's books were a justification of the positions adopted in the Bill and Declaration of Rights and the Act of Settlement.

Unlike Hobbes, Locke thought of the law and political society in no abstract, first-principled way. He described the laws to which each individual had tacitly consented for the protection of his life, liberty and estates or property, whether negatively and positively, as if they were those of the common law (Locke 1969, 190). Remarkably, for a man who argued that the founding natural rights could only be deduced by reason, when he discussed what they became after the contract, he insisted on the historical record and on example to make his argument. Running through his work is an endorsement of the common law and its institutional expression. Once the laws were made by parliament, they bound everyone.

Locke stated again and again that no individual should regard his opinion as higher than that of the laws made by that legislature. Human beings were too frail and self-interested to arrive at a sense of justice. Given the prior subordination to majority judgment, once that individual is the victim of a majority-endorsed state rule, she or he must abide by it in logic, since that is the place of terrestrial appeal. So Locke wrote that liberty was not licence and natural law made clear that "no one ought to harm another in his life, health, liberty or possessions" all of which were essential to the enjoyment of life (ibid: 123–4) and he added, with a debt to Hooker's *Ecclesiastical Polity* i.10, "'No man in civil society can be exempted from the laws of it', for if any man may do what he thinks fit, and there be no appeal on earth for redress or security against any harm he shall do, I ask whether he be not perfectly still in the state of nature, and so can be no part or member of civil society; unless anyone will say the state of nature and civil society are one and the same thing, which I have never yet found any one so great a patron of anarchy as to affirm" (ibid: 168).

In Locke, "liberty" was concretely never more than the freedom to do what the law did not prohibit. This established the limits of the Anglo-Saxon tradition of liberties created by 1689. As Blackstone wrote half a century later, "the definition of our rights and liberties…appear, to be indeed no other, than either that *residuum* of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges which society hath engaged to provide, in lieu of the natural liberties so given up by individuals" (Blackstone 1979, I, 125; see also Bobbio 1999, 445). This rendered problematic the right of an individual to defend him or herself from the tyranny of majority norms and laws. How monstrous a society conceived as made up of possessive individuals could be for workers, women, and slaves remained to become evident over the next century (see Locke 1969, 162–4) This is discussed in later chapters.

Hobbes

Locke became ever more influential in the eighteenth century and was an important source of inspiration for French radical theorists and revolutionaries, particularly the Baron de Montesquieu. His predecessor, Thomas Hobbes, had defended the monarchy, which meant that he was not. But in the long run, Hobbes' views about the individual were more important for human rights than Locke's view that the people were the source of rights and that rights were property and property was rights. Hobbes' views merit pride of place in a discussion of the way rights were theorised by great British thinkers and their French followers. His most radical innovation was that the starting point for all relations between human beings was a reasoning individual who created the rules under which he lived.

Himself a victim of the successful Puritan revolution, with its claim to find legitimacy in the laws and customs of Britain, Hobbes argued in some of the crucial propositions underpinning the theses of *Leviathan* (1651) that it is *individuals'* reason that leads men to subject themselves to an absolute monarch. In Hobbes, the sovereign rule of law can only be understood as the result of a compact of equal individuals for whom life would otherwise be nasty, brutish and short. "The essence of the Commonwealth…is one person, of whose acts a great multitude, by mutual covenants with one another, have made themselves everywhere the author" (Hobbes 1985, 227–8). This social compact empowers an absolute state whose lawmakers have total power to direct all social life, with a limit that there is no right to take life arbitrarily, since no one would contracted for that. A commonwealth "is a real unitie of them all, in one and the same person, made by covenant of everyman with everyman, *I Authorise and give up my Right of Governing my selfe, to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his Actions in like manner*" (Hobbes 1985, 227); and that absolute obedience must be given because it *has been chosen reasonably by individuals, who are logically prior to the laws that they have set up* (see Hobbes 1985, 110–12 and Bobbio 1989, 48). "[T]he essence of the Commonwealth…is one person, of whose acts a great multitude, by mutual covenants with one another, have made themselves everyone the author" (Hobbes 1985, 228). So, in Hobbes' schema, reasonable, choosing individuals and politics precede the rule of law as understood by Coke. By making all social order politics, Hobbes' theory denied the claims of community to priority over individuals or the state they created. Hobbes' contract is between equal individuals who are his starting point, rather than that other abstraction "the people".

What was at stake for rights was the status of authority, duty and obedience. It is at this point that his views, the theoretical point of reference for the later Stuarts, become very important for a history of the connection of the British tradition of civil liberties and that of human rights which started in 1789. Hobbes was a reactionary in politics. Lord Acton, who considered Charles I a reactionary force, wrote: "In general, the old cavalier families, led by the clergy and the lawyers, acquiesced in the royal prerogative, the doctrine of passive obedience, the absolute and irresistible authority of that which Hobbes called Leviathan, meaning the abstract notion of the

State" (Dahlberg-Acton 1985, 105). But, unlike Locke, Hobbes privileged reason against the national-popular pretensions of the common law, importing the views of Descartes via Father Marin Mersenne into his work. He traced out the implication of Coke's reasoning in *A Dialogue between a philosopher and a student of the Common-Laws of England* [1666]. Coke had conceded that equity was nothing but right reason, but that it required an artificial reason, that of those trained in the law. Hobbes countered that there was no reason in earthly creatures but humane reason. The law itself was no more than authority. Since such rules could be listed, "I pretend within a month or two to make myself able to perform the office of a Judge, you are not to think it arrogance: for you are to allow me, as well as to other men, my pretence to Reason, which is the Common Law and for statute law, seeing it is Printed, and that there be Indexes to point me to every matter contained in them, I think a Man may profit in them very much in 2 months." Hobbes proceeded to ask his interlocutor what justice was and on being told it was giving every man his own pointed out approvingly that the reply was Aristotlean. Then he added, "See you lawyers how much you are beholding to a Philosopher, and 'tis but reason, for the more general and Noble science, and the Law of all the world is true Philosophy, of which the Common Law of *England* is a very little part" (Hobbes 1971, 53–7, 58, 59–62).

Hobbes – like his late monarch, Charles I, – privileged individual reason against the common law. This was more important in the long run than his well-known apology for an all-powerful sovereign who could do anything he liked except arbitrarily kill his subjects. But, with the defeat of the monarch's claim to rule by divine right, this aspect of Hobbes was obscured by his monarchic political conservatism. Despite the reactionary flavour of his theory in the context of 1651, it was the privilege given to individual reason which would prove a strongly progressive ingredient for rights. Its virtue was its assumption of an abstract individual with no history or community, preceding and producing and overriding his individual capacity to decide what was just. In this schema individuals and politics precede the rule of law understood in Coke's sense. It is the structure of his argument and the hierarchies it establishes that were important for future ideas of justice. He explicitly recognised that it conflicted with the views of common lawyers that justice is contained in the rule of law. Hobbes' fierce assertion of the right of individual reason over of community authority, or philosophy over law, must not be forgotten. The privilege he accorded to individual reason in deciding what was just – the discourse of philosophy – presaged the views of the French drafters of the Declaration of the Rights of Man and the Citizen (see Chap. 4 below).

The Popular Sovereign or the Sovereign People

Still, Hobbes' assertion of philosophy's superiority in his *Dialogue between a philosopher and a student of the Common laws of England* should not hide the overall object of his theory: to justify monarchical rule. He saw the social contract as a once-and-forever constituting event, in which having chosen a monarchical form of government, the people had given up the right to rebel. Reason led to the acceptance

of subjection to the monarch. Nevertheless, the order of his argument is crucial to an understanding of how human rights later moved from the British tradition of the rule of law. Social contract theory sees the basis for all political arrangements as the product of a wilful consensus of reasoning beings. It therefore challenges the primacy of a rule of law to which men are in subjection without their own agreement. In that notion lay the germs of a democratic solution. But, where the contractors were individuals, his successors turned them into the "people". This allowed them to reconcile the notion of the common law as the expression of community wisdom. Crucial in this transition was Locke and particularly those who, like Montesquieu, took up and used his work.

There are at least two possible ways of understanding the claim that the popular sense of justice has priority over the rule of law. The first is that it does so collectively, through democratic institutions of state which make laws that all are expected to obey. The second is that through asserting sacred rights the sense of justice remains a matter for the individual conscience, which is consulted even where democratic majority laws are confronted. This second sense is usually left out in discussions of the 1689 Declaration, and of human rights more generally, when it is what is all-important. It is a doubly strange omission or neglect.

The main right fought for in the seventeenth century and ultimately achieved in 1789, was the right to religious toleration, that is, to freedom of conscience. This was tantamount to a claim that anyone should have a right not only to look to his own counsel and then perhaps to accept this or that law, but also to ignore and refuse the law if it did not coincide with the higher notion of justice knowable by all men. It was the key theme at the Whitehall debates after the English Civil War, where conservatives like Henry Ireton denied the rights of individual reason and conscience. But they won. When they did, the first interpretation became dominant, obliterating radical individualism until the French revolution. It did so clearly in social contract theory in the American colonies where the radical individualism which Hobbes opened up *malgré lui* was replaced by the Lockean notion that the people collectively should be sovereign and make the laws for themselves.

Locke was the philosopher who gave theoretical expression to the shift from the privileging of individual reason in Hobbes to that of the people that was attained in the Glorious Revolution. It was the democratic sense of justice that should rule, not that of the individual. Nowhere was there a clearer expression of this than in the words of the American Declaration of Independence of 1776,

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed. That whenever any form of government becomes destructive of these ends, it is the right of *the people* to alter or to abolish it, and to institute new government, laying the foundation on such principles and organising its power in such a form, as to them shall seem most likely to effect their safety and happiness (Birley 1951, I, 2, emphasis added).

While Locke's objects – to justify disobedience to the monarch and a right of resistance to an unjust rule of law – were the opposite to Hobbes', his social contract resembled closely that of Hobbes, but in his two *Treatises* on civil government

(1690), Locke projected the simple rational theory of Hobbes in quite different directions. First, he founded the rights of the contracting individuals in a myth of rights existing in nature and in their natures, thus starting the philosophical tradition of rights discourse. This description of natural rights hid a then unnoticed or underemphasized possessive individualism (Locke, [1690] 1969, 4) which corresponded with right in British law: "the right of personal security, the right of personal liberty, and the right of private property" (Blackstone 1979, I, 125). Behind such categories lurked the notion of an individual who *owned* himself, his works and his products. An individual so conceived could surface in monstrously selfish form in an unforeseen future. We do not find that fleshly, selfish being in Hobbes' semi-mathematical abstractions in which no individual owned himself to the extent that he could back out of the contract with others. Locke's possessive individualism completed the circle of natural rights and practical institutions, since it made rights *possessions*, not relations between individuals.

Second, on the practicalities of the rule of law, unlike Hobbes, Locke took British legal/constitutional history as a model, even if negatively (Locke 1969, 4). For him, liberty was a freedom to do what the law did not prohibit (Bobbio 1999, 445). In sum, Locke did not privilege individual popular reason where the justice of the rule of law was concerned. To do so would confuse politics with law. He privileged community standards over those of the individual. For him, the social contract created the people as a power, it did not preserve the power of the individuals whose reason led them to accept the popular relations of power. Both points of view were inimical to any notion of universal rather than nationally limited human rights.

No Rights for Those Who Not Belong to the Nation

It is not surprising that it was the victims of the national-popular majority laws who challenged them and their roots in a national legal heritage. They not only asserted rights for all, or universal rights, but also sought to justify them in terms of natural reason against an ancient and artificial reason that always, as those at the Putney debates had pointed out, excluded foreigners and outsiders from the rights.

The first and obvious outsiders excluded by the new national-popular majority were the monarchs. Charles I, victim of the claimed national consensus, became the first to express new views that would underpin human rights. He did so in his show trial – no different from those of Stalin centuries later – where a packed bench before a court specially constructed to keep a hostile public under control and unable to follow proceedings (see Wedgwood 1964, 108–11; Gardiner 1965, IV, 293ff) found him guilty of offences that led to his losing his head in 1649. The way he defended himself is of interest for the future of *universal* human rights. Indeed, the Stuart monarchs themselves ended up pleading the case for such rights against that of the national-political people. Lawyers, recently and notably, Geoffrey Robertson, have argued that because Charles was an anti-democratic tyrant who ignored the then-common law, he got what he deserved. Because, apparently, he sees parallels

between Charles, Hitler, Stalin and Saddam Hussein, and tyrants deserve no sympathy, Robertson is prepared to endorse the judicial murder of the monarch by a packed court (Robertson 2006, passim esp., 355–64; 1999, 589–92). The judges were found guilty themselves of murder and treason in 1660 (Stephen 1899, 128ff at 138). One argued that he was just carrying out parliament's directions. We beg to differ with Robertson's view and will illustrate the problem of privileging a national-popular rule of law raised by Charles at his own trial. Charles' views mirror those of the excluded Puritan sectaries, who argue a similar case about rights and their source as Hobbes, the theoretician of the Stuarts. At the core of all their views is the argument that what is just and right can be understood by any human.

What had been attained as British liberties at the end of the seventeenth century was a rule of law *sub leges* not *per legem*; that is, for equality before the law, not in it. This amounts to the celebrated right to one's day in court. The populace had thus won only this: the subordination of every individual to community standards as embodied in law – a rule of laws not of men – and not the establishment of rights higher than those in the laws, even where these were manifestly unjust. British men certainly had rights. In Blackstone's words, "these rights…can only be determined by…a civil or natural death." Apparently, no derogation from them could be made. There was, however, an all-important caveat that "civil death commences if any man be banished from the realm in the process of the common law" (Blackstone 1979, I, 128). In other words, in the British common law, law for citizen nationals took absolute priority over rights.

And what was it to give *law* of this family such supremacy? It was explicitly to deny a place for individual reason in deciding what was just. The triumph of the British version of the rule of law established the exclusive right to reason of an elite of lawyers. The British common law, while equal for all, insisted on the individual inclining before the received wisdom of the Court. This remains true up to this day. Thus Blackstone affirmed "the doctrine of the law is this: that precedents and rules must be followed unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly without consideration…we may take as a general rule, 'that the decisions of the Courts of justice are what is common law'" (ibid: 70–1). In sum, the rule of law required obedience from the subject to the courts and stressed that it was a duty that went with the right to protection by the law.

The British tradition of civil liberties was established by the defeat of claims to individual natural reason. The victors backed successfully history and community against individual reason. The common law tradition at that stage made it impossible to see law as innovation and subordinate to the humans it rules over. As long ago as 1957, J.G.A. Pocock showed that when the common law was understood as something that had always been there, it was also confused with the common custom of the realm. As such, it was regarded as co-natural with the nation. He quotes Davies:

> This Law therefore doth demonstrate the strength of wit and reason and self-sufficiency which hath been always in the People of this Land, which have made their own Laws out of their wisdome and experience (like a silk-worm that formeth all her web out of herself

> onely) not begging or borrowing a form of a Commonweal, either from Rome or *from* Greece, as all other nations of Europe have done; but having sufficient provision of law and justice within the Land (Pocock 1967, 33–4).

As the expression of the wisdom of the community for ages, it privileged community over all individual reason – so clear in Coke's rebuke of James, discussed above, which Pocock stresses. This privilege was given despite the fact that like all arguments whose premise is not the act of somebody but is lost in historical time, it rested on myth and in fact was systematically justified by false history or by arguments in the past future tense. Pocock shows that any historical record inconsistent with that given by the common law is dismissed or ignored.

The monopoly of history claimed by its opponents left the Stuart camp no argument before the courts, except to claim that the basis of justice lay outside or beyond a rule of law. Thus, curiously, the Stuarts and their followers advanced universalist claims, that all humans have natural reason. Here, they were closer to the views of the defeated Levellers' than was the Cromwellian state. As we show later in this chapter, the Levellers refused to base their claim to rights on a history that went back to Magna Carta. It has been noted many times that the Levellers' views were akin to those that triumphed in 1789.

It was James I who in the case on Prohibitions suggested that justice was something that he and any man could reason about and Lord Coke who maintained that only those trained in the ancient wisdom of the law who could do so. The same positions were adopted in the debate around the Petition of Right. Yet most striking was Charles' arguments when put on trial for his life at Cromwell's behest. Charles asked by what legal authority he was being tried and refused to plead to the substantive charges until he had a satisfactory reply. The judges replied that they had authority in the name of the "Commons of England". This only elicited a further demand that since the latter had no authority in existing law to try the sovereign, "I do expect particular reasons to know by what law, by what authority you did proceed against me here" (see Howell 1816, IV, "Trial of Charles the First, 1649", 1082–3; see also Lovell 1999, II, 112). The president's short reply that no court could accept a challenge to its jurisdiction further elicited this:

> Sir, by your favour, I do not know the forms of the law. I do know law and reason, though I am no lawyer professed. But I know this much law as any gentleman in England, and therefore (under favour) I do plead for the liberties of the people of England more than you do. And therefore if I should impose a belief upon any without reasons being given for it, it were unreasonable. But I must tell you that by that reason that I have, as thus informed, I cannot yield unto it (see Howell 1816, IV, 999).

When warned that he was not to dispute the Court's authority to try him or he would be held in contempt, he replied: "By any law that ever I heard of, all men (delinquents or what you will) may, let me tell you, put in demurrers against any proceeding as legal. I do demand that, and demand to be heard with my reasons. If you deny that, you deny reason" (ibid.).

This right to be heard was denied. The king was doomed. Today, the better legal opinion agrees that he was executed illegally. Since the law and justice are not the same, we prefer to state that he was executed unjustly. But towards the end

of the trial, the indictment had stated that Charles had failed to defend the public interest, liberties and justice, common right and peace of the peoples of the nation. Now was added that the supreme authority of the people rested in the Commons, which had appointed the Court (Howell 1816, IV, 1069–70, 1073; Lovell 1999, II, 128). Charles had sought to maintain his tyrannical power against the people, "to overthrow the rights and liberties of the people which were reserved to frequent and successive Parliaments" (Howell 1816, IV, 1070; Lovell 1999, II, 131). This was glossed with the claim that under Magna Carta the court had to provide expeditious justice.

While this trial took place well before the emergence of the modern doctrine of human rights, in it we see what is imposed on any individual faced by an institutionalised rule of law that claims to judge him for a public offence against a social principle endorsed by the nation. In order to obtain justice, Charles demanded to know what legal power they had to kill him. This is what the claim to reason amounted to, not to any gloss of political theory or philosophy, though there was clearly much debate about that during the reigns of both Stuarts. The court's reply rested simply on the unassailability of a historically-bestowed authority that went back implicitly to the Petition of Right of 1628 and through it to a legally dubious basis in section 40 of Magna Carta (Howell 1816, IV, 1118; Lovell 1999, II, 128).

Even more important, the rights of even the defeated despot were defended by sects who were aghast at the travesty of justice of Charles' trial and protested against it. Where it is sometimes said that Charles got what he deserved, that a past system was being replaced by a constitutional system and a rule of law, and that this justifies what was done, that argument is impossible to sustain when the treatment of the sects is examined. These groups were more progressive than the Protestant majority and its packed parliament and judiciaries. They represented, so to speak, a future more radical than that of those who spoke for the national majority. Their offence was to oppose the regime on ethical and religious grounds that differed from those of that majority.

The most obvious group to choose to illustrate the exclusion of outsiders from the rights to freedom of conscience and expression would be the Roman Catholics, but that would not make forcefully enough the point that rights based on a national-popular tradition are tyrannical, because Catholics themselves appealed to an authoritarian tradition and seldom argued for *universal* rights. They were as ready as Protestants to slaughter "heretics". They could not illustrate what was common from Right (Stuarts) to Left (sects) in the defence of universal rights against a national majority that persecuted outsiders: the claim that justice must rest on the natural reason of all humans. This is why we choose to start our story of internal outsiders with the Puritan sects, in particular the Quakers. While it was the orthodoxy that popery was evil and progress embodied in Protestant triumphs, historians usually argued that Oliver Cromwell was a wise and tolerant man who tolerated the Quakers. This was not Quaker opinion. If we listen to victims rather than victimisers, then we hear their clear condemnation of the first model for obtaining rights, that of limiting them to a national citizenry deemed by the sovereign powers to belong to the people because they adhere to certain "national" religious values.

Sectaries and Other Dissidents

In 1662, parliament, intent on defending the national-popular interest (it always argued that its measures were to defend the "government of Church and State"), had 2,000 Nonconformist ministers (one-fifth of all ministers in England) sacked on St Bartholomew's Day, for refusing to adhere or swear to the tenets of the official church, thus denying them freedom of conscience. This was further accompanied by a ban on freedom of movement in the "Five Mile Act" that prevented anyone who had been a minister going within 5 miles of the place where he had held office. The "sectaries" among these Nonconformists, thus became the special objects of persecution by parliament because they refused to knuckle under. Among them were the Quakers, first called that in 1650 because "we bid them tremble at the word of the Lord" (George Fox 1924, 34, 36). Soon 4,000 of their number were in jail for various offences against the state. There they suffered mistreatment and torture, but now in the name of the national religion. Witness the earlier treatment of James Nayler (1617–1660) who was arrested in 1656, flogged, pilloried, had a hole burnt in his tongue and was branded on his forehead for blasphemy. Only in 1672 were 1,200 of them freed under the Act of Indulgence. By that time, some, including John Bunyan, had languished in jail for 12 years because of their beliefs. Such persecution forced many to flee to the West Indies and the American colonies where William Penn founded the Quaker colony of Pennsylvania in 1680.

The Quakers provide a remarkable illustration of a minority who were defined as outsiders by the majority because of beliefs that were allegedly inconsistent with theirs. So what were these beliefs and how did they manifest themselves? It should be stated immediately that their beliefs made the Quakers among the first to state principles later underlying universal human rights. Though most known for their religious views through John Bunyan's *Pilgrim's Progress* (1653), their ethico-political views were best expressed in the views of George Fox (b. 1624) who was their first "leader" and whom Penn regarded as his mentor. In 1652 Fox had visions (perhaps he suffered from a sort of epilepsy) that led him to become an itinerant preacher. Like many "sectarians" of his time he took his faith from a personal reading of scripture and not from any church.

Fox was a gifted preacher and soon gained followers despite being obliged to preach illegally in private houses or open fields. This popularity too distinguished him from medieval predecessors. Quakers and Ranters often prayed together with the Levellers who also often shared their views, though the Ranters often preached and lived in unusual sexual promiscuity (see Levy 2000, 50–2). In a world dominated by the rule of law, Quakers believed that "lawyers were out of equity, out of true justice and out of the word of God" (Fox 1924, 17), but their own message was one of withdrawal; of private worship in a "society of Friends"; of mildness, non-violence and pacifism, and they refused to preach opposition to the laws that persecuted them. Fox epitomised those principles. The more officials of the state reviled him, the more the populace beat him up; the more he was accused of witchcraft and imprisoned, the more adamant he became that the individual and not the community

was the source of justice and goodness. For him the concept of Christ reborn was a metaphor for individuals living in the image of Christ in this world. With such principles, the Quakers should have been regarded benevolently by the new regime rather than been singled out for harsh treatment. Fox was at first convinced that Cromwell was a decent man and so turned to him directly when he was thrown in jail yet another time. He pleaded to the protector, urging him to listen to the voice of God, that it was because the national clergy were corrupt that they persecuted the Quakers. Cromwell at first agreed and had Fox released. But their overall persecution continued and intensified (Fox 1924, 104–8) and thereafter, Fox was turned away when he sought Cromwell's support. When Quakers continued to refuse to swear the oath of abjuration, Fox was accused of sedition. That is, the state made his innocuous, private, religious beliefs a political matter.

The main thrust of Quaker demand to be allowed their beliefs became ever clearer. It was summed up in these words: "At Leith the innkeeper told me that the Council had granted warrants to apprehend me, because I was not gone out of the nation after the 7 days were expired that they had ordered me to depart in. Several friendly people also came and told me the same, to whom I said 'What! Do you tell me of their warrants against me? If there were a cartload of them I would not heed them for the Lord's power is over them all'" (Fox 1924, 160–1). This insistence that individual conscience based on faith in God overrode the rule of law became intolerable to the state. It amounted to refusal to observe the obligation to fight for the nation, to marry only according to the Anglican rule and to refrain from expressing one's opinions when one felt obliged to speak out. The problem for the state was with the argument that justice is not only divine but can be known by each person and that this takes precedence over the rule of law. More and more individuals, mostly simple people, but also many leaders opposed to Cromwell's rule, found such views appealing. They were also of high principle, ready to endure practically anything to express their views.

Wherever Fox and his followers went, the populace increasingly demanded that such saintly people be left alone. The humble and the meek found their belief in natural reason and sense of justice common to all very attractive. The more they were persecuted, the more the Quakers associated themselves with such silenced constituencies. When Fox visited the West Indies and North America, he preached the principle that all humans have equal capacity to reason.

In a debate with a "doctor" in Carolina, whose core theme was whether native Americans had "the light and the spirit of the God" in them, Fox "called an Indian to us, and asked him whether or no, when he did lie or do wrong to anyone there was not something in him that did reprove him. He said that there was such a thing in him that did so reprove him and he was ashamed when he had done there wrong or spoken wrong. So we shamed the doctor before the governor and his people" (Fox 1924, 300). This egalitarian simplicity – without any assumption that outsiders did not share a universal sense of right and wrong, a point established in a Socratic dialogue admitting wisdom "from below" – could not be accepted by any state that feared and had rejected democracy.

To assert natural reason against that of authority embodied in a rule of law was implicitly egalitarian and democratic. It might lead to readings of scripture like that made by Gerard Winstanley and the Digger "sect". Like Fox, Winstanley argued that the principle of Christianity was a "universal love" that would conquer all. Like Fox, he condemned priests and lawyers. He denounced private property and the state that upheld it. One of his pamphlets concluded that Jesus was the chief Leveller and "shall cause men to beat their swords into ploughshares, and spears into pruning hooks, and nations shall learn war no more, and everyone shall delight to let each other enjoy the pleasure of the earth" (Wootton 1986, 332–3). Such beliefs led him to propose a distribution of untilled land in a form of primitive communism. While as nationalistic as others of his era, he did not share the Cromwellian vision of what it was to be English and to belong to the nation. Indeed, he was shocked at the way Cromwell's staff treated a "poor cavalier gentlewoman" and stated that many cavaliers "may enter into peace before some of you scoffing Israelites" (Wootton 1986, 331). Eventually some of his followers acted on his reasoning and occupied land at St George's Hill in Surrey in 1649, to the horror of the local landowners who destroyed their community. Winstanley ended up a Quaker.

It is no wonder that Quaker principles were seen as a threat by the property-owning ruling class. Too many critics of Cromwellian England seemed attracted to Quaker views for them to be tolerated. Many who had been Levellers at Putney became Quakers, or close to them, because of their disillusion with the "ancient and artificial" common law as it revealed itself in its new exponents. One was John Lilburne. In 1645 he had made clear a view of democracy other than that of empowering a national-popular majority. He affirmed that it was not from a community but from an aggregate of individuals that all rights arose, thereby directly challenging the doctrine of parliamentary sovereignty that had become a farce under the Protectorate and during the Restoration. Lilburne wrote, citing his ally Edward Stephen, "we have not withdrawn ourselves from our obedience to the King to yield ourselves slaves and vassals to our fellow subjects" (Wootton 1986, 277). As a man who believed that "it belongs to God, and to God alone, to rule by the law of his blessed will", he condemned the laws of parliament in a defence of the "multitude" (ibid.). Then he joined he Quakers. He was followed by other opponents of the regime: William Dell, Thomas Collier, and William Erbury, making the Quakers of this era a small army of moral beings ready to die for their principles. Nothing could be more of a threat to a regime that had tried mass imprisonment to no effect.

Most striking was the support that sects, especially Quakers, gave to the Stuarts. Many condemned Charles I's trial as against natural law. Notable among them was Lilburne, who had condemned Charles' execution as judicial murder. His criticism had double force because of the positions he had adopted in the Putney debates and before. But it was particularly after the Restoration that the strange alliance became clear as the later Stuarts tried to introduce religious tolerance in face of parliamentary opposition. To some degree its nature can be gauged by the dedication to the king of Robert Barclay's *Apology for the Quakers* (1675):

> You have tasted sweetness and bitterness, prosperity and the greatest misfortune, you have been hunted from the country where you reign, you have felt the weight of oppression, you must know how much the oppressor is detested by God and by men. If after such trials and

> blessings, your heart hardened and forgot the God who remembered you in your misfortunes, your crime would be the greater and your punishment the more terrible. Instead of listening to the flatterers of your Court, listen to the voice of your conscience which will never betray you.

As a result Charles II saw that persecution ceased temporarily. Later, Penn, the son of a vice-admiral repulsed by his faith, was a particular favourite of James II who called him "a very great man". This earned Penn the epithet "Jesuit", no minor charge, since by that time Catholics were being framed for sedition and executed without real trial by a bloodthirsty parliament.

The Quakers shared with the embattled monarchy a desire for freedom of conscience and worship. That is clear. But their unity with the Stuarts came because of their common victimhood at the hands of a nation-state that refused to give them the rights of other Englishmen unless they subordinated themselves to its law. Just as Charles I had insisted that the law rest on the natural reason that each individual had, so the Quakers insisted that nothing could overrule the inner conscience and what it dictated to reason. They had no choice but to oppose the community standards that were imposed on them, by pleading that the laws of the city were not could not prevail over the individual knowledge of justice that arose from the divine spark in man. Though there is no evidence that either were inspired by the Greek tragedy *Antigone*, they were in fact repeating what could be the only argument of a persecuted individual faced by the supposed opinion of a whole community and its traditions of rights and justice. Others seeking for predecessors would excavate such models buried deep in history.

Such attitudes were anathema to the national-popular project. Not until the reign of William IV was the requirement to swear an oath of allegiance to the enshrined principles of church and state replaced by a simple demand for an affirmation (1833). This change was itself moved by the first Quaker to be elected to the House of Commons in 140 years (3 and 4 William IV cc 49, 82). So Quakers were finally admitted to the rights of other British nationals 3 years after Roman Catholics were themselves "emancipated".

The solution of the nation-state faced with their readiness to die for what they saw as a higher justice than that proposed for nationals only, was to exile them all, mainly to the Americas, but also to Scandinavia and Germany. When great numbers departed en masse for Pennsylvania after 1680, "weeping and…in tears", they took with them their doctrine that one should love not only one's neighbours but also one's enemies (Penn 1947, 12). A belief like that could not admit priority to a nation-state or its rights. Certainly, Penn still called on them to be submissive and docile. So, if left alone, they would be no trouble to any state. But, as Penn himself noted, where matters of conscience were involved they were enjoined not to obey the state if its actions were considered wrong (Penn 1947, 27). So they had in some sense "turned the world upside down" through their egalitarian simplicity, lack of respect for status, and practical worldly benevolence. Their intention to create a godly realm on earth starting in Pennsylvania became their watchword for the future. Thomas Collier recalled that "some apprehend that Christ shall come and reign personally, judging his enemies and exalting his people, and that this is the new heaven and the new earth. But this is not my apprehension; but that Christ will

come in the spirit and have glorious kingdom in the spirits of his people, and they shall, by the power of Christ within them reign over the world, and this is the new heaven and the new earth…the kingdom of God is within you" ("A discovery of the new Creation" (1647) in Woodhouse 1951, 390; compare Penn 1947, 42). They provided an alternative to the exclusionary national-popular model of rights, albeit in a small corner of the world. It is this that must be remembered in a history of *universal* human rights.

Once able to practice their non-violent, egalitarian beliefs, they constructed in Philadelphia an extraordinarily tolerant, liberal society, far in advance of others at the time. They built the first hospitals, schooling for all and social services. While it is undeniable that when they first settled in the West Indies they had slaves, this practice was quickly condemned and banned, and Quakers became leaders in the struggle for the emancipation of slaves (see Chap. 9 below). But it was not so much the list of progressive views – for example, Fox opposed the death penalty – that was important for the history of human rights. It was their *universalism*, the love for all beings that Penn described in these words: "They reached to the inward state and condition of people, which is an evidence of the virtue of their principle, and of those ministering from it, and not from their own imaginations, glosses, or comments on Scripture. For nothing reaches the heart, but what is from the heart, pierces the conscience, but what comes from a living conscience" (Penn 1947, 41). For Quakers, love and charity were the bases of right. For those who strayed, they applied persuasion and example (ibid: 48), believing in "universal liberty of conscience". This ended selfish individualism: "independency in society" .As Nayler said in his dying breath: "Its crown is meekness; its life is everlasting love unfeigned; it takes its kingdom with entreaty and not contention, and keeps it by lowliness of mind" (Nayler 1710, 696).

Rights in International Spaces: Grotius

Universalistic views like those of the Quakers were no more than sparks in a dark sky where the national-popular theory for the attainment of rights was the position of the majority of progressives throughout Europe as well as the "people" of England and the Netherlands. We have seen how these views of the natural reason of all humans were almost forced on these tiny sects by their experience of the national rule of law as oppression and tyranny. The universal human whom they believed to be their equal and equally entitled to the rights of freedom of conscience remained, nevertheless, a religious notion that all mankind is one, abstract in its scriptural origins and only when faced with the natives of North America and the slaves of the West Indies did they begin to recognise real difference.

Yet, we cannot gainsay the emergence as a political reality in Pennsylvania of a notion that having rights did not depend on subscribing to the national norms. The further contradictions of the national-popular model described by Daniel Boorstin need not concern us here. This marked one of the multiple rivulets of new

understanding of what rights were which, when joined by many others, would provide a real basis for a notion of rights that did not rest on prior citizenship in a national people.

Another trickle, that came as a reaction the dominant model, was provoked precisely by the creation in a world of nation-states of questions about rights that arose in those places outside nation-states, or while individuals were no longer within the territory of the nation to which they putatively belonged. Again we see a common denominator that ran from Charles Stuart's defence in 1649, through sectaries like the Quakers, to the greatest progressive thinkers of the age: a privilege given to the individual's reasoning capacity as the source of what is right and wrong against claims of community values enshrined in legal traditions.

The great theorist of rights outside the nation-state was the Dutchman Hugo de Groot. He is a seminal thinker for universal human rights. A fervent Protestant Christian, writing *True Religion*, he was a neo-Platonist who insisted that knowledge of rights could be reached through individual reason, and he believed that the state's power rested on the consent of a people. He argued in favour of all those views, which, summed up, he called the natural law. "The natural law is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral bases or moral necessity; and that inconsequence, such an act is either forbidden or enjoined by the author of nature, God" (Grotius 1957 [1625]: sect. 15; 1964, I, 38, (Bk I, ch1, sect 10.1, 2)). Central to his approach was belief in the reasoning individual as the source of morality and ethics. He also believed that the object of those individuals was the creation of society that was harmonious and at peace. Again, this accorded with Greek philosophy and the views of many of its followers. Instead of arguing that how the first society arose was lost to human understanding, he said that it must be the creation of some sort of reasoned social contract between humans, whence arose all law (Grotius 1957, 15, sect 15). In turn, he typified this as concerned above all with trust, fulfilment of promises and, ultimately, respect for what belonged to another (ibid: sect 6) materially and spiritually. That individuals are the source of rights was clear; from their consent arose the polity with citizens governed by laws.

We should not make Grotius too much of a visionary: he was a practising lawyer who was a cautious observer of precedent and rules. Before fleeing Holland to live in France, he acted as counsel for the state on the law of prizes. His views did not differ greatly from those of many other Dutch contemporaries who saw freedom as coming from the control of the state by the mass of citizen-individuals and the goal of mankind as peace in national communities. The former make the community in a contract and then make a rule of law or state in a second contract. This social contractarianism dominated political discussion of human beings and their rights in the seventeenth century. It seemed to many people then (and now) that the best way to guarantee rights for individuals was through recognising the social contractual basis of all their relations. The community that each atomic natural or abstract person set up with others – everywhere – was the source of all law and all humans should seek to establish polities based on the principles of a popularly consensual

rule of law. He wrote: "Man is, to be sure, an animal, but an animal of a superior kind, much further removed from all other animals than the different kinds of animals are from one another…But among the traits characteristic of man is an impelling desire for society, that is, for the social life…peaceful and organised according to the measure of his intelligence, with those who are of his own kind"; this social trend the Stoics called "sociableness" (ibid: sect 6). Sabine's classic text on political thought sums up his view as "the maintenance of society itself is a major utility which is not measured by any private benefit…accruing to individuals" (Sabine 1937, 360).

But Grotius would not be so important for *universal* human rights if his views were no more than these. Many others had advanced or would soon advance similar views about the social contract. Significantly, his views were condemned, not only for the political-religious reasons that had got him imprisoned, but because they did not entirely fit the social contractarian insistence on the primacy and power of the national people as part of the sovereign state. His importance comes from his argument that such a contractual-consensual majoritarian view could not be the basis of all rights or rights for all. Grotius was not primarily interested in sovereignty, the concept that lay behind all social contract concerns. Much later, both his understanding of rights and of the social contract would be condemned by two major theorists of the social contract, David Hume and Jean-Jacques Rousseau. For Hume, his "is" (say, the social contractarian state) could not lead to his "ought", the guarantee of the rights of each individual. For Rousseau, the general will must always override the rights of any individual.

To estimate his importance for universal human rights, we should remember that Grotius chose as the subjects of his two great works, written in prison, areas where, by definition, rights could not be founded by a national community: the high seas and international relations. In both, rights had to be established without reference to, or outside, any single nation-state – without the rule of law or sovereignty as a premise. They were seen by national law as places of pure force. Some commentators maintain that such a view has its source in a particular reading of Machiavelli, whose *Prince* (1513) argued that the creation of a political realm called for a political morality based on shrewd need to maintain order through force and blandishments. On the seas, the prevailing belief was that might was right, since the seas were regarded as a place of anarchy or freedom. Trade and movement could not be regulated on it except by force. And war, as we have seen, was a sphere where only state interests needed to be consulted. It was not a place of right against might. So, the strongest state on the sea in the sixteenth and early seventeenth century, the Dutch, simply argued that it belonged to them. No-one could sail on it; trade via it, or claim possessions on it without their agreement. This was the theory of *mare clausum*. Jan Pieterz Coen, who founded Batavia, stated: "There is nothing in the world that gives one a better right, than power and force added to right" (cited by Boxer 1977, 98–9).

Grotius countered in his *Mare liberum* with the unpalatable theory of freedom of the seas according to a *ius gentium*. And to the prevailing view that the strongest

should take all, he argued that war could only be waged when it was just. So, trade should be free, there should be no monopolies and laws like that of England (1651) decreeing that all British trade should be in British ships, were unjustified. The state-endorsed policy of privateering, taking all non-national ships as prizes (his first book had been about this), was also not justified. His *De Jure ac pacis* states that no war of conquest or colonisation should be conducted and, if there were war, civilians should not be harmed.

Commentators sometimes emphasise his reliance in his books on massive research and on earlier thinkers, particularly, the monks Suarez and Vitoria, discussed below, to conclude that he brought nothing new to the notions of law, right and justice (Clark 1950, 125–8). But all lawyers seeking consistency look for precedent, even natural lawyers. Grotius looked for precedents, citing from the Bible, antiquity and theories whose views can be traced directly back to Bartolome de las Casas, whom we discuss later. Yet his massive scholarship was quite different from, say, that of Fortescue. It could not simply compile the existing law of the sea because there were no national traditions to refer to. Rights in open spaces like oceans where humans sailed and traded required new thought.

> We bring a new case. It is in truth no petty case such as private citizens are wont to bring against their neighbours about dripping eaves or party walls; nor is it a case such as nations frequently bring against one another about boundary lines or the possession of a river or island. No! It is a case which concerns practically the entire expanse of the high seas, the right of navigation, the freedom of trade! Between us and the Spaniards the following points are in dispute: can the vast, the boundless seas be the appanage of one kingdom alone, and it not the greatest? Can any one nation have the right to prevent other nations which so desire from sailing to one another, from bartering with one another, actually from communicating with one another? Can any nation give away what it never owned or discover what already belonged to someone else? Does a manifest injustice of long standing create a specific right? (Grotius 1972 [1608], 4).

Grotius appended two letters from Phillip III of Spain making those claims to exclusive jurisdiction. "I prohibit all commerce with foreigners in India itself, and in the regions across the seas" (ibid: 76–9). He declared that the answer could not be found by reference to "the ancestral laws and hereditary customs of the people of the Netherlands". The only way to establish the basis for rights in the domains he studied was through reason, natural law, and by abstract generalisations. This was law common to all nations or universal and "easy to understand, seeing that it is innate and implanted in his mind. A law derived from nature, the common mother of us all, whose bounty falls on all, and whose sway extends over those who rule nations, and which is held most sacred to those who are most scrupulously just" (ibid: 5). Ultimately, a jurisprudence of the sea or of international relations could not look backwards. It had to argue from certain axioms about rights, human beings and justice; from the general to the particular. Axioms were the order of the day and posed no problem for Grotius. He simply argued the "ought" from the "is" and the "is" was how peoples (*gentes*) interacted when they had their political attributes removed. The "solid fact" was man as the "masterless man" (Sabine 1937, 368). The starting point for his analysis was not any community but the component

individuals who create it: a law of the sea or a law of warfare was something to be made, not something that existed, "that law that intercedes between peoples as a plurality of the lawmakers of peoples."

So Grotius asserts that only "natural law" can apply to establish rights where humans have no shared history or attributes but co-exist in the same space. There, all were always foreign or Other and had to be accepted as such. Claims that such peoples should be forcibly civilised were dishonest (ibid: 14); "nature knows no sovereigns" and therefore there was no "particular right" in anyone there. One consequence was that as there was no possibility of possession or property in such spaces: there could be no rights with duties. The seas were areas of universal use by their nature, and common property for common benefit. In such spaces laws of prescription or custom could not apply, so long user was an irrelevant concept (ibid: 49). Grotius continued: "For, since the law of nature arises out of Divine Providence, it is immutable; but a part of the natural law is the primary or primitive law of natures, differing from the secondary or positive law of nations, which is mutable. For if there are customs incompatible with the primary law of nations…they are not customs belonging to men, but to wild beasts, customs which are corruptions and abuses, not laws and usages. Therefore those customs cannot become prescriptions by mere lapse of time, cannot be justified by the passage of any law, cannot be established by the consent, the protection, or the practice of even many nations" (ibid: 53).

So Grotius insists that outside nation-states only the law of nature can apply. Indeed, all national laws according particular rights and duties are a departure from the law of nature where all goods are in common. The law of nature applied in international law and dealing with others in war and peace.

Grotius is clearly heir to the Christian and neo-Platonist tradition that sees God as knowable to reason and his divine justice as a human goal (Grotius 1957, *Prolegomena*, sect 11). But this comes from "right reason" and not church teachings: "Just as even God cannot cause that two times two do not make four, so he cannot cause that that which is extrinsically evil be not evil" (ibid: Bk I, ch I, sect 10.5). So, even where sanctions do not exist, law can have an effect as justice brings individuals "peace of conscience" and is generally approved. He was a practical man who lived in a Europe racked with wars. He argued that a just war could be fought in defence of a just cause. That posed the problem of what was permitted in war. Again he noted that there were no sources; domestic law ended in the space between warring states. Therefore, principles about how to treat the other had to be formulated drawing on natural law (ibid: sect 30). He was certain that war was for professionals only and that non-combatants and neutrals were not to be harmed.

But, individuals like the Stuarts, Fox, Penn, and Grotius were fine souls who failed to convince their fellow nationals that there should be a basis for rights other than that of long, national traditions of law. The material reality of the planet had to change to make this come about, to make such ideas acceptable to masses of men.

Exporting the National-Popular Rule of Law: 1689 and America

That material reality changed in America in the eighteenth century when the national system of rights of Britons was successfully challenged not by a small minority but by much of a colonial population. While not marking a complete rupture with the notion that the way to rights was through a national rule of law, the Americans added radical new ingredients that pointed to openings for universal rights. The American variant was the work of a nation of victims who defied the rule of law that existed; again the rupture came through social and political revolution. Had the fighters for American rights not won, they would have been hanged just like Charles I, many Quakers or, as in Grotius' case, sentenced to spend the rest of their life in jail. And all because British rights for nationals found no place for their American subjects' opinions or professions.

By 1688 Englishmen were deeply attached to a "national tradition". As pointed out, this attachment was the result of hegemonic rule. The initial defining quality of Englishness was religious, Protestantism and anti-Catholicism having been made the defining features of Englishness in the sixteenth century. One of the first markers of a adoption of a further new set of principles expected of Englishmen was the Toleration Act (1689) that accorded dissenters the right to worship. In the eighteenth century this toleration was extended even to most papists. Mass murder for religious reasons was at an end in mainland Britain by then. Locke's most successful works were the two letters on toleration that he had composed while in Holland before the Revolution. These stated that to be tolerant was Christian and that it was impossible to control an individual conscience, that freedom of conscience and belief should therefore be established, and that it should extend even to Jews and idolators. The limit was reached when a group owed allegiance to a foreign power rather than the nation. Only thus were Roman Catholics excluded. As a corollary, it was not the state's business to regulate expressions of belief in worship provided this did not spill over into a more political realm. Civil government should therefore be separated from religious government (Locke 1963, VI). Locke made the key to his view of the social contract the principle that no man could consent to have freedom of conscience taken away: this made it a fundamental right of man. He negated completely the view of Ireton and the Commonwealth expressed at Putney and Whitehall 40 years earlier and effectively argued for a separation of church and state. Parliament only accepted that in diluted form, in 1689. But in the following 50 years Protestantism became less important to being a good citizen than commitment to the common law and the rights the law stated. By the late seventeenth century, the Protestantism that made English identity had evolved into privileging of the rule of law; that is an adherence to rule-following decisions made by a judiciary in accord with a "common law". This supposedly embodied the accrued wisdom of the Protestant British people about how to acquire and establish rights. The corner stone of these was the Bill of Rights.

A striking characteristic of the statements of rights in the Glorious Revolution of 1688 is their parochialism. There is no reference to the peoples of the world whose

"discovery" was *the* event of the seventeenth century. Instead, the rights were explicitly for Englishmen only, applicable only to men who belonged in that tradition and had roots in its previous history. This meant that rights were understood as viable and acceptable only in a *community*. As Bobbio has made clear, this is the defining quality of all national populisms based on a notion of a social contract (Bobbio 1998, ch8; 1989, ch1; 1996, 80). Since the 1689 statement of rights neither took into account other peoples nor regarded the rights established as applicable to other than Englishmen, this posed a fascinating problem for the British parliament: what was the import of the innovations of 1689 for Englishmen who had fled earlier intolerance and gone to North America? Did the new rights apply there in different conditions from those at home?

The law was settled. They did not, without conditions. Under the common law as declared by Coke, colonies fell under the royal prerogative, that is, that part of power that was not subject to the common law or to more than the monarch's notion of justice. This was because North America was considered uninhabited when Britons arrived there. It was thus lawless. The relevant cases stated that until the monarch made treaty or declared a legislature, he could rule as a despot and even exterminate all conquered peoples. So, in colonies, according to the common law, the "despotic" rule of the Stuarts was a reality that continued on their settlement (*Calvin's Case* 77 ER 379; *Campbell* v *Hall* (1774) 20 *State Trials* 239 (see 98 *ER* at 1047) Blackstone 1979[1765], 167–8). In 1769 Blackstone stated the orthodoxy for North America: "the common law of England, as such, has no allowance or authority there" (ibid: I, 105). Even when legislatures were granted by the monarch to a colony, only those British laws applicable in the new environment started to run. Thereafter, the reserved powers of governors, the monarch's representative, limited their rights, since new laws made by the colonial legislature could only be made with his assent and appeals from local courts went to the privy council. This created a great potential for conflict between the practice and expectations of "free" men and women, and the legal reality that they were nullities until a legislature was established as far as rights and the state were concerned, and even then faced the whim of the governor. For British "freemen" the rules were different after 1689. Americans did not get what Britons living in England, Wales and Scotland did.

Despite the legal rule, overall it is agreed by scholars that up until the 1740s the Bill and Declaration of 1689 did become in practice the basis for political arrangements and rights in the British possessions, provided the mother country had ultimate control. The British seemed ready to permit relative independence to the North American colonists until the mid-seventeenth century. The colonists were far away and difficult to control anyway. The effect was to remove the colonists from under the aegis of British traditions of politics and law and they effectively became small self-governing religious communities, both Protestant and Catholic. The charter system had made colonisation attractive to persecuted minorities like Catholics and Quakers. Lord Baltimore purchased Maryland (1632) and William Penn Pennsylvania (1681) because of the promised freedom from persecution. This had the curious result that such places were governed according to the notions of rights and justice of the excluded former inhabitants of Britain rather than those imposed by the

British national majority, resulting in the former giving a particular twist to the social contractarian principle expounded in 1689.

American Particularism

To understand how a new national-populist, social contract regime was adopted and unfolded in North America in the face of such legal contradictions and inequalities, it is necessary to go back in history before 1689. The first salient fact is that the French had arrived before the English, establishing Quebec in 1608 in New Canada. They had been quickly followed by the Dutch who settled New Amsterdam, later to become New York (1626–64). Both had been the principal enemies of the British in the sixteenth and seventeenth centuries. The British were on their heels as settlers, although mainly interested in the Caribbean. Each time the British set up colonies they did so under proprietorial charters, that is, the Crown made the colonists private owners of territories that the Crown claimed under the doctrine of *terra nullius.* These were supposedly un-owned lands, because they were not cultivated by anyone. The objective reality in all the colonies was that they had occupied native American lands by conquest and they faced France and the Low Countries as enemies already there before them. The French king Louis XIV had encouraged Indian depredations in the course of long wars with the British that would extend into the eighteenth century. The colonists therefore lived in constant fear of reprisals, and, on their frontiers, of being massacred. The British colonists therefore wanted imperial protection.

The tension between the law and the practice became important when the growth of the slave and sugar trade in the Caribbean and, then, the cotton trade around Chesapeake Bay, made the colonies major sources of wealth through trade. It has been estimated that by 1689 one-third of all British trade was with the American colonies. Charles II, and more particularly James II, wanted the profits that came through customs dues. A quirk in the otherwise liberalising common law allowed the monarch to abolish the charters of New England and to try to force the different colonies to unify as a "dominion" under royal government where they had hitherto been to all extent and practice self-governing administered societies.

The New England colonists who had fled repressive laws were clearly hostile to their re-imposition under Charles II and James II and lined up with the British parliament against them although it was also a repressive intolerant system. The majority saw the Stuart policy as part of a papist plot. Maryland and Pennsylvania at first supported the monarchs because of their tolerance towards minority religions. The Dutch settlements, too, that had been handed over to the British in the agreement of 1660, also chafed at British rule. But after a brief confusion and division of loyalties, most American colonies became Williamite after 1689. The oldest, Massachusetts, created in 1620 by refugees from Stuart England and set up as a state based on the Bible and inhabited by "saints", gave up its religious intolerance for a constitutional legalism that aped that in England and then went beyond even that (see Johnson 1991, ch6 esp. 235–7).

Eventually, when the dust of whom to support had settled, the political object of the colonies became to obtain for themselves a variant of the new British arrangements of 1689. Massachusetts, the most reluctant of brides, secured such a settlement in 1692, mainly through the manoeuvring of Increase Mather, its agent in London. Mather carried back what he called a "Magna Charta" for Massachusetts: "Massachusetts was to have a Royal governor with broad powers of patronage and a right to veto legislation, but one nominated by Mather and his allies. Puritan domination would be curbed by provisions for religious toleration and a franchise extended to freeholders rather than Church members; but the excesses of dominion rule would be avoided by a guarantee of existing property titles and provisions for a legislative assembly" (Johnson 1991, 234). By 1696 several other colonies had "as Englishmen" adopted the Declaration of Rights (ibid: 236) and made them applicable to settlers.

This response became a pattern and a goal for British colonies in the 1700s. Curiously, legal cases in the slave-based sugar and cotton economies of the West Indies and Carolina, challenging excessive gubernatorial power, later became the basis for common law claims to self-government throughout the British Empire (see Campbell 1964–7, 149–155, and Castles 1963–1966, 14–15). Since the planters in such places had often first lined up with James II, attempts to control royal prerogative power there were doubly significant. The conservatives of the colonies who established the legal limits to untrammelled power did so as "good subjects" (Johnson 1991, 231). What they proposed for the colonies was a deeply legalistic notion of rights. Such views became widespread. In Edmund Burke's words: "In no country perhaps in the world is the law so general a study. The profession itself is numerous and powerful and in the provinces it takes the lead. The greater number of deputies sent to the congress were lawyers. But all who read and most do read [literacy was almost twice as high as in Britain, AD] endeavour to obtain some smattering of that science…I hear that they have sold nearly as many of Blackstone's Commentaries in America as in England" (Burke 1924, 94–5; see also Boorstin1965a, I, Part I, 35–43). This legalistic understanding of rights presaged what would emerge throughout the Empire and prove disastrous for human rights 80 years later (see Davidson 1991).

The adoption of a legalism of that sort placed progressive colonies like Pennsylvania in a quandary, as rights there were more advanced than in Britain. Their solution was to let the non-Quaker majority that emerged in the eighteenth century run the colony while trying to keep control of their action by covert means. Boorstin argues, a little uncharitably, that this showed that Quakers were not good at governing a community despite their defence of universal rights (Boorstin 1966, I, Part 2, 69–74), Boorstin is a firm believer in the communitarian social contract and in the virtues of building an open republic, which he believes the US to be. Measured by such a yardstick, Quaker emphasis on the individual conscience, which had led some to ignore the ban on Quakers in New England and their subsequent torture and killing by other Protestants, only highlights that human rights is not *a social engineering project* but rather *a defence of the individual against the dominant social hegemony*. It is true that their initial generosity towards the Indians had

not led to the expected harmonious relations, and the depredations and massacres by the latter in defence of their homelands and culture posed a problem for people who, on reflection, should have realised that they were occupying another community's territory.

The American "more British than the British" position also posed problems for Catholic, slave-owning Maryland. Catholics there were already outnumbered by Protestants whom they wished to rule according the Catholic principles. This would no longer be possible if the principles of 1689, especially toleration, were accepted.

The most important problems in applying the new rights developed in the moderate Protestant areas, where too many settlers took seriously the professions of 1689 though they were increasingly more honoured in the breach in Britain itself. Their small town councils and legislatures really wished to control any attempt of the governor to drain their new riches away to Britain by customs and other trade imposts in a situation where trade had grown 12 times in 1704–72. By the 1730s there was mounting tension between the local representatives and the Crown over the political and legal principles underlying the new dues. Journalists like Benjamin Franklin (1706–90) started to formulate new views about rights that enjoyed significant support. Franklin was no radical. At most he was a Deist who had met and liked Pierre Bayle on a visit to London in 1725. He considered Indians "savages and beasts". In the 1740s lobbyists and other "colonials" made common cause at Westminster with members of the Irish ascendancy who fervently believed in the British constitution. Here the main figure was Edmund Burke, who became the major spokesman on American affairs and Americans' right to the same political arrangements and rights as those at Home (see Burke 1924, 90–2), arguing that "they are not only devoted to liberty, but to liberty according to English ideas and English principles". His hypocritical blindness to reality was seen in his assertion that the slave-owning citizens were "attached to liberty" (ibid: 94). Franklin and Burke remained friendly correspondents even during the War of Independence (ibid: 235–8). In sum, the Americans were more fervent defenders of the principles of 1689 than the Britons themselves.

But by the 1760s Americans were no longer "Britons" who "belonged" in the "mother country". They faced different problems and the distance between them increased as the British and French persisted in fighting their wars on American and other imperial territory. Americans were the victims of these wars, particularly of the slaughters that both sides encouraged the Indian tribes to engage in. In 1740–63 the settlers became desperate to protect their own frontiers. The British solution in 1767 was a new tax on tea to pay for troops.

This provoked the series of events, including the theatrical Boston tea party, in which cargoes of tea were thrown by irate Bostonians into the sea, that led to the American Revolution of 1776. The rebel spirits, who were not at first a majority, usually thought of themselves as more British than the British. But they did not want to reproduce everything in the old world. Their cry of "no taxation without representation" had a more democratic ring than any heard in Britain because they had developed an "American identity." The characteristics of an American in the second half of the eighteenth century were described by a naturalised subject of

George III of French origin, who farmed in New York. He described a world that had become multicultural despite its British beginnings, although when he stated that all Americans came from Europe, he was strangely blind to the half-million black slave slaves and the even greater number of Mexicans whose presence made the continent really multicultural. Indeed, despite a sensibility towards the Native Americans untypical of a world where most commentators thought they should become extinct, Crèvecoeur did not note their presence, either. For the French-American, the men and women who had settled there were the whites who had fled the evils of the old world. By becoming small farmers with property in the land, the latter had become self reliant-and fierce in defence of their rights. This led him to assert that there had developed the most perfect society that ever had existed – where man was as free as he ought to be. In a new world where "we are all tillers of the soil" and where "each person works for himself", the notion of rights was built on this premise:

> The instant I enter onto my own land, the bright idea of property, of exclusive right, of independence, exalt my mind…What should we American farmers be without the distinct possession of that soil? It feeds, it clothes, us: from it we draw even a great exuberancy, our best meat, our richest drink, the very honey of the bees comes from this privileged spot. No wonder we should thus cherish its possession…This formerly rude soil has been converted by my father into a pleasant farm, and in return, has established all our rights (de Crèvecoeur 1997 [1782], 41, 27).

For him freedom was based on the work, or industry, that transformed humans from savages into men. It had regenerated the poor of Europe who had come, creating new laws, a new mode of living and a new social system. From being nullities in Europe, in America all people ranked as citizens, freemen, because of the property they each owned through labour based on natural self-interest (ibid: 42–5). Crèvecoeur was quite sure that the "simple cultivation of the earth purifies them". He saw selfishness as one of the American virtues, together with litigiousness. He wrote about a social world that more or less corresponded with what Locke had in mind when he based his entire theory of human rights on labour and property. As Foner notes, the American idea of liberty at the time of the 1776 revolution was that it was something that a person owned like labour and land itself (Foner 1999, 8–9), possessive individualism at its highest development. It was very much "freedom from" and not "freedom to".

Crèvecoeur was an educated man who had followed the Enlightenment thinkers. Rousseau's political ideas were probably known to him. As he described the American identity, it also clearly expressed what was not in Locke: a democracy, where the good sense that came from the very fact of tilling the soil was converted into a right to power "from below", from simply thinking on nature and the world. This was a view also held by Thomas Paine (Keane 2009, 118). Crèvecoeur thought: "It is not in the noisy shop of the blacksmith or of a carpenter that these studious moments can be enjoyed. It is as we silently till the ground, and muse upon the odiferous furrows of our low lands, uninterrupted by stones or stumps. It is there that the salubrious effluvia of the earth animate our spirits, and serve to inspire us" (ibid: 19). As his editor Susan Manning points out, this cult of the small farmer and

association of the American national identity with his values was taken up by many of the fathers of the American Declaration of Independence, including Thomas Jefferson (de Crèvecoeur 1997, xix). While it is true that these leaders were often great landowners and slave owners (as was Crèvecoeur), they did share the practical "man of the soil" quality much more than their peers in Europe and the distance between them and the average American was not great, as Crèvecoeur pointed out. Washington laboured all day improving his property and his crops, making it more difficult for his employees and slaves to escape a rigorous accountability. Americans also seemed to Crèvecoeur to have what Rousseau thought they should have: a desire to make the laws under which they lived. "Europe contains hardly any other distinctions but lords and tenants, this fair country alone is settled by freeholders, the possessors of the soil they cultivate, members of the government they obey, and the framers of their own laws, by means of their representatives" (ibid: 55). Thus, when the claims about rights started to be made in the 1770s more loudly than before, as opposition to taxes and customs duties grew, the rights sought were thought in a way somewhere between Locke and Rousseau. It was almost inevitable then that the American demands for the rights of Englishmen, for "British liberties", was not simply a denial of abstract universal liberty as Burke claimed in 1774. The insistence on self-education through labour as a guarantee of good sense led quickly to an affirmation of the right of the people to be sovereign. So, if the views of the new Americans did not go beyond the notion of a democratic community, and slaves and Indians were not seen as members of the citizenry, yet the increasing assertion of American community interest against the tyrannical treatment of the British overlords was a harbinger of innovations in rights. These Americans were no longer, as de Crèvecoeur explained, Europeans, and they began to talk about rights in a new way, extending them to all citizens and opening the way to a democratic polity.

Manning notes that one primary virtue extolled by the Frenchman was "candour", an Enlightenment virtue par excellence, and something to which Rousseau laid claim in a strong way. It was what would cut through the cant of lawyers and pettifoggers: it was the reason that all freemen had. Benjamin Franklin, another of the fathers of the American statements of rights, laid great stress in his *Autobiography* on the fact that this popular wisdom did not mean lack of an elementary education or widespread reading compared with Europe. When Franklin declared "our Rights" to the British governor who sought to override the local Assembly (Franklin 1998, 165) he did so having read not only Bunyan but also Locke and Mandeville. Indeed, since the arrival of the first Protestants, the level of literacy in America had been much higher than elsewhere. And, if the Bible, which was still the staple reading, had become more a matter for private conscience than direct politics in many inhabitants, the establishment of newspapers and lending libraries since the 1730s had made many "simple" men well informed about both practical matters like advances in science and agronomy and the common law where it affected the rights of the individual (Franklin 1998 [1771–], 17, 19, 71–72, 80). He had a sharp sense of his own self-worth and high moral purpose. Both he and Washington fashioned chapbooks of moral and ethical goals to guide themselves in their everyday life. Franklin perhaps claims too much for himself, but he undoubtedly grasped the way affluence,

self-help and an increasing practicality were fashioning a world where men jealous of their privileges and rights were ready to pick up arms to assert them.

The commitment to British traditions of rights and the insistence that they be honoured, predominant up to as late as 1774, meant a fierce assertion of the right to be armed, to form local militias and to defend oneself again the tyranny of state. Throughout the colonies, militia were formed in the mid-1700s. Franklin was deeply involved in the creation of one in Pennsylvania. An arrogant British army and monarch saw such activities as dangerous to British interests. This, coupled with bad advice by councillors to the British, meant that there were many confrontations between British forces and locals when armed individuals met to assert their rights and oppose the new taxes. Finally, there came the "battle of Lexington" in 1776, where citizens were massacred by a brutal army shouting that they were rebels. This was followed by the battle of Bunker Hill at which Washington was the commander. Neither really merit being called battles but they marked a turning point in American commitment to British traditions. A rebellion was under way and British power did not allow that, whatever Locke had said about the right to overthrow tyrants. Almost overnight Americans became exponents of human rights of a *universal* sort based not on reference to any past traditions, but to the commonsensical reason and dignified self-interest that every man was supposed to have. The most read book marking that turn was Paine's *Common Sense*, which became the most popular of all revolutionary tracts and was pirated many times (Keane 2009, ch4). Many of the fathers of the American revolution say it started them on the search for rights that broke from British traditions. Rebellion had not been on their agenda; but after January 1776, a revolution was. It was based on the notion that 1689 should apply to all humans, not just the British community.

Throughout the colonies, local legislatures and others started to draft declarations of rights. Massachusetts, Maryland and most famously, Virginia, adopted statements of the rights of man, which, they maintained, overrode any legal obligation to submission to the monarch. The best-known of these documents was the Declaration of Independence of 1776 of the allied colonies, which founded the United States. The so-called Virginia declaration of 12 June 1776 was the model for many others, and was drawn up by slave owners, notably George Mason, Washington's neighbour. Its contents marked a radical advance on earlier British statements. The first article made clear that all men had inherent rights that they could not shed: life, liberty, property and the pursuit of happiness. The second declared the people sovereign and the third stated that "the government is, and ought to be, instituted for the common benefit, protection, and security, of the people, nation or community". It could be changed by majority decision of the community. The sixth article declared that "all men" had the right of suffrage if they could prove "permanent common interest with, and attachment, to the community." A similar universalism was to be found in the Declaration of Independence of the Representatives of the 13 United States, drafted mainly by Jefferson. It made clear that the justification for revolt was tyranny and the causes of the separation was such tyranny which denied Americans their rights. Underlying that assertion was the famous statement: "We hold these truths to be self-evident: that all men are created

equal, that they are endowed by their creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter and abolish it, and to institute new government, laying its foundation on such principles, and organizing it's powers in such form, as to them shall seem more likely to effect their safety and happiness." The document stated clearly that the purpose of democratic government was the attainment of basic rights for all.

These statements were drawn up by the patrician leaders of the revolution. The drafters of both the colonial and the US bills of rights often held remarkably advanced views not only about the rights to be enjoyed but also about the people to whom they should apply. They thought above all of the right to religious freedom so often denied in colonial history and by the people, but so necessary for the survival of the Union (see e.g. Madison to Jefferson, 17 October, 1788 in Banning 1995, 151). Among the most interesting of the protagonists of human rights was George Mason, who had drafted the Virginia Declaration and then with Jefferson pushed through a bill for religious tolerance. His insistence on the natural rights of all humans was remarkable. It was he who insisted on the bill of rights in the United States constitution in 1791, although he was obliged to work with the much less democratic Madison (Banning 1995, 4, 142). Unlike the Virginia Declaration, the US Bill of Rights is not at the head of the Constitution and is understood as a limit on it but subject to it and the judicial power.

These patricians' bills of rights opened the way to a triumph of democracy or a populism that, having opened to all men the borders of the United States, then shut them and extended the new rights to US citizens only rather than to all humans. For all, rights required civic virtue, a stake in the society. But, it has been noted that rights were understood by Americans as subject to the democratic or popular will of the community. They were thus the last in a tradition of social contract statements, whose main theoretical forebear was Locke, but in which the democratic people was now sovereign (see Bobbio 1996, 79–80). So the declarations of Massachusetts and Maryland spoke of existing for the "common good", while that of Virginia stated that the rights claimed were for the "common benefit". How far that community extended was not clear, but the notion of the open republic where anyone could migrate was certainly a widely held belief among the drafters. On the other hand, Indians, regarded as belonging to another nation, and "slaves" were excluded from formulations about "we, the people" (Foner 1999, 38). Only Rhode Island abolished slavery when the rights of all men were proclaimed as the basis for resistance to the British.

So, on the one hand, we see a view about rights that privilege them over the social contract and on the other, that they are limited to members of the community and the attainment of the common benefit of that community. The innovation, rejecting all earlier models, was the only one possible for revolutionaries. Yet they unconsciously assumed that the communitarian, or national goal, the duties that corresponded to the rights, did not conflict with the premise. In the words of John

Adams, "a democratic despotism" was impossible. This opened the way logically to major conflicts in which democratic power could overrule the rights of individuals. The fierce commitment to and ownership of "freedom" of the average American – or certainly the ideal type – was translated from an individual right to that of the nation and state as expressed through its parliament. Contradictions with declarations about the universality of rights were resolved in practice in favour of rights for nationals only, and an exclusion of rights for all others.

One of the initial motives for this shift in emphasis from universal rights to those of the community was a desire to protect the primacy of property rights against democratic challenges, especially those to property. We should not discount the undoubted desire to meld a union of colonies where slave-owning was regarded as a property right not to be interfered with. They were certainly concerned that the popular equation of freedom with autonomy would lead to lawlessness in the new state where everyone had the rights to bear arms. Concerned about the popular democratic wishes of the mass, the magnates had determined on a strong state and executive, and a strict separation of powers to limit democratic legislative pretensions. Their solution in the years between 1776 and 1787 was to ensure that the people was sovereign but that a true democracy should not exist.

Attempts by the patricians to inculcate civic virtue into residents before turning over power to the people were increasingly thwarted. As Foner (1999, 24) explains convincingly, "Madison, Alexander Hamilton, and the other architects of the Constitution were nation builders" at a time when self-interest seemed to overwhelm civic virtue.

After years of debate on the relative importance of rights and democracy, the United States Constitution was finally adopted in 1787–90. By that stage the claims of the national community had apparently moved to the fore. The constitution started with the bold: "We, the people of the United States in order to form a more perfect union, establish Justice, ensure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessing of Liberty to ourselves and our Posterity, do ordain establish this Constitution for the United States." Then the constitution was ratified by each state in the name of "the People". The people apparently thus had final power in establishing community goals of justice. The United States had embarked on a clamorous assertion of freedom and democracy as the expression of its national identity (Foner 1999, 16). The community and the nation would always prevail over individual rights in the US thereafter, although Isaac Kramnick's pithy claim that Madison "wanted nothing less than a complete reversal of 1776" (Kramnick 1987, 29) overstates the position of other drafters.

By 1787 the democracy for all humans proposed in the Virginia Declaration was gone. In its place, a restricted franchise on existing state rules was established. Only *citizens* of 7 years standing over the age of 25 had the right to be elected to congress and they had to be 30 years old to be senators. It is possible to see this retreat from 1776 as a motivated by a desire to defend property by landowners, but it is clear that de Crèvecoeur's Americans all believed in private property. Consequently, with fear of popular prejudice driving politics more and more, when the (11) amendments were inserted in 1791 into the Constitution as the American Bill of Rights, they

were clearly understood as subordinate to the community interest of the people as expressed through its highly gerrymandered, patrician congress and senate. Even then, it took a desperate political battle led by George Mason (and to a lesser extent Jefferson) to have them accepted.

Some of the notions expressed in the 1688 revolution remained as points of reference. The rights listed in the bill of rights replicated most of those already established formally in Britain by 1689, the right to freedom of conscience, assembly and equal treatment before the law by a jury of ones peers (first amendment). To that was added the all-important right to bear arms, ending a state monopoly of coercion and starting the tradition of "American" lawlessness in what was the most litigious of nations, that is, the most law abiding (second amendment). A history of universal human rights cannot overstress that the US "Bill of Rights" is in fact amendments to its constitution or sovereign law and subject to that constituting social contract. The rights of an individual are always subordinate to consideration of the community good.

From the point of universal human rights an important difference from British statements of rights was how far the US rights extended. While limited to citizens, it is quite clear that the colonies and the United States initially had a more open entry to citizenship for Europeans and Britons than any country in Europe. There seemed to be room for all to have a patch of land .For that reason, as Paine's *Common Sense* stated, America stood ready to "receive the fugitive, and prepare in time an asylum for mankind" (Paine 1987, 81–2). This lasted while the patricians exercised power. New comers had or should have the rights of the old. But, with increasing democracy in the US, that openness and thus admission to all through open borders to the human rights soon ended. The democratic people started a system like that described for admission to citizenship in Britain. Who belonged was decided by reference to an ideal national identity. The ingredients might have been different, but the structure was the same: outsiders would have none of the human rights until declared citizens. The first US Naturalisation Act (1790) limited citizenship to "free white persons"; all immigrants of other races were excluded from US rights. This innovation was more significant than all the affirmations about the rights of citizens. It then became a question who was really a "white man"? (Ignatiev 2009, 49). The US attitude to outsiders, particularly to the Irish who came en masse in the nineteenth century, lurched dangerously close to its attitude to slaves and Native Americans, discussed below in Chap. 9.

Conclusions

The nation-popular notion of rights having been developed and then come to a halt in Britain**,** the story of human rights had shifted to North America. There, British colonists, like the Quakers who had fled the injustice of the British state, took seriously the claims of Locke about 1689 and, seeking to be "more British than the British", started on a March to realise them. This culminated in statements about the rights of men which ended in a war of national liberation from the British. It was not

the Americans' intention to do more than establish a set of principles that they believed the mother country had betrayed. Many reputable commentators regard the Declaration of Independence, the war of 1776, and the rights enshrined successively in the US Constitution as no more than an attempt to continue, explicitly and implicitly, the British social contractarian tradition (see e.g. Bobbio 1990, 98–99, also 1996, chIII) while improving it. Rights were made by the people in its parliament and for the people. They were enshrined in a rule of law. But, if they intended to continue that tradition, while raising it to its correct and purer form, the rebels could not avoid innovating in unintended ways.

The cornerstone of the British tradition of rights was the common law whose basis was itself that ultimate power rested in a sovereign. Even after 1689 the latter remained the monarch in parliament. The American rebels could only establish their own "superior" system of rights by overthrowing that whole British edifice and starting anew with the claim that they were sovereign, breaking the continuity embodied in the British formulation of "king-in-parliament". Once the people was made sovereign and a really democratic polity proposed, the relationship of all institutions of state was changed, as well as the relations between those arrangements and the sovereign citizenry. An elected president depended on the popular will in a way that even William III did not. Indeed, the American revolution created a democracy whose collective and community will could best be embodied in a great leader, a president whose power would resemble strangely that portrayed in the Hobbesian image of Leviathan. Even when this was balanced by a Lockean/Montesquieuian system that insisted on checks and balances and separation of powers to protect intermediate power and thus differing interests, the democratic and political element was much more powerful than the universal right element. Rights of the individual remained subjected to democratic consensus and not superior to them. US statements of rights never got past the communitarianism of all national-popular systems of rights for citizens of the nation. Outsiders had no claim to the rights that Americans had. The 1776 revolution was the last of the great social contractarian revolutions.

The British limitations of human rights to citizens only had been coupled with laws making admission to citizenship in Britain very difficult. This was to be true of the British Empire as well. The US nod to universal rights at least made them possible as a goal for all others .But there, too, despite the mass immigration, democratic prejudice spurred by private property in land and human slaves, also ended easy access. The joint social contract tradition, especially in its democratic variant, became the model for all states in the nineteenth and twentieth centuries. Human rights were certainly recognised, but for co-national citizens only. They were only accessible to others by migration to states where they existed and easy admission to citizenship there. Neither British nor American model allowed that.

All this would not matter so much had the United States not emerged by 1945 as the most powerful and important nation-state in the world. When it did, it decided what rights would mean throughout the world; how they would be talked about and how their implementation would take place if US interests were to be affected negatively. Recent scholarship has shown that in the Second World War, the US

emerged as the overt and covert manipulator of the United Nations in its own interests and that the UN Universal Declaration of 1948 was politically influenced so that the US understanding of rights would become the accepted if not universal view (see Normand and Zaidi 2008, esp. chs3–5). The understanding of rights was forcibly limited to what it had been in Britain and had become in the continuity and change effected in the US. The problem is that the privilege given by both to legalism, in the US to democracy and the righteous open republic, was not shared by excluded groups who had fought for centuries in different ways for a new understanding of rights for all human beings – where what was just was not decided by a majority but according to a higher individual criterion.

What was logically and practically required to break the belief that a virtuous democratic people could demand that all other people become like it if they wished to have equivalent human rights was a new understanding of humanity that challenged the blind hubris of commitment to a national tradition. While it seems obvious now, it was not obvious to any national-populist tradition that a national tradition of rights had to silence any voice from outside about rights and justice. This understanding only emerged slowly in the process of the "discovery" of the rest of the world by Western states and their incapacity to force some of the newly-discovered peoples to accept the superiority of their national traditions of rights and justice.

Chapter 3
When the World Was New

The development of the first model for attaining human rights took place in a tiny European part of the world. Its goal was rights for nationals. Humans might never have gone beyond it if Europe had been the world. Outsiders like the Stuarts, the Quakers, Grotius and the utopians who believed in universal rights could have remained just bizarre irrelevancies to be killed, exiled or laughed at by national peoples whose leaders had the power to make a rule of law. Europe was, and is, fortunately, but a small part of the world. What enabled the notion of *universal* human rights to emerge to challenge the national-popular model for rights was the "discovery" of the rest of the world and humankind after 1492 by the European minority. This overturned all its received verities in an unprecedented way. A little unilaterally, we might say that Europeans were forced by the worlds they met, to compromise. Their arrogant vision that subordinated individual notions of justice to a national rule of law – already condemned by people like the Quakers who emphasised its oppressive approach – had to be modified. Unfortunately, they took three centuries to arrive at a compromise.

To speak of "discovery" lays me open to the accusation of Eurocentrism. I should immediately state that it has a particular sense. Contiguous peoples have always known about their immediate neighbours and so by an infinite series of links much of the world had known of the existence of the rest long before 1492. Intrepid individuals had travelled far. To trade, humans had always voyaged. The Silk Road that stretched for 8,000 kilometres from northern China to Antioch and Tyre had been used by traders' caravans for 6,000 years before Christ. Marco Polo described it at length. Europeans like Jean du Plan Carpin (in 1245–7), William of Rubroeck (1253–55), Jean de Mont-Corvin (1289–1328), and Odoric de Pordenone (1318–30) had visited and reported on China in the Middle Ages (see Boothroyd and Detrie 1992). Before and during the Crusades, Venetians had set up entrepôts in the Middle East where they met merchants coming from China. The Chinese eunuch Admiral Cheng Ho had led several fleets to Africa in 1371–1433 and today Chinese historians argue that Chinese had sailed to Europe well before the Europeans sailed to China. The discovery of North America has been pushed back from 1492 to the Vikings' voyages in the late Dark Ages. Great epic voyages had been made by the

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Polynesians by the time Columbus set sail. Ibn Battuta had "discovered" the Moghul kingdom in 1335c. Vasco da Gama reports in his account of the "first" voyage to India (1497) meeting a Venetian who had lived in the islands near Goa for almost 40 years and had become a Muslim (da Gama 1963 [1898], 84–6, 125). He tortured him because he thought he was a "pirate".

But, while individuals had heard of distant lands beyond those reached by the Crusades (Campanella's mythical City of the Sun is in Taprobane, Ceylon, fabled as the Garden of Eden; we find Inde in Chaucer and Marco Polo had described China in detail and at length), the world was not known *in a direct way* as a global whole of many interlocking people even by the elite, much less by the mass. Most ignored its variety and difference except as opposition. For example, the first Western voyagers were surprised to find communities of Jews and Syrian Christians in India and China though they had been there for centuries. The horizons of people who knew the other directly as immediate neighbours were not those required for global or total visions. Over a century had to pass before great numbers of people had personal contact with distant outsiders; before Indians or Aztecs were no longer "marvellous", to be kidnapped and put on show before the monarch and her scholars. Montesquieu stated that his *Lettres persanes* were meant to be marvellous and when they were written, Mehmet Effendi, first ambassador to France from the Porte, certainly marvelled at Versailles and le Nôtre's gardens (Montesquieu 1964, 862; Effendi 1981). As Saint-Simon noted early in the nineteenth century, the world really became round when many people had made the voyage. Despite Galileo's theory, before that there was still the possibility of an edge over which the ocean poured into nothingness. The common sense "from below" had to be transformed by a general vision "from above" and that meant that intellectuals had to believe the new information and see the world anew. It took time for culture shock and blindness to be overcome. For example, after the Crusades, Western chroniclers had been surprised and shocked to see how the few Crusaders who had remained in the Middle East – especially those of the second generation – had adopted Moorish clothing and mores. Neither side recognised themselves in the other (their common humanity) despite the cross-cultural links that had been established and the blurring of borders. Notable in Christian descriptions after they went to India is the fact that such acculturation in garb, demeanour and language rendered the acculturated Europeans, those who really knew the locals and spoke their languages, almost unrecognisable and incomprehensible to fellow Christians (see *Manrique* [1629–43], 1967, II, 98, 152, 154). Intellectuals and decision makers had to make an overall structural sense of the whole; their views were governed by the ideological structures within which they worked, and which sieved out or blinded them to the knowledge of little people at the frontiers.

The spread of the new knowledge was slow. Hakluyt's best- selling *Voyages* appeared in 1582. It was over two centuries later than the material discoveries when Montesquieu wrote, on the basis of the accounts of the voyagers, an intellectual "discovery", the first study of comparative government, a work that started from the fact of difference in order to decide the best ways to govern

(*Esprit de Lois*, in Montesquieu 1964, 528–808). This work became the foundation of our modern understanding of both history and politics. Montesquieu did not see the same object as all his intellectual predecessors. He proposed not to write a science of society or man in general, but of different concrete societies of the world or men, and that required a different method. Studying the accounts of voyagers, Montesquieu had decided that different societies were directed not by their fantasies, but by the invisible laws of their social needs (*Lettres Persanes* in ibid., 70, 83, 111 and passim; see especially letter No 94, *Esprit des Lois*, 529). The "discovery" was of "a new world" which compelled a new way of talking about human beings (Althusser 1968, 8–17). As Montesquieu put it in his *Pensées*: "[Before the great voyages of discovery] it was not like it is at present when all the peoples of the world are so linked together that the history of one throws light on the history of another. All great nations thought of themselves as the only one; the Chinese thought that their empire was the whole world; the Romans thought that they were monarchs of the universe; the impenetrable continent of Africa and of America were the whole world for their conquerors" (Montesquieu 1964, 890).

The first part of this chapter thus tells the story of the material discovery of the world as one. But for a book about *universal* human rights, what is important about those discoveries is how they changed fundamentally the terms for discussion of rights and justice. Added to millennial friends and enemies, were a host of "unknowns", who were necessarily "neutrals", whose cultures had to be learned to see where they fitted in the story of attaining rights for nationals. There is no gainsaying the importance of these discoveries for universal rights, since for the first time there really was a material notion of a global or universal humanity: of men rather than Man. On the other hand, the mass of Europeans learned nothing practically about the virtue of universality from the discovery of the Americas and India. That only came when Europe met China.

The second part of this chapter devotes considerable space to these theoretical discoveries, so important are they for the evolution of a universal model of human rights alongside the dominant nation-popular model that was achieving hegemony in Europe over the same two centuries.

When the World Was New

The discovery of America in 1492 in a westward voyage to find a new route to "Cathay" was a discovery in an unprecedented sense. For the first time, unknown and unimagined peoples were met, unlike the always-known peoples of Europe, Asia and Africa. It was a time when "the world was new and was no other" (Las Casas 1951, I, 88). For intellectuals and for the mass of humanity, it posed the question of what relations should be with human beings who had never been imagined to exist and who had to be taken at face value, since there was no common culture, language or other means of communication and no bazaar

interpreter to employ as had hitherto been the case when East met West. This is tantamount to saying that the discovery of the Americas forced Europeans, and then others, to consider what rights pertained to individuals never mentioned in any Holy Book and with no known history; people who seemed akin to the abstract man of nature and had no known cultural attributes. Moreover, the discovery opened up the possibility of other unknown peoples, and unleashed a frenzy of voyages that revealed ever more new worlds and cultures in the following three centuries. Humanity became measured in the future tense, not merely in the past and present. Also, as technology improved, the new voyages, unlike the old which went by land and passed from haven to haven, were made in ships. Thus the world became interconnected – with way-stations – in a more abrupt, direct face-to-face exchange of goods, money, labour, men, women and beliefs. So we have the discoveries of Madeira in 1420; the Canaries in 1424; Azores in 1449; and Cape Verde in 1460, all of which were entrepôts whose importance was negligible compared with the discovery of nations on new horizons. From this came the linking of Europe and Asia in the mental universe of many humans. The world was really one (Birch 1970, II, vi).

What interests us is the reaction of all these peoples to one another and, in particular, the reaction of Europeans to their "discovery" of others, not through fabulous accounts, but as a day-to-day interaction. The initial pattern was roughly what might be expected from peoples emerging from the barbarity of the Middle Ages. If they were more powerful, Europeans simply took possession of territory and exterminated the locals. The first *conquistadors* were bloodthirsty feudal barons who had a sense of themselves as nationals only because they had just emerged victorious from a centuries-long *Reconquista* of Iberia from Muslims, which had been as bloody a battle as any in the Middle Ages. They still thought of themselves as part of Christianity rather than as a national people (though so did others, like the French (see e.g. Paulmier de Gonneville "Voyage au Brésil" [1503–5] in Cartier 1981, 45) and the Portugese when they first went to India and southeast Asia. They were not merchants like the emerging bourgeoisie of England and the Netherlands but a hang-over from a mediaeval past. So they applied the mediaeval model of rights that they understood, which emanated from the church and ultimately the pope. Today it is astonishing to our minds that their claims to what they could do in other people's territories arose from Papal Bulls of 1481 and 1493 that divided sovereignty over the world between Spain and Portugal along arbitrarily drawn lines. For both states, this established their right to conquer and impose their law and morality on any territory within their ascribed domain. So when the Spaniards landed in central America, they obliged the local inhabitants to swear an oath called the *requierimiento* (1513) which enjoined the latter to accept the sovereignty of the Spanish monarch and to become Christians. If they did not they were informed that:

> We shall take you and your wives and your children, and shall make slaves of them, and as such shall sell and dispose of them as their Highnesses may command; and we shall take away all your goods, and we shall do you all the mischief and damage that we can, as to vassals who do not obey, and refuse to receive their lord, and resist and contradict him; and

> we protest that the deaths and losses which shall accrue from this are your fault, and not that of their Highnesses, or ours, nor of those cavaliers that come with us (see Greenblatt 1976, II, 573).

Since their listeners did not understand Spanish and much less the principles on which the proclamation rested, their response was often slow, or confused. They were nearly always killed on the spot before "they could even obey" (Las Casas 1992, 33, 56; 1992b, 51).

When the Dutch and English merchant bourgeoisie "discovered" India they tried to do the same. They had by then developed a constitutional model of rights for nationals that guaranteed life, liberty and later, increasing freedom of expression. But they had no sense that the newly-conquered peoples were entitled to anything more than the *indios*. The notion that the conquered territories' populations might be the subject and not the object of rights was not part of the law they formed in the course of material contact. To impose an alien national-popular system, say, British traditions, meant the destruction of the cultures of the conquered peoples. Yet the pattern of destroying the rights of the other in a conquest, down to extermination, could not continue outside the Americas. In Asia, the relations of force were different and the conquest took two centuries. In India, the European conquest might not have been successful had the sub-continent not already been collapsing through internal contradictions. Nevertheless, it was so vast, so rich, so populous, that Europeans had to compromise with local mores even as they imposed their model of rights on peoples for whom it could have little meaning. When the Europeans faced China, even stronger, more populous and richer, they came up against the proverbial immovable object. They never really conquered China despite attempts and were forced to learn from it and its traditions.

What lesson was learned here? The new worlds were as or more barbarous than those of Europe itself. Europeans knew this and used it as an excuse for a "civilising" mission; but they could no longer deny the fact of different cultures and that any thinking about the world had to start from such differences. Over three centuries, beginning with a few progressive thinkers who condemned the destruction of the Americans – notably Bartolome de Las Casas (1474–1566) – great numbers of intellectuals went beyond the existing Christian idea of universal humanity, that all humans are the same under the skin – in the image of God – and that their cultures were like clothes that could be changed for new garments. Thus, the veneer could be stripped away and rights that were identical and thus universal applied to all. But, starting with Las Casas, the new worlds of real difference gradually forced them to recognise that the customs, laws and rights, in sum, the cultures, of others were no veneer. They were of the essence of the being of those others. So their own ideas of rights could not simply be revealed to be untrue through preaching the word of God or civilisation. Henceforth, any notion of a universal humanity had to start from the fact that it involved a dialogue (polylogue) about what was right and just. In sum, any universal system of human rights required the support and participation of a sufficient majority of all the world's populations.

Discovering the Other: The Americas

We start with the discovery of the West Indies in 1492 when, in an expedition mounted to find and to take the treasures of the East, there began what Bartolome de Las Casas, first bishop of Chiapas, called "The Destruction of the Indies" (Las Casas 1992). The Spaniards believed that they were entitled, under Papal Bulls of 1481 that divided the world into spheres of Spanish and Portugese influence, to take all the land they discovered. Since between "civilised" peoples (including Islamic nations) such invasion would not have been considered legal, the explanation was that the Caribs, and the Mayans and Aztecs of the American mainland were not human at all. They were, in the words of Domingo de Betanzos, "beasts", to be treated accordingly. Hanke reports the Bishop of Avila as writing in 1517 "…they need, just as a horse or beast does, to be directed and governed by Christians who treat them well and not cruelly" (Hanke 1974, 11). It has been argued that since this was the first time Europeans had met peoples of whom they had no previous knowledge, it is not impossible that they should have wondered whether they were men, especially if men are defined by having souls and that is further related to believing in God. A striking example of this feeling of difference is in the dedication of Francisco Lopez de Gomara's very early *Historia general de las indias*, (de Gomara 1946) "The greatest thing since the creation of the world is the discovery of the Indies…indeed it can be called new because in everything it is different from our world. Animals…are different; the fish of the sea, the birds of the air, the trees, fruits grasses and grains of the earth. Their men are like ours except for their colour." But, he added, in other ways they were primitive despite being descended from Adam. "They do not know the true God…they sin greatly by idolatry, sacrifice of humans, eating human flesh, speech with devil, sodomy, many wives, and so on" (de Gomara 1946, 156; compare de Oviedo, *General y natural historia de las Indias*, 1957, 67 who stated that "destas gentes selvajes e bestiales" merited God's punishment and their own destruction). Events like the birth, to Spaniards in the New World, of twins joined together, became that of a monster to be opened to see if there were one or two souls (de Oviedo 1957, 170–1).

The first problem was how to communicate further about values and rights (see Cortes, n.d, 53 n3) with the 133 tribes with unknown different languages. There was no common language; the Caribs had no written language. Europeans had to decide what attitudes to take when neither side had the means of rendering what they did comprehensible to the other. It is true, as Las Casas said, that it was a time when the world was new. It brought Europeans face to face with peoples of whom they had no previous knowledge. But the Spanish were aware from the discovery of America by Columbus both that they lived in "times so new and like no other" *and* that the world was literally one and quite small. Columbus noted in his seaboard journal everything new, flora, fauna but "the world is small" (Colomb 1979, II, 194, I, 71–7; Todorov 1999, 5). When Francisco Lopez de Gomara wrote to the emperor (de Gomara 1946, 156) "the discovery of the Indias is the greatest thing since the creation of the world…it can be called new because everything there is different from

what we have…however, the humans are like us except for colour…they are illiterate", that could have been a spur to treating the new-found peoples equally. Columbus noted that because there was no shared language, both sides had to use signs (Colomb 1979, I, 61), which rendered them equal in a certain way. So Columbus advanced some views close to that of the notion of the "noble savage". But others coming after him could not avoid long comment on the endless human sacrifice to idols, especially to the sun god; their customs were not only novel but horrifying, especially among Indians on the mainland. After the work of Clendinnen, it is idle to deny the horrifying mass murder of sacrificial victims which characterised Maya and Aztec well into the next century. In one of her many books which touch on this subject, she records interviews made in 1562 about ritual sacrifice after the practice was supposed to have ceased under Christianisation. A weeping youth was killed in a way like that experienced by thousands who had been killed each day before Cortes conquered Mexico in 1517.

> And so they untied the youth and threw him down to the floor on to the mat and the *ah-kines* put down the candles they were holding and Diego Pech and Juan Coh took the said candles and the *ah kines* took the youth and threw him on his back and they seized him by the feet and hands, and Pedro Euan came and took up the flint knife and with it struck open his side to the left of the heart…the same knife cut away the entrails [arteries] and gave the heart to the *ah kin* Gaspar Chim, who lifted it on high having first given it two little cuts in the shape of a cross, and this witness does not know what part it was that he took out of it, and put it in the mouth of the greatest of the idols there which was called Itzamna (Clendinnen 1987, 198–9).

Despite the initial marvelling, what mattered for rights was that two bloody cultures met. The Spaniards of the time were a rough and barbarous lot driven by a desire to get rich quick. As Las Casas wrote (1992b, 36), "The cause [of the holocaust that followed the arrival of the *conqustadores*] had been because their sole ultimate end was gold and getting rich in a few days". Those who risked their lives on adventure probably were worse, more entrepreneurial than the others, and the alibi for their self-maximising qualities was the promotion of Christianity everywhere. Hernan Cortes typified such a man. Leading a small group of bandit-like mercenaries who had already been hardened in the war without quarter against the Muslims (the *Reconquista* of the Iberian peninsula), he simply started to murder his way towards the Aztec capital. The conquest of the Americas and the extermination of its peoples by Europeans had begun.

The practices of the conquistadors in the sixteenth and seventeenth centuries were horrific; they regarded the Indians as worse than animals and butchered them in frightful ways. These massacres were the first great holocaust of history (Todorov (1999, 131–3) estimates the numbers killed at 70 million, 90% of the total population within 50 years of 1492). As an eyewitness, Las Casas reported what became typical: they tore babies from their mothers' breasts and fed them to their dogs, and developed ingenious ways of burning them alive as slowly as possible (Las Casas 1992b, 74, 77, also 103–4). Tens of thousand were killed at a time, without reason in Cholula and other places where the Spaniards had been welcomed by the inhabitants. Las Casas' conversion on the road to Damascus came when he saw the massacre

of Caonao which took place when the clerics were temporarily absent in another part of town. So Bartolome de Las Casas, himself a slave-owning conquistador who initially shared the Aristotelian view of the superiority of some peoples over others, observed the massacres at first hand and began to write reams of reports and condemnations of those murders of "millions" of "pacific, humble, mild Indians", pointing out that they were unjustified violations of "natural and divine law" and consequently "grave mortal sins" worthy of "eternal and terrible punishment" (see ibid., 29–31).

Las Casas clearly did not believe that the Indians were the sorts of barbarians whose savagery and warlike character or lack of government meant that they should be "civilized". He wrote in his refutation of Juan Sepulveda (see below), relying on his personal experience and many historical accounts that:

> Not only have they [the Indians] shown themselves very wise peoples and possessed of lively and marked understanding, prudently governing and providing for their nations (as much as they can be nations, without faith or in knowledge of the true God) and making them prosper in justice; but they have equaled many diverse nations of the world, past and present, that have been praised for their governance, politics and customs, and exceed by no small measure the wisest of these, such as the Greeks and Romans, in adherence to the rules of natural reason'(cited in Hanke 1974, 77).

Las Casas regarded the swearing of the oath of allegiance to the king and the church by Indians as "absurd, irrational and unjust" and as deservedly having met resistance from them (Las Casas 1992b, 50–1). He and his progressive contemporaries pointed out that the Americas were populated territories "full to the brim with people" and that the conquistadors were there for the gold despite their protestations about bringing Christianity and civilisation to inferiors (ibid., 39). The argument later used to occupy their land and displace local populations, that they did not cultivate it, was not accepted or advanced by him. Whatever these peoples did with their environment – however, unreasonable it appeared – was not relevant in deciding what was just treatment of them. He applauded risings and mutinies like that in Chiapas and, as Bishop, refused absolution to slave owners. It is important in this regard to recognise that his overall view was hostile to slavery, despite some contradictory asides about black slavery, and that Charles V abolished slavery as a result of his activities (Llorente 1992, 143, 173–4).

As bishop, he condemned the murdering seizure of the Americas by his compatriots, going as far as suggesting that all offenders be excommunicated. This policy earned him the enmity of many powerful land owners in central America. They suggested that his statements that Spain had no right to the lands that had been occupied by force in the name of Christianity made him disloyal and a traitor to the monarch. Finally, this forced him to return home to defend himself and his Dominican order against such charges and to put his own views clearly. It was at this stage that he made a clear formulation of the rights of the *Indios.* He did so in celebrated debate at Vallodolid against the leading Aristotelian of the day, Juan Gines de Sepulveda. On this Las Casas spoke as a bishop, a post to which he was appointed in 1510.

His pleading forced a reconsideration of the justification given by the Spanish for their conquest. which was couched in terms of the notion of rights that was received

wisdom among them. Las Casas starts his *Defence of the Indians* (Las Casas 1992a, 25) probably written in 1548–50, just before the debate with Sepulveda: "They who teach, either in word or in writing, that the natives of the New World, whom we commonly call Indians, ought to be conquered and subjugated by war before the gospel is proclaimed and preached to them so that, after they have finally been subjugated, they may be instructed and hear the word of God, make two disgraceful mistakes. First, in connection with divine and human law they abuse God's words and do violence to the Scriptures, to papal decrees, and to the teaching handed down from the holy fathers. And they go wrong again by quoting histories that are nothing but sheer fables and shameless nonsense."

Rulers, and the Catholic church which arrogated to itself the care of souls, simply thought mankind was evil and could only be saved by the works which the church set, especially those of penitence and confession. There is much to suggest that the populace shared that dark view of the world in which salvation and happiness could only come in the afterlife. But explanation for the *indios* by reference to history was impossible, unlike the relations with Islam and Judaism that Christians had already evolved. The incommensurability of values of both parties on the verbal/rational cognitive level meant that the Europeans' authoritative guide: Aristotle's views about rights and duties or ethics, also could no longer serve as a guide about how to treat them(On the incomprehension see de Oviedo y Valdes 1946, I, 484).

Las Casas argued that it was on the basis of ignorance that they attributed to Indians characteristics they did not have, thus acting deceitfully. If they continued to massacre they would only breed enmity and hatred: "treat others as you would like them to treat you. This is something that every man knows, grasps, and understands by the natural light that has been imparted to our minds" (ibid., 27). His view was adopted by other clergy who saw what was being done to the Indians and began publicly to condemn it. Las Casas advanced many of the positions that would be adopted only after the United Nations made rights universal in 1948, 400 years later. He pointed out, starting from Aristotlean categories, that when people whose language, customs or system of government were met and classified as barbarians, natural reason told us that they thought the same about us. Very rarely would we find really savage, unsociable men anywhere (ibid., 35–6). Only such people should be hunted and caught so that they could be brought to the right ways.

What is important is that in his refutation of Sepulveda's view that the Americans were as "monkeys to men" (Hanke 1974, 84), he not only pointed that their customs did not differ greatly from those of the early Christians but suggested how they and all similar others should be approached. We may typify this as adopting a mild approach where, no matter how incomprehensible to Spaniards their human sacrifices and worship of idols might be, there was no crime so horrible "as to demand that the gospel be preached for the first time in any other way than that established by Christ, that is, in a spirit of brotherly love, offering forgiveness of sins" (Las Casas 1992a, 88).

But, in the debate with Sepulveda and others who argued that reason showed the Indians to be more animal than human and thus not entitled to equal treatment or rights with their superiors, Las Casas went further. He simply affirmed that although it was impossible to communicate with or understand the Indians and they remained

incomprehensible, they were nevertheless rational human beings and to be treated not according to Aristotelian standards but those of the Gospel which preached love for all human beings. They were as entitled to respect for their humanity as any others. He proposed a new human ethic: "Aristotle farewell: From Christ, the eternal truth, we have the commandment: 'you must love your neighbours as yourself'" (ibid., 40). The rejection of Aristotle is very important in understanding the universality of human rights. Girardi has pointed out that Las Casas' "conversion" to the cause of the Indians was a theoretical and practical discovery of them as the subjects of rights, not just their object (Girardi 1992, 154; see Todorov 1999, 160; Las Casas 1951). So, from the seventeenth century onwards, Latin American history turned to the meaning of that history in a struggle for self-definition. At the core of this was the ongoing debate about the effect of any attempt to impose an outside morality, in this case Christianity, and a peculiar concept of rights on Others (see Girardi 1992, 71–9, 81).

The importance of such views for the claim to universality for human rights arose from the fact that the peoples of the new world who had never been met before could not be communicated with and thus were absolute other, could never be thought of according to a notion of community or commonalty. We recall that the foundation of the national-popular model of rights is a national community. Nevertheless, according to Las Casas, such previously unknown people had to be treated according to the Gospel with "fraternity" and "love" not as conquered, lesser beings. In sum, human rights belonged in a realm higher than that of any then existing positive law, and were asserted and established politically "from below". A code like that was essential for a notion of universal rights, where the criterion was not merit.

In this Latin-American tradition then, a just approach to rights could not comprise the caveat that the claimant prove that he or she was like Europeans, let alone "worthy". Human rights, rather than being given, were involved the responsibility and participation of the subject. Human beings were the subjects rather than the objects of human rights.

Mildness: A Feminine Virtue

At the core of Las Casas' teaching was the policy of adopting a mild or "meek" approach based on the Gospel to all newly-met and incomprehensible cultures. We might call it a policy of "wait and learn" which greatly resembles the principle of St Francis of Assisi. It reminds us that views like Las Casas can be found centuries earlier. What matters is how they became ideologies capable of galvanising popular political support.

Mildness is a policy that differs from that of religious toleration, which evolved in the eighteenth century, and tolerance, which is acceptance of other than religious beliefs. It also goes beyond the "trust" that underpins any contractual notion of individualism. It presumes no common language or love or *caritas* in the Christian sense of forgiveness for the invincible evil that is in humans. It is directed to converting people to one's own ethical standards but, as we will show, it assumes that this may involve a long period of bargaining and compromise through which a

person may learn the function and validity of some action or attitude that that person finds reprehensible. In the interim it is a practical attitude to adopt so that individuals can get along with people with different values from themselves while they figure out how to end the slaughters and infringements of rights and dignity that have existed in all times and places. It is "holding to our own belief about the Good in the face of rival and disputing views, and yet not imposing them even when we have to desire, the anger, and the power to do so" (Davidson 1996, 4).

The doctrine of mildness refuses to begin with empirical facts and thence derive a justification for a belief that ones' own values are superior and should be imposed on others. In such a slippage, we end with these equivalences: Indians–children–women–animals–savagery–violence–matter–body–appetite–evil, and Spaniards–adults–men–human beings–forbearance–moderation–form–soul–reason–good. Las Casas' retorted that each side was equally barbarous or saw the other as such. "As St Paul says of himself and others in Corinthians 1:14:10–11 'There are, it may be, so many kinds of voice in the world and none of them is without signification…. Therefore, if I follow not the meaning of the voice, I shall be unto him that speaketh a barbarian, and he that speaketh shall be a barbarian unto me'. Thus, just as we esteemed these peoples of the Indies barbarous, so they considered us, because of not understanding us" (Greenblatt 1976, II, 564).

So the starting point of converting people to new values, where no side can take the high ground, was not mutual understanding, but mildness: sitting down, learning the language of the culture of the other in the wide sense. Imposition of the Christian ethic was not permissible because some of the other's practices were incomprehensible. Perhaps the core ingredient for the future development of human rights was the rejection of Aristotle for the Gospel: "One must love one's neighbour as oneself" (Todorov 1999, 160).

Such views scarcely corresponded with those of the majority of Spaniards and although the king of Spain condemned the destruction of Indians as a result of reports like Las Casas', their slaughter continued until they were exterminated in many parts of Latin America. Apart from individual priests like Bernadino de Sahagun who followed Las Casas' precepts in Mexico; the Jesuits of the Amazon, made famous for their defence of the *indios* in the film, *The Mission,* and later, Bishop Rosendo Salvado of the New Norcia mission in Western Australia, European laymen continued to be more butchers than saints into the twentieth century. Rigoberta Menchu's autobiography relates as frightful a genocide of Indians in Guatemala as that witnessed by Las Casas five centuries earlier. We discuss such events below in Chap. 9 (Menchu 1984, chXXIII).

The Other and International Law

But, despite rejection their rejection by the millions of Europeans who followed him to the Americas, the views of Las Casas were adopted in the sixteenth century as the basis for a new international law. They had been picked up by the Dominican lawyer Francisco de Vitoria (1480–1546) and Francisco Suarez, SJ (1564?–1617)

who wrote major works in 1557 and 1612–21 (see below) respectively, that became the most important texts for radical international law until those of Grotius. Their debt to Las Casas is quite clear. While, like him, they long remained only points for references for succeeding generations of lawyers and philosophers (Francis Bacon (1561–1626) and Alberto Radicati (1698–1737) were influenced by Las Casas), eventually they were recognised as the founding fathers of a post-national theory of international relations. Then they became important for a non-national theory of rights.

De Vitoria was closest in time to Las Casas. In his five books about what ought to be the relationship between nation-states and thus what ought to be the relative rights of human beings divided among such states, he posed the first challenge to any theory of rights based on the national-popular model. The latter would evolve, typically in Anglo-Saxon common law, into the only theory of rights "in-between" in a world of nation-states and rights for citizens only – the so-called "gun shot" rule. This was that a nation-state's rule extended from its coasts as far as it guns could fire. Beyond there was anarchy, the war of all against all. Since it led to endless disputes and wars, and, for example, clashed with the need to control piracy, it was internally contradictory and inconsistent. Moreover, it could not account for rights for the spaces between real state power to impose national sanctions. De Vitoria came up with a much more consistent theory for those who sought rights for those "who do not belong". This is one reason why Grotius relied much on his theory and why it developed as a "law of the sea" – what lay in-between nation-states.

Like Las Casas, de Vitoria was shocked by the treatment of the *indios*. He saw the discovery of the Americas as revealing so new a world that it required a complete reconsideration of the existing notions of rights (compare e.g. Anghie 1996, 321–2 and Grisel 1976, 306). He worked with the intellectual tools of earlier mediaeval theories of sovereignty and had been greatly influenced by the doctrines of Erasmus, but had to think the problems of rights anew in his attempt to address radical cultural difference as a problem requiring the creation of a new universal system of rights. He left behind the mediaeval notion that temporal authority was founded on divine law and papal authority. Rights were established by starting from real material cultural differences between peoples. In *De Indiis prior* (1539c) he simply states that the *indios* have a society and polity and clearly are reasonable beings (de Vitoria 1964, para 333, 127). They thus share through the *ius gentium* a system of rights common to all reasonable beings. Relations with them had to start from that premise: two sets of subjects meeting each other. They could not be precluded by any of their distasteful cultural characteristics, especially their not being Christian, from a claim to sovereign possession of their lands. Like Las Casas, his starting point was that the only real way to find any answer to the question of what rights existed in common among newly-met humans was through natural reason. Its conclusions should be applied by a sovereign monarch (see Anghie 1996, passim and 323) like that of Spain.

This thesis challenged the main bases for Spanish claims to conquer the Americas: that the emperor was temporal lord of the world; that the pope was spiritual lord of the world; that they had that right through discovery; that the *indios* refused the faith

of Christ; that they committed sins against nature; that they had voluntarily accepted Spanish rule and that God had granted the Indians to the Spaniards. In place of those principles – which underpinned the *requierimiento* – de Vitoria proposed others applicable in the first case to relations with the Americans and ultimately with implications for all relations between different peoples with different national law and rights. These were that all humans are free to travel, trade, and exchange without hindrance; they are permitted to preach their beliefs peacefully; that, once they converted others to their beliefs, no-one could force the converted to return to their traditions; that no local tyranny should be permitted; that once a majority so decided, it could place itself under alien sovereignty; that warring states could appeal to outsiders for help and such aid would be just and, possibly, if they could not administer their state lawfully, outsiders could step in and do so. All of these principles, as Anghie has pointed out, still allowed the Spaniards to enter foreign territory and faced with refusal to allow them to act as they wished, to occupy it: "any Indian attempt to resist Spanish penetration would amount to an act of war which would justify Spanish retaliation. Each encounter between the Spanish and Indians therefore entitles the Spanish to 'defend' themselves against Indian aggression and, in doing so, expand Spanish territory" (Anghie 1996, 326). Indians were incapable of fighting anything but an unjust war. Anghie would have us accept that de Vitoria argues that the irredeemable resister may be suppressed and even exterminated (ibid., 334). In other authors, like Parry, the point is made that de Vitoria regarded the *indios* as children and thus in need of tutelage, which was the general view of the just obligation of a monarch.

How we assess his attempt to create a new more just world of rights for both parties depends on what status we give to the national-popular model. The Spanish – not yet a national-popular polity in the sense described in Chap. 2 above – did not recognise the national-popular claims of the native peoples. If we regard the right to exclusion as fundamental, as it is in the national model, then the "refusal to receive a stranger" is acceptable. But that view cannot found a system of universal human rights. We return to this issue below.

So de Vitoria's views, however caught by apparent contradictions, were important since they founded a modern international law which presumes nation-states as a reality but considers universal rights in that context. Here the salient point is that such rights can be universal only where strangers always have freedom of movement and expression. His arguments were taken up by Grotius who, as we have seen, started to think of rights severed from notions about who owned or belonged in a space. They were also directly delivered to Charles V, whom de Vitoria advised, and who was the greatest Catholic monarch of the time. His ideas thus received partial endorsement by the state and had the potential to become hegemonic in circumstances other than those of seeking to extract the maximum wealth from the new territories. One hundred years later, this became a possibility even in those Catholic states whose world was still predominantly mediaeval. But for two centuries, they were argued only by a few intellectuals in such places, notably by Suarez, who completely severed the *ius gentium* from natural law and thus completed the progress in a theory of universal rights from a religious to a secular notion of rights.

The telos of Las Casas' enigmatic farewell to Aristotle was revealed: loving others as in the Gospel did not mean assuming that they were just like you and subject therefore to your reason and judgment – in this case, as if they were Spanish or some other known civilisation – but that, despite appearing unreasonable because of incomprehensible qualities, they should be treated as you would wish them to treat you, mildly and with *caritas*. Though not stated directly, this amounts to a claim that all humans have rights despite their physical, social, cultural or other attributes.

Suarez (1548–1617) endorsed de Vitoria's theses about the rights of others, and when and how far Spain had the right to apply her laws outside her borders. No prince could bind a subject or have rights outside his state, although aliens would be subject to the law of the state once domiciled within it (see *A Treatise on Laws and God the Lawgiver, Book III On Positive Human Law*, passim in Suarez 1964, II, 398). If a person was not a subject, then he could not be forced to change either errors or rites no matter how horrible they appeared; limits were placed only on infanticide and a need to defend the innocent.

Since Spaniards had no right to occupy others' land and coerce non-subjects, Suarez also insisted that they had no rights beyond those of free entry and expression, though it was their duty to spread the Gospel. He insisted on toleration and other policies approximating Las Casas' policy of mildness, and persuasion where they sought to convert the *indios* (Suarez 1964, II, esp. 348ff). But free entry and movement by strangers was a basic human right (ibid, 756, 781) and it could be enforced. Exclusion was not permitted. Of interest for human rights was Suarez' assertion that among the justifications for war was "denial, without reasonable cause, of the common rights of nations…such as the denial of transit [or] trading in common" (ibid., 817). So, Suarez did end up defending the notion of a "just war", but it was subject to three conditions, especially that "conduct must be proper, and due proportion must be observed at the beginning, during its prosecution and after victory" (ibid., 805). He thus endorsed Las Casas' views, particularly where he writes of the "just work" of the Christian individual. As a Christian, Suarez shared Las Casas' belief that the church had the right to preach and to defend its preachers, that is, he believed in the right to free speech (ibid., 739ff). But this did not mean that there was right to conquer infidel territory. There could be, he stated, no support for such claims in Christian doctrine, rather the contrary (Matt x. 16; Luke x.3). Following Las Casas, he argued that preaching of the faith should be informed by "gentleness, patience, and the power of the word, and also by living example (Paul 2 Corinthians x.4)" (ibid., 747–8).

From our point of view, that of deciphering the meaning of the UN Declaration of 1948, the greatest interest of Suarez lies in his discussion of the three virtues of humankind. If no state has jurisdiction outside its borders, where its rights end, what then are the rights common to all humans when they meet, interact and overlap with each other? Where do they come from? In Suarez' three works, *De legibus* (1612), *Defensio fide* (1613) and in the *Triplice virtute teologiche Fide, Spe e Caritate* of 1621, Suarez distinguishes *ius* from *lex*, justice from law, describing the first as "a certain moral power that every man has either his own property or that which is due to him" (Suarez 1964, II, 30). While he made clear that he was not primarily

concerned with such moral principles, he expressly shared Las Casas' Aquinian reasoning: "This argument is confirmed by the fact that all the precepts written by God upon the hearts of Man pertain to the natural law, as is indicated by the words of Paul (Romans ii, 14–15) and all the precepts which may be clearly inferred by reason from natural principles are written in [human] hearts, therefore all such precepts pertain to the natural law" (ibid., 331–2). Then there were rights that existed between the equitable and the good, or "natural law" which is never "defective". If i*us* as *lex* sometimes erred, between the two there existed a *ius gentium* or law of peoples. It was (ibid., 326–7) "that law which natural reason has established for all mankind and which is uniformly observed by all men". "The precepts of the *ius gentium* were introduced by the free will and consent of mankind, whether we refer to the whole human community or to the major portion thereof; consequently, they cannot be said to be written upon the hearts of men by the Author of Nature, and therefore, they are part of the human, not the natural law" (ibid., 331–2).

Suarez emphasised that such a law of peoples presumes a universal society: "the human race, into howsoever many different peoples and kingdoms it may be divided, always preserves a certain unity, not only as a species, but also as a moral and political unity (as it were) enjoined by the natural precept of mutual love and mercy; a precept which applies to all, even to strangers of every nation" (ibid., 348). This is almost identical to the argument put by Las Casas at Valladolid in defence of the Indians and their resistance to Spanish law (Llorente 1992, 181–2). "[Legislative power] resides not in any individual but in the whole body of mankind…the basic reason is evident…all men are born free, so that consequently, no person has political jurisdiction over another person, even as no person has dominion over another, nor is there any reason why such power should,[simply] in the nature of things, be attributed to certain persons over certain other persons, rather than vice versa" (Suarez 1964, II, 373). Thus universal rights could only be found in an individual's sense of justice. Because human rights involved a private individual criterion for justice, he did not condemn vengeance for public offences. In such cases the plaintiff/victim acted as both judge and executioner but the cause "is simply that this act of primitive justice has been indispensable to mankind and that no more fitting method for its performance could, in the order of nature, and humanly speaking, be found" (ibid., 819). Such revenge was not seen as in conflict with the "law of peoples" or the "natural law" that lay behind that law. We recall that Bacon, that fierce defender of the common law, took the opposite point of view: where rights for citizens existed, no private justice was acceptable except in exceptional cases.

The views of these three men of the cloth were seminal for universal human rights. The discovery of the Americas had faced them with a practical problem of how a new world should be administered and what rights the culturally different peoples should have. Although all religious men, their starting point was not an abstract natural law of God but the facts of nation-states and that their traditions of national law were inadequate for the new world. Las Casas observed directly that the application of the national laws and rights of his compatriots led to massacre of the *indios*, so far were the values of their worlds different. De Vitoria and Suarez developed on his observations. National law was good for its people. The problem

was to establish a system of rights common to all really different people. Thus, what they proposed as universal right arose from the limitations of national laws in the new circumstances. Their solution to the practical problem of difference made them leave behind considerations of the natural law inscribed in the hearts of each man and to seek a law of peoples. As Suarez wrote: "You may say that the *ius gentium* and civil law differ in that the latter is the law of one state or kingdom, while the former is common to all people" (Suarez 1964, II, 345). In its developed form then, the universal law is a subtraction from, or external to, or superior to, the claims of national laws. While it aspired to the divine, to justice and to equity, they made clear that it was not a prescriptive natural law that, as God had made it, could demand the subordination of men to an absolute rule. It was rather that because a law of peoples had to be negotiated between equals, a completely human construct, the result of human readiness to work out what was shared in their views was untouchable by national law. This view could lead to acceptance in the law of peoples of what one group might see as wrong. As described by Suarez, it was roughly customary international and unwritten law "binding on all" where national law was written and binding only on subjects of that nation (ibid., 345). Being practical men, concerned with real problems and not simply a general morality, they recognised that each nation (and individual) had its own values and beliefs and wanted to promote them, indeed could not avoid doing so. But to avoid coercion and massacre and infringing the *ius gentium*, the only legitimate way to do this was by persuasion (ibid., 748). The problem then became what was a just war other than when the freedom to move and express oneself was interfered with? It certainly had to be waged by a legitimate power for a just and reasonable cause and conducted properly according to rules of proportion (ibid., 805). Suarez also added: "I hold that a war may also be justified on the ground that he who has inflicted an injury should be justly punished, if he refuses to give just satisfaction for that injury without resort to war" (ibid., 818). That policy would prove double-edged.

We can sum up the import for our story of the two Spanish legal theorists as proposing for the first time the only solution in a world of nation-states for universal human rights, which could only exist if there was totally free movement and expression throughout the world. This was reaffirmed many times afterwards. Where only one or some nation-states have adequate human rights, all individuals living in communities that do not have them in their national rule of law must be allowed into national systems that do if they are to enjoy their benefits. The universalisation of national standards is inconsistent in logic and practice with restrictions on entry to any nation-state.

Imperialism: A Denial of Rights for All Humans

Unfortunately for the progress of universal rights, views like those of Suarez and deVitoria, and the ethics of Las Casas on which they rested, were not the preferred common sense of the mass of their compatriots to whom they preached. Less generous

ideals drove their actions and beliefs. The first voyagers from the West were little more than sea-borne versions of mediaeval robber-barons' retinues, accompanied by warrior monks, immortalised in Camoen's national epic, *The Lusiads* (see Eckford Luard, I, 186; Ronald 2007). Like them, they set out to win riches, preferably quickly, and were guilty, like da Gama, of a "diabolical conduct towards the Moors" (Birch 1970, II, xxi) worthy of Richard the Lion-Heart. One goal was the mythical kingdom of Prester John, supposedly a great Christian monarch who rivalled Genghiz Khan, and whose riches in gold and jewels they were intent on having. The myth of Prester John is lost in time but it had been a theme in Mandeville's *Travels* (1366c) which, while based on the few accounts of voyages already available, was mostly a "marvellous" account. Marco Polo also speculated about where the treasure might be and reported that the kingdom was somewhere to the north west of China (Polo 1979, 93; 22, 105–6). A bogus letter from Prester John became a best-seller. By the time that da Gama set out to find him, 5 years after Columbus "discovered" the Americas, his kingdom had been relocated to somewhere in Ethiopia and the Portugese captain speculated that it was in Mozambique. Girolamo Sernigi, who travelled with de Gama, reported that in Calicut "they have some knowledge of Prester John…that the people of Prester John have letters and a written language" (Sernigi in da Gama 1898, [1497–9], 134).

The new marauders hoped for gold and jewels but they also wanted other riches, the spices of the East. With them sailed hardy men sent forth by the new merchant classes to seek direct access to the spices of the east (see the letter expressly stating this from King Manuel to the king and queen of Castile in July 1499 (da Gama 1898, 113–5), which also expressed the hope that there "will be an opportunity for destroying the Moors of those parts" and would lead to the conquest of Cathay. For centuries spices had passed overland from the Moluccas through Asia on the camel trains of the Muslim traders. But such was the mutual hatred after the Crusades that the Muslims frequently interrupted the trade with the West. The Christians had only themselves to blame for their success in doing this. Before the Crusades Islam had been disunited and weak, and also a moderate and fairly tolerant merchant culture. The Christian onslaught united Islam, making it a warrior religion that conquered all of northern Africa and southern Europe until stopped in Spain in the fifteenth century. Islam's proselytism had led to the conversion of nomadic warrior peoples like the Seljuk Turks and later the Mongols, and it had spread into central and south Asia by the time da Gama sailed into Calicut. Five centuries of conquest and conversion associated with names like Genghiz Khan (1187) and Tamurlane (1336–1405) had established Islam as far as Vienna in the West and China in the East. Islamic warlords had divided up the northern Indian subcontinent in 1180–1350 much as the Germans had done in eastern Europe in the same period. By 1526 their descendants, the Moghuls, ruled most of central and northern India. Their exploitation and brutality at least matched that of mediaeval European monarchs (see generally Asher and Talbot 2006, chs2 & 49). In the centuries before the arrival of the Europeans, the Moghuls continued to slaughter their way south into equally violent Hindu kingdoms and then pushed Islam south into south-east Asia. A shocked Ibn Battuta remarked in 1335c on their extraordinary savagery (Battuta 1982, III, 5, 72).

An English observer wrote in 1608, when war and rebellion were as endemic as they had been in feudal Europe, "Their government is of such barbarous kind, and cruell exacting upon the clownes, which causes them to be so headstrong. The fault is in the chiefe, for a man cannot continue halfe a yeare in his living, but it is taken from him and given unto another; or else the King taketh it for himselfe (if it be a rich ground and likely to yield much, making exchange for a worse place…). By this meanes he racketh the poore to get from them what he can" (Hawkins in Foster 1985, 114).

Sailing eastward rather then westward, the Portugese arrived as India reached her peak of wealth and power. Her population of 150 million was exploding. They marvelled at the wealth they saw, but otherwise, they saw a place not unlike that of the Europe they had left. The poor ate rice and chupattis even in 1640. They were sacrificed in their thousands in religious rites; surrounded by tigers who ate them. They were ruled by the only class who could read, the Brahmins "who are a set of religious men (just as our priests among us)." The king still went on fastuous royal progresses to extort the peasants hard-earned gains (see Manrique 1967, II, 185 and fn) The Europeans were mostly simple men with feudal values who huddled together while they sought the "liberty" of trade as townsfolk had done for centuries in Europe. Fitch reports in 1610 that he found an Englishman, French soldiers, a Dutch engineer and a Venetian merchant and his son and servant in Agra "newly come out of Christedome" (Foster 1985, 146). Just as in Europe they bribed, blandished and promised. They beat and brutally murdered when they could. But as a tiny ethnic minority they could only continue the customary Christian enslavement and slaughter of the Muslims on occasion. Muslim India was a much mightier and richer place than any state in Christendom. In the end this too would force them to a new world view. This made the history of their relations with Asia significant in a different way from that with the Americas and a different but equally important lesson was learned.

The killing of Muslims started on da Gama's first voyage. Hapless dhows were taken and everyone murdered; "they…returned again to the battle in the sea with the Moors who were swimming and with lance thrusts and cuts they killed so many of them, that, although they were tired of slaughter and unable to accomplish their whole purpose, some managed to escape, yet the sea was so tinged with blood that it was a frightful thing to look at it. The cabin boys and ships servants… did nothing but thrust the bodies under the water with grappling hooks, and tear out their bowels in such a manner that the slaughter was great among them, and there was one cabin boy who alone put to death 80 Moors" (Birch 1970, II, xxi; da Gama 1963, 85–6; see also da Gama, n.d., 331, "the captain major commanded then to cut off the hands and ears and noses of all the crews"). On arrival in Calicut, da Gama butchered the population in a manner reminiscent of the sack of Jerusalem. Another observer recounts how over a century later they still tied the Koran to the necks of dogs and sent them running through the town (Coryat in Foster 1985, 278).

As in South America, this all masqueraded as advancing Christendom and destruction of the anti-Christ. The Portugese ships sailed with priests aboard,

although like the others they often changed their frocks for the garb and function of merchants. The crews still divided up the worlds they found religiously; in taking land, they also intended to proselytise. Their whole enterprise was informed by views like those of Joao da Barros *Da Asia*:

> There having risen in the land of Arabia that great anti-Christ Mohammad, more or less in the year 593 of our Redemptor, he so worked the fury of his skill, and the fire of his infernal sect by means of his captains and Caliphs that in the space of one hundred years, they conquered all of Arabia, part of Syria, and Persia, in Asia and in Africa all of Egypt beyond and before the Nile (Barros, I, i, 1–2 cited in Subrahmanyan 1993, 49).

The Portugese maintained their intolerance for a century. Manrique recalls a meeting with priests (*raulins*) in Burma to debate the faith.

> One of the most venerable of them…said to me that he was as surprised at me as he had been at all the other Christian raulins, they being so ill-disposed towards and lacking in respect for their Poras (Gods), and also at our temerity in holding that only the faith that we taught earned salvation; obviously this was due to our fraud and malice…His Highness demanded why I spoke in such vile terms of his deities. I replied that the reason was that those Gods were unworthy of the name which had been given them by ignorant man…Now while this truth was clearly demolished by reason itself, it was still more evident from actual manifestations of the Divine ruler."

The *raulin* countered that a good person went to heaven whence he was reborn as an animal that might again commit sins and be reborn.

> I told him that he was hopelessly astray and very far from the truth, for if God transmuted souls in order that they might commit fresh sins and go to Hell we could say that God was the prime Cause and Author of such sins. This was impossible as God was sinless…If, therefore, what you say is admitted, what use is there in making false statements and promises to the people to the effect that they must all, eventually go to Heaven and enjoy the sight of your Poras and their everlasting bliss? I have no doubt, however, that by observing the faith which you say the Poras taught you, you will all go, not to Heaven, but to where you will enjoy, instead of everlasting happiness, the never ending punishment s of Hell, in the place where the Poras are, in the company of other Devils (Manrique 1967, I, 177–80).

This showed the continuation of a mediaeval intolerance that bordered on foolhardiness. Between 1600 and 1773, the Iberians conducted 73 *auto da fe*. It contrasted with Muslim tolerance (at a price) of Hindus, whom they scorned, and of Jews, that over the centuries had created symbiotic forms of many faiths throughout India and southeast Asia.

Yet despite still burning heretics in Iberia, the good Augustinians could not do the same with impunity in India and even less so when the Jesuits moved into Indo-China and then China itself. If they were still feudal and corrupt, the Iberian church faced immensely powerful states. Manrique's view of China, for example, was that everyone "must be at a loss for words to describe the lavishness, the liberality and open handedness with which the Divine Creator of the world has treated this nation, showering on them the riches, delicacies, and first fruits of the earth" (Manrique 1967, II, 71). While railing against their "infernal priests" and "diabolic idolatry", he was forced to marvel (for example, at the Great Wall) with the impotent envy of "the less favoured people of our Europe" (ibid., 76).

The inhabitants of India also started by marvelling themselves at these newcomers. But the latter's deeds rapidly disabused them about the murderous Christians (Subrahmanyan 1993, 54–6). Even Manrique described his lay compatriots in these words: "highway robbers and men of loose lives" who "started trading" (Manrique 1967, I, 41). With the second Portugese voyage, local Muslims declared *jihad* against them. When the Dutch and English Protestants arrived after the Portugese, they lost credibility through feuding among themselves (Hawkins in Foster 1985, 77). By the eighteenth century, they enjoyed the same evil reputation among Muslims that their Crusader predecessors had in the Middle East.

Within the overall detestation of the Europeans, we should however note, to be taken up later, that they effected some important – and hated – changes benefiting the poor and oppressed in the centuries that followed their arrival. By 1590 the Jesuit missions had already made 251,000 converts and conditions of life improved for them in many ways. Of course, there were ancient Christian communities to build on and a general tolerance of such "people of the book" evident in the portraits of Mary (Mariam) at the Moghul court. But, unlike the Americas, where Las Casas had preached a mutual learning process and peaceful exchange without significant effect, Europeans started to learn from the Indians of the sub-continent in a much more equal fashion. The new way of seeing outsiders was clearest among missionaries. From the outset, many British and Dutch found it opportune to dress like Muslims and even to convert (see Withington (1612–18) in Foster 1985, 203–4). They had to work with Muslim and idolator interpreters until they themselves learned the local languages. Thomas Coryat learnt Persian, Arabic and Turkish on his travels (Foster 1985, 237). Some even converted to Islam or Hinduism and then converted back (*Travels of Athanasius Nikitin*, in Major 1957; Withington in Foster 1985, 204; see also Hawkins (1608–11), John Mildenhall in Foster 1985, 116–7; Finch in Foster 1985, 147). They intermarried or took concubines. (Hawkins in Foster 1985, 57, 85). If trade drove their acculturation, religion drove the missionaries. Starting with Francis Xavier, the austerity of Jesuits appealed to the south Indian fishermen with whom they worked. Even more important was the rapidity with which they learnt local languages and took on local appearance and habits, eating local food (Manrique 1967, II, 206–07). The Italian leader of one mission even wore the red marks of a Brahmin. This symbolised the European need to compromise with such huge and ancient cultures and peoples (see Subrahmanyan 1993, Ch9). It revealed a slow rethinking of Western truths and the reasoning behind them.

Learning from the Other: India

On the Indian sub-continent, what was important for our history was the failure of the British to learn much about the limitations the systems of rights like those developed in Britain in the previous century. Civil liberties had been firmly established in Britain when it became the dominant imperial power in India in 1757. The British were concerned about such matters in their new possession in ways that

their predecessors in India were not. The earlier Western invaders came from countries where conditions were like those described in Chap. 1 above –worlds without human rights. French rivals for dominance in the subcontinent in the eighteenth century still had not attained the level of British civil liberties in 1689. Not surprisingly, the Portugese and French approach to Indians was like that of the Spanish in America a century earlier. They simply imposed their mafia-like standards and the horrible sanctions that went with them. More might have been expected from the British than such murderous oppression and sometimes they sometimes imposed their standards – for example, where the torture of suttee was concerned. On occasion, then, the Raj lived up to professions about rights and justice at home and imposed them in India, which benefited some victims on the sub-continent. But, the case-by-case imposition of civil and later, political, liberties, whatever their benefit, was harmful overall for universal human rights. It provoked great resistance, which in turn fostered a wilful blindness among British rulers about the view of rights and the values of the people on whom it was imposed. It fostered a refusal to learn, listen to, or even see the victimised other. Eventually, it added up to a translation of British national rights into a demand that Indians become Britons and finally, because of that refusal to recognise rights for those who were different, into racism. Las Casas' strictures about the conquistadors' treatment of *los indios* can be applied directly to the most advanced national human rights system that existed before 1776. British policies about human rights in India completely contradicted the rationale for a national-popular tradition of human rights and should be read as a condemnation of the exclusionary nature of such systems. We saw in our previous chapter how those systems did not extend rights to foreigners, those who did not belong, whether they lived within or outside national borders. The Indians were regarded as aliens and treated as such when their rulers so decided. The Indian experience made clear that such exclusion from rights extended to many more millions in the new empires of the eighteenth and nineteenth centuries than had ever been the case before.

We recall that the British system created in 1689 was expressly stated to be the expression of a particular national history and therefore appropriate to the British. British civil liberties were those that fitted Britons. No other system, created in foreign climes, would work in the sceptred isle. That was made explicit, as we show in the next chapter, when the French suggested a universal human rights system for all peoples in 1789. A fortiori, it should have been obvious that the British model ought not to be imposed on other traditions. Their imposition would, according to British reasoning itself, only provoke resistance and the assertion of another tradition of rights whose origins were buried in the mists of time, in an original myth. That law and its rights could be frightful, depending on the traditions; in India this was often the case Yet, despite such rationales, the British had imposed their rule of law on the Irish, arousing a bitter resistance. In India, once they had the power, they did likewise. The response was similar. British law was imposed and the voice of the victims was smothered when they demanded rights. The limitations to the exporting the national-popular tradition of rights was never really recognised and that system not called into question.

India Before the Raj

The explorers and adventurers had found a world in the East that in some ways differed little from those of their own feudal world in transition. India was a place of poor and servile peasants, often forced by the constant wars, plague and famines to sell themselves into slavery which was ubiquitous (Manrique 1967, I, 53, 64; Bernier 1968, 205ff) They were mercilessly exploited by lords headed by a king who was described as divorced from his people (Bernier 1968, 156). The priestly caste of Brahmins, "their masters and directors" (Manrique 1967, I, 77), exerted a total hegemony over the Hindu mass. They would commit suttee and self-sacrifice to man-eating sharks because of their subordination (ibid., 74). Brahmin teaching about the Good seemed so removed from a brutish and short everyday life as to be irrelevant to their assessments. There is little evidence that many saw much to respect.

But they also met difference that at first made them marvel and, for some, put into question their own values and how far their own "reason" could and should apply to peoples whose religion was part of everyday life. The reverse was also true (see Hawkins in Foster 1985, 71; Major 1957, 9). Manrique wrote about an Indian who worked for him: "This he did, as Orientals do, without losing sight of his own interests, but in so skilful a manner as to leave me indebted to him. In such matters these folk could give instruction in many European Courts, where it is customary that even if a stigma should fall on their character it yet leaves them as unspotted as if it were merely a drop of water, since few remember that they have received it and leave the skin…remains no longer than that from a spot of water does upon your clothes. Yet the Europeans are styled politicians and civilised man and the Indians barbarous" (Manrique 1967, I, 97, 129; Razzak, in Major 1957, 16–17). What status did European economies, societies and polities, and values, have when faced by such a comparative model (ibid., 126–7; II, 140–188)?

To illustrate: in India, lords were not hereditary; they lasted just as long as the monarch's favour. On their death a new placeman would arrive. Was this better or worse than the European system they wondered? (Manrique 1967, I, 53; Hawkins in Foster 1985, 182–3; Bernier 1968, 224ff). Then they discovered not only polygamy but polyandry (Razzak in Major 1957, 17; Conti in Major 1957, 20–22), which reversed the notion of monotheisms that women were not the equals of man. Above all, to shake their assertiveness, they met worlds that were infinitely bigger, stronger, richer and, in many ways, more "civilised" than their own. Conti reported that "Pestilence is unknown among the Indians; neither are they exposed to the diseases which carry off the population in our countries; the consequence is that the numbers of these peoples and nations exceed belief" (Conti in Major 1957, 32). "This Agra is noe city but a towne; yet the biggest that I ever saw", reported Nicholas Withington (Foster 1985, 226) "Agra …I doubt whether the like be found within the whole circumference of the habitable globe" declaimed Coryat (ibid., 244) who also marvelled at the huge and strange animals (ibid., 246). They were struck by the plentiful and cheap food (Manrique 1967, I, 54; Coryat in Foster 1985, 248). Bernier noted Emperor Aurangzeb's statement of his obligations: "being born the son of a king.

I was sent to live and labour not for myself but for others…that it is my duty not to think of my own happiness, except so far as it is inseparably connected with the happiness of my people"(Bernier 1968, 130). In sum, the Moghul king appeared the greatest of all the world (Coryat in Foster 1985, 246; Edward Terry in ibid., 296).

So the difference they met vied with the similarities they saw with their own lives, forcing them to start thinking of universalism in a new way. Where Christianity and the church had preached that all mankind is one, that universalism was revealed as abstract since it assumed that all humans were God's creatures, equally loved and virtually interchangeable. Humans in the divine, heavenly, mode of reasoning beings were replaced in Western minds by the material Indian reality that humanity existed as difference that was not always comprehensible and was sometimes bad by European standards. Where in the Middle Ages, Christians and Muslims had forced different people to become the same in attributes (by "conversion") because they saw such difference as evil, after the discovery of India, difference in religion or skin colour was no longer deemed to be the mark of the devil. This had started with the Moghuls well before the Portugese arrived. The latter noted with astonishment the picture of Mariam at the Moghul court (Manrique 1967, I, 178–9). So whites started to query their values. And they began to make cultural compromises. After initial massacres by the Portugese, the model of syncretism was adopted by the Jesuits, much to the horror of Rome (see O'Malley 1944, 50–52).

In sum, after 1500 a dispute started about how to deal with difference and "universal" humanity. If the Moghuls had not started to tear their kingdom apart in fratricidal warfare, setting off a rapid decline of India late in the seventeenth century, it might have been resolved in favour of tolerance and mildness towards outsiders much earlier than it was. But by then, European attitudes had changed to scorn and a determination to conquer and "civilise" the Indians. Their own sense of the individual and rights was well advanced, but together with the nation-popular model for rights, they had developed nastier views that the others had to prove that they were part of humanity by becoming like whites. If they did not, then they should be forced to do so and in the extreme they should be exterminated. Practically, the lesson was no different from that learned in South America. A telling illustration of this was the way that the Raj abolished the inhuman practice of suttee. Their policy went from straight repression to compromise with local traditions to a desire to turn the Indians into citizens in their own British image.

Suttee

When Westerners and Indians made contact after da Gama's voyage, both still came from the savage, warlike, human rights-less worlds of the Middle Ages that we have described. The relative strengths of the different European nations and the largest two or three states in India in the fifteenth and sixteenth centuries made the Indians overwhelmingly superior. But in the seventeenth century, the Indians started to tear themselves apart and collapse, while Holland and Britain became mercantile

capitalists with strong states based on a rule of law and rights for nationals. The divergence in power grew as Europe and the West became much more powerful than India as the century progressed. The reasons are beyond this book, but the rise of capitalism was accompanied by technological advances in the West, especially in making war, that were not paralleled in India. Despite the incessant wars of Western trading companies like the East India Company with local sultans, an uneasy balance of power continued until 1757 when the Bengali nawab challenged the advance of the white traders. The nawab of Bengal, Siraj-al Daula's, defeat at Plassy in 1757 by Robert Clive marked the beginning of a British dominance in India that slid into rule first by the East India Company then, after 1857, directly by the British state. India became the "jewel in the crown" of the empire, the source of wealth exacted in a terrible exploitation (see generally Jasanoff 2005, Part One.). Tipu Sultan, the strongest of the lords who continued to resist, hired Westerners for his armies and tried to catch up technologically without really changing the autocratic and arbitrary world of the "oriental despot". Tipu Sultan had sought the French as allies and in bizarre quirk pronounced himself "citizen Tipu" after the French revolution (Jasanoff 2005, 148–63). His defeat also marked the defeat of the French empire in India as it was reduced to a few pockets and trading posts. The British warrior-nation had won in a world where all nations were warrior nations, expressly contracted for the defence of a people.

This left the nation-state that openly boasted that it had the most advanced public (they were not yet known as human) rights in all Europe in control of Indian destinies. When Thomas Babington Macaulay made this claim in his *History of England* in 1848 (Macaulay 1980, 19) he had already made the major policies for India 20 years earlier as a member of the governor general's council with the brief to reform its legal codes, and thus to decide what rights should be in the sub-continent. The complex relationship inevitable in a world of nation states, where one dominates another, was illustrated in what he did in and after 1833. British public rights were well in advance of those in India; no longer, for example, were people burned alive as a matter of course for their religious beliefs. Was it not Britain's moral duty to end the oppressions of that sort on the subcontinent by imposing respect for the rights it had already won?

In India, on Macaulay's instructions, what was regarded as horrifying to Britons in the nineteenth century was to be eradicated. And by then the British had the power to do so, to convert their disapproval into legal prohibition, even against local wishes. Thus India became a field for exporting national traditions built up by one people and forcing them on others, in a "clash of cultures". On the other hand, those rights had been won "from below" for citizens by Britons; they had not been imposed from above. Their source was a felt oppression of victims of the state. This was not necessarily the case in India. Faced with local opposition, concern for the victims slid into a blanket condemnation of the powerless colonial other's system of customs and laws. They could be and were explained by the "uncivilised "backward" and "unreasonable" nature of the views of the colonial people.

In a history of universal rights, what is important is the fact that the experience of the *indios* in Latin America under a backward semi-feudal rule of the Spaniards

was replicated in form if not in outcome – since most sub-continental Indians were not exterminated – by the most advanced national human rights system then existing. Opposition to British values and rights brought the harshest sanction. And it seemed to the Indians as hypocritical as early Portugese and Spanish attitudes, whatever the claims about advancing rights and liberties. After all, at the same time as the British were cleaning up "feudal" India, they were executing their own offenders for over 200 "crimes" such as stealing a handkerchief. Moreover, since the ultimate decisive factor was the interest of the British nation and its empire, the policy of eradicating "crimes against humanity" (the term was coined later) was ambivalent, and failure to do so could be explained by referring to another of the British rights, like freedom of religious belief. Nowhere were the contradictions more obvious than in the policy regarding suttee.

Suttee is the Hindu practice of "self-immolation" by recent widows who are either buried or burned alive. Its origins are disputed. Hindu specialists claim that it was decreed in the laws of Manu, 200 BCE; that it is described in the myth of Madri in the Mahabharata (600 BCE) who burnt herself on the funeral pyre of the god Shiva. The practice was reported by the Greeks in 400 BCE. Mandeville reported in his *Travels* (1366c) on the basis of eyewitnesses a century earlier when it was performed in Ethiopia ("Prester John's land"): "And when any man dies in that land, they burn his body…. And if he have no children they burn his wife with him. And if she have children they let her live for to bring them up. And if it be so that she choose rather to live with her children than be burnt with her husband, then she be arreted [deemed] to have died" (Mandeville 1967, 123, compare French ed. in ibid., 326, 339, 394; see also Marco Polo 1979, III, xvii) Ibn Battuta reported it often in the early fourteenth century and even that Muslim widows considered doing it (Battuta 1982, III, 71). It became widespread in Hindu areas of India and southeast Asia, but by 1500 it was concentrated in some areas of the sub-continent. Commentators sometimes described it as required because the widow could not keep herself when her husband died without becoming a burden on the family. By the sixteenth century it was promoted and rationalised by Brahmins as essential to ensure *sati* or chastity among widows who might otherwise be driven to prostitution.

Brahmins and other official spokesmen usually claimed that it was voluntary, and there are cases of widows who petitioned rulers who had forbidden the practice, to be allowed to be burnt. Were it truly voluntary, it would not breach human rights, but already by the sixteenth century its "voluntary" nature was in dispute. Reluctant widows would be bound and pushed onto the fire by their relatives.

The reluctance of victims to be burnt was noted as soon as the Europeans arrived. Horrified Westerners noted that it was widespread and not voluntary. Nicholas Conti wrote, confirming Hieronymus di Santo Stefano: "If she show…timidity (for it frequently happens that they become stupefied by terror at the sight of the struggles of others…) they are thrown into the fire by the bystanders, whether consenting or not" (see Major 1957, 24–25, also 5–6). An English observer found it "verye lamentable" when in 1612 c he saw a 10 year-old virgin who was to be burnt in Surat. The governor, who had stopped the suttee, then allowed it to proceed when appealed to by "her friends". Withington's account continues that they

returned and "with great joye to her" burnt her to ashes (Withington in Foster 1985, 219–20). He reported that among the Rajputs the practice had originally been coerced "but nowe they have got such a custome of it as they do it most willinglye" (Foster 1985, 221). He blamed the family for exerting pressure on the child for fear of being dishonoured. Another report, this time by Bernier in 1667, stated that it was "a frightful dream" from which victims shrank when they saw the "piled wood" "so as to leave no doubt in my mind that they willingly would have recanted, if recantation had been permitted by the merciless Brahmins, but those demons excite or astound the affrighted victims, and even thrust them into the fire". He had seen a child, hands tied, terrified, burnt alive by the Brahmins of Lahore. "I found it difficult to repress my feelings and to prevent their bursting forth into clamorous and unavailing rage; but restrained by prudential considerations, I contented myself with silently lamenting the abominable superstition of these people." In his defence we note that he intervened in another case, was successful in stopping it, and was thanked by one of the relatives.

He noted that the Muslims had done all in their power to repress "the barbarous custom. They did not indeed, forbid it by a positive law, because it is part of their policy to leave the idolatrous population, which is much more numerous than they are, in the free exercise of its religion, but the practice is checked by indirect means." Yet, he noted, suttee remained widespread because official attempts to dissuade women from it had not worked. As this suggests, he was acutely aware of the hegemonic force of the practice: "I soon found that this abominable practice is the effect of early and deeply rooted prejudices. Every girl is taught by her mother that it is virtuous and laudable in a wife to mingle her ashes with those of her dead husband and that no woman of honour will refuse compliance with the established custom. These opinions men have always inculcated as an easy mode of keeping wives in subjection, of securing their attention in times of sickness, and of deterring them from administering poison to their husbands." As he noted, quoting Lucretius, religion can be used for holy and unholy ends (Bernier 1968, 306–314). In *An Account of the Isle of Bali* by Friedrichsen (cited in introduction to Birch ed., II, 1970, lxxxi), there is an account of a suttee observed in 1847. The woman was urged on by a priest who described heaven in glowing terms and promised a rise in caste. Friedrichsen added that the menfolk "sometimes use means of compulsion to prevent the women from retracting. They accompany the victim of the family; they heap up the fire, and, if the woman hesitates, tip up the plank on which she stands above the fire, so that she falls in against her will. These cases, however, are of rare occurrence. Deception of the imagination and the use of opium have generally made the victim quite indifferent, and they jump into the fire as if it were a bath". The last sentence throws doubt on the voluntary nature of the practice. Scepticism about it as suicide was increased by the information that the victims were mostly slaves or concubines and, in the nineteenth century, *sudras*, the lowest caste, deemed to issue from the foot of God (Birch ed., II, 1970, lxxi). Frequently they were children married before puberty.

Consequent on their horror, Europeans tried to end the practice when they established their power. D'Albuquerque banned the practice in Goa: "when d'Albuquerque took the city of Goa, he forbade from that time forward that any more women should

be burnt, and although to change one's customs is equal to death itself, nevertheless, they were happy to save their lives, and spoke very highly of him" (Birch 1970, 94). Withington reports that the British agent vowed to end it in his jurisdiction. The missionaries fought to prevent it. But European presence was weak and sporadic until the eighteenth century. Following the Moghul practice, many gave up direct prohibitions and many, according to Bernier, held their tongues for "political" reasons (Bernier 1968, 306–14). The British East India Company (1600–1858) officially did not allow it in areas it controlled (where it was most prevalent), but it was tolerated and it continued. Sometimes, the need to keep millions of subjects peaceful was pleaded as an excuse, a tacit recognition of its hegemonic force. Sometimes, it was dressed up as a version of "religious tolerance". In sum, when Europeans were few and without power, their disapproval did not lead to effective prevention of the practice. This changed only when in 1858 the British became the imperial rulers of nearly all India.

Early in the 1800s, opposition to suttee existed only among tiny, isolated groups of Indian radicals. So when in 1829 William Bentinck suggested that suttee be banned in Bengal, his proposal was still tempered by concerns about provoking rebellion because it would thought an insult to Hindu religion: "I have no doubt that the conscientious belief of every order of Hindus, with few exceptions, regards it as sacred" ("The Suppression of Sati", 18/11/1829 in Keith 1922, I, 213). He warned that the rule of the British would be regarded as ending "the most complete toleration in matters of religion" that had existed until then. It would provoke general distrust and intractability. Nevertheless, he and his advisers felt that suttee was too horrible and that only if the good of mankind were threatened should it not be abolished immediately. Bentinck's intention was to impose an outsiders' view of religion and morality through law. He wrote that his first and primary object was for the benefit of the Hindus. "I know nothing so important to the improvement of their future condition as the establishment of a new morality, whatever their belief, and a more just conception of the will of God…that to the command received as divine by all races of man, 'No innocent blood shall be spilt', there can be no exception."

Then began the complex reaction that is so important to a history of universal human rights. The practice of suttee took life away by torture and is completely against a primary human right, the right to life. On the other hand, as many commentators noted, it was regarded by most Hindus as part of their religious practices. Human rights as established in 1948 guarantee right to religious liberty. Bentinck's wish to wash out "a foul stain upon British rule" was commendable but was ill-received by the Brahmins and many other Hindus. They started a newspaper, *Dharma sabha*, to defend their cherished religious institutions, including suttee, and appealed to the privy council against the ban on the grounds that it was an infringement of their religious liberty guaranteed in various acts of parliament. Although the appeal was disallowed in 1832, suttee continued in all areas under British control, especially the Punjab. It continued unabated in the Rajputana until no longer endorsed by the Brahmins in 1846 and in surviving principalities was only formally banned in 1837–46. The last suttee officially noted was in Udaipur in 1861. There are unofficial reports of the practice continuing today in isolated cases.

British determination to get rid of suttee was an early example of ingerence, where a human right is imposed on a majority. It must continue where human rights can only be enforced in a world of nation-states. There will always be some nation-state with the power to force another people to submit to accept such rights, that is, impose their own specifically nationally/culturally specific hierarchies, on others from a different world. There seems little doubt that had democracy existed in India the majority would have supported Brahmins in their defence of the Hindu practice. So women's rights were in conflict with community values and British policy faced that reality. Their initial choice was to profess a "right to difference". Then they adopted a hegemonic practice. Macaulay stated in 1833 that the object of Britain's enlightened despotism was to expand the public mind of India; to educate Indian subjects by good government into a capacity for better government and to ensure that they: "demand European institutions" having been instructed in European knowledge (Keith 1922, 265). There was no suggestion that the learning should be two-way, that the Europeans should learn from the Indians.

Despite the different community laws that had existed previously, through the British Government of India Act (1833), they imposed one common law for all India while guaranteeing "due regard to the rights, feelings and particular usages of the people". The act also ensured that no Indian would be excluded from office because of "religion, place of birth, descent, or colour, or any of them", all worthy promises in conformity with the most advanced positions of British domestic law at the time. But despite such professions, the aim was clearly the imposition of the norms of the imperial power. The project was a unilateral imposition of European standards in its insistence that the goal was "the privileges of citizens"; the rights it offered were those of the national-popular model already established in the imperial centre. There was no hint of any understanding that if universal human rights were "colour blind" then the process should involve learning in both directions, that reason might be culturally relative or that imposing British rights might prove intolerable.

Within 25 years, the Indian sepoy army that Bentinck had been sure would not revolt, rose in the Indian Mutiny and, although brutally crushed in the name of the state, started India's long March to national liberation and Indian rights for Indians. This progress would culminate in the same problems of all rights systems based on national-popular traditions: exclusion of all others not regarded as Indians by the majority and finally, genocide of Muslims by Hindus.

Policies regarding suttee are an early example the limits of the national-popular model for rights when extended to imperial possessions. The problem lay not with the wrongs and injustice of the practice which was widely recognised by the imperial power, but with the solution it proposed. This was imposed, one-sided, culturally blind. It tried to make all Indians into Europeans and have them adopt dominant European values. Its disregard for the "usages" of the different individuals of the sub-continent united them against it. As Napoleon had discovered earlier (discussed in Chap. 5 below), human rights cannot be easily imposed by one nation on another in a world of rival nations. It provokes a war of national liberation by the oppressed nation seeking to enjoy its own tradition of rights. However, in giving primacy to national liberation, the Indian response was also equally inadequate for a universal human rights.

Learning from the Other: China

The "discovery" of India by whites had clearly shaken their beliefs in their own view of values and rights. But, once the relationship had become regular and the whites had won the struggle for domination, those initial doubts were smothered by a belief in the right to "civilise" the natives by imposing the system of rights already evolved as part of the social contractarian notion of the traditions of the British people. There are no great, or even significant lesser, works by European theorists of rights that hold up India as a model, or even show that Indian culture had shaken up the arrogant virtuousness of the theory of rights developed in Europe. The solution of exterminating the entire population practiced by the Iberians in the Americas had not been repeated, it is true, but the notion of Indians as subjects of rights was risible.

It was only when Westerners, mostly French, "discovered" China that they were forced to resituate themselves and their beliefs. They were obliged to admit what Marco Polo had written and they had denied three centuries earlier: that China was immensely more powerful and rich than all of Europe. This led them to start learning from others, rather than anathematising them, relativising their own core received beliefs, both those based on authority and those based on reason. Foremost in this discovery and reconsideration were again Roman Catholic missionaries, above all Jesuits, whose accounts of China became in the eighteenth century the basis for an Enlightenment which rejected the hard imperious mathematical reason of Descartes or Pierre Bayle (1647–1706) and its expression in social and political theory in the work of Hobbes and later social contract theorists.

One of the first missionaries to report at length was Matteo Ricci who arrived in China in 1552 and thence visited Japan, living until his death in 1610 in Peking. He marvelled at the wealth, power and size of the country (Ricci 1911, I, 44ff), and he argued at length that life there could be a model for Europe. Europeans were seen as objects rather than subjects. Richard Teese's brilliant and neglected thesis sums the implications up after quoting Mendoza's best-selling account (1585) "of a state, carefully regulated, a prosperous empire of immense duration" when he notes that Joseph Scaliger reputedly said, "this admirable empire condemns us" (Teese 1977, 5). The observers did not deny the terrible cruelty, the poverty and misery of its millions, the child murder, especially of females, the slavery, general dishonesty and sexual mores – prostitution, drugs – all of which they condemned as un-Christian. But they severed these observations about the human condition from a state that, unlike Europe, had maintained internal and external peace for more than 1,000 years and did so, it appeared, by the inculcation of religious principles and precepts derived above all from "their greatest philosopher, Confucius" (Ricci 1911, I, passim esp. 21, 22).

Fascinated by what they saw, these missionaries learned Chinese and sat at the feet of the Chinese to learn about their society and state. The overall impression from reading their reports is that they saw the Chinese as more "civilised" than Europeans (e.g. ibid., 49) and generally more mild, tolerant and latitudinarian in

their enforcement of rights and duties (ibid., chs1, II, VI) despite Christians themselves being prohibited from carrying out work of conversion.

Jesuits themselves started to compromise with local traditions after Francis Xavier reached Japan in 1549. Their attempts to proselytise thereafter followed a pattern of first learning the local language; then exchanging technical knowledge with local rulers and then seeking formal permission to make conversions. The French Jesuits who were sent out from France in 1684 were professional geographers who were both curious and ready to learn. Isabel and Jean Louis Vissière, in their Introduction to the Jesuits' *Lettres édifiantes*, cite a letter of 1703 to the effect that "from the beginning the scientific vocation of the future mission was asserted" (Vissiere and Vissiere 1979, 8). Father Parennin's letters reveal a scientist in religious garb whose response was almost typical. He wrote that China was bigger in every way than Europe, marvelling at its cities and monuments. It was older and above all it was more mysterious.

The Jesuits taught the Chinese how to make iron cannon and in return obtained entrée to the court and particularly to Chinese academies and scholars of mathematics and astrology. They were not always impressed by Chinese knowledge, blaming Chinese isolationism for a lack of spirit of inquiry. But in some areas what they discovered was devastating for received verities of Europeans. Since they were themselves intellectuals they were fascinated by the Chinese knowledge of astronomy. Father Verbiest, a famous astronomer, had access to Chinese records of eclipses, which showed scientifically that China had a reliable history going back thousands of years before what Christianity proposed as the beginning of the world (see ibid., 33). After some argument, they often agreed that the origin of the human race could not be in the tribes of Israel but lay before any record about those people (Teese 1977, 24–6). This gave great offence to other intellectuals in both the Catholic and Protestant churches; it could suggest that mankind started in China. It also ended the belief in a mother language that came from the Middle East, probably Egypt (see Vissière and Vissière 1979, 387–398).

They suggested that the key to the success of the state was the hegemony that philosophical and religious ideas played. What interested them, then, was the role of intellectuals in the state. This mandarinate and how it was selected, trained and worked, intrigued monks who also saw themselves as intellectuals. In sum, they studied the Chinese national-popular state and the rights of its people as *administration*: where civil servants and intellectuals were one and the same, with the latter having the function of interpreting laws that came down from the past, like the *12 Tables*, in an innovatory way from day to day, thus ensuring a seamless rule for the "sun of heaven" that had lasted centuries (Ricci 1911, I, 33). In place of the warrior individualism of the monotheists and rule as repression, the Chinese appeared to place rule in the hands of men of letters (ibid., 33, 45). While even Ricci thought that the Chinese were dishonest and effeminate, he was obliged to recognise that their system worked to ensure peace. In place of the repression of European states, the way to success of rule in China was the inculcation of religious virtue in every subject. In sum, Ricci identified a hegemonic project as the way to win a population to certain principles(see Teese 1977, 9–22).

Ricci saw that from the point of view of social order, the main Confucian teachings were: "…about the five relationships that all men have. That is, father and son, husband and wife, lord and vassal, older and younger brother, comrade and comrade" (Ricci 1911, I, 91). He and other visitors insisted that the main value inculcated was filial piety and that China was seen as a family with a divinity at its head. Since there was religious tolerance, they remarked that as well as Confucians there were the followers of Lao-Tse and "idolators" who prayed to thousands of gods. The father/son relationship and the idea that each individual had a fixed place in a social hierarchy did not in itself seem remarkable to Europeans coming from a still-patriarchal society. What was remarkable for them was the lack of rebellion and disorder compared with their litigious society and the treatment of their own victimised Muslims and Jews. When writing of the second minority, whom he stated had come centuries earlier via Persia, Ricci noted: "From what I have discovered, they never disseminate or seek to spread the law, but live in subjection to the laws of China and in great ignorance about their own sect, and are held in low esteem by the Chinese, and thus through being already naturalised they do not suspect them of any rebellion and allow them to study for and enter the ranks of the magistrates of the country, and many of them having been admitted to that rank, leave their old religion, there being little left of it except not eating pork so as not to become accustomed to it" (Ricci 1911, I, 86). While the few Jews had kept their rites, Christians had adopted a syncretic religion. Such tolerance was novel for monotheisms.

It is perhaps fortunate for human rights that the Chinese emperor banned conversion, claiming that the ancient laws of Confucius could not be changed; it meant that the Jesuits' reports home, which they were obliged to make, concerned lay matters in this new world. They built up an unparalleled archive about what could be learnt from another culture. By doing what Las Casas had advised as general policy, sitting down and learning from the other, they became "sinified" even down to their clothing (see Vissière and Vissière 1979, 132) Père Jacques described a sinified Jesuit in 1722 "our clothes here are those of honest men. I exclude the bonzes who do not wear common clothing…. A long robe of white cloth, another above it, also long, ordinarily of blue silk, with a belt, over all a little black or violet coat to the knees, very loose, with short wide sleeves, a little bonnet like a shortened cone, surrounded by a hanging mane of silk or red cloth, cloth shoes on our feet, a fan in hand" (ibid., 227–8.). It was their judgment that China should provide a model of governance for Europe, above all by emulating the hegemonic function of the mandarinate.

This slow approach to conversion led to the Jesuits learning much and reporting back to Europe what they had learned. The *Edifying and Curious Letters about China* of Father du Halde became best-sellers in the eighteenth century. European intellectuals were fascinated by the reports. It is not surprising that the "platonic" idea that kings should be philosophers or that the greatest nation on earth should be governed by intellectuals like themselves, should prove enticing for Europe's intellectuals. In 1697 Gottfried Leibniz (1646–1716) wrote: "My judgment is that this [Jesuit] mission to China is the greatest event of our days, both for the glory of God, and for the general benefit of mankind and the development of the science and arts, among

ourselves and the Chinese; for it is an exchange of knowledge that can give us at once their works of several thousands of years, and ours, which is something greater than we can think of"(Vissière and Vissière 1979, 13). His attitude was repeated in France where debate raged inside and outside the church about the importance of learning from the Chinese. Jean-Marie Arouet de Voltaire (1694–1778) became the protagonist of adopting the Chinese political system as a model for "enlightened despotism" in Europe. He worked from 1732 to 1757 on his *Siècle de Louis XIV* which extolled the Emperor Yong Tcheng's rule (Voltaire 1966). He gushed:

> If any annals give us certainty they are those of the Chinese that have joined the history of heaven and earth. Alone of all peoples, they have constantly identified their epochs by the eclipses by the relations of the planets; and our astronomers, who have examined their calculations, have been astonished to find them almost all true. Other nations invented allegorical fables, and the Chinese wrote their history, pen and astrolabe in hand, with a simplicity of which we do not find another example in all of Asia…Each reign of their emperors was written by contemporaries; there are no different ways of counting among them. No contradictory chronologies…It is here that we must above all apply our great principle that a nation whose first chronicles attest to the existence of a vast empire, powerful and wise, must have been put together as a people during earlier centuries (Voltaire 1963, I, 66–74, chs1, 2).

Voltaire was a conservative, who sought and gained admission into the high governing circles that started to dabble with Enlightenment thought late in the seventeenth century. The monks had argued that Confucianism was a parable for Christianity. This made it easier for fiercely Christian rulers to consider China. Voltaire's argument, succinctly expressed in his *Essai sur les moeurs et l'esprit des Nations* (1757) was strongly anti-clerical but the points it made were telling for a generation of conservative or moderate enlightenment figures. Because Chinese history was older than that of Europeans, as proved by its references to eclipses verified by Father Gaubil and other Jesuits, it ended claims based on the Bible that mankind came from of an original family after the flood (ibid., 25). Chinese claims to a continuing regime of immense antiquity suggested that much could be learned about how to govern from it, despite the lack of progress due to isolation and different languages. What Confucius proposed as good government, was a patriarchal government ruling rationally and tolerantly (ibid., 224).

Since Voltaire became adviser to several European monarchs, initiating a practice in "applied political theory" adopted by several other leading philosophers, Denis Diderot, Jean D'Alembert, Christian Wolff, all of whom were attached to different European courts and wrote advice to their monarchs on how to rule, his arguments for learning from China marked a remarkable change from the Eurocentric view of predecessors. They appealed to the monarchs to become "enlightened" like the Chinese rulers even while remaining "despots". They should introduce new legal codes guaranteeing rights for their subjects. They were partially successful with Frederick II of Prussia, who expressly committed himself to a social contract in his *Anti-Machiavelli.* Until recently they were also sometimes regarded as influential in the legal reforms of Joseph II, the Austro-Hungarian emperor. However, even his reforms to the code of his mother, the Empress Maria Theresa, which ended the draconian Carolina of 1532 (described in Chap. 1 above) are today no longer

regarded as inspired by Enlightenment theorists. It was rather practical matters that led to change. These deserve a short aside as they are relevant to later issues.

Maria Theresa had reformed the already updated Carolina, in the Ferdinandea of 1656. But her code was a mess of contradictions. Joseph, trained by legal theorist Christian August Beck, proposed a short simple code to replace it and during his mother's reign persuaded her to abolish torture in 1775 and the death penalty in 1787. But Beck's teaching that "judges sitting even in the highest courts were mainly agents of the monarch who aided him in solving disputes between his subjects" was useful because it showed how legal reform allowed efficient centralization (Bernard 1979, 8–9, 16). Bluche reminds us that while Joseph certainly worked hard and sought to imitate Frederick II of Prussia, proclaiming "We must create the happiness of our people, even despite them, and just as a legal despotism rules in a republic, so in a monarchy there reigns the despotism of principles" (Bluche 1985, 122–3, 130–1), his motive was to unite a multicultural empire as a nation. Repression, not rights, became the rule as German was forcibly made the one language for schools and a protectionist economy was created. All individuals thus acquired the equality of subjects. Officially serfdom disappeared in 1781–2; in practice it continued until 1918.

In his book, Francois Bluche makes a number of important points about the "sinifying" of Western thought. First, that all the philosophers so enamoured of Chinese thought and modes of governance never really considered (or had) the power required to change anything. They remained counsellors to absolute monarchs, which meant that reason was "an immense grab bag at the service of the omnipotent prince"(Bluche 1985, 329). If this sums up the practical failure of the philosophers who sought to emulate the mandarins, then it points to the relativisation of the claims of reason, making the question of rights a more practical matter than before. It was not a domain for theology or philosophy but one for historians and political theorists. Those thinkers gathered around the *Encyclopèdie* led an assault on non-empirical knowledge by starting a critique of their own predecessors as well as the claims of received religion and as a consequence advanced the novel view that there was much to be learnt from new cultures. Already in 1734 Voltaire wrote in his *Philosophical Dictionary* about the viewpoints of the "internal outsider", the Quakers, suggesting a connection with how he viewed the Chinese, thus marking a confluence of two rivulets into a great river of progress towards universal human rights.

In the long run, the decline of the European progressives' attachment to strong reason was probably more important for the progress of human rights than any practical influence. Bluche's dismissal of the practical effects of sinification in the eighteenth century is correct. But the effect of accepting that Confucius and Mencius could provide lessons for Westerners, would be great. We need only remember that in Christendom, the opinions and writings of the other, typically, the Koran, but including Aristotle, were anathematized, banned, and reading them could lead to death. So extolling Confucius, albeit under the mantle that his work was a parable for Christianity, was akin to proposing in the Middle Ages that Mahomet had a point of view. Had that principle been accepted in the Americas, the holocaust there would not have been so automatic. It is important to note in this regard that the supporters

of China had often read Las Casas and held him up as a model. On the other hand, the Jesuit "sinification" led the church to condemn their readiness to acculturate and, after what became known as the "quarrel" of rites, to discipline and eventually abolish the Jesuit order in 1773 for departing from the authorized view of Rome.

The Confucius (551-478BCE), whom the Europeans read and proposed as a model, had advanced more than a set of social rules encapsulated in the notion of filial piety. He argued that that was the paramount social virtue (Confucius 1987, *Analects Bk* 1.6, Bk II, 2.5). But he regarded heaven, whence virtue found its origin in Chinese thought, as the source of a general moral code (*tao*) where God helped those who helped themselves (see e.g. Creel 1962, 50; Cheng 1997, ch2). He returned to individuals the responsibility for their own moral salvation. Unlike even Protestant Christianity, Confucianism taught that people had only their own common sense and conscience to guide them. He argued that each individual human, being equal, should think for himself. In Creel's words: "Relatively few philosophers had been willing to trust men in general to think for themselves. Confucius was not only willing that men should think for themselves; he insisted upon it. He was willing to help them and to teach them *how* to think, but the answers they must find for themselves" (Creel 1962, 59). It followed from this insistence that all humans could reason, that not just authorities or experts, monopolised the truth. Humans could ask an a priori question: "If a man does not constantly ask himself 'What is the right thing to do?' I really do not know what is to be done about him" (Confucius 1987; 134 Bk XV, 16).

Using commonsense, Confucius argued that humans wanted happiness. They could have this not by being selfish or self-maximising but by treating all others with reciprocal decency and justice. This was especially what a king should do with his subjects (Confucius 1987, *Analects* Bks 1, 5 and II, 21). The supreme virtue was to love one's fellow human beings, regardless of their class. It was on the basis of such views that the Jesuits argued that Confucius advanced a "Christian" creed. But the master was no democrat. Nor were his disciples. Practically, he was intent on having rulers accept that virtue should guide their actions and that philosophers like himself should guide princes. Those who claimed to educate and rule had therefore to attain to the highest abnegation and probity, though not necessarily austerity, to be credible. Educating the people to virtue and justice was the way to securing their recognition that a patriarchal system of rule was in the best interests of all. "If one tries to guide the people by means of rules, and keep order by means of punishments, those people will seek to avoid the penalties without having any sense of moral obligation. But if one leads them with virtue (both by precept and example), and depends upon *li* [roughly, what one ought to do: courtesy good manners, dutifulness] to maintain order, the people will feel it their moral obligation to correct themselves" (Bk, II, 3). Consequently, the monarch's rule should not be punitive but hegemonic.

Confucius' heroic insistence on the ability of men to rule themselves made many martyrs among his followers before it became common sense for a mass of Chinese. The successful spread of Confucius' ideas may be due to their popularisation by his pupil Mencius (380–289 BCE) (it is possible that Mencius did not write his works himself). Mencius was also known to the Jesuits. The positive philosophy of Mencius added to Confucius, especially where he could be a source for universal

human rights. He confirmed the Master's teaching that humans made themselves human by adopting a moral and ethical approach to others. All humans were tendentially good but it would be the good man (the *shi*) who brought out in them the spark of goodness. But, as it was a philosophy presented as a package to be accepted or rejected holus bolus, refusing to consider deeply the sources of evil, it discouraged criticism and became inflexible and did not encourage individual initiative (see Creel 1962, 98; Cheng 1997, ch6).

Mencius' teachings turned Confucian thought into a matter of public schooling, rather than an individual following of the ethical way. Hundreds of intellectual followers of Confucianism (*shi*) became advisers to lords. Mencius proposed a Confucianism that was a practical matter of governance. Hegemonic rule of the masses was designed to make them accept their place and support an enlightened patriarchal society. As the Jesuits were no democrats, this Confucianism of the mandarinate was what interested them. This left out the Confucius who wrote about the right of the little man to think for himself and rebel against injustice. Confucius had recognised that there was structural inequity, especially economic, and that it was as murderous as killing others with knives. Following his code of individual conduct (*tao*) properly required a readiness to die for one's beliefs (Confucius 1987, *Analects* Bk. XIV, 12, 19–20, compare Mencius 1972*,* 2(1), 2–7). In the last analysis, he argued that a person should die for his beliefs and rights against the laws of the city or state; it was human duty to overthrow a tyrant.

This made his followers opponents of the aristocracy who defended class claims against the policy of appointment on merit that the intellectuals supported. Mencius' teachings stressed rather that the way to happiness was through internalising and accepting objective reality: one should not try to make a plant grow faster than it had been destined to grow. But, as little changed in the life of the masses, even once they had become Confucians with an obligation to rebel against wrong, many were attracted to the existential and anarchical views of the *Tao te Ching* of Lao-tse, roughly Confucius' contemporary. He too preached a *tao*, but for the "little man". His was a "drop-out" philosophy or code of conduct. In Taoism there is the notion that life is absurd – a view that we have already suggested was hegemonic among peasants in Europe in pre-modern times – but Taoism differed from Christian mediaeval thought, because the practical solution proposed was not individual self-assertion against unjust social norms but withdrawal from them. "The perfect man does nothing" (Creel 1962, 117; Cheng 1992, ch7). Taoism taught that humanity is instinctively against interference with others. One of the cryptic, yet revelatory, parts of the *Tao-te-Ching* (Lao-tse 1972, 10) runs:

> Loving all men and ruling the country, can you be without cleverness
> Opening and closing the gates of heaven,
> Can you play the role of woman?
> Understanding and being open to all things
> Are you able to do nothing?
> Giving birth and nourishing,
> Bearing and not possessing,
> Working yet not taking credit,
> Leading yet not dominating
> This is the primal virtue

Another adds (Lao-tse 1972, 13):

Accept disgrace willingly
Accept misfortune as the human condition

What do you mean by "Accept disgrace willingly?",
Accept being unimportant.
Do not be concerned by loss or gain
This is called "accepting disgrace willingly"

What do you mean by "Accept misfortune as the human condition"?
Misfortune comes from having a body.
Without a body, how could there be misfortune?

Surrender yourself humbly; then you can be trusted to care for all things.
Love the world as your own self, then you can truly care for all things

And a third (Lao-tse 1972, 67):

I have three treasures which I hold and keep
The first is mercy, the second is economy,
The third is daring not be ahead of others.
From mercy comes courage; from economy comes generosity
From humility comes leadership

Nowadays men shun mercy; but pay to be brave,
They abandon economy, but pay to be generous
They do not believe in humility, but always try to be first,
This is certain death. Mercy brings victory in battle and strength in defeat
It is the means by which Heaven saves and guards

Since Lao-tse was concerned with the heavenly way and Confucius was not, they established certain foundations of the worldly hegemony of the Confucians as both doctrines evolved in the face of the realities of Chinese society. Foremost of those was mildness towards others and an escape from society to arrive at the social. Ricci did not notice this. In his discussion of Lao-Tse and his followers, he noted only that while they professed to believe in the heavenly father they worshipped many idols. He dismissed as "vanity and lies" their attempts to seek for eternal life through bodily exercise (Ricci 1911, I, 96–7). It was thus Confucius whom the European philosophers knew in a somewhat bowdlerised form. It remained for later generations to go back to the other forms of Chinese philosophy that the Jesuits had acknowledged. Through them, it was Confucius whom European progressive intellectuals quoted with approval (see Montesquieu 1964, 1075; Voltaire 1966, 1967).

Learning from the Other: Chinese Thought

Voltaire's *Essai sur les moeurs* was written partly to refute Montesquieu's condemnation of China as a "despotism" despite the hegemony secured by education into filial piety to the Emperor (see Voltaire 1963, I, 216–7). In his *Esprit des Loix* [1748 EL]. Montesquieu argued a case that was also very important for the development

of rights: that in such polities there were only subjects who were nullities, that is, who had no rights at all and therefore they could not be adopted as a model for societies with evolved national rules of law. It is the disagreement between the two French thinkers that is usually the object of attention. But, it is what they had in common and how their dispute opened up other new perspectives that is more important for the development of universal rights.

Despite their opposition, together they began, and soon many others were involved in, a Europe-wide debate centred on the Grimm brothers' *Correspondance litteraire* published in Paris. What first must be noted is that, inspired by the accounts of voyagers, both French "father" figures had written "world" or universal histories. The place of proof for arguments about rights and justice – and history more generally – was being shifted by them from revealed truths, appeals to authority, into the realm of world history. Montesquieu's library at the chateau of La Brède shows that it is not far-fetched to claim that Confucius fathered the European Enlightenment, as well as enlightened despotism. Montesquieu exemplified a new comparative approach to knowledge, even though he ended categorising China as "despotism". He stated explicitly that all cultures had their rationality and that social order had its invisible laws. Only a comparative approach to the study of cultures could establish what were appropriate rights and laws of a people (Montesquieu 1964, 529; Montesquieu 1973, *Lettres persanes* [1721], No 94, 111). "I have not heard men speak of public law where they have not sought carefully what was the origin of societies; that seems ridiculous to me. If men did not make them up, if they left and fled from one another, it would be necessary to ask the reason and seek why they kept separate. But they all are born tied one to the other; a son is born to a father and attached to him; that is society and the cause of society" (Montesquieu 1973, 111). This was far from the mediaeval approach to rights and law for whom other cultures were not to be studied but exterminated.

From such writings began a mass approach to knowledge that would lead to the "weak-thinking" that was important to the development of understanding of rights. The "philosophes" views became staples for the middle classes of Europe in the second half of the eighteenth century. Diderot, editor of the first great *Encyclopèdie* to be published (1751–72), was also involved in this debate and together with a colleague, the Abbe Raynal, wrote a *Philosophical; and Economic History of the Two Indies (1775)* (Diderot 1981) that went into 17 editions in 8 years. Raynal drew up a balance sheet of the pros and cons of following the Chinese model. Such debate showed that *what* should be learnt from another culture remained a matter for debate; *that* intellectuals and their readerships should look outward and learn from other cultures was no longer in question.

Too much should not be made of that observation. Before it could become generally accepted, those who professed such an approach would have to be empowered and even as advisers to monarchs as powerful as Frederick of Prussia and Catherine of Russia, they were not so empowered. Those monarchs were interested in the technological advances of science, from clock-making to navigation, rather than in Chinese thought about governance and rights. Moreover, all these thinkers expressed contradictory views even within their own corpus of writings. A study of

the evolution of the *Encyclopédie* reveals that its universal, empirical pretensions only gradually resulted in a rejection of the scientistic claims of Descartes and followers like Bayle and Hobbes. What I have identified as the beginning of "weak thinking" struggled to escape from genuflection to great predecessors. In Voltaire's *Philosophical Dictionary*, Bayle and Descartes are honoured for their opposition to the anti-scientific obscurantism of the church. And in the *Encyclopèdie*, the entry on Descartes is so laudatory that he would have been pleased to have written it himself. Voltaire's furious condemnation of a rising young star, Jean-Jacques Rousseau, revealed a man convinced of the superiority that came from a great culture against any suggestion that what the mass of people thought or believed mattered. But the most important contradiction with their openness to other cultures was their continued commitment to the idea of the nation and the national-popular model. We discuss some aspects of this in the next chapter but here we re-emphasise that Montesquieu assumed the nation and the people as the unit for analysis on a comparative basis. What was good for one people was not necessarily so for another. The Enlightenment universalism and preparedness to learn from the other did not end a continuing belief in the national tradition, the need to identify it and to shape all institutions and values in terms of that history. Even the titles of their books gave that away. Montesquieu's defence of his major work starts by stating that the *Esprit des Loix's* object is "the laws, customs and divers usages of all the peoples on the earth" (Montesquieu 1964, 813). In the *Encyclopèdie*, the entry on political economy (see Gendzier ed, 1967, 189), by Rousseau, makes a careful distinction between the rights of nationals and those of "strangers". In even more extreme form, Raynal, (the author is possibly Diderot himself) castigated the horrors of the American holocaust and started a tradition of condemnation of slavery, but he wrote in the same book, "A nation would be prudent to rid itself of well-founded terror [but] would be even more reasonable if it, without wounding the laws of humanity and justice, expelled and exterminated outsiders…if I made off with its women, children and property; if I attacked its civil liberty; if I interfered with its religious belief; if I pretended to give it laws; if I wished to enslave it" (Raynal 1981, 119). Our author(s) directed that the "national mind" be recognised as a real starting point and that "it must preside at the council of peoples"(Raynal 1981, 149ff).

What the contact with the other and the vast spaces between nations had also added to such realism was the assertion that the "national mind" would not always affect individuals. They noted that "at the frontiers' the national standards of the rule of law almost disappeared and that having crossed the Equator "a man is neither English, Dutch, French, Spanish, Portugese; he keeps from the fatherland only the principles and prejudices that excuse his conduct…he is a tame tiger who returns to the forest; bloodthirstiness takes over again. So the Europeans have shown themselves to be, all of them, in the new world, where they brought a common rage and search for gold". So, the focus on rights for outsiders had been shifted mentally to a question of "frontiers". How to get rights across those barriers? They still thought of them as natural barriers of race and culture, suggesting it would have been better if, in the history recounted in this chapter, humans had intermarried and through

consanguinity "the strongest of bonds could have made a single family of foreigners and natives" (Raynal 1981, 149–50). As a solution to reconciling the national-popular model of rights with the reality of a universal humanity, this brought more problems than solutions.

Conclusions

Capital in all these meetings with the other and the mixed and variegated reactions to their notions of right and wrong was that they compelled Europeans to think beyond the national-popular models where rights were ascertained by looking back into one's own national history. To the diachronic was added a synchronic and comparative method in which the views of others were not absent, typically in Montesquieu. This amounted to a challenge to the belief that hard scientific thinking in which one party had the truth that should be privileged against all others. It was such a rationale that underpinned the imperialisms in which conquerors impose values on others and decide all rights.

By the late eighteenth century the essential prerequisites for universal human rights had emerged. Some people saw themselves as subjects and capable of divine aspirations; more practically, a significant minority of Europeans had established in practice rights for themselves as humans; and finally the latter had become aware of the existence of the rest of humankind in its kaleidoscopic variety. The importance of the last "discovery" was that it had led to the realisation among "opinion makers" that henceforth, European national notions of justice could no longer be imposed by force on all those others. They would have to be negotiated between culturally various humans as subjects and, since the values and standards of many of those humans were incomprehensible to others, a notion of rights without boundaries on the basis of differences of race, sex, or belief became a political possibility. The idea of a universe of humans had taken concrete form. They were no longer monstrous but could be thought of as having claims to the same rights as all others without having the same attributes. It would only take one nation-state to adopt and implement such views to effect what Immanuel Kant called a truly Copernican revolution in our concept of rights. It had to start somewhere and it started in France, the birthplace of universal human rights was we know them.

Chapter 4
The Open Republic or Kafka's Doorman

It is not surprising that once the victims of feudal conditions of life had established the sorts of human rights that existed in England, Holland and the United States, individuals who lived in states where they did not exist would want them for themselves. So there began a long, uneven, historical process after 1689 in which others sought to obtain what Britons and Americans had. What they sought first were the rights to life, liberty and the pursuit of happiness for fellow nationals. The most significant population to do this in the eighteenth century was France, where there continued a combination of the sort of conditions described in Chaps. 1 and 2 above. But in France, the victims were stymied in their desire for human rights by a state that refused to concede to their people even what the British had. This forced them to go beyond the Dutch and British, and even the Americans, in the claims they made. Again, the demands would lead to violent revolution against oppression. But in the French case, because of the obduracy of its monarchy, the victims wanted power for themselves, not merely the concessions made in other European countries, where the conflict had ended in a deal between oppressors and victims whereby power *conceded* rights.

Before 1789, together with rights had come new duties to the rulers. In France in 1789, power and rights were established "from below" as they had been in the US in 1776 but without any corollary duties to the community and its historical identity, and without new duties to the state or even its democratically established rule of law. The main result was a polity where not only, in the famous words of the Abbé Sièyes, the Third Estate wished to be something, but it became the source of power according to the Rousseauian formula that freedom is living under laws one makes for oneself. As we have seen, when the English had made such claims at Putney in 1647 they were dismissed. The Americans had made and achieved similar claims in 1776. But, while "people power" was born in the two revolutions and lived briefly in the polities they set up, the French revolution was much more important for universal human rights than the American. The Americans sought only the Lockean system of human rights for citizens that the British had putatively established in 1689. They more or less obtained that goal. Because the French state would not agree to even such a limited social contract or list of rights for its own citizens, the

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victims there united to seek much more from the new polity that they established in 1789. It was, indeed, a polity in which the people would be sovereign, as in the United States, but because France's most advanced leaders lived in the rich theoretical and cultural world described in our previous chapter, they declared as the goal of the new revolutionary French state, universal human rights, not simply rights for nationals. The list, as we will see, was not much different from that of 1776, but its beneficiaries were expressly stated to be all mankind. That mankind was still some abstract "Man" like that of the mediaeval church. But by 1789, all who talked of Man had in their heads Men, those vastly different humans who had been discovered in the previous 200 years. And, they thought of them as the potential source of power, as myriad voices "from below" or from "beside". As we recount in later chapters, other nation-states would have none of this "nonsense on stilts", as English jurist Jeremy Bentham put it, and quickly crushed this first effort to universalise rights. Indeed, by 1815 the universal human rights of 1789 had become a distant memory. Even those states that had human rights for their own citizens saw to it that such universalist notions remained off the agenda for nearly 150 years. They were tyrannical imperialisms – it was dangerous to suggest that their new victims, the peoples discovered by the white West, might have even the right to life that Hobbes had made the cornerstone of all systems based on a social contract between state and people. The nineteenth century empires of the metropolitan states were ruled in much the way as those described in Chap. 1. There was no social contract; it was at best a mafia system.

Early French Criticism of Locke

As we have seen, the English parliament's declaration of rights proclaimed a right to property. The first problem here, already evident by the early eighteenth century, was that equality before the law and parliamentary sovereignty did not protect all subjects from tyrannies of state and inequalities established *in* the law. Too often, the law privileged property owners; the nature and number of rights an individual enjoyed were proportional to his or her stake in property. The English poor, in particular, felt the effects because property was encroaching on their livelihood at an accelerating rate. In England, enclosures, ending common land, access to game and even freedom of trade saw the number of crimes against property increase every decade. The poor felt that the laws passed by their representatives in parliament were unjust. So a first factor compelling a reconsideration of the 1689 model was those inequalities in rights and justice for property owners and others.

Locke, the great theorist of what had been won in 1689, had made property the pivot of his definition of the rights to life and liberty. He argued that because individuals owned their labour, and were free to transform nature and society through that labour, by mixing themselves with nature and society through their work, they mixed freedom and rights with acquired property. The three main rights of life, liberty and happiness thus, he argued, were coterminous with property that, in turn,

was acquired through work. His theory (he had been influenced by the Huguenot refugees in Holland when he had composed his political work on 1689 and some letters on toleration there) was revealed by critics to have no place for the rights of many sections of the population deemed not to be part of the community of property owners: workers, women, slaves, the poor. Certain inferences flowed from his "possessive individualism", obvious in the American colonies. For example, since a national society was the product of the work of its people, they owned and had the right to protect it. This led contradictorily to a defence of community rather than individual rights. So a second factor compelling reconsideration of the British model was the inadequacy of the theory on which it was based.

Almost immediately after publication in English, Locke's work was translated into French and Dutch. At first there was little criticism of his claims about 1689 from French progressives, who wanted more rights. Montesquieu, who had visited England in 1729, fell in love with all things English, even turning his garden at Le Brède into an English garden, while struggling to master the English language. He noted during his visit that

> England is at present the free-est country in the world, I except no republic; I call it free because the monarch has no right to commit any imaginable wrong whatsoever, the reason being that his power is checked and limited by an Act; but if the lower chamber becomes master, its power would be unlimited and dangerous, because it would have simultaneously executive power; at present the unlimited power is in the king and Parliament, and the executive power in the king, whose power is limited. Every good Englishman must therefore seek to defend freedom equally against attacks by the Crown and by the House ("Notes sur l"Angleterre" in Montequieu 1964, 334).

Voltaire (1939, 61) lauded Locke in 1734: "perhaps never was there a more methodological mind or a more exact logician". What appealed to both was how English constitutionalism supposedly protected individuals against despotic power. Montesquieu went on to write the influential *Esprit des Loix* (1748–50, translated in Geneva into English, Italian, German and Latin) which he claimed expanded on Locke's view that a successful constitutionalism protecting basic rights to life, liberty and property rested on separation of the powers.

The younger French around the *Encyclopèdie* also made a particular "ideological" reading of Locke. He was presented as a theorist whose main insight was how best to establish a social contract polity as the basic political arrangement in all societies, without affecting existing property rights whence liberty of person would be guaranteed. In the *Encyclopédie* (1765) the entry on "natural right" was by François Quesnay, a political economist and doctor to Louis XV. He argued *inter alia* that in the face of a world that was "poor, contentious and anxious" human beings sought the justice that could underpin happiness and rights, through the "reason" that separated them from "the wild beast". But they did so not as individuals but as "the entire human race" according to the general will. "But, you will say, where is the depositary of the general will? Where would I consult it? In the principles of law written by all civilised nations; in the social practices of savage and barbaric peoples; in the tacit conventions of enemies of mankind among themselves, and even in the feelings of indignation and resentment, those two passions which nature

seems to have placed even in animals to compensate for all the deficiency of laws in society and the blemish of public vengeance." Taken alone, despite its social contractarianism, this seems somewhat beyond Locke's elitist constitutionalism in proposing a voice "from below" and "from outside". However, if read that way, it conflicts with Quesnay's overall views. When read together with the entries on "political authority" and "political economy" it does not imply a criticism of a right to property. The article on political authority simply repeats the national-popular, social contract view that underpinned Locke's work. That on political economy, written by the budding philosopher Rousseau, states, with Locke as authority, that society was established "to protect property understood as natural and political right, that is, the right that each one of the individuals comprising a society to enjoy the wealth that he legitimately acquired" (see Gendzier 1967; Rousseau 1971, II, 303). The Lockean theory of rights based on property reached the height of expression in Diderot's and Raynal's *Histoire philosophique et politique des Deux Indes* [1772] (Raynal 1981; for the complex relationship between Diderot and Raynal see Duchet 1978). The book contained a bitter criticism of the colonising practices of Europeans, describing them as barbaric, particularly in Latin America. But it also explicitly stated that where land was not cultivated, that is, where there was no admixture of human labour with the soil, there was no right to property. It followed that Europeans could take land from peoples who did not cultivate it (Raynal 1981, 118–119, 259ff, 290). This was a retrograde view of the rights of others compared with Las Casas' two centuries earlier. Since some of them knew of his work, and lived through the French conquest and seizure and loss of parts of Canada and Louisiana – traded as if the natives had no right to that land – we can only explain their position by an obsession for intellectual consistency with Lockean views.

So, overall, up to the middle of the century, there was no a radical departure from Locke in French theory of rights. But then facts in the world compelled a reconsideration. The unity in support of Locke came to be tempered by suggestions for improvement. If, in the 1730s, Messieurs Voltaire and Montesquieu had spent more time in the "dirty streets" of London, where the "canaille" swarmed, than with kings and ministers, they also might have been less rosy in their estimation of what had been achieved by England's "Glorious Revolution". Indeed, had they ventured into Ireland and Scotland, where right to property – from which Catholics were excluded – was leading, by the mid-1730s, to starvation for thousands, or to the New World where the king's prerogative still ran, even down to the right to exterminate entire conquered populations, they might have been more guarded in their praise. But then they were noblemen, or hangers-on, and in France equality before the law still did not mean equality in the law. When a noble man insouciantly crushed a child beneath the wheels of his coach, he went unpunished, because of the nature of state power in France. It was an absolute monarchy. The political backwardness of the French state united moderate and radical critics in proposing a solution that would leapfrog what the British had gained in 1689. The French made a polity whose whole object was to attain and impose the rights of man.

We can identify three intersecting histories leading up to the introduction of the proclamation in revolutionary France of *universal* human rights through democratic

national power. The first of the three cross-cutting histories was that of the monarchy, the state that it embodied and of those who benefited from it. It discredited forever the notion of rights from on high or without democracy.

The Absolute Monarchy and Rights

In 1789 the French monarchic state remained backward-looking (see Baczko 2008, 12–13). French kings up to the seventeenth century had remained brutal men with feudal values dressed up in new ideological clothes, just the greatest of the nobles who had in the Middle Ages lived in a symbiotic relationship with their middle men and peasants. France was still a place of feuding feudal families *après la lettre* as rival factions struggled for ascendancy through dynastic marriages and mutual slaughter. In the sixteenth century, the mediaeval practice of dynastic assassination and murder continued unabated as it died out in England and Holland. Both Henri III and Henri IV were stabbed to death, the latter in 1610. Ladurie's history of France from 1460–1610, *l'Etat royal 1460–1610, (*Ladurie 1987b)*,* is a litany of assassinations and internecine warfare among the ruling classes.

The continuity with a brutal feudal past ended in the late 1600s as the monarchy established central control over the state, though not over its people. They rid themselves of or subordinated the unruly nobles who had united again and again to challenge their power, most notably as the league of the "*guisards*". Thereafter the higher nobility became *courtisans* (those living at court), ruling the rest on the monarch's behalf. Since they were often incompetent and insufficient in numbers, the monarchs created beneath them a new aristocracy, the *noblesse de robe*, to administer the state. On the latter depended a host of government officials who made the law throughout France. This had created a vast officialdom in the seventeenth century who shared the hostility of the monarchy towards those of the local nobility who used their leadership of the people to stem the centralising project. The new oligarchs (nearly two-thirds of all nobles) were terrified of assimilation into the peasant mass and abhorred any local government that might let the latter have a voice in defence of their interests and take power away from them (Ladurie 1991, II, 77–8, 93, 118).

Where the feudal monarchs and their lords had kept close contact with, and relied on meetings of various sections or estates of the "people", Louis XIV (1638–1715) succeeded, because of conditions and class relations in France in fulfilling the dream of most monarchs, including those of England and Holland, of ruling without consulting any representatives of his people. As in England, the monarchy had held meetings of such bodies as the Etats Généraux of nobles, clergy and richer townsfolk to raise funds against various concessions (see generally de Stael 2000, chXI). In France the last meeting of the Etats Généraux, until the eve of the revolution, was in 1614, and the different corporations and *parlements* who had shared in rule with it and the monarch were abolished or exiled in the following 150 years as they became troublesome to the king (see Ladurie 1991, II, 271–2). The *parlement* of

Paris corresponded roughly with the mediaeval parliament of England called to discuss and endorse the king's laws. Justice and rights became what the monarchs thought they were, summed up in the maxim "Si veut le roi, si veut la loi" (de Stael 2000, 117). From the middle of the seventeenth century, whatever the monarch wanted to do was done as far as his writ ran.

Louis XIV had himself called the Sun King and believed that he should extend his power to all of Europe. So his reign was one of endless wars that started well and ended disastrously. They bled France dry in men and money. Louis XV (1715–74) was an amiable hunter of beasts and women, a sort of ne'er do well. In his wars, the country lost practically all its imperial possessions in the Americas and India. Both kings were ostentatious in their wealth, the first building Versailles and plastering sun images all over France, like that on the Cathedral of Orleans. As the self-professed embodiments of the state they were also responsible for all its disasters. By 1750 their extravagance in face of the growing misery of the masses had ended the popular reverence that the monarchy had enjoyed a century earlier. Even the "enlightened despotism" proposed by Voltaire and by Diderot (in his early thought), was censored by the state and eventually considered impossible to implement.

To explain and give legitimacy to the monarchical project of centralisation from above and refusal to consult any community bodies, theorists developed the notion of divine right. One dimension of the theory of divine right was traditional. It evolved from the mediaeval notion that a king had an obligation to his subjects, which went back to at least Philippe le Bel in 1302, and was restated by Protestants like Francois Hotman and Philippe du Plessis du Mornay in the 1600s. Divine right allowed that a monarch had obligations to his people; James I of England had expressed this as the marriage of the monarch and the territory, through which he became the father of his people. As we have seen, in England the development of rights for nationals took the form of a rejection of such claims. But in seventeenth and eighteenth century France, it was affirmed – a novel idea – that the fulfilment of this duty did not require the king to consult anybody. Jean Bodin's (1530–96) *Six Books of the Republic* (1583) made clear that a monarch had to be virtuous – contra Machiavelli – but he did so by consulting only his conscience as God's representative. He should keep himself away from direct contact with the people whose duty it was his to judge (Bodin 1993, 8, 9, 118–120, 381). In the following century princes were taught these principles from their first days. When Louis XIV came to the throne in 1643 he swore to serve his people, proclaiming: "We must consider the well-being of our subjects, much more than our own. It seems that they are part of ourselves, since we are the head of a body of which they are the members. It is only for their advantage that we make laws; and that power which we have over them should only serve to make us work more efficiently for their happiness." But his views were encapsulated in the lapidary but apochryphal "l'Etat c'est moi". His successor had Jacques Benigné Bossuet (1627–1704) as his tutor, who wrote a manual on governance for the young prince which proclaimed: "Princes are Gods"… "All the state is concentrated in the person of the Prince…in him is the power, in him the will of the whole people" and "the people must remain in the condition in which they have been accustomed by the passage of time; that is why God takes

under his protection all legitimate governments, in whatever form they may be"… "By Him all kings reign, both those whom birth establishes, and those who come by election, because He presides at all councils. There is no power on earth which he has not ordained. No authority exists unless it comes from God, says the oracle of the Scripture". Louis XV stated, "legislative power belongs to me alone, without dependence or being shared. It is by my authority alone that the officers of my Court proceed, not to form but to register, publish and execute the law, and they are permitted to advise me as is the duty of good and faithful councillors. All public order emanates from me. I am its supreme guardian. My people is one with me and the rights and interests of the nation, that some dare to make a body separate from the monarchy, are necessarily united with my own and lie in my hands only" (see Revel 1992, 310). This meant that Louis XVI (1774–91), erudite though he was, was unshakeable in his belief in a divine right to rule (see Nogaret 2006, 17). The king and his machine, the centralised state, consulted God alone in deciding what rights should exist.

In sum, the king and state officials who made all policy and decided all rights gradually lost contact, in the sixteenth and seventeenth centuries, with the people of the countryside, and with most city dwellers as well. In the previous centuries they still went on great progresses throughout their realm and lasting months each year, which had kept them in close contact with a nation that shared in one culture. Kings and their courtiers no longer belonged in the world that was their former "natural" environment. They were out of touch with their own people (see for example, de Stael 2000, 153: "Usually the courtesans placed themselves between the king and the nation, like an echoing trumpet that changes what it reflects"). So, after 1685, the most striking feature of the French monarchy and higher aristocracy was its almost complete ignorance of what was happening in the *hexagone* that was increasingly controlled by its state machine in the following 50 years. It lived in isolation in Versailles and compelled all nobles of a certain rank to live there with it, leaving the country in the hands of middle men and peasants. It even alienated a large section of the progressive nobility and clergy. It is notable that Necker, Louis XVI's financial adviser, put his finger on the problem when he said in 1785 that the gulf between the monarch, his ministers and the people explained the crisis that would strike in 1787: "The vast gulf between the common people and all other classes prevents us from seeing how the man who is but one in the crowd is treated by the powers that be" (cited in de Tocqueville 1955 [1856], 133). Reports by critics should have warned the monarch and his state officials that there was a serious threat to their own existence if rural misery continued. But such messages were not getting through to them by the second half of the eighteenth century as they shut themselves away from the reality, even of the country nobility they aped. Madame de Stael who through her father knew the court intimately, wrote that one of the traits that characterised "the aristocratic party in France, was to regard all knowledge of the facts as suspect" (de Stael 2000, 151). The failure to realise how harmful their attitude would become can in great part be laid at the feet of the French monarchy.

Divorced from the realities of France by their self-imposed isolation at Versailles, soon the object of derision and hatred of the Paris mob, they were caught in toils of

their own making. They had certainly centralised the state in an endeavour to by-pass the nobility and to extort money from the populace and even old allies like the church. This centralisation had created an increased national sense among the townsfolk as better communications developed and trade became national rather than local, but it was a nationalism against the absolutist system rather than for it. The isolation, already decried by Montesquieu in his *Pensées* as typical of despotism (Montesquieu 1964, 877), was the significant aspect for human rights of what was known as absolute monarchy.

The divine right system itself made it well-nigh impossible for any effective reforms to be made even when the monarch wanted. This was particularly so where taxation and justice were concerned. Louis XVI dabbled at first with "enlightened" projects like inoculation, and the promotion of industry. France's economy grew, especially industry. A succession of ministers favouring private property in the country came and went. But larger projects for centralisation and raising money without too much pain failed. The requirement for funds still existed in the eighteenth century, but the king had decided to do without the Etats Généraux. The solution was to sell all offices to aspirants, expanding the *noblesse de la robe*; to increase taxes on the poor, to create new charges were they had not previously existed and then, as expenses exceeded even that income, to borrow huge sums from local and foreign bankers. Ultimately, Louis XVI appointed a Genevan-born banker, Jacques Necker, as minister. Hired by the extremely conservative chief adviser Jean-Frederic Philippeau de Maurepas to sort out the financial woes of the kingdom, Necker was a manager who did nothing to challenge the system (de Stael 2000, chsIV–IX). He simply raised loans from overseas banks to finance the state and these had to be repaid, so taxes on the masses were increased radically. Regulation of grain sales caused prices to rocket late in the 1780s. National indebtedness soared. British visiting expert in agricultural economics, Arthur Young (1740–1820), stated that the economic policy of Necker was "stupid, ridiculous" (Young 1942, 125).

It is against this background that we should understand the reign of Louis XVI. He was, unlike his predecessors, shy, liking to play with clocks, and somewhat gauche, and had major sexual problems caused by Peyronie's disease. It is difficult to blame him for the system he had inherited. Thus Germaine de Stael recalls: "The character of both King and Queen were worthy of respect; but the arbitrary nature of French government was so out of touch with the spirit of the times, that even the virtue of princes disappeared in the vast sum of abuses that surrounded them" (de Stael 2000, 82). From the outset, Louis XVI was caught by a mediaeval tradition of dynastic marriages that saw him married at the age of 16 to Marie-Antoinette, daughter of the empress of Austria, Maria Theresa, in a plan to unite both countries in their respective projects of conquest. Royal marital alliances had made most of the significant European wars for 200 years after 1550 "wars of succession" (see generally, Sorel 1947). Little can be understood about the strength of absolute monarchy if we do not remember that monarchs were united by family ties across the continent.

The story of their marriage and the role of Marie Antoinette in it shows how adequate rights and justice in the face of changed social realities cannot exist while a state keeps itself isolated and looks only to God for guidance rather than listening

to the voice "from below". The disaster for the monarchy started with the wedding of the prince and his child bride, a horsy, vital, fun-loving autocrat who also came from a family of brutal, absolute monarchs. It cost 2.2 million *livres*. The lavishness portended the future extravagance of a woman who quickly dominated her shy, retiring husband. In the following decade he spent 36 million *livres* each year for the maintenance of the court, while malnutrition and starvation increased in the adjacent Paris. He also lavished presents on his wife. Both became the butt of the mob, and ditties and scurrilous pamphlets only increased the distance between them, their state and the people. "The Austrian" was detested and accused not only of adultery but of the most hideous perversions. They knew of this, at least. In 1775 she wrote to her mother: "We are having an epidemic of satirical songs that are being made up about the whole Court…. I am supposed to have a taste for both men and women" *(*Lever 2005, 144–5). She was certainly stupidly spend-thrift at the worst moments. Her mad gambling and dubious financial activities were common currency. She was also completely dominated by the mother who had married her off to make Austria and France, the two greatest states of Europe, united, in Louis XVI words, "by blood and friendship". Empress Maria Theresa had her daughter spied on and manipulated for political ends, but her real problem was the political ineptitude and bad judgment that came from a life of splendid isolation. When we peruse Marie Antoinette's correspondence we can see why "enlightened despotism", where all others are in subjection, has difficulty functioning in times of change. It simply cannot know the problems and therefore cannot provide rights or justice to address those problems, no matter how much the despot seeks God's guidance through his personal conscience.

Maria Theresa did not approve of her daughter's extravagance when the poor were clamouring for bread (Lever 2005, 201) but she encouraged her isolation, advising her not to "read" for fear that she would become impious and question her divine right to rule: "Evitez toute sorte de familiarité avec de petites gens." (ibid., 36) The empress tried to rein in her talkative and opinionated daughter: "the world is evil"; "don't gossip". She was gratified when her spy reported to her that "The most satisfying thing for the Dauphine is that each day she gains ascendancy over the Dauphin's mind" (14/7/1770) but probably not when he wrote that "her youth, her inexperience and her taste for dissipation cause me to be greatly apprehensive, above all at a time when minds are in great fermentation, and affairs in terrible disorder" (2/6/1773) (ibid., 120). Isolated from reality by the sycophants around her and without advice from councils or representative bodies, the princess nonchalantly informed her mother that the love of "the people" could be won cheaply by waving to them. Even at distance the empress knew that popular distress was great and reproved her daughter again and again, "to save you from the abyss into which you are throwing yourself" (ibid., 179; see also Mercy to Maria-Theresa 18/5/1770, ibid., 176). She wrote to her daughter on 2 September 1776: "The news from Paris announces that you have bought a bracelet for 250,000 pounds and that it is thought that you are dragging the King into useless extravagance that for some time has again increased and is placing the state in the distressing condition in which it finds itself" (ibid., 202; see also the letter from Mercy of 17/9/1776 in ibid., 204–5, also

219: that the King was paying her debts "which was remarkable since he is naturally thrifty above all about money that he controls himself").

Not only did Marie-Antoinette's mother encourage her isolation but she also commended the king when he brutally suppressed bread rioters in the first half of 1775. These poor people had been victim of an edict of his then-minister, Anne-Robert Turgot, that grain prices should be free in a time of shortage. "I am enchanted by the news about the attitude of the King and his orders to *Parlement* about the present mutiny. I believe that there is somebody behind them. The same talk led on our people in Bohemia, though yours curse about the dearness of bread, and ours about compulsory labour (*corvée*), they also wanted an order abolishing that. Generally, this mutinous spirit is becoming familiar everywhere: it is the result of our 'enlightened' century. I often bewail it, but the depravity of customs, the indifference about all that is connected with our Holy Religion, the continual dissipation, are the causes of those evils" (Lever 2005, 177–87).

The belief that one absolute monarch encouraged in another the idea that the solution was to crush "our people" on the assumption that someone else had provoked the problem showed how complete was the divorce between such monarchs and the population. The system was not working when relations between a king and his people was explained by the intrigues of cabals or where the pages amused themselves by spitting on the bourgeoisie from the balconies of the palace or running them off the streets. Secret correspondence (Marie-Antoinette 2005, III vols) shows that "personal politics" rather than a structural analysis was the queen's forte. Unbelievable though it may seem, even in that crisis, the monarchs continued to believe that "the people" loved them. She continued to express such sentiments even after her imprisonment. Arthur Young reports seeing the queen when under house arrest walking in the Tuileries, faced with a disrespectful crowd, but still not really registering that she was not loved (Young 1942, 309).

Such stupidity, lack of a sense of reality and lack of information, meant that the sense of injustice and absence of a real rule of law felt by all classes and particularly the poor was not acknowledged. Monarchs who consulted only God to decide on justice for the people, and who dismissed any court or body that even remonstrated about what they did, could not provide either adequate laws or justice in the state–people interface. When Tobias Smollett lived in France during Louis XV's reign he observed: "The interruption which is given, in arbitrary governments, to the administration of justice, by the interposition of the great, as always had a bad effect upon the morals of the common people. The peasants too are often rendered desperate and savage, by the misery they suffer from the oppression and tyranny of the landlords" (Smollett 1979, 33). He followed this observation with a list of cases that showed that even if there were a rule of law in France, it did not mean equal justice. So, despite Bernier's observations about the backwardness of Indian despotism compared with the French rule of law of the late seventeenth century, while there were different rules for different people it did not matter that the administered state had many rules. Alexis de Tocqueville wrote that where a "poor man" was involved

> if his adversary was the state, he came up against "exceptional" tribunals, biased judges, summary procedures, a mere semblance of a trial, and execution of judgment was enforced peremptorily, there being no appeal against the orders of these courts. "The provost and the lieutenant of the mounted constabulary are directed to deal with any unlawful assembly or disturbances in connection with the shortage of the wheat crop; trials of offenders shall take place in the provostal court and there shall be no appeal. His Majesty forbids all other Courts to take cognizance of such offences." This Order in Council remained in force throughout the eighteenth century (de Tocqueville 1955, 191).

Proposals for extensions to the British model for rights took on particular force in France because, far from accepting the constitutionalist Lockean programme of the Enlightenment, the French monarchy became more and more "absolute" as the century proceeded.

Such realities were matters that lawyers and administrators knew from everyday experience and, if they were not corrupt, were offended. Traditionally, the king had to register a policy/law before the *parlements* who then could discuss it without stopping it. This power of remonstrance by *parlements* made royal policy a matter of public debate. The power was increasingly used in the second half of the eighteenth century. For our purposes, the most famous were *Remonstrances* in 1771 and 1775 made by Chrétien Guillaume Lamoignon de Malesherbes (1721–94) (Badinter 1985) who sat in the Cour des Aides. He was very popular. Together these *Remonstrances* were a condemnation of the "despotism French style" that was "threatening the whole nation." Enlightenment figures, notably Voltaire, who had promoted an "enlightened despotism" that clearly was not working, poured scorn on Malesherbes' insistence that the way forward for the monarchy was through a rule of law and of the magistracy (ibid., 93–5). Despite this and despite being published clandestinely, the *Remonstrances* were a great public success (ibid., 79). They were an account of evil counsel leading to bad policy (ibid., 70–71) and the need for a constitutional monarchy on the Lockean model to prevent errors in policy and consequent unrest. Malesherbes had certainly read both Bodin and Locke, and his ideas owed much to the latter, but it was the practical disaster of splendid isolation that made him write his first *Remonstrance*. It was prompted by an exception being made to the rule of law by the king when he stopped the Duc d'Aiguillon's trial for suborning a witness in Brittany. The second was made in an attempt to save the monarchy from its own folly in not seeking a constitutional solution but preferring to dismiss any bodies that criticised its policies and actions. An earlier *Remonstrance* had seen 130 parliamentary members exiled and removed from their offices. Malesherbes thought that his in 1771 would also see him banished, but "nothing will stop me getting the truth to the throne" (ibid., 74).

Many lawyers and lesser figures contributed to the controversy in support of Maleherbes. No doubt his insistence on the centrality of the *parlement* of Paris to any solution to problems of governance was pleasing to those who thronged around it. His position was not unlike that assumed by Coke with James I in 1612 in its insistence that since there were no longer any Etats Généraux, the only defence of the people's rights could be by the magistracy (Badinter 1985, 153). De Stael wrote: "It was strange idea that judges who were appointed either by the King or by buying office should pretend to represent the nation. Nevertheless, bizarre though that

pretension may be, it worked to limit despotism" (de Stael 2000, 121). In 1774, when the new king came to the throne, he called back the *parlement,* thus assuming the role of the "good king" in an overall policy of ending despotism (ibid., 129).

In the same year, remonstrating about the inequitable taxation system of the Ferme Générale and its new taxes, Malesherbes extended his argument from a defence of the magistracy to call for a liberal revolution establishing a written constitution, the fundamental law which could allow the law to end arbitrariness. This was too much for the new king and his Ministers. Malesherbes' views were quickly smothered and had to be published outside France and smuggled back into the country (Badinter 1985, 138). A number of half-hearted royal edicts followed in 1777. They were backed by Necker and designed to end the malign influence exercised by the *Intendants* in financial matters through their presence in the king's council. Necker advised transparency where money matters were concerned; but these were at best half-measures in face of the judge's criticisms.

Malesherbes violently opposed what he saw as the oriental despotism creeping into France. For him, this denied the time-immemorial rights of self-government of Frenchmen, their rule of law, and he stated the impossibility of any monarch to rule outside such laws. These could not be arbitrary. Again, he identified the problem as one of royal isolation from the French people, denying their status as citizens. His views were therefore particularly important to the development of the national-popular model for rights in France. Fifteen times he refers to "the rights of the nation" or "cause of the people". Having read the natural lawyers, he listed the rights to life, liberty and property. While avoiding the key question of the source of those rights, which would have put divine right into question, his belief in natural law made him assert that all power came from the people for whose benefit the sovereign ruled. In an earlier remonstrance of 1770 he had written "the rights of the people are as imprescriptible as those of the sovereign" (Badinter 1985, 84).

When unrest became uncontainable as the country staggered into bankruptcy in the 1780 s, views like his own, those of practical administrators, were certainly adopted by great numbers of lawyers who by that time had a passing knowledge of the Lockean national-popular theory of the social contract. While in no way democrats, they did make up the bulk of the country's notables – a "basoche" that had clamoured back as far as 1754 at the despotic reduction of the powers of the law courts. What they harked back to was the emerging rule of law of the new middle class that had been halted in the eighteenth century. They aspired to a constitutional monarchy. This became possible when, facing their complaints, the king called the Etats Généraux for the first time in 173 years, in a belated effort to allow a voice from below.

The New Bourgeoisie and National-Popular Rights

The history of a monarchy by divine right and its idea of rights intersected with a second history, that of the commercial, administrative and intellectual bourgeoisie, still a minority compared with the peasantry, but already dominant over it financially

and, through literacy, intellectually. As they emerged, they had required a rule of law, above all commercial law, just to exist. This was, like that in England, mainly about contracts based on trust, enabling predictability and future planning. But because of the interference of the monarchy in all matters in the eighteenth century, including commerce, the private realm had become interwoven with the public. Rights against the state became necessary for private success in business. A pattern for the development of rights like that in England under Charles I was seen in eighteenth century France.

We turn now to this second history. In it the quest for a national-popular model for rights was taken up in France and developed further into the democratic model by a section of that bourgeoisie. What hinted at rupture with all previous national-popular models for rights was already present in Malesherbes: a recognition of the Montesquieuian argument that such a model was opposed to "oriental despotism". It referred outwards, not merely backwards. It could not then be simply a repetition of 1689, the recovery or establishment of rights for nationals, but would also have to consider rights for all men.

In the sixteenth and seventeenth centuries, France had known roughly the same commercial development as in England and Holland. A new merchant bourgeoisie had emerged and towns had grown immensely. A prominent and prosperous merchant bourgeoisie, both Protestant and Catholic, figured in most nation-wide descriptions by 1600. The new class had often espoused Calvinism and, as Huguenots, as they became known, concentrated in La Rochelle, Bordeaux and the south. A de facto toleration for Protestants was established by the Edict of Nantes in 1585 after internecine religious struggles, often fostered by the rival aspirants for royal power (for the Edict of Nantes see Bettenson 1959, 302–03) but France remained technically in the camp of Roman Catholicism after King Henri IV (1589–1610) had apocryphally stated that Paris was worth a mass and converted from Protestantism to Catholicism. His more bigoted rivals suspected that he had not changed and was too tender in his treatment of his former co-religionists. Official toleration lasted until 1698. Unofficially, it continued through the eighteenth century in certain areas.

In the 1700s, France's economy grew five times and industrial production equalled that of agriculture in 1789. As the country prospered in the first 50 years of the century, the last significant famines were in 1720; plague disappeared; and wars were less and less fought on or near national soil. European armies were made up of conscripts supplemented by professional or foreign mercenaries like the ubiquitous Swiss guards. The average Frenchman was not involved, although about one in six was conscripted to fight (see Ladurie 1991, II, II, 40, 43, 47, 50–1; Ferro 2001, 141–54; Wiesner-Hanks 2006; 178–9).

The richest merchants became a new nobility and ruled the countryside more and more from their market towns. A mid-eighteenth century comment captures this world: "Nice abounds with noblesse…three or four families are really respectable; the rest are *novi homines,* sprung from bourgeois, who have saved a little money by their different occupations and raised themselves to the rank of noblesse by purchase. One is descended from an *avocat*; another from an apothecary; a third from a retailer of wine, a fourth from a dealer in anchovies, and I am told, there is actually

a count at Villefranche, whose father sold macaroni in the streets. A man in this country may buy a marquisate, or a county, for the value of thee or 400 pounds sterling, and the title follows the fief; but he may purchase letters de noblesse for about 30 or 40 guineas" (Smollett 1979, 129). By 1790 about two-thirds of all nobles were such men, perhaps 200,000 in all. The richer peasants, like Rétif de la Bretonne's family, enjoyed decent and fat, if hard-working and brutal lives.

The rule of law and of lawyers also became general within the new class and its sphere of influence by the eighteenth century. It started 400 years earlier, in commercial and contract law between individuals, while criminal law remained more the preserve of the state and so arbitrary that Blackstone made no distinction between France and Turkey even in 1765. Public law remained the preserve of the state, the nobles and their entourage. In the early fifteenth century, the edicts of the king were normally rubber-stamped by the *parlements* when they concerned government rather than interference with rights that appeared guaranteed to certain regions when they became part of France (see for example, AN, Collection Le Nain, U2201). Since these courts were mainly the preserve of the nobility, the clergy and the high bourgeoisie until the seventeenth century, what was disputed in them was frequently the right of the monarch to take away some traditional right to tax, or to be exempt from some due or other. In such cases, the centralising monarchy relied increasingly on the rules in Roman law, which strengthened its hand, both against opponents and against the lawyers. Countering this turn to Roman law, local interests asserted local custom, something akin to the English common law. It took a long and uneven process for the first to establish its supremacy and it did that only by allowing an appeal to natural reason and natural law in an effort to reconcile Roman law with French realities. Repeatedly, lawyers heard lines like those of 1572 that affirmed that it was established "nothing revealed the goodness…of the King more than the authority that he gave to Justice and that he had subordinated his power to reason and that he has not only patiently suffered but freely given to his subjects to revoke doubt and controversy and to debate and judge the rights that he claims" (AN, Collection le Nain U2206, 289–290). This was despite the monarchs' sacred quality and his divine rights. Increasingly, it was asserted that that a case should heard in French rather than Latin, though reference to Italian glosses on Roman law became common. So we hear pleaded by lawyers of the *procureur du Roy's* in 1476: "it might seem to many present that the case should be pleaded in Latin (a case between the elders of Rheims and the duke and archbishop of Rheims over the payment of the *regale* (royal right) on the death of a foreigner) but the Court holds that what is said in the Liv de pena super vallerium in primo folio de *Instit Antiq*…touching on the prerogatives of the King, that it should speak and propose in its French language ius?? hominis idiomatis." The pleading then continued that all rights arose from the king and it was common knowledge that on the death of a foreigner his goods passed to the monarch (ibid., U2208, 90–92).

A text of 1615 described this progress as it seen at the time (Bouchel 1615). It states that by then, lawyers had to have a 5-year degree that achieved a consistency and respect for precedent that they were expressly urged to show. In 1599, in one court, after establishing the order of the roll of lawyers, the king's advocate exhorted

lawyers as to their duties, especially the "emulation of their ancients", and prosecutors to be faithful and diligent in their office. Among the tasks enjoined for prosecutors was a better record and observance of *ordonnances* than in the past and a careful record of finances (taxes) (AN, Collection Le Nain, U2208, 99ff). The court decided in 1592 that custom that could be proved still overrode any *ordonnance* of the king "who could not abolish rights…because customs are accorded by subjects and not by kings" (Bouchel 1615, 763). But it is striking that the desire of the state to centralise law and thus to demand that lawyers be trained in Roman law, led to the latter turning to reason and conscience as the final place of reference. In this they did not differ from Lord Coke's views except in the balance between the "ancient and artificial" learning, of which they were so proud, and considerations of what was just. This made constant appeal to Roman law texts. Yet they argued that judgment should be reached by the judge consulting his own conscience, asking whether after using the sources, he would like the law imposed on himself (Bouchel 1615, 1331).

It is important to affirm in the face of common lawyers' misconceptions about civil law systems that the latter also followed precedent – maybe just through lawyerly caution – and when important judgments were made, it was understood that the decision was important as it "fera loy pour plusieurs autres semblables" (AN, Collection Le Nain, U2206, 301) Thus, this law moved case by case and slowly.

As the absolute state intruded more and more into everyday commercial affairs, partly by farming tax collection to the new middle class, and partly through increased and novel charges even on the nobility and clergy, and by taking away feudal rights, the distinction between private and public law blurred. After the Etats Généraux were no longer summoned (1614), the 13 *parlements*, the most important in Paris, whose history went back to the Middle Ages, and which roughly corresponded with constitutional courts, started to assert themselves as defenders of rights and justice through appealing increasingly to natural law. Before the assertion of absolute monarchy by Louis XIV, when a royal edict was made they examined it to see if it accorded with what they thought the traditional or customary laws of France. If they did not approve, it was not promulgated unless the king personally attended court and insisted (*lit de justice*). This had always been contested, but only with absolute monarchy did the monarch ignore and exile any *parlement* that would not approve new measures.

When he did this, (after 1754) the *parlements* cast for themselves the role of defenders of the rights of French people. In the eighteenth century, as expressed by Malesherbes, the *parlements'* assertion of itself as the bulwark defending rights led quickly into a Lockean desire for what had apparently been won in 1689 (Badinter 1985, 98–99). Where in 1771 Malesherbes simply stated that: "Today the Courts are the only protectors of the weak and unfortunate; since the Etats Généraux have not existed for some time…. So the Courts are the only bodies where raising one's voice for the People is still permitted" (ibid., 153) by 1775 he was writing: "such is the nature of arbitrary power, Sire, that justice and humanity loses all rights when a single man is deaf to their voice" (ibid., 184)… "the despotism against which we raise our voice today"… "exists when a single sovereign and his executive exercise

absolute and unlimited power…causing an intolerable tyranny." He warned that the sort of government that existed in France was a "true despotism" (ibid., 202–5). "They seek to destroy the true representatives of the Nation through hidden government". "The general assemblies of the Nation have not met for 160 years, and long before had become very rare, we dare say almost useless" (ibid., 207). The courts had certainly claimed for the whole people their right to natural justice, a fair trial before judges (ibid., 225), but what was needed by 1775 in France was a written constitution guaranteeing a voice to the People: "In France the Nation has always had a profound sentiment for its rights and freedom…however the articles of that freedom have never been written down as power has passed to those with arms and into royal power" (ibid., 205–6)… "the true representatives of the Provinces no longer exist but it is left to each community of citizens to look after its own affairs a right that we do not say was part of the primitive constitution of the realm but goes back much further, to natural law and the law of reason" (ibid., 208); "we wish for the re-establishment of the ancient rules" to give the people what they need to preserve themselves from despotism" (ibid., 259). "We cannot hide from you, Sire that the simplest, most natural, way most in conformity with the constitution of this monarchy; would be to hear the Nation assembled together, or at least to allow assemblies of each Province; nobody should be too cowardly to say anything else, or to leave you ignorant of the fact that the entire Nation wishes to have a Etats Généraux, or at least provincial Estates" (ibid., 265).

This shift to a political solution was explicitly a negation of Coke's view that in the last analysis lawyers should decide about rights and justice because of their access to "ancient and artificial wisdom". Maleherbes, against his own profession, argued that the rule of law that had emerged in previous centuries had replaced arbitrary unwritten rule by that by "legal men", the new citizens, and that only they could know the law (Badinter 1985, 271). This left the public ignorant of their rights and "obliged to have a blind faith in lawyers". "So Justice [had] ceased to be public as it had been at first"(ibid., 271–2). With the age of print it was possible for the public to participate in the making of Justice as judges did in the court and to invoke the testimony of the public (ibid., 273–4).

Much of *basoche*, the lower orders of lawyers, agreed with this political solution as it was understood in Lockean terms. Some of course did not, and the king had no trouble replacing recalcitrants, dismissed in 1764–1771, by compliant new comers (Ladurie 1991, II, 249–50). Yet, among them as a class, after the *parlements* returned to favour under the new king, it was common knowledge that they spoke for the nation against the centralising despotism and that what they wanted was a somewhat idealised version of what already existed in England. This they saw in French tradition as well (de Stael 2000, 83, 119). The version of the British system that they envied was not so much the tarnished reality as that proposed, advanced and used to justify revolt in North America in 1776.

Yet, despite this similarity in goals, there was a significant difference of mighty importance for human rights in their policies. The political solution as expressed by Malesherbes was tendentially, but not consciously, democratic. Popular rights should be embodied in laws. But for the people to know their rights, laws should

be simple, written and accessible to all citizens. They should be based on natural reason and not a lawyerly knowledge of national precedent. "Good laws exist only when there a simple laws" (Badinter 1985, 193). The latter should be codified so that there was no arbitrariness (ibid., 130). This demand for a simple code of laws embodying natural rights departed completely from the British/American tradition. It built on earlier attempts at codification by Chancellor Henri Francois d'Aguesseau during the reign of Louis XIV. This, and the other projects of codification to simplify the law, had been expressly based on natural law principles, that is, law was something anyone could reason about since everybody knew what was right or could arrive at that knowledge in debate (see Ladurie 1991, II, 134–5 for the limited practical effects).

France had become the great centre of natural law theory in the seventeenth century. Like other states with a rising merchant bourgeoisie it had sought to extend commercial law and make it consistent. As we have seen, in the absence of recorded case law like that of the English, it had introduced Roman law imported from Italy. So its new swarms of lawyers, rather than turning to Littleton, turned to Bartolus and before him Justinian. We can see a shift by the sixteenth century in the teaching in French texts for lawyers to a system aiming at a greater consistency by basing itself on the glossed Roman law coming out of the Italian universities like Bologna. In 1615 Bouchel made a compilation of several authors who had practiced in the previous century. The book traced the procedures in French courts back to ancient times, claiming that the original cross-examination by the parties had given way to interrogatories between specialist lawyers and judges. The first had to have studied civil (Roman) and canon law for 5 years. In fact, from 1555, they had to have a university degree. So in a typical case of 1529 the court referred to Quintilian, the Institutes, the Glossators as well as to St Augustine (AN, Collection Le Nain, U2219, Plaidoiries après diner) and in another from 1572, to Bartolus and Baldus as well as to Plato (AN, Collection Le Nain, U2206, 280, 282) It is not, however, the constant use of Roman law to refute claims arising under the haphazard feudal system that interests us, though that established consistence of procedure and practice. By 1684 texts like de Ferrière 1684 (AN, Collection Le Nain, F 11759) made clear that for lawyers "good sense" was not enough and a good knowledge of Roman law was necessary. What matters for our story is the increasing insistence on natural law and human reason as the basis for establishing rights.

In sixteenth century France most law was still based on custom and on the *turbes* (Esmein 1895, 725–6) although Roman law that was written existed in some areas and started to be systematised in 1687. The *turbes* has been described as follows: "au fond c'était la un jury rendant un verdict collectif…et cela concorde bien avec l'opinion qui voit dans la vieille *inquisitio* carolingienne l'origine du jury anglais" (ibid). (For an exhaustive exposition of its role and procedures in this period see Tagereau 1662, 185 ff.) It was to escape such customary practices and procedures that jurisprudents Jean Domat and d'Aguesseau and lesser writers in 1668–1751 started a rationalisation of the rule of law whose extreme revolutionary expression is found in the works of Brissot de Warville in 1781. The common theme of all three was that the source of law was not to be found in its history but in natural law or

justice, which could be attained by reason shared by all humans (Pardessus 1819, I, xvi, 1–30). The earliest of the three, Domat (1625–96), argued that the law was based on natural principles "engraved" in the hearts of all individuals who were the "same". So only in the people could be found the natural immutable law of justice. They were thus, so to speak, the court of last instance, no matter how much they had been corrupted by society's failings (Domat 1980 [1850], 1–8). D'Aguesseau, who took Domat as an inspiration, argued that general propositions of law which built on primitive law should be established because primitive law was "as common to all nations as justice itself" (Pardessus 1819, I, 100–30).

In these writers religious references are much fewer than in, say, Grotius; they are more "lawyers' lawyers". But the thrust is the same: they believe that all humans can decide what is right, not only the privileged class of those learned in the law. Moreover, those human beings are humanity generally, not just one's co-nationals. This refusal to divide humanity into those who know and those who do not, was already moving towards some notion of universal humanity. What is important for universal human rights is that it challenged the notion that freedom would come through assertion of national traditions, even when these gave ultimate sovereignty to the "people". Logically, natural law allowed any individual to come to speak at the meeting establishing a social contract and a rule of law. So, if there was a rule of law established by the seventeenth century in the little French pocket of the world, it expressed itself in different and contradictory ways. For human rights, the issue was not that a rule of law was a step towards their attainment *but which sort of rule of law.*

The lawyer class from top to bottom saw itself as the spokesperson for adequate rights. What was important about its views was not the similarity with the British traditions, and they were many, as we show below, but what was different. Like d'Aguesseau and Maleherbes, despite claiming to appeal to tradition, they experimented with a view that rights and laws were established not only by appeal to national traditions coming from the past. In the place of such accumulated wisdom they proposed rather a direct appeal to the people for their views about justice and rights. In the history of human rights, this became crucial with the recall in 1787 of the Etats Généraux. The overwhelming proportion of the Third Estate and many of the First (nobles) and Second (Clergy) were lawyers coming from the Malesherbian tradition.

The Peasant Majority and Rights

We reiterate that the pattern of economic and social development in France had been roughly the same as in England in the seventeenth and early eighteenth centuries, but, given French agriculture, the class composition changed differently. In the two previous centuries a merchant bourgeoisie had emerged and feudalism had gradually disappeared. The king had centralised state power in his hands and an elaborate state machinery had emerged. But where the little Protestant countries had to trade,

turning to the sea to survive and develop, France remained overwhelmingly a rural economy, with twice as many peasants proportionately as England and a numerous petty aristocracy. The most significant group remained the peasantry up to and after the revolution of 1789. The nature and scope of rights, old or new, depended greatly on how they saw those rights and how they should thought they should be applied.

In law, feudalism had disappeared. Most "feudal" land had become the private property of the nobility and upper bourgeoisie in 1500–1700. In the mid-eighteenth century, The reforms of Turgot (1727–87) were directed to further establishing private property among the peasants in a state-imposed modernisation. In many cases this occurred as it had in England, but in not enough. Nearly all significant proposals for reforms started from the premise that there would have to be more peasant private property in land and a free market economy (see Turgot 1971, 1–9 and below).

While the growing bourgeoisie sought to extend contractual and property relations and the law based on trust to both the peasants beneath and the petty nobles above it, conditions for peasants deteriorated. While peasants owned their land, the monarchy still extorted the last *sou,* pushing many off their land. An ever-greater number of day labourers, constantly hungry, were seen in the country by the end of the seventeenth century – in Ladurie's phrase, after 1500 the population became "wanderers" (Ladurie 1987b, 64) and in the towns and cities a new class – who had fled rural poverty – commonly referred to even by progressives as the scum (*canaille*) – pullulated.

So after 1700, almost out of sight and mind, there were regions where the cultures of the Middle Ages still prevailed despite the majority of the country being hauled into modernity by commercial development. The poverty of such regions was reported by practically all foreign visitors in the eighteenth century. When there was a poor harvest or bread prices rose, the misery became extreme. There was starvation in certain areas in 1728, 1731, 1740 and more general hardship after control of grain prices ended with Turgot's reforms in 1764 (Ladurie 1991, II, 131, 225ff). This pushed up grain prices in the towns, to which more and more of the expropriated peasantry was drifting. Hardship reached a peak under Louis XVI (ibid., 93). We have already recounted the life of Rétif de la Bretonne's father – hard but without hunger. The accounts in the third part of the century about the *hobereaux* (small farmers/yokels) were different. When the sick and irascible Tobias Smollett made his trip south through France in 1764 he noted (Smollett 1979, 66, 72): "The peasant in France is so wretchedly poor, and so much oppressed by their landlords, that they cannot afford to enclose their lands; or to stock their farms with a sufficient number of black cattle to produce the necessary manure. …The peasants are often rendered desperate and savage by the misery they suffer from the oppression and tyranny of their landlords." Smollett was chauvinistically British (he did not like the fruit in the south of France because it was too sweet and garlic made him sick) and he was undoubtedly taken in by peasant *fourberie*. He often wondered why they ate so often when dressed in rags. Nevertheless, he was an astute observer of general transformations taking place in France. Matters were much worse when Arthur Young made his voyage in 1787–89. Despite the efforts that had been made to rationalise agriculture and grain production since 1764, Young noted that in the Dordogne,

one of the backward areas, "We meet many beggars…all the country girls and women are without shoes or stockings, and the ploughmen at their work have neither sabots nor feet to their stockings. This is a poverty that strikes at the root of national prosperity…. It reminded me of the misery of Ireland" (Young 1942, 25). He made an ominous prediction: "Everything conspires to render the present period in France critical; the want of bread is terrible: accounts arrive at every moment from the provinces of riots and disturbances, and calling in the military to preserve the peace of the markets. The prices reported are the same that I found at Abbeville and Amiens. 5 *sous* (21/2 d) a pound for white bread and 3 and half *sous* to 4 *sous* for the common sort eaten by the poor, those rates are beyond their faculties and occasion great misery" (Young 1942, 125).

Many peasants were left completely outside any process of modernisation and built up backward-looking family circles with the old petty nobility that continued in the less economically developed areas. In regions like the Vendée and the Morvan these continued to resemble what had existed in the Middle Ages. Both sides were tied together on some issues, mainly hatred of middle-class officials of state. Where nobles wished to retain feudal rights, peasants often had little hope of getting more than a *lopin* of land, and found it easier to stay with their lords than to risk leaving. They did not love, and could turn on, one another. But both shared in their brutal patriarchal social relations; their attachment to the local church; their culture with its extensive knowledge of agriculture, nature, natural medicines. Among them there was a comparative lack of book learning while the bourgeois men were becoming more and more literate (by 1770, 60% of city dwellers could read, up nearly 18% since 1683 (Ladurie 1991, II, 49)). The rural population felt increasingly culturally marginalised by the merchant cities, above all, Paris, which grew greatly in 1600–1800. This class differentiation would be very important for the development of rights in the eighteenth century. The nobles were described by Smollett as no different from their peasants in areas near Nice: "There are some representatives of very ancient and noble families, reduced to the condition of common peasants…a gentleman told me, that in travelling through the mountains, he was obliged to pass the night in the cottage of one of these rusticated nobles, who called to his son, in the evening: 'Chevalier, as-tu donné a manger aux cochons?'" (Smollett 1979, 129). They could unleash a terrible anarchic violence that no number of mercenary troops would be able to repress. Their attitude towards the rule of law and the rights supported by the bourgeoisie never became positive. The peasant resented the loss of the traditional self-government of the villages described in Chap. 1 above. Most lords, with whom a peasant had been able under feudalism to build up a family circle to avoid the worst of his obligations, had left for the towns, except in places like the Vendée. In their place were the "hobbyhawks", the peasant nickname for their new middle men.

In sum, according to de Tocqueville, by the eighteenth century the peasantry had become a race apart. "The French village was a community of poor, benighted rustics, its local officials were as little educated and as much looked down on as the ordinary villager; its syndic could not read; its tax collector was as incapable of compiling, unaided, the returns which so vitally affected his neighbours' interests

and his own" (de Tocqueville 1955, 124). Frustrated, the peasant's only way to express himself was through violent action. Violence punctuated the "inertness" of the French village described by Turgot, Louis XVI's adviser on rural matters (de Tocqueville 1955, 117).

Alexis de Tocqueville concluded that the realities of peasant lives made revolution a foregone conclusion and that it would be carried out by "the least educated and most unruly elements". With an astute eye he summed the latter up in these words:

> Long enfranchised and owning the land he worked, the French peasant was largely independent and had developed a healthy pride and much common sense. Inured to hardship, he was indifferent to amenities of life, intrepid in the face of danger, and faced misfortune stoically. It was from this simple, virile race of men that those great armies were raised which were to dominate for many years the European scene. But their very virtues made them dangerous monsters. During the many centuries in which these men had borne the brunt of nation-wide misgovernment and lived as class apart, they had nursed in secret their grievances, jealousies and rancours and, having learned toughness in the hard school, had become capable of enduring or inflicting the very worst (de Tocqueville 1955, 207).

His classic work on the *ancien regime* is endorsed by Roger Chartier, who argues that even the rich peasantry had become better off only to go backward and this reversal in fortunes was intolerable for them. As de Tocqueville described the peasantry of the eighteenth and early nineteenth centuries, their identity was bound up with the plots of land that gave them independence. So they bitterly resented not only the dues they had to pay which were hangovers from feudalism, but also the new varieties created by the state, which the tax collector embodied (ibid., 31).

One of the main taxes was the *taille*, which varied from year to year and was levied on villagers. The collector, caught in webs of family obligation, excused those whom he was under an obligation to the detriment of others. Consequently, hatred and envy was as present in French villages as it had been in the Middle Ages. There was no more sense of justice than there had been under feudalism as neighbours remained competitive enemies in a war of all against all. "So it was that envy, malice, and delation flourished to an extent that might not have caused surprise in the domain of an Indian rajah, but was certainly exceptional in Europe" (ibid., 127).

The new figures of hatred became the town and village-based tax collectors. The peasants started to feel more in common with their poverty-stricken local lords, don Quixotes of the countryside, than with any townsman even as a "levelling up" process greater than that in Britain took place (de Tocqueville 1955, 81). Until about 1750 the king was still a far-off, divine creature for many, but in between were the hated agents of the state, the myriad officials whose offices were bought and traded to raise money for the royal coffers. So de Tocqueville's further argument is that state centralisation had both been complete and yet not gone far enough by the eighteenth century as local government had been sold into the hands of local oligarchs (ibid., 48), all the more hated for their vexatious incompetence because they were personally known. The main problem was the inequity of their application of rules. "The Old Regime [was] in a nutshell: rigid rules, but flexibility, not to say laxity, in their application" (Tocqueville 1955, 67). The state did exempt certain rich people from taxes. They were detested by the average peasant.

As the indigent peasants moved into the towns and nascent industry, they brought those attitudes with them: a common sense that had little room for ideas of equal justice. Then Romantic bucolic notions about rural life gave way to a view of the people epitomised by the epithet "canaille" as real contact with the "people" rendered the middle class apprehensive of those only a generation removed from the village.

It is useful to see the history of the peasantry and petty nobility, still nearly two-thirds of the population in the late eighteenth century, as a separate development from that of the rest of French men and women although in fact it intersected with the two other histories. Many of the peasantry were a large marginalised residue of the Middle Ages with corresponding lives, expectations and sense of rights. They were in contact with and influenced by the merchants and some were upwardly mobile, but many were not, especially those in distant and isolated regions of France. Since their view of rights was backward looking – basically that of a church that they believed in when it preached eternal damnation because all humans are evil and which they laughed at when it spoke of loving all men – what they thought rights were, and right and wrong, was backward-looking and should have become of less and less importance to the innovatory content of universal rights as every day passed. Yet, because they bore the values described in Chap. 1 above, their beliefs would complicate matters during the revolution, both for those who advanced a democratic-national popular model and contradictory with proposals for universal rights for all men. Some humans and their ideas remained other for such nobles and peasants. Once the latter had a voice in a democracy, alien people and ideas would be at risk. Since similar groups continue to exist on a mass scale world wide, and even in France to this day there are pockets with "feudal" values (in conditions up to the early twentieth century see Weber 1979; Robb 2007), their view of rights remained and remains very important in the history of human rights.

Towards the Democratic National Model of Rights

Proposals to extend the British model for rights took on particular force in France because the French monarchy was increasingly absolute and had become a despot by the eighteenth century. Blackstone, writing in 1765, made no distinction between rule in France and Turkey. In a world where Montesqueiuan categories were common parlance, this meant that he thought that French subjects still had no rights at all. They lived, moved and expressed themselves at the whim of the ruler. It was certainly the case after 1643 in the public realm of relations between the state and subject, as distinct from relations between citizens, ending a secular trend towards the rule of law. More and more often, the monarch and his entourage were held responsible of all the suffering and oppression in France and became cordially hated by their subjects. The intense mutual hatred boded ill for the monarchy if it ever lost control of the population.

After 1750, the failure of France to achieve real rights for all nationals through "enlightened policies" from above, and the failure of Locke's model, led to the

increasing popularity of a radical way to introduce and ensure rights, that proposed and rejected at Putney in 1647. Its premise was that the representatives of the people – the parliament – would neither pass nor allow inequitable laws if they were controlled "from below" by the introduction of democracy. In the proposed extensions, the national-popular social contract model of rule under law would become the *democratic*, social contract, national-popular rule of law, where freedom would consist, in Rousseau's famous words, in people living under the laws they made for themselves (Rousseau 1971, II, 524.).

This proposal for making rights correspond with justice through a national-popular democracy was not seen as contradictory with rights for all human beings. Rather, it asserted that a democratic polity would never be unjust to its citizens or to others. Its natural object was the attainment of rights for all men. The further solution to the problem of the rights of the conquered new peoples discussed in Chap. 3 was free admission to anyone who wished to share in the laws of the democratic republic. There developed the idea of havens of human rights to which all oppressed individuals could flee in an unjust world.

Much of the historiographical dispute about the meaning of the rights created in the French revolution turns on whether the lawyers discussed above were still Lockean or had gone beyond that view. Some were in transition, particularly the more radical lower ranks, whom Ladurie calls the *basoche* (a sort of variant of *canaille* for lawyers). They claimed to express the voice of the nation and this is the role they assumed, through presenting the famous *Cahiers de Doléances* (Books of Grievances) that flowed in from all over France in 1789, most of which were drawn up by higher lawyers, often petty noblemen themselves. But they were affected by the ideas of the intellectual class much more than British lawyers had been.

While Malesherbes and other practical men were developing the positions already described, the intellectuals, smarting from their failure to "enlighten" despots, had given up on the Chinese model. Older men like Voltaire fulminated against Maleherbes' democratic tendencies and disrespect for the monarch, but they had had their day. A new alliance was forming between the practical men and the theorists. The lawyers and the intellectuals overlapped but were separated by the world between practice and principle. Maleherbes did not want to go beyond Locke's positions, or those of constitutional monarchy. The same Malesherbes who wrote the *Remonstrances* when his own role was threatened, was the censor who, on practical, political grounds, did not allow freedom of speech to intellectuals. He authorised the publication of the *Esprit des Lois*, but when the king asked him to censor Rousseau's *Social Contract*, he asked the publishers to remove the author's name from the frontespiece. Malesherbes was an enthusiast for another of Rousseau's works, the most successful, *Emile,* useful as a part of a reformist project to save the monarchy. Yet orders were given for Rousseau to be seized and *Emile* was ritually burnt on the orders of the *parlement* de Paris.

The Chinese model having been discredited, mainly in the work of Montesquieu, but also through the practical failures of Voltaire, Diderot, d'Alembert, Wolf and others to persuade this or that monarch to introduce new laws protecting human rights, intellectuals looked elsewhere for examples. These they had found as the

Pacific was discovered by Jean Francois Galoup La Perouse (1741–88), Louis Antoine de Bougainville (1729–1811) and James Cook (1728–79). Bougainville's voyage was intended to rival that of the round-the-world exploration of George Anson (1697–1761) and he was at sea while Britons Philip Carteret (1733–96) and Samuel Wallis (1728–95) were exploring the Pacific, just before Cook landed on the east coast of Australia and New Zealand. Through these explorers, the whole world, almost universal humanity (some peoples have only been "discovered" in the last 50 years and there may still be some who are unknown), finally became known in its diversity. Without that knowledge, a notion of human rights that extends to all humanity would be fatuous.

The discovery of the Pacific by European voyagers was often state-financed, precisely by the monarchs whose despotism was proving disastrous at home. In the three decades 1750–80, most of the Pacific and Australasia was "discovered" and mapped by European scientific expeditions that also laid claim to what they found under the *terra nullius* doctrine theorised by Locke, but is much older in British law. Louis XV – as we have suggested – was little more than a feudal robber baron in new clothes and the rising bourgeois class was still interested in profit. The objects of Bougainville's voyage were thus akin to those of the discoverers of Asia and America. Louis XV's instructions were to make a voyage of discovery via South America through the Pacific to China. They ran "as no other European nation has either a right or an establishment in these lands [Australasia and the Pacific], it can only be to France's advantage to reconnoitre and take possession of them if they offer useful objects for her commerce and navigation" (see Constant 1980, 10).

But it is undeniable that the discoveries of the previous two centuries and the Enlightenment desire for knowledge had whetted French scientific interest. In the scientific part of the instructions, we can see a new international interest and competition in science and technology that older historians emphasised (see for example Mounier and Labrousse 1983, 237–251). Intellectuals found new inspiration in what they thought were the legal and political arrangements of Pacific peoples. For example, Diderot and Raynal were much influenced by Bougainville's accounts of his voyage to Tahiti in 1766–8. In turn, these drove them to seek similar examples closer to home and to propose legal and political arrangements that built on and extended them.

Bougainville was no believer in the noble savage. He had served in Canada and led the retreat from Quebec when both French and English had used Indians as guerrilla fighters who took no prisoners. He had a bleak view of "native peoples", writing that the Indians were: "naked, black, red, roaring, bellowing, dancing, singing war songs, getting drunk, demanding soup, that is, blood, attracted for 500 leagues around by the smell of fresh flesh and the chance to teach their young people how to cut up a human being destined for the pot" (Bougainville 1980, iii). On this voyage of discovery he noted that the Patagonians urinated crouching down. "Is that a natural way to piss? If so, Jean Jacques Rousseau, who pisses very badly when he does so, should adopt that practice. He sends us back to the noble savage" (ibid.). (Rousseau suffered terribly from kidney problems.)

Nevertheless, Bougainville was an educated man who followed the latest in the struggle of political ideas. He was also a practical naval man. This is what made his account of Tahitian society the more remarkable for his readers, tired by the reports of the horrors of oriental despotism. Bougainville described "a garden of Eden" (Bougainville 1980, xvi, 138) whose natural fertility and profusion of goods meant that there was no private property. Indeed, he had thought at first that they were all thieves (ibid., 150, 155). The natives were of unbelievable beauty and apparently had no sexual prohibitions, living in a happy promiscuity of goods and humans. He wrote: "the character of the nation seemed kind and soft to us. There seems to be no civil war, no particular hatreds, although the country is divided into little cantons, each with its own independent leader. It is probable that the Tahitians practice a good faith among themselves that they never question. Whether at home or not, night or day, their houses are open. Each one gathers the fruits from the first tree he falls upon, and takes them from the house he enters. It seems that where the essentials of life are concerned there is no private property, and all belongs to all" (ibid., 155). He noted that when they stole something from his ships, the chief did no more than hit them a couple of times, adding: "I do not think that they know of any more severe punishment", noting their distress at seeing anyone in chains. The overall picture was so positive, drawing strength from the refusal of sailors to leave the island and their paramours, that it could not become the more paradisiacal the more it became distant. This process started when Bougainville, continuing his voyage, left the Friendly Islands and arrived in the New Hebrides. The discovery of Melanesia and the Torres Straits brought violent conflict with the local inhabitants. Nothing positive was reported. When they made it to the Dutch entrepôts in the Moluccas, where they were well received, the comparisons made Tahiti even more attractive. Molucca was a multicultural society but no "garden of Eden". The Dutch lived opulent lives, but they deliberately destroyed local spice crops to keep prices high and conducted a terrible rule of terror over local people who were docile and friendly.

While astonished and impressed by social life in Tahiti, Bougainville also noted that the chiefs were absolute rulers despite calling councils whenever a decision had to be made. There were servile groups, in particular women. "We thought that they were equals among themselves, or at least, enjoyed a freedom that was not subject except to laws established for the happiness of all. I was mistaken, the distinction of rank is strong in Tahiti, and the disproportion is cruel. The kings and the great have the right of life and death over their valets and slaves; I am even led to believe that they also have a barbarous right over the people whom they call *tata-einou*, or base men. It is certain that they take their victims for human sacrifice from among that unfortunate class of people. Meat and fish are reserved at table for the great: the people live on fruit and vegetables only" (Bougainville 1980, 167). (The Tahitian commonalty of goods that extended even to men offering women for general sexual use was both enticing and embarrassing to the Europeans, though the crew availed themselves of sexually compliant women, spreading among the Tahitians the syphilis that would decimate the population within 50 years.)

These negative comments were not taken up by his readers. In the European imaginary after Bougainville's account, Polynesia became a paradise like that

dreamed of in the utopian texts of yester-year. The naturalist, Commerson, who had voyaged with him, called his vision "utopian", expressly connecting it to More's notion of the ideal society. Diderot and the German Johan Gottfried von Herder (1744–1803) were dazzled by the new world and its "new" social and political arrangements, apparently based on "sensibility", the senses and *jouissance* (joys of the flesh). As a consequence, Diderot changed his views between the first and third editions of his *Encyclopedia* from those of the Enlightenment to views akin to those of Rousseau, the emblematic anti-Enlightenment figure. In his *Supplement to the voyage of Bougainville or a Dialogue between A and B*, written in 1772 (published only in 1796), he advanced the following didactic views about what the discovery meant to a Parisian intellectual.

An old Tahitian, Orou, asks Bougainville to leave because the French could only end Tahitian happiness and enslave and corrupt the islanders. This request comes after the ship's padre refuses, for religious reasons, the offer of the Tahitian's daughter. Diderot continues the account as an attack on the church and its attitude to sexuality, and by implication an attack on Western values. There are many asides, like that which points out that Adam and Eve's progeny, humanity, came from an incestuous union, but the main point is that Europeans are hide-bound by their own ideology. Orou asks why European magistrates allow the monk to be celibate, "the worst of laziness" The monk just replies that "he respects it [celibacy] and ensures that it is respected". Diderot then reports Bougainville intervening: "Do you want to hear the abridged version of our history? This is it. Natural Man existed; we introduced artificial man into that natural man and a continuous war started in him that lasts all his life. Sometimes the natural man was stronger; sometimes he was brought to ground by the artificial and moral man; and in both cases a sad monster was torn apart, pinched open; tormented. However, it is such extreme situations that force man back to their primitive simplicity" (in Lough 1953, 202). He further replies to the padre who asks if humans should be left natural or "civilised" that "If you want him to be a tyrant, civilise him…if you want him happy and free do not interfere with him; enough unforeseen incidents will bring him into the light and deprivation; just know that it was not for yourself but for themselves that all those wise legislators have beaten and fashioned you into what you are" (in Lough 1953, 203). He perceives in all social, religious, civil and political institutions affirmation of hegemonic rule. "To bring order is always to make oneself the master of others by constraining them." To the padre's retort that Bougainville prefers the state of nature, he replies that he is not sure, that men have gone back to the forest but never the converse. So we should subject ourselves to apparently senseless laws. In France the padre's rules should apply and in Tahiti those of Orou, the "savage" (see Lough 1953, 167–208).

The whole work stated clearly that Europeans should see matters from two points of view and complement the reason of the West by that of the "sensibility" of the Tahitian. It was characterised by a coming to terms with the reasoning of the other. This meant a relativistic or "weak" status for reason, when compared for example with that of Bayle (Bayle 2007, esp. 15ff) It was process that had begun with Montesquieu, who showed himself a Foucauldian *avant la lettre* in some passages

of his *Persian Letter*s. In these, he supposedly expressed the views of a Persian about the Europeans: "They made huge discoveries in the new world while not knowing their own continent…there is a place here where they place all their madmen…. Without doubt the French, much decried by their neighbours, shut up a few madmen in a madhouse, to persuade those who remain outside that they are not mad themselves" (Montesquieu 1973, 197). As if to reinforce the retreat from Enlightenment privilege of reason, Montesquieu added that he wrote the *Letters* to make clear the importance of marvelling rather than simply recounting what "really exists" (Montesquieu 1964, 862). Such comments took on militant tone in Raynal, who wrote in favour of the "errant" life of "savage man". He warned that in a "policed" state: "men who claim the Rights of Man perish, are abandoned and infamous". French social inequality would end by breeding "revolt against injustice" (Raynal 1981, 295).

After the tumultuous upheaval of 1789, the ideas that Diderot and Raynal expressed replaced those of Maleherbes and the moderate lawyers. We can fairly claim that on the eve of the revolution, Diderot had adopted a democratic view of the national-popular version of rights. Rousseau added a last democratic dimension that horrified the moderates who started the process. But we should not think that he or those who used his ideas for democracy were *universalists.* Rather, as we will show, they were fervent nationalists.

The Etats Généraux and Rights

Facilitating the development of nationalism in its frightening national-popular form was the incompetent stupidity of the king and court who, despite all attempts of the constitutional monarchists to save him from their own folly, tried at practically every step to make a constitutional solution to the French crisis of 1788–9 an impossibility. He set off this latest crisis by calling for a democratically chosen Etats Généraux to suggest solutions.

Of those elected to the Etats Généraux in 1789, about two-thirds were lawyers. Chartier's figures break them down into these categories: of 648 deputies, 131 were practising lawyers; 218 were judicial officers; 14 were notaries and 33 were municipal councillors (Chartier 1987, 116–7). Since most were local and provincial notables, they were more *basoche* than the great lawyers. They gave order to the myriad lists of complaints that were brought to the hastily arranged hall in Versailles where the Etats Généraux met together.

Unlike the nobles and the clergy, the first two estates, whose representatives were chosen from within themselves, these lawyers were elected, almost fulfilling the hopes of Malesherbes' second *Remonstrance*. So the people elected lawyers to speak for them. Such politics was completely new in western European history, if we except the mythical democracy of ancient Athens, since it was the first ever expression of nearly democratic national-popular will.

The mode of election for the Third Estate – remembering that such elections had never been held before – varied depending on region and constituents. Usually there were four stages. In the country, the deputies were elected from the parishes in a ratio of 1:100. Small towns and villages chose four deputies each. In larger towns, the ratio was one deputy for every 100 members of a trade corporation and two for every 100 from the liberal professions. There were two procedures for sending them to Versailles. Local deputies, having gathered the *cahiers,* met and elected their deputies; then these *cahiers* were consolidated and taken to the principal *bailliage* in a main town by a quarter of the local deputies, where deputies to the Third Estate were nominated. Paris had a separate procedure. Its 60 *arrondissements* held primary assemblies which then sent delegates to the city meeting that elected 20 members to the Etats Généraux. In the rural areas, there was no qualification for office but in Paris there was a low tax qualification if a person did not have a university degree.

In sum, there was almost universal male suffrage and electors voted for an individual and not a list (Halevi, "Etats Généraux" in Furet and Ozouf 2007, 151–2). Even in the backward Morvan, a rough and ready democracy based on traditional practice, and the "people" drew up a *cahier* which most townsfolk then discussed, revised and turned into that which was sent to Versailles (see Paris 2008, 55–76).

This electoral procedure was as close as possible to a new Rousseauian model (discussed in detail in Chap. 6 below), adapted to great country. If we cannot attribute it to a Rousseauian climate, it is difficult to identify another major thinker as its author or inspiration. On the other hand, the men who made up the Etats Généraux in 1789 and who drew up the first declaration of the rights of man and the citizen that proposed universal rights for all humans were, if anything, Lockean, with a twist that we discuss below. They wanted a constitutional monarchy and did not seek a democracy. Rather, until the Jacobins took power, they remained sceptical about democracy and then became reactionary when they saw what it meant in practice. The lucky ones like de Stael fled to Switzerland while others like Madame Roland ended up as victims of "the people".

Yet, despite their moderation, when the Third Estate insisted that all three Estates deliberate and vote together, which would have given the voice "from below" a majority, Louis tried to stop it and then to assert a right to veto unknown in English constitutional monarchy. This pushed the Estates into declaring themselves a sovereign national assembly and then into drafting a declaration of the rights of man and the citizen, that Louis again tried to sabotage, and finally to set up a constituent assembly to draft a short-lived constitution designed to attain the goals of the declaration promulgated in 1791. This too the king accepted with bad grace. At each stage, the design for a constitutional monarchy based on a rule of law like that in Britain became more and more unlikely. Girondins, who continued in secret to try to save the monarchy from itself, placed themselves in opposition to the voice "from below" of those who considered freedom to be living under laws that they made for themselves, that is, in a democracy.

With the state dragging its feet in the face of the demands for constitutional reform; the representatives of the nobles and clergy jealously refusing to sit down with the majority Third Estate to deliberate together as a whole, and the "people"

becoming insistent and demonstrating ever more violently for bread and rights, the representatives of the Third Estate were pushed to swear an oath and constitute themselves a constituent assembly on 17–20 July 1789. Its task was to draft a new constitution based on the rights of man. We can sum up what these men and, from behind the scenes, many women, wanted, as a statement of rights for all humans everywhere based on the US models but updated in terms of natural law. Many of the protagonists who were at the Etats Généraux and who then set up the national assembly to impose a constitutional monarchy on a reluctant Louis XVI had been in the United States. The Marquis de Lafayette – a sort of tear-away aristocratic scion who had found inspiration as a soldier in the War of Independence – was one; his friends, the Lameths, two others. Brissot de Warville, influenced by the US example, (who failed in his attempt to be elected to the Etats Généraux) became the leader of the Girondin faction that led the revolutionary state until 1793 (see Gueniffey, "Brissot" in Furet and Ozouf 2007,76–99). Englishmen, like Thomas Paine, arrived in Paris to acclamation, after having famously taken the Americans' side against the British. Soon they were hobnobbing or renewing acquaintance in Paris with US constitution-makers Thomas Jefferson, the US ambassador to a France in revolution, and Gouverneur Morris, representing the economic interests of the new republic (see generally Baczko 2008, 359 and ff). In politics, they were constitutional monarchists where the Americans were not, and yet, despite a conservatism that later saw survivors like Madame de Stael line up against the revolution and ally themselves with radical reactionaries like de Maistre and later, in the case of the Abbé Siéyès and Talleyrand, bring about the dictatorship of Napoleon Bonaparte, they were responsible for the first time in history in identifying and declaring universal human rights as the object of all politics, human rights and, most importantly, what the structure of universal human rights would have to be. Overall, what united them across an ocean was a patrician elitist belief that they should be the representatives of the people and defend their rights against all tyrannies. These rights should be founded on natural law applicable to all humans. In Brissot de Warville's words: "In these dark times, the laws in most countries in Europe are a heap of imaginary customs that cannot make people happy…there is practically no trace of the natural law…which should be the basis of all good legislation" (Brissot de Warville 1781, Avant propos v; Intro: iii). It was their knowledge of the British and US models that made them declare universal rights in a novel way that broke with those models.

The local *cahiers* collected by the reformers concerned practical grievances about taxes and lack of access to justice, above all those that came as "petitions" from the peasantry, while those from the towns and the middle class "demanded" rights in more general and patriotic terms. Chartier agrees with de Tocqueville that whatever the different interests of the deputies, they refined the basic demands in terms of a general culture or climate. An analysis of their libraries (where possible) shows that they contained mainly legal texts. But this is not to say that they had the same restricted culture that British lawyers had. As we have seen, legal texts in France comprised both much Roman law and natural law in which all humans were regarded as having the capacity and right to reason about justice. Given the degree requirements imposed since 1678, we can be sure that all lawyers in France thought

in terms of natural law when theorising. This was certainly the case with the higher lawyers like Brissot de Warville, who was already a guru. Moreover, Chartier suggests that it is highly likely that many read, if not subscribed to, the *Encyclopédie* (Chartier 1987, 121). In the Franche Comté, men in legal and administrative circles accounted for more than half of the 137 Third Estate subscribers to the *Encyclopedia.* Occasional evidence shows that a few had Rousseau in their libraries (ibid.).

They thus couched the revised *cahiers* in more general terms based on natural law and its theory of rights. Significantly, their noble and clerical fellows refined this further and more progressively, translating the generalisations into claims to human rights. We recall that the absolute monarchy had alienated much of the progressive nobility and clergy, many of whom espoused the views of the Enlightenment. Common to the *cahiers* from both the third and first estates was a claim to the individual rights like those won in England: a rule of law; habeas corpus, freedom of the press and a new penal code. They also wanted more regular parliaments with stronger powers and responsible ministers. But only one-fifth of the nobility and slightly more than one-quarter of the clergy wanted a new constitution rather than a reaffirmation of what they regarded as the unwritten constitution of France: they did not seek radical political reform, much less democracy. What they did want, developing on the natural law, were the "rights of man". In this they were, according to de Tocqueville, in harmony with the age or climate. Paris showed itself particularly concerned that the "rights of man" be stated. That city was also much more interested in establishing control from below over Parliament (Chartier 1987, 137–9). So the delegations to the Etats Généraux at Versailles went there with a popular mandate to declare the rights demanded by the "people".

Universal Human Rights for the First Time

The men and women who made a revolution based on the "Declaration of the Rights of Man and the Citizen" intended to create a rule of law, one based on the prior popular desire for justice that drove the revolution; these were the "rights" declared in 1789. But, they had to be translated into rules. It is this translation which is all-important for the history of human rights. It went through two phases which we may call the *political* and the *legal* moments, which corresponded with (1) the debate around the drafting and structure of the declaration and (2) the further translation of the results of that history into French law, above all in the civil codes and some other legislation like the *loi Chapelier* (see generally Furet and Halevi 1989).

It is useful to begin our discussion of the *political* moment from the role of the Abbé Siéyès, because it was his view of the structural nature of the new rights which, despite modifications, prevailed in the first moment. His original preamble made it past substantial revisions to the list of rights by Honoré Riqueti, comte de Mirabeau, and structured the list of items they added to the declaration. The declaration's distinctive character was in the preamble and first two articles (see Mounier in Furet and Halevi 1989, 928ff; Thouret, in ibid., 1122–1129; Rials 1988, 197–251;

Baker, "The Idea of a Declaration of Rights" in van Kley 1994, 185–9). Siéyès was, according to his biographers and historians, intimately acquainted with both Locke's and Rousseau's ideas. Exactly how they influenced him is immaterial as Gauchet points out (Gauchet 1989; 1996 passim). He did express in his famous *Qu'est-ce que le tiers état?* the leit-motif of the revolution seen as its intentions rather than its outcomes; seen, that is, in its political moment. The Third Estate had been nothing but would be something in the new order. Its view of justice would be imposed. The whole world would be turned upside down as this meant a reversal of the previous hierarchy of rule of law and justice. When Siéyès summed up what his draft declaration of the rights of man following the thousands of demands for such a documents in the *cahiers de doléances*, he stated:

> A Declaration of Rights must change totally in spirit and nature. It ceases to be a concession, a transaction, a treaty condition or a contract between authority and authority…There is only *one* power, *one* authority. It is a human being, Man, who commits his business to an agent (proxy), he gives his *instructions*; he declares to him the agent, what his *duties* are; he does not amuse himself by saying: and I want to conserve intact this or that of my rights. That would be cowardly ridiculous, miserable, and I defy anyone to list them completely and satisfactorily (Gauchet 1996, 83).

Unlike all British declarations and documents to this date, this was no treaty with what already existed. In this regard, the distance between the British tradition and the French declaration is not bridgeable. All the British documents are explicit or implicit treaties with monarchs or other authorities. They fall inside the powers of those authorities whether narrow, as with the monarch's prerogative powers, or wide, as with the claims of the British people's "time-immemorial" customs. The French goal was a declaration that consciously created rights that had no correlative duties. They were rights created against the notion of duty to some legal regime which was higher. This would always remain essential to universal human rights.

But this still leaves us with deciphering the memory of despotism that drove the revolutionaries to draft the declaration: with what that despotism was and how it could be overcome, as it could be argued that the French decided to adopt the British tradition of civil liberties as a model in other ways. As Siéyès and others, including the Jacobin leader Maximilian Robespierre, described that despotic regime, its first sin was inequality before and in the law, just as the British radicals had argued in the seventeenth century.

As we have seen, the monarchical absolute state which had been built up in the previous 200 years in France and elsewhere in Europe and to which at least some of the Stuarts had aspired vested absolute power in the monarch who was its sovereign. Gauchet tells us that one of the fundamental axioms of public law before the revolution was: "The nation is not a body [of humans] in France; it resides entirely in the person of the king" (Gauchet 1989, xix). Underneath him existed entirely at his whim, "orders" or a hierarchy of human beings: nobles, peers, churchmen and commoners all of whom had particular duties towards him, as well as rights vis-à-vis each other. The inequalities of power and immunity from sanction of the lowest a propos the highest have been immortalised in that image of a child being crushed with impunity by the wheels of a careless nobleman's coach.

In the now labyrinthine debate about the causes of the French revolution and whether it resulted in significant social change, what must be remembered is that those who drafted the Declaration of the Rights of Man and the Citizen and decided on its significance wished to get rid of a whole edifice on which the monarch could claim 'l'état c'est moi'. The proclamation of the first 1791 constitution of the revolutionary state read,

> the National Assembly…abolishes *irrevocably* the institutions which wounded freedom and equality of rights: - there is no more nobility, peerage, hereditary distinctions, or distinctions of order, nor a feudal regime, nor patrimonial justice, nor any titles, denominations and prerogatives which derive from them, nor any chivalric order, nor any of the corporations or decorations for which were required proof of nobility, or which supposed distinctions of birth, nor any other superiority than those of public officials in the exercise of their functions…venality and inheritance of public office no longer exists. There no longer exists in any part of the nation for any individual any privilege or exception from the law common to all French people – there are no more associations (*jurandes*) or corporations or professions, skilled workers associations (*arts et metiers*) – the law no longer recognises either religious vows, or any other undertaking which would be contrary to the natural law or the constitution" (Gauchet 1989, 21–2, emphasis added).

The clear object was to destroy all connection with past systems of power and the community/ies that expressed them. This too departed completely from the earlier British traditions whose rule of law always claimed to continue previous traditions and to reassert previous communities.

The intention to break with the old order was accompanied by an intention to leave only equal individuals in their place. The entire French revolution was an assertion of the rights of individuals against all community claims and intermediate associations between the individual and the state, even political associations (see le Chapelier "Rapport sur les sociétés populaires" in Furet and Halevi 1989, 432–9). The latter dimension was clarified in the debate with more moderate supporters of the revolution who wished for a different, less radical, rupture. Long before what was universally recognised as a revolution had led to the flight of the nobles, the imprisonment and guillotining of the king and then any opposition, to civil war and to mass drowning of loyalist opponents, both radicals and moderates acknowledged that their force came from the mass, the "crowd" in the streets whose views they had to translate. It was in the debate in August 1789 which led to the adoption of the declaration that the intentions of the victors in the debate became clear. The Archbishop of Bordeaux, Champion de Cicé, set the tone. He demanded a declaration of rights that broke with the notion of precedent obligations. This could be achieved by placing it before the constitution that embodied the rule of law. The moderates led by Jean-Joseph Mounier argued contrarily that a continuity with the *past order* had to be maintained; that positive law always modified statements of principle and that there should be a statute of duties as well, making the subjects of law bounden to the community (*Archives parlementaires*, VIII, 317ff; Rials 1988, 162–8, 606–8). By almost unanimous majority, such views were rejected and the declaration placed at the head of the constitution so that its principles should override those governing relations of the state with the citizen.

The main debate took place 1–4 August. One of the crucial decisions was that there should be no statement of duties. When this was coupled with the placing of the declaration before the constitution, Siéyès' structural vision had triumphed, one in which each individual had more freedom in society than in the state of nature (ibid., p257ff). If, as Gauchet claims, the ghost of duties remained in different subtle ways (which we consider below), they did not in the fundamental legal or political sense. The legal sense is that it is logically and practically impossible to create rights without duties. The political sense is that all rights are "freedoms from" and presume a social contract antecedent to those rights that enumerates those freedoms but which overrides them.

In fact, the declaration was adopted in the face of such arguments, which were repeated many times in the debate. If accepted, the rights created would have been no different from those always recognised in the common law rule of law and the individual and his reason, and understanding of what was just would always have been subordinate to those of the community, expressed through common values inherited from the past or as the product of the majority consensus when the polity was established. In either case institutions would have been privileged over individuals. Siéyès' views, while not always adopted in entirety, set the parameters. He made quite clear that any exhaustive enumeration of rights was impossible. His declaration of a few short principles which were to be "for all men, all times, and all countries" was expressly a rejection of the notion of political duties antecedent to rights. Such a document as he proposed was adopted. This also distinguished the French declaration from the American texts, which always made the goal of rights the common good and not justice for the individual. The French declaration was expressly not to be subject to the social contract, to being overridden by a democratic majority. Certain matters were irrevocably finished or established.

The Declaration began with a statement (the "Preamble") that the scorn of the rights of man were the sole causes of public unhappiness and the corruption of governments; that it would list the natural, inalienable and sacred rights of man "so that the acts of the legislative and executive power, being able to be compared at every moment with the end of all political institutions, are more respected; so that the claims of citizens, henceforth founded on simple and incontestable principles, always tend to maintain the Constitution and happiness of all." The priority of the declaration over the constitution could not have been made clearer. It was in clear contradiction with the US constitution whose bill of rights was included as a late afterthought within it.

The first article stated that men were born free and equal in rights; social distinctions could not be based on anything but common usefulness; the second that "The end of all political associations is the preservation of the natural and imprescriptible rights of Man; these rights are liberty, property, security and resistance to oppression"; the third that the principle of all sovereignty lay in the nation; no body, no individual could exercise authority which did not emanate expressly from it. They were in descending order of importance and constitute the core of the declaration.

Only after establishing that hierarchy was there mention of the rule of law, in Articles 4–9. This can only be read as subject to the principal rights. As Article 3 made

clear, laws were politically imposed: they did not come from anywhere else in practice. Thus laws could only forbid what was harmful to society outside the protected realm of rights (Articles 4 and 5) (see on this Clermont Tonnerre speaking in debate on 23/10/1789, in Furet and Halevi 1989, 233: "The nation is a corporation of individuals united into society: they are only so united to preserve natural rights. This preservation is the prime clause of the social contract and no further clause can infringe it. It is the veritable and fruitful principle that establishes what law can never create; it alone makes sacred true rights that pre-exist, true natural relations…. Any law that goes beyond them, or pretends to create, oppresses and is no law."). Article 6 was particularly important because of its Rousseauian popular and democratic quality. It ran: "The law is the expression of the general will; all citizens have the right to participate personally or through their representatives in its formation; it must be the same for all, whether it protects or punishes. Since all citizens are equal in its eyes they are equally admissible to all public dignities, positions and employment, according to their ability and without any other distinction than that of virtue and talent." While this section refers clearly to law and not to rights (and was only tendentially democratic, since even male suffrage was not a reality until later), it is important as it shows that the supposed consensus of all in the foundational social contract was intended to continue into the day-to-day making of the laws themselves. This meant, as we will show, a new type of polity, one where even the law was subject to politics.

Articles 7, 8 and 9 restated the fundamentals of the rule of law that had already existed since the Magna Carta. No man could be arrested or detained except in accordance with the laws and their prescribed procedures. All citizens had to obey such laws. As Article 8 made clear, such laws had to precede the offence, be legally applied and only impose punishment which was "strictly and evidently necessary". Article 9 stated that since everyone was presumed innocent until proved guilty "if it is judged indispensable that he be arrested, any coercion (*rigueur*) that is not necessary to secure his person must be severely punished by the law". Here lay the germs of laws against torture.

Having established the nature and limits of the rule of law, the declaration then passed to the content of rights as then they were perceived. Article 10 guaranteed freedom of conscience and religion and their expression within the laws established for public order. Article 11 ran: "Free communication of thought and opinion is one of the most precious rights of man. All citizens can thus talk, write, print freely, being responsible for abusing this freedom in cases decided by the law." Article 12 stated that protection of those rights required a public police who were created for the benefit of all persons and not "the use of those to whom it is confided", that is, the state. Article 13 continued that since this state was required, all citizens would have to be taxed to pay for it equally and Article 14 that the citizens would decide what and where and how much was needed and have the right to an accounting about its use. The following article continued in the same vein: any state employee was accountable for his work to "society". Article 16 stated that any society in which rights were not guaranteed, "had no constitution".

Finally, and added as an afterthought following much debate, the last article added what would become the declaration's Achilles' heel: "Property being an

inviolable and sacred right, nobody can have it taken away, except when public necessity legally established obviously requires it, and then on condition that a there be a just and prior indemnification." The declaration contained many confusions, but this one, when associated with Article 3, would be the most deleterious. The rights were not always clearly attributed to men or to "citizens" and in this case the overlap between rights (untouchable by law) and law was patent. It evidenced a highly political compromise which leads us back to the traces of duties to which Gauchet alluded.

The overall thrust of the document was clear. It was to defend all individuals against the state, to protect their very bodies from subordination to abstractions like community standards and values embodied in sovereign bodies. As citizens, they would also be empowered through control of the legislative organs. They would attain that freedom which was living under laws of their own making. Yet the drafters did not forget the need of the poor for an economic and social justice which implied a redistribution of wealth and property. Since it has erroneously been asserted that the men who drafted the declaration were not concerned about such matters, it is imperative to recall that great numbers made points similar to that of Pison de Galland: "Property must not prevent any person from surviving…. Thus every man must be able to live on his work. Any man not able to work must be assisted" (in Gauchet 1989, 823). Siéyès himself, the master mind of the new formulation of rights without duties, if not the declaration itself, stated in his second plan for it: "Any citizen who is unable to provide for his needs, or who cannot find work, has the right to help from society, while submitting to its orders" (in Rials 1988, 619). In this, such speakers reflected the demands in many of the *cahiers des doléances*. For example, that of the Third Estate (who would be "something") of the bailly of the Duke of Nemours which stated in Article 2 of its project for rights: "Men have the right to help from other men" and in Article 4 "All human beings who are in the condition of infancy, impotent, frail, infirm, have the right to free help from other men" (Rials 1988, 552). Gauchet goes as far as to suggest that had circumstances not intervened to prevent a definitive draft, the declaration would most likely have contained an article on relief.

As Siéyès' words showed, they were quite conscious that these economic and social rights were required to give force to the civil and political empowerment of all citizens, who were called on for active participation in politics. They would also "bring the state back in" to the rights equation where the initial point was to establish rights against the state: "Rights should not be limited to complete and effective protection of individual liberty: citizens are still entitled to all the benefits of association…. No one is unaware of the fact…. One knows that nothing is more apt to perfect the human race, morally as well as physically, than a good system of education and public instruction…. Citizens in common have a right to all that the state can do on their behalf" (cited in Gauchet 1989, 95).

In sum, the declaration created a transparent hierarchy. First and highest were the rights of man, without which there was no "constitution" or rule of law. Once these were established – and not all were listed in the declaration because of "circumstances" – then a democratic citizenry could make laws in accordance with those

rights through its institutions; though this subordinate rule of law should contain as few rules as possible and be equal for all. The state machinery which administered it, parliament, police and public officials, were to be accountable to "society", which since it is a term wider than that of citizens we may assumed corresponds more or less with the term "nation" in Article 3. We return to this. Here, we merely affirm in a preliminary way that it corresponds with all those people born on French territory, or who had taken on the characteristic values of those born on French territory.

Within rights, the civil and political rights that protected the individual against the tyranny of the state were undoubtedly regarded as more important than economic and social rights. Yet the need to shift citizens from a passive to the active role allotted to them in Article 3 required a threshold of economic, social, and educational minima to be guaranteed by the state. It is not clear how much the drafters had thought this through. As followers of Locke and his category of possessive individualism, their ideas were internally contradictory and could be interpreted in different ways. Despite its goal of being so simple that it was clear to all, the declaration could not attain that. Nor indeed can any document. The drafters divided the population into active and passive citizens, while the goal of Article 3 was that all men should be active. When we look at what separated active from passive, the dividing line is one of economic, social and educational deprivation. Economic, social and educational rights were thus logically needed as bridging mechanisms so that the fundamental civil and political rights might be ensured. This interpretation gains strength from the drafts of Robespierre and the Jacobins when they attempted to build on the 1789 Declaration while adding their more "social" concerns. It cannot be denied that Jacobinism was itself caught in a "petty bourgeois" contradiction: its desire that all men should become small proprietors. But Robespierre made clear while reaffirming in 1793 that "The right to express thought and opinions, either through the press or in any other way, the right to peaceful assembly, the free exercise of religious observance, cannot be forbidden," that these had to be accompanied by economic and social rights. Why? Because without them the "little man" could not become an active citizen. "For these rights not to be illusory and equality a chimera…society must do what is needed so that the citizens who live on their labour can attend the public meetings that the law calls on them to do without injuries to their existence or to that of their families" (Gauchet 1989, 329–30).

Nevertheless, what is essential is that all economic, social and educational rights are designed to ensure the radical individualism where men assert and guarantee for the future the defence of what is sacred to them against any tyranny of state or community. This makes the famous debate between Georg Jellinek and Emile Boutmy in 1902 much less "absurd" than Gauchet suggests. In this debate, (Jellinek 1902; Boutmy 1902) the German insisted that the inspiration for the French declaration was the American War of Independence of 1776, which led back to Locke and the Reformation. Boutmy countered that Rousseau and the Enlightenment were more important and that the declaration was quite different from those of the American colonies. What was really at stake is what sort of individual the drafters had in mind. Was he Lockean, a selfish, self-asserting owner of himself, or Rousseauian, a person whose *soi-même* assumed the interdependency of human

beings with each other and therefore responsibility for the weak? Further at stake between them was the issue of the individual and his or her relationship to the community into which he or she was born. Only once that question is answered can the nature of the novel rule of law intended be understood.

There was little mention of obedience in the declaration. Article 7 called for obedience from every citizen called upon or affected by the law. In the 1793 Jacobin revisions (discussed below), which had introduced a sort of social right, the "moral limit" assigned to freedom was "do not do to others what you would not like them to do to you" (Article 6). The Christian resonances were complemented by those in Article 123 of their constitution in which the republic honoured not only old age and misfortune but also "loyalty, and filial piety". The absence of duty and obedience in any form was only replaced in the revised text of 22 August 1795, when moderate reaction set in and the innovations of 1789 began to be reversed and to slide rapidly into what became the dictatorship of the consulate.

Only during Thermidor (1795) did the declaration become the "Declaration of the Rights and *Duties* of Man and the Citizen". Nine duties were listed. It added to the Christian exhortation of 1793's Article 6 the positive: "Constantly do the good to others that you would wish to receive," and changing the word duty for obligation, included "to defend, serve, live in submission to the laws and respect those who are its organs" (Duties Article 2). This change was due to circumstances that halted in full flight the intentions of the 1789 draft. We discuss in detail in later chapters how this happened and what it entailed. It was an example of the triumph of the organic, communitarian over the individual view of rights and justice.

So, up to 1795 obedience to the law was certainly not the primary virtue. Rather, a fiercely assertive right of resistance and then active political citizen presence was what was prized. As Article 2 of the declaration made clear, one of the four fundamental rights was that of resistance against oppression. It was so dominant that it frightened even strong supporters of the revolution like Mary Wollstonecraft, who as fierce opponents of Burke and the British tradition which called for obedience to that tradition, had fled to France. By 1794 they were shifting back towards the rather weaker Lockean notion of the right to resistance against tyranny. She wrote:

> Before I came to France I cherished, you know, an opinion, that strong virtues might exist with the polished manners produced by the progress of civilisation; and I even anticipated the epoch, when, in the course of improvement, men would labour to become virtuous, without being goaded on by misery. But now, in the perspective of the golden age, fading before the attentive eye of observation almost eludes my sight; and, losing thus in part my theory of a more perfect state, start not my friend, if I bring forward an opinion, which at the first glance seems levelled against the existence of God! I am not become an Atheist, I assure you, by residing at Paris: yet I begin to fear that vice, or, if you will, evil, is the grand mobile of action, and that, when the passions are justly poised, we become harmless, and in the same proportion useless…The wants of reason are very few, and, were we to consider dispassionately the real value of most things, we should probably rest satisfied with the simple gratification of our physical necessities, and be content with negative goodness" (Wollstonecraft 1989 [1794], 444–5).

When the prized virtue is resistance to oppression, logically, the starting point for understanding justice lies outside the state (*état de droit*) and in the individuals who

compose it. This is the view that Siéyès and his fellows sought to embody in the declaration, despite its ambiguities. We quote Brissot: "Men are free and they consequently can revise their constitution whenever they choose to set up extraordinary assemblies" (Rials 1988, 563). In sum, the Declaration ended the notion that it was the rule of law that contained justice and that the citizen had the duty to subordinate himself and obey that law.

Conclusions

None of the major drafters of the 1789 declaration were democrats. Indeed, men like Morris, who had great influence in such circles, were conservatives troubled even by their generosity towards the people and by what he regarded as the overly democratic terms of the constitution drafted for the still-monarchical France of 1791. In the salons of Madame de Stael and Madame Roland, the authors of the declaration overlapped with even more reactionary individuals than the Americans. Their hostility towards democracy antedated any excess by the revolutionary mob, but their fear and contempt for the "street" was quite obvious and would become a great weakness after Robespierre thundered at them that unlike them, he did not "represent" the people, he *was* "the people", and then let the people loose their idea of justice against the obviously privileged aristocratic and bourgeois Girondins.

I harp on the undemocratic, even anti-democratic position of those who drafted the first declaration of universal human rights because it would become so important in the future. This should not obscure the remarkable achievement of the drafters, but we must note in advance here that the success of their human rights was short-lived, though no shorter than that of the democracy that their Jacobin successors were also the first to establish.

Chapter 5
Jack Is Master in His Own House: The Triumph of the Nation

Rights and the French Citizen

The majority of the men, mostly of the upper class and progressive nobility, who drafted the first Declaration of the Rights of Man and the Citizen were at most constitutional monarchists. They believed and stated that the new rights were for all humans and self-evident, but where politics were concerned, they intended to rule for the people and on their behalf. Brissot, the pre-eminent leader of such moderates, wrote in 1791: "I understand by republic a government where all powers are delegated or representative; elected in and by the people; temporary or subject to recall." They had no intention of letting the masses make the laws for themselves. In these attitudes they stuck to a tradition that went back centuries: decent sovereigns ruled for and on behalf of their subjects. Mounier, prominent in the drafting of the declaration and the 1791 constitution, simply stated in defence of his enthusiasm for the English constitution "that all great nations…require the bases of the English constitution" with all power exercised by delegates not the people (in Furet and Halevi 1989, 985–6). They regarded the latter as unfit to rule themselves without a long education. Sieyès reputedly said that the people wanted to be free but did not know how to be just (see also Furet and Halevi 1989, 1025). When these moderates met exponents and protagonists of democracy and defenders of the virtues of the mob, like Anarcharsis Cloots, the Prussian nobleman who called himself the "orator for humankind", they were scornful of such pretensions and dismissive of his views. Cloots wrote in 1792: "Let us glory in the epithet of 'sans culottes' given to the nation by malcontents; that epithet will make the fortune of all humankind" (Cloots 1979, 426–31, 377). He voiced this view before Madame Roland – rumoured to be the intellectual and organisational genius of the moderate Girondins – who reported that "this vile person…spouted common places about the rights of people, the justice of the revenge and the usefulness that that was for the happiness of the species" (Roland 1986, 126). The moderates wanted a rule of law that protected the people from power and everyone from even an elected power (Gueniffey 2007, 83 and ff). They were concerned that the rights established in 1789, especially that of the rule

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of law, might be obliterated if the people really took power directly. Immediately outside their doors was the "street" (Roland 1986, 129). That world was their immediate concern. Their object became to exclude the city mob from political power and they sought to achieve this by ensuring that no-one without property and a fixed address could have a vote. They would not countenance the inclusion of the most terrifying little people in formal power.

A fear of the mass was strong among them and many regarded the Parisian and other urban mobs as the *canaille* (see Roland's description of the prostitutes and petty offenders with whom she was imprisoned in Roland 1986, 274). Behind the Girondin (the majority of the moderate group coalesced under this name) argument that no-one was really attached to more than his or her local area (Roland 1986, 127–8), there lurked the folk memory of the horrors that the "scum" could let loose and a fear of its strength if it continued to unite. The slaughters of the Fronde (1648–52) and St Bartholomew (1572) remained as folk-memory of the horrors that the urban mob could inflict once manipulated. Violent peasant revolts and urban bread riots were an even more recent memory. Anarchy was a favourite bogey for them (see Mounier in Furet and Halevi 1989).

Consequently, the Girondins were horrified by the almost immediate assertion in 1789, by peasants and townsfolk, of a direct power "from below". Many of these poor people were starving after the terrible winter of 1788 which had destroyed their crops. They expected from "their" revolution – which had started with the near-democratic election to the Estates General in 1789 – more than abstract rights. The mass power behind the revolution in both country and town understood the revolution as a way of filling their empty bellies. A country of formerly warring villages united and self-identified as the nation. They met, drank and danced together, swore oaths to each other and the nation in good old mediaeval fashion, and started to wear the symbols of the revolution. Baczko has made clear how important these endless oaths of fidelity were in constituting a new sense of nation while not departing from ancient traditions that a feudal peasantry understood. Initially, they were spontaneous and they did mark a new nationalism and power from below. But in no time they became obligatory for all individuals and a refusal to swear loyalty to a nation identified with the declaration was regarded by a majority of the population as treachery and led to terrible consequences. The Parisian mob proposed a tribunal run by itself for the new crime of *lèse nation* (Mounier in Furet and Halevi 1989, 971–2). Baczko notes that swearing the civic oath was made a condition of citizenship and simultaneously excluded from the rights of nationals all those who refused to adhere to the principles of the new regime (Baczko 2008, 59–60 and ch. 2).

By 1791, the oath "brotherhood or death" would become "to die defending [French] fraternity is to die in the face of potential enemies." When villages that had long been enemies began to "fraternise" (Furet and Ozouf 2007, 202), it boded ill for parties like the Girondins who wanted to rule *for* the nation, not to let the nation rule itself in accord with Rousseauian principles. Mounier noted direly in September 1789:

> nothing in the world is more ridiculous than the way the word *nation* is being abused today, if it had not brought terrible consequences. A nation is only the coming together of all the individuals who make it up. In a great people, since this meeting is impossible, a nation can

> only exercise its rights through its delegates. However, the word has been used: first of all to exaggerate the rights of deputies by confusing them with the body of the people; then it has been used to make the poorest and most ignorant class revolt. Everything has now become national; crimes are committed in the name of the nation; brigands call themselves the nation; and in each town and in each village, we find the nation exercising the rights of sovereignty, which are attached to this noble title; which often enough gives us sovereigns who are a trifle ferocious (Mounier in Furet and Halevi 1989, 980 note).

The irruption of the people started with the "great fear" that swept through the countryside in 1789, precisely when the declaration was being debated. The roots of the "great fear" are difficult to explain but not difficult to understand when we recall both how backward, tradition-ridden and superstitious the peasants were *and* their terror of the arbitrary power and injustice of the "lords". In 1789 the fear of starving peasants was that the "lords" were "sucking their blood". In spring and summer they started to sack the chateaux and offices of state, to destroy tax and land records, to demand that feudal rights be renounced and to expropriate some of their owners (Revel 2007, 192–204). To avoid the need to repress the peasant revolt and to square the circle of their policies with their professions to represent the people's interests, the new rulers declared that feudal privileges and rights would be abolished without any compensation; thus the peasantry was temporarily won for the Third Estate, though property as such remained so that the "people" could acquire it for itself. The men drafting the declaration hastily and belatedly added the right to property to the inderogable rights of man (in Article 17).

The Girondins could not complain about all the oath-swearing of citizens one to another as they had set an example when they transformed the Estates General into a national assembly with sovereign power, in the Tennis Court Oath of 30 June 1789 and started to draft both the declaration and a new constitution. Everyone made the oath of loyalty to each other and to the national assembly both orally and in writing. The one dissenter to the Tennis Court Oath was almost lynched – as he probably would have been in any French village. Democratic power "from below" was thus constituting the nation and marginalising the individual. The Girondin manoeuvres could not stem the tidal wave of national-populism that would engulf these *bien pensants*. The city mobs periodically rose and took power into their own hands, beginning with the celebrated sack of the Bastille. Such journées recurred regularly for 5 years until direct expression of popular wishes was crushed brutally by Bonaparte, an act that marked the end of democracy in the French state. But in 1791 any group that offered to include the peasants and the excluded urban "street" in power would worst the Girondins and their policy of establishing a constitutional monarchy like that in England. The Jacobin Club, named for the place in which it met, made this promise and furthered the process of establishing national power on democratic lines. Their success enshrined popular attitudes and prejudices as the source of all power. Robespierre incarnated that politics; he was a man for whom the goal was "the execution of a Constitution in favour of the people". He proclaimed his debt to Rousseau.

Robespierre marked the rise to power of his policies and the ouster of the Girondins with the lapidary statement that he and his fellows did not defend the people, they *were* the people. Contrary to the Girondin claim of 1791 that the French

revolution was over, we must agree, following Albert Soboul, that with Robespierre it began, because with him Rousseauian democratic principles and the power "from below" of a national-popular polity were established. Today, historians like Manin, Gauchet and Furet argue that democratic ideas became important for rights after the rise of Robespierre who turned the revolution of 1789 in a radical direction. Up to that time, Rousseau's *Social Contract* was not widely read and the goal of the men and women who made the revolution owed as much to Locke as to Rousseau. Without the democratising of nationalism, the spontaneous unity of a nation of villagers might have lapsed back into the traditional rivalry. Girondin policies rested on that estimation. But in 1792 democracy and power "from below", a sovereign people that could do no wrong and a nation whose goal was the attainment of right for all citizens, became the driving force of the revolution. What we must also note is that Robespierre and the Jacobins never ceased to reiterate that the goal of this revolution, unlike that of any previous revolution, was the establishment of the rights of man. Robespierre himself always stated that French rights should be universal and available to all, seeing no contradiction between democratic national-populism and universal rights. Indeed, he extended the list of rights significantly because of his identification with the people, understood as the "street", whom he believed could never be unjust. Yet, under his regime, the reality that democratic nationalism and universal rights were contradictory became clear for the first time (see Zizek 2007; Manin, "Rousseau" in Furet and Ozouf 2007, 251).

Robespierre, Jacobinism and the National-Popular Revolution

The national-popular revolution was much more than the Jacobins who came to power in August 1792 and led it until their overthrow in 1794, or their leader, "the Incorruptible" Robespierre. Yet his short and meteoric career encapsulates what was important for universal human rights in the short democratic – defined as power "from below" – period of the revolution before reaction set in and the rights of man disappeared for over 50 years. This section focuses on Robespierre's career and how it expressed a revolution that went from being national to national-popular and thus loosed forces totally inimical to the notion that human rights should be for all and not just national citizens.

A useful point to start is the 1791 constitution, which was short-lived because it was neither democratic nor republican, but it summed up the solution that both Girondins and Jacobins then proposed for the tension between rights for citizens and rights for all people. Both factions privileged human rights for citizens since they knew that state power extended only to national borders, if that far. This made central for universal rights the issue of the frontiers that delimited internal and external politics. Since, as far as both Girondins and Jacobins were concerned, the object of all constitutions was the attainment of the rights listed in the declaration, it became a matter of debate how to make the totally new regime directed at universal

rights available to non-citizens. The 1791 constitution came up with a first solution. It stated in its second title that all who fulfilled the following criteria could be French citizens and therefore enjoy the rights in the declaration: those born of a French father; those born in France of a foreign father who had established residence there; those born in a foreign country of a French father who had established themselves in France and taken the civic oath and "finally, those who, born in a foreign country and descended in any degree whatsoever from a French man or a French woman expatriated because of religion, come to reside in France and take the civic oath." Anyone born overseas of foreign parents who resided 5 years in France and had property or business there and took the civic oath and anyone living in France whom the legislature chose to naturalise and who would swear the civic oath could also become a citizen The civic oath ran "I swear to be faithful to the Nation, to the law, and to the King, and to maintain with all my power the Constitution of the kingdom, decreed by the National Assembly in the years 1789, 1790, and1791". Citizenship could be lost by taking foreign nationality or belonging to any foreign association "which implies either proofs of nobility or distinctions of birth, or which requires religious vows." So, foreigners wanting rights just sought refuge in France and French citizenship and French rights could be legally obtained almost at will.

Overall, then, the solution was that France should have porous borders and those who wished to enjoy its new human rights could simply have them. This apparently ended all tension between rights for all humans and rights for citizens. With this view, Robespierre and the Jacobins appear to have agreed. In their proposed 1793 (*montagnard*) constitution, every foreigner over 21 years of age who lived in France by his labour or property or who married a Frenchwoman or who adopted a child or maintained an old man or "who is considered by the legislative body to have deserved well of humanity" was a citizen. Clearly, most of the national leaders appear to have thought that the new rights would be so attractive that everyone would want to emulate the innovations. Great numbers of progressives did flood into France. Given their experience, we might see in them a parallel with refugees from political persecution in a later age. Equally, up to half of the nobility, depending on the region, fled the new regime. Frontiers remained porous for a brief period.

The problem of the "open republican" solution to the contradiction between rights for citizens and rights for all was that the "people" or the nation – for the terms were already interchangeable in discourse by 1789 – whom the Jacobins explicitly represented, had even less time for outsiders than had the British a century earlier (see Nora, "Nation" in Furet and Ozouf 1992b, 337–56). Those who did not "belong" would receive short shrift in the first democratic national-popular state in history to espouse universal human rights (Wahnich 1997, 206).

Robespierre was a petty-bourgeois lawyer from Arras, elected to the Assembly by the boot makers of his town. Arras was little provincial town closely connected to its peasant *arrière pays*. We can only begin to understand him and his success when we remember that he was a small town "intellectual", well-educated and desperate to get ahead. He called himself *de* Robespierre for a time, like his associate d'Anton. Like his idol Rousseau, he was excluded from integration into the ancient regime by his origins. Some personal characteristics he kept all his life, living

austerely on bread and milk, alone, a believer in a family he had never had (his father was a ne'er do well), and in that religion necessary to solitary souls. Madame Roland, when they were friends, described him as badly spoken, sneering, greenish in complexion but smart (Roland 1986, 196–9; see also Matrat 1972, chs1 & 2; Scurr 2006, passim, esp. 37). Unlike Rousseau, he never went abroad, his experience being limited to Arras and Paris. He lived quite unconsciously in conformity with the limits of the society we described in earlier chapters: suspicious of foreigners and those who "spoke different", of spendthrifts and the rich. Robespierre embodied popular attitudes, hopes and dreams *and* hatreds A realist, like most of the small shopkeepers who supported him, in the dire sense of realism that they espoused about the "world", a myopic place, he knew that humans were deceitful, venal and brutal and that the crowd would be violent with those it envied, resented and hated, above all the aristocrats. But like other Jacobins, he understood why they were vengeful, explained and forgave their atrocities, and argued that they would turn out well in the end, after a little expiatory blood-letting. Once given a decent life they would show how virtuous the people were. Revenge was a word he used often. Marxists have sometimes reproached him with being petty-bourgeois in his desire that all humans should have a small property and independence. They also mocked his eating his primitive fare at a table waited on by a maid. Given the time, such views as his, which scarcely deviated from those of Rousseau or Kant, can only be seen as highly progressive – there was almost no proletariat and the little people of France were peasants and small merchants. In sum, he was the emblematic Frenchman of the epoch. This made him the darling of the city mob whose force he unleashed and defended against the upper-middle class. He simply expressed their views. So did many other Jacobins, like Marat, who stated that he was "the rage of the people", or Chabot, who reminded all deputies that they had been sent to make law by the sans culottes (Fife 2004, 82). It is noteworthy that early in his career as a barrister, he was often in trouble for his criticism of the law as a denial of justice, especially to the poor and meek (Matrat 1972, 36–9).

The Jacobins and their leader incarnated a constituency known as the "sans culottes". These people were city petty-bourgeois and struggling professional men – and some women – who had never enjoyed the possibilities of the typical Girondin, much less the great lawyers and intellectuals that formed their leadership. Analysis of their membership showed that they adequately expressed the Paris population, whom the Girondins watched in alarm from their windows. "The typical sans-culotte is neither a worker from the Gobelin factory nor an indigent, but an artisan, a member of a trade association or a little entrepreneur [petit patron]" (Higonnet 2007, 426–70). Often able to read and write, and having the vote, a sans culotte was nevertheless a street person embodying all the popular attributes that made him so feared by the Girondins. Full of brotherhood for his friends, he saw himself as an implacable hater of the privileged and those who gave themselves airs; all those unlike himself. Everything individual was subordinated to the community and its mores. "The patriot [for this is how he referred to himself] has no personal interest", the Fontaine-Grenelle section explained to the popular society of Auxerre. "He brings everything back to the common mass: enjoyment, painful feelings, all is

staunched by him in the bosom of his brothers" (Higonnet 2007, 428). He believed in manly, violent, direct action for "justice". If he had an intellectual hero, it was Rousseau. In sum, he embodied the prejudices and attitudes of the g*rande nation*. It was this constituency that Robespierre put in power, above all, the toughest of the street people, who were the enforcers, typically the "strong men" of les Halles. In doing so, he successfully fostered *malgré lui* a viciously exclusionary nationalism that would become the model for all other states in years to come. He was violently against all that was foreign and did not belong to the nation as defined by himself and his constituencies (see for example, Milligen's recollections about Robespierre in Thompson 1938, 252–4).

What became important for the rights of man then was the creation of the active citizen from this constituency. Already in 1791, two-thirds of males over 25 years of age had been given the vote, making even Girondin France the most democratic society in history since Athens. The only ones excluded were those who had no property or fixed address (see Rosanvallon 1992, 55).This allowed the age-old attitudes of the French villages – which for another century would continue to be where most French lived – and of urban dwellers not long removed from those villages, to determine policy and the understanding and implementation of the new rights. As Wahnich has pointed out, for these villagers anything foreign and not attached to the land, anything or anybody who was unknown, was suspicious (Wahnich 1997, 103, 113–17). Great numbers had been forced into the cities in the late eighteenth century, leaving behind the community hospitality of their villages. In Paris, whose mob was Robespierre's strength, this was supplanted by a furious lumpen proletarian communitarianism, that of market folk. They were "enfranchised" in a system of de facto direct democracy while an almost universal suffrage was proposed, only to be put on hold because of war. This augured ill for foreigners and those who had foreign accents, just as it had in Sicily four centuries earlier. Even then, democratic nationalism might not have become chauvinism (see Cooper 1964, 236). What ensured it was the total hostility of all other European nations to the new human rights, their express decision to destroy those rights and to physically exterminate the individuals who espoused them (see Mayer 2000, 172).

The Girondins, constitutional monarchists who expressly stated to their English friends that the English constitution was their model, were not regarded as a threat by other powers. While the object remained merely to make France a constitutional monarchy, the more fiery proposals about the rights of man were more laughed at than feared. Indeed, both Girondins and Jacobins, misled by tiny groups of supporters' letters from London (see Cobban 1960, 39–42), at first thought that nations like Britain and the US could get together with them in a sort of unity like that proposed by the abbé de St Pierre, because all were progressive. Even when it became clear that both the British state and the British people wanted nothing of the new rights, the moderates were quick to distinguish between the evil rulers, notably Pitt, and a population duped into forgetting that it was the source of the liberties newly won in France (Wahnich 1997, 281–310 for a detailed discussion).

Robespierre is famous for his opposition to both the exportation of the new doctrines of human rights and to any war against tyrants who denied them to their

people. A little man, he thought that improvements should begin at home, and with little matters such as a decent life for little people. But events forced him to change his mind and by 1794 Pitt and the English had become the "enemies of human kind", whom he declared that he detested.

The early laisser-faire attitude of other powers about the innovations in France changed radically when the French king and his queen, having shown their hostility to the new regime and especially to its ending of feudal property among nobles and the Church, attempted to flee France. Louis had been forced by a furious mob, which killed two of his guards and threatened to cut off Marie-Antoinette's head, to sign "your declaration" and the constitutional proposals of the national assembly on 5 October. Thereafter, breaking his oath, he plotted secretly to overthrow the new regime. Inept as ever, the monarchs were caught at Varennes in June 1791 during their flight to join émigré groups, brought back in ignominy and after 6 months imprisoned in the Temple. The other absolute monarchs of Europe were outraged at this treatment of their kith and kin. Many autocrats were related by blood to the French monarchs and deeply insulted by the way he had been told that there would be a constitutional monarchy. They stated this at a declaration from Padua in 5 July 1791.

An alliance and declaration was made by the fiercely hostile Austrian emperor, brother of Marie-Antoinette, and the Prussian king, in which they promised to destroy the new regime. In response, the Girondins started the first "French" war. In reply to such hostile declarations and to consolidate support for themselves, they declared war on "the king of Hungary and Bohemia" in 1792. The motives of the Girondins need not concern us, but we note that Robespierre was fiercely against the war, uttering a prescient warning. The war would distract from urgent internal problems; it would exhaust the nation economically and in the end would privilege the role of army leaders (Robespierre 1959, VIII, 48). Despite his opposition, the Girondins pushed ahead with their plan, vaunting their right to carry the new principles of the declaration to any other people who wanted them. The invasion of France from the east was only stopped by a massive popular army of French "patriots". Already, they were singing a new national song, "La Marseillaise", whose words foreshadowed the age of warrior nationalism: *Allons enfants de la patrie, le jour de gloire est arrivé…ils viennent jusque dans nos bras, égorger vos fils vos compagnons. Aux armes citoyens, formez vos bataillons, marchons, marchons, qu'un sang impur abreuve nos sillons*. Their impure blood would water the furrows of France. In the bitter defence of the nation by thousands of untrained Frenchmen, against soldiers whose leaders promised to and did exterminate the French people in their entirety, France became ultra-nationalist and the defence of the declaration of rights became the slogan of French nationalism (see Mayer 2000, 172). Robespierre warned direly: "The French are not affected by a mania to make other nations happy and free despite themselves. All these kings would have been able to vegetate and die unpunished on their bloody thrones had they been ready to respect the independence of the French people" (Zizek 2007, 14). Thenceforth, the new human rights would be exported at the end of bayonets despite earlier statements that this would never be done.

It was not so much that a nationalist slaughter had begun that would only end in 1815 with half of Europe's population involved and millions dead. People had always slaughtered each other. It was that it had become a national-popular phenomenon, not just the affair of mercenary soldiers who were *soldé*. Now, it was a matter of morality and ethics involving the whole population; and in the French case, since all the other states had chosen to make it so, the principles to be defended were those of the declaration. To be French was to adhere to those ideas. As J-G. Thouret stated in mid-1791, the refusal of the king to sign it and the successful storming of the palace in October had this effect:

> The declaration of rights acquired a religious and sacred character, it became the symbol of political faith, it was stated in all public places, stuck up in country citizens' homes, and the children learned to read from it [the new education system made it the core of the curriculum]. It will henceforth be difficult to create a different declaration, or even to edit it. We believe that it contains all the seeds whose consequences are of use for the happiness of society (cited in Baczko 2008, 128–9).

It was stuck up in public places everywhere and formed the basis of teaching in the new state school system. To oppose universal human rights became the mark of all other national peoples except the Americans. Each claimed to be defending their own traditions of rights and justice. British progressives like Jeremy Bentham pronounced natural rights for all "nonsense on stilts". As condemnation and promises to extirpate those principles poured in from all the states of the "civilised" world except the United States, a determination to defend and impose them grew apace in France. Robespierre, ever the realist and expressing the popular desire for vengeance, epitomised the new, revolutionary, nationalist defence of *universal* human rights.

What eventually made democratic nationalism and rights for all a contradiction were the series of wars launched against the French by a coalition of other European states. Historians often explain the first of these wars, in 1792–4, and that which started in 1795 – led by the British Prime Minister William Pitt – as motivated by a desire to strip France of her possessions while that state was weakened by the flood of émigrés taking their wealth with them and leaving a country sorely divided about the new regime. This certainly was one of the motives. But another was the challenge that the new rights posed to existing regimes elsewhere (see Pitt 1925, 47, 57, 76, 84). These were nearly all autocratic or, in the best of cases, corrupt oligarchies like that which ruled in England. As one contemporary observer, who would be deeply implicated in the events that ensued, wrote (with the benefit of hindsight): "England meditated about immense conquests and infinite trade advantage from the ruin of a nation that till then had been its only rival. More than any other court in Europe that of England should have feared the contagion of the new ideas, that we could say were almost born from its bosom; and to render them hateful to the English people could find no better means than awakening ancient national rivalry and make them hated if not because they were unreasonable at least because they were French" (Cuoco 1998, 225–6). Edmund Burke, who had been a defender of the Americans even up to and after their War of Independence, wrote a book that was rapidly translated and emulated throughout Europe, *Reflections on the French Revolution* (1790).

In it and in his correspondence, he showed that the coalition against France involved more than a ravening pack of dogs turning on the weakest of the pack. He feared that the new-fangled principles of the declaration would spread like lightening into other countries, so appealing were its principles to the untutored dissident masses (Burke 1981, vol. II, 330–6; and "Speech on the Petition of the Unitarians" in Cobban, 1960, 188–9). They did so only among small intellectual groups, but making war on France was regarded as justified (Gentz 1802, 198–200).

It is in the context of a merciless war against the new French regime that we should see the importance to rights of France having been made democratic. Sometimes, historians attempt to avoid the connection by insisting that what the Jacobins introduced was not democratic, that they loosed the mob while shutting down the democratic vote on pretext that the war made it impossible. They are certainly correct that Robespierre made the excluded mob of Paris direct active citizens, even redesigning the Assembly so that they could be menacingly present during debates. But that, *pace* those who would reduce democracy to something other than power "from below", was more democratic than the Brissotin formula where representation was seen expressly as a way of excluding the people from direct say about their desires. What the Jacobins wanted was to base the new state power on the masses and therefore, they wanted a truly democratic regime. They wanted all power to emanate directly from the nation, that France should express the national sentiment of its people. Robespierre and other Jacobins reiterated that *ad nauseam* (see Zizek 2007, passim). We note in passing that the rule of the mob also enfranchised women, the main activists where social matters were at stake, for the first time, and allowed the women's voice in briefly. When those of anti-Jacobin persuasion came back in 1795, women were again relegated to the home.

To understand how the traditional hatred and fear of outsiders among the peasantry became a national hatred and fear of all outsiders and other nationals, we have to remember the millennial history where the lords, recently ousted in France, had slaughtered them mercilessly for making any claim to rights. Even well after 1789, the old regime, stupidly unaware that there had been a revolution and that they no longer ruled, when not insulting the average man in the street by spitting on the new symbols of the nation, like the revolutionary cockade, continued to massacre. We should recall that the mass and especially the town mobs were literally starving due to high bread prices and that whenever they agitated or took summary justice against some hoarder, they were savagely repressed by the moderates who were great believers in law and order and terrified of anarchy. The conservative lord Dorset reported this in April 1789: "Bread is getting dearer every day…unless the government finds some means of effectively preventing the scarcity that is to be apprehended, the distress of the people must become insupportable" and he noted that the military had fired on demonstrators "some few" of whom were killed (Thompson 1938, 27–9). The report differed little from the account of the massacre of the Champs de Mars in July 1790, or after the mob had brought the monarchs back to Paris to the chant of "here comes the baker and his wife and his apprentice" (the Dauphin). Soldiers still shot them down when they clamoured for bread (Thompson 1938, 74, 140–1). Another English spectator was horrified at the treatment

of "poor rioters" by the National Guard in early 1792: "they fell upon them in a most inhuman manner, Beating their heads with the Musket and applying the point of the bayonet to several" (Thompson 1938, 149). The emigré opponents of the revolution who had fled before there was any real popular violence, massed in places like Coblenz and promised to make Paris one great cemetery. They meant it. When invasion finally came and the French, having spontaneously formed themselves into National Guards and federations in the interim, faced professional troops and mercenaries, they knew that no mercy could be expected for man, woman or child. Indeed, the Duke of Brunswick, leading the Prussian and Austrians invaders, promised to apply martial law to any civilian resisting the invasion. This made them fight desperately and, despite early reverses, to win. It was clear by 1792 that the defence of the declaration meant putting your life on the line against foreigners who vowed your destruction.

The condemnation of the French Revolution and its declaration by Edmund Burke was adopted by every monarch and by the Pope, and, more significantly, by great numbers of the public of other nations. Burke's book sold 17,500 copies in ten editions in 1790. The Pope, perhaps vexed by the revolutionary annexation of tiny papal enclaves in France at Avignon and the Comtat-Venaissin, joined him in condemning the Rights of Man and all its works. When, in 1790, the French state proclaimed a civil constitution of the clergy, which allowed freedom to practice only if loyalty to the new French state were sworn by priests, the Pope issued *Quod aliquantum*. He proclaimed that this civil constitution established as a right of man not only freedom of religious opinion but also absolute license in matters of religion. This "monstrous right" flowed from the false principles that all men were free and equal (Chaunu 1989). This made the attack on universal human rights a religious crusade by Roman Catholics. Killing supporters of those principles was interpreted as a religious duty, as we show below. Emigrés, who had fled France, like the Savoyard Joseph de Maistre who was very influenced by Burke and his fear that the rights of the declaration would upset the existing social order (in this he was right), preached a new doctrine of total rejection and extermination of such false unchristian principles (see generally Darcel 1992). He was actively engaged in opposing human rights through anti-revolutionary espionage networks from 1793 onwards and became the intellectual leader of reaction in the nineteenth century. The violence of his views goes far to explain the hatreds that developed between defenders of human rights and those who opposed them from the start. They show what the believers in *universa*l rights would be up against throughout much of the next century, and how such rights were incompatible with the nationalism of the sort preached by Burke and de Maistre.

De Maistre emphasised the difference and inequality of "peoples". By 1794 he had decided that "all brutal breaks with the historical trajectory of a nation lead to decline because they substitute individual…for national reason, the expression of the genius of a people through time, that is to say through its history" (de Maistre 1992, 43). This Burkean view, already adopted by the first international relations theorist of Germany, Gentz (Burke's translator), was expressly stated to be anti-Rousseauian. De Maistre also appealed to history and not philosophy, claiming that

in history, only already-structured societies had ever existed even among "savages" and any "social contract" was never a choice (de Maistre 1992, 96–8). He argued that a study of sovereignty in each nation revealed only an expression of the nation through its language; national distinctiveness would remain forever a mystery (de Maistre 1992, 121); so any constitution only stated already existing laws or forgotten rights, mainly unwritten. Thus the 1688 Bill of Rights had its origin in a historical past (de Maistre 1992, 121). In sum "all peoples have the government that suits them and nobody chooses their own". Human will cannot create anything (de Maistre 1992, 121). The French revolution was thus ridiculous, driven by a scourge – human reason – seeking to express itself through individuals (de Maistre 1992, 133–4). In this policy, there was no difference between Jacobin and constitutional monarchist. De Maistre wrote that "Rousseau and Payne" (sic), the latter the author of a "very bad book", built on exceptions and minority views.

> The work [Paine's] is called Babel, that is, "confusion". Everyone is speaking his own language; nobody understands and dispersion is inevitable. There has never been, and never will be, and cannot be a nation a priori. Reason and experience unite to establish this great truth. What else is able to embrace in a glance the combination of circumstances that must make a nation suit this or that constitution? How, above all, would a few men be capable of that effort or intelligence? Unless we are deliberately blind, it must be agreed that it is impossible and history, *which must decide all these questions*, is what comes to the aid of theory at this point. A few nations have shone out in the universe. Is there one that is constituted as Payne would have it? All particular modes of governing are *divine work*. A constitution in the philosophical sense is then only the mode of existence attributed to each nation by a power above (de Maistre 1992, 144, emphases added).

For de Maistre, successful nations were marked by the absence of many laws. Thus England's constitution had only six components: the Magna Carta; its confirmation; the Petition of Right; habeas corpus; the act of Settlement and the Bill of Rights. But "it was not because of these laws that England was free but because the English people were free that they had such laws", the fruit of long experience, born gradually and slowly. Since a real constitution was a creation that did not come from men it must come from God. Rights were simply good customs and good because they were not written down (de Maistre 1992, 145). It followed that men need not reason but belief. Prejudice is good, essential to humans, "the true elements of his happiness". Individual reason is inimical to all human association; men needed a national religion. "All known peoples have been happy and powerful insofar as they have obeyed faithfully the national reason which is nothing but the annihilation of individual dogmas and the absolute and general rule of national dogmas-that is a useful prejudice" (de Maistre 1992,148). Men had to subordinate themselves "to the common existence" like rivers that exist as masses of water. Patriotism was the abnegation of the individual. Moreover, it was futile tor try to educate the mass to higher standards. Ideas had to be subordinate to needs (de Maistre 1992, 166); "prejudice and fanaticism" are simply "the beliefs of nations". To try to destroy them in order to be free had led to two million dead. Rousseauian disclaimers were in bad faith as it was his ideas that were hegemonic in the French Revolution (de Maistre 1992, 177–8).

So, governments were good only if monarchical or aristocratic, like that of England. Monarchy was a "natural" form that had evolved differently in each country. In turn, this meant that there could be no general model for government (de Maistre 1992, 205). Wisdom came from looking at the history of the ancients. "The first and perhaps unique source of all the evils that we are experiencing is the scorn of antiquity or, what amounts to the same thing, a scorn for experience" (de Maistre 1992, 206). A historical survey would eventually establish a hierarchy of races. It was clear that aristocratic societies spilt less blood and for better reasons than did democratic societies. Laws were no more than commands; Rousseau had confused regulation with law. In a democracy, law was powerless and the harshness and injustice of the state increased. A people were united not through their will but as a sort of family that was self-regulating without knowing how it was so (de Maistre 1992, 219). Only in monarchies based on popular consensus was it possible for both citizens and foreigners to be treated fairly and equally.

Summed up, as de Maistre wrote in a later book, "The 1795 Constitution is made for Man. Well, there is no such thing as Man in this world. I have seen during my life, Frenchmen, Italians, Russians etc. I even know, thanks to Montesquieu, that it is possible to be a Persian. But as for Man, I declare that I have never met him in my life; if he exists, he is unknown to me" (de Maistre 1988, 87). Conservative nationalism thereafter began from the irreducibility of cultural difference. Any attempt at conscious social engineering was wrong-headed. The only difference between the French version and that of its enemies was that the French believed they could make a revolution, that is, create new rights.

Only two and a half thousand copies of Burke's work made it into revolutionary France. De Maistre, a favourite with moderates and Girondins once they had fled Jacobinism, provided the chapbook for the reaction. It was on his principles that the attack on universal rights was conducted by all anti-French coalitions. Once these coalitions were successful, the new international order that accompanied the return of the *ancien regime* was guided for years by that logic about the incompatibility of national traditions and universal rights. In de Maistre we recognise one source of national socialist and other extreme nationalist doctrines.

The Beginning of the End

The emergence of the people as the source of power of the Jacobins, albeit brutal and terrifying in its overthrow of law and order, in its quick accusation of "aristocrat" applied to anyone who opposed it, was quite understandable. Indeed, the old regime was responsible for the conditions of starvation and illiteracy that underpinned the brutality of a mob that periodically after 1789 went on a rampage to impose its views in notorious "journées". The Jacobins, who unlike the moderates listened to the gallery, pushed human rights well beyond the new "law and order" that the drafters of 1789 intended.

The mob and the sans culottes more generally were rabid nationalists whose only saving grace in the face of equally nationalist enemies was that their creed was the Declaration of the Rights of Man and the Citizen and not a violent opposition to such rights. Nevertheless, their national-popular creed had dire consequences for *universal* rights. These French nationalists had won the first war by 1794. They did not, however, if we except French-speaking Brabant and the Rhine, do much more than hold French borders. On the other hand, after the attack on the new nation, all foreigners became suspect and the demand for passports ubiquitous (Wahnich 1997, 116). While in 1789 it had been a protection to say that one was English (in response to the epithet "aristo"), by 1791 it was a definite disadvantage. One Englishman pleading on behalf a co-national received the curt reply from Robespierre that his friend was safer in jail than out (see Thompson 1938, 254).

While the earlier French protestations that they would never export their new rights by force of arms had disappeared by 1792, France was, it must be emphasised, still on the defensive against foreign enemies. Those peoples whose own national identity was most developed, like the English, still vowed to destroy the new rights. The French would have done well to have learnt not from a mythological British history of attachment to universal human rights but from contemporaries like Cobbett, himself a short-lived supporter of the Revolution, who wrote: "I went to that country full of all those prejudices that Englishmen suck in with their mother's milk against the French and against their religion" (Thompson 1938, 153). He became as violently opposed to the French revolution as to the American. Initial French distinctions – encouraged by the few radical English supporters – between the good English people and their evil rulers, gave way quickly to the view that the English nation was as perfidious as its leaders and sinned doubly by its betrayal of its own principles, supposedly those of 1688. In time, the belief that they could be saved by enlightenment, a sort of re-education in rights, was also relinquished (see Wahnich 1997, 281–310).

The mutual hatred of the French and the English was increased by British attempts to foment and support rebellion in France, which by 1791 had become bitterly divided, with a majority against the new regime. Pitt thundered: "it was natural to think of calling forth, of disciplining, and of rendering regular and effectual, that part of the French nation who had taken refuge in England, and whom we might enable to bear arms, for the purpose of assisting in recovering all those rights that had been most dear to them" (Pitt 1925, 53). British agents-provocateurs were particularly active on the Atlantic litoral. Expressing the national mood of defensiveness, fear and suspicion, Robespierre gave up previous attempts to separate the English people and leaders on the Rousseauian ground that a people always end up being good. Instead, he echoed the view "from below" expressed by deputy after deputy in the National Assembly, that the enemy was the British nation and that the struggle over rights was a struggle between good and bad nations. "Why do you wish me to distinguish a people which is complicit in the crimes of its government from so perfidious a government? As a Frenchman, as representative of the people, I declare that I hate the English people. Until [it destroys its government] I will bear it an implacable hatred" (Robespierre 1973–4, II, 185).

Robespierre had made clear early in his career that he privileged the nation and its rights over everything else, even claims by regional interests, including his own constituency; that he should represent their concerns (Matrat 1972, 68–9). He followed the views of the depaysé street of Paris rather than his Breton fellows whose nationalism was tempered by local loyalties. The raising of age-old hatreds and persecutions to a national level from its more local manifestations of the past generalised and authorised the butchering traditions of the peasantry and *menu peuple* of all countries that we have already traced. In 1793, the French state, in retaliation perhaps, for British massacres of Frenchmen in Genoa, where "300 Frenchmen of the crew of the frigate Modeste were massacred without thought while awaiting dinner" declared that "..we have the right to reproach the English with violation of the law of nations {"a natural right" AD] ever since the war began". (Archives parlementaires, vol 91, 39) and then decreed a take-no-prisoners rule in the war with British. This decree was never fully implemented but it legitimated national feelings of hatred and determination to "exterminate" all foreigners (see Wahnich 1997, 311–27). The British should all perish for their opposition to the new principles. This translated at a popular level into statements like this from Provins: "In decreeing that no longer will Englishmen or Hanoverians be taken prisoner you have acted as defenders of the rights of nations. A people that is so cowardly as to pay for and commit crimes and bend its will to the criminal orders of Pitt can no longer be counted among humans. It is guilty of betraying humanity" (cited in Wahnich 1997, 319). For the rights of others, this was disastrous, as the decree that no prisoners should be taken was understood as justified by the defence of higher values, those of the French and the declaration (Wahnich 1997, 318). It changed the desire to defend human rights into a crusade to destroy the "new Carthage". A state whose policies encouraged Frenchmen to think that defending human rights meant "washing ones hands in the blood of the ferocious islanders" (Wahnich 1997, 326), who were allegedly not human beings because of their opposition to human rights, was setting a precedent for genocide in the name of promotion of human rights. The logic is startling similar to that proposed by the two Bush administrations' policies towards Iraq and Islam.

The violence was directed outwards and was reciprocated by all the warring parties, as is further explained below. Each claimed to be fighting to defend its own tradition of rights, that is, its identity as a community. But nationalism's incompatibility with even basic rights to life and liberty turned into a denial of human rights even to the inhabitants of the national soil. In the first war (1792–4) the French had conquered little territory, mainly in Brabant and on the Rhine, but the fighting saw the immigration and flight of refugees into France. Local French authorities rapidly extended the newly-authorised suspicion and hostility to all foreigners to these new comers (see Wahnich 1997, 86–106). Barère, Robespierre's ally, had a decree passed unanimously on 18 March 1793 expelling from the republic all foreigners who were there without authority. It marked the end of France as the sanctuary for refugees from human rights abuses in other places, which had been decided in constitutional articles on asylum in 1791 (see Wahnich 1997, 76; Constitution of 1791, arts., 118–120). From Mathiez to Noiriel, the major French commentators end up with basically this

conclusion, taken from Noiriel: "Hardly had it been stated as a principle than the right to asylum was baffled in practice. Albert Mathiez has shown how strongly the antagonism between the two demands proclaimed at the same time were shown to be in 1793: the generous welcome shown to the persecuted of the entire world and the exclusive defence of the citizens of the nation" (Noiriel 1991, 34; also see Mathiez 1918, 80ff). This ended the naïve solution of reconciling national and universal rights through open frontiers.

Wartime conditions were adduced to introduce rule by a Committee of Public Safety and exceptional tribunals to try "suspects", those denounced as the enemy within. The belief in direct democracy made exclusionary nationalism worse. Robespierre returned control of foreigners to local municipalities. By 1793 foreigner and "vagabond" or "brigand" were becoming increasingly interchangeable terms in reports, reflecting the common belief that attachment to a place and people was the only guarantee of loyalty. In Robespierre's speech in April 1793 in favour of a new democratic declaration, containing economic and social rights for the poor, he also argued: "Those who make war on a people to stop the progress of freedom and to destroy the rights of all, must be pursued by all, not like ordinary enemies, but like murderers and brigand rebels" (Zizek 2007, 167). Local ignorance and hatred of outsiders became rampant. A family model of community started to reassert itself with a passion that led, as we show in a later chapter, directly into the first of the modern war crimes/genocides of the era of universal human rights, committed in the name of defence of human rights in the Vendée in 1793–4.

As noted, Robespierre had become an apostle of human rights for the nation, proposing an extension to the 1789 declaration to cover social and economic rights. Even before the first declaration was adopted he had spoken fiercely for Jewish emancipation; against the death penalty, and for total freedom of the press; pleading for the protection and voice of his sans culottes against a Girondin position that slid quickly towards a raison d'état. When faced with the menace of foreign invasion, he gave up on these positions, arguing that the defence of the nation overrode general, universal human rights. "Weep for the hundred thousand patriots immolated by tyranny; weep for our citizens expiring under their flaming roofs; and the sons of citizens massacred in the cradle, or in the arms of their mothers. Have you not enough brothers, children, wives to avenge?" (in Zizek 2007, 138). Within weeks of the Jacobin triumph, he started to imprison and then guillotine all those deemed opposed to the nation. Soon, it was sufficient to be denounced as anti-patriotic to be executed without trial by one's peers. Any opposition to the view of Paris and the mob brought mass reprisals. It has been estimated that 16,600 were executed during the Terror and vastly many more imprisoned, terrified for their lives under the kangaroo court regulations of the popular tribunals (Greer 1935; Furet and Ozouf 2007, 293–315). Thousands more were massacred or drowned by the regime after risings in Lyons and the western ports and cities. Soon, they were joined by thousands more, falsely accused of plotting against the nation. Hundreds of foreigners, including Cloots and Paine, were imprisoned, and refugees, including Wollstonecraft, fled the "promised land". Their sin was to be non-nationals – Other.

The cases of Paine, celebrated as the author of the *Rights of Man* which critiqued Burke's intemperate work and as a hero of the American revolution, and Cloots, a Jacobin favourite of the most radical groups, are emblematic of how this slide from nationalism to the denial of elementary rights was made. Both had been made honorary citizens of France in 1792. Both were fervent proponents of universal human rights. Paine's memorial reads "All mankind is my country" and Cloots is famed for cosmopolitan universalism. "I defy anyone to show me a single article of our declaration of the rights that is not applicable to all men, in every climate" (Cloots 1979, 258). They were certainly no nationalists but they were pariahs.

Paine could not speak French; he had dedicated the second part of his book on rights to LaFayette, another hero of the American revolution, who took up monarchist positions in 1790; and he voted against the execution of the King in 1792, which put him at odds with the Jacobin leader. These errors were explained by Paine's incapacity to understand the French because he was English (see Wahnich 1997, 190). Robespierre thought that Mr Paine should leave. Paine was expelled from the Assembly and imprisoned. He was lucky to escape with his life through a chance error by the guard.

Robespierre was more savage about Cloots, whom he detested because of his frequently expressed criticism of nationalism and chauvinism, and his refusal to divide peoples into good and bad; friends and enemies (see Cloots 1979; *Archives Parlementaires,* vol 63, 393; Robespierre 1950, VIII, 84). In a speech that virtually condemned Cloots to death (he was guillotined on 24 March 1794) Robespierre asked: "Can we regard a German baron as a patriot? Can we regard a man with more than 100,000 livres of rent as a sans culotte?…No citizens. We should be on our guard against foreigners who wish to appear more patriotic than the French themselves. Cloots, you spend your life with our enemies, with the agents and spies of foreign powers; like them you are a traitor, who must be watched" (cited in Cloots 1979, 653). His hostility towards both men undoubtedly expressed a dislike of people who did not speak French like the French. In destroying them – for Paine, too, set off into a limbo where he would die alone and anathematised in the United States – for chauvinistic reasons, Robespierre also destroyed the strongest exponents of universal rights in France. They had to believe in universal rights because they were foreigners on a national terrain.

Robespierre and the Jacobins clearly recognised that there were cultural differences and peoples who did not want the new rights. But their solution was to expel them or crush them. Indeed, as well as expelling all foreigners, they ordered all French-born émigrés to return home. They constantly argued *force majeur*: the attack from outside which was certainly constant and aimed at fomenting internal opposition to the regime. Within no time, this radical nationalism undermined the declaration, which was suspended in fact and symbolically shrouded by some of the government in the Cordeliers club. But it was deviated in an even more harmful way by the attempts to make popular-democratic power the basis of what was being done. Had the declaration merely been suspended and shrouded, that would have been bad enough. But worse came from the proposals to square the nationalist claim that all was being done in defence of the declaration with the demand of the democratic

constituency that all be obedient to the nation and its rule of law. The Jacobin regime, horrendous though it was for its opponents, was a rule of law and for a long period had majority support. The law of suspects, "an informer's charter", of 17 September 1793, started the official witch hunt of all foreigners following spontaneous popular massacres in the previous 2 weeks in which over 1,000 people died. The main period of the terror was then conducted under the Law of 22 Prairial that set up kangaroo courts entitled to ignore even the age-old rules for fair trial that went back to Magna Carta and beyond (10 June 1794). The French state was implacable in its view that the enemies within and without imposed on it the need to rule by decree, and that any treachery deserved the most extreme of penalties. Robespierre reiterated this again and again. It was a view that enjoyed general support among the government and people until, following its logic, he started to encourage the revolution to devour its own children, mainly moderates and the Girondin leaders: Condorcet, Sieyès, Barnave, Brissot, Roland and others. Robespierre coldly justified their marginalisation, expulsion from government and later execution as defence of the nation and declaration (Zizek 2007, 173–98; see also 131).

It was this, and above all the Law of 22 Prairial, that finally brought down Robespierre and the Jacobins, and began the period known as Thermidor when the moderates reassumed power. His own weapons were turned against him; he was deposed in a furious debate, wounded and imprisoned, and he and his followers were guillotined with as much celerity as they had killed their own enemies. The greatest single mass political murder in the revolution was the guillotining of 71 Robespierrians on 10 and 11 Thermidor (Baczko 2008, 167). After his fall, massacres and mass purges of anyone denounced as a Jacobin became the order of the day. Since Robespierre had enjoyed popular support, this meant that thousands were affected, dismissed, thrown into prison and given their farcical trials. Summing up Thermidorian Pierre Charles Louis Baudin's assessment of Jacobinism, Baczko writes: "This was the terrible truth about the Terror, the nation itself was complicit in the tyranny by either its enthusiastic acclamation or by its troubled silences" (Baczko 2008, 253–4). Explicitly anti-Rousseauian and anti-democratic, Thermidor returned vowing to establish a "rule of law", *its* law, in defence of order and national unity, so that its revenge could be exacted through the courts. But it had been too involved itself in early executions to be able to do anything but continue the French revolutionary state based on the rights of man and the citizen. Again the justification of its policies was that the Revolution, the defence of the nation and the declaration required them. Only by this time, the privilege given to the people, the nation and democracy had already undone the principles of the 1789 declaration and the first statement of universal human rights as law came to an abrupt end.

Two Steps Backwards

By privileging the national people, democracy and citizens' rights over rights for all, even if only in theory, the Jacobins were opening up the possibility of a return to the more limited understanding of human rights expressed in the American colonial

drafts. They exiled or killed moderates like Brissot who had gone beyond that view because of its limitations. It was not a necessary step, but avoiding the two steps backwards from 1789 required the recognition and reconsideration of an inherent problem in any declaration of rights that reintroduced the state. Robespierre considered the matter, but he was alone.

Robespierre's demand for social and economic rights in his proposed declaration of rights of April 1793 expressly affirmed a notion of citizens' duties to other citizens. This necessarily brought the state back in and required laws. They presupposed a community interest. Should it override that of the protection of individuals? How could the two matters be reconciled? Robespierre stated clearly that there was a hierarchy: economic and social rights were to enable a citizen's political obligations to be carried out. They and the notion of community obligation that went with them did not have equal status with the primary liberties of the active citizen. Nevertheless, the latter was defined as the national citizen and no longer as universal humanity (Zizek 2007, 257–9). Where the distinctive marker of the 1789 declaration was a hierarchy that subordinated the state and law to individual rights, the new democratic-populist formulations risked reversing that order. For Robespierre, individuals had duties to a "supreme being" (see Jaume 1989, 303–4). The latter was probably more Rousseauian than Christian but S/he nevertheless subordinated individuals to an overarching authority or law. The duties to common community standards expressly excluded in 1789 could start to creep back as a corollary of human rights. To allow this would end the primacy of individual rights over any law and it would make impossible rights for those who did not belong.

In fact, Robespierre's proposed new declaration did not become law, but that of the Jacobin-dominated group of the assembly called the Mountain incorporating his views was passed in June 1793. It also hinted at a drift away from the 1789 protection of the individual to a protection of the national community by adopting the leader's formulation on social obligations. It spoke of citizens and stated that the goal of human society was "the common happiness". In its structure, this was no different from that of the US declarations, although that common happiness was defined differently. It was stated (Article XXI) that "Public welfare is a sacred obligation. Society owes subsistence to unfortunate citizens, either through finding them work, or through proving means for existence for those who are unable to work" (Jaume 1989, 301). It also promised public schooling and health, where the Americans were clearly Lockean in their possessive individualist view of human beings and uncompromising defence of private property, that is, of the existing economic and social order.

The 1795 Thermidor declaration of rights simply made explicit that rights meant duties to the community that existed and therefore were for citizens only (for the texts, see Jaume 1989, 305–9). Moreover, they were embodied in the laws of the state and thus subordinate to the constitution. They drew up a new one in order to ensure that the drive towards democracy would end; private property and the existing class system remain; and that there would be no nonsense about justice being higher than and separate from the courts' decisions. That took the new order back beyond 1776 to what had been stated in Britain a century earlier; Rousseau's views of rights disappeared and Locke's were resuscitated. Yet the standard was still the

nation, now expressed through the gerrymandered new convention, an obedient people fierce in defence of its *patrie* and declared traitor if it was not. The new symbol of the national-popular was about to emerge from the wings: Napoleon Bonaparte, who was made a general in recompense for dispersing the mob clamouring for its rights in 1795. More than 200 people were blasted by his cannon on the bloodiest day in the history of the revolution (Baczko 2008, 296). Universal, indeed even national, human rights were blown away at the same time. Proponents of such views had been tried for them in all the other countries of Europe; now the French state itself began a series of trials that sent support for the rights of man underground for more than 50 years.

Nationalism Ends British Liberties

We have made clear how much a Lockean tradition and admiration for the British tradition of rights for nationals inspired the declaration of 1789. We have also pointed out that, led intellectually by Burke and politically by Pitt, the British nation became opponents of the new rights. Tiny, progressive, intellectual groups – often individuals from oppressed minorities such as the Quakers, or the Irish and Scots who had condemned the absence of freedom of belief of the Test and Corporations Acts – toyed with the French ideas as models for modernising the corrupt system that had become established in Britain. Tracts by James Mackintosh, the Rev Drs Priestley and Price, Mary Wollstonecraft, William Godwin and the Earl of Stanhope appeared in 1789 and 1790 to greet the new natural and popular rights of the declaration. But that welcome was quickly countered by the "prejudice" of the "people of England" (see Cobban 1960, 97) and most of the Enlightened intelligentsia, notably Mackintosh, around London clubs like the London Corresponding Society, became conservative after the Jacobins started on their democratic nationalist-inspired terror (see Cobban 1960, Part V passim).

The new principles were seen by the state as a threat to British traditions of law and order, and popular hostility towards the French and, therefore, towards "rights", was used to roll back all the gains in public rights for nationals that had been won in 1688. So nationalism and national-popular policies, this time those of the British, showed themselves a reactionary force, destroying those human rights that had already been won for national citizens.

There was much to decry in eighteenth century Britain despite the claims of its intellectual specialists in rights from Blackstone to Macaulay. Common law rights for citizens did not meet anything like the standards demanded by the declaration; for example, over 200 offences still carried the death penalty. There was no religious liberty, all public positions being effectively reserved for Anglicans under the Test and Corporations Act. But there was in law, and increasingly in practice, no slavery or serfdom; freedom in most cases to move, work and make one's own destiny; trial by jury, due process and no torture; wide freedom of expression (though not of religion); an elected parliament, though suffrage was farcically restricted; the

executive was made responsible to the legislature; primitive systems of social relief and some local government; and, most importantly, a national ideology that the "rights of Englishmen" had existed since ancient times.

The war with France and hatred of its extolled rights of man, that is, of the *universal pretensions* of the declaration, saw nearly all those rights disappear, even in law. This was done through the Libel Act (1792 32 Geo III, c60) that ended free speech in favour of the new rights; by Sedition Acts (1795, 36 Geo. III, c7, 36 Geo III, c8) to imprison those who supported them; by the suspension of habeas corpus (1794, 34 Geo III, c54) and, finally, by new Aliens' Acts (1793 33 Geo III, c4) introducing tight control of foreigners and denying them what British rights remained. These laws were passed mainly in the first two decades after 1789 and followed by legislation designed to end Combinations (1799, 39 Geo III, c79), that is, uniting for common goals, freedom to dispose of oneself and one's labour, roughly introducing a sort of new serfdom, in the Masters and Servants Acts (1818–) and Poor Laws (1834, 4 and 5, Will IV, c76) (for a useful compendium see Costin and Watson 1952, I, Section A). While Britain did not return completely to despotic government, its colonies, where it transported the victims of its draconian criminal law, developed fully despotic regimes, that is, a right-less realm was created that lasted, *grosso modo*, until 1840. It is important to remember, where rights are being discussed, that nation-states with empires have always exported the worst breaches of rights for citizens to their colonies, making their own record appear acceptable by putting national abuse of rights "out of sight and out of mind". Britain did this systematically in the West Indies, Australia and, of course, India, throughout the nineteenth century.

It was not just state policy to use the wars against the French declaration to roll back the lopsided gains of the common law in the eighteenth century. Pitt's policies rested on a popular fear of the outsider and his allies within. Using Burke's work, after 1790 Pitt encouraged the belief that thousands of brigands were bringing or would bring social unrest to a supposedly harmonious society. In fact, the government was deeply disturbed by riots and revolt in Scotland and Ireland, and by the social distress caused by enclosure of land there and England (see generally Green 1920, 807). By 1796, Pitt was warning of an invasion by the French (Pitt 1925, 153–63), exaggerating the foreign threat for political reasons. This caused a popular panic. Reciprocating Robespierre's hatred, the British people were encouraged to hate the French and their supporters and quickly took matters into their own hands, engaging in a lynch law that should not be forgotten when the finger is pointed at the brutality of the French mob of 1789–92.

Pitt had let loose the mob in 1792. His main intermediary was John Reeves, who formed an association for preserving liberty and property against Republicans and Levellers which declared "that is now become the duty of all persons, who wish well to their native Country, to endeavour, in their several neighbourhoods…to support the Laws, to suppress seditious publication, and to defend our persons and property". This was a duty in defence of "our religion and laws" (cited in Cobban 1960, 97, 276–7). These groups started to break up meetings of supporters of rights. They also encouraged a popular mob to do likewise.

Part I of Tom Paine's *Rights of Man* was a reply to Burke's work. It is one of the clearest statements of natural rights of the individual and that they are universal. It became the point of reference for many in the British Isles who hoped for much from the French revolution (see Paine 1963, 40–7, 69–76, 88, 130–8). It sold 200,000 copies. Paine had returned from the US to Britain, his birthplace, in 1787. He was already regarded as a cosmopolitan. In 1792, when Part II of his work appeared, constitutional societies drawing inspiration from the revolution, with large working-class memberships, had been formed in many British cities, and before the revolution had embarked on "the terror" and radical nationalist views held sway in France, the English mob, expressing a widespread anti-rights chauvinism, started to burn Paine in effigy, as did "a patriotic mob" in September at Chelmsford in Essex. This is the newspaper report:

> On Wednesday last, the effigy of that Infamous incendiary, Tom Paine, was exhibited in this town, seated in a chair, and borne on four men's shoulders; – in one hand he held the "Rights of Man" and under the other arm he bore a pair of stays; upon his head a mock resemblance of the Cap of Liberty, and a halter around his neck. On the banner carried before him, was written "Behold a traitor! Who, for the base purposes of Envy, Interest and Ambition, Would have deluged this happy country in BLOOD" (cited in Williamson 1973, 160–1).

Paine then fled back to France. He was tried in absentia for libel. Since many of the supporters of the French were Scots or Irish and therefore in the popular mind both foreigners and also probably not really human – cartoons portraying the Irish and the Highland Scots as simian became common – popular lynch law applied to supporters of human rights was also a sort of chauvinist racism. It was carried overseas to Australia, with the thousands transported to a great jail between 1788 and 1820: those deemed *civiliter mortuum* (having no rights) by the common law. Supporters of ideas like Paine's who were left behind were also tried under the new acts for libel, and in some cases, sedition and treason. These acts were couched in terms that almost guaranteed conviction, whether it was believed that the words would have any practical effect or not. In addition, Lord Braxfield, judge in the Scottish case, believed that human rights doctrines should be extirpated and is reputed to have said: "Bring me the prisoners and I will find the law". His Lordship knew that the English constitution was the best in the world and "for the truth of this, gentlemen, I need only to appeal to your own feelings" (Proceedings against Thomas Muir, Howell 1816, vol 23, 25 AD 1793, 229–30).The bulk of the accused became known as the Scottish martyrs.

The English accused, more middle class and less committed to the idea of democratic nationalism than the Scots, were often acquitted; the prosecution's main concern in Paine's case was that his work and proselytising for the rights of man would undermine British love of country in favour of rights for all men. This concern was explicitly stated in some of the repressive acts cited above and the debate on their passage. "I impute then to this book, a deliberate design to eradicate from the minds of the people of this country that enthusiastic love which they have hitherto had for that constitution, and thereby to do the utmost work of mischief that any human being can do in this society" ("Trial of Thomas Paine", Howell 1816, vol 22, 33 George III AD 1792, 382). Paine's defence lawyer, Thomas Erskine, made clear that

what was at stake was simply the freedom of the press that had apparently been established in Britain since 1688, which, were he convicted, would end. Paine was convicted by a jury that did not even wish to hear all of the argument.

The offence of which the Scots were accused was more serious: sedition. It was also groundless and, as their own defence made clear, offended against even the vaunted tradition of the rights of Englishmen. What all those on trial were seeking in fact was reform, inspired by the French democratic example, of the British parliamentary system, which had become corrupt rule by hereditary owners who bought and sold their seats. Thomas Muir simply pleaded guilty to the offence of wishing to improve the British system – as heir to Blackstone and Locke before him to restore the "rights of the people" (see "Trial of Thomas Muir", 1816, vol 23, 25 AD 1793, 191). But he pointed out that this was no offence and that Pitt himself had launched his political career with a statement of similar objects. The kangaroo court, whose judges' patent bias was as obvious as their disregard for the rules of due process, was enraged because he had favourably compared the new French constitution and its democratic support with the regime in Britain, and had organised publications and meetings that promulgated demands for the rights of man. He denied pushing Paine's work but the indictment ran that he did "wickedly and feloniously advise and exhort others" to read Paine's *Rights of Man* "which book…is a most wicked and seditious publication, calculated to vilify the constitution of this country, to produce a spirit of insurrection among the people, and to stir them up to acts of outrage and opposition to the established government" (ibid., 119). It is true that there was a "Paisley" Declaration of Rights – in Europe, thousands of these documents appeared following the French example – but it would have been more than farcical had the charge not been sedition, and, as one judge said in another trial, if these seditious meetings had been secret they would have amounted to treason.

The real offence was twofold. The judges were furious that individuals should start thinking for themselves about rights. That was something – as Coke had said – that remained the preserve of the common law and its practitioners. In the trial of Maurice Margarot, another person guilty of wanting the rights of man, one judge said:

> Who are the men to whom the history of the world has consigned the highest honours? The Legislators…Men of unbounded talents and highest ability; – of extensive information… with weight and authority established over the minds of their countrymen…But nowa'days, it seems, all these things are changed. A boy, such as the witness Calder, now at the University, steps forward at once to controvert the practical and prudent wisdom of our ancestors, and to tell us what is the law, what is freedom, and what is the best form of preserving both. A set of the lowest and most ignorant of the people are assembled together, and advised and directed by Mr Margarot to subvert our present, and raise on its ruins a better form of government than that which our fathers established, and most foolishly, as it is now declared, left us an enviable and valuable inheritance (Proceedings against Maurice Margarot in Howell 1816, vol 23, 25 AD 1794, 697).

This lack of respect for inherited traditions was turned in argument into treachery and hatred of the British people. The accused were shown to call each other "citizen"; to assemble in a convention (thus they were French); and to seek out other national enemies of the British, in most cases through speaking to the United Irishmen. They "asserted" the rights of man and talked of sounding "tocsins". "What

is this tocsin. It is an instrument made use of by the people of France to assemble" (ibid., 625). When the feisty Margarot, a delegate from the London Corresponding Society who had organised three "Conventions" in Scotland, taxed the judges with being grand inquisitors who denied him a fair trial, they replied that he was a "stranger" and a "foreigner" who did not understand the traditions of which he spoke (ibid., 629). They then reminded the jury, who under the act were given ultimate power, that this foreigner was calling them a packed jury, an insult to Britons. Margarot was of French origin and the jury needed no encouragement in finding him guilty and sentencing him, like his fellow Muir, to transportation to Australia. This outcome illustrated the strength of national feeling against France.

The Scottish accused were not usually seeking their own national parliament, although the Act of Union of 1707 was recent in their memory, but their Irish interlocutors certainly were. The Protestant-led United Irishmen, with whom many of these Scots were in contact, and whose declaration of 1791 took much from Paine, had been equally enthusiastic about the declaration of Rights. Unlike the Scots, they had made contact with the French and demanded independence and a national parliament, organising for a rising. Wolfe Tone, their leader, who called Paine's book "the Koran of Belfast", became their agent in France. The Directorate, and then Napoleon, promised military help and despatched an army under Hoche that was prevented from landing by stormy weather. Despite this, the rising took place. It was brutally crushed by the British, for whom the Irish were traitors and exponents of the newfangled rights. Indeed, Burke had warned that the contagion would spread there quickly.

The history of the treatment of the Scots and Irish, in an endeavour to keep the nation pure and loyal by rejecting all the gains it had made in previous centuries, revealed another deleterious effect of nationalism. Englishmen had systematically sought to exterminate the Irish and the Scots in the sixteenth and seventeenth centuries, sometimes on the grounds that they were not human, and both peoples had deep memories of that treatment. This genocidal policy was again practiced in the panic caused by the fear of a French landing in 1796. The Irish "croppies", peasant rebels who shaved their heads in imitation of the French revolutionaries, were tortured and slaughtered by the British state and its supporters. The British invented the torture of pitch-capping for the shaved heads. In reply, in 1798 Irish rebels took no prisoners and the same treatment was meted out to captured soldiers. British troops (often the Hessians and Hanoverians used for dirty work in the American and French wars) butchered entire populations, notably in Wexford. When defeated, Tone chose to suicide rather than be executed.

British nationalists labelled universal rights no more than the national ideology of traditional enemies whom they hated, while adopting certain structural characteristics that also emerged in the Jacobin defence of the democratic nation and its citizens' rights, down to affirming that a nation was a great family. The repudiation of the French rights thus also created other mortal national enemies who in turn went back to their own national traditions rather than continue the fight for rights for all humans. In Ireland, the attempted unity of Protestant and Catholic on the basis of rights that were blind to religious difference fell apart after the 1798 rising. In its

place there grew up a renewed cult of traditions that went back to the O'Neills and Cuchulain and has become folklore in the song lyrics "I met old Napper Tandy", one of Tone's associates, who bewails that the British are "hanging men and women for the wearing of the green".

Yet a further significant effect of this treatment of rights is not immediately obvious. Certainly, in the 1790s, supporters of the declaration were massacred; certainly the British gave up all the national rights that had made them models even for the French. Nationalism ended British rights for "foreigners and strangers". But, British history insists that once the war was over, mainly in the 1820s, the repressive acts were repealed and the national standards of Britain were reinstated. This is correct in ways that we examine below; but told in the absence of a further history, it is bad faith.

The British had begun to practice ethnic cleansing during these years and continued to do so in the post-war years, for example in the highland clearances, which pushed great numbers of Scottish Catholic clansmen to emigrate. They also transported thousands of people they feared would support the rebels, many of whom were often guilty of minor offences of a criminal nature, and formed a "criminal class" in the wide sense. It is through such transported convicts that principles of the declaration arrived in Australia, Canada and New Zealand, with Margarot and others.

The policy of exporting the problem allowed the British regime to appear more satisfactory in its human rights for nationals in the nineteenth century than it really was. But in the places of exile, where the transported were banned from raising the issue of rights, the right-less rule of the 1790s continued. In such places, none of the British rights applied before the middle of the nineteenth century. They were great jails where the worst abuses known to the Scots and Irish in the 1790s continued unabated: not for nothing are there many theses comparing the convict system of Australia with the serfdom of Russia and the slavery of the US. That part of "the British realm" long remained ruled by torture and the lash, and a complete denial of all the rights attained in 1688, even for "free" men.

Exporting Rights at Bayonet Point

The national-democratic revolution led by the Jacobins had reduced universal rights to rights for French citizens only. The national, anti-democratic resistance of the English had led to the abolition of nearly all the rights for citizens that had been won between 1688 and 1789. But the most deleterious effect of human rights as a national ideology came when the French – having promised never to export their new principles – started to win the second war in 1796 and then, under Napoleon, conquered nearly all of Europe by 1812. Since being French meant adhering to the Declaration of the Rights of the Citizen – for they had been reduced to that in the Thermidorean declaration of 1795 – this meant the exportation and imposition of those rights at bayonet point. In many countries, this took a legal form, as declarations of rights were introduced in many conquered European states in 1797–9.

As is the case today, these new rights were at first welcomed by small intellectual circles, heirs to the Enlightenment, but the imposition of the new values by invading armies that also lived off the land and murdered opponents with terrifying frequency turned the vast majority of backward peasants into violent opponents of what they either did not understand or, justifiably, saw as hypocrisy. Killing thousands in the name of the principles in the declaration was as confusing and likely to anger then as it did recently in Iraq. Even the intellectuals, who had welcomed the arrival of the revolution at first, and were usually of Jacobin persuasion, became increasingly sceptical about French professions and the Thermidorean refusal to see the revolution as the national-democratic system they had awaited.

By 1800 these different oppositions had often coalesced into a new national unity that stressed the need to throw the French out. Sometimes, they were successful temporarily, as in the Kingdom of the Two Sicilies, or, for more complicated reasons, in Egypt. Then Napoleon, who had made himself the French national leader, then emperor in 1804, and knew that his popularity rested on his success in wars of conquest, returned with murderous intent and effect until the different national peoples again regrouped. The tide only began to turn against the French in Spain in 1808. By that time, human rights were a distant and seldom-mentioned notion, even in France. The national unity of their enemies was forged on the principles of common traditions to which the French innovations were alien or at best had to be radically adapted to national ethics, as they were by Mazzini, the theoretician of Italian nationalism in 1821–48. Spaniard, Italians, Germans, Dutch, as well as Englishmen, died in their thousands for their own traditions of rights. In sum, the effect of exporting the French principles with the French army created hostile nationalisms, that united across their difference, and eventually not only destroyed Napoleon but also did so explicitly to destroy universal rights and to reinstate the old regime. This meant a return to the notion of rights that existed before 1789. The Austro-Hungarian and Russian emperors' Holy Alliance certainly tried to return Europe to the pre-national and dynastic status quo ante 1789. In Naples, for example, Ferdinand was returned to power under a secret treaty of 1815 in which Austria undertook not to "allow changes that would not be in accord…with the ancient institutions of the monarchy" (cited in Romani 1950, 5). Only in England and the Netherlands had these been anything like those proposed in the declaration. So the defeat of France meant the end of not only universal but also citizen rights in many other countries of Europe.

Until they became identified as a French national ideology, the reception of rights had been more positive if not widespread. Not only had the French stated that they would never impose their new rights on other peoples, but until 1796 they were not really in a position to do so as they struggled to hold their borders against the hostile coalitions of enemies. In only two cases, tiny enclaves, those of Franchimont (16 September 1789) and Geneva (April-July 1793), made declarations of rights inspired by the French example of 1789. The Marquisate of Franchimont, with its 70,000 inhabitants, was part of the principality of Liège. Its document was closest to the 1789 declaration (see Fauré 1997, 144), with the twist that community standards and mores "from below", strongly democratic, replaced

the French individualism (ibid., 145, 147). The Geneva declaration of 1793 departed from the 1789 one by listing rights and duties in two columns in its first draft, indicating a communitarian understanding of "rights for us" that was removed from the second draft. The fundamental right to resistance on which democracy was posited in the Jacobin versions was watered down. Citizens were directed to obey their constitution (ibid., 151–2).

Next to make a declaration was the Netherlands whose traditions were so liberal, rivalling those of the British, that the French in 1789–90 included them among countries and nations fit for the rights of man. Indeed, they speculated that the Netherlands, together with the Swiss, British and Americans, might become a sort of international alliance based on the new principles where the Spaniards, Italians and Austrians were regarded as backward products of centuries of despotism, unable to rule themselves according to the new human rights (Wahnich 1997, 333ff). The French concern with the Netherlands went back to a proposal made in 1788 to the Stadholder by Mirabeau, but there had been local projects back to 1785 that foreshadowed the French innovations of 1789. Mirabeau's project of rights for Batavia had contained a similar preamble and contents to that of 1789 where rights preceded any agreement: men were born free and equal, and the people were sovereign. Government was to achieve their happiness. While we may discern the American example behind those words and in the clauses that protected property, the project also had a Rousseauian stamp, down to the right to assemble, make the laws and bear arms (Rials 1988, 519–20). The problem was how the Dutch would receive this overture. Traditional Dutch openness towards French dissidents had given way in the eighteenth century to a reasonable fear of French territorial aggrandisement. The wars of Louis XIV and his heirs against the Dutch, and the annexation of Dutch territory, were not quickly forgotten, nor were the Dutch mollified by projects such as that of Mirabeau, a known adventurer. His generous gesture was countervailed in the first French war, first by the annexation by 1793 of "Belgium" and then by the patent determination of the French to make war on Holland, allied with England since 1688, to seize control of the Amsterdam financial institutions. In the treaty of the Hague of May 1795, the victorious French left the conquered United Provinces free and independent, but took significant places that allowed France access to the sea, and exacted a promise that a government like the one in France would be established. An army of occupation remained in key areas.

The Dutch could not but feel that they were having the new rights regime imposed on them. However, they were a "republic" with the radical traditions we have discussed and whose political legal institutions started to change in 1796 in a French direction in striking similarity to the declaration of 1789 and even more so to that of 1793. The new constitution of 1798, eventually passed by referendum and adopted by a purged electoral body (as had been the case in France), was less democratic than that originally proposed. It was nevertheless radical; it began not with a declaration but with principles. These were, however, strong statements of natural and sacred rights of "social man". If citizens were perfectly free under laws equal for all and had duties to others in society – here we see replicated the 1795 Thermidor version of the declaration – then the object of government remained "the guarantee of

the person, life, honour and goods, and the culture of the mind and morals" (Jaume 1989, 317–9). Fauré tells us that the Dutch were not simply following an irritated French diktat since they adhered openly and explicitly to the 1793 declaration when refusing the more moderate French version proposed to them. Moreover, as in 1789, they made clear that their priorities were like those of 1789, not those of Thermidor or Napoleon. They insisted on a debate about preliminaries, especially whether the declaration should precede the constitution, with all the implications discussed above in the French case. A wide consultation took place. After a history in which Protestantism had advanced rights wielding the Bible in Grotius-like steps, unlike the experience of Catholic France, there was much concern about the status of religion and of rights being grounded in a supreme being. But what is capital is that the Dutch chose as the French had. Fauré cites one of the speakers who had proposed the articles on natural and on civil rights:

> The president put to the vote the question whether there should be first a declaration of natural freedom and then of civil freedom or a general definition of freedom. The majority decided for the first position and it was then decreed that the said article would be divided into two, in these terms: "Natural liberty is the faculty of Man to direct his own actions in such a way as not to harm others. Civil liberty is the faculty of a citizen of directing his own actions and himself, in such a way as not to contradict the law that is the expression of the will of society" (Fauré 1997, 177–8).

The Napoleonic Reaction

It was only when Napoleon began his successful conquest of Italy that the forcible imposition of human rights for local citizens in the newly "liberated" states became clear. As they were imposed by arms by foreigners who had been told that they should live off the land and pay for the conquest by extracting vast sums from the conquered people, only a few idealists among the latter remained long attached to their principles. For the vast backward peasant majority, they simply represented French hypocrisy. This view was justified after Thermidor and particularly when Napoleon had risen to power. There is a great deal of evidence that he and his supporters did not believe the Italians fit for democracy, much less for the rights of man (see Woolf 1973, 158–9; de Las Cases 1968, I, 396–7, 577–9, 705–42). But this is less important than the logic of the new nationalism of the French state and its soldiers: French interests came first and the local regimes installed by force of French arms were expected to act in French interests.

Napoleon's hard "law and order" quality made him increasingly a favourite of conservatives keen to turn back the clock to 1791 if not to 1788. Even where critical of some of his actions, their views, which led to the Romantic revival of the post-Napoleonic world, were often like those of Stendhal. The latter wrote in reply to Madame de Stael, whose liberalism and basic honesty was shocked by Napoleon, but whose triumph she and the Girondins had nevertheless fostered, that:

> On all sides France was on the point of disappearing into a bottomless abyss…If ever circumstances could prescribe the eternal right that all men have to the most unlimited freedom, general Bonaparte could say to all Frenchmen: "Through me you are still French,

> through me you are not under a Prussian judge or a Piedmontese governor; through me, you are not the slave of some irritated master who seeks revenge for his fear…Suffer me to be your Emperor"…Such were the main thoughts that went through the minds of Napoleon and his brother on the eve of the 18 Brumaire (9 November 1799); the rest related to the mode of its execution (Stendhal 2006, 45).

There could not be a clearer statement that Napoleon expressed the new national principle in warrior mode: "the army is the nation" (Johnson 2002, 120). His nation was territorially the same as Sieyès in 1789 but now it was built on the notion of all others as enemies, a traditional place to be defended. After 1797 it slid from the national-popular into the warrior model of nationalism. Napoleon openly admitted that his own survival depended on his continued military success. The emergent notion that those who deserved citizenship and therefore rights were men who would fight for the nation was exemplified in Sonthonax' (see Chap. 9 below) offer of citizenship and human rights only to those blacks who chose to fight for France and in defence of the great nation (see Dubois 2004, 155–7). After Napoleon, even in France, the notion that rights should go only to those who would fight for the nation became a universal principle. It had to presume the nation as an insuperable premise for rights. This posed logical problems for *universal* rights since the notion of merit or worthiness had entered the calculation. Napoleon, on "liberating" Italy and bringing human rights to its inhabitants could only respect as opponents those who fought him. If they did not then they had no right to rights. As his armies advanced, resistance to their depredations was met by martial law. So Napoleon, who exhorted his men to respect Italians and their traditions, also executed the enemy in great numbers. These war crimes were encouraged and became notorious during his Egyptian campaign, all of which reinforced the notion among the Italian and Egyptian peoples that universal human rights were no more than French ideology, a set of slogans that masked the real brutality of the French. When he crowned himself emperor in 1804, Napoleon established a dictatorship. His speech makes clear the nature of his nationalism.

> If this throne, to which Providence and the will of the people have called me, is precious in my eyes, it is for the sole reason that by it alone can the most precious rights of the French nation be preserved. Without strong and paternal government, France would have to fear a return of the evils from which she once suffered. Weakness in the executive power is the greatest calamity of nations. As soldier, or first Consul, I have but one purpose; as emperor, I have none other: the prosperity of France (Johnson 2002, 142).

Napoleon was a man of great contradictions, some of which demand emphasis in a book about universal human rights. As we have suggested, he was from a backward Corsican society whose values were like those of the most reactionary of the French petty lords, and he shared their view of mankind based on a peasantry he knew and scorned. Strongly committed to family, he also was a staunch believer in law and order, and had scant respect for the Rousseauian premises of the declaration and its abstractions. Men were evil, could only be ruled by an iron fist and departure from the law should be forbidden. Napoleon was thus a "realist", contemptuous of humankind, which he expressly believed had no principles and he could buy with honours and rewards. That view was shared by French peasants and it reinforced their attitudes when they became the backbone of his new "great army". While that

army was triumphant, they loved him (their "little corporal") as they had loved their feudal robber barons of old, and Napoleon definitely fitted that category, murdering and stealing for family and friends, astutely continuing the political marriage system, and placing his often incompetent family on thrones throughout Europe after 1804 (on the corruption of his court, see Woloch 2001, 142ff).

But he was not insensible to cultural and ethnic difference; indeed, having been the butt of French discrimination himself, and proud of his embellished Italian noble origins, he was very sensitive to cultural difference. We see this in his strong support for the new French codes of law, which, while mainly Lockean in their early drafts, were radically altered at his insistence when they proposed equal treatment for women and a right to divorce. They were imposed throughout the empire (see Cambacérès on the model Code Napoleon in Fenet, 1968, I, 11ff; Weill and Terré 1979, 107, fn2, on the states that followed it and pp. 96–7 for how Napoleon packed the decision making bodies). The family and the husband's rights were privileged over those of individual women on the grounds that the average French (peasant) would not accept a change to their age-old social hierarchies (Johnson 2002, 115–16). Before the abortive conquest of Egypt (1798), which he also pillaged, he warned his troops that they were going to a Mahommedan country and that they should respect the customs and beliefs of those people. This was a marked departure from the French revolutionary commitment to an abstract individual, Man, seen as having rights regardless of cultural or social context. We would expect that Napoleon would have deferred more to the conquered peoples' beliefs and hopes. This was belied in his Italian campaign when his hard-headed realism meant that nationalism trumped all concern about rights.

Italy and Rights

Napoleon's Italian campaign (1796–7) began badly but later became a triumph that made his career. The French nation conquered Italy. Until 1802 he claimed to be bringing the rights in the declaration to the liberated peoples of Italy. Upon the "liberation" of northern and then southern Italy, Napoleon established new republics: the Cispadine, later the Cisalpine, then the Ligurian and finally the Parthenopean. Each was given a constitution, and rights like those of the 1795 declaration were declared in the first two. In some cases, since the local supporters of the declaration were Jacobin in their views, the new Italian statements of rights even drifted back towards those of the Mountain, especially in the articles on economic and social rights. Those of the Cispadine and Cisalpine republics merely replicated that of Thermidor, but in Liguria it stated that the people were sovereign, that the end of government was to secure men in the exercise of their rights and that the end of society was the common happiness. A whole section dealt with the rights of men in society and duties of society like that of 1795. Yet unlike that of Thermidor with its emphasis on private property, this declaration insisted that the indigent in society had a right to subsistence and to education.

Consistent with the end of universal claims in France, none discussed "man", only men in society (Jaume 1989, 314–5; Fauré 1997, 152–63). Rights were for citizens not all humans.

Rights and Cultural Difference

The short-lived Italian experience was very important for rights. The French had recognised that even large numbers of their fellow countrymen would not support universal rights. Napoleon was even more sensitive to the fact of cultural difference than, say, Robespierre. The choice of both Napoleon and Robespierre was to impose them while simultaneously declaring that the people on whom they were imposed were hostile, were not ready for, or were unworthy of human rights. We can see the roots of this attitude in the notion, found in Condorcet and even Toussaint and other Haitians (see Chap. 9), that despotism had so long degraded the oppressed that they were unable to live up to the new standards of respect for others. Olympe de Gouges, a strong supporter of rights for blacks as well as the spokespeople for the rights of women, also warned blacks not to be so vengeful if they wanted rights.

This belief that Spaniards, Austrians and Italians, as well as all Muslims, had lived so long under oppression that their people were not worthy of or ready to accept rights for all humans can be traced back even further, to Montesquieu. The belief that there was a hierarchy of cultures and that some had to advance to catch up with the French was widely held among progressives. The danger was that any "reasonable" claim by critics and opponents would be dismissed by the dominant, that is the more powerful, discourse, in this case the French. Criticism of their view of rights and the language in which they expressed it would be dismissed as "unreasonable". In Napoleon's case, given his dim view of humanity, and explicit rejection of Rousseau for Voltaire (Johnson 2002, 126), it was a response that amounted to a refusal to learn from resistance to the new rights or to persuade through education (except in France), in favour of a manipulative and repressive solution. He solved the problem that popular resistance posed for universal human rights by compromising with local traditions and age-old prejudices, or simply caving in to them when that was advisable.

The first way this was expressed was through the recognition of religion and its claim to monopoly over rights and justice. But where in Robespierre's case, and that of many other revolutionaries, this was a nod towards a notion of divine justice and thus returned power to the individual on the principle enunciated by Las Casas and Antigone, for Napoleon the recognition of religion was a recognition of the church as the authority to which individuals were in submission. In 1800 he stated:

> How can a state be well governed without the aid of religion? Society cannot exist save with inequality of fortune, and inequality of fortune cannot be supported without religion. When a man dies of hunger by the side of another who is gorged, he cannot accept that disparity without some authority that shall say to him: "God has decreed it thus: there must be rich and there must be poor in the world; but in the hereafter, and for all eternity, it will be the other way about" (Johnson 2002, 110; see also Woolf 1973, 267).

The second way was to discard the principle completely. Declarations of rights disappeared in Italy following the introduction of a new French constitution that paved the way to Napoleon's imperial power (the constitution of 1799 is reproduced in Stewart 1963, 769–9). It contains no declaration of rights. Having seized power on 9 November 1799 and made himself emperor 4 years later, he became their worst enemy in the name of the law, the new *Code Napoleon*, whose content he personally oversaw and which was promulgated in 1804.

Since Napoleon was ready to change his views as circumstances required, his approach to local difference was manipulative and unprincipled. It is important to start by acknowledging that Italian supporters of rights, especially those of Jacobin persuasion and therefore "democratic" in tendency, often shared the official French assessment that the population was unready for such ideas because it had been hegemonised in a despotism. Typical in this regard was Cesare Beccaria (1738–94) who, by the nineteenth century, would be recognised as the greatest reformer in the criminal law of the eighteenth century (for his views see Beccaria n.d., 3–215). Their descriptions of the peasantry and its attitudes and how much they clashed with those proposed in the declaration of 1789 correspond with those we have suggested in earlier chapters must remain common in a world of "feudal" and subsistence agriculture. The more thoughtful, including Beccaria himself, inferred that it would require a long hegemonic education of the mass to convert them to the notion that rights should be for all humans – indeed, given the backward nature of Italian states, that such a notion as rights exist at all for the poor peasant.

Bonaparte was astute in his estimation of the church's moral sway over Italian peasants. His instrumental use of rights, before he gave them up completely and started to hunt down all their supporters throughout Europe, reinforced ecclesiastical authority and that of nationalism hostile to universal rights. Two of the clergy, Pietro Tamburrini and Nicola Spedalieri, wrote long books about rights. They came from opposing Jansenist and anti-Jansenist factions, but both argued that all rights emanate from on high, whether from God or the king and demanded strict obedience to the church (see Salvatorelli 1975, 102–10). Thus Napoleon's nationalism led to a reinforcement of the views denounced in the declaration and indirectly to statements that resembled those of Burke and de Maistre, although there is no evidence that the two Italian priests had used either.

The Parthenopean Republic and Rights

The reaction in 1799 of the Neapolitans, who had long lived under one of the most poverty-stricken and backward despotisms on the peninsula, was not what the French wanted. The local supporters of the declaration were "Jacobins". They had moved to that potentially democratic position after being disappointed in hopes of enlightening the despots. A number of projects for the reform of agriculture, the end of feudalism and the law, had led to little change in practice. As the queen of the Two Sicilies was Marie-Antoinette's sister and, like her, controlled her

own buffoonish husband, the court was fiercely hostile to the revolution, although too pusillanimous not to bargain with Napoleon. The progressives also faced great popular hostility to the declaration and the French by a Neapolitan populace which, despite its suffering and oppression, remained fiercely loyal to monarch and church and to defending its cultural traditions. In 1799, the French under General Championnet fought their way into the city against fierce popular resistance while most of the intellectual Jacobins hid from blood-thirsty street people. True to the Napoleonic line, Championnet both handed over government to the minority Jacobins and applied the policy of respecting local traditions. This recognition of cultural difference paid off when he attended the feast where, according to tradition, the blood of Saint Januarius, patron saint of Naples, would liquefy if the portents were good. The locals expected that Saint Januarius would disapprove of the godless French conquest that had seen the court flee with its British allies to Sicily. But the blood liquefied and the populace became Jacobin overnight. The shaven-headed elite thus came to power at a moment of fickle popular support (see generally Croce 1970, 195–209).

It immediately set about drawing up a declaration and constitution, assuming that the principles were so evidently what the people wanted that it was merely a matter of promulgating them through the new *Il Monitore napoletano*, whose editor was the minor noblewoman, Eleanora Fonseca de Pimentel. The document was not terribly radical but it was Jacobin; it declared that the object of the constitution was the rights of man, of the citizen and the people. The rights were placed at the head of the projected constitution and stated that all men had equal rights and should be equally treated under the law. All men had a right to life and to improving all their faculties. Their freedom was limited only by the obligation that others also be allowed the same freedom "and that an individual did not disorganise the political body to which he belongs." Then followed the rights to freedom of conscience, expression, property. The Jacobin right to individual resistance was limited to "resistance against perpetual and hereditary authority, which are always tyrannies". All men had the right to live under a rule of law and to elect and to be elected to public office. Summed up, the Jacobinism in the project clearly privileged the sovereign people over the individual and was reduced to this: "The fundamental right of the people is to establish a free constitution, that is, to prescribe to itself the rules under which it would live as a political body." It would make the laws under which it would live either directly or through representatives. There followed a long list of duties, starting with that of respecting the rights of others but including the provision of economic, social and educational help to others, in particular to the needy.

The project summed up its essentially communitarian thrust, which privileged rights for citizens in the words: "The general will, or the law, must direct individual wills. All citizens must obey the laws that emanate form the general will, or form legitimate representatives of the people" (the entire document is in Fauré 1997, 283–6). While patently Jacobin and scarcely what the French wanted, it did not emphasise universal rights but instead focussed on the rights *and duties* of the citizens.

The shortcomings of such declarations have already been stressed. What was important for *universal* rights was the lesson learned about how to circumvent cultural difference (having admitted its substance) and how to use it to convert hostile populations to such principles. Despite initial resistance to the notion that all is clear and the benefit of rights obvious to those who are denied them, the Neapolitan supporters saw that this was not true. They also realised that they would have to translate the values underlying the new principles into the popular language, to find roots in the national history so that they seemed endogenous and not merely imposed by the hated French (see *Il Monitore*, 9 February1799 in Battaglini 1974). In Naples this was particularly important as there, the urban street, the largest mob in Europe, constituted a "nation" so separate in its history and culture from the enlightened intellectual class that it even spoke its own language, incomprehensible to the innovating supporters of the declaration (Cuoco 1998, 65, 123–4, 132, chXIX).

Where Napoleon used the clergy to transmit his centralised authoritarianism and law and order regime, the Neapolitans used the progressive clergy (of whom there were many in an age of Enlightenment), to transmit downwards the new views about rights. More significant yet, they recruited and raised to positions of importance individuals from the street on whom they relied to translate the notion of rights into traditional terms and language, above all into the "street" style (see Scafoglio 1981; Battaglini 2003, 32, 52, chXXIII). Some of the speeches and other documents of these men have survived. They reveal how abstract rights were transformed into concepts about the treatment of all humans rooted in local traditions and comprehensible to at least some locals. It was an arduous task with many contradictions as the notion of universal rights made a limping way forward.

Hegemony and Universal Human Rights

The problem with the initial policy was, as Cuoco, one of the "patriots", as they were henceforth known, observed:

> Like the French, monarchs thought that the revolution was a matter of opinions, of reason, and persecuted it: they were ignorant of the causes of the French revolution and feared the effects for the same reason for which they should not have been afraid of them. When and where has reason had a following? The more abstract the ideas of reform, the more remote from the senses and fantasy, the less they can be within reach of the people. If the King of Naples had known his Kingdom, he would have seen that the political state of the Neapolitan nation was completely different from the French, so that he had not to fear from the people of Naples what had been done by the French people (Cuoco 1998, 258–9).

Mutatis mutandis, the new provisional government initially had the same view of the force of reason, ignoring Melchiorre Gioia's perceptive words: "It is not possible in a moment to get rid of the prejudices of a people that have been respected for centuries" (see Salvatorelli 1975, 131). As a group, the Neapolitan universalists had been "formed on foreign models" completely removed from those of the bulk of the nation. In Cuoco's view they should have gone into the *piazza* rather than aped the

system of Jacobin clubs. "Our revolution was a passive revolution in which the only way to succeed was to win over the opinions of the people. But the views of our patriots and that of the populace were not the same: they had different ideas; different customs, and even two different languages" (Cuoco 1998, 325–6).

The patriots promulgated the Rights of Man and made incessant reference to them, especially through the new *Monitore napoletano*,(all further references to Battaglini 1974) of which Eleanora had been made editor. Works like Mably's *Rights of Man* were published. But they opposed these principles to the mores of the *lazzaroni*. When, in February, patriots were massacred in many provincial towns, *Il Monitore* admonished that this was in blatant contrast with the actions of Masaniello, who had led a popular rising in 1647. Then Naples had taken the lead by rising against despotism; shouting for a democratic republic and through reasoned instinct, seeking the rights of man. "Today the nobles proclaim equality and democracy and the populace scorns it" (9/3/1799). But, as well as being heirs to the reason of the Enlightenment through Mario Pagano, Antonio Genovesi and Gaetano Filangieri (Pagano was a member of the provisional government), the patriots were also heirs to the strongly nationalist and localist tradition going back to Giambattista Vico and Machiavelli, both of whom stressed the need for leaders to appeal to fantasy and the sensibility of the populace.

In reply to Cuoco's criticism of their initial insensitivity to the popular culture, we can say that some patriots learnt quickly (see *Il Monitore*, 9/5/1799). Far from simply imposing their ideas on the plebs, who feared and hated them, they started a programme of translating these novelties into the local idiom. Pimentel was the moving force. She noted quickly the power of the existing attachment to place and traditions. In the third number of *Il Monitore* (9/2/1799) she wrote:

> the big and possibly greatest line of separation between us and the rest of the people is that we have no common language. If we seek the reasons for our most recent misfortunes, we see that they particularly derive from this separation. It is the secret of every tyranny, and the more so of our own, to foment it; our secret must be that of deliberately destroying it. Until, then, the plebs, through the establishing of a national education, is able to think like a people, the people must bend down to the plebs. So every good citizen who, through sharing in the linguistic patrimony can easily speak and involve himself with it (the plebs), should conduct work that is not only useful but a duty.

That admonition left open the question of what it was to "speak" or "commune" through a shared language where one side had had to learn it.

Il Monitore noted that many citizens had already been publishing propaganda directed to the populace. But, Pimentel added, it would useful if it took into account its popular language and culture. She suggested that to existing religious missions should be added civic missions and that progressive ecclesiastics should man them because they had "great experience of popular persuasive methods." The *lazzaroni* had learnt over centuries that it was better to stick with the existing powers (see generally the proverbs in Zazzera 1996, 52 and passim), "the delinquent who is ignorant is not a guilty person, so justice requires us to instruct the plebs before condemning it, and not a moment should be lost in this instruction" (*Il Monitore* 2/2/1799). So one of the main tasks that this small bridgehead of

champions of human rights very early set itself within the hostile culture of superstitious, street-wise and class-conscious plebs, was to translate its principles into the local idiom. The problem was that they had neither the necessary skills nor even speak the local language.

Eccelesiastics became very important to the work of translation. We note in particular the Franciscans Giuseppe Belloni and Pisticci and Father Marcello Scotti. who brought about a fruitful reconciliation of rights and religion. Since 1780 they had been producing catechisms in the vernacular. Priests were the organic intellectuals of that era and closest to the people. Their task was to put together notions that the populace were familiar with in the vernacular, itself riddled with superstitious and credulous idioms, with the new ideas about rights (see for example, Colletta 1967, I, 321–2). The nature of this translation was double: (1) rights were to be shown compatible with Christianity and (2) the discourse of abstract reason was to be shifted to that of the senses, indeed, of religious feeling (see Scafoglio 1981, 8–10; see also *Il Monitore Napoletano*, 16 April 1799). This was already different from the original proposal of *Il Monitore* (5/3/1799*)* that a bulletin about government proceedings be printed in the vernacular and read out in public places. Such a double translation was intended to start truly counter-hegemonic work involving the use of street theatre and songs and puppets to spread the new values among the plebs (ibid., 19/2/1799). Pimentel understood that this shifted the activity from instruction, which presumed teachers coming from above and transmitting scientific truths; to education, which involved rather an insertion of values coming "from below" into new vessels.

Apart from the clerics, to whose work we will return, the main protagonist of this shift from instruction to education was Luigi Serio, who in 1780 had replied to a book by Abbé Galiani on the Neapolitan dialect. Galiani had suggested that the dialect might by "cleaned up" and raised to become the real language of the two Sicilies. Thus he accorded a passive role to the recipients of any rights regime (see Scafoglio and Troiano 1995). Lying behind his thesis was his fear and contempt of the *lazzaroni* expressed in his famous *Dialogue sur le commerce des bleds de 1770*, itself a book provoked by his observation of the famine of 1764. He wrote that what interested him was the "last of men", porters and sailors, the rejects of town and country;

> those men who…drink most and reason least…they occupy the wharves and halls, offering their labour for pitiful gain…it is important to keep them occupied and content.. since they are the sole authors of all risings. They have their throats as their offensive weapon…They are much to be feared…They must be employed, must earn, must be dispersed and from those…ever thirsty throats, they must be made to drink and shout: "Long live the King" (cited in Scafoglio and Troiano 1995, 16–17).

In sum, Galiani preached language policy as hegemony of state.

In reply, Serio pointed out that Galiani did not really know the language of the *lazzaroni*, nor the experience and values it embodied. Galiani thought of the language aped by the middle class, while the true people were "the carpenter, the chair maker, the fishmonger, the butcher, the rag merchant, the butcher and the *lazzaroni*." He wrote his rebuttal, *Il Vernacchio*, in their dialect because it was the living language and not literature that mattered. The essential characteristic of the people

was its joking quality, the buffoonery that allowed it to get by: "In Naples we are all by nature *Pulcinellas.*" Children dressed as *Pulcinella*. To calm a child a servant would pretend to trip to make everyone laugh uproariously. Everybody prefaced news with "now I will make you laugh."

> A tall man is called Big Mosquito, Partridge, Harvest Ladder or "Get off your horse". If he is small and thin he becomes Stick, Giant Fart, String; Little Shit, Dwarf; Will o' the wisp… So, if you think about it, we Neapolitans lean more towards the buffoon than the poet (Scafoglio and Troiano, eds, 1995, 63).

Throughout his book, Serio addressed the 5-ft Galiani as "little shit".

Given his ultra-democratic opinions, Serio was one of those "patriots" who went to the people in 1799, as required by Pimentel. He translated the rights of man into dialect and died fighting the reactionary army at the gates of Naples (Scafoglio 1981, 14). The members of the *Società filantropici* also went. But most important when it came to translating the principles of 1789 into dialect were the few individuals who were *lazzari* themselves. They were able to change those principles into the traditional *spieghe* (explanations), *ngiurie* (insults) and *parlate* (discussions). The most famous were Michele Marino, known as O pazzo (the Madman) Sergio Fasano, Domenico san Giacomo, Antonio Avella (*U Pagliuchella*), Father Michelangelo Cicconi, and Francesco Antonio Gualzetti. The last edited a newspaper in dialect that explained the rights of man and was reported in *Il Monitore* (25/5/1799) in these terms:

> to the news-sheet [Gualzetti] attaches another, in which he elaborates in dialect the principles of society, the rights and duties of man and the citizen, in sum, all the principles of society and the fundamental maxims of democracy. He couples in exemplary manner both sacred and profane erudition and, starting from Adam, goes through the patriarchal era to reach the establishment of the king of Judah, taking from the sacred texts all the passages of use to show the kingdom as oppressive and put it in a just perspective, that of its hatefulness.

Gualzetti emphasised rights not duties.

Some of the dialectical material and speeches have survived to be collected by Scafoglio and others. They read in similar vein to Gualzetti' s *Discurze populare*. In one, Gualzetti, after a long preamble setting the scene, tells of meeting pro-British *lazzaroni* and disagreeing with them about this and that, and continues to argue that what mattered was not whether the British were "good blokes" but whether to support justice and truth. His interlocutors ask him "what truth"? Gualzetti asks them, in reply, why they thought it just to attack the French when all they wanted was to rule themselves and do without a king who had power but no concern for people. Ferdinand had handed everything over to Lord Acton, who like his accomplices, was only interested in lining his pockets. Ministers never read anything and when they sat in judgment, did not consider what was relevant. As his friends knew, only the rich were ever acquitted and the poor were victims of the (mis)rule of law. Should such matters not find some solution? That was not ever going to come from the regime that the English were seeking to re-establish. They used simple people (like you) as soldiers. Don't you want to know why you are going to your deaths?

> I know what your reply will be and I tell you that the King had no authority to start the war. Because it is us who fight those wars with our blood. And if we do anything we have a right to know why we are doing it…and if we had known that the war he wanted with the

> French was a war about saving face (*puntiglio*) and not for our benefit, we would not have supported it so much and so many poor families would not have lost either a brother, a father or a husband. And His Majesty would not have embroiled the whole nation to revenge the King of France. What does the removal of the King of France mean to us? The real reason was that they were his relatives and "got the shits" (no poco de caccarella), because they knew we had no rights and they were afraid it would happen to them what happened in Paul, Romans, II, 6 who said "God will make those who surrender to injustice feel the weight of his anger and will burden with pain and affliction the soul of any person who does evil."

Then, using a wellerism, common in Neapolitan dialect, Gualzetti said that war was no joke and he wanted it out of the world and that world governed by universal law. He ended by promising to talk more about it all another time in the same place when he would speak publicly about such matters and write down in dialect his replies to their questions although he had never done this before. He told them he would give the talks the title *Discurze populare*, starting them with an Our Father, unlike the other pamphlets, which never did so. He would talk about what came to his mind because he wanted the truth out and they should correct him if he got something wrong. Three months had gone by and still nothing had been done to implement the good policies of the provisional government. He ended by saying that once their stomachs were full, they would all feel better. He bid them farewell and brotherhood. He asked their forgiveness if he had joked a little (see Scafoglio 1981, 135–9).

In another pamphlet, the following argument was made to explain how monarchy had emerged. Reason distinguished men from animals and God had given us reason to distinguish good from evil through judgment. God gave Adam free will, saying that if he did good he would have good and if evil, then evil. Without our natural reason we would be like dogs or pigs. With Eve came all our troubles. So how could the queen do anything but evil? She has been another Eve for us with this difference, that she had loosed a ruinous war against the population of the world. After her, everyone had had to look out for themselves, starting with heads of families. Each doing what they did best and exchanging it in the market. But there were some scoundrels who would not work, who became vagabonds, and disobeyed their fathers, becoming beggars and thieves. This upset good people so much that some of the fathers armed themselves, united and built cities. The rich then oppressed the poor and fights took place. Again the fathers united to set up armed authority and laws under the wisest. For 1,760 years such government lasted without kings until, according to Scripture, the first king Nimerod, took power. He was a hunter, a violent man, who treated humans like animals. The fathers had became weak and cowardly and set bad examples. Men are jealous and ambitious. War became common. There was no justice in such a world and even the Hebrews asked Samuel to find a king because his sons were so bent. God told them that in doing so they were rejecting Him. So Ferdinand IV had taken other people's sons to make war and used thugs to raise taxes. As Hosea said they rose up against kings. He promised to continue the lesson the next time (Scafoglio 1981, 140–4).

Even more popular than Gualzetti was Michele O Pazzo whose harangues always moved from particular concerns to general principles, omitting anything that was

not part of popular culture. He stated in one that we all knew heat from cold but good men also knew why the seasons changed. When O Pazzo was asked what a citizen was he replied:

> I don't know but it must be good because our new leaders have taken it on board. Everyone becomes a citizen, the signori are no longer your excellency and we are no longer *lazzari*. In sum, from now on we are all equal…I can be a *lazzaro* and a colonel [he had been made Colonel by the provisional government]. In the past the gentlemen were colonels already in their mothers' bellies, I am because of equality. Then some were born big, now you can become big (Scafoglio 1981, 156).

Michele asked to speak when Mario Pagano, the head of the provisional government, faced an angry crowd protesting about food shortages, because, he said, Pagano

> did not understand how to talk to the likes of us." The crowd started cheering. "'I am Michele the *lazzaro* nicknamed the 'mad one' although I am smarter than the lot of you or why would you have chosen me as your leader? I am your head…and you should listen to my advice.' The crowd, joking, fell silent: 'Listen to Michele', came from all sides. 'Don Mario spoke well but you don't understand him because he is a scholar and does not speak our matters and you, Antonio, yell more than everyone.' Antonio, known as a famous bag snatcher, disappears to the laughter of the crowd. 'Courage, brothers, the hard times will come to an end and in time we will see everyone well-dressed and in school. Long live the Republic. Long live equality. Long live our Representatives. We don't have a Republic yet, it is being made and when it is we idiots we enjoy its benefits'.
>
> Nor could he, Pagano, communicate with such thickheads, because Ferdinand never set up schools where poor people could learn things. "Don Mario is a gentleman. Long Live Don Mario, Long live our representatives." The crowd took up his cry and he quickly continued. "You ask for bread as if don Mario were a baker and had shut up his shop in times of shortage. It's true: bread is dear but who is making it dear? The tyrant who destroys our ships bringing grain from the Puglia and Barberia. What should we do in exchange? Hate him, everyone should make war, take up a knife, we should die rather than again see him King over us. But yelling won't get you bread." Turning to the most vociferous, he said: "If you, Domenico, want to look for something, go to the Mole and work. But you prefer to lie around in the sun twenty-four hours in every twelve and then you complain that the sun does not get up early enough." The crowd laughs and he slinks away. "Today's government is not republican, [but] we are making a republican government and when it is made, we idiots will know what it, through the benefits and the pain it brings us…Those in a hurry sow the place with radishes and eat roots; he who wants to eat bread sows grains and waits a year" (cited in Scafoglio 1981, 156–7).

Most of these words were spoken or read to an illiterate population used to listening to street story-tellers. They were laced with references to the common sense of the street; the corruption of Acton and the vicious life of the queen. But what is most striking for a history of rights is how religious values and precepts were adduced in a deeply religious society to ground the assertions of rights. Scripture became the source for advancing the new values. This was partly necessary because that was how the voice "from below" talked of such matters, but it was also policy. The patriots learned that rights could create unity by appeals that grounded them in a just life for all, promised by most religions for millennia. The catechisms that came from the clergy emphasised that rights were in conformity with the Gospel, that Jesus wanted equality and democracy (*Il Monitore* 2/4/1799). Duties to all men went with rights.

In May, Pimentel wrote, reminding the readers how the French had won over the people by going to the feast of Saint Januarius: "The King used to go to San Gennaro, it seems to me that it would be not only useful but necessary, if the Government kept up the same style. Let's win the trust of the people if we wish to instruct them" (ibid). The government decided that it would stupid to refuse the traditional lighting of the catafalque at a religious feast (see also Battaglini 2003, 44ff). This policy was accompanied by a determination to include the populace in religious and other festivities that had in the past been reserved for the nobility (*Il Monitore*, 9/5/99). The procession of Corpus Cristi was about to take place. Pimentel urged that each municipality should send people to the procession chosen at random from all trades, from the little shops, family heads, the respected locals "so that the people can feel it is more appreciated than it was. It will begin to get a taste for elections, the honour of being elected and accustomed to respect for those who are older and keep better standards *(migliori costumi*). Let us attract to us the most honest of the People, the ones who have influence over it, so that proprietors even if they own only a shop or stall are milder and more interested in public peace, and once attracted to us, will stay; thus the people will slowly become accustomed to primary assemblies, that is, to the August function of citizens" (ibid).

We should remember that these efforts to win the people by having them participate in the new democratic order took place while the government had to cope with the day-to-day management of the state and fighting a war for which the French expected them to pay. Most of their attention was directed to such daily minutiae. Like their fellows in the north, they became more and more disillusioned with the French, but the real problem in winning the populace was – as all the speeches indicated – the near-famine conditions of the city of Naples. For the *lazzaroni*, salvation was eating every day in the new regime of "heaven on earth" that was promised. Instead, they got a food blockade and a promise of conscription (Scafoglio 1981, 126–30). The draft constitution with its list of rights and duties of man was never promulgated (see Pagano in Fauré 1997, 283–6).

The government knew that it could not continue without French support. It had to raise the 25,000 ducats that the army demanded by raising taxes, as the state coffers were empty. The populace could not pay. It wanted the abolition of feudalism and taxes on bread and fish. Finally, after considerable debate, the government abolished the feuds. But it also introduced ill-advised taxes on bread and fish and only abolished them when an angry mob had to be won back to the regime. In sum, the government could not provide the necessary economic and social reforms quickly enough, especially while honouring the right to property. Chants against the monarchy could not offset such failures. As every month went by more monies had to be directed to fighting a losing war. Thus, while the *lazzari* were empowered with speech, and the unelected government hurriedly passed laws to match those in France, it still seemed their enemy. The mob remained anarchic. There are several reports of rowdy meetings critical of the government's decisions. The government had promoted "vast assemblies of the citizens" and set up patriotic halls for the expression of popular views as well as clubs like those in Paris. On one celebrated occasion the *lazzari* and petty bourgeoisie assembled to complain about corruption and nepotism, causing so

much disturbance that the provisional government's presiding officer established a "secret committee" to discuss the bone of contention.

> This disorder made the need felt to nominate inspectors of the hall and to have to have a greater number of sentries to police the few troublemakers and the malevolent who do not lack numbers will be able to disturb meetings so as to avoid the unprincipled outcome of restricting and limiting the number of listeners. The more restricted the numbers, the less public the sittings, the more the freedom and dignity of the people is derogated from (*Il Monitore,* 5/2/1799; 23/4/1799; M. Battaglini 2003, 108–9; 225).

The complainants simply by-passed the government and went to the French with their complaints. The government was obliged to set up a committee to vet employees because of the endless, ridiculously exaggerated allegations that were part of popular culture in Naples (Cuoco 1998: 352–354; Colletta 1967, 74–5). Perhaps Cuoco went too far when he wrote that "they wanted to show the people that the way to employment was now open and on the level, but they could not make them believe that the only path was merit and virtue. They wanted to raise people out of nothing. We saw Pagliuchella made a municipal councillor of Naples and Michele u Pazzu head of Brigade. Thus Caligula made his horse a Consul. This made the job vile. The people laughed at the lack of sense instead of applauding" (Cuoco 1998, 367–8). But Cuoco had a point, a culture given to mocking everything, even its king and its church, would do the same with its own leaders. Indeed, the chant of the crowd when Michele U Pazzu was executed on the return of Ferdinand was mocking: "Michele the Madman you ate pizza; you gave me none. Po po po. You've got your head on a lamp-post now!"

"Going to the people" had come too late. The war against the monarchy was being lost in Calabria. The French attributed the success to "gold" and reduced their exactions. Led by Cardinal Ruffo, and preached to by a reactionary clergy, an army of *sanfedisti* (holy faithful), composed in great part of thousands of jailbirds and brigands who had been promised amnesty, invaded from Sicily and now drew close to Naples. The insurgency they encouraged spread like wildfire. Every day, atrocities committed by the bandits loosed at Cardinal Ruffo's command were reported in Naples. He had unleashed a savage class and cultural war by telling the plebs that the patriots intended to kill all of them for their attachment to their religion and traditions (Colletta 1967, 95; Croce 1965, 79–80). Even Ruffo claimed to be horrified at the excesses committed against provincial patriots as his troops marched towards Naples. "They have killed 50 in front of me and…when they saw I was horrified by the spectacle, consoled me by saying that the wounded were the enemies of the human race, that the People knew who they were. I hope this is true" (Croce 1949, 182). There was talk of blood being drunk. The patriots of Naples knew that the gallantry of their "army" could not save them and regrettably, established a secret police to hunt down traitors. They started to condemn "plotters" against the government to death. The most infamous of these cases was the execution of Luisa Sanfelice and her family (see Croce 1966).

When late in 1799 the French, some a little shamefacedly, withdrew their army to face threats in the north, the Parthenopean Republic's days were numbered. The *lazzari* rose to the chant of *chi ha pane e vinu, ha da esser giaccubinu* and for

several days went on a rampage of looting, rape, murder and even cannibalism. Woe betide any young intellectual who wore his hair short and un-powdered, Jacobin style. "Unfortunately for us, we had cut our hair short following the fashion…how could we escape the fury of the populace who were massacring everyone with short hair believing them to be Jacobins" (de Lorenzo 1999, 43). Like the bespectacled victims of Pol Pot in more recent times, the best they could hope for was quick death. The records are shocking: "Fiani…after dying was reduced to bits by the mob and almost entirely roasted and eaten…his liver was eaten whole in the market by the cowardly plebian *sanfedisti*. A *lazzarone* who refused to eat was slaughered" (Fasulo 1999, 47; see generally de Lorenzo 1999).

The republican leaders who had not fled and had survived the massacres were duly arrested. Despite undertakings by Ruffo and Lord Nelson that nothing would happen to them, the queen had already decided that they all should die and their property be confiscated (her letter to this effect is in Macciocchi 1993: 277, fn3). She exhorted Nelson to treat Naples "like a rebel city in Ireland", whereupon Nelson disgraced his own memory by executing Admiral Caracciolo, head of the Neapolitan navy, on board his ship, possibly because Lady Hamilton, Nelson's lover, had once had her favours refused by him. She was a close friend and possibly the lover of the queen as well. So the revenge and the purge that the queen called for took place.

A hanging judge was found. He tried to persuade the patriot leaders to turn on each other or renounce their commitment to the rights of man and was enraged by the firmness of their refusal. One hundred and 22 were condemned by the state tribunal to be hanged or beheaded, among them, De Pimentel who went serenely to the scaffold after taking her morning coffee. The crowd reviled her, shrieking "whore". Her friend Serra is reported to have said bitterly: "I always worked for their good and they take joy at my death" (Croce 1961, 60). The crowd sang a new song the next day:

A signora Donna Lionora
Che cantava n'copp'o triato
Mo abballa mmiezo mercato
Viva, viva, u papa santo
C'ha mannato I cannuncini
Per scacciar I giacubbini
Viva a forca a Mastro Donato (the hangman)
Sant'Antonio sia priato (Croce, Annedoti, II, 272).

How do we sum up the Parthenopean Republic's achievements? To Napoleon's conservative genuflection to the culture inherited from history, they had added a priceless lesson about the techniques needed to convert a hostile popular mass to human rights. They had used the idiom and language of the people to clothe the new concerns with relevance. The cult of abstract reason and the law of nature had made them think at first that all humans would see the value of such universal principles (see Cuoco 1998, 257–9; Salvatorelli 1975, 133). But they had gone beyond that and realised that the value of rights were not self-evident. That realisation came too late and they were too few to bring to fruition their discoveries. As idealists they were ready nevertheless to sacrifice themselves in an experiment. Perhaps their

most notable discovery was to accept the religious commitment of the mass and to try to reach them by showing that rights were simply the obverse of their Christian duties. In sum, rights could be promoted by referring beyond them to the underlying values and ethics of peoples, to be found even in Catholicism, which the French *philosophes* had execrated as *infame*. Such values as justice and charity were decidedly not rational in the Enlightenment sense but they were what even the people seemed to want.

The reconciliation of rights with religion could and did appear contradictory with the fierce assertion of the individual and his reason in the declaration of 1789. But in Naples it did not mean a blind acceptance of authority or of community claims; it meant a right to brotherhood. We might say that the slogans of liberty, equality and fraternity had been pushed by the Neapolitans in the direction of fraternity and thus of how to universalise the language of rights. Yet, this story is a priceless source in the history of the universalisation of rights. By allowing the voice from below to state what it thought was justice and how a better world could be constructed, by making it a struggle for universal rights in the face of undeniable cultural difference, the Parthenopean experience showed how a bridge between the abstractions of 1789 and real history could be made. The list of rights changed somewhat but the substance – an irreducible notion of justice with divine pretensions – remained. In fact, the highly religious, "weak" thinking quality that underlies respect for all others emerged clearly there. Unfortunately, the experience was short-lived. With the French stripping the republic of all its wealth, with popular clamour for land proving difficult to satisfy and starvation in the streets, as well as nigh anarchy when the populace irrupted onto the political scene after centuries of despotism, the battle for the hearts and minds of the people was difficult to win. Moreover, as elsewhere in Italy, it did not extend beyond the city. The peasants of Sicily and Calabria were recruited by a reactionary church and monarchy and, in an army of the holy faith led by the exiled Cardinal Ruffo, they were let loose on the few Jacobins of the countryside before a final assault in Naples less than a year after Napoleon's victory there. The savagery of the peasants in service of their traditions was appalling. Even the cardinal was concerned by the juggernaut he had launched. The French protectors, called home urgently, left the locals to their brutal fate. In fairness to a decried population, the way the Neapolitan mob exterminated the local Jacobins was little different from the way the Paris mob had expressed itself. The difference was that the Neapolitans fought for the national tradition of rights *against* universal human rights, while the French mob had fought for human rights.

What Naples in 1798–9 revealed was that, faced with the reality of cultural difference human rights can only win if it wins a battle for history. What historical identity will the mass adopt where there are different stories of the past and vying hegemonies? Naples made clear that the battle for universal rights was a battle of hegemonies. This involved more than preaching about the world and about rights, it involved changing the way that world was, the real material conditions that made the world of rights and justice for all appear impossible, as it had to the disabused street folk of the greatest "oriental" city in Europe.

So in the world of nation-states that was emerging in 1799, in a world of uneven development of populations, it had become clear that even a state dedicated to universal human rights had few options but proselytising like Las Casas. It could stay at home and preach and wait for other "peoples" to catch up, passing through all the horrors described to this point in this book. This was, roughly, Robespierre's early view. Or, it could export those values at bayonet point, invited to do so by supporters in the other population, by definition a minority. If it did so, or was "compelled" by force majeure to take this option, then it could only hope to have the new principles adopted if it did not use force and oppression against the local population. In the French case, most obviously under Napoleon, the use of force and oppression only convinced local majorities of the virtues of their own traditions. Invasion and imposition of "foreign" values reinforced attachment to national traditions that explicitly excluded foreign values and history. If the invading state was hypocritical in its policies and did not provide an example of devotion to its universal principles, then the hatred was redoubled. That was the Napoleonic experience.

That left the option of persuading the invaded people of the value of the new principles. Naples was the first clear example that this could be done if the locals were allowed to translate the new principles into their own idiom. Otherwise they would remain completely alien. Naples also hinted at how that persuasion, in the tradition of Las Casas, might be implemented. Apart from setting an example of loyalty to one's own professions (which did not work sufficiently in the case of the Neapolitans as the ditties about Pimentel showed), the innovators' best policy was to lead by example. This was almost impossible for the invading army dedicated to establishing a regime that broke with what locals thought was right. The innovators had to overcome a popular perception that they were disloyal to their own fathers.

Peoples and Nations

While it is clear that over centuries different peoples had seen the others as having certain national characteristics that were fairly constant, in earlier periods those making the observations were few in number and often in awe of what they saw, as we saw in Chap. 3 above. There are now many studies of nationalism that recount older cultural unities than those constructed after 1789. In turn, as de Tocqueville made clear, the centralised revolutionary French state machine merely continued changes already made by the *ancien regime*. We have also seen how both the centralising Bourbons and Napoleon's centralised administrative state had created political units quite different from the jigsaw chaos of the Middle Ages. Both the revolution and Napoleon made the nation the basis of state power. Power from below had become a reality that rulers had to take into account as they had not previously. The Napoleonic era can be understood as the channelling of popular energies through turning the people into warriors by creating all others as enemies. Other states imitated Napoleon by conscripting their peoples in a fight to the death with the French that simultaneously meant purification of the internal

populations by murderous repression of dissent. The elimination of ethnic and cultural difference – sometimes, as in the case of Ireland, political institutions – inside nation-states was well advanced by 1820.

Having contributed and suffered so much in a discontinuous world-wide war in 1792–1815 that extended from the Americas to India, all these warriors became political beings. They had won their right to citizenship by fighting. No state could oppose that for ever. Indeed, a black could become a citizen of France if he enlisted in the revolutionary armies. It is a sad footnote that a century later, blacks in the US and Australia, having fought gallantly for the nation, expected that they too would get the same rights as whites, but were disappointed. In sum, the new edifice that arose from the ruins of 1815 and would grow gigantically over the next 100 years, was the nation-state. As the rural peasant world disappeared and masses of people shared a common destiny in the new industrialised urban world, rulers had to concede more and more to their "people".

Already in 1815, western Europeans were not going to have the clock put back to the *ancien regime*. Attempts to do this, as if states were playthings of monarchs who could ignore national sentiments, lasted only 15 years after Napoleon's defeat. Then the system of balance of power fabricated in Vienna in 1815 disintegrated as "nations" rose in revolt. The new national masses who defined themselves in part by their difference from their enemies of 30 years resembled each other in one important respect. Quite unconsciously, and often despite themselves, they all adopted one part of the 1789 French programme in their desire to have a political voice. They asserted that state power and the consequent laws and human rights should arise from the people, who having been nothing, intended henceforth to be something. Even more remarkably, they adopted the Jacobin version, by claiming that the nation/people were a force for good and that ills and lack of rights arose from political arrangements that did not give them pride of place. In sum, they became democrats like Robespierre in the 50 years after they had fought to destroy his ideas. It is undeniable that they also espoused fiercely not only the defence of their own values, as France had in 1791, but those of the conquering Napoleon and his chauvinist armies that asserted a right to rule over others and decide whether they were worthy or human rights or not.

Over the next century, all states adopted the view that the population was the basis of state power. In the context of pre-existing states that more or less corresponded with a single constructed ethnicity based on shared language and culture, to build a polity on power from below was to allow popular prejudice and hatreds to guide state policy. In France, peasant attitudes dominated because of peasant numbers. Their prejudices, especially hatred and fear of outsiders, directed state policy, no matter the professions. The Girondins attempted to hold this back but the Jacobins, stressing the need for democratic control of law, and through a cult of the people, encouraged the triumph of popular prejudice. The more the revolution incorporated the people in defence of France and in bloody war, the more the universal values of the declaration were ignored. Indeed, the declaration was even symbolically shrouded in major places of popular power. The privilege given to popular power in discourse and in reality, above all, the loosing of the horde of sans

culottes, underpinned Jacobin policy and its solutions. The worst of these, discussed in a later chapter, was its policy of exterminating internal peasant rebels in the Vendée and elsewhere. So the sense of nation fostered in a formerly disparate kaleidoscope of regions translated rapidly into a mass racism and thence to genocide in the name of the defence of the declaration. The racism was new in one sense only: where once the peasants also marvelled at difference, disenchantment set in, and the state encouraged the objectification of the other as deliberate policy. This made the nineteenth century a century of the extension of hegemonic power. In all states, national armies, national schooling and the creation of national language and myth of origins (sometimes more than one), became a feature of life. Attachment of the individual to the nation was its primary object.

Conclusions

Only France supported universal human rights and only for a short period. Attempts to export them only provoked hostile reactions from other peoples. This pattern repeated itself as other nations invaded and colonised much of the world in the rest of the nineteenth century. As other nation-states established human rights for nationals, they also attempted to impose them on their imperial subjects. Thus the long British list of rights to fair trial; freedom of conscience and expression and sometimes even the vote, were gradually extended to parts of the British empire. Then the practical problem of nation-states that were hostile to *universal* human rights exporting *national* rights became clear. The reality was worse for the conquered than with the French who at least started by proposing universal rights that ignored difference. Only by becoming like Britons, or adopting a British national identity, could equivalent conquered people enjoy the rights of Britons. This was nearly always impossible for them to do. As Montesquieu had pointed out in the *Spirit of the Laws*, they could not simply change their minds. All their traditional rights and duties had a social function and sense within their societies, which were nearly all peasant societies until 1945. So, he explained that the denial of woman's individual autonomy apparent in the obeisance made by a Chinese daughter- in-law to her mother-in-law (Montesquieu 1964, 645) had functional justification in that society. So, British attempts to end the appalling practice of suttee met strong opposition that drew on the social forces at work even in middle-class India. But the way to rights by exportation of, say, the common law to colonies, ran into an even greater problem than that of their inappropriateness in different societies at different stages of development. All the national human rights that existed in the nineteenth century had been established in the "white" Western world. By definition, non-whites, the bulk of the conquered peoples, could not attain the required level of Britishness. Their difference was indelibly inscribed on their skins. The human rights that Britons, French or Americans enjoyed in the nineteenth century were never extended to them.

If, then, the way to universal human rights did not and cannot come via imposition by other states, as the current problems of the US and its allies in Afghanistan

and the Middle East continue to make clear; if they provoke a regression to national traditions of rights among the conquered population, then the only real alternative for the minorities who want them, is to migrate to nation-states where those rights can be found. But, this, as we will show, requires free movement around the world. But nation-states, however they started, grew less and less likely to do this as the century progressed.

In sum, whatever the logics, nation-states and universal human rights, indeed, human rights *tout court*, were unhappy partners from the outset. On the other hand, universal human rights had been made law of state for the first time in 1789. The idea had won enough mass support to end the dismissive argument that they were impossible dreams. Forever after, supporters could point to the 1789 Declaration of the Rights of Man and the Citizen as proof that it was a practical goal. As we recount later, in Chap. 11, tiny groups and individuals continued to fight for such rights after 1815. However, as the next four chapters show, the defeat of universal rights in 1815 and their execration by most states ensured that they were all but forgotten for more than 100 years. People sought instead to establish human rights for themselves and their fellow nationals; they won them only by making it increasingly difficult for outsiders to enjoy them as well.

Chapter 6
Rousseau

When Napoleon was finally defeated and sent into exile in 1815 much of Europe lay in ruins. Hidden by those ruins and almost forgotten was the greatest achievement of the French Revolution: the Declarations of the Rights of Man and the Citizen of 1789, and the variants of 1791 and 1793. Together these made up the first ever coherent statements of universal human rights. More, they were the first such statements to be made positive laws of state. They expressed in constitutional form that the goals of that state were universal human rights. We have shown how they were consciously made quite different in nature from any earlier declarations of rights. These, like the British documents, were either expressly limited to human rights for a national people, or, in the best of cases, as in the American declarations, were incoherent because their proclamation of universality was simultaneously undercut by a provision that those rights were subordinate to the common good of the body making them. The conscious decision in 1789 to break with all earlier models by placing the declaration before the constitution, and thus to establish rights without duties, would already justify placing the French declarations at the beginning of the history of universal human rights. But, there is more to the story we have told in the last two chapters than that. Although for centuries individuals and groups had dreamed of such rights, and it is arguable that the great religions necessarily embodied such dreams, never had they been made positive law by a politically dominant mass. The fact that they were transformed from idealist dreams to positive law gave them a materiality that even countries of common law and similar traditions had to recognise. I only partly share the positive theory of law, that is, that a right only exists if a person can point to the law embodying it. But, as the declaration was law, no common lawyer could thereafter maintain that the French documents had only the force of declarations or preambles to substantive laws that they then had in the common law tradition. Their contents were not simply pious generalities. So, the French documents were a milestone in another sense as well. After 1789, people could always point to them as proof that universal human rights could be more than dreams, they had been, albeit for a short period, made the constitutional principle, the highest law, to use H. L.A Hart's celebrated typification of a constitutional rule of law.

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As we showed in Chap. 4, the Girondin and Jacobin declarations must be read together. This is because the intimations of the need for economic and social or third-generation rights in the 1789 document were only given full expression in the Jacobin versions where they were shown to be logically required to sustain the principal legal/civil and political (first and second generation) rights of mankind. Without threshold economic, social and educational rights, rights to life, liberty, belief and expression are practically impossible. This is the opinion held today by most significant theorists, as well as by the major institutions defending human rights, the United Nations and the Council of Europe/European Union foremost. Today, any statement that denies, indeed separates, second and third generation rights can be regarded as lopsided and incomplete even if it has popular support.

So the 1789 and Jacobin declarations together tell us the import of the French revolution's innovations. On the other hand, the Thermidor declaration of 1795 did not innovate. As indicated in Chap. 4, it reintroduced the notion of duties to the community and thus returned to the position of the British and American statements of 1689 and 1774–6. It was this version that was imposed by force in other countries by Napoleon, before being abandoned completely after 1802. Drawing a line between the pre-1794 declarations and those thereafter, and emphasising the key importance of the Robespierrian and Montagnard additions to the 1789 version, also means that the French declarations should be seen as Rousseauian in inspiration. The Jacobins were expressly Rousseauian. Moreover, it is arguable that from the calling of the Etats Generaux, the "climate" in France had been Rousseauian. The declarations were both Rousseauian and also the greatest achievement so far in the history of universal human rights – contrary to the orthodoxy, which concedes that while the declarations were Rousseauian, their pretensions to universality were a disaster.

As Chap. 5 showed, declaring universal human rights did not lead to their automatic implementation. Indeed, the history of 1789–1815 was rather a history of their practical failure. Much of the French population did not want them and had to be forced to accept them. This meant their early suspension in France. We have seen how they were given up by the Jacobins and the revolution more generally in favour of national interests. A majority of European states tried to destroy them by force of arms, seeing them as the ideological embodiment of the menace to traditional social and political order that the revolution represented. We have also seen that attempts to export them had been disastrous and aroused hostility towards them in other peoples because they were seen as French hypocrisy. Other "people" to whom their benefit should have seemed obvious execrated them, leaving the minority who supported them in the invidious role of "traitors" to national traditions. When the victorious French attempted to export them by force of arms, backed by local minorities of believers in the new principle of universal human rights, they created hostile majorities to their imposed rule of law. This brought the first positive expression of universal human rights to a grinding halt, both in France and in much of conquered Europe. In other words, whatever the professions of Rousseauian principles, critics were always able to point at the failure of the new principles as evidence of their impracticality. They were as much pie in the sky as they had ever

been, despite popular support and a state that made them positive law. An important school of interpretation – henceforth the orthodoxy – was built on the reality of the betrayals and defeats described in Chap. 5.

The orthodoxy argues that what is important in measuring the validity and morality of those ideas was their practical consequences. It is that history, one in which the ideals are translated into practice in a real, already-given social context, that should guide our assessment of the first universal human rights regime. It is in the translation and its results that we see the real import of any ideological programme. So the concrete meaning of universal human rights is found in the history spelled out in the previous chapter. In the orthodox version of that history, the French revolution, whose universalistic goals are not denied, expressed itself in Jacobinism, which created a politics of direct democracy. This irruption of the masses into politics translated itself into a warrior nationalism. This rabid nationalism had no space for any challenges internal or external, and forcibly imposed a uniformity of all individuals. In fact, other nations and peoples did not want to accept the newfangled universal values, and bloodbaths ensued, spilling over from repression of oppositions to genocides. The heirs to the revolutionary tradition, who emerged in the nineteenth century in mass-based nationalisms, fostered a democratic nationalism that became in the twentieth century "totalitarian democracy". The Jacobin model was the source and inspiration of such polities whose full expressions were in fascism, Nazism and communism. From the reality of the history of the promulgation, defence and exportation of universal human rights by Jacobinism, the orthodoxy further identified the source of "totalitarian democracy" in the supposedly Robespierrian and Rousseauian cult of the people and the loosing of the horde.

Given the critiques of Burke, de Maistre and the coalitions that vowed to destroy the revolution and all its works, which were described above, the tone of the orthodoxy's critique evokes a feeling of *déjà vu*. Like those precursors they feared that emphasis on the "people" and its right to make law would in practice always lead to a denial of the rights of the individual. This was, apparently, much what the Jacobins had done. As we showed, they certainly ended rights for outsiders and foreigners. Indeed, the more the French were forced into defence of their new principles, the more they developed a sense of virtue and superiority in which other "peoples" were not ready for universal human rights. After Thermidor and under Napoleon the move from a realisation that other nations did not automatically see the superiority of the new rights to a readiness to shoot them en masse became quite clear.

The thrust of their criticism is understandable. They are certainly right that the object of the French revolutionaries was to establish popular sovereignty, which for a short period they did, creating a state the closest to a democratic polity since ancient Greece. Rosanvallon (1992, 55) reminds us that two-thirds of all French males were enfranchised by the 1791 constitution, establishing the principle of one person, one vote, one value. France was the first democracy and the only of that time. Britain did not reach the same degree of political participation until 1884. When the coalition finally smashed the remnants of the revolution in 1815 placed Louis XVI's heir back on the throne, only 72,000 people continued to enjoy the vote and in 1845 only 241,000 (ibid., 56) The suffrage of 1791 attached even those

who were passive citizens to the state. As Rosanvallon reminds us in his careful study of definitions and nuances of the suffrage, all dependent categories of individuals who were not thought to be autonomous, notably domestics and women, were excluded. But in Paris, where domestics totalled 17% of the population, and other nomads and pariahs formed a huge floating population, the direct democracy of the mob was decisive in politics, particularly when the Jacobins were in power (ibid., 155–7) The feeling among the French that the state was theirs was widespread as a result. Robespierre and his followers often simply rubber-stamped the latest mob claim or action. We cannot read the endless tributes to the parliament by 1792–3 without being impressed by the popular endorsement of state action, both Jacobin and Thermidorian, even when it resorted to terror. One example, from Neuchatel in 1794, reads:

> Long live the Convention. Thanks to your energy, the leaders of a frightful conspiracy that menaced the Republic with imminent destruction, have suffered the punishment for their misdeeds and you have been able to save the freedom that you created and proclaimed. For us, citizen Members, full of just confidence in the wisdom of your measures, we swear unlimited obedience and respect to laws…We swear that we will always rally with good Frenchmen to the wise principles that you have proclaimed. We consider as enemies those whom, under the mask of patriotism, wish to attack the rights of the citizen. We will do our duty to denounce those who dare to attack the liberty, equality, unity and indivisibility of the Republic [unto death] (Archives Parlementaires, First Series Tome C 24: 10 - 8/11/1794 CNRS editions, Paris, 2000, 300).

Notable about this address is that it is to the semi-dictatorial Convention, which had combined legislative and executive roles to fight the war against the coalition. The Convention had embarked on a terror campaign against all those not considered good Frenchmen. This involved the terrible repression of rebels in the Vendée and mass drowning of between 2,000 and 3,000 people in Nantes in the first months of 1793.These are discussed below. Such unreserved expressions of support for state power were made to the perpetrators of such terror. Yet through this state, they believed that human rights for all would be attained; that the French people, once freed from tyranny and all its institutions and laws, would be generous to all, according the new human rights it enjoyed.

This democracy did contain an element of direct mob rule. And, since France was soon invaded and citizen armies were formed to defend the principles of the declaration, popular power became fierce warrior nationalism, a novel ideological force. So there is considerable evidence for the orthodoxy in the history of Jacobinism and much more in the history of the revolution under Thermidor and, if Napoleon is part of that revolution, especially under him. Above all, we must acknowledge the reality that universal human rights – the goal and national identifier of the French people and its polity – was rejected by all other European peoples and nations. This led to the terrible wars and genocides that foreshadowed those of the second half of the nineteenth and the twentieth centuries. On that basis, the historical record is a condemnation of Jacobinism, its inspiration in Rousseau's ideas and its goals of universal human rights. But were those disasters simply or mainly the fault of those ideas and actors?

I maintain that the orthodoxy reveals itself as partial and over-influenced by their concern with the genocidal policies of fascist and other totalitarianisms through which they lived. Without sufficient reservation, they made the nineteenth century national-popular revolutions, with their exaltation of the "people", the expression of the intentions of the French revolutionaries. They could only do this convincingly by eliding Rousseau, Robespierre and universal human rights in a cavalier lack of concern for history. When we unpack the duo: (1) democracy as power from below, leading to (2) rabid nationalism that denied the rights promised to all, we see that there was more to the history of the years 1789–99 than is perceived or emphasised.

We might sum up the orthodox view this way: Universal human rights or rights without duties reject a sense of social obligation to other individuals in the community. When espoused by the mass they encourage too much emphasis on democracy, unleashing mass prejudice. Roughly, the argument proceeds that a nation's belief in its own righteous superiority –certainly the case for the protagonists of the declarations – would lead to the belief that its opponents were in error and an evil to be extirpated. Invading French armies had conducted themselves consequently. In the real world of nation-states, this destroys what civil liberties there are. Better, as Burke had argued, the compromising, deal-making exchange and the "good enough" representative democracies like those of Britain and the US, and their more modest lists of rights for their own nationals. So what these critics promoted, with great success after 1950, was the idea that, if people want human rights they should choose the British procedural tradition rather than that of Rousseau and universal human rights.

We cannot deny that even before 1815 there was clearly a tension between democracy and universal human rights. It also clearly grew stronger and more widespread the more or the stronger the democracy. This was the logic of developments everywhere in western Europe in 1789–1815. Mass participation in state policy whether for or against human rights led to strong national feelings. If their cultural and political origins lay earlier in time than the years of French hegemony in Europe (1797–1815), the endless and murderous wars of the coalition that sought to destroy France and its declaration of the rights of man and the citizen in the name of older dynastic values and of Napoleon's *grandes armées*, had given "nation" a new meaning. So many millions had been conscripted and so many more been affected by the tramping armies and foreign occupiers, that nation and "people" had taken on a new warrior quality. Another nation had become an enemy for the mass as well as the state.

But was the Jacobin democratic nationalism that undeniably became the leit motif of nineteenth century history and, given its values and deeds, deserving of criticism, inextricably linked with and responsible for the short life of universal human rights? It is true that in the 1800s, following the French example of 1792, democratic nation-states emerged throughout the Western world. In fact, the century saw the triumph of Rousseau's views in their most significant interpretation, that of the theorist of the goodness of democracy as the source of all human rights in laws a people makes for itself. The triumph of the idea of the popular nation-state in the French revolution is important to our story as it led to the world-wide establishment

of national democracies and human rights for the citizens of many countries. It is also true that, for a combination of reasons discussed in later chapters, the nation's immense new power was often used to deny human rights and liberties to individuals, even to fellow nationals and to "those who do not belong". According to a range of theorists from Right to Left, this was a development that must be traced back to Rousseau.

With the benefit of hindsight, however, we suggest that the orthodox interpretation of 1789–1815 is not acceptable even where populism is concerned. It ignores the essential hegemonic policies proposed by French revolutionaries but never implemented because of the war. To adopt views like those of Robespierre meant a politics that sought to create all human rights through the power of "the people". This could be unharnessed and direct, or harnessed and indirect. Procedures did not matter, the shape of the people did. Like the Parthenopians, Jacobins proposed, though did not implement satisfactorily, a hegemonic project that would transform a population rendered ungenerous by centuries of suffering into generous believers in the principles of the declarations. A keystone of their policy was national schooling, through which the nation would be "instituted" by "instituteurs", the new title for a teacher. The "produced" people, who wanted citizen power, to make the laws and rights for themselves, would supplant the patchwork of cultures that existed even in 1815. So the Jacobins continued to a large extent the views of Condorcet, although they also imprisoned him (Baczko1992, "Instruction publique" in Furet and Ozouf 1992b, 275–97)

It was crystal clear to observers by 1789 that a popular culture that rested on objective and deeply entrenched relations of social power and objective economic realities, and opposed such rights, required careful consideration when protagonists of the rights of man and the citizen tried to promote the new values in France and in other cultures. It is salutary to record that contemporary supporters of individual rights, like Condorcet, already saw the dangers that were posed to a nation forced to defend itself against enemies by the democratic claims of its citizens. Condorcet wrote in his "first memoir" on public education of 1790 that to secure equal rights, a state had to educate each individual about his or her duties (Condorcet 1994, 64) because, as he said in his "second memoir" (ibid., 109), in France so many people were constitutionally obliged to fulfil public office at a low level, as jurors, electors, members of the *conseil general*, municipal officers, JPs and so on, that they had to understand the responsibilities involved as individuals rather than members of a community.

So, the outcomes described in our previous chapter were neither inevitable nor implicit in the ideas of the Jacobins. The critics' view left out the Jacobin object: that the "produced" French people should self-define as believers in universal human rights. Jacobins did not believe in losing the horde, as fascists did. Unquestionably, the Jacobin policies in favour of mass hegemonic education did not last long and Napoleon was clearly sceptical about their practicality. The contradiction of Jacobinism lies in the frustrated intentions that the orthodox criticism does not stress. For the Jacobins, universal human rights always required a mass education. Nevertheless, the critique forces us to return, to look for the lessons and in particular

how far Jacobin contradictions were rooted in Rousseau. In particular, since Rousseau clearly inspired the declarations, and the Jacobins in particular, what is of interest for universal human rights is whether he thought of his "people" as hegemonised into a commitment to universal values.

Universal Human Rights and the Revolution: The Conservative Orthodoxy

The conservative tradition started, as we showed, with critics like Burke and de Maistre, to whom we can add the entire progressive school of British jurisprudence initiated by Jeremy Bentham, for whom natural rights were "nonsense on stilts". (In this judgment he merely repeated Burke's view.) They all recognised Rousseau's pre-eminence in the French revolution's innovations. Such criticisms disappeared when the achievement of the revolution, universal human rights, was buried and consigned to a memory hole after 1815. The next serious conservative attempt to evaluate the sources, significance and meaning in jurisprudence of the 1789 declaration was by George Jellinek. He established the new conservative orthodoxy in 1902, just 3 years after the excavation of the forgotten tradition of French human rights by the League for the Defence of the Rights of Man (1899), discussed below. The rather feeble but historically superior reply to Jellinek from Emile Boutmy was usually downplayed by Jellinek's successors (Jellinek 1902; Boutmy 1902).

In what thereafter became a favourite ploy to save human rights from universalist pretensions, Jellinek argued that the French declaration was a continuation of the American declarations and behind them, Locke and Protestant values. Boutmy countered that the revolution and the declaration of 1789 followed the ideas of Rousseau. Jellinek was able to make his continuities by listing the rights or items in the respective documents. They do resemble each other, as, indeed, they also do to the earlier British bill of rights. But that is to miss the point, as Boutmy indicated. What matters is the structure of the French declaration; its allotted pride of place before any constitution or rule of law or higher community interest (as Bobbio made clear 1990, 100–1).

The historical record supports Boutmy rather than Jellinek. Via the Jacobins, Rousseauian ideas inspired the revolution whose goal was the declaration. Later conservative commentators did not mince words in asserting a variant of Boutmy's thesis in the period 1930–70. They argued that their practical failure was the responsibility of the Jacobins and thus of Rousseau. They insisted that in practice, that tradition, whatever its professions, was and had been contradictory with human rights. On the principle that "by their deeds and their posterity ye shall know them", they argued that universal rights, divorced from national traditions, had led to repression of any rights at home and oppression overseas (Bobbio 1990; Jacob Talmon 1952) and set up an opposition between democracy and liberalism (see Berlin 1969 [1993 ed.]; Shklar 1964, 919–43). After the genocides that had been perpetrated in the first 50 years of the twentieth century, above all by fascism and communism,

both of which extolled the Jacobins, the conservative critics were concerned for individual liberties in states based on a Rousseauian notion of "the people".

Inevitably, a book that asserts that universal human rights start from declarations of Rousseauian inspiration and yet simultaneously argues that they are not discredited by what occurred in 1789–1815 must consider closely what Rousseau and, in particular his Jacobin interpreters, really proposed.

Rousseau and Hegemony

No individual's ideas make a revolution. What matters is the way that they are taken up by sufficient numbers of people to cause revolutionary change in society, politics, rights and moral views. In focussing on the ideas about rights of Rousseau (1712–1778) we are arguing no more than what conservative historians today do: that the French revolution "marks the meeting between a great thought and a historical movement" (Manin 2007, 458). In fact, what mattered for human rights was the *way* that "great thought" and "historical movement" came together in the ideology of the law-makers who would draw up the institutional arrangements of the revolution. Usually, it was only those law-makers called Jacobins who explicitly referred to Rousseau as the inspiration for their work in 1792–3. Those who killed the Jacobins suggested after 1795 that Rousseau was the devil and in 1800 Napoleon blamed the whole revolution that he helped undo on Rousseau: "He was mad, your Rousseau: it is he who brought us into the fix we are now in" (ibid., 459).

Today, historians like Manin, Gauchet and Furet argue that Rousseau's ideas only became important for rights after the rise of Robespierre who turned the revolution of 1789 in a radical direction. Up to that time the *Social Contract* was not widely read, and the goal of the men and women who made the revolution was a constitutional monarchy that owed as much to Locke as to Rousseau. With this we can agree. As we have seen, Malesherbes knew and corresponded with Rousseau while remaining a "Lockean". But we do not require a "direct" reference to Rousseau to see the influence of his ideas on the revolution and the rights regime it introduced. There existed a historical and political climate that was the background to the events of the revolution. The decision-makers expressed that climate. In that perspective, even those who were Lockean could not escape Rousseau. Myriad lines, like these of constitutionalist Madame de Stael, who knew many of the protagonists of the revolution, confirm that estimation: "Thus both Charles I [Stuart] and Louis XVI could consider themselves heirs to a power without limits, but with the difference that the English people relied on the past to claim their rights, while the French demanded something new, since the convocation of the Estates General was not prescribed by any law" (de Stael 2000, 293; see also Mounier, 1989 in Furet and Halevi 1989, 979–82).

In 1792 Rousseau's views – democracy as power from below; a sovereign people which did no wrong and a nation whose goal was the attainment of right for all citizens – became the driving force of the revolution. Robespierre proclaimed his

debt to him in lapidary terms: "I would tell you since the great moral and political victory proclaimed by Jean Jacques, that men love only those who sincerely love them, that only the people is good, just and magnanimous, and that corruption and tyranny are exclusively the attributes of those who disdain the people." He was man for whom the goal was "The execution of a Constitution in favour of the people" (*Defenseur de la Constitution* cited in Manin 2007, 476–7; Mathiez 1988, 261). He added in 1792, "nobody has given us a truer idea of the people than Rousseau because nobody loved them more" (Manin 2007, 477; compare Zizek 2007, 85–105). Robespierre's view was fervently shared even by fellow Jacobins whom he had had guillotined. For example, Anarcharsis Cloots, a perfervid believer in the rights of man, embarrassed those at Madame Roland's table with his belief that the people was always good and had the right to do what it wished (Roland 1986, 426–31).

We note, however, that while Locke wrote the legitimation for 1689 *after the event*, theory following practice, Rousseau's theory became the theoretical basis for a mass practice *during the event*. This reversal was given later theoretical development by Feuerbach and Marx. So Rousseau's theory was so "practical" that it was taken up by masses of humans in whom it struck a chord and who, in changing the world of social relations, also changed rights and values in a gigantic revolution whose basis was that history (the past) should in no way determine the present. Rousseau agued from what existed to the future, not from the past to the present, in his endeavour to create a decent world and to show what the rights of human beings should be. After him the drive for *universal* human rights could never be limited to preserving what already existed: they required the creation of a more just new world.

Rousseau proposed an "anti-historical" or revolutionary model for human rights that broke entirely with earlier appeals to "ancient traditions". His thought did contain the internal contradictions that allowed a whole school to accuse him (unjustly) of being the origin of twentieth-century totalitarianism. What matters here is how, even more than his friends Diderot and Grimm, Rousseau rejected and discredited early, the strong reason expressed by Bayle and Bernardin de Saint Pierre, whom he condemned for "folie de la raison" (Rousseau 1967–71, II, 575 and I, 367), and the social contractarian theory of rights advanced hitherto, especially the tradition that Locke embodied, as well as earlier Enlightenment theory of rights "from above", especially that of his "master" Voltaire ("Monuments de l'histoire de ma vie" in Rousseau 1967–71, I, 61–2; II, 269).

He did so by insisting that democratic rule "from below" by people who had no real collective historical memory would lead to real human rights for all, because whatever the people might be like when first given power after centuries of oppression and ill-treatment, in the end they would do no wrong or be discriminatory towards others. As he wrote to M Christophe de Beaumont: "the fundamental principle of all morality, about which I have reasoned in all my writings and which I developed in the last [*Emile*] with all the clarity which was possible for me, is that man is a naturally good being, loving virtue and order, that there is no original sin (*perversité)* in the human heart and that the first movements of nature are always right (*droit*)" (Rousseau 1967–71, III, 339). We will highlight how his democratic,

national-popular model for attaining rights, with its insistence on belonging in a particular time and space, was seen not only as a basis for rights for citizens but also that it would accord all others the same human rights when they wanted to join them Indeed, for him, the object of all polities was to achieve *universal* human rights. In his model, the practical attainment of those rights implies a theory of free exit and entry for all humanity into havens of human rights (see Article II of the Declaration of the Rights of Man and the Citizen; Bobbio 1990, 59). But that was only implicit.

Rousseau's radical rejection of all earlier models for attaining rights through the nation, while it appeared to build on them, may be explained by his inability to get into the existing system through aristocratic and patrician patronage, or to get rights "from above." He was a victim of the social order. He represented the limits of the policy of integrating the rising class into the absolute system of national administration and justice. There was simply no place for the lower bourgeoisie to enjoy the rights of that world. Nearly all the figures we have described had succeeded in doing so, from Voltaire to Malesherbes. The former was the son of a *notaire* and the latter a high-ranking judge, both deeply defensive of the privileges of their caste. Rousseau came from a petty-bourgeois background, like his close friend Diderot, who was the son of a cutler. Moreover, he was an orphan and a Protestant, from Geneva. He was an autodidact and obliged to work in menial and servile jobs. Jean Guéhenno's biography (1966) captures the petty-bourgeois dimension of his life and how, until 1750, desperate sycophancy could not obtain him sufficient *entrée* even into a rural good society. Rousseau's *Confessions* and many other autobiographical works reveal a self-confessed, self-obsessed person, relating the humiliations and frustrations that made him what he was. His character often seems over-sensitive, difficult and, sometimes, paranoid about his treatment by the rich and the great. For example, he had been denied proper human and financial treatment while working as a clerk in the French embassy in Venice in 1748. When he was welcomed in intellectual and enlightened circles there, this provoked a famous outburst by the Ambassador, Pierre Francois, Comte de Montaigu.: "'How, he said, furiously, is it that my secretary who is not even a gentleman pretends to dine with a sovereign [the Duke of Modena] when my own gentlemen do not'. Yes sir, I replied, the place that your Excellency has honoured me with has so enobled me that I even have a jump on your so-called gentlemen and I am received where they cannot be" *(*Rousseau 1967–71*,* I, 240). Although, morally, Rousseau had the better of this exchange, it left him smarting: "the justice and uselessness of my complaints left in my soul the seeds of indignation against our stupid institutions where true public well-being and true justice are always sacrificed to I know not what apparent order, in fact destructive of all order, and which only adds the sanction of public authority to the oppression of the weak and the iniquity of the strong. Two things prevented this seed developing then as it did later; one was the question of myself in this matter, and that private interest, which has never produced anything great or noble, could not bring out of my heart the divine impetus that belongs only to the purest love of justice and beauty to produce". He explained his consequent loss of employment there as "just because I was foreigner" (ibid., 246). His sense of being an outsider, other, was explicit. All his works were written by "a citizen of Geneva", that is, expressly by a

foreigner who could not "belong" and thus he observed the rights that he sought for all citizens as an outsider seeking them. Thereafter, his solace lay in books and solitude (letter to Malesherbes 4/1/1762 in ibid., 60).

The turning point in his life of humiliation and denial of rights by the privileged came in 1750, when, urged by Diderot, he submitted an essay on the sciences and the arts to the Academy of Dijon's competition. This is how he wrote about that essay, which won the prize in 1753, and made him an *enfant terrible* detested by the older Enlightenment intellectuals and carefully watched by the censorship office run by Malesherbes:

> Suddenly, I felt my mind dazzled by a thousand lights: hosts of lively ideas presented themselves together with a force and confusion that troubled me in a fashion that I cannot express, I felt my head turn as if drunk…Oh Sir, if ever I had been able to write down a quarter of what I saw and felt under that tree, with what clarity I would have shown all the contradictions of our social system, with what force would I have shown all the abuses of our institutions, with what simplicity I would have demonstrated that mankind is naturally good and that it is through such institutions alone that men become evil. [All this] has been spread through my three main works: the first *Discourse*; that on inequality; and the treatise on education [*Emile*] which are all three inseparable and form a single whole (ibid., 62).

The *Discourse on the Sciences and the Arts* made Rousseau notorious. It attacked every principle and content of the national popular tradition of rights up to that date. By this time Rousseau was familiar with Bodin, Locke, Bayle, the French Enlightenment and the accounts of the voyagers. He was evolving a completely new view of the relationship between society and rights that focussed on the way all acquired knowledge and historical social arrangements established a "hegemonic" power over human minds. Those arrangements would have to be dismantled before truly human rights could be established. Human rights could only come through a revolution, a *tabula rasa* approach to politics. The first paragraphs of the *Discourse* ran: "letters and arts, less powerful and despotic maybe, spread garlands of flowers over the iron chains with which humans are laden, smothering the feeling of that original freedom for which men seem born, making them love their slavery and forming what we call 'policed' peoples [peoples ruled by laws]" (*Discours* in Rousseau 1967–71, II, 53). And he added in a footnote: "princes always regard with pleasure the taste for agreeable arts and superfluities…spread among their subjects; for not only do they thus feed the smallness of mind necessary to slavery, but they also know very well that all the needs that the people attribute to themselves are so many chains they place on themselves" (ibid.).

So all acquired knowledge enslaved, as it was directed to fulfilling the vicious need for more and more goods. Rousseau argued that we see this throughout history and in every civilisation as they develop from original small, natural states. In such places, all education was directed to the self-maximisation of each individual, who forgot his duties to himself and to others. The result was that no longer were there any citizens (ibid., 66), only specialists. He concluded that a politics of re-education designed to foster the innate virtue of mankind was needed. This educatory politics remained his central concern thereafter. The savage attacks by Enlightened opinion on this work only clarified its meaning. One scathing reply

came from the king of Poland, then posing as an enlightened despot. "Without knowledge of history, of politics, of religion, how would those on whom the government of states falls know how to maintain order, subordination, security and abundance?" (ibid., 73). The elite position of the Pole was akin to that of Coke and highlighted what Rousseau meant to his contemporaries: a break with that tradition about the source of justice and rights.

Chastened, Rousseau, who still wanted approval, refined his argument. He allowed that it would be foolish to deny that science in itself was good, but it was inappropriate for the mass of mankind who were driven by "passions" to misuse it. Such limited beings should learn their duties. "My point is", he wrote, that "they should not be so fiercely attached to science" (ibid., 77). Already, "weak" thinking was at the base of his theory of rights. He stated clearly that the thrust of his thought was against the *d'haut en bas* Enlightenment theory of knowledge as a guide to social action. In the place of men as mind, and with reason as the only guide, he argued that what drove humans was what we can call – before the letter – psyche, something that was made but was pre-rational; men were driven by needs. Realism pushed him to agree that men in society were already corrupt and that in no way could they be brought back to virtue within it. So, rather than burning all libraries, the arts and sciences should be used to soften human "ferocity". "Let us offer these tigers some food so that they do not devour their children. The lights of an evil man are less frightening than brutal stupidity; they render him at least more circumspect about the evil he could do, through the knowledge of what might be done to him" (ibid., 86). Then again he nuanced his argument. The arts and sciences were the work of genius and reason. Many inventions had been useful. But what concerned him was their effect on "moeurs". His target was and remained, above all, philosophy, or reason as applied to social arrangements, thus disturbing the natural state of mankind's "ignorance" by its reformist schemes (ibid., 142).

This brought Rousseau to state that a revolution was the way out. Through it, rights could be established *ex novo* without the contradictions of the past like those proposed in England. Moreover, when the *new* type of rights was introduced, they could not be based on the property interests or individuals defined as owning their own labour. Locke was not consciously rejected; he would remain, contradictorily, central to Rousseau's thought, as we saw in the article on political economy written for the *Encyclopedia.* But the basis for rights would be duties towards one's fellows. "This is how I would arrange a genealogy: the first source of evil is inequality, from inequality comes wealth because the world's poor and rich are relative, and everywhere where men might be equal there will be neither rich nor poor. From riches are born luxury and idleness, from luxury (sloth) come the fine arts and from idleness the sciences" (ibid., 83). In preparatory work for his *Social Contract*, he wrote: "the rich and those who are happy about their condition are extremely concerned for things to remain as they are, while those in misery can only gain through revolutions" (ibid., 262).

His assessment of the arts and sciences as hegemonic forces that were Janus-faced, led him to make another innovation from the social isolation to which had been sent by intellectuals' disapproval. He wrote about this solitary life in his

Promenades (1773) and *Letters from the Mountain* (1764). In 1755 his second discourse, *On Inequality,* appeared. It asserted that as a result of studying men in history too much, human beings had made themselves incapable of knowing what a human was. They had to return to studying man as an abstraction from history, a being imagined outside historical society, stripped of what had rendered him evil and unhappy, previous history (ibid., 208–12) This is the human without attributes addressed both in the French declarations and the 1948 Universal Declaration of Human Rights. As a starting point for a search for well-being, two abstract principles should be adopted: (1) humans were intent on self-preservation and (2) they felt a repugnance at seeing others "like themselves" suffer (ibid., 210). So the hypothetical starting point for rights was not men in history but in nature – which never lied. Rousseau saw man "under an oak, slaking his thirst."

His starting point in nature meant that he referred constantly to accounts of the voyages made to simple or "primitive" societies as possible models. Bougainville was not listed among his references but at the time of writing the *Discours* Rousseau was in constant contact with Diderot, who was writing his own essay on nature, partly inspired by Bougainville. Since Rousseau knew that North American peoples were "savage" he indicated them as proof that from society itself evil and cruelty towards others started. So his views would not start from any history but from common sense. "It is clearly against the law of Nature that a child commands an old man, that an imbecile leads a wise man and that a handful of humans are stuffed with superfluities while a famished multitude lacks what is necessary" (ibid., 247). But, if mankind had nevertheless chosen its leaders in a social contract designed to benefit itself and yet had enslaved itself, what did that fact mean for inequality and the private property on which inequality was based (ibid., 235–9)? As men clearly are not animals, since they have free choice rather than instinct as the impulse to action, the mess that they had got themselves into in social organisation was also something that they could get themselves out of. Man became his own "tyrant" through his attempts to control his environment through reason, communication and philosophy (ibid., 218). They turned him to self-love. To this natural difference, humans had added social difference in creating property and consequent inequality. Probably the most famous lines of the *Discourse on Inequality* are: "the first man who enclosed land and thought to say 'this is mine' and found people simple enough to agree, was the true founder of civil society. How many crimes, wars, murders, miseries and horrors would have been spared to humanity by the man who, tearing up the stakes, or filling in the ditches, had cried out to his fellows: 'Take care when listening to this impostor; you are lost if you forget that its fruits belong to all men and the land belongs to no-one'" (ibid., 228).

The rejection of the Lockean view of rights is clear. Where there was no property, there could be no offence. Where the Englishmen had defended law and social arrangements because there was private property, Rousseau arrived at the opposite conclusion. The rule of law had not improved matters, it had led humanity to decrepitude. Society, or humans relying on one another and accumulating goods, had made private property possible and work essential. Work was the source of the denial of rights or justice and their replacement by the law of property and inequality. Here,

Rousseau foreshadowed how to get out of the mess. The argument was two-pronged and two works to explain how were written at the same time. The more successful was *Emile or on Education* (1762). This went into 22 editions before 1789 and made Rousseau famous. The second, the *Social Contract,* went into 13 editions (see Manin, 2007, 460).

*Emile (*and the *Nouvelle Héloise)* is Rousseau's demonstration of how people could be educated out of their self-imposed tyranny. It encapsulates the views in the other works but since it deals only with the education of children by an intellectual, it seems less revolutionary and was more acceptable to moderate opinion than the *Social Contract.* It does not propose mass violence. Whatever Rousseau's own resentments and hatreds – usually of the spoilt rich and their hangers-on who benefited from the absolute monarchy – he was always a retiring and peace-seeking man. Of course, he was conscious that any proposal for education to uncover the "natural" or "good" individual had to justify such a project against centuries of hegemonic distortion that tend to discredit it.

What would such a "counter-hegemonic" work consist of? Rousseau insisted that learning from life was the worst way to learn (see *Emile Manuscript Favre*, in Rousseau 1967–71*,* II, 429). The guiding principle was that education was to make a person know him or herself and never to seek to do more than was possible. Freedom, the highest of all values, lay in wanting what a person could attain (ibid., 443). While the starting point of his draft version stated that the goal of education was for the "felt" life, for a feeling of well-being and that education started before formal schooling (ibid., 431), a child's desires should not be encouraged, as they lead to fury at denial and to despotism if satisfied. Needs alone should be satisfied. *Il faut* and not *je veux* should be the words that a child learnt most.

This required a firm but respected and universally loved teacher, who was an authority. But as a self-professed practical man concerned with facts rather than principles, Rousseau emphasised that the student sometimes became the teacher, learning was a two-way street.

The text to be used was *Robinson Crusoe* (Rousseau 1967–71, III, 130) and the skills taught practical: agriculture, blacksmithing. Rousseau justified this choice by stating that these were needs for the times. While the Hurons in fact were better models for education than the academy, Emile remained "a savage who must live in a city" (ibid., 498).

In the published version of the work, Rousseau made even clearer that what he proposed was an education for citizenship (ibid., 22) and therefore that *Emile* was a political work – education for counter-hegemony. This makes difficult to accept the sharp distinction made by many commentators between *Emile* and the *Social Contract.* They were written one after the other (1758 and 1762) and the now more-famous *Social Contract* appears to be a sequel applying more generally other "policy papers" and reports.

Emile, read in this light, is notable for its refusal to privilege work as the basis for rights and morality (ibid., 64), emphasising rather a Periclean view that justice is inscribed in all human hearts (ibid., 170fn). This compassion was what should be developed in all children, both men and women. At this stage, it must be

acknowledged, civic and moral regeneration was not seen as requiring a social revolution. It was rather "the profession of faith of a Catholic priest" and, in the *Nouvelle Heloise*, of a "religious woman" (ibid., 404). On the other hand, Rousseau was advocating a new religion, not that of the arts and sciences, but a general faith that would inspire all human beings. This hegemonic programme ran though his *Social Contract*, the book whose contents inspired the Jacobins and which was read again and again by Karl Marx 50 years later. As Bertrand de Jouvenel suggests, Rousseau was thus a thinker ahead of his time (see Cranston1964, 65), espousing the views of Grotius and Pufendorf, but rejecting expressly most of the contents, though not the form, of the Western tradition of political thinking going back to Aristotle.

Given his earlier views about the corruption of history and those expressed in *Emile*, Rousseau thought that a legislator who saw further than the people about how to attain rights would be required. So the process of making a republic involved "educating the people" and anyone who undertook that task also sought to change human nature from that of a solitary individual into a social being – to constitute men so as to reinforce them (ibid., 531). The project was one of hegemonic education where general maxims would be translated into "the language of the people". "In order that a people that is being born may share in (*gouter*) the same political maxims and follow the fundamental rules of *raison d'etat*, it is necessary for the effect to become the cause; that the social mind, which must be the work of the institution, presides over the institution itself; and that men must come before the laws what they become through them. Thus the legislator, being unable to apply force or reason, must have recourse to authority of another kind, which can bring about things without violence and persuade without convincing" (Rousseau 1967–71, II, 533). As in the earlier work, this legislator would himself create the institution that would educate him.

In sum, republican politics requires the inculcation of a civil religion if it is to work. In the last analysis, Rousseau argued that effective power rested on what he called "public opinion" but what would today be called a mass ideology. Rousseau thought that this would be very difficult to create in a large variegated state although it would be easy to do where everyone knew everyone else. But once such an education was complete, a nation would be consensually united on a daily basis.

Rousseau and Democracy

So what institutional arrangement could educate public opinion and be educated by it? Here we must interpret and infer from Rousseau's overall views and the logic of his work. He followed Montesquieu in believing that different forms of government were appropriate to different peoples or nations (Rousseau 1967–71, II, 551). Consequently, Rousseau had adopted a traditional triadic division of types of government into monarchical (aristocratic) democratic and mixed. Because he understood democracy as direct democracy, he simply regarded that form as never having existed except as an ideal. But it was to that ideal that he aspired.

Not since antiquity had democracy existed anywhere in Christendom. In the Greece of myth and in Aristotle it had been understood as direct democracy. The Pacific discoveries had whetted the belief that such polities might be possible and bring about the paradisiacal worlds supposedly described by the voyagers. Just how that might apply in the oppressed populations, corrupted by history, of the largest state of Europe, was unclear.

In his *Project for a Constitution for Corsica* (1765), one of the policy papers to which we have referred, (Corsica was the place that Rouseeau singled out in the *Social Contract* as a place where a real democracy could still be established), he made absolutely clear that the only place where a pure democracy could exist was in a small country, because there everyone knew everyone else and were interrelated and were viscerally attached to the place, to the soil. This, he added, was a reality found only in agricultural communities of peasants (Rousseau 1967–71, III, 496).

The *Project* is sometimes cited to show that Rousseau only believed in democracy for small communities like those of mythical antiquity or the Pacific. We should not agree too hastily that the work proves that he was no real believer in what we will call "impure" democracy in a large state. Undeniably, he started from the notion of a social contract through which individuals established a constitution and a rule of law. In Rousseau, the social contract reduced itself to "each of us puts in common his person and powers under the supreme direction of the general will: and we receive each individual as an indivisible part of the whole" (Rousseau 1967–71, II, 522). The associated individuals who made the law of the republic were citizens who subjected themselves only to laws that they made for themselves. This made them free. If they did not obey the general will, it would be imposed on them. Only republics were legitimate governments (ibid., 524, 530).

In a world where all theory, even social contract theory, made power come "from above", either as divine right or, as in Hobbes and Locke, as the result of an original and sole social contract, Rousseau made it come "from below". This is a minimalist definition of democracy that takes into account its evolving history and contradictions. (On the notion of "from below" see Bobbio 1984, 50; 1999, 331–3). Bobbio does not agree that Rousseau maintained such a theory but we argue that because Rousseau's theory was radically new and different compared with earlier theory, it led towards such minimalism. This was most important for human rights despite the contradictory qualities of his work about democracy that we discuss below. We may foreshadow our argument by stating that to achieve a popular national unity in favour of rights for all, or an "open republic", he was forced to a radical individualist theory of the citizen. We can only do justice to Rousseau's contribution to universal human rights by recognising that there were two strands to his thought. On the one hand, there was the undeniable belief in democracy and that it made a strong, almost organic, nation. It is this that Bobbio and others fix on critically. But there was the other strand that argued that any strong democracy, despite expressing itself in national form, would never deny rights to others. What interests a history of *universal* rights is the theory he developed to reconcile the national community interest and the assertion of its non-exclusionary nature.

We consider first his undeniable view of democracy as the cure-all. His notion that power from below was a moral good that should be attained because the people – the majority of humanity – once empowered could never choose against itself, was radically new and unlike the ancients' notion of republican government. Against received wisdom, Rousseau stated explicitly that Machiavelli was a republican, a nation-builder who asserted the national-popular passion of a people (Rousseau 1967–71, II, 546). This reference is very significant. Much theory, especially that in Machiavelli's *Discourses on Livy*, argues that republics are the result of human failings and disagreements, those of life itself, just as Rousseau does. So the self-interested goodness of a unified people does not deny difference. As a self-described practical man, Rousseau always insisted that his work should be read as such and that it was a refusal of the book-learning of elites. He wrote the common sense of the average man. We can ignore the not untypical stance of the autodidact who pleads street wisdom against a cruel, out-of-touch academy. His practicality lay elsewhere.

Since neither monarchical nor mixed forms could be republican, that is, rule in the interest of the people, he had to propose a democratic form. So, was he proposing it for a large country like France? The answer seems yes because his measure of appropriateness of a type of rule was the signs of institutional success in growth of wealth and prosperity in a people. We can only read this as a condemnation of what existed in France, a monarchic state, and of the mixed Locke/Montesquieu model proposed by Malesherbes and the lawyers, which had led to misery in France and Britain. What a large country like France required was a new sort of republican democracy. Hitherto, democracy had only existed in the tiny Greek states of antiquity. How did he envisage it in a country too big for every French man to know one another and to assemble together? How could a sovereign people make laws under which it would live and where all who were equal by the social contract would have to express its general will?

Rousseau clearly wanted and expected an active citizenry, "with love of fatherland". The problem was how they would make the law if they could not meet together and if intermediate bodies between citizen and state were not to emerge to distort the general will? He did not give a clear answer to that question. Rousseau's fuzziness about the practicalities of elections and representatives is notorious. He was scornful of the British system of representatives: "The English people think that it is free. It is wrong. It is only so during the election of members of Parliament. Once they are elected slavery overtakes it." (ibid., 588). Representation in a legislative function was mere slavery. Certainly, any representatives at other levels of government would have to have an imperative mandate to ensure that they expressed the general will. But he followed the Platonic wisdom about the triangle: men can only imagine perfection and strive to attain it. Its inaccessibility does not disqualify it as the goal. He was certain that the right of citizens to vote in assemblies could never be taken away. He hoped that there would be near-unanimity at such assemblies; too much debate showed too little general will. What comforted him was that where plebeian and patrician disagreed, the former would tend to unite. He recognised the need for majority rule since unanimity would exist only when the social contract was itself concerned.

Given his antipathy to representation, on the whole he seems to have envisaged government by referendum: "the real advantage of a democratic government is that

it can be established in fact by a simple act of the general will". The Roman example suggested that this was possible. He seems to have had in mind occasional plebiscites. But he added a passage that suggested a regular plebiscite: "Other than the extraordinary assembles that unforeseen circumstances may require, there must be a fixed and periodic meetings that no-one can abolish or prorogue, so that on a particular day the people is legitimately convoked by law, without there being any need for any other formal convocation" (Rousseau 1967–71, II, 562, 556). The general will was consent: "when an opinion contrary to mine carries the day, that proves nothing if not that I was mistaken and that which I thought to be the general will was not the general will…This supposes it is true that all the characteristics of the general will are plural and when they cease to be so, whatever position one takes, there is no longer any freedom" (ibid., 565).

The essential consequence of this notion of a democratic general will was a national community:

> What makes the will general is less the number of voters than the common interest that unites them; for, in this institution each person necessarily submits to the conditions that he imposes on others; a remarkable agreement of interest and justice, which gives the common deliberations an equitable character that disappears in discussions about all particular affairs, for lack of a common interest that unites and identifies the rule of the judge with that of the parties (ibid., 528).

Such a political system allowed for no intermediate associations between the citizen individuals and the general will, whose decisions would always be good. So it is undeniable that while Rousseau believed that power should come from below, he had a communitarian view of the social contract, though he expected the community to be totally renewed in a revolution. It was to build the nation. The community and its laws were always privileged over the rights of the individual. Since all those outside the social pact "were strangers among citizens", they were obliged to abide by the nation's laws. Indeed, all majority votes made laws for all others (ibid., 565). This was not a denial of individual freedom because, he wrote, a citizen consented to all laws even when personally opposed by them. This seems to be an almost chauvinistic privilege given to the national citizens to make rules for all others on its territory according to the national character, into which it had been educated. But Rousseau's thought went well beyond a clamorous nationalism and it is in the further dimension that his views became crucial for human rights. We make a considerable detour to discuss this as it is not usually dealt with in the literature from our angle.

Rousseau and Human Rights

We should remember that although Rousseau made all individuals – especially foreigners – subject to the national law which expressed the general will, he was a foreigner himself, discriminated against in France, who signed himself as a "citizen of Geneva". He knew personally what it was to be an outsider in a host society whose laws were unjust towards him. So, while it was his belief that the establishment of the general will would end such unjust laws, he also adverted to the ways of overcoming

the tension between the belonging that he insisted was essential to any viable republic and the reality of *autres pays, autres moeurs* and how to live with such difference. How could "community" attachment be reconciled with his sensitivity towards the outsiders whom he said should be banished if they had no commitment to the nation, as unsociable beings, incapable of loving the laws and justice and of giving up a life, if need be, to fulfil a duty?

As Bobbio has pointed out, "people" is a dangerous term without an adjective: By "people" Rousseau apparently meant a peasantry and petty bourgeoisie, seen in a romantic light. his lack of definition has led some to accuse him of opening the way to fascism, also a populist creed based on the petty bourgeoisie (Hitler's *kleine leute*). His positive view of the petty bourgeoisie certainly preludes that of the 1930s and 1940s with the plebiscitary politics favoured by fascism. Yet this neglects the differences in time and place, and emphasises unilaterally how he was used later. (We discuss this later use of Rousseau in a later chapter.) Nevertheless, it is clear that for Rousseau "the people" only becomes good when freed of the existing hegemony. As he had stated many times, all human beings were hegemonised by the ruling ideas, which led them to support a system that brought them misery Any viable solution would have to come through a counter-hegemony, again a constant theme in his work. He stressed the need *to institute the citizen*, in unusual agreement with Hobbes In his description of the content of such a counter-hegemony, we find some clues to how Rousseau reconciled his belief in "the people" and the defence of outsiders.

He definitely believed in re-education. Since this would have to have to be adopted "below", what is strikingly modern is the way he suggested it might be done. First, he advanced a theory of learning through participatory democracy where the people would learn in the process of self-government how to govern and to be good, concerned citizens, driven not by the desire for self-aggrandisement through work and enterprise, but by a higher awareness that every person shares a concern to avoid suffering. Humanity is one in that sense.

The second dimension throws light on the direction in which an empowered people would express their attitudes towards outsiders. This brings us to the supposed problem of his "social engineering", not only of individuals but also of the mass of the people. Rousseau did not think that interfering with freedom of expression through censorship was inappropriate in a democracy. On the contrary, democracy involved social engineering through a *civic* religion that would unite a people under majority rule (Rousseau 1967–71, II, 273–4). So he asserted that religion was useful to the state in an express disagreement with Bayle (ibid., 575).

He surmised that a national civic religion could have a positive function if "it unites the divine cult and the love of law, and making the Fatherland the object of adoration by the citizens, it teaches them that to serve the state is to serve the tutelary God". To do this:

> The dogmas of this civil religion must be simple, few in number, enunciated with precision, without explanation or commentaries. The existence of a Divinity, powerful, intelligent, doing good, prescient and providing for the future, the life to come, the happiness of the just, the punishment of evil people, the sanctity of the social contract and the laws; there we have the positive dogmas. As to the negative dogmas, we limit them to one: intolerance; it belongs to the religions that we have rejected" (ibid., 579).

So he concluded "we must tolerate those who tolerate others"(ibid., 580). Rousseau was thus again concerned to ensure a national civic religion that would end exclusionary social values. While no individual could escape the nation's laws once on its soil, the danger of such a Leviathan persecuting individuals who did not disagree with it or did not accept the civic religion would be countered through a civic religion directed to the highest divine principles.

Rousseau believed that "the cult of a Supreme Being" was common to all individuals, he opposed established religion. In the hegemony of the *ancien regime*, the problem was the legally prescribed religion of state with its dogmas, rites, since this meant that "outside of the nation that follows it, everything is foreign, barbarous and disloyal" (ibid., 578). He thought that even a national religion was bad because it "renders a people bloody and intolerant so that it breathes only murder and massacre; and thinks that killing anyone who does not accept its Gods is a holy deed" (ibid., 576). Compared with that, Christianity's universalising pretensions of love for all others were praiseworthy even if they did not attach citizens to the state because the primary allegiance demanded was to heaven. While Christians did their duty, they did not have the passion and attachment to the *patrie* needed for its defence. It was a "slave" religion of dependence and contradictory with that of republicans (ibid., 578). So he was not prepared to tolerate the universalist religion of "priests" with great leaders like the pope. Both Protestantism and Catholicism were unacceptable as they disunited nation and society. So while Rousseau believed that anyone should believe what they wished, he had to reconcile that with the need for a fierce attachment to "the fatherland", which would make a person both a good citizen and subject, a maker and a subject of laws.

For Rousseau, this solution of a system of democratically-made laws that would not be exclusionary, or deny right to non-citizens was unproblematic. It was not founded in a blind belief in the people. The general will that was always good and generous was constructed in a counter-hegemony in which a national people would believe in and advance rights for all, including foreigners. He thus started the tradition that asserts that democracy is a universal good. Its civic religion, unlike previous religions, would not be exclusionary but inclusionary. There is no gainsaying that the standard demanded and the end of the citizen ethics resembles closely the declaration of the rights of man and the citizen passed into law in 1789. Whether that was the idea he had of rights (his civic religion) remains unproven. What is proven is his belief that once the poor were given democracy, respect for human rights would arise from their hegemonised views. So, unlike his avatars, Rousseau insisted on the principle *autres pays autres moeurs.* A strong nation-state would not interfere with other states and their systems of government. The converse also applied. He promised to write a book about the subject of international relations and law but never did so. This leaves us again having to reconstruct from fragments what he thought about the other outside the republic.

What is certain is that he believed that what a person felt about a country, even his own, varied. In the final analysis, he regarded patriotism as an essential quality in humans who could not escape being attached by their needs to a particular place ("Fragment sur la patrie" in ibid., 189–90). Individuals were more attached to a

place where their life had provided them with the necessaries. It is true that he thought that social distinctions and rights were established first in the labour of rural communities and were then destroyed by the progress of history – property, inequality and the arts and sciences. Such a view was fed by his own rural isolation and the dreams that he had about the benefits of a "natural" life, one close to nature. But he was a practical man. Since society existed with private property even in Corsica, his object was not its abolition but placing strict limits on free enterprise, instituting a small-holding peasantry and allowing no further development. This would impose on Corsicans a brake on self-interest and subordinate them to the public good. He believed that part of the job of the legislator was to disallow popular opinion if it conflicted with a higher standard: the public good.

He proposed a federation of European states in which no one state would have the power to damage another. This was an idea he developed in debate with his friend the Abbé Bernardin de Saint-Pierre, an early protagonist of "perpetual peace" (Rousseau 1967–71, I, 334). Rousseau suggested that the participating nations should be placed in mutual dependence with an international army to sanction rogue states and an international court. States would come to see that this international law was in their interest, especially for commercial reasons, and a European parliament and an arbitration system might emerge. This addressed the problem of incongruity of rights as between states.

However, within a state, we are left with Rousseau's core belief in a democratic national-popular social contract where all depends on the goodness imputed to a national people. The latter's support reinforces the state vis- à-vis dissenters. This is immediately relevant to resident foreigners. It remained to Rousseau's disciples to resolve the conundrum of a national people whose first object has to be rights for themselves, and a world in which foreigners constantly arrived among them and had to live under laws not of their making. Logically, they were no freer than Englishmen were between elections. What rights did such individuals have?

It was left to his disciples to answer because, as he aged, Rousseau became more concerned with how to create a national-popular state than with democracy, much less any individual claims to rights. In 1771 he wrote a project on the. *Constitution of Poland.* The salient point of this was how to build a community. He wrote: "There can never be a good or sound constitution except where the law reigns over the hearts of citizens: if the legislative power does not see to that, the laws will always be evaded. But how do we get to the hearts? That is what our institution makers (*instituteurs)*, who only ever envisage power and punishments, never think of, and where material rewards work no better. Even the most complete justice does not lead to that, because justice is, like health, a good that one enjoys without feeling and which inspires no enthusiasm, and whose price is only felt when it is lost…. So how do we move hearts and make the Fatherland and its laws loved? Dare I say; through children's games, by what appear to be idle institutions to the eyes of superficial men, but which form cherished habits and unbreakable attachments" (Rousseau 1967–71, III, 528–9). So, for Poland, Rousseau proposed a passive revolution in which a new hegemony favouring a new regime of rights would be established. Like all such passive revolutions, it had to build on past traditions and yet recompose them. He thus

abandoned his tabula rasa approach to history. The hegemonic process was explicit, taking antiquity as its model; in those times: "all sought the ties that attached the citizens to their *patrie* and to each other and they found them in the particular usages, in religious ceremonies that by their nature were always exclusionary and national, in the games that brought many citizens together, in the exercises that increased their pride and self-esteem; in the plays that recalled in the history of their ancestors, their misfortunes, their virtues, their victories, and thus interested their hearts, enflamed them with the desire to emulate and attached them strongly to the Fatherland that as ever more their concern" (ibid., 530).

Rousseau thus proposed something like Milosevic's appeal to a foundation myth (Kosovo) coupled with "bread and circuses": "to re-establish the ancient traditions and introduce others suitable for Poles"; to ensure that all Poles grew up *Poles* rather than just men, that is, Poles who believed that "ubi patria ibi bene" (ibid., 532–3). By proposing a federal government for Poland, as only in a small state would such national fervour exist, he also proposed that the traditional nobility continue. It was a federation that would strengthen the state (ibid., 566). Indeed, despite King Stanislas being a terrible tyrant and responsible for the misery of the serfs, Rousseau even urged that he be kept on at first. The existing machinery of state should not be shaken up too much and the emancipation of the serfs should be gradual after a long education in citizenship (ibid., 537). There should be a monarch with prerogative power and the parliament could only cut his head off if he did not do what was required for the defence of the nation; in the meantime, property relations would remain as they were while the traditional leaders educated the people into national citizenship.

It is such contradictions with his earlier work that posterity has focussed on. Rousseau is usually portrayed as a thinker who finally subordinated democracy and individual rights to nation-building. It is difficult to avoid such a conclusion. Fortunately, not all his ideas were taken up, or were so only in one way. In the end, the way his theory was used gave a particular slant to the development of human rights as his disciples struggled to fill in the gaps and to square the circles.

Conclusions

We sum up by claiming that, among theorists, Rousseau was more the great inspiration for the democratic, national-popular model of rights established in the French revolution than for the first statement of universal human rights to be passed into law. He also argued that support for human rights for all would only come through a hegemonic education in their favour. It was not automatic. Unfortunately, his view contained a fatal weakness: It did not consider whether a democratic nation-state might end up more vicious in its exclusion of the rights of others than the undemocratic model that had preceded it. Rather, its principle was that once freed of the corruption of a world based on inequality, the masses, whom many knew would be savage in the first phase of a revolution, would become virtuous and generous once

they made the laws for themselves (Rousseau 1967–71, I, 527–8; Manin 2007, 465). To argue for a democratic version of the national-popular model for attaining rights was to empower the majority – and, in France at that moment, above all the peasantry whose qualities we have already discussed. When villages that had long been enemies started to "fraternise" (see Furet and Ozouf 2007, 202) for the first time in 1789, it boded well for French nationalism and ill for others. Within 2 years "brotherhood or death" would become "to die defending [French] fraternity is to die in the face of potential enemies." The "people", the nation, for the terms were already interchangeable by 1789, would have even less time for outsiders than the British had a century earlier (see Nora 1992, 339–56). Those who did not "belong" would receive short shrift in the first democratic, national-popular state in history to espouse universal rights. (ibid., 206). In fact, genocide in the name of the national people started on French soil within 3 years of the promulgation of the rights of man and the citizen in 1789, expressly in the name of defending those principles.

Chapter 7
Human Rights and the Working Class

The Contradictions of the National-Popular

Nationalism had repulsed universal human rights by 1815 and continued to do so throughout the nineteenth century despite wars of national liberation fought to reclaim national traditions of rights. The defeat of universal human rights started under Thermidor and Napoleon, with his insistence on the new administered state and its law and order. It continued up to 1848 almost without a break. For universal rights, the return of the old regime (1815–30) and the development of a "bourgeois" hegemony (1830–90) has to be seen as continuing what Thermidor started: the persecution of believers in rights for all humans and the restriction of such beliefs to tiny groups of true believers for nearly a century. Supporters of universal rights dwindled to a small number, were regarded as "mad" and frequently persecuted mercilessly. Chapter 10 shows that they were nearly always organisations of the new working class, which developed over the century into a proletariat. The effect of the murderous oppression of such groups was to send them fleeing to all parts of the globe, bringing the notion with them to places who had never heard of it before, and shifting the geographical centre of universal human rights to Anglo-Saxon countries and the New Worlds. Unfortunately, the ideas arrived with foreigners who were already seen as the enemy in the logic of warrior nationalism and few host peoples were interested in listening to them. The majority of the world in Asia and Africa remained oblivious to universal rights until almost the end of the century. Their lot, as we show in a later chapter, was to suffer and endure while the history of rights was fought by whites.

Between 1815 and 1945, only the French state ever again proclaimed such notions as a goal, and that was very briefly in 1848. By then they were regarded as no more than French national law, no different in substance from the traditions of the British common law, the Dutch Reformed law, the Muslim sharia, the Hindu Vedas, and fitting nobody except the French. It followed that in the few countries in the Western world where human rights existed by 1815 all the sections of society still denied those rights could only obtain them inside their state by being recognised

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as worthy by the legislators. The excluded still constituted the *majority* of the populations of the states that had established some human rights, although the number and nature of rights from which they were excluded differed. The largest group with inadequate rights were women. All women were excluded from active rights and could only await as a boon from male legislators the rights that their particular condition required. On the other hand, they usually enjoyed some established civil rights. The next largest excluded group was the propertiless working class. Again, they enjoyed passive rights to life and liberty but no right to make the laws under which they lived. A third, even more significant, group were from different religious or ethnic minorities, often regarded as aliens if not traitors. The latter, for example, the Irish, who were not allowed their own language or religion, sometimes had even less than the civil rights than women and workers had. On the other hand, in some countries, like France, some groups, like Jews, had enjoyed equal rights since 1791.

After 1815 each group conducted a political struggle to have the particular rights that they needed, recognised and made into law. The goal of all became to have the vote. This would allow them to put their representatives into parliament and create the rights they needed. Obviously these differed from those of the well-off propertied classes who already enjoyed civil and political rights under, say, the bill of rights of 1689, and had little need for economic or gender-specific rights. The process of becoming recognised as nationals and obtaining rights was measured from below by the democratisation of politics, the marker of being included as citizens.

Rousseau's theory of democracy triumphed, not in Jacobinism but in the democratising project of the nineteenth and twentieth centuries. Only a people that rules itself can be free was the common chant of all national-liberation movements after 1815. Moreover, within states where rights were limited to a minority of the population and where we witness a struggle by out-groups to prove that they merit citizenship and therefore rights, we also see reiterated ad nauseam that through democracy a good people or community is forged, and that the resultant republic will bring economic, social, political and cultural rights for the whole nation, despite internal disagreements within the republic that emerges. We cannot blame out-groups for the hopes they had that democracy would bring rights for all and that the key right to win was the vote. Throughout a history of embedding each "people" in the national tradition of rights by making them the source of such traditions through parliament, we see the dead hand of Rousseauian theory, revived as a doubly strong belief in each nation-state in the goodness and virtue of its own people, whose genius lay in creating laws or rights appropriate to its different national history.

Undeniably, in the Western "white" world, human rights for nationals grew greatly over 150 years after 1789 as out-groups were admitted to the vote, through "democracy". They did not for the majority of all whites who lived in eastern Europe, particularly the Tsarist Empire where serfdom continued for nearly 40% of the population until 1861. Nor did they exist for most whites in Australia until the middle of the century. For the rest: Latin Americans, Africans and Asians, whose homes the whites occupied by force in the ways described in Chap. 3 above, the human rights of individuals remained almost unknown and certainly not generally

sought or observed. Yet we should not jump to the conclusion that in autocratic states, even the more backward, rights could not be created from above well before they were won in democratic states. Democracy is not a necessary condition for rights. Autocratic Austria-Hungary abolished the death penalty long before Britain and the United States.

What few thinkers addressed even in the second half of the century was how the right to vote fitted with the other rights. Did it override them, so that a majority decision in some national or community interest could and should deny the other essential rights of an individual to life, liberty and the pursuit of happiness? Or was it, as the French declaration had suggested, merely a tool for enforcing those rights which were inderogable? Formally, the answer was that there could be no democracy without rights to life, free speech and expression and so on, and conversely there could be no rights without the democracy that ensured them. Moreover, as we have shown, history had seen civil rights precede political rights (see generally Bobbio 1999*,* 371; 1990, passim) . But the answer given in the nineteenth century was inscribed in the logics of seeking national rights. If their attainment depended on admission to citizenship by showing that one was worthy of and merited what others enjoyed, then the notion of rights being "natural" and applicable to all was impossible. In order to have human rights, a community or national bar had to be passed where the criterion was merit and the judge was the nation-state itself, according to its overriding community interest. We thus see during the 1800s, the disappearance of the discussion of natural rights from national legal systems even as they end torture, slavery and other crimes against humanity. When natural rights disappeared, so did universal entitlement. In the nineteenth century, the more democracy grew and the more the nation-state was empowered as ever more individuals were given the right to vote and make rights for themselves as a community, the more others who did not meet the national bar were excluded.

To become citizens – that is, have rights in the city – all excluded humans had to show that they belonged to the nation or shared in the national identity established by those who were already citizens. So, the history of the rise of democracy – that is, making all nationals citizens with rights – amounts in this dimension not only to a reinforcement of the nation-state, but also the elimination of a right to difference, as the desired identity became that of a national citizen able to say: "I am British or French or Haitian". Indeed, an individual who enjoyed citizenship of the first of these two was even protected in his national rights everywhere. Significantly, since the power of Haiti ended at Port au Prince, the proud British boast *civis Romanus sum* provoked laughter when squeaked by nationals of Haiti. They were obliged by a coalition of other nations, notably the US, to repay the French for winning their own freedom, effectively wrecking their national economy up to this day.

Since the price of being admitted to rights through national citizenship was ending lesser attachments, all residual oppositional differences in substance or appearance had to be suppressed by those who wanted in. At most, they could argue that such differences were complementary to what already existed, a sort of addition to the value of the historically transmitted and structurally unassailable social/legal order of the nation. And, of course, since loyalty to the national interest was the

paramount value, to suggest the execrated French notion of 1789, universal rights, was the greatest of sins, disloyalty to one's own fathers and mothers and the heritage they had bequeathed. So, the requirements for citizenship and thus rights became impossibly high for outsiders seeking admission to a state whose history and national identity was foreign to them. Furthermore, the process of excluded groups winning human rights within nation-states, which undoubtedly took place for many during the nineteenth century, had as a background a rapidly changing world. Precisely when states were granting existing human rights to more and more of their own people, a world of formerly sedentary populations was giving way to a world of massive international migration. This was forced by both need to find new sources and places of livelihood, typically easily available land, and the requirements in newly-occupied territories like the Americas and Australia for cheap and plentiful labour. The slave trade was an early example of both.

Global Migration

The new global migration started in the seventeenth century with the black slaves (discussed in Chap. 9 below) and continued into the twentieth century for even greater numbers of Europeans, Asians, Pacific islanders and others. In the 1800s, 51 million people left Europe, 38 million for the US. After the 1880s, a new, mass non-white and non-black African migration began. France sent Tonkinese in their thousands to the French Pacific possessions as labour. Similarly, Indians left soon after (for example, to Fiji in 1889) in hundreds of thousands as indentured labour headed for Africa, the British Pacific colonies and elsewhere. Chinese migrated to southeast Asia (so many that it became known as Nanyang), South China and further to all the continents except Africa. The immigrant flows were massive, outweighing any potential repatriation or return home for millions of people. This was often of peoples who were the latest form of slave, bonded labour needed in the empires of the European powers.

The main human right desired by all these individuals remained that to life. Yet, once slave and tied labour like serfdom ended, usually by the last quarter of the nineteenth century for whites, although it continued undisturbed for "other races" until well into the twentieth century, it became clear that the right to free movement was of central importance. Without a right to free movement in the free capitalist labour market of national democracies, an individual could not move to where there was work, and unless work was found, he or she starved, or was deprived of life. The mass migration of bonded labour was not observed everyday by white majorities as it took place in their empires, far away and out of sight. The story remained hidden for the majority of white nations who vaunted the human rights they themselves enjoyed. Consequently, the history of what mass migration meant for human rights based on admission to national citizenship was not studied from the point of view of victims until a 100 years after it started.

Before 1860 white newcomers had been integrated culturally, or "naturalised" into nation-states. This was possible because their numbers and natural differences with host societies in Europe, America and Australasia were not too great. Immigration did not suggest that the nation-state and human rights might be contradictory interests, particularly while excluded groups like workers and women were winning human rights for themselves. So long as groups like ethnic minorities, who was not considered capable of integration because they were too different, could apparently be sent "home", to where they "really belonged", the nation-state itself did not come under siege. Even among progressives the solution to majority oppression became to give everyone who had no home, a homeland as soon as this was possible – preferably at not too great a cost to the donors. It was not simply hypocrisy. It was considered kind and just to repatriate people. We meet such ideas again and again, well before the notorious solutions to the "problem of the Jews". Victims themselves espoused the solution of attaining national independence as the path to rights and justice. For example, John Brown's plan (see Chap. 9) was to set up a free state for blacks somewhere in the vast "empty" spaces of the United States. Decent men and women decried imperialism and worked for the freedom of all peoples and national self-determination. International law started to develop in new directions in 1878 after the Treaty of Berlin when "minorities" were recognised formally, leading up to the post-First World War solution carried into reality under President Woodrow Wilson's aegis. Usually this was and is seen as part of the struggle for (human) rights for those of minorities. Through national independence, all peoples could enjoy the boon of self-determination and the greatest active right of all, on which all others rested: the democratic vote.

Rethinking such solutions only really started with the immigration after 1880 *into* Western Europe of thousands of Eastern Jews, people whose story was immortalised in Joseph Roth's books. They were very different in dress, language, religion from the citizenry of the states they fled to; but they were also indistinguishable from other whites, unlike blacks and Asians. They were, after all, "European". And they were "refugees". Despite continuing obliviousness to their suffering shown by nationals who had won rights for themselves, such masses of "white" forced migrants, later called pariahs by Hannah Arendt, lost faith in the notion that rights would come through winning acceptance in their old or their new homeland. As the *heimatlos*, they challenged a blind faith in any fatherland's claim to decide who it would admit to the boon of its rights. The populations who started to meet them en masse had grudgingly to recognise that they had been forced to leave after persecution by nation-states and national peoples seeking to purify themselves (see Noiriel, 1991, 98ff; for history and logics of purification see Moore 2000). When the *heimatlos* washed up in tidal waves on their shores and nation-states engaged increasingly in policies of ethnic cleansing, belief in the nation-state model for human rights became less and less secure, as states refined and purified their national identity and made immigration and citizenship more difficult to obtain by aliens. Some saw that rights for these huge migratory populations would have to be accorded to them regardless of "homes". There was little way to imagine this except as *universal* human rights.

The Stake-Less Sufferers: The Working Class after 1815

Within the few Western states that had already established some human rights, the majority of the population was, in 1815, still excluded totally, or in part, from what rights had been won. The first of such groups was the working class whom the law excluded from many passive or civil rights and all political or active rights, notably that of making the laws under which they lived. This chapter recounts how they won that active right by the end of the nineteenth century and were thus able at last to create through legislation some rights – to a fair wage, decent housing, education and health – that already in 1793 the Jacobins had declared were necessary. They did this more rapidly than other excluded groups, although their struggle was of heroic proportions. That story has been told many times. The relative rapidity with which they won the human rights of other co-nationals is easily explained: they had fewer problems in conforming to the ideal national identity.

Before 1815 the holders of power had inserted "from above" groups previously excluded from human rights. As shown already, such national traditions were being forged before the French revolution and the Napoleonic era, but their nature and complexity developed dramatically after 1789. The reforms of the centralised administered Napoleonic state-building, especially the breaking up of feudalism that had started in 1789 and continued under Thermidor, had created a new landed upper-middle class in many European states. They were not entirely silenced on matters of power and rights after 1815. The material world had changed in a way that allowed new ideas to creep into the discourse of nationalism. These could override any appeal to those of the feudal pre-1789 world and all returned monarchs had to compromise with them. When they did not do so adequately they faced palace revolts – sometimes glorified as revolutions – which culminated in 1830–1 in a new political order in many countries. A "bourgeois" hegemony began in many states.

This progression is illustrated by the Two Sicilies and in Italy more generally. After 1806, the local resistance to Napoleon by a new landed class saw the formation of new semi-political organisations, including the freemasons and, more radically, the *carbonari*, whose name harked back to a libertarian tradition in Naples and elsewhere. Members of these organisations were hostile to notions of universal human rights because those notions had become identified with France and its national hypocrisy. But they were equally opposed to the old regime and its backers – in Italy mainly the Austro-Hungarian Empire – which had by 1815 reoccupied its lost domains in the north and centre of the peninsula and stood behind the tottering monarchs of the Two Sicilies. Out of such secret societies as the *carbonari* arose a new nationalist movement in which the heroes of the national liberation struggle, notably Giuseppe Mazzini, cut their teeth. Their views would win a sufficient mass following by appealing to the national traditions of rights in much the same fashion as the Dutch and British had done in earlier centuries. In sum, the notion of a fellow national had become much more open by 1815. It comprised possibilities wider than those of lords and serfs tied together in immemorial ways, or even the autocratic and brutal realism of Napoleonic rule.

Napoleon, having regrouped after defeat in Egypt and Italy, returned to Naples and put his brother Joseph on the throne in 1806 with the admonition that the populace would periodically revolt because of the inequalities and injustices of the world, and that the only way to cope with that was to slaughter them (Johnson 2002, 165, 169–70). This became the pattern of imperial rule until 1815 in Italy, Spain (where Joseph was made king in 1808) and Germany, where others in the emperor's entourage were made princelings in the same decade. It was reinforced when Napoleon was defeated at the battle of Waterloo, having been undone by his overweening ambitions. He had lost the support of the French people and even of his armies, with the defeats in Spain and Russia and his nonchalance at the slaughter of his men. Then the *ancien regime* returned and tried to put the clock back to 1788.The hunt for the remaining supporters of the declaration of rights that had become a feature of Napoleonic Europe after 1802 became merciless, as vengeful monarchs and feudal lords returned to the worlds that they had lost in 1789. For the few survivors of the revolution, preaching the rights of man became a matter of life and death.

In 1815 the greatest war hitherto experienced in history came to an end. Millions of men were demobilised and returned home to join millions of others crippled in the war. The mass returned to a slow-down in production which in 1825 turned into a depression that lasted in many countries until 1848 (Dolléans 1957, I, 28–9). This resulted from the free trade system that a victorious Britain imposed and that destroyed any emerging competitive industry elsewhere. In sum, the little people returned after 1815 to lives that were ever more miserable and poverty-stricken. In some countries, the worlds they returned to had changed greatly economically and socially over a generation; in others the past continued. The states of the Holy Alliance remained until the 1870s dominated by feudal agriculture and serfdom like that described in Chap. 1, worst in its eastern and southern peripheries. The misery of their poor was matched by a benighted ignorance that meant that human rights were unknown concepts (see for example, Herzen 1963). In Western Europe they had to find work in a world where the bourgeoisie was in the ascendancy, where private, not feudal, property was becoming the norm, and where, above all, the industrial capitalist future was already clearly triumphant in Britain. There, the war had transformed production methods but systems of social management had often been frozen for over 30 years as the war demanded total commitment.

In France the feudal estates had been broken up during the revolution and replaced by small peasant property. But there were already small pockets of industry, notably textiles in Normandy and the Lyonnais, and mines in the north and east. The former had doubled production in 1720–60 but the revolution and war brought this development to a halt at the small workshop stage. The 20,000 in the Lyon silk and textile industry lived in appalling conditions in 1789: "Twenty thousand people are fed by charity, and consequently very ill-fed and the mass of distress…among the lower class is greater than was ever known…the chief cause of the evil felt here is the stagnation of trade" recalls Arthur Young (Young 1942, 306). These people were caught by the flight of capital and the English blockade. Their attachment to Robespierre's

and Babeuf's declarations of rights (see Chap. 11 below) is partly explained by their suffering. At the same time, the Catholic church was obliged to build up its social services to help indigent families. Their conditions worsened after the Restoration, when their nostalgia for the rights promised in 1793 increased. In 1834 for these men and women: "to live [still] means not to die" (Dolléans 1957, I, 16).

The *loi le Chapelier* of 1791 prohibited people organising to defend and improve their conditions. But in some cases the family circle relations of the small workshops palliated this denial of rights because it was still possible in 1815 to believe that master and journeyman had joint interests. Had they looked across at Britain, they would have seen the future of their world. By 1830 an agrarian England was becoming mere nostalgia (Cobbett 1982).The workshop was disappearing into the factory. Vast numbers of servicemen joined the masses, from all over Britain and Ireland, thrown off the land during the enclosures, and who migrated to London and other great cities in search of work. On returning from the US in 1800, William Cobbett (described by his contemporary William Hazlitt as "unquestionably the most powerful political writer of the present day" (Hazlitt 1936, 50)) not only found them poor, but also by 1812 they "seemed like chickens, creeping and piping to find a hiding place, while the kite hovered in the air" (Reitzel 1947, 120). Cobbett estimated that half of his rural neighbours were paupers by the end of the war (ibid., 137).

In 1810–16 conditions were so bad that country-folk started to destroy the machines that were replacing their labour in the semi-spontaneous "Luddite" riots. The offenders received harsh jail sentences and some were transported to Australia. Then, in 1815 it was made quite clear that the British state, which had forbidden any organisation for the defence of workers' conditions in 1800 (Combination Act, *Statutes* 39 and 40 Geo III, ch106), would not tolerate any protest at all. At "Peterloo" in Manchester in 1819, a protesting crowd was charged by the militia and 11 were killed and 500 injured. *Habeas Corpus*, which had briefly been restored in 1815, was again suspended. Shortly afterwards, the Six Acts, effectively banning any meeting of protest, were passed.

In Britain's working class, otherwise like that of France in many respects, we find one obvious difference from their fellows across the Channel. For a generation, the British working class had been taught to anathematise the French revolution and all its works. Returned soldiers saw the French as their worst enemies. Before Napoleon's transportation to St Helena, they came with a mixture of fear and reverence to look at the imprisoned leader, as if he were a wild animal. Even the progressives had after 1800 set up the American revolution as a preferred model to that of the French, since the former had been made by "British minds" and had not slipped into "anarchy" (Dinwiddy 1999, 449). After 1815 the conservatives talked much of the revolution, holding it up as the object of general execration, while their opponents took up views like that of Walter Fawkes:

> They [the French] had been governed by the *sword*, and only knew how to resist by *violence.* They had *no law*, no *ancient Constitution*, the proud legacy of their fathers, to appeal to. They were misled by *metaphysics* and *imaginary* good. We bow to the *accumulated*

> *wisdom* and *experience* of ages. When they had *curbed* their *old* government, they had a *new* one to make; when we get rid of our "virtual representation" we shall fall into the *old current,* and feel ourselves *at home* again (cited in ibid., 449).

Cobbett took a rather more balanced view. He had been a luke-warm supporter of the revolution and after reading Paine had gone to Paris in 1792, leaving for the US only when war made it dangerous for foreigners to remain. He had defended the British strongly in Philadelphia against the pro–French Americans and when he left the US he pronounced that he hated it and its revolution for its hypocrisy; his belief in Britain only becoming less wholesale when he landed in jail in England for condemning Hessian mercenaries' brutalities against British conscripts who refused to go to war until paid (Reitzel 1947, 53–6, 64–5). Yet in 1815 he said that the people could no longer blame the Levellers and Jacobins for their woes. Such radicals had opposed the war and its deleterious consequences; now, the solution was parliamentary reform. Something the Jacobins had also sought.

Parliamentary Reform and the Workers

So, working class suffering continued and so did the denial of human rights to them because they had no stake in the country. The only solution, after universal human rights had been smashed, appeared to be to gain national rights through winning active citizenship for themselves. The main object of the Peterloo meeting was, for example, equal representation "or death". By a curious twist, this meant adopting the core notion that Rousseau had coined: freedom comes from living under the laws one makes for oneself. It took until 1884 for male workers to win that right even in the country that claimed to have created the most advanced rights regime in its revolution of 1689 (see Macaulay 1980, 19). Women had to wait until 1928. Few new rights would be added for workers and women until those preliminary victories were won.

In the 1820s, the workers in both France and Britain often looked to their "natural" leaders, the middle class, for solutions and in particular backed the demand for more democracy. In 1830, in a relatively bloodless 3-day revolt in Paris, the combined classes, including a few survivors of 1789, like Lafayette, ended the attempts of the reactionary Charles X to return to the old regime. Charles abdicated. A new, constitutional liberal regime, based on the principle of "popular sovereignty", was established under the "July" monarch, Louis Philippe of the House of Orleans. Similarly, agitation and riots finally forced the British reactionaries to pass the Reform Act of 1832 that ended their corrupt and unrepresentative parliamentary system of rotten boroughs and enfranchised new merchant cities, compelling regular elections. In both cases the upper levels of the new bourgeoisie came to power, while the monarchs and lords gave grumbling ground. The working masses that provided the power in the streets to push through these changes expected a *quid pro quo*. They were disappointed in both Britain and France.

France

Within a year of the "three glorious days" of the 1830 revolution, the workers of Rouen, who often toiled for 17-h a day, asked for a 12-h limit. The authorities replied that the freedom of labour was no less sacred a right than all the other rights for which the French had shed their blood. The owners set up a federation pledged not to improve conditions. The workers replied with an assertion of a right to organise. The state countered with more repression and the workers realised that they could expect nothing from the new July monarchy's constitutional regime. "The 3 days of July, says *Le Peuple* of 31 October, have done nothing but change the dynasty. It promised more…" (cited in Dolléans 1957, I, 55). Another paper noted that the Republican promise of more political rights while protecting the right to property did not see that:

> It was not for this that the workers got together in their coalitions and revolts. Politics was not an issue: it was not a matter of opinions but of interests. The lower classes experience, there is no doubt about this, bad feelings about property; and that is happening not only in France, but in England and Belgium; everywhere we can see that the lower classes are tending to invade property; that is *the* question of the future, an entirely material and palpable question (*Les Debats*, 13/9/1830 cited in Dolléans 1957, I, 54).

Machine breaking became widespread in France late in 1830. The cost of living was so high in Lyon that trouble started there, where the workers had, once again, expected their conditions to improve with the July monarchy. In asking for salary increases, they were disappointed. "The order of things had changed, but despotism, chased out of the chateaux, had found refuge in the counting house." The bosses of the workshops (*ateliers*) tried to elect a commission to bargain for minimum piecework rates (*le tarif*). Initially, it seemed that some of the middle class and the prefect would be in favour, but the bulk of the employers (*fabricants*) refused even a proposal that would have given the workers enough to live on while leaving themselves an "honest profit". The owners had "speculated on hunger" and appealed directly to the new national assembly to have all agreements cancelled. A lock-out was proposed. Demonstrations on 20 November 1831 led to conflict with the National Guard. The prefect and the Guard's general were taken prisoner by the workers, whose cry had by now become Sylvain Maréchal's: "The tariff or death"; barricades went up and the workers massed behind them. Fighting led to the workers taking control of the city. A few warehouses were burnt but basically order and respect for property was maintained. At this point, the unity between the bosses of the workshops and the workers broke down. Both pledged allegiance to the monarch but the former wanted to use only legal channels to obtain their goals. The workers set up a provisional government, with the support of the prefect. This allowed the forces of law and order to return to the city and the workers went home expecting that their demands would be met. Instead, the owners invoked the penal code and a ban on organisations. An army of 20,000 was dispatched to Lyon, execrated in the villages as it passed. On its arrival, 19 workers were arrested and the rest were told by Minister Casimir Périer to resign themselves to no changes in their conditions.

Dolléans cites Charles Béranger's petition to the Assembly in 1831 to show how far workers' perceptions of the possibility of joint activity with the middle class had changed since 1830.

> Liberals…all united together on the day of danger, rich and proletarian, idle and workers, drawn to one common goal, all had faith in their God, freedom. A powerful God that gave birth to prodigies to destroy an out-of-date order of things. But, after the victory, when it was a question of building a new edifice…they put together a few bits of smoking debris… each sought to build his own little nest…they barricaded themselves in while we proletarians, the great number, stayed outside, without shelter, without clothing, without our *pot-au-feu*, soon we will be without bread (Dolléans 1957, I, 71–2).

In 1832 the workers started to set up "philanthropic" societies to get around the 1791 ban on organising. In Paris, that of the tailors took the name Society of the Rights of Man (Dolléans 1957, I, 70). Its goals were still economic and social improvements for its members, but it stated that it would no longer "obedient" to other persons. Disappointed republicans had collected around the Society for the Rights of Man. Some were reading the work of Etienne Cabet, Saint-Simon and Pierre Leroux. Jacobins dominated the Society of the Friends of the People. They were mostly middle-class but some workers started to join. By the end of 1832 the Society of the Rights of Man had 750 members and that of the Friends of the People, about 300. Their slogans echoed those of Maréchal. A committee began to draft an exposition of the rights of man based on Robespierre's version as transmitted via Michelangelo Buonarroti (see Chap. 11 below).

In 1833 the philanthropic societies started to organise strikes to win some minor improvements. The tailors' Society of the Rights of Man suggested to other societies that they unite to strengthen the ties of brotherhood, to secure limits on working hours and win a minimum wage while awaiting a "popular government". The state responded by applying the penal code with extreme severity. The leaders were arrested and jailed for up to 5 years. Pointing to the treatment of the tailors, Leroux, Buonarroti's contact, pointed out that mechanical workers had nothing to sell but their labour. So the 4–5,000 compositors and typesetters in Paris should unite to become a class. In all these cases there was a repeated call to "brotherhood" (Dolléans 1957, I, 83–6.).

Such exhortations were answered. Six thousand cobblers went on strike in Paris and their spokesmen were jailed. Then the Society of Perfect Accord, whose origins also went back to 1797, established itself in several cities. The new cry was that in unity there was strength, and a united strike would win the workers just and decent conditions. "In defending the rights and interests of our body, we will protect the rights and interests of all the others." The cry for "human brotherhood" again resounded from all quarters. A slightly dubious police source reports this speech from Voyer d'Argenson, one of Buonarroti's circle, to the Society of the Rights of Man: "We should stop talking about politics to the workers and speak only of their material interests…set up coalitions [that focus on their misery and the egoism of the owners]" (ibid., 90).

Republican concerns had not in fact disappeared (in 1834 the Lyon Society of the Rights of Man adopted explicitly republican projects), but the speech highlighted

the new central concern that class antagonism was causing the state. A radical reorientation had taken place in the projects of promoters of the Rights of Man. The authorities warned that strict measures would be taken to uphold "the law" and the owners decided to break the workers once and for all. The societies decided to resist with force any attempt to repress them. The state had become the enemy of the workers. Soldiers were sent into the streets of Lyon and Paris to face the crowds. There was a moment of fraternisation. In Lyon 5–6,000 workers controlled the heights above the city below, held by 13,000 soldiers. The latter were told that the workers were "canaille à mitrailler". Shots were fired and a 6-day battle ensued. The insurgents showed heroism and humanity but the troops replied with great brutality, news of which rang around Europe. At the end of the week there were 600 dead or wounded workers (Lambron 2004, 144). The Paris workers then fell into the government's trap. It had led them to believe that, given the situation in Lyon, their claims would be met. Instead, the leaders of the Society of the Rights of Man were arrested and the workers assembled to protest, throwing up barricades. General Thomas-Robert Bugeaud had been instructed to give no quarter and told his 40,000 troops who surrounded the workers' quarters to "kill everybody". A terrible massacre of innocents followed, immortalised in Daumier's *la rue Trasnonain.* Many of the victims had been frightfully mutilated.

The constitutional monarch stated before the Assembly that "it had been a lesson for those who so often have had the criminal audacity to attack the government" (Dolléans 1957, I, 107). The beaten workers drew another lesson: it was useless to expect more justice from the new bourgeois capitalist constitutional monarchy than from the old regime. The rights of man were obviously not going to be tolerated by the French state in the post-1834 period, even as ideas. Censorship became draconian. For supporters of the rights of man, the new enemy was the bourgeoisie, henceforth no longer considered part of the people.

In the 5 years after 1834, the motley supporters of rights who harked back to Robespierre via Buonarroti, having in some cases been expelled from Belgium to France in 1830, fled French state repression. The major destination was London, as England was where the most liberty was to be found. Typical were the surviving leaders of the Society for the Rights of Man, with whom Cabet made contact in London in 1834. Another group belonged to the secret German League of the Banished (1834–6) whose links with Auguste Blanqui's Society of the Seasons led them to participate as the League of the Just in an abortive rising against the French state in 1839. This saw Blanqui condemned to a long term in prison. In 1838 their main intellectual leader, a disciple of Gracchus Babeuf and an early communist inspired by Christianity, wrote lines that exemplified the shift in thinking after 1834.

> The names of Republic and Constitution
> Beautiful tho' they are, are not enough.
> The poor have nothing in their stomachs
> Nothing on their bodies, and must always suffer.
> That is why the next revolution must be social, if their lot is to improve (pour son mieux-etre)
> (Weitling 1895).

These refugees, who practically all knew one another, whatever their particular credos, brought the rights of man to Britain. The British workers, hitherto rivals of their French fellows, felt a great sympathy for their suffering in 1831–4. It was recognised by the National Union of the Working Classes in 1831–3 that the French workers had been robbed by the crafty middle classes. Even their right to express themselves had been denied. Walter Scott is reputed to have stated that the repression had turned him into a Jacobin (see Dinwiddy 1999, 453). No longer were supporters of rights under the anathema they had been.

London thus became the new centre for the defence of the rights of man in the 1840s, just as it also became obvious to many progressives that defence of civil and political rights was useless if these were not accompanied by economic, social and education rights. While the French still asserted pride of place for rights, it was the symbiosis of the French tradition with the working class experience, as exemplified in Britain, that would be more important in the next 5 years.

Britain

The English urban and industrial working class was already very large. Two-thirds of the population lived in town by 1826. It lived in appalling conditions, but due to the political activity of men like Cobbett and Francis Place, it technically had, since 1824, enjoyed a modicum of freedom of expression and the right to organise. In the 1820s, many workers were persuaded that a betterment in their lot could come from parliamentary reform to allow more middle-class members. Their leaders, like the cabinet-maker William Lovett, helped organise in 1831 the National Union of Working Classes *and Others* (my emphasis) directed to reform of the suffrage. Like Cobbett, with whom he collaborated, Lovett built on the claims to ancient liberties of Englishmen that in the years after 1815 were much more common among the English working class than appeals to human rights. Broadly, he believed in collaboration between the working class and others. While he had created a newspaper "contrary to law" to assert "might rather than right", its goal was still to assert popular sovereignty (see *The Poor Man's Guardian 1831–5*, (henceforth PMG); see also Briggs 1969). But by 1837 Lovett and his fellows had changed their tune (see *PMG,* 11/4/1835, 490). By then, English workers knew that they had little in common with their masters, that the parliament worked only against them, and they wanted "equality of Rights".(see *PMG*, 14/2/1835, 427; all page references are to the facsimile edition ed., Hollis 1969)

The problem was how to attain that equality. In a lengthy debate in early 1835, a dominant group emerged. Its views were adopted in the 1839 charter, whose principles informed British working class activity for the next generation. Provoked by Robert Owen's view that even the attainment of universal suffrage would not lead to economic and social rights and that a new moral order based on education was needed, the editors of the *PMG* stated clearly what they thought the correct policies should be. We can sum these up as achieving ever increasing democracy and thus

imposing by law on the middle classes, who were the enemy, the economic and social and other rights needed for civil and political rights. The Chartists knew that this would be a gradual business but none thought that there would be no reform for 32 years (see Briggs 1969, esp. 19–20) and that manhood suffrage would only be achieved in 1884. The "grand line of demarcation" that separated them from Mr Owen was this:

> We simply seek a radical reform in the Institution of property, through a radical organic reform in the Legislature, leaving it to the superior wisdom of a just and enlightened Legislature, representing all interests, to introduce subsequently the necessary social reforms. The principle to be determined on by the people is,-*that there shall be henceforth no idlers, or uselessly employed persons in society, and that each individual shall receive the full equivalent of his services, and no more* (*PMG,* 28/3/1835, 474–5; 21/3/1835, 465ff; 4/4/1835, 481ff).

The goal was still equal rights, but the policy was legal and only revolutionary if effective reforms were revolutionary; "we beg to disclaim on behalf of Chartists *generally* the charge of '*violence and incendiarism*'" (Lovett and Collins 1969, 16). The editor, H. Hetherington, thought of himself on occasion as Robespierre's disciple, although the Chartists were quick to deny that they wanted a republic without a monarchy (*PMG*, 28/3/1835, 478). Such policies were far from those of the Jacobin who combined "the noblest qualities of human nature, such as *perfect disinterestedness*, *incorruptibility,* and an unconquerable love of justice" (*PMG,* 13/6/1835, 565). What is important is that the proponents of these electoral reformist policies had the overwhelming support of the working class until 1848, gathering millions of signatures for their petitions for a six point Parliamentary reform (see Thompson 1971, 62–66). In the interim years, they worsted the radical wing of the Chartist movement in a struggle over policies. The latter drew close to, and started organising with, the European refugees in 1842.

What leaders like Hetherington, Lovett, and Hunt and Cobbett before them, enjoyed, was being in tune with the "British" qualities extolled by Burke, and shared across classes until industrialisation. Theirs was a confused pragmatism, clear in Cobbett (see Hazlitt 1936, 50ff), which combined good-heartedness, generosity of spirit and a readiness to keeping changing policy depending on circumstances, to adapt to all interests at play. They were courageous and most spent time in prison for their sense of fair play and scorn for a rule of law that worked only for the rich. They never stopped denouncing, ignoring and opposing it. But they thought that abstract principles, even as expressed by Paine, who remained a hero, were more appropriate "over there" than in Britain. This was a view reciprocated by their French interlocutor Louis Blanc, whose own reforms were described by John Stuart Mill as "the State should disburse sufficient funds to create the amount of productive employment which was wanting" (Blanc 1971, 57–8; 83–4). They also saw as hypocrites men who defended the abstract rights of 1789 without adding on those proclaimed in 1793 (*PMG*, 13/6/1835, 561). The reformist Chartists argued that having friendly members of parliament meant the repeal of more reactionary legislation. In sum, they were right to assert: "The people want to be represented" (*PMG*, 30/5/1835, 544). Unfortunately, most of the "radical" MPs on whom they

counted, supported instead the Poor Law that ended parish relief for the destitute if they did not work.

However, in order to explain Chartism's relative popularity and success, we must acknowledge that its agitation, self-sacrifice and pressure in parliament gave it credibility and did lead to reforms. The state had allowed freedom of the press and then taxed all papers so prohibitively that workers had to publish illegally and then go to jail for it. They did both and finally the tax was abolished. Similarly, the freedom of organisation forced through by Place's agitations, was circumscribed in 1834 by the use of old legislation like the Unlawful Oaths Act (1797) to prosecute and convict and transport farm labourers. Constant agitation on their behalf saw their return from transportation after 4 years. (*PMG,* 11/7/1835, passim). From the point of view of rights, they made gains for English workers. What they all ignored was the theoretical issue of *the structural place of rights as higher than any law*, even that passed by a democratic parliament. They assumed that such a Parliament would not infringe rights. Overall, rights were not discussed as prior or superior to politics, despite the constant claim that the rule of law was the problem (for example, *PMG*, 11/7/1835, 592–3). It was left to the radical Chartists to advance such views.

Nationalism and the Working Class

The drive for rights for all the workers of the world took place in a world where nation-states were increasingly became the norm. Outside tiny radical circles, there was no further move towards the *universalisation* of rights for decades. Even within the international organisations seeking the universalisation of rights through the international proletariat, radical proponents were often in a minority against anarchists who expressed a different, peasant, view. This created great inconsistencies in less rigorous thinkers than the marxists. After 1848 Harney, for example, started a close association with Mazzini, himself an exile in London since 1836, and leader of the popular nationalist movement Young Italy and its avatars elsewhere under the umbrella of Young Europe. By the 1850s, Mazzini had become a privileged writer in the radical chartist *Red Republican* and *Friend of the People* (*RR*, 20/6/1850; 7/9/1850, 94–5; *FP,* 1850–1, *passim*; all page references are to the Merlin Press Facsimile edition, London, 1966; see for example, *FP*, 14/12/1850, 6–7). Harney's and Ernest Jones' calls for a brotherhood of peoples was quickly confused with Mazzini's populist Holy Alliance of Peoples. This was seen in the very name-change of their paper from *Red Republican* to *Friend of the People*. ("it [*RR*] was a name which…would always keep those who bore it, a small party" *FP*, 7/12/1851, 1). The radical Chartists began to support the struggles for liberation of peoples, which Mazzini argued was a priority, needed before any declaration of rights could have any effect. For the Italian, first came the duty of the individual to God and people and after independence for the national community was attained, then the rest would follow (Mazzini 1887, 44ff).

Harney's colleague, Ernest Jones, became such a populist that he even failed to see fully the dangers of supporting British imperialism and the retention of its

Empire. He thought that this had been built by the English workers' blood and tears and they should not relinquish it (*RR*, 31/8/1850, 82; see Marx and Engels, 1976 (11 January 1848), Vol 6,473–5: "This Empire is rightfully the property…of the entire people"). This was despite Jones' own recognition that the people were becoming less radical after the set-backs of 1848, and his mixed feelings about the trade union politics that were replacing the Babouvist drive for popular sovereignty of the charter and "something more" (see *FP*, 18/12/1851, 41–2; 25/1/1851, 49–50). If, on occasion, Harney condemned the brutality of imperial rule in places like Ceylon, he was caught in his hope that the reaction of the 1850s would give way to a renewed popular drive for a real democracy, and that this would lead to decent treatment of colonies (*FP*, 8/2/1851, 66). Such hopes were shared by Mazzini and "young Europeans".

This populism and encouragement from radicals of the belief that a worker should be a populist nationalist came just after a revolutionary struggle, based on the principles of 1789 including universal human rights, was mercilessly crushed in 1848 and a democratic popular reaction set in, starting in France. We search in vain for any awareness that the new state based on universal suffrage had become a violent enemy of universalistic rights claims. Yet that awareness had been common in the aftermath of the defeat of the French Republic in 1848.

France and the June Revolution of 1848

This event should have shattered forever the Babouvist belief that a democratic state of the people necessarily would establish real rights for all and that it would also create a brotherhood of the peoples. For the first time in history a national government elected by universal male suffrage came to power after the so-called February "revolution of contempt" that forced Louis Philippe to abdicate. Yet, backed by a popular mandate, in June 1848 it crushed, with terrible bloodshed, a workers' rising in Paris that demanded the promised economic and social rights. Not only representative democracy, but also "the people", was shown to be a problematic category for rights. No amount of wriggling could get past that verity although the debate about the workers' virtue that started then continues among supporters of rights to this day. Even words changed their meaning in that debate (see L. Blanc in *PF*, 15/3/1851, 105ff; Herzen 1963, 132).

The revolution started in February when a series of banquets of middle-class constitutionalists shocked by the corruption and chicanery of the state and monarch, hence the "revolution of contempt", forced the monarch to abdicate. The revolutionaries declared a republic based on the principles of 1789. But the working class, bitter at its treatment under the July monarchy, demanded the "right to work" (Blanc 1971, 81). The moderates, led by Alphonse de Lamartine, historian of the Gironde, were forced to accept Louis Blanc – whose plan for "national workshops" responded to the right to work – Ledru-Rollin, and even a worker known as "Albert" (Martin), into the interim government. The first two had histories

going back to the Buonarrotists, and thus to the Jacobins. Soon others of Babouvist persuasion joined them. As a result, the proposed new constitution was to establish not only a republic, but also a declaration of rights that guaranteed economic and social rights (the right to work) as well as the civil and political rights the moderates wanted. In November the declaration was made formally the basis of the short-lived republican constitution, declaring both rights and duties antecedent to positive laws (Art III). It then stated that all citizens, as well as owing a duty to the republic, had to ensure sufficient work for all to provide the means of subsistence. They had to work "for the common well-being by mutually helping each other fraternally". There was no abolition of property, whose rights were guaranteed, but even the diluted document was as close to that of Babouvism as had been attained (see Jaume, 1993, 322–3).

Reluctantly, the moderates around Lamartine and Louis Napoleon agreed to remarkably positive innovations in rights. The death penalty was abolished, partly to avoid the fear of a repetition of the Terror (Blanc 1971, 70–1). Slavery was also abolished. Ledru-Rollin was responsible for the introduction of universal suffrage for males over the age of 21. And a system of National Workshops was set-up, Blanc warning the workers that they could not expect miracles. When he did this, the crowd, who had waited so long, told Lamartine that the people would endure 3 months of further misery in the service of the Republic.

While what was proposed was no more than a welfare state and, according to J.S. Mill, went little further than the Elizabethan Poor Laws elevated to national policy, those deposed and the middle class in the new Assembly were not going to accept even that. It was unimaginable that those who worked would have an inalienable right to be fed. Work was only provided for 10,000 and the suffering Paris mob grew more and more obstreperous (see Robertson 1952, chaps. 4 and 5). Marc Caussidiére, the new police chief, leader of the Society of the Rights of Man and a popular favourite, created a "red" *montagnard* force of about 2,700 armed workers.

The French experiment was applauded by the international workers' movement and inspired revolts throughout Europe, in Germany, Czechoslovakia, Italy, Ireland, Poland and even a feeble emulation by some English Chartists. Marx and Engels wrote their famous *Communist Manifesto* (1848) predicting the collapse of capitalism throughout Europe. Progressives flocked to France where a timorous middle-class started to organise to prevent "anarchy". The latter accused Blanc and his supporters of connections with "Communists", like Blanqui. More importantly, they started to organise among the local notables, with their client-peasants in the provinces, for the promised elections of 23 April, whipping up fear of the effect of Parisian dominance through the National Workshops and the right to work (see Vigier 1982). The progressives, aware that the peasant majority was opposed to economic and social rights and saw a threat to property in the new regime, tried in vain to have the elections postponed. They were held with an 83.5% participation, and a majority of deputies against the economic and social innovations was installed. One hundred and thirty Legitimists and 300 Orleanist deputies were returned to an assembly of 900 (Rosanvallon 1992, 381 and Part III, passim; Blanc 1971, 362, 371, 384). The new Parliament was inaugurated in a March-past of various armed forces,

already commanded by men who hated the new "democratic and social" regime. The Parisian workers watched hopefully.

For the first time, the tension between the two ends of Robespierrianism and Babouvism: rights and representative democracy, became strikingly clear in practice. A majority could oppose rights, rather than back them. Supported by their majority in the Provinces, the conservatives backed the "political" and not the "social" republicans (Blanc 1971, 389). The re-elected conservatives and their allies proposed to send the troublesome members of the Workshops to work in the provinces, dismantling the new social system. The whole edifice of economic and social rights looked ready to collapse. The Paris mob began to become more vociferous about a "sell-out" of their rights and to "invade" the Assembly. On May 4 they pasted up the declaration of the rights of man around the city and some began plans to arm. Other national liberation movements that had hoped for help from the French were left to fend for themselves after promises by Lamartine were not honoured. "Trouble-makers" like Marx were expelled overnight from Brussels. Within a year, many revolutionaries throughout Europe would be executed by returning occupying powers.

On 23 June, the workers of Paris, spontaneously, it appears, started to organise in the eastern suburbs, set up barricades and marched into the whole of eastern Paris almost as far as what is today the Beaubourg (see Engels, in Marx and Engels 1976, vol 7, 124–7; 132–3). "The people deceived, and beholding unabated misery at their firesides, threw themselves into the insurrection of despair" (Caussidière,1848, Vol 1,243ff). The *bon bourgeois* were terrified, fearing that they would all be killed, and turned for protection to the 15,000 strong *garde mobile*, composed of the riff-raff of the city, for protection. They also placed supreme dictatorial power in the hands of General Eugène Cavaignac, already known for his brutality in crushing resistance to French rule in Algeria, where he had pioneered the criminal techniques of the *razzia* and the *enfumade* (putting whole villages in caves and asphyxiating them with smoke; de Luna 1969, 45–51). The insurrectionaries were basically law-abiding individuals who insisted that their rights be observed. But Cavaignac, vowing death, gave orders to destroy the crowds and a frightful slaughter took place. It was estimated at the time that up to 15,000 workers were killed, including perhaps 3,000 summarily executed after the events. The real figures were perhaps a tenth of that number. Observers present, like Alexander Herzen, recall: "after the victory over Paris, we heard the gunfire at short intervals…We glanced at one another our faces looked green. 'The firing squads' we all said with one voice…Cavaignac carted about with him in his carriage some monster or other who had killed dozens of Frenchmen" (Herzen 1963, 47).

The dreadful lesson was that working class Frenchmen and a democratic government defending law and order rejoiced at the commission of such atrocities in the repression of the call for rights. The radical Herzen wrote of his despair at realising that democracy was no guarantee of justice or rights. The cult of the people was a new religion no different from any other. "It was not enough to despise the crown, one must give up respecting the Phrygian cap; it is not enough not to consider *lèse-majesté* a crime, one must look on *salus populi as* being one" (ibid., 51). He argued that in a world where the murder of proletarians had become a duty of a good

citizen, the dream of the republic was no more than acceptance of the tyranny that already existed; that the radicals had been so carried away by their love of freedom and the people that they had not bothered to consider who the latter were and what they wanted. All the dreams of rights and democracy were abstractions, far ahead of what the average man wanted. In fact "poverty dreadfully warps the human soul, no less than wealth. And anxiety about mere material cares crushes our capacities" (ibid., 63). Like all idealists, the radicals rejected facts that did not fit their theories. The people, as power, were not the way to justice or rights: they were the same people who would go tomorrow with eagerness to watch today's heroes being hanged. In sum, "The formal republic appeared in its true colours after the June days. The incompatibility of fraternity or equality with the snares called the assizes of freedom or the slaughter-houses that go by the name of military tribunals, is beginning to dawn on many" (ibid., 84).

Herzen was so disillusioned by representative democracy that he referred to it as a cunning device. Democracy would create nothing since the masses knew only what they did not want, not what they wanted (ibid., 88–9). In Paris they had deliberately given the dagger to Cavaignac, thus becoming traitors to themselves. But "the people" was an invention of liberals created out of love and just as much a lie as its contrary born of hate. "They believed in humanity as they had invented it" (ibid., 119). Anyone who knew France was not surprised that the majority voted for Louis Bonaparte (see also Vigier 1982, passim). In their suffering reality, they bore no resemblance to the people of Jacobin revolutionary theory. To them, the revolution was not liberation but revenge.

> To the word "brotherhood" they stuck on the word "death"; "brotherhood or death" became a kind of "money or your life" for the terrorists. We have lived through so much ourselves, seen so much, and our ancestors have lived so much of our lives for us, that it is surely unforgivable for us to lose our heads and imagine that it is enough to proclaim the Gospel to the Roman world to turn it into a democratic and social republic, as the *reds* used to think; or that it is enough to print two columns of an illustrated edition of the *Droits de l'homme* for men to go free (Herzen 1963, 113).

A more generous assessment would acknowledge that men like Blanc knew very well that "the March of History does not keep pace with the desires of generous hearts", but believed that nevertheless the "few men of character" had to press on boldly with the project for rights, a beacon on the hill, even though the majority probably would reject them (Blanc 1971, 296–7).

The discredit that had fallen on democracy as the vehicle of rights took time to sink in on the left. Herzen went back to Russia to make a populist or *narodnik* revolution (Lenin 1955). Mazzini, despite his followers being crushed in the Rome revolution, hung on to his faith in the people until 1870: what use was a declaration of rights without popular national power to support it (Mazzini 1887 [1859], 44)? In the 1850s and 1860s his view became preferred among English progressives. The English Chartists, though shocked by what had happened, continued to republish Robespierre's Declaration (*FP*, 19/4/1851, 169ff) and continued to pin their faith on the different qualities of a British democracy. Marx and Engels vacillated, half-agreeing, before settling in 1871 into the typical revolutionary position that there

was a true democracy, that of the proletariat, not that of the majority. The bulk of workers' organisations everywhere endorsed the notion that what their constituencies instinctively expressed and wanted was what should be policy. Populist nationalism was reborn as a majority phenomenon. By the 1870s and 1880s, the working class had flocked into trade unions and then into support of Parliamentary politics in alliance with the middle-class progressives in Europe and its Empires. Both supported the empire and its subordination of other peoples on the ground that the national people had primacy. A new popular nationalism triumphed throughout the world. With it came a democratic support for the principles of national sovereignty and precedence for national citizens over all other human beings. The idea of *universal* rights almost disappeared from working class politics.

National Rights for the Working Class

So, after 1848 the triumph of nationalism and the nation-state conditioned the working class struggle for rights. When working class organisations sought to add economic, social, health and educational rights to the list of 1789, they were obliged to adopt policies that sought to redistribute national wealth. This meant going beyond a view of rights as a defence of the individual against the state. It obliged a focus on winning power within the new constitutional regimes through the election of workers' representatives to parliament. A preliminary to that goal was a suffrage that was sufficiently wide to allow workers real voting power. Ultimately, it meant arriving at alliances with the middle class already in power to obtain those extensions although that class was hostile to the extension of the rights of man. When all these concessions are added up, success depended on the admission of the workers to the national citizenry (see for example, *PMG*, 23/5/1835, 538: "what we demand is that the poor…shall be admitted to their full rights of citizenship"). As a more and more democratic suffrage was won throughout the "white" world in 1857–84, and working class parties gained parliamentary seats, the working class became more and more nationalist, racist and exclusionary. The US Immigration Law of 1882, the British Aliens Act of 1905 and the White Australia Policy of 1901 were laws sought for or supported by the organised working class parties. All contradicted the principle of universal rights. In his *La Tyrannie du National Le droit d'asile en Europe 1793–1993*, Gerard Noiriel writes: "The Parliamentary Commission set up in 1888 [in France] to examine the multiple bills aimed at protecting the national labour market, concluded at the end of an exhaustive enquiry into the state of legislation on that question in the different countries of Europe: 'It is piquant to note that those peoples most attached to ideas of progress, of liberalism, of democracy, are the most concerned to make wise and protectionist laws against immigration' This quote proves that national protectionism is not in contradiction with the establishment of democratic regimes, on the contrary" (Noiriel, 1991, 93). The concern of many working class organisations of the early nineteenth century for the "brotherhood" of men – which explicitly went

back to Robespierre – became submerged in campaigns for the "right" of "peoples", starting with one's own, to be free and protected.

In fact, the reformist working class movement was, as Marx argued in his Critique of the Germany Socialist party's Gotha programme (1875), becoming more and more complicit in strengthening the rule of law of the bourgeoisie. As it won economic and social rights for each national working class through parliamentary laws, its memory of the objects of articles 1 and 2 of the 1789 declaration – to set up a realm of sacrosanct rights for every individual regardless of where he or she came from, that could never be overridden by any community, democratic or not – faded as each decade passed. The object of the rights of man was protection from the rule of law. As Wollstonecraft had stated in her *Vindication of the Rights of Man*: "a blind respect for the law is not part of my creed" (Wollstonecraft 1998, 27 fn1). Increasingly, the reformist working class forgot that imperative.

Going it Alone: Trade Unions

For two decades after the savage repression of 1848, the urban working classes who had espoused revolution licked their wounds and grouped for self-defence. Countries followed different trajectories, but some of the shared characteristics across were a working class suspicion of the middle class and its theories, and, after the shock of 1848, a distrust of the peasantry and the countryman generally, as these had proved the backbone of reaction. Universal suffrage was continued in France after 1848 by both Louis Adolphe Thiers, who applied a test of domicile and then by Napoleon III, who insisted on universal male suffrage without conditions, because both saw that their conservative power was reinforced by the rural majority that had voted for the suppression of the supporters of economic and social rights in 1848. Acute observers already knew that universal suffrage was not the panacea it had been seen as, but a confusing and unreliable force that could swing its support in any direction (Rosanvallon 1992, 393ff). Concretely, while the majority remained rural and in favour of private property and old traditions, it would continue to support the right to property against claimed economic and social rights. The urban and industrial working classes decided to rely on themselves. The years 1860–80 saw the emergence of great numbers of co-operatives, craft unions and then, as these federated, the creation of "trades halls" and "bourses de travail", concerned to protect working class conditions and to obtain by mass action against the state and its democratic majorities some of the economic and social rights that had been fought for in 1848. Workers' organisations and their leaders, like Fernand Pelloutier and Victor Griffuelhes in France; George Odger and Alexander MacDonald in Britain; Samuel Gompers in the United States and Ferdinand Lassalle in Germany were pragmatists and relied on the workers alone. No socialist theory was really of any importance until the 1890s and the socialist sects that would keep alive the rights of man had little influence among the workers until the new century (see Chap. 11 below).

In 1871 the Paris working class staged a last epic revolt to attain economic and social rights like those briefly adopted in 1848. France had just been defeated by the Prussians in a terrible war with many casualties and Emperor Napoleon III had been captured. Leading French republicans had declared France a republic again. Establishing a commune to oppose the planned republic of the "Rurals" at Bordeaux, the Parisians experimented with direct democracy. The Prussians withdrew their troops from around Paris in a truce with Thiers, head of the new republic, and allowed his armies and reactionaries to murder, imprison or transport over 100,000 inhabitants. The working class, like its fathers and mothers in 1848, were butchered by a democratic regime with the approval of a democratic majority. Today flowers are still placed at the Mur de Fédérés at Père Lachaise cemetery where thousands were shot without trial. But, except for the marxists and some anarchists, who drew the conclusion that a direct assault on existing state power would be necessary to obtain rights but who remained tiny minorities until the twentieth century, the bulk of working class drew the lesson of the future leader of French socialism, Jean Jaurès: "undoubtedly, the great weakness of the Commune was to have to deal with an Assembly which, reactionary though it was, was the outcome of universal suffrage and the general will of the nation" (Jaurès 1970, 104). Despite the discredit that had fallen on democracy in 1848 and that continued in 1851–70 when Napoleon III relied on the reactionary majority for support in a regime of universal male suffrage, there seemed no alternative but to come to terms with continuing reactionary majorities and to seek change through parliaments that they dominated.

After 1871 more and more workers and their organisations decided that the only way to obtain their rights was through participation in parliament. In 1848 Louis Blanc summed up a general trend that has lasted up to this day. "Universal suffrage…is like the triumphal arch through which one by one all saving principles will pass" (cited in Rosanvallon 1992, 449). The choice to seek democracy as the priority logically meant privileging a drive for full citizen rights, not universal human rights, and in turn that meant seeking to become the power basis of the nation-state. If the "one sovereign method for Socialism was the conquest of a legal majority" it was because "In the nation…The rights of all individuals are guaranteed, today, tomorrow, and forever…The nation and the nation alone, can enfranchise all citizens" (Jaurès,1970, 8–9, 129). From the point of view of the rights of man and the citizen, the problem with this belief and the policies that followed from it, was that when the attainment of full citizenship through democracy was made the key of the vault on which the attainment of all other rights depended, all rights could only be created by a majority of citizens through law. A majority could also undo them. They were not inderogable. Thus a major theoretical problem concerning the structure of rights – how a list of rights fitted together and according to what logic and priorities – was ignored in the choice to make universal suffrage the key right. Democracy was certainly one of the listed rights from 1789 onwards and it had been priority after 1791 by supporters of rights. But the issue of where it fitted in with the other civil and political rights – as the instrument for the attainment of, but subordinate to, the listed inalienable rights of all human beings – made clear in the preamble

to the declaration of 1789, and restated by Marx in 1843, was obscured by the choice expressed by Jaurès.

In his view, widely held in socialist and labour parties by the 1890s, empowerment supposedly came through becoming an active citizen, with full political rights, but without any revolutionary rupture or violence. This meant coming to terms with existing parliamentary institutions dominated by the "enemy", the bourgeoisie and the peasant majority for whom private property was an aspiration for those who did not have it and sacrosanct for those who did. They would have to grant the right to vote to workers and they would not do so if they were frightened away by threats to redistribute wealth and well-being radically, by calls for economic and social rights. The small workers' parties that emerged in France late in the 1870s and then in Germany and Italy and elsewhere by the beginning of the 1890s, all had to reconcile that contradiction. The working class in Britain had already learnt from the Chartist support for O'Connor and other "progressives" in the 1830s and 1840s that the first step to gaining their goal of rights through national laws was to win over sympathetic members of Parliament and they sought to repeat that policy. Emblematic of such people were John Stuart Mill and John Bright, on whose support as radical liberals workers relied in Britain to get through parliament the Second Reform Bill to extend the vote of 1867. Together, workers' and progressive organisations brought out demonstrations of 600,000 in London to hear John Bright of Anti-Corn Law fame, a disciple of Cobden; some chained themselves to the railings of Hyde Park. But the bills were not passed until finally the compromise was reached that only the small-propertied householders of Britain would be enfranchised. Fewer than 10% (1,994,000) obtained the vote in a population of some 20 million. The vast propertiless majority remained vote-less. This was all that such alliances could achieve in parliaments dominated by the bourgeoisie. The Act was presented by Benjamin Disraeli, the conservative leader, as making Britain safe in the hands of those who inherited, safe in her national character. Despite the need for such compromise to achieve their goals, the British trade unions started to support the Conservatives in exchange for promises to make political and economic reforms. The practice of playing off one party against the other had begun with all its corrupting effects. It was paralleled in France by compromises with the Republicans and the Radicals and in the US with the Democrats and the Republicans. Some rights were won using such tactics. In 1875, in what has been called an "engagement gift" by the British Conservatives, the Employer's and Workmen's Act replaced the Master and Servant Act; the Conspiracy and Protection of Property Act replaced the Criminal Law Amendment Act and the Trade Union (Amendment) Act of 1876 established the legal status and impunity of unions. These gave British workers the rights of organisation and strike denied them by criminal law until that date. Bright entered the Cabinet; in 1870 the first working class man sat on a royal commission; in 1874 unionists Alexander MacDonald and Thomas Burt were elected to parliament; in 1875 trade unionists started to sit on school boards and in 1882 they became factory inspectors (Green 1920, 874). Finally, in 1884 the vote for all males resident for a year in their home was won. In Green's words "The working class of England, after a conflict of 50 years, had won the full citizenship denied them in 1832" (ibid., 878).

In Germany the working class groups built on such conservative concessions, although these had been designed to tame them and were justified by a belief that the workers were no threat to the existing state (for German state socialism, see G.D.H Cole 1964, II, 258–261). Germans had enjoyed "state socialist" measures like insurance and had universal suffrage (1871) since Bismarck's time. The Social-Democratic Party (SPD) (founded in 1875 by Liebknecht, August Bebel and Ferdinand Lassalle out of smaller organisations) enjoyed the mass support of working class organisations. Its Gotha programme (1875) demanded universal male suffrage, universal military training; the abolition of all laws denying freedom of opinion, organisation and the press; people's courts and, finally, free, compulsory primary education. Marx lambasted it as bourgeois democratic and Engels added that "so long as the proletariat still *uses* the state, it does not use it in the interests of freedom but in order to hold down its adversaries." Most of these demands were obtained under Otto von Bismarck, chancellor of the united Germany until 1890 (Marx and Engels 1953, 357). Socialist parties were banned in 1878–90.

After 1890, duly tamed, socialist leaders like Karl Kautsky and Eduard Bernstein set the policy for most other European socialist parties when the SPD Erfurt Programme of 1891 became a model to follow elsewhere. Like the Gotha programme, it sought first to assert popular rights and only then working class rights. The first included the vote for women and proportional representation; parliamentary control of foreign policy; and separation of church and state. It also included a bill of rights in which the usual civil and political freedoms for men were extended to women; a citizen army and devolution of power. Finally it sought a welfare state with free medicine and education; free burial, and devolution of power, all paid for by graduated taxation and death duties. For the working class, it sought an 8-h day, regulation of conditions of work, the right to unions and labour insurance paid for by the state and administered by the workers (see Sassoon 1996, 23–4; Cole 1964, II, 432–5). The assertion of the bill of rights for all citizens is notable. As in French socialism, a claim was being made to continue the declaration of 1789 but, once again, because it would come as a consequence of winning a socialist majority in parliament, it could not be the inderogable basis for all social and political arrangements.

Within a decade, a socialist government was closer in Germany than elsewhere. In 1912 the SPD became the biggest party in the Reich. This primacy given to reformist electoral politics spread via the Brussels Conference of the newly constituted Second International (1889) to the new Italian Socialist Party (see Turati 1921, 8–9*)* whose leader pronounced that with that congress, and under German and British influence, all socialists were embarked on one correct path, that of the reformism of Liebknecht.

A similar history could be traced elsewhere. Starting in the 1850s in the British colonies; in the 1860s in Britain and the US; and reaching France in the 1870s, the working class clamour to be admitted to the vote resulted in perceived and sometimes unanticipated results. For example, in France, the socialist party led by Jules Guesde, who in 1876 had written in *Les Droits de l'homme* favourably of the exclusion as a representative at union congresses of anyone who was not a manual worker

(Dolléans 1957, II, 19), had as early as 1880 had an electoral programme reluctantly approved by Marx himself (see Marx and Engels 1953, 403–4). Relying on progressive support in parliament, others, known as the possibilists, availed themselves to the full of the universal suffrage re-affirmed in 1875 in order to force through similar reforms to those in Britain. In 1884 the loi le Chapelier and relevant criminal provisions were abolished. Unions became legal on registration of their statutes. Then, using the right to strike, they exacted economic and social concessions like the 8-h day, and, in particular, universal schooling.

In all these parliaments, the working class parties, whether socialist or labour, remained minority parties until 1899 when a Labour party was elected in Queensland, Australia. They therefore had to enter alliances with others to attain their goals. Their leaders were aware of that and endorsed the practice. In Germany, Liebknecht had written in his *How Shall Socialism be put into Practice* (1881), a chapbook for socialist leaders in Germany and France for 30 years after, that socialism would have to participate in government as it would not have a majority constituency for years. The term working class should therefore be extended to become co-extensive with the people (see Jaurès 1970, 81–4, 88). The majority of socialists believed that Marx and Engels' predictions that all the world would be divided into capitalists and proletarians had been proved wrong. Rather, the world was divided into nations.

Over two decades the workers, having won the vote, elected first their old enemies and then their leaders at union and parliamentary levels who, in turn, became complicit as national citizens in the projects of their allies. What they were getting themselves into, step by step, through, say, working with the French Radicals, was the "national vision" of such people. (I borrow this phrase from the seminal Thomson 1964, 130). For Georges Clemenceau, the great leader of France up to 1914, the purpose of democracy was to build national solidarity. Clemenceau had written: "Democracy alone is capable of making the citizen complete. To it alone belongs the magnificent role of reconciling all citizens in a common effort of solidarity" (Clemenceau 1930). This was exactly the view that Jaurès endorsed. It was expressly anti-individual. Moreover, it was close to the view of the nation expressed by Ernest Renan in 1882 after the chagrin of the defeat of 1871 by the Prussians, an exclusionary notion tilting into racism.

By the 1890s critics were already pointing out that the working class was being bought off with concessions and its leaders' access to state office and, in the case of hundreds of thousands of its members, with jobs in a huge state apparatus. To the Leninist critique that started in 1902 would soon be added notable works by Roberto Michels, Gaetano Mosca and Guido Dorso, all of which described the emergence of labour movements whose power rested on a work-force bought by the concession of economic and social rights limited to the national workforce only (Lenin 1955 [1902]; Michels 1915; Mosca 1975; Dorso 1925). Nor were they wrong about the concessions being deliberately structured to incorporate the workers into a national project set by the dominant groups. That was the explicit object of German "state socialism's" architects. Even the sympathetic Mills' *Chapters on Socialism* (Mills 1991 [1879]) were written with that object.

But both Clemenceau and Jaurès, who met together regularly (Dreyfus 1965, 185–6), saw what they were doing as promoting the rights of man and claimed so to their followers, confusing the rights of man with those of the citizen. The first, with his friends, established the League of the Rights of Man in 1898–9 (see Rebérioux 1994, 414ff). Jaurès had this to say about the Declaration. "Socialism alone can give its true meaning to the Declaration of the Rights of Man and realise the whole idea of human justice" (see Jaurès 1970, 12 and 20). He made a claim to inherit the tradition and history of rights from 1789, through 1848 (Jaurés, nd, 11–15), through Babouvism, and, insofar as the otherwise "erroneous" Marx continued Babouvism, through marxism. Yet his entire project for socialism reduced the rights of man to those of the national citizen. What they would amount to concretely would be thrashed out in deals with peasant and small-property-owning classes and their representatives.

The countries of new (white) settlement conformed to this pattern of compromise. But there, an even more alarming characteristic was emerging, a commitment to private property and a desertion of the sacrosanctity of economic and social rights. Countries like the US and those in the white Commonwealth had become destinations for Chartists and other disillusioned Europeans in the 1840s and 1850s. They often became prominent in the emergence of the craft unions of those places and then often leaders in local politics. But they faced new realities, the most important of which was an apparently inexhaustible supply of land for all newcomers. So they rapidly moved away from Chartist demands for the abolition of private property, seeking rather a piece of land for everyone. The existing states in such places deliberately released land free or at low prices to such new arrivals – as in the US Homesteading Acts of 1862 – in the course of which followed the extermination or enslavement of the local indigenous populations (see Chap. 10 below). So the former radicals and the unions they helped to create explicitly became supporters of private property. In the US, the worker organisation the Knights of Labour reached its peak in 1886 when it had 729,000 workers as members and organised 5,000 strikes that won the 10-h day in many places. But its goal was to build a nest-egg for each worker so that he or she could become independent. Leading unionists who emerged from that experience, like those in the International Cigar Makers' Union, became the leaders of the American Federation of Labour. In the early 1900s the federation not only adopted openly pro-capitalist policies, but also embarked on the alliances with corrupt officials of state that were to be the hall-mark of American labour politics. As in Europe, some workers grouped in small anarcho-syndicalist (and later marxist) groups like the International Workers of the World (IWW). In Australia, the IWW also built up a small following among men and women disgusted by the policies of the mainstream labour unions and they formed the Labor party in 1891.

The great majority of the Australian population had lived in towns since 1788, when the colony of New South Wales was settled. But Australian colonies released land either free or at low prices for settlement as a solution for any crisis. Living "on our selection", owning a small rural property, remained the popular goal until it was finally understood that the continent was too harsh for such farming to be viable. South Australia had been created on the basis of making land available at low prices

to upper working class people in Britain who aspired to own property and had enough money to buy it. Because these "workers" posed no threat to the system, in 1857 universal male suffrage was granted in South Australia, whose lead was quickly followed in the other colonies.

Former Chartists and Irish Republicans had become prominent in politics in all the colonies the 1850s and often led the fight for universal suffrage. Their success meant that anti-union acts even more repressive than those in the mother country were abolished or replaced with the right to organise and strike. The workers, especially shearers, went on strike for better conditions and, because there was a shortage of labour and high capital investment in 1860–90, made major gains in conditions. Not until after all Chartist memories of rights were long forgotten and the workers been converted to a belief in private property, did the system go into economic crisis. As in Britain and the US, the depression of early 1890s saw the emergence of industrial unions and then labour parties, working together with any allies. All socialist theories of brotherhood and universality of interest were eschewed on the grounds that they were not needed in Australia. Socialist theory belonged in old Europe. By the twentieth century a similar story emerged to that in Europe and America – of labour party alliances and the gradual establishment of elites who collaborated with a state hostile to the extension of economic and social rights that threatened property (Childe 1923).

The logics were more than ideological for the mass of workers, as they created, by a labyrinth of laws, an insertion of the worker as citizen into a nation-state as the rule of law. Critics had noted this when French unions were allowed to exist only if their leaders were citizens and if their statutes were approved. Then a socialist deputy, Alexandre Millerand, who had joined the government and shared Jaurès' views, proposed a bill in 1899 to expand union power by allowing the unions the right to commercial activity. It was accompanied by another setting up arbitration by agreement and regulating strike action. The Federation of the Bourses de Travail disapproved of the proposal, arguing that: "the right to legal standing, accorded to the unions, far from being an increase in freedom for them, is the best means that the government can find to strike at them, since this right will subject them to civil damages, that the present regime avoids, and will oblige them, in case of strike, to either neutrality or to legal action duly guaranteed by ruinous legal action" (cited in Dolléans 1957, II, 28). Nevertheless, in 1904, the bill for compulsory arbitration that made strikes illegal came before parliament. Union organisations remained hostile to a law that took away what had been granted in 1884.

Arbitration as a way to avoid strikes had been pioneered in Australia and New Zealand in the late 1880s. Europeans observed it with interest and German, Italian and French reformists approved of it strongly (see Métin 1910; Tampke 1982). In Australia, arbitration was made compulsory in 1904 for strikes crossing state borders. In the words of its major proponent, it created "a new province of law and order" (Higgins 1922). It was negotiated as part of a deal between Labour and conservatives in parliament who wanted high tariff walls to protect their industry. The *quid pro quo* was the legal exclusion of coloured labour from Australia, sought by the unions and the Labor Party. This marked the beginning of the infamous "White

Australia policy". Unlike Europe, where foreign labour had been "white", from eastern and southern Europe, though scarcely welcomed by the unions, the policy emanating from the working class organisations in Australia was directed at preventing free movement and access to national economic and social rights to the Asian masses who made up already three-fifths of the world population. Facing coloured others was mainly an affair of nation-states bordering on the Pacific Ocean and made developments for rights most interesting there despite the relatively small white populations. The acceptance of the compulsory arbitration system that ended the right to strike was facilitated by an early judgment in the new court for industrial disputes. This guaranteed a fair living wage to all male heads of families. Women were given a much lesser wage for equal work. In exchange, immigrants from all non-white "races" were excluded from Australian soil. These, we recall, were defined to include all non-English speaking southern Europeans.

The working class desired to exclude foreigners and non-citizens to ensure that they would not threaten the acquired economic and social rights by working for lower salaries and in order that they might not obtain benefits that they had not paid for through taxation. It was a feature of working-class argument that the state should protect them from such inroads and they were prepared to support tightening of both immigration acts and access to citizenship from France (1889) to Britain (1905) to the US (1882). In the US, the exclusion of Chinese immigrants despite an existing treaty was recognised by minority judges to be "incompatible with the immutable principles of justice" but the majority recognised the nation's right to exclude anyone (see *Fong Yue Ting* v *USA*, 149 U.S. 698).

The general desire to exclude foreign workers from the national territory, whether they were Italians in France, Belgium and Switzerland, Poles in France and Germany, or "Asian hordes" of Indian coolies and Chinese in Australia, or Chinese and Japanese in North America, became increasingly intense in the 1880s and 1890s. It was then that for the first time, mass labour migration into Europe started, as racism took pogrom forms on all European peripheries. It spilled over into violent racist riots like those during the gold rushes in Australia against Chinese (1854–61); on the transcontinental railway in the US and in San Francisco, also against Chinese, (1869, 1877) and against Mexican rural labour; against Italians at Aigues Mortes in France (1893); against "Jews", eastern Europeans, Russians and Poles in Posen, Germany, the *borinage* in Northern France and Belgium. Labour organisations were increasingly ready to support controls on freedom of movement across their frontiers and to support national projects designed to attain those controls. The history of Australian federation can be explained partly in those terms. So, while the effect of becoming full citizens was to abolish controls on freedom of movement within one's territory, say, by the ending of the master and servants acts, and similar legislation that bonded labour to stay in one place, it also ended the second human right after that to life itself, the right to free movement everywhere.

The French constitution of 1791 had guaranteed freedom of movement as a perfecting of the rights of 1789 (Art 3). In 1790 Puchet considered passports "a police disorder, the more odious because they support all the art of tyranny." At the time, even conservatives agreed with him. Again and again thereafter, it had been stated

that passports interfered with a right to free movement and were unacceptable. In 1874, after guaranteeing free movement in labour agreements in 1860, France officially banned all passports for westerners (Noiriel 1991, 79; 157). Yet 20 years later, border controls were universal and the term "alien" commonplace. Passes with photos and containing basic histories were essential to movement. Labour had facilitated the ascription of national identity by the state. No-one could invent himself as the state owned his history. Once admitted, practically everywhere non-nationals were subject to police controls on residence, movement and work. In some states they could escape to frontiers, but as US, Australian and Canadian judgments of the time noted, local freedom was giving way national attachment as such areas passed under the jurisdiction of the nation state.

This "alienation" of those not born on a territory; their identification as potentially harmful and even as enemy other, explains the support of socialist and labour parties for citizen armies to protect the national territory. Marx noted worriedly that in the Franco-Prussian war the notion of race was in the ascendant in the face of brotherhood or universal rights. Indeed, the Parisians rose partly to defend France against its "betrayal". While he, and the "Marxist" social sects, started an unrelenting opposition to war on the grounds that the proletariat was united across nations, a Dutch anarcho-syndicalist, F. Domela-Nieuwenhuis, uttered these perceptive words at the Zurich Congress of the International in 1893. "You talk of the chauvinist appetites of the bourgeoisie, but chauvinist appetites, alas, exist among the socialists as well as the bourgeoisie. Scratch an internationalist and you will find, at the bottom of his heart, patriotism and national feeling. So we see Bebel declaring right in the Reichstag, war on Russia, the hereditary enemy! Ah, how much less chauvinistic Heine was 50 years ago than Bebel preaching the massacre of Russians. They threaten you with the Cossack the way children are threatened with the devil or the police man. You say that Russia is barbarous. Who will stop the republican French saying that Germany is barbarian. Let us return to the principles of socialism, to the fraternity of peoples" (cited in Dolléans 1957, II, 102). Liebknecht promised in reply that socialism would work relentlessly against militarism. Jaurès was, however, evidence of the perceptiveness of the Dutchman's claims. He stated: "If our country were threatened, we would be the first at the border to defend France whose blood runs through our veins" (cited in Sassoon 1996, 19).

These chauvinist attitudes – that had not existed strongly 30 years earlier – and that had been formally condemned several times by the Second International before 1914 – partly explained the grab for Africa and then for much of the rest of the world that caused clashes between the major powers like the Fashoda incident (1898); the Agadir incident (1911) and the Sino-Russian War (1905). These all saw the emergence of more and more popular support for military expansion. Each nation explained its actions by claims to advance and protect civilisation, using slogans like "the white man's burden" as alibis for murderous occupations of other peoples' traditional homes (for example, see President McKinlay's Speech of 11/4/1898 in Birley 1951, III, 234). Socialist and working class support for their own countries in 1914 only gave way to disillusion and anti-war feeling as millions of simple men died in the trenches in 1914–1918. It provoked the successful Russian

Revolution in October 1917 which was led by the small sect of Bolsheviks, who had been unrelenting in their criticism of socialist chauvinism and reformism for over two decades. Reformism was temporarily discredited.

Conclusions

So human rights were won by workers at the price of denying their universality. By 1914, they covered a long list of rights to life, liberty and the pursuit of happiness, though economic, social and education rights were still to be won. But these were expressly for nationals only. Democratic workers reinforced the national-popular state, strengthening national rivalry that spilled over into racist antagonism by the end of the nineteenth century. The tensions between nations based on democracy and universal human rights was explicitly recognised. Exclusion from rights of anyone different – who did not belong – was regarded with approval by overwhelming majorities won over (by democracy) to the idea that they owned their nation. Nevertheless, the success for national workforces in 1890–1914 in winning rights through a reformist policy and through gaining the vote was undeniable, and it is not surprising that other groups without rights, like women, chose to emulate it. This again reinforced the confusion of the rights of man with those of the citizen; strengthened the existing democratic state with its rule of law; and reinforced the exclusion of non-citizens.

Chapter 8
The Excluded: Women

National Popular Democracy and Women

More than half the world's population of humans are women. On the eve of the French revolution, they were even more oppressed than their menfolk, even in states where national systems of rights existed. We have described the plight of women in societies with peasant majorities and "feudal" mores. They were beings portrayed as both the source of evil – by the church – and or mindless. The monotheist religions accorded them a lesser humanity and fewer rights than men. In no national legal system did they enjoy even the limited rights that working class men did. Indeed, in law they were often chattels of their husband. The great progressive figures from Milton to Jefferson, Montesquieu to Rousseau, explicitly stated that women were inferior or subordinate, or justified that status. In sum, they appeared the ultimate victims; they wanted the rights that their menfolk had and others to protect them from the community of men. So, for a short moment they claimed the human rights attributed to all by the French revolution. When that dream was ended and national-popular regimes hostile to the universal principle emerged and then became the characteristic political form of the nineteenth and twentieth centuries, they sought what their men had, rights for nationals only. For the majority, this meant following the path of working class men in seeking the vote; a place in parliament and human rights for themselves, not for all humans. But it would take them much longer than the men, who, indeed, once empowered by democracy, made women's situation worse in many places. Women's only way to rights was to become more national than the nationalists. The faster they reached that position, the faster they obtained human rights. The price was much the same: they undertook not to challenge the national project or identity and agreed to exclude all those who did.

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Women and the 1789 Declaration

Immediately after the French revolution, some women talked of rights as universal, as including themselves. By 1793 the nationalist turn of the Jacobins saw this initial universalism, consistent with human rights, slide into rights for citizens only. It was this slide that started the women's movement for rights on the reformist path.

There was apparently only one woman at the storming of the Bastille a month before the declaration was drawn up. But women led the marches on Versailles complaining about the price of food and those forcing the monarch to bend his knee to the national assembly and finally to come to Paris to be imprisoned. Each time, they did so proclaiming that their men were proving pusillanimous (see Kelly 1987, ch2). In other words, the revolution was as much the work of women as it was of men. Indeed, women asked to be armed and to fight, but the men refused them that right. Women claimed or acted as if the rights of man extended to themselves. They set up clubs like those of the men, notably the Cercle social, Les Amis de la Loi, tendentially Girondist, and then the Society of Revolutionary Republican Women, more Jacobin, and close to the Enragés. While the active majority were working women from the streets of Paris, some of whom were soon renowned as the *tricoteuses* who knitted socks for the national army, they found leaders and spokeswomen among their numbers from many backgrounds. The most famous of the names that have survived are Madame Manon Roland, Etta Palm d'Aelders, Théroigne de Méricourt, Olympe de Gouges and Mary Wollstonecraft. The last two wrote major declarations or books on the rights of women that have ensured their posterity, but the others were perhaps more important although their views had to be "translated" by men and women of a later era into openings for the future.

In astonishing hypocrisy, the male drafters of the declaration, and men more generally, when faced by the demand of women to state that the new rights extended to them, simply refused to do so where active rights were involved, although passive rights were always conceded. Women belonged in a private realm. While they won several woman-specific passive rights like the abolition of primogeniture, the right to divorce and to maintenance, matters that concerned and were expressed by most of their spokespeople, these gains came to a halt when women sought the right to vote and to be elected (see Shanti Marie Singham 1994, 114ff and 149–50). A speech during the debate on the declaration ran: "Women, at least as they at present are, like children, foreigners, those who contribute nothing to maintain the public establishments, must not influence public matters" (*Archives Parlementaires 1789,* VIII, 259). Under the Gironde, women found a few men like Condorcet who supported their claims to be treated equally with men where the vote was concerned. In July 1790 in an article on "l'Admission des femmes au droit de cité" he wrote: "have not [men] violated the principle of the equality of rights by quietly depriving half of mankind of the right to participate in the formation of laws, by excluding women from the rights of citizenship?" Since women had the same qualities as men, they necessarily had the same rights. Against arguments that because they could fall pregnant they could not fulfill public duties, he mocked: "no-one ever imagined taking away [these] from people who have gout every winter or who easily catch

colds". Nor would he accept that they were not guided by reason. Even if they were more sensitive than men that meant nothing, as such difference came from "education and not nature" (see the translation of the article in Lynn Hunt 1996, 119–21). Condorcet was one of the few in favour of the equal education of women on the basis that they were reasoning beings like men. He argued that once education and not skills training was at stake, not to educate them would introduce inequality into a family and leave no-one to educate children in civic virtue. Teachers should come from either sex. "Human life is not a struggle where rivals dispute the prize; it is a voyage where brothers work in common, and each using his force for the good of all, is rewarded by the douceurs of reciprocal benevolence, by the enjoyment that attaches to a feeling of having deserved recognition or esteem" (Condorcet 1994, 96ff, 103; see also Fraisse 1989, 95ff). But Condorcet was notable for his unrelenting insistence on individual rights and hostility to the notion of overriding community claims. He was, thus, notably, also an opponent of slavery and believed that rights should extend to other "races". "Either no individual in mankind has true rights, or all have the same ones" (Hunt 1996, 119–21; Jaume 1989, 109ff). Gouges attended his wife's salons and paid him homage; his wife, Mlle de Grouchy, was famed for her reply to Bonaparte's comment "I don't like women getting mixed up in politics" by retorting with "You are quite right, General, but in a country that cuts off their heads, it is quite natural that they want to know why" (Blanc 1993, I, 20–1; Alengry 1904, 78–81). Condorcet possibly only escaped the guillotine for his individualist view of rights, the only potentially *universal* view, by dying, perhaps at his own hand, while in prison.

Unfortunately, the Rousseauian turn of the Jacobins also privileged the "street" and progressive women seeking full rights found themselves facing both a hostile male and a female majority in favour of the role allotted to them and in support of the suppression of the progressive clubs. Singham puts it nicely in her work: "From being the voice of the oppressed under the Old Regime, public opinion had come to speak for the oppressive majority of the Revolution" (see Singham 1994, 151). One major explanation for the attachment of the male and female mob to the Jacobins is that what concerned them was bread. But we cannot discount their hatred of the "intellectual" women who too frequently had pasts that made them open to the epithet "whore" or worse, "denatured" or "viragos" or "amazons" in a context where the decent housewife was being extolled as the model for women. It has been noted that young mothers were absent from the mass demonstrations by women in support of rights (Hufton 1992, 5, 17–18). The crowds were old or very young and symbolised by Théroigne de Méricourt in her soldier's uniform urging the crowd to massacre suspects, or Pauline Léon's raucous demand for arms for women, whence "the Amazons". Those too much opposed to the Jacobins were doomed. Active organisation by women for the vote and expressions of views at variance with the Jacobin position led to outright condemnation, and, in October 1793, the suppression of their clubs. To justify this, Jean Baptiste Amar of the Committee of Public Safety stated:

> Should women exercise political rights and get mixed up in the affairs of government? Governing is ruling public affairs by laws whose making demands extended knowledge, an application and devotion without limit, a severe impassiveness and abnegation of self; governing is ceaselessly directing and rectifying the action of constituted authorities. Are

> women capable of these required attentions and qualities? We can respond in general no. Secondly, should women gather together in political associations? No, because they will be obliged to sacrifice to them more important cares to which nature calls them. The private functions to which women are destined by nature itself follow from the order of society. This social order results from the difference between man and woman. Each sex is called to a type of occupation that is appropriate to it. Its action is circumscribed in this circle that it cannot cross over, for nature, which has posed limits on man, commands imperiously and accepts no other law (see Hunt 1996, 137).

Roland and the "virago…woman-man" de Gouges were guillotined by the Jacobins after travesties of trials. De Gouges was the only woman guillotined for her political writings (for Roland, see Kelly 1987, 117ff; Blanc 1993, I, 24).

The closure of clubs foreshadowed the prohibition of women's assemblies in 1795 and, once Napoleon had come to power, the end of their equal rights in marriage and the right to equal grounds for divorce by articles 213, 324 and 339 of the *Code civil*. Thereafter, the first French women battling for the rights of man disappear from the historical record or become footnotes like that which records that Méricourt went mad or that Palm d'Aelders, a Dutchwoman, returned to Holland to promote rights there, but disappeared in 1795. There did emerge, especially in romantic forms, an incipient feminism associated with Madame de Stael, Necker's daughter, whose novel *Corinne* marked a strong assertion of women in their difference, but it is notable that such developments came from people who had become hostile to the French revolution and actively opposed to it from their refuges in Switzerland and other places (Fraisse 1989, 186ff; for de Stael's circle in Switzerland see de Maistre 1992, Preface by Darcel, 55).

This exclusion from active rights was justified by what historian Olwen Hufton has called the "Sophie model" (Hufton 1992, 4). Sophie was Rousseau's ideal of womanhood, the chaste homemaker, simple and virtuous. More, it was in women's nature to be like her when they were not corrupted by civilisation. What should be done for them was an education and upbringing that corresponded with a nature that was quite different from that of men in its emotional sensitivity and reduced capacity for reason. Whether this was merely male hypocrisy is immaterial; it meant that for the drafters of the declaration, women were not qualified to exercise active rights – to make the laws under which they lived. For them, freedom was to live under their husband's tutelage. It was because of their supposed natural difference that they were excluded from the category "Man" despite the fact that rights were supposed to be blind to exclusion on the basis of social difference and despite explicit recognition that "Homme" encapsulated humankind (see Hunt 1996, 133).

In sum, women were excluded from rights on grounds not addressed in a declaration that forbade all exclusion on the basis of social distinctions. They were excluded on the grounds that they were of a different nature from men, not quite as human, or even not human, if the capacity to reason like men was the measure of humanity. It was a new challenge to universality that had to be overcome and repudiated. Women had to show that either it was not true or that if they were truly different, having different needs requiring different rights, they should nevertheless have the threshold rights. Two major arguments were advanced before the entire revolutionary project of rights was crushed by Napoleon and in the Restoration.

Olympe de Gouges and Mary Wollstonecraft wrote their works in response to men's refusal to extend the rights of man and the citizen of 1789 to women. Olympe de Gouges chose to claim rights on the ground that men and women were not so different that they required different rights, though not without some contradictions, particularly in her practice. Basically, they were the same and complementary. She did not address directly the problems of the "Sophie model". An actress, who claimed (possibly falsely) to be the bastard child of nobility, and of a dubious reputation, she was an autodidactic who did not write French correctly. As someone close to the "street" she followed its common sense closely, so there was an evolution and incoherence in her views that could be held against her, summed up in Mirabeau's patronising "we owe great discoveries to this ignoramus" (cited in Blanc 1993, II, 11). Writing was the mark of reasoning (like a man) (see generally Fraisse 1989) and it became a key to exclusion. It was generally believed among men that women should not be part of the debate. De Gouges, as a failed playwright, and constant pamphleteer, certainly was in the debate. Starting with a play against slavery in 1785, she intervened in all the major debates on rights (see Blanc 1993, passim and 80). At first she lined up with the Gironde and was a supporter of Necker, de Stael's father. After articles on national funds for the restructuring of the nation, she continued in a series of works to develop a defence of a constitutional monarchy, several times addressing letters to the king or queen to provide leadership for their people. She was strongly elitist in her alliances ("je suis Aristocrate") (in Blanc 1993, I, 202) and never "went to the people" whom she soon came to fear and express contempt for after several occasions when they roughed her up or frightened her because of her views that abhorred violence, blood-letting, war, and opposed the execution of the monarch and the Terror openly (Blanc 1993, 99–100, 107). She, like the French population, became firmly nationalistic and expressed a *cocorico* hatred of foreigners after the first revolutionary war started. In July 1791 she wrote that "in France prison should be the punishment of any foreigner who gets involved in our affairs…it is well known that people…thrown out of their own nations for their crimes are spread throughout Paris, to excite revolt". Here she referred to Marat, whom she dubbed a Swiss "who had dared to influence the deliberations of the National Assembly" (in Blanc 1993, I, 109).

In September 1791 she addressed her "Declaration of the Rights of Women" to the queen, stating that it was the latter's duty to promote it because men, having become free in 1789, had become unjust towards their partners. Although this has made her famous, her declaration merely replaces the word "Man" in the 1789 Declaration by "Woman". It does not ask for qualitatively different or even new rights except by touching on the need for a new form of marriage contract to ensure maintenance of children after divorce (in Blanc 1993, I, 211–12). She simply wanted the same civil and political rights as men. Her declaration was probably destined for the Brotherly society of the Two Sexes but *the Journal des Droits de l'Homme* took up its themes (Blanc 1989, 189). Much more interesting than the text is its Preface and Postface, where she asserts that men wanted to rule as despots over women who "had all the intellectual faculties", indeed, were superior to men in intelligence, beauty and courage.

De Gouges laid claim to the same rights as men enjoyed on the grounds that women and men had everything in common and that to attempt to disentangle the two sexes made men themselves bizarre. Women could and should also use philosophy and reason as their standards. If they had the right of mounting the scaffold then they had the right to mount the tribune. Instead they were like slaves bought in Africa, and worse off under the new regime than they had been under the old. Here she opened up a future association between excluded women and excluded others generally, and identified the problem for universalising rights as in majority community, or democratic opinion. She noted that in the colonies men also reigned as despots over others whose "fathers and brothers" they were. This was recurring theme in her work: not only did she associate women and blacks as under a common yoke but, thinking of her own illegitimacy and its effects, insisted that in reality humans all could be and were mixed. Rights could not be apportioned according to difference. Humanity was one (Blanc 1993, I, 205–215).

It was not this work that brought opprobrium on her. She was already the object of hatred and menaces from the slave owners and their supporters in Paris for her constant reminder that slavery offended the declaration of the rights of man and the citizen. Then she threw herself into the debate on the 1793 constitution. These later views brought her into open opposition to Robespierre and the Jacobins, and particularly to all national-populists. She wrote openly in favour of a separation of the powers in her *Trois Urnes ou le Salut de la Patrie* (July 1793) and was, like other Girondins, in favour of federalism against the "Republic, one and indivisible" of the Jacobins, that is, against national populism. Since such views were prohibited, she became an outlaw for refusing to abide by the national law. While maintaining her French patriotism on the grounds that the declaration would be destroyed if the Coalition won the war, and continuing in 1792–3 to fight for equal treatment for men and women, indeed, for all human beings, she henceforth focussed on the right to free speech in face of its ban by Robespierre: "Man has the right to manifest his opinions, provided they do not trouble public order; I would therefore like this will to be supported by the reason and justice of the Rights of Man, it is a question of deciding the interests of the Patrie, it is thus a question of being consequent in deciding which party will save it, this would be, it seems to me, by a plurality of votes, and would not that be a profound consequence of appealing by name (*nominal*) to all individuals in the realm, and to add this means to the additional articles of the Constitution, to call back those absent, to declare to them by a solemn decree, that on pain of losing their property, they have to return home, for a limited time, to decide legally and voluntarily about the form of government" (in Blanc 1993, II, 87).

She was never entirely consistent and often raved. When faced with the war she attacked both sides of politics, calling them the enemy within, allies of the aggressors. It was time to repent and pardon and for French people to get together to oppose both in defence of the rule of law. "I considered the Jacobin Club a necessary counter-poison to the despotism, but today this remedy is itself a true despotic poison" (in Blanc 1993, II, 113). Two pages later she writes that neither the Jacobins nor the Feuillants were her enemies because she burnt with civic virtue (*civisme*) for

the country that they were tearing apart. This incoherence had one unifying quality. She had recognised that a line was being drawn by Jacobinism between the people and "decent" individuals and that the former were a danger to the individual freedom and rights of the latter (in Blanc 1993, II, 118). Since these opinions made her a marked enemy, threatened with the noose, we can only conclude that she was insouciant or politically very brave in persisting in her opinions.

Eventually she was arrested, deserted by everyone including her son, and in an extraordinary closed "trial", where she condemned Robespierre as soulless and rights as illusory, condemned to death. In her testament she claimed that her object had always been to create fraternity among men. But seeing that her death was inevitable she left her heart to the Patrie, and her soul to women (in Blanc 1993, II, 238–40, 255–6).

Wollstonecraft shared de Gouges' pro-Girondin sympathies and horror at the Terror at the time when she wrote the *Vindication of the Rights of Woman* that she addressed to Talleyrand, Bishop of Autun in 1792. But, apart from herself having a miserable personal life from that time on, like that of de Gouges, what she wrote was very different, more sophisticated and more interesting for human rights. She was no Don Quixote but Wollstonecraft attacked the Sophie model (Wollstonecraft 1998, 111ff) and Rousseau, whom she otherwise respected, for his view on women. It was a barbarous notion, that women were not incapable of attaining the reason of men and, indeed, not to provide them with the education to do so, as had always been done, was harmful to humanity as a whole. If the object were the attainment of talents and virtue, "all those who view [women] with a philosophic eye must, I should think, wish with me, that they may every day grow more and more masculine" (Wollstonecraft 1998, 90–1). She did not deny that after giving them education it might be revealed that they were "different" but she argued fiercely that any lack of public virtue would be overcome in the creation of what we will call the "'English hockey player model', healthy strong, commonsensical and practical". The most perfect education…is such an exercise of the understanding as is best calculated to strengthen the body and form the heart…to enable the individual to attain such habits of virtue as will render it independent" (Wollstonecraft 1998, 107; see also 292).

Her assumption, like de Gouges', was that the problem of inequality was social and that all duties and rights were human and not naturally or sexually derived. "Asserting the rights which women in common with men ought to contend for, I have not attempted to extenuate their faults; but to prove them to be the natural consequence of their education and station in society" (Wollstonecraft 1998, 332). To attain power over themselves required that property be subordinated to provide for their needs for independence (ibid., chix, 264). Truth was always the same for both sexes and reason was the way to it. It was by distinguishing between men and women that the argument about woman's weakness was founded. Equality of rights would then enable her to be an active citizen. Wollstonecraft was thus in favour of a national education process similar to that proposed by Condorcet, with boys and girls together. In sum, she believed that virtue, that is, being a good citizen, would never prevail in society till the virtues of both sexes were founded on

reason (ibid., 294). Her view was the opposite of the sentimentality favoured later by the Romantics. It was reason that raised mankind above the animal and led to perfection.

There is a touch of the English school marm in Wollstonecraft, but notable is how her practicality led her further than de Gouges, to argue for concrete economic, social and above all (since she addressed the middle class woman explicitly) educational rights to empower women. In this she was also well ahead of Roland, who also conceded that women had been ruined by the roles allotted to them and wanted an educational programme to render them fit for citizenship. Nevertheless, like both the Frenchwomen, she argued for rights for women on the grounds that they had no significant natural differences from men and if virtues were what they were, masculine, then women could and should attain to them. All three favoured Condorcet. All subordinated communities to rights.

Their views were written before the economic and social innovations of 1793. Other French women wanted no more than rights for fellow nationals, following the views of Jacobin menfolk. There is little doubt that the male and female crowd that so horrified them (see Roland after the September massacres: "Women brutally violated before being torn to pieces by those tigers, entrails cut out and carried like ribbons, people eating human flesh, You know my enthusiasm for the revolution, well now I am ashamed of it. It has been dishonoured by the scoundrels, it has become hideous to me." (cited in Kelly 1987, 70)) was important in the introduction of economic and social rights in 1793. Poor women wanted bread. Issues like primogeniture, divorce and education were distant concerns. The Society of Revolutionary Women was set up explicitly to obtain the maximum set on prices. When Robespierre opened up the assembly to the mob, he included the *tricoteuses* in that group, although they were ready to let their men do the talking and take the active political role. One of de Gouges' offences was that she was not a *tricoteuse*. Their object was to get rid of the Girondins, whom they saw as middle-class. Palm d'Aelders and Méricourt as well as de Gouges were menaced with death in physical attacks by such women. The pro-Jacobin group was extremely nationalist and racist, unlike the intellectual women. It is notable that the former organised themselves and met separately from their menfolk. This was seen as a threat to domestic order, but possibly less so by the working than the middle class men (Duby and Perrot 1991, IV, 31–2). The women only became a threat to Jacobinism when they backed Enragé views, like those of Jacques Roux, who encouraged direct action against hoarders and small businesspeople. It then became a policy of the Jacobins to break up the female crowd by removing its leadership and to "cede on demands concerning bread" (Hufton 1992, 35). Ultimately, the state fired on rioters, attacking women, and occupying the work class quarters with troops. Working class women went home still dreaming of rights to bread.

It was such women who, through encouraging the Jacobin's policy of economic and social rights, provided a link with the working class continuers of the declaration. Little written by these women's views remains except the odd pamphlet about the right to bread, but they had pressured working class men into thinking of the need to extend the list of 1789 to other matters, a policy continued

after 1795 by the followers of Babeuf. Such radicals did not reciprocate, continuing rather the exclusionary policies of the leaders of the French revolution where women were concerned.

Active rights for women were not important among the concerns of the Babouvists who sought to continue and extend the declarations of 1789 and 1793. Babeuf himself had been open towards women having rights. His last testament left the education of his children to his wife (in Bravo 1979, I, 77). But his associate Sylvain Maréchal proved no different from his predecessors in 1789 where women were concerned. Despite his extreme statements in the Manifesto of the Equals that rights belonged to all, he wrote in 1801 "A Bill forbidding women learning to read". There is some dispute whether it was intended as a provocation, but it certainly repeated the Rousseauian view that women were by nature different from men, not able to reason in the same way, and likely, if they learnt to read, to try to enter a public realm by writing and then by demanding active democratic rights (see Fraisse 1989, ch1). The result would be unreason and passion in a realm where the object of reason was to dominate the passions. The goal of society was that they should be moderate when entering the public space, a view that became common sense in the nineteenth century (ibid., 68). The object of democracy should therefore be to master women and return them to their natural state. It appears that as late as 1828 Buonarroti, Babeuf's intellectual heir, shared the general view that active rights should not extend to women, rather that their role was distinct from that of men.

This was not an auspicious start for the men who, after 1815, carried on the tradition of rights. The rights of women do not loom large in the writings and activities of the socialist sects up to the 1830s. On the other hand, the Christian socialists, the communitarians and the utopians certainly did consider the issue of the family closely. This should not mislead us. So had Napoleon, whose privilege given to the family explained his opposition to equal rights for individual women in the Code civil. To discuss women as part of a family or in relation to their children always meant subordinating their individuality to a community. This was evident in early nineteenth century views. Richard Lahautière, whose *Catechism* of 1839 was strongly egalitarian and who made work the sole duty, expressed a common theme. Marriage was the basis of the family and should not be broken except as a last resort although divorce had to exist as it was the only way not to violate human freedom. When love ended, so should marriage (Bravo 1979, II, 180–1). The Saint-Simonians, in particular Victor Considérant, believed women should be treated as equal within the utopian community. Sometimes, as in the anti-Babouvist Alphonse Constant's writings, the erotic was central, but Pierre-Joseph Proudhon was both a misogynist and anti-feminist. Cabet discussed marriage and children in his *Voyage en Icarie*. He certainly believed that within the utopian community all should have equal rights regardless of differences in strengths, but he definitely thought that rights meant duties, above all to the community that should have priority. In his scheme, marriage was a choice and divorce could be had "when necessary". In nearly all the utopian projects the Christian influence was explicit and there was a refusal to resort to violence. Considerable debate took place about

the feasibility of "drop-out" communities. On the whole such projects were endorsed by Babouvists. Since the premise for the success of such utopian schemes was education for all, given the corrupt nature of humanity, the theme of women's individual rights should have been strong. It was not. Could this be because in all cases, men spoke for women (Duby and Perrot 1991)?

Cabet had met and talked much with Robert Owen. In the latter's work we find a renewed assertion that rights for men and women should be equal, a practical view rather than one that started with where women should fit into a communitarian scheme. In his *Book of the New World* (1840) Owen simply affirmed that "individuals of the two sexes will be equal in education, rights and personal freedoms". Again divorce was allowed.

What happened in France for the next 150 years was determined by the *Code Napoleon* which made women wives and without the rights of men. On the rest of the continent, women also remained relegated to the private realm for another century because of a fear that women would neglect their "natural" role if they were not subordinated and obedient to their husbands in the way specified in Art 213 of the *Code civil*, whose contents were replicated in law from Norway to Italy. In 1848 Leroux was hooted for suggesting that they should have the municipal vote (Duby and Perrot 1991, 47–8, 104–5, 122).

For women to continue to win human rights the battle had to shift elsewhere. As with working men, the main battle for human rights for women shifted to the English-speaking world in the nineteenth century. And like working men, women moved in that century-long struggle from the radical positions of the French women revolutionaries to a reformist position that bought them rights at the price of their showing that women shared the qualities of men by agreeing that the nation came first and the others would remain others, excluded from the rights that national women enjoyed, as far was women were concerned, despite a victimisation that was infinitely worse than that of women.

Rosanvallon, having canvassed the usual explanations for the lag in winning the female suffrage in France (1944), suggests that the success of women in English-speaking countries was owed to their utilitarian approach. Unlike the French who were concerned for the rights of individuals, in Anglo-saxon countries and their empires, women were seen as a distinct group to be enfranchised *as women* and not individuals (Rosanvallon 1992, 522–3). But much was common to both countries: "The power of women seems to fall with rise of democracy. Political freedom only grows at the expense of their empire, and their slavery has possibly never been as great as in those places where men have the most independence. The contrast is explained easily, the more man acquires Rights to the City, the more he is jealous about their use for himself, and about launching himself into the public space. It does not take long for him to exaggerate to himself his individual importance" (Charles Nodier 1825, cited in ibid., 178) The implications for rights are great and perhaps summed up in another genial *aperçu*: women eventually were given the vote because they were seen finally by some commentators as a good reactionary force to throw into the battle against collectivist or anti-property rights (Rosanvallon 1992, 521).

Womens' Rights Cross the Channel

In Britain and, above all, in the New World, women emerged as actors seeking political rights, stepping right from Christianity into Chartism and then forming their own organisations.

In the English-speaking world women followed the men's reformist pattern with all its contradictions and pitfalls. Their struggle paralleled that of the men: to seek full active citizen rights by showing that they were like men and therefore belonged in the national "city". As one of their leaders, Millicent Fawcett, wrote at the end of the century in reply to the *Spectator*'s assertion that: "We dwell so strongly on the franchise [for men in South Africa] because it includes all other rights, and is the one essential thing": "This is exactly what we had been saying for years, and what we considered we had proved" (Fawcett 1976, 150). Despite geographical and historical differences, the same pattern was observable in many countries. In many states women won, by the middle of the twentieth century, the vote and right to sit in parliament, which they saw as the premise for obtaining national rights, particularly those that addressed the specific needs of women. They were given that vote when they had shown that where it mattered to the nation they were the same as men. Where it did not, they laid claim to power as women who were the complements of men and needed in the latter's managerial state, showing to the men who held the power that overall women constituted no threat to the democratic nationalism of the state but provided needed skills for it. Certainly, the resistance of men to their admission as national citizens had become so vexatious by the twentieth century that the suffragettes of Britain started on what they called a "revolution". They used violent means, often symbolic, but sometimes involving attacks on property and institutions, that attracted both reprobation and attention. But even these methods did not mean that they were not eventually absorbed into the national-democratic project of all reformism.

We also must note, however, that yet again, the argument for inclusion turned on the relevance and importance of "natural" difference. This became socially less and less "common-sensically" obvious as the nineteenth century progressed, especially in the countries of new settlement. On the other hand, the terms of the debate conditioned women's attitudes. They felt commonalty with other groups excluded on the grounds of natural difference. Within their movements we therefore find less racism and more joint action with others to obtain rights than among working class men. Nationalism did not always mean racism. This should not be stressed too much. Women felt considerable shared interest with blacks at the beginning of the history of rights but it dwindled as the century went by. Late in the nineteenth century, as the women's movement became less middle class, less Christian, and more conditioned by concern to obtain a decent standard of living for the working class, the strong sense that women were slaves and should support rights for blacks and other groups declined. Nevertheless, it was there as an abiding theme.

The work of Lamennais, Cabet and Mazzini as well as that of the Babouvists was printed in the Chartist newspapers. Its language was Christian. Salvation would

come peaceably through learning to love one's brothers. Helen MacFarlane (Howard Morton) was one of the first regular woman writers in those papers. She was influenced by Lamennais. Best known as the English translator of the *Communist Manifesto,* "she also has the distinction of being the first Christian social revolutionary of modern Britain" (see Saville 1966; Schoyen 1958, 203–4). Her articles, like Weitling's, portray Jesus as a *sans culotte*. She expected Protestants to support the enlargement of the intellect and the soul (*FP*, 21/12/1850, 11; *RR*, 28/9/1850) and presaged a republic without helots and slaves: "A Society…not only of free men but of free women; a society of equally holy equally blessed Gods" (*FP*, 28/12/1850, 19). Her support for "red stockings" found many supporters among social and moral Chartists, and especially women who were increasingly militant in support of democracy and rights.

By 1840 women had become factory fodder in Britain and their plight as well as that of their children had become a central concern of Chartism. No longer could nostalgia for small societies and the role of women within them advanced by Proudhon have any meaning for them. But the economic and social rights sought by the women of Paris in 1793 certainly did. In 1839 their Newcastle-on-Tyne organisation wrote this in the *Northern Star*:

> Fellow countrywomen, -We call on you to join us and help our fathers, husbands and brothers, to free themselves and us from political, physical and mental bondage…We have been told that the province of woman is her home, and that the field of politics should be left to men; this we deny; the nature of things renders it impossible. We have seen that because the husband's earnings could not support his family, the wife has been compelled to leave her home neglected and, with her infant children, work at a soul and body destroying toil…for these evils there is no remedy but the just measure…the right of voting in the election of the members of Parliaments…in other words to pass the People's Charter into a law and emancipate the white slaves of England…we call on all persons to assist us in this good work, but especially those shopkeepers which the Reform Bill enfranchised. We call on them to remember it was the unrepresented working men that procured them their rights, and that they ought now to fulfil the pledge they gave to assist them to get theirs (*The Northern Star*, 2/2/1839 reproduced in Thompson 1971, 128–30).

Practically, this programme meant embarking on the reformist project of obtaining democracy and thus rights for citizens through parliament. Back to de Gouges, the women had sought representation, in her case through their own female assembly, that is, they had sought active rights. Never had it been denied that in theory they were entitled to passive rights, the bulk of which were economic and social and had never been implemented. But, with Chartism, women hitched their destinies to the reformist goals of their men-folk. The latter sometimes supported women's rights. The master joiner R.J. Richardson, from Manchester, and from the radical Chartism that the state feared, wrote while in prison for riot, *The Rights of Women* (1840). After quoting Burns to the effect that the rights of women deserved *some* attention and that even children "lisp the Rights of Man", he stated that women should be involved in politics because they had the natural, civil and political right as well as the duty to do so. No just civil law could exclude them. They stood on equal footing with men. He challenged those who denied them the right to be in politics to enter an open debate on the matter. "I conceive Woman has a political right to interfere in

all matters concerning the state of which she is a member, more especially as applied to Great Britain." This was so by the ancient laws of Britain because of the legal obligations that were placed on her except as femme covert; because she paid taxes and because of her contribution to national wealth in labour and skill. He noted that not only was the monarch a woman but that women filled many local offices. A woman had for all these reasons a right to make the laws under which she lived. He then showed exhaustively how many women were involved in the workforce, often constituting a majority in textiles, and the terrible conditions under which they laboured. He concluded that since God had created women to temper man, she should take part in his councils and make the laws or prevent bad laws that would harm humans, especially her children. "I consider that she who neglects her country's good neglects her God". Since there was no distinction between men and women, the former had to go on advocating women's right to take part in politics. Bad laws would never cease until every man of 21 years of age, and every woman of twenty had a vote and they should therefore band together to oppose the progress of despotism (see Thompson 1971, 115–27).

Women's participation in Chartism certainly led to the formation of separate "bands" of women (see Mather 1980, 114ff). They soon played major roles in Chartist Sunday schools and Chartist Christian churches; became active in temperance unions and in local government. Male Chartists sought them out, recalling their charitable pasts in missionary work and salvation of Negro slaves. As early as 1845 Cobden noted the anomaly that they had no vote. In 1847 there appeared the first extant pamphlet by a woman in favour of women's suffrage, written by Quaker Anne Knight. She couched her demand in terms of duty (Roberts and Mizuta 1993, 19–20). In February 1851 an organisation for female franchise was launched in Sheffield after Lovett and his groups had left that proposal out of the Peoples' Charter for fear of arousing more opposition to it than it already had. Like Frenchwomen in 1791, Chartist women thought that their menfolk were often pusillanimous. Separate and distinct rights for women were now on the table. The reformist goal was the same as that of working men: rights through national laws. The former remained hostile to women's claims. The *Friend of the People* celebrated the third anniversary of the French revolution of 1848. On April 19, 1851 the paper republished and endorsed Robespierre's declaration in its entirety, ignoring how much it had been owed to Parisian women, and it got itself in an unseemly exchange over its own demand for universal suffrage after women reminded the editors what this meant. "A considerable term of discussion…must elapse before the public mind will be ripe for the acceptance of a Womens' Charter" although it promised to publish articles about that. (*FP*, 8/3/1851, 102) The problem was male working class resistance to the admission of women to the vote. The debate between men and women did not take place.

Rather, "the Anti-Corn Law agitation was the nursery in which many a girl of that generation learned to know how closely public questions concerned her" (Roberts and Mizuta 1993, 17). As this hints, from the 1850s onwards, the organised women's movement became more and more middle class, especially in its leadership. If organised at all, women workers joined unions. Nevertheless,

philanthropic work among the poor, fostered by Christian churches, made the middle-class philanthropist aware of the terrible conditions and brutal treatment of working women and children. They became spokeswomen for divorce reform and adequate maintenance for working women in the 1840s and 1850s. As women were admitted to university and developed networks that connected them to J.S. Mill and other supporters of women's suffrage, their voice grew louder. Millicent Fawcett, one of the pioneers, and married to a Cambridge don of progressive opinions, recalls the closeness of the then very elite network and how she had been given a first edition of the *Subjection of Women* by its author, John Stuart Mill. They worked mainly by petitioning progressive men in parliament (Fawcett 1976, 87; Roberts and Mizuta 1993, 139). By 1875, 1,273 petitions had been sent to parliament. Mill was asked to present a petition for the vote for women when the Second Reform Act was debated, supported by Disraeli and other conservatives. But despite mass meetings that prominent male supporters attended, women's hopes were dashed. Like the working class male they faced a long haul to show that they deserved the vote. This meant making all the compromises of reformism. But their resentment at women's supposed "natural" marginality also meant that at first they were always siding with other excluded groups, like the Jews excluded until 1877 from Cambridge University.

By the 1870s many women were working in minor office and teaching positions as well as in factories. It was a decade when women started to make break-throughs by winning the municipal vote and membership of different school boards. They provided the link between the elite leadership and a mass base (Fawcett 1976, 118–19). Those elected to the school boards in 1870 also formed the first leadership of the official Women's Suffrage movement: Fawcett, Elizabeth Garrett, Emily Davies, Flora Stevenson and Lydia Becker. Their regular public meetings were fraught with danger. Insult was their daily lot. They faced hostile jingoistic mobs, made up of the same sort of people who had demonstrated for the Turks against the Russians in 1877 (see Chap. 11 below), but they influenced the state sufficiently to have laws to protect children from prostitution and similar measures passed in the early 1980s. The emphasis they gave to obtaining the vote increased as the position of men in parliament and outside hardened against them. After 1884, it was clear that giving men the vote did not mean that women could hope to obtain it as well. The extension of the vote to men was made conditional on sympathetic MPs not supporting the vote for women.

What is noteworthy is not only that women had to organise to fight their way to national citizenship against men, even "progressive men", but also that they had to do so by overcoming exclusion based on the "natural" difference argument we have already met in France. The significance for rights is enormous. Their universality had to be established through a denial of the relevance of natural difference. This should be remembered as an enormous contribution whatever the shortcomings of their struggle. It makes women's reformism different in significance from that of men since it contains a built-in contradiction that cannot be left behind, between the drive to inclusion and a relative openness to other excluded groups. This remains so despite lack of awareness of it. Women's groups certainly forgot the other, like male

reformists, as time went by and they were included more and more. But their gains advanced all others with "natural" differences even as they denied their relevance of "natural" differences for themselves.

Eventually, this denial of difference gave way to an argument less friendly to the universalisation of rights. The hostility of men to their having equal rights forced women into consideration of themselves as "different" but "deserving".

Today, a distinction is made between a movement for the right to vote (rights feminism) and a movement to empower women with distinct womanly goals (woman's emancipation feminism). The struggle for the vote and that for particular rights for women went hand-in-hand after men started to get the vote in 1884. Bearing in mind this distinction, and the separatist and exclusive implications of women's emancipation, the concentration of women on the suffrage after 1884 had implications for rights.

In the 1870s we see emerge strong claims based on women's specificity rather than claims to equal rights on the basis of the interchangeability of individual women and men. Fawcett herself endorsed the views of Harriet Taylor's daughter Helen, writing: "We do not want women to be bad imitations of men; we neither deny nor minimise the differences between men and women. The claim of women to representation depends to a large extent on these differences. Women bring something to the service of the state different that which can be brought by men" (*Nineteenth Century*, 26, 1889, 96; see generally Holton 1986; chs1 and 12–13).

These rights were by definition no longer universal, as they had been for the first French protagonists, but much more limited and inconsistent with an individualistic notion of rights. There disappeared after 1884 the distinctive characteristic of earlier women's movements for rights, a strong feeling of shared oppression with workers and particularly Jews and blacks. We discuss this below

While engaged in the struggle for full citizenship, early British woman activists noted that from James Mill's professions in 1825, through the 1832 Reform Act, woman had been increasingly subsumed in legislation under man, the husband, in an English variant of the Sophie model. They noted, like their French counterparts, that they had had more equal treatment in earlier, less democratic, epochs than they had after men obtained more and more political power. By being forced to go it alone by their menfolk, the women of Britain had embarked on a distinct emancipatory programme in which alliances with others were contingent and pragmatic. The women's movement openly traded its support for any party at elections against promises to obtain the vote for women or legislation specifically addressed at women's problems (Holton 1986, 32). By 1893 this included an alliance with the new Labour Party, that eventually adopted a policy of vote for women while the ruling Liberals opposed it. This did not mean that the working class generally was a loyal supporter of the excluded half of the population. That depended on what alliances it entered into with more conservative parties in parliament. Given the class composition of the women's leadership and their husbands' frequent attachment to the Liberals, this could pose problems when that party was less favourable to women than its rivals. The memoirs are full of accounts of the tensions that emerged. Consequently, the different women's suffrage groups divided into the National

Union of Women's Suffrage Societies in 1897, basically pro-Liberal, and the Women's Social and Political Union (1903), more pro-Labour. Fawcett's group remained with the first and by 1912 was openly hostile to the tactics of the second, those of "militancy". Fawcett was fearful that this would divide the "ladies" from the "working women" in what was now a mass movement. Yet, overall they did not differ in goals, obtaining rights through parliamentary legislation.

In the 1990s a new type of leader also started to emerge. A new tone was set by the Pankhursts, Emmeline and Christabel, mother and daughter. Emmeline Pankhurst painted a picture of what it was to be a British suffragist in her defence while on trial for conspiracy in 1912, when she tried "to make you understand what it is that has brought a woman no longer young into this dock". Women, she said, had believed after 1867 that they too would soon have the vote, a right that some had enjoyed until 1832. Instead they had gone on living under laws not of their making, paying taxes and yet without a legal existence. She was a small child when in 1868 the court decided that to be their lot and when she grew up she joined the suffrage movement led by Lydia Becker and married a lawyer who fought for women in court. She worked through the late 1870s and 1880s to attain the suffrage by constitutional means. Women's meetings were bigger than those of the agricultural labourers enfranchised in 1884. Their petitions required carts to carry them to parliament. Yet they got nowhere with their plea for equal treatment. Instead, she was told that she was competent to go onto school boards and so "to prove that women were fit and competent for the vote". "We ought to have known, gentlemen, that that was an argument that had never been used in the case of men. It was never urged upon the agricultural labourers that they should show their fitness for the vote. We listened to the argument – some of us; I was one of those women. I did join a political party, and worked very hard for it in the belief that the gentlemen who promised that when their party came into power they would deal with our grievance, would keep their pledges". She became a member of a Board of Guardians; saw the terrible conditions of working women and realised at the end of it all – having proved herself worthy of citizenship – that it had been a waste of time. She was a blackleg to her own sex. And so she decided that the time had come to revolt against injustice. This brought her to militancy in 1905. She and her few allies started by trying to ask questions at political meetings and were silenced as "hooligan" women. But "when men come to interrupt women's meetings, they come in gangs with noisy instruments, they sing and shout together, and stamp their feet". She recalled that at one by-election meeting in Leeds in 1908: "students tried to break up our procession, and I was alarmed at the resentment shown by the crowd…I had to use what influence I had gained to save the lives of some of these students…" Against a background of such violence, she said, the Government had determined to destroy the WPSU, but its membership, from all classes, meant that "it would not pay a democratic government to deal with this organisation as a whole" and so it singled out the leaders like herself to break the organisation. Around the world the women's movement had emerged and even in China women had the vote. So she would continue fighting to obtain a voice in deciding what the country did (Jorgensen-Earp 1999, 229ff).

By the twentieth century, such women were working ceaselessly with a distinctive feminine understanding of issues for the inclusion of women as national citizens, enabled through the vote to attain women's goals. In 1908 Emmeline pronounced: "Government without the vote is a tyranny". The vote was symbol of freedom, citizenship and liberty. Seeing matters from a point of view of rights specific to women, there were laws that women wanted and needed changed, like the marriage laws that were made by men for men. Then there were laws of inheritance that excluded women. Then there were matters like housing conditions, the Midwife's Act and the right to work in decent conditions for decent wages (ibid., 31–41).

The struggle for the vote for women became more and more violent as the century progressed and the state refused to grant it or, on some occasions, half-promised it and then reneged on the undertaking. The direct action of the suffragettes took more and more an anti-men form according to the following logic: "The suffragists of old times made a mistake…[t] hey relied too much on the justice of their cause, and not enough on their own strong right arm" (ibid., 87). They faced the censure of being unladylike. "But think what is at stake. Human liberty. What we want is action… any woman who is content to appeal for the vote instead of fighting for it is dishonouring herself." The measure of the justice of their claims was not success but they would win because they were right (ibid., 87).

At first they merely held mass illegal meetings; then they started symbolic violence, like stoning No 10 Downing Street, the British prime minister's residence; the dry-spitting and slapping of policemen and finally they resorted to smashing shopkeepers' windows. Despite their manhandling by the mob, they continued a campaign that included attacks on country homes, the burning of stations and other symbolic acts. Numerous arrests followed and in 1909 they started hunger strikes and were force-fed while in prison. The brutality of this procedure became public and won them ever-greater support among women. Since most of those arrested were working class women, it was not until Lady Constance Lytton hid her identity, was imprisoned and force-fed, a procedure that may have led to her death soon after release, that the state and the men involved even acknowledged the brutality (ibid., 109–110).

When the Suffragettes – as they became known – called mass meetings, organised working-class women and used tactics such as rushing parliament, the hostility of the populace and of parliamentary leaders like Lloyd George was made clear. In one episode the women were arrested after distributing leaflets calling on women to "rush" parliament, whose doors had been closed to them. They were tried before a police court on trumped up charges of encouraging violence and breaches of the peace. Christabel, Emmeline's daughter, reminded the court that that sanction had not been applied before 1884 to men engaging in similar meetings to obtain the vote. They refused to be bound over to keep the peace and were sent to jail.

Conscious of male hostility to the new militancy – it divided women as well the state – having again broken earlier promises, proposed a referendum on the vote for women, the democratic solution. The Suffragettes refused any such exclusionary procedure. Whatever the view of men, their struggle would continue. This rebuttal

is usually presented as a feminist refusal to accept that men should decide about women's rights. For rights, what is important is the refusal to allow democracy to override rights and justice. Recalling Cromwell's struggle to end the "divine right" to rule of the Stuarts, the Suffragettes noted that "it takes a great deal more trouble, ladies and gentlemen, to fight against eight million divine rulers than it did to fight against one" (ibid., 288). This realisation that democracy was the enemy of extensions of rights, makes it even more puzzling why the militants redoubled their struggle to be included as national citizens. The best that can be said is that the incoherence of seeking rights through parliament – thus limited to nationals – and universal claims, was not seen by idealists in 1912. On the one hand, they were borne forward by a belief that in freeing their half of the human race, they would free it all. On the other, it was argued that women were working "for the [British] race"; that British children were dying in great numbers where in the white colonies they were not, as there women had the vote. Legislation had ensured that (ibid., 215–6). On the one hand, they decided that the commercial population as a whole was an enemy and many shopkeepers had panes broken, and they deplored the conditions of concubinage into which Indian women were reduced by the British forces. On the other, they vowed to stand shoulder to shoulder with the best of men as equal citizens, "so that together we may save the race."

What was most notable in both generations of British suffragists was how, like their men themselves, they saw no contradiction between national loyalty and concern for the problems of the other. This became evident during the Boer War when Fawcett and others were sent to check on conditions for children in British concentration camps. She certainly recommended improvement in sanitary conditions and when she saw on a second visit that that had not been done, recorded that it was the responsibility of the superintendent and former medical officer. Today, the criminal excesses that took place there are accepted fact. But Fawcett showed a primary loyalty to the nation and not to fellow-women. "The war naturally caused an almost complete suspension of work for Women's Suffrage…our movement kept on growing in an atmosphere in which a deeper sense of the value of citizenship had come into being" (Fawcett 1976, 149–51). While she recognised the terrible mortality rates due to poor conditions in the camps, she gave more credence to British men's explanations than to those of the Boer women (Fawcett 1976, 162). The need for candles to nurse the sick was met by these ruminations: "We did hear…that the Boer women were very expert in using candles as a means of signalling to their friends on commando…I for one could not blame them if they did…The instinct of the non-combatant to help the combatant on his own side is a very powerful and practically universal" (Fawcett 1976, 157). She denied that any Englishmen ever dreamed of killing a Boer woman who tried to help her brethren.

It is undeniable that by the twentieth century these women were conscious of the damage done by empire and felt solidarity with women world-wide. They built up links with other women in Europe and the US. It is also undeniable that they realised that newly enfranchised male workers were not automatically their supporters or allies. Yet the overriding principle that guided their activity was the need for full citizenship. In a famous speech made on the eve of the First World War, Mrs Pankhurst

still proclaimed this as women's object. But by then, despite the lessons that she had given to her American colleagues at Hartford a little earlier, she declared the suspension of all further struggle, in order to work for the war effort. Her reasons are illuminating. The WPSU had fought for citizen rights and therefore had duties to the nation: "And so when the war broke out…some of us decided that one of the duties of the Women's Social and Political Union in war time was to talk to men about their duty to the nation – the duty of fighting to preserve the independence of our country, to preserve what our forefathers had won for us, and to protect the nation from foreign invasion". The honour of the nation was at stake and in that context duty began at home. It was to support the fight. Women should be recruited into national service. To talk of peace was weakness. Women had to show their patriotism. Thus other nations would be protected, first and foremost France, the Mother of European Democracy. Defeat by Germany would set the women's movement back by 50 years. She went on soon after to tell Lloyd George, her old enemy, that any sort of suffrage would be enough given the need for patriotism (Jorgensen-Earp 1999, 359–65).

It was only when faced with such proof of commitment to the nation and needing the women in the wartime workforce to be docile, that the state in 1918 finally gave women householders over 30 the vote. (Women received the vote in "undemocratic" India (1921) and the "undemocratic" Philippines (1937)) (see Fawcett 1976, chXXIII, esp. 233). After "agreeable" talks with the women leaders, the government stated expressly that women had proved their worth as citizens. On receiving this limited boon, as women did not obtain the vote on the same basis as men until 1928, Pankhurst led her followers in singing "Oh God, our help in Ages past" and the national anthem ("which represents what we have in our hearts…love of country, justice and freedom") and pledged the new Women's Party to work for the nation. This party called upon women of all classes "to forget their class and unite in common service of the nation" (Jorgensen-Earp 1999, 269–71). Mrs Fawcett's group, which since 1912 had been somewhat overshadowed by the WPSU, had also suspended political work when the war started. It decided to raise funds "for the dislocation of business" and undertook to "sustain the vital energies of the nation while the strain of the war lasted". Its London branch changed its name from the Suffrage Society to the Women's Service Society. When finally the vote was conceded it was greeted with "Henceforth, women would be free citizens" (Fawcett 1976, 247) The hymn "Jerusalem" was sung at Queen's Hall, but not the final passages of Beethoven's fifth symphony, as hoped.

Some women were disturbed by the compromises made in the name of the nation. Already, they had been coming together with those marxists who were anti-war, after disillusionment with a Labour Party that dismissed the suffragettes as middle class. Later some would join the Communist Party. They saw how the jingoistic working class were being slaughtered in Flanders and noted the famous Christmas fraternisation by disabused soldiers. Arguing for solidarity like that between German and British workers during a dockers' strike, they portrayed the war as a capitalist one. Conversely, they reminded their readers: "Deep down and beyond all race and class distinctions we are human beings, with the same needs and instincts". They argued that class distinctions were less important than what human beings had in

common (*Womans Dreadnought*, 14 August 1915). But, to call for the brotherhood of mankind and a human suffrage, even to support full voting rights for all men, in times of war, seemed treasonous and was portrayed as such.

Women's arguments on a string of occasions were illuminating for rights' history. They made clear again and again that rights were never won without a political struggle that broke a bad rule of law. As heiresses to the earlier struggles, they knew that appeals to the Courts in 1868 had resulted in legalistic avoidance of justice (Jorgensen-Earp 1999, 227–9). Christabel Pankhurst, a lawyer, told the court: "It has been left to the twentieth century – it has been left to these so-called democratic days – to see our judicial system corrupted for party ends…To sum up what I have just said, Magna Carta has been practically torn up by the present Government…we have had no fair trial. The whole of our liberties have been won by action such as ours, only of a far more violent kind. We have not broken the law…we are prepared to say that even if we were law breakers, we should be justified in being so. Magna Carta itself was a threat of a breach of the peace" (ibid., 62–78). Her mother chimed in that petitions and constitutional means had not worked and women continued to die because of men's laws (ibid., 79ff). The Suffragettes pointed out that British liberties back to before Cromwell had been won by political struggle. Their own opponents admitted this. Moreover, "academic arguments" had got women nowhere, compelling them to exercise their rights to organisation and direct action won in those "fights" and "warfare" (ibid., 57). There could not have been a clearer statement that rights and freedom could only be won against the rule of law. This was what all British history showed. The problem for universal rights was what they fought to attain and won: the rights of national citizens.

The long March of British women to the right to vote had led them to the same nationalist and communitarian exclusivism as their menfolk before them. They showed once again how rights are only won by courageous people who place justice above any rule of law and fight for it. But they also showed that to aim for the goal of rights through democracy and a parliament necessarily makes rights for nationals only. The non-national, the other, tends to become an excluded being, indeed, an enemy. This conclusion would have been unavoidable even had they adhered to the notion of right to vote for all. But when they started to seek rights for women as a priority, excluding a common struggle with men, they made their own position even more contradictory with the notion of universal rights. We are not surprised that as people of their time they should show more than a tad of nationalism and superiority vis-à-vis other nationalities. It was all taken for granted at the time. More remarkable is how some escaped those blinkers.

New Worlds and Old Standards

British women were the last of the English-speaking women to obtain the vote. Women in 19 US states (1879–), Australia (1893), New Zealand (1893) and Canada (1917) had had it much earlier, in some cases for 40 years. They too had followed

the same progress of seeking the vote and laws through parliament that would give them rights. What is striking there is that they won the vote first where the men considered that they were a conservative force and could be opposed to a changing reality. For a combination of reasons their community with their menfolk led them from nationalism to racism. The trend was most obvious where women were least like the Sophie model, in the west of the US and in New Zealand and Australia, where being middle class did not mean not working.

In the United States, women had had, as in France and Britain, more power before their menfolk were enfranchised than after. The US constitution and bill of rights had stripped them of the status they had had earlier. By 1807 the voting rights they enjoyed in the colonies all disappeared in the new republic. Again, the justification derived from a variation of the Sophie model: women belonged in the private and not the public realm. A notable lone voice of protest was Fanny Wright whose book (1829) demanded the vote, free liberal education, birth control and better divorce laws, as well as the abolition of slavery. She was a socialist who was recalled by Ernestine Rose in 1858 as the first woman in that country to speak on the equality of the sexes.

Women were already active in anti-slavery associations by the 1830s, which we discuss below, but they were expected to keep to charitable work. In the same decade, thousands of militant British and Irish women emigrated to North America carrying the lessons of the Chartist struggle for the vote with them. The Americans made contact with British anti-slavery activists. Several of their leaders were excluded from the London World Anti-Slavery Convention in 1840 together with the British women delegates. Elisabeth Cady Stanton, a Quaker, furious at her exclusion by men from the London convention, started immediately on return to the US to agitate for a return of voting rights to women, announcing that "We resolved to hold a convention as soon as we returned home, and form a society to advocate the rights of women". At a conference in Seneca Falls in 1848 she debated and accepted a policy of seeking equal suffrage for men and women (Stanton 1971, 80–3).

The terms of the Seneca Falls reveal the stamp of rights as understood in the US constitution and other American documents and as expressed in France in 1789. The Seneca Declaration parodied the US Declaration of Independence: "When in the course of human events…it becomes necessary for one portion of the family of man to assume among the people of the earth a position different from that which they have hitherto occupied, but one to which the laws of nature and of nature's God entitled them…[they are obliged to explain why]…We hold these truths to be self-evident: that all men and women are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life liberty, and the pursuit of happiness; that to secure these rights governments are instituted, deriving their just powers from the consent of the governed". The document continued that: "when a long train of usurpation and abuses…evinces a design to reduce them under absolute despotism, it is their duty to throw off such government…such has been the patient sufferance of women under this government, and such is now the necessity which constrains them". Men had established a tyranny over women by depriving them of the vote; by obliging them to live under laws not of their making; by depriving

them of rights "given to the most ignorant and degraded men-both natives and foreigners"; by ensuring through the marriage laws that woman is civilly dead; by taking away her right to her property; by divorce laws that were inequitable especially regarding rights to guardianship of children; by taxing her; by excluding her from education; by excluding her from religious ministry; by establishing different moral codes for men and women; by assigning to her a role of action "when it belongs to her conscience and her God". They therefore insisted on immediate admission to all the rights and privileges which belonged to the citizens of the United States (Seneca Falls declaration in Kraditor 1968, 183–9; Stanton 1971, chix, 149). This was the first of a series of meetings to obtain women's rights.

While we again see a drive for national citizenship like that in Britain, the document is so close to that of 1789 in the structure of its notions, that we see already a difference from the views of the British, whose reference point was the ancient liberties going back to Magna Carta. The American woman's drive for rights would thenceforth take a different path: for rights rather than for women's emancipation (see Kraditor 1965, ch3). They struggled to obtain a hearing and although they worked hard in the 1850s in Kansas for the vote for women and blacks, were unsuccessful. What particularly stirred up opposition against them was their temperance work. Masculine reactions against them on the east coast are captured in Henry James' *Bostonians*. In 1866, Stanton, Lucretia Mott, Susan Anthony and Lucy Stone established the American Equal Rights Association. Up to this date, the movement had been limited to the east coast, was driven by the principles adopted at Seneca Falls, fed by a sense of further injustice when blacks were made citizens in the Civil Rights Act of 1866 and women remained excluded from active citizenship. Thereafter, its epicentre moved west.

Then the drive for active rights for women took on a different character. Frontier territories like Wyoming and Utah both introduced equal suffrage for women in 1869 and 1870 respectively. There has been much debate about why: because women were ranch owners; because many supposedly came from Scandinavia and Iceland where women were already important; because they would oppose polygamy; because they would counteract the enfranchisement of the blacks that had taken place further east? There is a striking similarity with developments in Australia and NZ where women also obtained the vote early. In all these places, women had been obliged – like the celebrated drover's wife of Australian literature – to fend for themselves and do everything men did while their men were away ranching vast expanses. Their strength and self-reliance was proverbial. (Thus, the first Wyoming MP is described as: "The six foot tall [Esther] Morris was precisely the type of woman Victorian Americans identified with successful settlement, strong-willed enough to survive hardship and dedicated to raising her sons to be upright citizens. 'With her boys…what she said was law'" (see Scharff 2003, 88) The Sophie model, or its equivalent, would have been laughable in all these places by the middle of the nineteenth century. "Natural" inequality was a distinction without importance. Women and men were virtually interchangeable in capacity. This was a novel context that made inclusion as citizens no real problem. So, in Wyoming, before that area sought to join the Union, despite being socially conservative, men gave the vote

to women. The bill's sponsor, William Bright, had been influenced by his wife, but there was no public agitation whatsoever. It was a gift of the 21-member male assembly of cowboys and frontiersmen. Thenceforth, women occupied public office and worked in all areas, symbolically riding horses astride and voting regularly. Utah followed Wyoming's suit a year later. Seat of the Mormons, it was even more socially conservative than Wyoming, and renowned and decried by progressives for its polygamy. Again the vote came without any real agitation by women, having been promoted by a breakaway group of Mormons, the Godbeites. It reversed the image of Mormon women as downtrodden. Both territories refused absolutely to abolish the equal vote as a condition of admission to the Union. They were finally accepted in 1890 and 1895 respectively (Stanton et al. 1969; Stanton 1971, chxviii, esp. 297ff). Those states were under-populated and their conditions of life imposed so particular a shared life of activity between men and women that they had little in common with the lives of women in the east. So while state after western state gave the vote to women – Colorado (1893); Utah again (1986) Idaho (1896), Washington (1910), California (1911), Arizona (1912), Kansas (1912), Oregon (1912), Illinois (1913), Nevada (1914) and Montana (1914), and this was significant for reasons discussed below, it was not a model for national action. In the populous east, the self-reliant western model of womanhood, very much like of Wollstonecraft's "hockey-player", was difficult to emulate. Rather, the image of women as "partners" of their men against others, subordinate and complementary, replaced it. Nevertheless the eastern suffragists went to see how the vote was won there and were active in western territories. Regrettably, they learned a national-popular and racist lesson that highlighted the contradiction between rights universalism and rights nationalism in the US.

Easterners like Stanton had already established a national organisation, the National Women's Suffrage Association (NWSA, 1869) and Lucy Stone and Julia Ward Howe had established the American Women's Suffrage Association (AWSA, 1869), which later united in 1890 as the NAWSA to carry the battle for the vote into the national arena. A string of legal cases in the 1980s and 1990s made clear that it was the national government that was sovereign and not the states. Power would have to be won there. But Congress had rejected outright a Bill for the women's vote in 1870 and then proceeded by law to remove the vote from the unrepentant woman polygamists in 1887. This prompted Stanton to visit, to see the recipe for success. She held up Wyoming in 1888 as a model of where women had transformed barbarism into civility. This phrase took on a particular meaning on the eastern seaboard since the western women were, in fact, establishing a community based on barbarous racism. Thereafter, the eastern women's movement also became more and more racist and xenophobic, and was backed by white supremacists from the west like George Francis Train (Scharff 2003, 69–92).

Women had had no success when they had sought the vote as a universal right. They found the formula for victory by seeking only rights for themselves as *American* women, as nationals. When millions of male immigrants from Europe started to arrive – Jews, Slavs, Italians and others – the women's movement demanded the vote for themselves on novel grounds when compared with their

earlier assertions about natural rights: They argued that women would counteract the perceived vice and crime of the immigrants – who were working class, Catholic, and lived in slum conditions – by standing together with their men as an Anglo-Protestant community that could dominate the new comers. Endless statistics were adduced to show that white women and men together could dominate all the new outsiders (see Kraditor 1968, 253ff; 1965, ch3). As Carrie Chapman Catt said in a speech in 1894: "There is but one way avoid the danger – cut off the vote for the slums and give woman…the power of protecting herself" (ibid., 261). Stanton shared in this middle-class argument about the defence of values and the community against people she now regarded as lesser people. This boded ill for their earlier allies the blacks of America. East coast women often became xenophobic after 1889, responding to male suggestions that they might swamp the black vote. In 1893, the National Women's Association openly argued that women were better educated than blacks and superior in civic capacity. Soon women became as fervent as men in their commitment to community as the basis for the exclusion of others, on nationalist, racist and, finally, bellicose lines. The shift over a generation, away from their commitment to natural rights spelt the end of solidarity with blacks and other excluded groups that had been their signature up until 1880. They won their way into Congress after arguing that American women were superior to both non-Anglo foreigners and blacks. In this way, east and west came together, although the history of murderous lynching for which the west became infamous, usually involving women "insulted" by blacks, Asians or Hispanics, did not become a feature of the eastern seaboard (Pfeiffer 2001). By insisting on their community with men, the insiders, rather than blacks, the outsiders, they were eventually accepted into the city. The price of obtaining rights for nationals alone was again clear. What is doubly remarkable is how they changed the way they used their Christian inspiration from its charitable Quaker form that led to Stanton's famous essay on natural rights (Kraditor 1965, ch3) to the version of Christianity favoured in which God had made other races hewers and bearers for the superior whites. Christianity had become an Old Testament weapon against universalism.

They then added the claim that they were essential to the national society and filled particular roles in it. Like working-class men before them, women filled a host of different functions in society and the state by the 1880s. While still seen above all as the "wife", they were fact in the public realm, above all in education and the caring professions, and great numbers worked in industry or on the land. Men and their state could not ignore this and as they won rights for themselves like decent minimum wages they had to consider women as well. Usually they denied them equal wages on the grounds that they were not the heads of families – as in the *Harvester Case* (1907) in Australia – but they were increasingly made legally present. For women, as for men, this was two-edged. They obtained rights and they subordinated themselves to the state and a consideration of its overall interest.

The east coast American women leaders were predominantly middle class. The list of names of women involved by the twentieth century includes many who were eminent in several fields: Jane Addams, Helen Keller, Emma Goldman, Ellen Gates Starr and others. Their work in national and international philanthropic associations

was extraordinary. They propagandised through papers like *The Woman Voter*, *The Women's Journal* and *The Woman Citizen*. Later, many would join the nascent labour movement and some the socialist sects. Their social activity had some attractive force for men, given the middle class qualities and peaceful methods of US women. But women overall fulfilled multiple functions after the 1880s in a social state needing "household management" on a grand scale (see Kraditor 1965, 68). Jane Addams wrote (in *Ladies Home Journal*, January 1910):

> Women who live in the country sweep their own dooryards and may either feed the refuse of the table to a flock of chickens or allow it innocently to decay in the open air and sunshine. In a crowded city quarter, however, if the street is not cleaned by the city authorities no amount of private sweeping will keep the tenement free from grime; if the garbage is not properly collected and destroyed a tenement house may see her children sicken and die of diseases from which she alone is powerless to shield them, although her tenderness and devotion are unbounded. In short, if women would keep on with her old business of caring for her house and rearing her children she will have to have some conscience in regard to public affairs lying quite outside of her immediate household. The individual conscience and devotion are no longer effective. The statement is sometimes made that the franchise for women would be valuable only so far as the educated women exercised it. This statement totally disregards the fact that those matters in which women's judgement is most needed are far too primitive and basic to be largely influenced by what we call education (in Kraditor 1965, ch3 and 68ff).

The insertion of women into such roles in Britain had thus been paralleled in the US, though the general argument for feminising democracy and creating a maternal state was stronger in Britain than the US, where the concern with rights for all remained stronger than rights for women only (Holton 1986, ch1). The Americans were less revolutionary and militant, but they had built up close contacts with their British counterparts. They did not adopt their tactics until 1913, despite an equally exclusionary stance by both parties and their menfolk.

It was such an audience that Mrs Pankhurst addressed in 1913 at Hartford, urging them to adopt her tactics. One or two, who had worked with the WPSU, like Alison Paul and Lucy Burns, did. There were 500 arrests in the next 2 years for "Loitering" and other offences, but what really obtained them the national vote in 1918 through the 19 Amendment was the sentiment that we have already seen in England: The war effort required it. As President Woodrow Wilson stated: "I regard the extension of suffrage to women as vitally essential to the successful prosecution of the great war of humanity in which we are engaged. It is my duty to win that war. And I ask you to remove every obstacle that stands in the way of winning it. They (other nations) are looking to the great, powerful, famous democracy in the West to lead them to a new day for which they have long waited; and they think in their logical simplicity that democracy means that women shall play their part in affairs alongside men and upon equal footing with them. I tell you plainly that as Commander-in Chief of our armies that this measure is vital to the winning of the war" (*NYT*, 1/11/1918). Although the bill was twice blocked in the Senate, it finally passed. Women were US citizens. They had finally been included because they had proved their loyalty to the nation at war. Cartoons show them filing into the recruiting stations of the time. Their claim for rights posed no threat to the nation.

The history of their defeat in the struggle for the vote and for inclusion as national citizens in 1900–18 contained another history that makes their story more interesting for human rights than that of the British women in the same period. Their very exclusion from power in the context of the understanding of rights going back to Seneca Falls, kept a sense of unity with the excluded stronger among a minority of them until the end of the century. Since the *sturm und drang* of the fight against slavery and racial discrimination was part of their lived everyday experience, they had a sense of the need for brotherhood and sisterhood with other excluded groups that was reciprocated long after they had given it up. As William du Bois stated in the *Crisis*, October 1911: "Every argument for Negro suffrage is an argument for women's suffrage; every argument for women's suffrage is an argument for Negro suffrage". Many women were religious and many were Quakers who engaged in missionary work and for whom the suffering of other peoples was experienced at first hand and felt sharply. We note, to be discussed below, that this separated them sharply from the western American women, who, while self-reliant, were members of communities that were highly exclusionary on religious and racial grounds. The mutual support of men and women in the west spelt exclusion and denial of rights to Native Americans, blacks, Mexicans and Asians. If they shared their husbands' views then they were complicit in crimes we discuss below (in Chap. 10). The men had established the Big Horn Association in Cheyenne, which proclaimed: "The rich and beautiful valleys of Wyoming are destined for the occupation and sustenance of the Anglo-saxon race. The wealth that for untold ages has lain hidden beneath the snow-capped summits of our mountains has been placed there by providence to reward the brave spirits whose lot it is to compose the advance guard of civilisation. The Indians must stand aside or be overwhelmed by the ever advancing and increasing tide of emigration. The destiny of the aborigines is written in characters not to be mistaken. The same inscrutable Arbiter that decreed the downfall of Rome has pronounced the doom of extinction upon the red men of America" (*Cheyenne Daily Leader*, 3/3/1870 cited in Dee Brown 1971, 152–3). The positions of women in the east were more contradictory.

It is the process of inclusion via the exclusion of others (not so unilateral among American women as elsewhere) that is of interest for rights. Nowhere was the contradiction clearer than in New Zealand and (South) Australia, where women obtained the rights to vote in 1893–4. Both these places had created women who were self-reliant and did most of the tasks men normally would do. The Sophie model was not only irrelevant but dangerous where women were expected to cope while the men were away for long periods droving sheep or on the waterfront. While subject to all the brutalities met by women elsewhere and therefore seeking the same rights to maintenance and divorce, they did enjoy considerable state support for families from first settlement. Eventually, they started to organise to obtain the vote (see Grimshaw 1972). In New Zealand, women read Mill's *On the Subjection of Women* enthusiastically when it first appeared and in 1869 his correspondent, Mary Ann Muller (Femina), appealed to men for the women's vote and property rights. From that date, the composition of the NZ suffrage movement paralleled that of Britain. It was white, middle-class (the working class only joining after 1893),

and it worked through petition and the support of men in parliament. Several times sympathetic premiers and supports introduced bills for the vote for women after 1878. When a bill was passed with hardly a ripple the movement was led by Kate Sheppard, a British missionary who also led the World Christian Temperance Union. Her demands included the assertion that it should be conceded because the "women's vote would not support a particular party, but would generally add weight to more settled and responsible communities". Conservative leaders like Sir John Hall supported her work because he thought women would be a steadying influence in the community and in politics (Page 1996, 5).

These women were set on rights to property for women and traded votes with any party for promises of prohibition, which earned them the hostility of the liquor industry. They were more in favour of the Liberals than Labour, but when they obtained the vote they sought factory legislation to protect women in sweat-shops. New Zealand had a large minority population of Maoris whose oppression was certainly not central to their concerns. But women supported, like the men of New Zealand, the ban on Asian migration (Page 1996, 25).

The pattern was much the same in Australia, where despite their Victorian bustles, middle-class women were self-reliant and not at all like the Sophie model. The demand for the suffrage was not strong and it was more or less given by the male-dominated parliaments starting in South Australia in 1893. One author states: "the granting of adult suffrage, by all-male Parliaments, was a gesture born of political opportunism" (Teale 1978, 253). In the case of Western Australia, where women got the vote in 1899, it was a deliberate attempt to counter the political vote of the Kalgoorlie "diggers" with that of the conservative wives of landowners. In Victoria, where agitation started in the 1880s, again in close association with the Temperance movement, leaders noted that their constituency was among country women rather than the "socialites" of the city. They built on a middle-class base of women already strong in the social and educational world and in business, to apply pressure on men through the Suffrage League to obtain legislation more favourable to women. Again the focus was on protection of girls, maintenance by fathers and joint custody of children. While jeered at by some men, sent to their tiny meetings by liquor traders, they portrayed themselves as the conservative civilising influence in society. They would rein in men's unbridled quality. Sharing to the full the attitudes of their menfolk when wider issues than those of women were at stake, they backed them solidly in opposing the entry of Asian labour to Australia. Vida Goldstein, who ran for parliament in 1903, garnering some 50,000 votes, summed up their contradictions. The daughter of a Polish Jew and a squattocracy mother, she was an early leader of the movement for a vote for women in Victoria (1908). Later she became close to the small socialist sects. But in 1903 her platform in Commonwealth elections was to cut out a "women's sphere". It supported the exclusion of Asians and the White Australia policy and favoured compulsory arbitration. "I believe in the principle at the root of this legislation, that Australia should be protected against the cheap labour of other countries, but I believe the remedy lies not so much in drastic and restrictive legislation…but in the principle of equal pay for equal work. Alien and coloured immigration is desired by many because it provides cheap labour.

Make the principle of equal work for equal pay mandatory, and then there will not be such a keen desire for unrestricted immigration, with all its dangers to health and morality" (Teale 1978, 262).

If rights for Australian women did not mean rights for Asians, the attitude of Australian women to the Aboriginal women was no more inclusive. On occasion, there was a sense of solidarity, but usually the whites' arrival in the countryside was accompanied with a determination to prevent "miscegenation" and a general support for men's policies, which, as we will see, had been as genocidal in Australia as in Wyoming. Indeed, while Sojourner Truth, a black woman militant, had been at the second US women's rights convention in 1851, and reminded the white middle class there that they had discussed black men's rights and not black women's, I have searched in vain for an Aboriginal or Maori woman in the nineteenth-century women's suffrage movement in Australia and New Zealand. Sojourner Truth made a speech "Aren't I a Woman?" that put paid to the notion of woman as a simpering homebody. She said:

> I am a woman's rights. I have as much muscle as any man, and can do as much work as any man. I have plowed and reaped and husked and chopped and mowed, and can any man do more than that? I have heard much about the sexes being equal; I can carry as much as any man, and can eat as much too, if I can get it. I am as strong as any man that is now. As for intellect, all I can say is, if woman have a pint and man a quart – why can't she have her little pint full? You need not be afraid to give us our rights for fear we will take too much, for we can't hold more than our pint'll hold. The poor men seem to be all confusion, and don't know what to do. Why children, if you have women's rights give it to her and you'll all feel better. You will have your own rights and there won't be much trouble (Truth 1991, xxxiii; for another version, see 134–5).

This strapping, six-foot black woman was at least there when rights were discussed. The sole recollection about the Maoris in Grimshaw's book is that the bill for women's suffrage was stopped by two Maori MPs fearful of empowering their own women, whose intellects they too belittled in an even more sexist view than the whites had (Grimshaw 1972, 69n, 89–90). Maori women obtained the vote along with white women. The way white women in Australia saw their Aboriginal sisters was even worse. In the early twentieth century, they encouraged and supported the policy of forced removal of Aboriginal children from their mothers to bring them up in a civilised way, showing little empathy for the mothers' pain. Today this is rightly judged an act of genocide.

Conclusions

Women's history has been given more space here than that of the male working class because it is more significant for universal human rights. The negative dimension has been indicated and is discussed at length later. The positive dimension arose from the terms that men themselves imposed in the debate on whether women were worthy of national human rights. Men suggested from the outset, indeed,

before 1789 above all in Rousseau's work, that women were not human in the same way as men and that human rights could not apply to them in the same way. In time, this became more and more a male emphasis on their inadequate mental fitness, expressed or visible in the different virtues they supposedly embodied. Women were obliged to defend themselves by stating that all humanity was as human as, the same as, white men or, that any differences of a physical or social nature, made no difference where rights were concerned. This directly challenged the model of rights-for-nationals-only. It thus opened up the logical possibility for an extension of those rights to other "different", individuals. Unfortunately, in practice, it was easier for women to be admitted to the citadel and to obtain the same human rights as men (and indeed, other new rights), if they emphasised their shared qualities or values with the men, including those of excluding from rights all more "different" beings.

Chapter 9
The Excluded: Slaves

Another Kind of Slavery?

After workers and women, the third major group excluded from the human rights that nationals enjoyed by 1815 were ethnic minorities, present in all the states that had attained civil and political rights for national citizens. In Europe, they were different mainly through language and culture. Thus in Britain there were Gaelic-speaking Irish, in France, Gaelic-speaking Bretons and throughout Europe, Yiddish-speaking Jews. More obviously different were those of a different skin colour. Blacks were described in 1852 in the United States as "clearly marked out by the Divine Ruler" and by the middle of the century self-defined in census and legislation in many countries as belonging to "other races". In Europe they were few in number in 1815. But they made up one-sixth of the US population. In 1789 they were almost all slaves who enjoyed in practice and often in law no right to life; no right to liberty; and whose "happiness" was otherwise marred by the constant torture and toil that their white masters imposed on them. Clearly, none of the statements of human rights before 1789 were considered to extend to them. So, once the 1789 Declaration of the Rights of Man and the Citizen became known to those in France and the French colonies, they started a clamour for freedom and the other rights that French citizens enjoyed. Enemies of France kept the ideas unknown in their slave possessions.

This chapter recounts how the national-popular interests of the white majority quickly ended black slaves' hopes that human rights would apply to them even under revolutionary France. There was a short period when some were freed by the Jacobins before Thermidor returned them to slavery and Napoleon re-imposed the seventeenth century slavery laws. It was several decades before the whites who enjoyed national rights liberated them in a formal sense: Britain in 1833; France in 1848; the Netherlands in 1863; the United States in 1866 and Brazil in 1886. After that, blacks were forced to follow the same route as women and workers – to seek through the exercise of national citizenship, the vote – the rights they needed because of their particular victimisation.

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Judged formally, the path of securing human rights through the nation-state worked for them as it had for workers and women, and often earlier. But in practice, little changed for blacks despite formal emancipation. They may have danced in the streets on being proclaimed free but they quickly discovered that little of substance had changed. Emancipation was subordinated in all states to the national-popular interest. Nearly everywhere, slave status was replaced by an informal semi-slavery. Typical was the first article of the British 1833 Act that abolished slavery throughout the British empire. It made all slaves automatically "apprenticed labourers" working for their former slave master (Abolition of Slavery Act, 3 and 4 Will IV, cap 73). Freedom did not mean freedom to leave your former torturer. No longer were they by law "things like hogs" to be destroyed at will, though again, as I recount later, whites did get away with murder until well into the twentieth century. But, unlike workers and women, obtaining life and liberty and even the right to vote brought blacks little change in their condition if that is measured by the economic, social and other rights needed to make them active citizens who made the laws under which they lived.

I show further in this chapter how their initial disappointment on not obtaining the rights promised by the French declaration of 1789 led some to an initial reaction that was pregnant with problems for the future. In the French slave colony of Saint Domingue (Haiti), where they were overwhelmingly in the majority, the slaves revolted, threw the whites into the sea and created their own nation-state to establish human rights for themselves. The Haitian revolution 1789–99 was the first successful black national liberation struggle, although it did not ensure Haitians control of their own destinies.

The second reaction was that of the blacks in the Spanish colonies adjacent in Latin America. They also rapidly claimed the rights proclaimed in 1789. But in Latin America, blacks were a minority, whites and mestizos constituting the majority. A Haitian solution was not possible. There, the successful national liberation struggles against the Iberian overlords hostile to the notion of universal human rights, were often supported by black slaves. But after victory, the social composition of the new nations had not changed, the majority still had interest in continuing slavery. As a series of liberation struggles took place throughout the century, often inspired by one statement of rights or other, the myriad new states kept slavery. There were no real rights created for blacks in Latin America until well into the 1900s.

The chapter continues with a discussion of the most interesting solution for blacks denied rights enjoyed by whites, that in the US. It illustrates the limits to any policy of obtaining rights through admission to national citizenship, which came relatively early (1866) on the Northern continent, where it had majority white support. Like all states with slave regimes, in the eighteenth century the US experienced continuous slave revolts, savagely repressed. There the tension between the rights proclaimed for all in the bill of rights and treatment of blacks was obvious, which provoked debate on whether the democratic popular sovereign could choose to establish slavery in the new territories it occupied. Was the US merely a state where popular sovereignty as we described it in Chap. 2 privileged the people to

make the laws it wished to live under, including a law for slavery – or was it a state where popular sovereignty existed to attain the natural, therefore universal, rights listed in the declaration of independence? In 1861–5 a bitter civil war in which millions died was fought over that issue. Blacks also fought in that war for the northern abolitionist regime against promises of freedom. The white majority reluctantly freed all slaves in 1866 and gave them the voting rights whites had.

Once having won the vote, blacks, as a perpetual minority and not politically organised as a separate group, did not have the clout to force the state to grant them the rights they wanted. To attain the rights they needed they had to make compromises with white majorities Often, the treatment of men and women had been uneven – the "fair wage" won in 1907 in Australia was not the same for a man and a woman – but at least, once allied, their power as active citizens bore some fruit. That was not the case for blacks up to and beyond 1948.

Formal freedom changed little; once freed, the former slaves were left to sink or swim in a white society whose identity was already established. Without economic and social rights, emancipated blacks were ill-fitted for conformity to the life of the "typical" American described in Chap. 2 above. For centuries they had been denied an education, deprived of skills and seldom knew more than the economy of slavery. Once emancipated, they became even poorer, and huddled in unsanitary slums in the cities to which they fled to become unemployed, often turning to crime to survive. State-enforced fair wages were unthinkable in the majority world of possessive individualists. Many sank. In the 1960s, American blacks were still fighting for their civil rights 20 years after the country adhered to the Universal Declaration of Human Rights. To the white majority it appeared as each decade went by that blacks were ever more incapable of becoming like other Americans and thus heirs to the home-grown traditions of rights.

We recapitulate that the virtues on which the republic was supposedly built were those of self-reliance born of having land, working it and becoming self sufficient. This had made a nation of possessive individualists whose fierce commitment to civil and political rights was accompanied by an adamant refusal to add economic and social rights, necessarily emanating from the state. Frederick Jackson Turner reaffirmed this notion of national identity in 1893 as America's frontier moved west. Yet, it was exactly economic and social rights that were needed by millions of ex-slaves if they to become good active citizens. Without second generation rights for all, the whole system condemned the blacks to degradation. Their continuing ignorance, dirt, illness, drunkenness and criminal activities were what old American whites, men and women, pointed to as proof of continuing difference – ineradicable black inferiority. Contrarily, many new immigrants from Europe, who shared many of these defects, at first made common cause with blacks before choosing the easier path of assimilation to the white majority's ideal identity.

The failure of blacks to obtain even the truncated rights won by women hinted at an almost insurmountable problem for many ethnic minorities who seek to obtain rights through joining the nation as equal citizens. They are, in many cases, indelibly different. They cannot choose to disappear into the majority. Yet, if they do not do so, they are not considered worthy of rights. Many blacks in the Americas and

Caribbean made valiant efforts to belong, without success. Other ethnicities, who in earlier epochs, had been exterminated for "speaking funny" or "looking different", could hide their difference by changing their clothes, cutting their hair and learning to speak the language, and eventually blend into the national identity even if they changed it ever so slightly. "Other races" could not easily follow that path.

We note that where they were in a tiny minority, as in mainland Britain or France, it was possible, because of their irrelevancy, to grant blacks the boon of some human rights even in the eighteenth century. Already in Somersett's Case (1771–2), Lord Mansfield had stated that habeas corpus applied to a slave temporarily in Britain, whose owner wished to take him back to the West Indies and forcibly put him on a ship. The judge decided that whatever the law elsewhere, in the absence of a specific law denying them to slaves, they had British rights. Lord Mansfield considered slavery odious (Howell 1816-, Somersett's Case, in vol. 20, (1771–2), 1). While a positive or self-congratulatory history of attitudes to slavery in England usually cites this case, it is well to remember how aleatory such decisions were. In 1827, in the Case of the Slave, Grace, which was rather similar, Lord Stowell typified Mansfield's view as obiter dicta and reminded the court of the origins and nature of the common law: "I observe that ancient custom is generally recognized as a just foundation of all law; that villeinage of both kinds, which is said by some to be the prototype of slavery, has no origin than ancient custom; that a greater part of the Common Law itself in all its relations has little other foundation than the same custom; and that the practice of slavery, as it exists in Antigua and several other of our colonies, though regulated by law, has been in many instances founded upon a similar authority". And, he further reminded his listeners, slavery worked well and was necessary to the economy of the West Indies. (Howell 1816-, "The Case of the Slave, Grace" in Vol 2 (NS), 1827, 274).

The main significance of such legal decisions for universal human rights is this: they gave a handful of blacks rights in Britain and led, early on, to inter-ethnic equality there, while hiding the treatment by Britons of slaves and near slaves like convicts in the colonies. These remained right-less or civiter nullius. But they were out of sight and out of mind.

In all states with human rights, the white majority half-freed blacks and then decided that they could not fit the ideal national identity required for rights. So, a further solution was proposed to secure them their rights. It is this that makes the United States experience so important for universal human rights. All states that could not see how blacks could become part of the national project suggested separate development as a solution guaranteeing rights to each different "nation", often contemporaneously or just after emancipation. They argued that where possible, emancipated slaves should be sent "home" or, where that was not possible, to "empty" spaces where they could establish their own nation-state with rights appropriate to their traditions and culture. It is not surprising that conservatives made such proposals. For universal human rights, what is important is that they also came from progressive proponents of human rights for all nationals. Even the great liberator, President Abraham Lincoln, toyed with such policies for freed slaves. By 1878

the progressive solution by international agreement for problems of integration and assimilation became to create new nation-states for all ethnic minorities. So, for example, in 1917, the "problem of the Jews" was to be solved by giving them back their "home" in Palestine. The League of Nations established in 1919 to ensure world peace after the First World War made it a cornerstone of international relations that all different peoples should have their own state.

When they first freed slaves en masse during the American War, the Britons tried resettling blacks in Sierra Leone, then north Americans tried in Liberia and the French in Gabon. All these experiments met disaster by the end of the century. Where there were millions of blacks they could not be successfully repatriated. On the other hand, it proved very difficult to make them conform to the national identity and live like other law-abiding citizens where the laws made them victims on a daily basis. They remained as a continual reproach to the ideal image of a national citizen. Against this reality, the policy of ethnic cleansing that had started in Haiti and was continued in all these other states through their policy of repatriation, mutated into something much darker. Since the Middle Ages all those who were different had, once the marvelling ended, been seen as monstrous and often murdered en masse because they "spoke funny". In the nation-state and conditions of mass migration these attitudes were given new dimensions as science was added to theology. By the late eighteenth century, it was claimed that blacks interbred with monkeys. This argument was extended to many culturally different peoples by the middle of the nineteenth century. Both Scots and Irish were portrayed in cartoons as simian. Cultural differences were more and more explained by different natural attributes Each "race" was increasingly defined by a "blood" that explained incapacity to conform to the national identity. Strange solutions, public policy in Latin America and Australia as late as the 1970s, were made to create a coffee-coloured race where the superior white blood bred out the black. Again, this did not overcome indelible difference. So a final solution was proposed: to rid nation-states of such contaminating influences by the extermination, where numbers permitted, of all the "inferior" humans. As we show in Chap. 10 below, this had become practice in the most democratic states with the most human rights for nationals from the early 1800s. If blacks were spared in the US, it was because they were too numerous.

The only positive outcome of this slide towards what became known as genocide was that it so revealed the limitations of human rights limited to those who fitted a national image that it eventually provoked a reconsideration of the long discredited notion of universal human rights proposed in 1789.

Until the shift to the view that some people did not deserve rights because they were more like animals than humans, what concerned the history of the rights of man was what rights meant and what *universal* meant. With each change in definition, more included and excluded groups had been created. But to suggest that some foreigners or races were really inferior, as shown by their social comportment, raised the question of what it was to be Man, the question of the "human" in universal human rights? How far should that term be extended?

Slavery

While workers had found their admission to first-generation rights, becoming part of the nation in the process, and women had overcome the even more difficult task of proving that they were now like men, but somehow "beside" or indeed in the "pedestal" version, "above" men, both had always been "nationals". Contrarily, in 1789 the 1.5 million black slaves in the remains of the French empire, that is outside France, were French only because Frenchmen and women "owned" them and they were regarded and treated as "animals", as absolute other, not part of the project of national rights. We turn to their condition in the years leading up to the 1789 Declaration, when men like Marat were writing books about the French struggle against the tyrant, with titles like *Les Chaines de L'Esclavage* [1774] (Marat 1988).

For well over 100 years, slaves had been bought on the Guinea Coast and shipped for sale in the Antilles. The slave ports of the French Atlantic thrived: Brest, Nantes, La Rochelle and Bordeaux. In England, Bristol became immensely rich. It is estimated that 3,321 French slave expeditions took place in the 1700s (Chateau-Degat 1998, 50–1) and about 40,000 slaves were arriving per annum in Santo Domingo in 1787, when the island had half of the slave population of the French colonies (450,000 slaves). Six thousand whites and 28,000 freed men ruled over them (de Saint Méry 1984, I, 28–9). On the islands they produced sugar, rum, cotton, and other crops essential to the good life of the bourgeoisie and nobles of France. These goods were shipped back in the empty slave ships in what became a triangular trade: France, West Africa and the Antilles. By the middle of the century, Santo Domingo rivalled, despite its size, British India in wealth and importance to its metropole.

While there is dispute, hinging on definitions, the slave trade can be seen as a genocide. One African word for the slave trade is *maafa*, meaning holocaust or "terrible disaster". Millions of blacks died at European hands. The victims were Africans, the perpetrators the whites who often espoused the rights of man without realising their limitations in a world of rights for nation-state citizens only. So slavery and its sequels can also be seen as the beginning of history of human rights on the African continent as well, leaving it still to reach Asia and thus have a worldwide spread. The history of the spread of the rights of man starts to intersect with the separate, though linked, history of genocide in Africa. It took half a century before its implications were spelt out.

In order to grasp how horrific were the lives of the slaves imposed by whites in their own national interest and to draw parallels with the concentration camp world of Nazism, which marked the apogee of the cult of limiting rights to the nation, I try here to draw a vivid picture of their lives drawn from historical sources from different periods of the century.

When enslaved, most were men and women up to the age of 35 years. They had usually been captured in tribal wars deliberately fostered by slave traders, but many were also criminals who under local customary law had lost their right to liberty. They were of all social status (for example, see Equiano (1789); in Gates 1987, 12–13).

Sometimes they had been marched thousands of miles on little food to the Guinea Coast, chained and yoked in lines dragging a large log to prevent flight, lodged along the way in fetid *baracons* in transportation managed by local slavers. "Packed together like herrings in a barrel, they bred all sorts of putrid sickness and dangerous infections, so that, when their jailors came to see them in the morning, they had to take away each day several blacks dead, and separate the corpses from their unfortunate companions to which they were joined by their chains" (cited in Jean Fouchard 1972, 106). About 15% on average died during the voyage (see Vissière and Vissière 1982, 49–50).

The local traders were often Arabs, especially after slaves started to be taken in east as well as west Africa. They were far removed from home and language by the time they arrived in the great holding depots of the coast. Many had already died and since the old, sick and children were of no value, they had often simply been slaughtered (see Pruneaux de Pommegorge's *Description de la Nigritie*, 1789, in ibid., 1982, 75–6). On being sold to the slavers they were branded on the breast with a hot iron with the slaver's symbol, making it difficult for them to escape or to be substituted by someone else (see generally, Fouchard 1972, 49–52; Vissière and Vissière 1982) This painful operation was discussed in these words: "that could appear…cruel and barbarous, but it is necessary to do it and we take care not to push it [the brand] far in, above all with women, who are surely the most delicate." On the slavers, the men were chained in twos while women and children were allowed to move around the forward deck. The men were like sardines, obliged to sit because there was no headroom and only allowed out on occasion. They sat in their own excrement and urine for an average of 40 days (Fouchard 1972, 106). There is a plan of the *Brookes*, made in 1822, which shows the overcrowding (Vissière and Vissière 1982, 40–1). If lucky, they were fed twice a day on beans and a little water in the tropical heat.

When the slaves reached the Indies they had been reduced to skeletons (ibid., 1982, 133). They were then fattened for a few days and rubbed with oil in the holding prisons to make them more saleable. Then one day the terrified slaves, stripped naked, saw the gates open and a horde of frantic buyers like that at a chain store on sale day, hurl themselves on them, pinch them, hit them, examine their sexual organs, even taste their sweat. Since they already feared that they were to be eaten, a fear generated by the drinking of blood-red wine and the surgeons' readiness to cut up dead slaves to identify what had killed them, their terror was extreme. From the outset, many had chosen to suicide rather than face the unknown. Others had died of depression and melancholy. Now the families were separated; they were branded with their owner's name on the other breast and the vast majority sent to labour in the fields, to build roads, bridges and ditches. This was often if not always without tools or animals. Their lives as slave labourers had begun.

Each day they laboured for 14 h in the sun with little food or drink, whether sick, or pregnant, under sadistic whip-wielding overseers, white, black or mulatto. These foremen had right of life or death. The regime was so harsh that the slaves died from exhaustion in great numbers. There were 455,000 slaves in the French colonies in 1791; they numbered 709,155 in 1777, which suggests a high excess of deaths over

births of about 16,943 each year between 1777 and 1791, even discounting new arrivals. It is claimed that most died within 3 years of arrival in their prison-home.

These slaves were obliged to speak Creole and to change their names, and were not permitted to marry. Rapidly, their societies made up of different tribes became fractured into brutal gang-like relations typical of all concentration camp-like worlds. What united them apart from the frenzies of sexual congress in a world where men greatly outnumbered women, was their fear and hatred of their masters and others who had power over them. While they learned to dissemble and to use ruses, as well as to ingratiate (Patterson 1991), down to playing the absurd role expected by their masters, thus developing a "sambo" image, they hated and feared and scorned whites and mulattos. As the last suggests, the jailors exercised a *droit de seigneur*, often selling mother and child when she was no longer desirable. Reputedly, African black women preferred black men (de Saint Méry 1984, I, 57). The notion that they were a degenerate race, even less than animals, was a widespread alibi for their enslavement and consequent treatment. "The fact is that the Negro is in a state of real degeneracy compared with the civilized Europeans" (de St. Méry 1984, I, 79).

Occasionally, the stoic fortitude of the powerless gave way to resistance, mutiny and revolt. Usually, this took place on the slavers when they came from Africa and the tiny white crew faced ten times as many chained blacks who frequently came from long warrior traditions. Once in the Antilles, resistance started by the development of a language; a culture formed from which whites were excluded, built around songs, dance and *voodoo*, already described by contemporary observers as evidence of the bestiality of the blacks. The first risings on the ships made clear that they were far from acquiescent or docile and it also provoked the fears of whites, which explained the horrors of punishment in the slave world. One account suffices; it is provided by Paul Erdman Isert, written to his father from Saint-Croix on the twelfth of March 1787 to tell him, "I was almost killed by the hand of an unhappy Negro." Isert made clear that on the slave ship on which he travelled, the blacks "feared death much less than slavery" and would kill themselves when they could in order to avoid being turned into powder (from their bones); or being flayed to turn their skin into shoes. These horrifying fears were dismissed by contemporary commentators, but sound less improbable after the Nazi holocaust. The revolt took place while he was outside the armed barricade to the poop. There was a sudden silence ("when in so packed a ship, one hears a murmur"); it was followed by a terrible war cry as the seated Negroes rose together. Isert was hit on the head with an iron bar and as the whites barricaded themselves on the fortified poop, he was dragged forward where a slave tried to cut his throat with a razor but was killed by shots being fired into the slaves from the poop. This saved him, while the blacks, no longer chained together, were shot down. In despair, the rebels then threw themselves into the sea. Thirty-four were killed for two wounded whites. Then came the punishment, particularly of the leader: "A Negro who had already been in America and in England… and had returned to the coast…He had told (the others) so many truths and lies about America; that it was a place of unhappiness and misery, where they were given so little to eat, in exchange for blows and too much work…A very dangerous

person." Isert admitted the substantial truths of these stories but was caught in the logic of the system. He approved the imprisonment of the leader in a pigsty.

Sometimes such revolts were successful, which only made the punishments when they were recaptured the more horrifying as blacks were tortured to death before their assembled fellows.

This pattern on the transports set the pattern for the islands where the complexity of a society where white women hated black mistresses and tortured them, and the fear of the men about the revenge of the slaves, meant that any insubordination met terrible sanction. The records are interminable in recording episodes like this that showed how the culture was Sadeian:

> The wife…had a Negro who had broken some utensils. To wreak a vengeance on him which he would really feel, she had him stripped naked, had his hands tied and hung him from a nail; she took a needle, which she stuck deep into him, slowly in all parts of his body. The unfortunate man screamed in a strange fashion while she continued (Isert in Vissière and Vissière 1982, 128).

The official, authorised, everyday, listed punishments and the amounts paid to specialised torturers sum up the horrific world of the slave and yet explain the occasional hopeless rebellions and their savage vengeance. Among these were: the unlimited use of the lash; suspension from a ladder or stake; prevention of sleep; hanging by a nail through the ear; cutting off an ear; burning irons on the feet and the iron mask (which prevented eating). Among the more savage were cutting off members; tearing out the kidneys; spilling burning oil over the body; cutting the body open to put in molten lard; mutilation; breaking on the wheel; suspending until death from starvation and exposure; burying alive; burying to the neck and filling the orifices with sugar to attract insects; having sexual organs cut off; drowning; being crushed in a mortar; having lips sewn together; having the breasts pierced and burned; and, "Negroes raped in front of their husbands or having to watch their children cut up with machetes" (Fouchard 1972, 116–19). All of these hid even more horrific and horrendous treatments, not authorised by custom, particularly when the victim refused to incline before his tormentors.

A major form of resistance was flight into the hinterland (*marronage*) where thousands of people squatted in a world where they were constantly hunted. Evasion was savagely punished and lists of *marrons* carefully detailed their descriptions, encouraging delation and an absence of social trust. This was compounded by a rigid class distinction based on white and the shades of mulatto down to the lowest, the newly arrived African (de St Méry 1984 [1757], I, passim; compare Régent 2004, Chap. 4).

Finally, there was the sole major revolt before 1791 by blacks on Santo Domingo, who had been driven to desperation and ready to risk all. This was the famous revolt of Mackandal who led his *marrons* on marauding raids on white properties. His plan to unite all blacks and drive the whites from the island of Santo Domingo came to naught. He was betrayed and burnt alive upon being captured (James 1963, 19). Again and again, we read of the true courage in the face of death of such rebels in the West Indies:

> The conduct of one of these unfortunates before the *Court of Justice* [emphasis added] deserves to be reported. He asked to be heard for a few moments and was allowed to do so, and he expressed himself this way: "I was born in Africa, where, defending my prince in a

> fight, I was made a prisoner and sold on the Guinea Coast as a slave, by my compatriots. One of you, who is now my judge, bought me; and I was so cruelly treated by his foreman, that I deserted, and joined the rebels. I was forced to serve Bonny*, their leader, whose despotism was worse than that of the Europeans. Revolted by such conduct, I decided to flee mankind forever and to live in peace in the forests. I spent two years almost alone, greatly mentally disturbed, and only bearing that life in the hope that I would see my dear family again, although, after my absence, they were perhaps dying of hunger in my own country. I say then that two miserable years went by in this situation, when the *chasseurs* discovered and captured me and took me before this court, in which I have recounted this history of my lamentable life, and from which I ask only the mercy of executing me next Saturday or as soon as possible." This speech was pronounced with extreme moderation by one of the handsomest Negroes ever seen. His master, who (as he had observed) was among his judges, replied shortly: "Rascal, it is a matter of what you have told us. Torture will tear from you, in an instant, crimes as great as yours, as those of your hateful accomplices." The black, who felt all his veins swell with indignation, replies: "Master, the tigers of the forest have trembled in these hands (which he raised momentarily); and you dare threaten me with your pitiful instruments of death. No, no, I scorn the torments which you now invent as much as the miserable person who inflicts them." Having said this, he himself went to his questioners, whose terrible tortures he suffered, without giving up a word; after which he refused to speak and ended his days on the rope (Stedman 1982, 143–4; compare Walvin 1992, 236).

Most slaves adopted the servile style of men and women who wished to survive, and of course, leaders broke down and begged for mercy, not sufficiently sustained by their hatred of evil.

As this story intimates, the white system in the European colonies *rested on a rule of law*. In the French possessions, the controlling edict was the *Code Noir* of 1685 whose apparent mildness hid the horror of regulations under its Article XVII. The Code Noir (in Vissière and Vissière 1982, 163ff; Chateau Degat 1998, 162; Sala-Molins 1987, 72–9, Part Two) set legal forms for the everyday treatment of slaves. It was directed at slaves more than whites. They were to be converted: they were never to be freed if they had been concubines and given birth to mulattos, even if they were to be removed from such masters who were fined 2,000 lb of sugar; they were not to gather even at marriages; and if they did, they were to be whipped, or on recidivism, put to death; they were not to engage in any commerce without permission of their masters; they were not to have hard liquor. Masters had to provide a minimum food ration and clothing whether they could work or not; the wealth they created belonged to their masters; and they could perform no public office. The latter warrants a full translation, as it shows slaves' nullity created by the "rule of law": "Slaves cannot hold office, or any public function; nor act as arbiters, experts or witnesses, in either civil or criminal matters; and, if heard as witnesses, their depositions will be only used as memoirs, to help judges obtain clarity elsewhere, without ever raising presumptions, conjunctures, or the slightest proof, from them." Slaves were to be judged without their masters being questioned and were subject to the same court procedures as free men. The "day in court" did not, of course, mean equal rights before it. If they struck their master or any of his family they were to be executed; this was also the case where other free people were concerned, and theft by slaves or freed slaves, or women, could be punished by "harsh punishments" or by death, and lesser thefts by the lash or branding with the fleurs de lys. A master

had the option of making good his slave's theft or handing the latter over to the person from whom he had stolen; a slave who had fled for a month "from the day his master had denounced him to the law" would have his hands cut off and be branded; a recidivist would be hamstrung; and on the third offence the punishment was death. Any person helping a fleeing slave was subject to heavy fines: slaves were "goods" and could be passed on. While they could be given their freedom, they should continue to show respect for their former masters.

The only limit was that the masters were forbidden to torture (except by the lash or confinement) or to kill their slaves, but the officials could absolve them without royal pardon. However, these provisions were undone by the same article which allowed slaves' owners to decide when the slaves deserved punishment and which placed no limit on the lash until 1784. The ministry issued edicts after 1784 that slaves were *never* to be in the right if atrocities were alleged or they complained of excesses. The limits were therefore officially ignored (Fouchard 1972, 112–14). The letters from the ministry read *inter alia*:

> If it is necessary to redress the abuses that inhuman masters would make of their authority, it is also extremely important that nothing should be done which would lead slaves to misunderstand and to move away from the bounds of dependence and submissiveness where they should be. It is necessary to keep the slaves in the dependence where they should be… We must at the same time take care to do nothing against masters which would diminish the respect of slaves for them…If a few masters abuse their power, it is necessary while secretly repressing those people, to let the slaves continue to believe that the former could not commit wrongs against them…It would be dangerous to allow the Negroes to see the spectacle of a master punished for violence against his slave (Fouchard 1972, 14).

Haiti

This monstrous rule of law was only qualitatively different from that against which peasants and serfs revolted in the 1700s. Not surprisingly, the Declaration of the Rights of Man and the Citizen was seen both in France and in the French empire as ending it and ending slavery itself. By 1790, progressive mulattos had joined radicals in the national assembly to push for the revolutionary rights, backed by Mirabeau. Caught up in the new enthusiasm, Count Charles de Camech, one of the largest proprietors in Santo Domingo declared that mulattos should be admitted to administrative assemblies and blacks freed (James 1963, 64–8). The assembly was divided however and many proprietors from the Antilles sat in it. It referred the "colonial question" to a sub-committee headed by Barnave, a lawyerly moderate (Martin 1948). A local assembly for Santo Domingo was created, a cowardly act that left the destinies of the island in white hands. The mulatto leader Vincent Ojé went home to encourage the revolutionary insurrection then fighting unsuccessfully against landowners, who were usually white royalists. He was captured and with his followers, frightfully tortured and killed.

News of this murder tilted the balance in favour of the abolitionists, including the Jacobins. Backed by Robespierre, the freed mulattos pushed for their admission to

rights. The problem was, in C. L. R. James' (1963, 89) words, "the mulattos hated the blacks because they were slaves and because they were blacks." Here the racial issue crosscut property. Both whites and mulattos were property and slave owners. Neither wished to end slavery but whites would not truck with mulattos and the claims of the latter led to reprisals by the *petit blanc* supporters of the revolution. In turn the representatives of the latter did their best to ensure that the slave regime continue, even if the cruelty of the past was expected to end.

This was inconsistent with the Declaration, whose principles quickly became known. It contradicted both property in human beings and its defence, and the need of the metropole for the colonies which it had exploited (see Pluchon 1989, passim). With each successive radicalisation of the revolution, especially the push by the Paris mob that brought about the execution of the king and put the Jacobins in power, the groupings changed and re-coalesced and the Declaration was reinterpreted. Yet overall, the republic sought to ensure respect for the law, that is the *Code Noir*, which was a recognition of slavery. While the blacks basically stayed quiet until 1791, despite their hopes, nothing changed. They were surprisingly peaceful given the past they knew and the professions of the revolution. This extract from a letter sums up the early ambivalence:

> We have been informed that there was circulating in the colonies pottery on which there is printed a kneeling Negro, raising his chained hands to a white; one reads beneath the inscription: *Am I not your brother also?* This sentiment is human but we thought it more humane yet to buy up and transport this crockery into the king's storehouses (Pluchon 1989, 43).

As Laurent Dubois points out (2003, 288), after the local *petit blancs* and the mulattos had laid claim to the new rights, the black slaves also saw them as a guarantee of freedom. They also gave the right to revolt if their freedom was not accorded.

Finally, the feared day of vengeance came. The blacks rose, slaughtered hundreds of men, women and children and burned the plantations and properties. Not even the sympathetic C. L. R. James (1963, 88 and passim) could do more than remark that the whites reaped what they had sown and that the vengeance of the slaves was not as horrific as that of the whites and their state when they regrouped and counter-attacked. And with so monstrous a system, it was not only the worst tyrants who suffered, the more decent whites and their mulatto allies were killed too, as symbols of "*illiberalism*" (Fouchard 1972, 154–6). Typical was the Breda plantation, whose owners had freed the slave who would later take the name Toussaint Louverture.

The Marron leaders of this first revolt made clear some basic divisions. Property was less important than *colour* in this conflict. The emissary armies of the French republic led by men like Léon Félicité Sonthonax worked hard to bridge the white/mulatto gap. Sonthonax even included a black in his ruling council. But his mandate was to bring order by the state against the counter-revolutionary whites and the blacks. The insistence on a France "one and indivisible" in a place 2,000 miles away finally made the blacks oppose even the revolution's "rule of law". The slaves were learning in a guerrilla war how to fight and soon were casting around for allies. Both they and the whites started to court disillusioned mulattos of different political persuasions. The mulatto "old (50 years) Toussaint" made such an alliance with

slave insurrectionaries in 1793, after 2 years of vacillation in obscure manoeuvrings (Fouchard 1972, 160–1). As he later acknowledged, with their backs to the wall, the slaves accepted arms and an alliance with the Spaniards who occupied the other half of the island. They thus became part of the threat to the unity and peace of the French nation, which had become the rallying point for the revolutionary left. The struggle for freedom of slaves *had to become anti French-national to assure rights for themselves against rights for Frenchmen*.

When Toussaint proclaimed on 29 August 1793 – the time from which we can date his leadership of the revolt – that "I have undertaken vengeance. I want liberty and equality to reign in San Domingo. I want to bring them into existence. Unite yourselves to us, brothers and fight for the same cause", it was as general of the armies of the king, that he spoke (James 1963, 125), not as part of the French revolution. It was the armed rebellion and the fear of losing the colony that finally forced the French to enfranchise the slaves in 1794. Claiming to be the *sans culottes* of the colonies, the blacks then shifted into a defence of the Robespierrian national-democratic project against promises of better treatment. They started to call themselves the Black Nation (Dubois 2003, 290).Yet eventually it would only be by establishing national independence as Haiti, after having fulfilled Mackandal's plan to throw all whites off the island, that the blacks would obtain freedom.

As recounted, the French revolution had long set on its nationalist degeneration, but in 1793 the logic of events led to the law ending slavery on the island. The convention first endorsed emancipation for slaves living in *France*. Thereafter, the primary object of France was that the slaves stay loyal to France and the revolution, since the British and Spanish were attacking on all sides, most successfully in the Caribbean. This meant a policy of emancipation in exchange for loyalty to the French nation "one and indivisible". The slaves – unwisely in the event – accepted this deal of the subordination of their rights to a national interest that still proclaimed commitment to universal rights. The rebel logic was explicated in 1799 in Toussaint's "Testament", in which he argued that initially the desire to escape the prejudices and arbitrariness of the rule of law had led to the slave revolt. He wrote that his earlier proposal for freedom and amnesty for all blacks had been refused by the authorities, who had forced him into the arms of the Spanish. Only when the mulattos were suborned by the whites in a Machiavellian manoeuvre of divide and rule, and the isolated blacks were defeated, were the latter pushed into alliance with the Spanish. "More unfortunate than guilty, they turned their arms against their fatherland" (Shepherd and Beckles 2000, 858–60). But the blacks had learned that the Spanish object was to sow dissension among them. Despite having been "abandoned by his brothers the French", now Toussaint offered unity, "forgetting the past, occupying ourselves hereafter only with exterminating our enemies and avenging ourselves, in particular upon our perfidious neighbours" (ibid.).

So Toussaint accepted French promises of freedom for blacks in 1794 .He went with a personal army of 600 battle-hardened troops to join the French cause. After his return to the revolution, with whose metropolitan representative, General Laveaux, Toussaint built up an excellent relationship, the mulattos turned on Laveaux in a notorious episode and counting on British support, tried to overthrow

the republican regime. Toussaint now warned against those who "dared bring a heinous and sacrilegious hand upon the representatives of the nation"; reminded his "brothers" that "France has decreed, has sanctioned general liberty; 25 million men [sic] have ratified this glorious and consoling decree for humanity, and you fear that she may return you to your former state of bondage, while she has so long been fighting for her own liberty and the liberty of all nations, and even warned about the vengeance which could be wreaked on the accomplices" (cited in ibid., 860–1). He soon gained control of the island, and was made governor and general. To win his war, he had developed the first examples of the guerrilla tactics that were widely acknowledged by the middle of the next century. For example, in Lamartine's didactic political play, *Toussaint Louverture,* his tactics were described thus:

> Their impious cohorts will suddenly come on our hidden posts: silence until then. And suddenly up, in a single bound, at the awaited signal of the first war cry a people appears to come out of the ground under their feet (Lamartine 1857, 209).

As the French governor sent by Napoleon to curb Toussaint's forces is made to say: "a new people has other rules for war, its citadels are the jungle and the rocks; if we advance they flee; if we attack they give in; all we own is what we stand on"(ibid., 132).

To Westerners used to set warfare, the guerrilla and its brutality appeared anarchic. Then Toussaint brought into play another element threatening to Enlightenment notions of order and rationality. He had allowed a certain culture to develop. Although himself an observing Christian, he utilised the system of voodoo and its allied practices to bind his followers into loyalty. "Vaudoux" has always appeared savage and alien to Frenchmen. De St Méry spent pages describing its culture in a baffled discourse, which failed to understand the culture that bound slaves together while excluding whites. "Vaudoux as a great non-poisonous snake", was the supreme being whose powerfulness was communicated by high priests and priestesses who enjoyed "unlimited respect" of all of vaudoux society. St Méry saw that this mixture of African/Creole/white customs constituted a society of submission and domination. But as he noted, it was always secret in its meetings and its oaths, based on magical cures and love potions, and fits, in an atmosphere of song, dance and drink. He warned: "in the wild nothing is more dangerous…than the cult of vaudoux, based on these extravagant ideas out of which one could fashion a terrible weapon" (de St Méry 1984 [1757], I, 67–9). Toussaint built on the ceremonies of Zamba Boukman, the voodoo priest who had started the rising in 1791 (see Carolyn Frick in Sheperd and Beckles 2000, 961–77) by the sacrifice of a pig, Boukman reportedly told the slaves that their god had ordered this. "It is reported that in the case of the rising in the north, the slaves, having drunk the pig's blood took its hairs as fetiches for protection". This has remained a part of west African and other cultures (ibid., 963; see also Pluchon 1989, 63).

Toussaint never posed as a witch doctor, but he passed himself off as a Catholic Mackandal leading his *blood brothers* to their destiny by acting as the head of a sect and he based his guerrilla system on the voodoo network (ibid., 59, 66). This terrified

the whites. More importantly it meant that the assertion of difference was also an assertion of a cultural difference that no Enlightenment reason could explain. Nor could Christian religion admit its explicitly positive side. It was a harbinger of something even more problematic for the future: the confusion of rights with independence not only for a territory (national liberation) but also for a single cultural ethnic community based on blood.

There can be no doubt that metropolitan French attitudes were partly responsible for this. After the Directory (1797-) took power to defend the French nation against outside assault, Bonaparte, first *consul* in an early version of plebiscitary democracy, made clear his racism. Where Toussaint spoke as an equal, and indeed in an authoritarianism born of wartime command, mirrored Napoleon, the latter swore that no black would ever be a French military leader. More, he decided that French national interests demanded the submission of the emancipated slaves to metropolitan demands. The terrible exclusiveness of the confusion of rights with territory and thus with an indivisible nation became obvious.

In sum, Toussaint's commitment to the revolution, to France and to production (by his order the former slaves had no right to leave or stop working their plantations under white bosses) came as the conservative anti-Jacobin reaction calling for law and order started to come back in France. There was a shift after 1795 among the French against the grudgingly accepted views of the "Friends of the Blacks". By 1797 this had become an open attack on those "Friends" and on Toussaint by groups later exiled from France as fomenters of a royalist plot. Toussaint was in charge of an army that Thermidor and Napoleon accused of allowing anarchy to reign. While the continental war raged until 1815, the Society of Friends of the Blacks, formed in 1788, were seen almost as traitors to the nation. Indeed, as the opposition to slavery shifted to Britain, any suggestion that the rights of man should apply to slaves was seen as part of a plot to harm French economic and political power.

Carefully dissimulating his intention to reintroduce slavery, Napoleon sent a large fleet and army under General Leclerc and other tried army officers to "help" Toussaint return the island to order and prosperity. Toussaint was to remain chief, but the object was obvious in a proclamation that stated first that France was now a united nation and then informed the inhabitants of Saint Domingue that the army had been sent to protect them from further external and internal enemies. Anyone who did not rally to the "captain-general" would be a traitor to the republic, and the anger of the republic would devour him like "fire devours your dried out cane." Toussaint's soldiers were invited to join the French army. Leclerc promised that the proprietors would have their property respected. Toussaint himself received a letter telling him to choose between the title of pacifier or devastator of the colony. Outgunned, outmanoeuvred and tired, Toussaint gave in. He was shipped to France in 1800 and imprisoned in Joux until his death.

Leclerc promised never to depart from the sacred principles of freedom and equality for blacks' (25/12/1799) was made explicit by Leclerc in the Creole version of his declaration: "Mais pas crere ci la yo qui va dit…que blanc velé fere vous esclave encore: y a menti…plutot que crere yo, repond et songé bien que ce la

Republique qui baye liberté, et qui va bon savé empêché personne de ?? pren ci encore" (Martin 1948, 240). In a disgraceful betrayal, Napoleon reneged on his promises not to reintroduce slavery. Nowhere in French possessions except on Santo Domingo did slavery disappear until 1848. In 1802 he simply decreed that the *Code Noir* be reapplied, forcing the black armies to regroup and start a savage "take-no-prisoners" war.

When forced by this treachery and atrocities of the French, who proposed the slaughter of the entire mulatto group (Saint-Victor 1957, 246), yet again to take up arms, one of the rebel leaders, Dessalines, called for a "vengeful rage" with a slogan of "war to the death with all tyrants" that recalled the basis of Toussaint's constitution of 1797: "Never will a colonist or European put foot on this ground as a master or proprietor" (St Victor 1957, 247). While proprietors were later allowed to return, it was as part of a compromise or deal, not because they had the right to do so. The national project, in emulation of that of the Europeans, rapidly led to a total disintegration of the formerly rich colonial economy. The rigid economic nationalism and exclusion of non-nationals from holding property ensured ever greater economic marginalisation of the island, a first example of "unequal relations" within international relations (Manigat 2003, 221). Within years of winning its freedom, Haiti was ruled by voodoo-practicing "emperors", caricatures of Napoleon, men who ended even the rights of the citizen in a world of barbarism that later became a staple of Cuban literature critical of communist rule. Never was there a clearer example of the danger of a national project that insisted on the right to a particular popular culture, that is based on power from below. It quickly negates rights, whether national or universal.

Nevertheless, it is necessary to recognise, as Dubois (2003, 294) reminds us, that whatever the contradictions of the Haitian example, it forced the decree of 1794 abolishing slavery and "constituted a crucial chapter in the development of universalism, for they gave a new content to the abstract universality of the discourse about rights, and illustrated strikingly its force, having transformed a plantation society based on racial exclusion into a republican regime founded on equality of rights". As Aimé Césaire wrote long after, the French revolution and even the 1795 Declaration of the Rights of Man accorded to all peoples the right to independence and sovereignty; within that dubious gift, when Toussaint had asserted the rights of man, it was to show that there can be no race of pariahs where rights are at stake. He fought for the rights of all human beings (Césaire 1981, 343–4). The same claim to have extended rights to the human species could not be made in the two Americas, where rights came not because the oppressed revolted and threw out their oppressors but as concessions of their oppressors.

Three points must be recalled here. The slaves had only obtained their liberty, the rights in the 1789 declaration, by imposing it by force on the rule of law. But their leaders had adopted the measure of the nation for more rights and thus accepted national loyalty as the overriding imperative; and by such logic, would only obtain that freedom for themselves when they threw out the "accomplices" of the counter-revolution that took power in France in 1797 in an early form of national liberation and ethnic cleansing.

Latin America

Soon after the news of the Declaration reached the French West Indies it crossed the water to that part of the vast South American continent that faced the Caribbean. This was an area ruled by the Spanish and, further south, the Portugese. It, too, was based on a slave economy but the proportions in each population of whites, mestizos, blacks and *indios* were quite different from that in the French colonies. There was not a vast majority of blacks and slaves as in Santo Domingo; rather, over several centuries of white occupation and intermarriage, a mestizo population amounting to 60–80% of the total, many of whom were Creole or native-born, faced the blacks. Already there was a highly structured society with the "whites" at its head, monopolising wealth but with a large mestizo class as a buffer against the slaves who were seldom more numerous than their oppressors. While new slaves arrived throughout the eighteenth and early nineteenth centuries, they were provided in the main by English, French and Dutch slavers as the Iberians no longer conducted significant slaving trades. The difference in the composition of the population meant that solutions for the slaves had to be different from that of the Haitians. They could not simply throw the tiny white population into the sea. On the other hand, together they could throw off the yoke of their imperial masters and establish themselves as a nations.

Spain and Portugal were part of the anti-French coalition, and, as we have seen, Toussaint had allied himself briefly with the armies of Spain in his struggle against the local French reactionaries and loyalists. The reading and promulgation of the Declaration was banned in New Granada. Nevertheless, soon after 1789 a French visitor to Venezuela reported being shown a hollow in the roof of a house where the owner kept his copies of Raynal and Rousseau, and another visitor in Bogota, later capital of Colombia, a clandestine translation of the Declaration "which scandalised the authorities" and was surreptitiously printed on a hand press itself smuggled into the country by an enterprising printer called Antonio Nariño, who was severely punished for doing so (Trend 1946, 19). For some young Venezuelans, the Declaration provoked a yearning to make it the gospel of a new era (see Carozza 2003, 297–8) There are reports that the documents of the revolution were already being used as wrapping paper in the shops of Cumana by 1807.

The attraction of these documents and of the Haitian model was their nationalism and their criticism of the tyranny of a distant state that the Latin American middle class justifiably felt was their lot under Spanish and Portugese rule. The Creole (native-born) middle class, highly educated, but well removed from its Iberian roots by then, had, like its peers in Spain, Portugal and Italy, become "enlightened" in the eighteenth century. The closer to the north of the continent, the more French were its sources of inspiration. In what would become Argentina, Uruguay and Chile, it was to the English and US enlightenment that the leaders looked. But in those southern places black slavery had not been central to the economy. The particular form of Latin American resistance to Iberian rule was criticism of religious claims based on faith in a world enthralled to the church for centuries and a new privileging of reason through the study of science.

Overall, the middle class of Latin America saw the Enlightenment and then the American and French revolutions as justification for their claim to self-rule against distant metropoles that exploited and drained their wealth (Griffin 1966, ch2). Again the central theme became that of seeking national sovereignty as a way to attain rights: national unity before, but not without, concern about the right to freedom of slaves. But some south Americans were also attracted by the criticism by the French revolutionaries of slavery of both blacks and Indians whose condition and status was recognised. This sympathy led back, as it did with the Amis des Noirs of Paris, to seeking roots for the new rights in early Hispanic traditions, above all in the work of Bartolomé de las Casas. The Bishop of Blois stated in a speech to the Society of the Amis des Noirs in 1801 that, in the new world, a statue should be put up to the memory of Las Casas as a champion of human rights (for the address of the Bishop of Blois, Grègoire, defending Las Casas against the claim that he fostered black slavery, see Zavala 1964, 58).

In Latin America, Dessalines' policy of throwing whites and mulattos into the sea could not be followed successfully, although in a rather dubious story he is reported to have advised Francisco de Miranda, the Venezuelan patriot, that there was no alternative to "coupé têtes, brulé cazes" even in Latin America if national liberation was to be achieved. But, under the influence of the new ideas of equality and freedom and emulating the Haitians, mulattos and black slaves revolted in Venezuela in 1795. The revolt was barbarously suppressed by the whites. A second rising in 1797 led by middle-class idealists was also crushed with savagery. This so-called Guaira rising sought to unite a cross-ethnic constituency to attain the 1793 version of the rights promised in France and some of its followers carried that dream into the 1811 revolt discussed below (see Thibaud 2003, 310 fn 18; Parra/Grases 1959, 152ff). Some refugees from Trinidad were involved. Both threatened the internal arrangements of local society and were for individuals against the state rather than for the establishment of a new state. However, rights for the individual were clearly not a priority for society as a whole. Local terror about black revenge was the predominant feeling.

The populace remained loyal to Spain until after 1808 when the Madrid rising against the French and the imposition by Napoleon of King Joseph freed them from any obligation to the metropolis. Until that time the French on Guadeloupe kept carefully out of Spanish affairs in Latin America. Francisco de Miranda had just led an abortive rising against the Spaniards and was again planning the creation of a vast monarchical state backed by Britain. He had become – like much of the local middle class – violently anti-Jacobin after the Terror. Consequently, a struggle for national independence from Spain only started in 1811. It was led first by Francisco de Miranda and then by Simon Bolívar, whose success made him the "father" of modern Latin America. Bolívar typified the progress of the relationship with the Enlightenment and the declaration of rights of middle-class Latin America. He had been born in Caracas in 1783. He was brought up by a Negress slave, Hyppolite, of whom he said: "I never knew any father but her". She had pride of place at his victory parade (Trend 1946, 28–9). This certainly affected his way of thinking about humanity. Like his generation of rich landowners, he read Voltaire, Montesquieu, Rousseau and Volney.

Voltaire and Rousseau appear to have influenced him most. But he also read Plato, Las Casas, Homer, Horace and Madame de Stael, all less revolutionary thinkers. He visited Spain in 1799 on the equivalent of the British "grand tour" and passed through Paris at its Napoleonic apogee. He was shocked to see the revolution transformed into empire and disgusted when Napoleon made himself emperor. Symbolically, he visited the house where Rousseau had lived with Madame de Warens on his way to Italy, where he hoped for Rome soon to be liberated. So the young Bolívar was a revolutionary nationalist when he returned home in 1807. When he started holding meetings of the Sociedad Pattriottica in his house, the society was regarded as Jacobin. He and Miranda both went to England to seek British support for their struggle, now against Napoleonic Spain. In 1811, empty-handed, they went back to Venezuela and the declaration of Venezuelan independence was proclaimed, asserting "rights" against the centuries' long European oppression. They were joined by the disappointed survivors of the 1797 revolt. An inconclusive war with the counter-revolutionary royalists led to a negotiated peace. The Colombian constitution of 1812 imposed on the new Colombian state also contained a statement of rights and duties of the citizen, in Chap. XII. While Carozza thinks it is much closer to the French than the American statements, this is only true if the 1795 Declaration is the basis of comparison (Carozza 2003, 302–3 and fn 111). It contains an extensive statement of duties, the most important of which stated: "The first obligation of the citizen aims at the preservation of the society and thus requires that those who constitute it know and fulfil their respective duties." The latter are very conservative. For example, to be a good citizen, one had to be filled with filial piety and be "a good husband". The striking insistence on subordination to the national community is less important than the fact that, like the US models, the rights were buried in the constitution rather than its premise. This made rights unable to be universal because their creation was subject to national political considerations.

In what is known as his Cartagena manifesto, Bolívar still appeared a liberal, though more like the US constitutional fathers than the French revolutionaries. He was in favour of an enlightened rule of law. This marked the high mark for rights in Latin America. Thereafter, Bolívar's views underwent a conservative evolution that emphasised the individual less and less and the nation more and more (Griffin 1966, 49). He was a gifted warrior nationalist who eventually defeated all challenges and, like Napoleon, enjoyed the loyalty of his troops. During his campaigns the losers were massacred in a deliberate emulation of Dessalines' policy of killing all whites because they opposed the national project. Latin American nationalism was constructed on the cleansing of those opposed to the nationalist project but the particular problem of slavery was not of overriding importance (Thibaut 2003, 324–5). Slaves conscripted into this fight against the middle-class mulattos were given freedom; the rest were either re-enslaved in 1821 or remained in servitude even in Venezuela and Colombia until 1854 and 1852 respectively. Again the deleterious effect on rights of minorities that came from a project built around national independence became evident.

Still, in Bolívar's Angostura statement of 1819 there had been a clear move away from even the American sources of inspiration. He stated that he had been forced to

assume the post of dictator and supreme chief of the new republic as a result of driving forces of Venezuelan history. In this capacity he was drawing up a plan for a constitution before handing over power to the legislators. He declaimed that Venezuela "on breaking with Spain, has recovered her independence, her freedom, her equality, her national sovereignty. By establishing a democratic republic, she had proscribed monarchy distinctions, nobility, prerogatives, privileges. She has declared for the Rights of Man and freedom of action, thought, speech and press." But at the risk of profaning such sacred texts, he felt that she had to be reformed first, not following the North American example, but Montesquieu's advice that each country should have government appropriate to it. What had to be done was to create a centralised unitary republic, one and indivisible. "Unity, unity, unity must be our motto in all things" (Bierck 1951, I, 191). A nation like that of Rome and Britain had to be forged (ibid., 182–4). And so, despite acknowledging the fact that men are born with equal rights, he suggested that the legislators should read and follow the British constitution. A hereditary upper house should be kept and filled by the "Liberators" and a president should be elected. This was because the South American people had been under a yoke of ignorance, tyranny and vice that made them without civic virtue. Americans by birth and Europeans by law, ever in dispute over the right to the land with the native peoples, Venezuelans had always been "passive" and that made liberty difficult to attain. The arduous task of the legislator was thus to educate those "who have been corrupted by enormous illusions and false incentives. Liberty says Rousseau, is a succulent morsel, but one difficult to digest" (ibid., 173ff esp. 177). Government would have to be based on the "tutelary" experience of Venezuelans. So Bolívar took away with one hand practically what he conceded theoretically to rights with the other. Within the nation and a state based on a moderate version of the British constitution, he still wanted the emancipation of the slaves. Yet a state set up under the effective control of a new warrior cast of "liberators" who were the old economic rulers reborn, was unlikely to move rapidly in that direction and when it did, was unlikely to move beyond a new peonage for old slaves.

All over Latin America his model was adopted and dominated for 100 years. It became the continent of national liberation struggle, creating many new nation-states, each a military dictatorship with the trappings of an enlightened constitution. The continent tore itself apart in a series of wars of regions seeking to liberate themselves from the old centres, creating a new liberator in the form of José de San Martin who freed Peru in 1821 to forestall a mulatto and black rising. Similarly, Venezuela was broken into Venezuela and Colombia with Bolívar presiding over a constitution like that proposed at Angostura. Long wars took place as Brazil and Paraguay, Argentina and Chile and Uruguay each fought to free themselves from their predecessors and establish firm boundaries. Millions died; nearly a million in the Paraguay wars of 1864–70 alone. Yet in most capitals, statues were erected to the common hero, Bolívar. The American republics were ruled by military and landed oligarchies for whom human rights had no meaning.

For the blacks and the *indios* conditions did not change greatly although they were emancipated eventually. In Brazil, heavily dependent on servile labour, and in

Cuba, slavery continued to exist until, respectively, 1886 and 1888. The following words were written in 1829 in Mexico: "I confess I find no difference between black slaves and Indians on our haciendas. The slavery of the first has as a cause the barbarous law of the strongest, the slavery of the Indians has as a cause fraud, the malice[of proprietors] and the innocence of beings almost without will. And it is truly something that should really astonish us to think that the Indian population of new Spain has lost instead of gained in the revolution for [independence]; it has exchanged abstract rights for positive privileges" (cited in Jaulin 1972, 67). Nor did the treatment change, even up to this day, for those considered inferior beings. Rigoberto Menchu reports how her brother was burnt alive for resistance in Guatemala, within living memory (Menchu 1992, chXXIII; 198ff esp. 201).

Brazil, already one of the largest and most populated countries in the world, a Portugese possession, had a particular history of relations with French revolution. A desire for independence started among the miners inspired by 1776 but they did not contemplate the extension of rights to slaves or Indians. In 1798, mulattos in Bahia, directly inspired by the ideas of the French revolution, formed the Conjuraçao alfaiates, the conspiracy of the tailors. One conspirator explained while on trial why he rebelled: "We want a republic in order to breathe freely because we live subjugated and because we are coloured and we can't advance and if there had been a republic there would have been equality for everyone." The impress of the revolution was also clear in posters that asked for a republic, equality, free trade, and the abolition of slavery as well as equality and fraternity and black and mulatto troops. Again the revolt was suppressed and although there was another rising in Pernambuco in 1817 that still seemed to be inspired by the ideas in the preamble to the 1789 Declaration, resistance to the monarchy then diminished. It is from the Pernambuco rising, which abolished all nobility and classes, that the struggle for national independence for Brazil is often dated, but in fact that was a long time coming and was really only half-baked. An opposition to Portugal was not possible in the way it had been with Spain once a puppet French king had been put in power at Madrid. The Portugese monarch fled to Brazil with his court in 1808, declared himself emperor and established a Brazilian monarchy that lasted until 1889. To oppose it would have been high treason and posed conflicts of loyalty for the middle class. The local large landowners and merchants had an inordinate influence at court, which ran the country based on slavery in their interests. Yet when the monarchy ended and the republic was proclaimed, the coffee kings remained in power as semi-feudal potentates, no longer needing the slaves as they had replaced them with millions of starving southern European immigrants whose stories of suffering exceeded those of the US. Rights remained to be discussed in the coffee houses among a liberal intellectual minority whose contacts were with European anarchism and revolutionary theory more generally. Even they, like their North American peers, thought that Brazil would degenerate unless "whitened" and the gap between the races and cultures was subordinated to national goals. The notion of the "people" became confused with that of the plebs. Equality of rights disappeared.

Spain dominated Argentina, Chile and Uruguay whose Indians had largely been exterminated and where slavery was not essential to ranching. The conditions of

blacks and slaves did not dominate intellectual debate as they had further north. The ideas in the Declaration made it only into some radical, often priestly, hands. We read that Friar Camilo Henriquez of Chile was influenced by it. On the whole, these areas remained more under British hegemony and after independence (Argentina 1816; Uruguay 1830; Chile 1817) although all ruled at first by liberators, their fierce nationalism was informed by Anglo-Saxon sources more than French, which had practically disappeared in Europe as well by then. Unlike North America, few European radicals emigrated there until late in the century.

A febrile, nascent working class movement, organised by intellectuals divorced from the life of workers, occasionally proclaimed rights, but it was mainly inspired by the anarchist models of the First and Second Internationals dear to the Spanish and southern Italian migrants who arrived in 1880–1900 (Goodio 1980, Parts 1 and 2; esp. 32ff). While these countries all remained frontier societies, the long settlement and the control of the Catholic church made the histories of women there different from those elsewhere on frontier societies. Historical parallels between countries of new settlement did not extend to the emergence of the same sort of women, or a vision of their role that meant that they would be anything but subordinate in law to their men-folk. And, in societies where often men did not enjoy the vote in the 1800s and most of the early 1900s, neither did women (see *Slaves of Slaves The Challenge of Latin American Women* 1980, 23–6). In sum, rights did not come to Latin America despite a short flirtation at the beginning of the nineteenth century. Blacks remained right-less formally and informally well into the twentieth century, despite the triumph of national liberation and its trumpeting of citizen rights. The non-black majorities saw to that.

The United States

There were three million slaves in the USA in 1800, one-sixth of the population, but in the South where they were concentrated, they numbered between one-third and one-half of the population. By the nineteenth century, there were so many blacks that natural increase meant few further slaves from Africa were needed. So long had blacks been in North America and so much had the society become layered from slave to free, that no original cultures or languages remained. They were a black immigrant minority in a white immigrant nation. By 1789, a three-way trade had developed from Europe to the Caribbean and thence to the US. Much of the wealth of all three areas depended on this trade in bodies, sugar, coffee and manufactured goods. Then in the early 1800s, the invention of the cotton gin meant the development in the southern states of a vast cotton industry built on slave labour, which made very large profits for the owners. The conditions of the slaves were little different in the US from in the Caribbean, with all the attendant horrors. The society of the South was fearful, macho and hypocritical. Slave revolts had taken place in 1712, 1739, 1763 and 1800 and continued every decade into the nineteenth century, often involving large numbers of slaves and ex-slaves (see generally Walvin 1992; 259ff).

All involved violent revenge for suffering and savage retribution once the rebels were captured and suppressed. US slave owners, horrified at what had happened on Santo Domingo, had even prevented fleeing whites from entering the US in an irrational fear of revolutionary contamination of their own slaves.

Yet this slavery existed in a nation that professed in its own declaration of independence (1776), that all men have natural rights and are free. It also stated that when tyranny was too great, men had the right to revolt and overthrow that tyranny. Clearly this was not understood to apply to slaves and other property. Even Thomas Jefferson gave up his original view that slaves should be freed and decided that as inferior beings they were not ready for rights (see Bernstein 2008, 40–2). The position of the US state was therefore hypocritical and in contradiction with its professions where blacks were concerned. Little more could be expected of the founding fathers, one of whose most progressive members, Jefferson, was himself a slave owner who hypocritically kept hidden his sexual relationship with a female slave.

Eleven states that were free and eleven that were "slave" had been admitted to the Union when the original line between free and slave states had been declared. It had been quickly been stated (1804) that the declaration did not extend to freeing existing slaves in the slave states south of a notional Mason-Dixon line. This line was redrawn in the Missouri Compromise (1820) that allowed the new state of Missouri, which was north of the Mason-Dixon line, to join the Union, though its constitution allowed slavery. The declaration was stated only to mean that slavery would not be allowed in the future elsewhere and the external slave trade was banned (Birley 1951, II, 31–3). Even that compromise caused violent controversy and threats of secession from the South. The tenor of the debates was that the issue of slavery had to be subordinate to keeping the Union or nation intact. Jefferson himself saw that to question the democratic right to enslave could be "the death knell of the Union." After 1828, the new Democrats, led by President Andrew Jackson, spoke for the new west, whose prejudices we discuss in Chap. 10 below. Playing on fear of national disunity, in 1854, in the context of opening up the west through railway construction, Senator Stephen Alexander Douglas, the leading light of the Democrats, proposed to allow slavery for the new state of Nebraska on the ground that whether or not slavery should exist was a matter of popular vote, or popular sovereignty. To this, we can add the hypocrisy of J.C Calhoun's argument (1839) that slaves were happy and that the contradiction between capital and labour had been solved through slavery. Nebraska would be north of the line drawn in the Missouri Compromise. In other words, his proposal expressed a further extension of slavery in the US. Despite its rights for all, the United States continued to extend slavery for blacks in the national interest. This was even more outrageous than Napoleonic France's desertion of the blacks in the national interest since it was the work of "Democrats", not a dictator.

The central problem was emerging: the democratic majority of white males did not want freedom for slaves even when they lived in "free" states themselves. Alexis de Tocqueville noted in his famous *Démocratie en Amerique* (1835) that despite the local democratic Puritan origins of the US, a tyranny of the majority was the characteristic of the new nation. It crushed freedom of thought and opinion in thousands

of tiny ways. The critique is notable as it showed the distance between the ideas about the place of rights of a European moderate liberal who had supported 1848 and the American understanding that a popular majority should be pre-eminent. We return to this in later chapters.

When abolitionists put their case through new newspapers like the *Liberator*, they met the opposition of a majority of whites bought with promises of land that the nation believed was "manifestly destined" to belong to whites. Anti-slavery societies had emerged in the 1820s among progressive whites, often religious people. In the 1830s women like Angelina Grimke and her sister set up women's organisations to oppose slavery and called on Southern women to join them. They had to endure the opposition of the northern Congregational church for their temerity. They were joined by Stanton, Mott and others whose history in the suffragist movement we have seen. Then in the 1850s the refugee leftists of the International Association (IA, discussed in Chap. 11) who arrived from Europe, where slavery had already been abolished, arrived to add their voices to a Christian–Socialist alliance to secure rights for the slaves. William Lloyd Garrison, a member of the Union Humane Society to oppose slavery, wrote to the IA on April 29, 1858 that "we say with our American brothers: 'our country is the world; our country men are all mankind'" (Lehning 1970, 246). Men like Adolph Douai in Texas, where perhaps one-fifth of the population in 1852 was "forty-eighters", and Hermann Meyer in Alabama, followers of Karl Marx, worked for emancipation right in the hotbeds of pro-slave societies. Joseph Weydemeyer, who was Marx's main correspondent in the US, insisted on the centrality of the struggle against slavery by marxists. Their activity increased after the passage of the Kansas-Nebraska Act, which approved the creation of two slave states (1854) and prompted an uproar by abolitionists. The American Workers' League held a mass meeting in New York where German-American workers declared that they regarded all supporters of the Act and slavery as traitors to the people. Many went on to join in the new anti-slavery Republican Party (see Foster 1952, 39–40). Women's organisations also fought strongly against the passage of the Act. While as we have seen the women became less and less supportive of blacks, the new "vile multitude" of workers who immigrated to the US and who formed over half of the population of the major cities by 1860 were constantly forced *when they first arrived* into a common cause with blacks by the Anglo nation (see Ignatiev 2009). Again the theme was the defence of rights against that of democratically-based majority communitarian claims, against the "national interest".

The slaves revolted several times in the 1830s and 1840s, sometimes claiming their rights on the grounds of Christian principle. Notable was the abortive 1859 attempt led to trigger a slave revolt by a sort of Mazzinian example by John Brown at Harpers Ferry. The working class organisations of Cincinnati openly endorsed his action. In his final address to the court he said: "This Court acknowledges, as I suppose, the validity of the law of God…It teaches me to 'remember them that are in bonds, as bound with them'. I endeavoured to act up to that instruction…I say, I am yet too young to understand that God is any respecter of persons. I believe that to have interfered as I have done…in behalf of His despised poor was not wrong, but right" (Birley 1951, II, 232–3). He was hanged.

The opposition to slavery often built its case around the principles of the American declaration of independence. Thus the first number of the *Liberator* (1/1/1831) stated: "Assenting to the 'self-evident truth' maintained in the American Declaration of Independence, 'that all men are created equal, and endowed with their Creator with certain unalienable rights-among which are life, liberty and the pursuit of happiness', I [Garrison] shall strenuously contend for the immediate enfranchisement of our slave population." Garrison quoted a poem by Thomas Pringle of the London Society for the Abolition of Slavery throughout the British Dominions, dedicating himself to "oppose and thwart…thy brutalising sway – till Africs chains are burst".

The contradiction between the 1776 Declaration and slavery, indeed, between the declaration and the exclusion of any person from rights on natural grounds, was repeated insistently by abolitionists. But it was accompanied by the Christian, Quaker, argument and by more romantic work like the poems of John Greenleaf Whittier, as well as Harriet Beecher Stowe's *Uncle Tom's Cabin*. If that was one side of the argument, the other was the claim of the superior right of popular sovereignty or democracy which, as Tocqueville indicated, had already won most Americans by 1835. The supporters of the declaration had to win democratic support for abolition. This is what makes the ideas of Abraham Lincoln, under whose presidency slavery was abolished finally in 1865, so important for the history of rights in the US. We can sum up his contribution as obtaining for slaves freedom as a right under the declaration by winning democratic support for the abolition of slavery. The problem for *universal* rights was that he could do so only by ensuring that freedom was subordinate to national unity and a project in which blacks only had a subordinate place, where rights became rights to equality of opportunity not to equality of outcomes within the nation.

Abraham Lincoln

Lincoln had witnessed the treatment and condition of chained slaves personally in 1841 and was horrified at the arbitrary lynching and burning of innocent blacks in popular riots in 1838. Above all, he felt that this treatment breached the rule of law and thus trampled on the heritage of the founding fathers, the boon of a rule of law equal for all. This feeling brought him into opposition to the Know-Nothings who opposed non-Anglo-saxon and Catholic immigration and wanted these immigrants excluded from rights. But he had not been opposed to slavery in his early political career; he even opposed abolitionists in 1837–45. "I hold it to be a paramount duty of us in the free states, due to the Union of the states, and perhaps to liberty itself (paradox though it may seem) to let the slavery of other states alone; while, on the other hand, I hold it to be equally clear, that we should never knowingly lend ourselves directly or indirectly, to prevent that slavery from dying a natural death – to find new places for it to live in, when it can no longer exist in the old" (Cuomo and Holzer 1991, 14, 31). Lincoln was a lawyer who, like Kant, believed that obedience to the existing law was the paramount duty, even if the laws were bad. This meant

that he probably considered it a duty to put down a slave insurrection when all they sought was guaranteed to them by the Declaration of Rights. From the point of universal human rights, that document was null while the interests of the majority remained selfish and could and should override it.

Although he had known hardship and poverty as an agricultural worker in the west, what drove Lincoln was commitment to the American dream. This had roots in the 1776 Declaration and it was interpreted by him as a basis for national popular unity. While on other matters he would differ from his later rival Stephen Douglas, he too believed at first that the rule of law could be trumped by a majority of the people. The people had the right to revolt and establish its freedom, imposing it on any minority: in other words the populace was sovereign. Following the Rousseauian precept that the people would always turn out good, up to the 1850s, he saw no contradiction between democracy and national unity and, eventually, rights for all. So the gaunt Prophet Lincoln applauded the risings of 1848 in Europe and the Texas war of independence against Mexico in 1846. He explicitly paid homage to Kossuth, and to Smith O'Brien and John Mitchel, two of the Irish patriots transported to Tasmania. A strong supporter of the separation of powers of the US constitution, he also opposed concentrating all power in the hands of the president. In this he was quite unlike his Latin American predecessors, who often ruled under US-inspired constitutions. Like most Americans of the day, he was strongly Christian.

But in the 1850s the struggle over the treatment of the Negroes grew and the pro-slave group started, in Lincoln's estimation, to attack the "whiteman's" charter of freedom – the declaration that "all men are created free and equal" (Cuomo and Holzer 1991, 52). This compelled him to pay more attention to the logic of the creeping extension of slavery. He took as his first model slave-owner Henry Clay because of Clay's devotion to the cause of human liberty and because Clay did not believe that Negroes were to be excluded from the human race where human rights were concerned. In a now-famous speech in Peoria in 1854 he set out some preliminary ideas on the issue. It was, he said, with Jefferson, that the prohibition on the extension of slavery started, but by 1854 some men were claiming this conflicted with the sacred right to self-determination to have slaves. These people taunted those opposed to the extension of slavery by democratic choice as hypocritical. He still did not favour immediate abolition and could not think what sudden freedom would mean, as solutions like those of sending everyone to Liberia were impossible. But introducing slavery to new states infringed the existing law of 1820 against bringing them from Africa.

Against the argument that anyone could take "their hog" to Nebraska and should therefore be permitted to take their slave, he retorted that the huge numbers of free blacks showed that they were more than some thing that could be regarded like other property. Here he came to a major breakthrough in his thought. He remarked that the whole argument about what should be privileged, the prohibition on slavery or the democratic right to decide to have slaves, depended on whether the Negro was a "Man". Because if he was, and Lincoln argued that he was, then he was entitled to self-government. No rule without consent was the leading principle of the 1776 Declaration and his own "ancient faith". Whatever the basis of the agreement

between the states in 1776, it did not cover carrying bondage into a new state. So here Lincoln adopted his distinctive stance. He set off the Declaration as superior as a guide to right and wrong over the constitution. Rights overrode politics or local sovereignty except insofar as that relationship was otherwise established by the Declaration itself.

So he was concerned to save the Union but only within the rules of the Declaration. What existed already in law should not normally be tampered with, but any innovation was subject to the law of human nature that showed slavery to be evil. Lincoln sounded alternately like Rousseau and Pericles and here he simply stated like his forebears in 500 BCE and in 1789 CE that there was inscribed in the heart of man the feeling that slavery was evil. Thus he replaced his insistence on passion-less reason of earlier days with an appeal to a higher law. The two principles of equality for each individual and the sacred law of self-government could not coexist. Any toleration of slavery was through necessity not principle. So he called for a re-adoption of the Declaration as the national ideal (Cuomo and Holzer 1991, 65–78).

Then came the infamous Dred Scott decision of 1857, denying slaves the rights of citizens and, therefore, the chance to be admitted to active rights. In response, he started a campaign against it and its premises, evolving his own view of human rights. The conclusions were the high point in US understanding of rights in the nineteenth century. Scott was a slave who had been taken to the free part of Louisiana and then Illinois who, on his master's death, sued for his freedom on the grounds that he had become a free man there and that "once free always free". The Missouri court refused his plea and he was returned to the family. He appealed to the Supreme Court on the grounds of illegal detention. The issue was whether he had standing before that court as a slave. The Chief Justice Robert Brooke Taney ruled that he had no standing and then went on to add that a slave was mere property and that under the constitution anyone could take their property anywhere, the Missouri Compromise being wrong. It was a victory for the slave owners as it stated that the rule of law endorsed their views and not those of Lincoln.

The Chief Justice simply stated that slaves were not intended by the founding fathers to be included in the "people" or "citizens" of the United States and could claim none of the rights and privileges that other citizens had. "On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race and whether emancipated or not, yet remained subject to its authority, and had no rights and privileges but such as those who held the power and the government might choose to grant them" (*Dred Scott* v *Sandford*, 19 Howard 1857, 393). Moreover, the court said that no state could override this federal exclusion by granting a free black state citizenship.

The total exclusion of blacks from citizenship by the intentions of the founding fathers was supposedly shown by two matters in the constitution. It allowed the 13 states (1) to import slaves and (2) to have property rights in slaves guaranteed. The only power the federal government had was to protect the property rights of slave owners. Power over new territories could only be acquired by consent. In their absence, property rights were jealously guarded by the constitution and conjoint with the rights of an individual. Slaves were in no way different from other property

that the law was bound to protect. They were no more than an "ordinary article of merchandise and property".

The strictly legalistic reading of the constitution can be seen as political, as can the court's firm refusal to accept that any foreign model or law of nations could override its terms. As a lawyer, Lincoln was aware of the earlier cases leading up to the Dred Scott decision. Charles Warren, in his two-volume history of the Supreme Court, notes that the New York *Tribune* considered the decision supremely political but he does not share that opinion or the view that the judges were simply biased. They were simply lawyers, old, conservative and without much political savvy or courage (Warren, 1922, esp. II, 302). It meant, however, that after 1857, Lincoln could not rely on the rule of law.

Lincoln's continuing use of the Declaration to establish basic rights for blacks was thus a political act against the rule of law. It was founded on the assertion that God "is with us" – the theme of his speeches leading to his election as president and to the Civil War. By late 1857 he simply proclaimed that a state could not exist half-free and half-slave (Cuomo and Holzer 1991, 105–6). He developed the argument that the rights in the Declaration were common to all men and not just to the descendants of the settlers of 1776, and were therefore a binding and unifying force. In a speech in 1858 in his run for the Senate he argued that America was a nation of 30 million, half of whom came from Europe. The latter could not trace their blood back to those days and feel "part of us", but they found a commonality in the statement that all men were equal and that they had the right to claim all the rights of native born. His "Democratic opponent" claimed that the people of America were the people of England and that the Declaration would not apply to the Germans of Illinois, whom he was addressing. Where would the exclusion of others like them stop if it were allowed for the Negro (ibid., 114ff). Lincoln explicitly reiterated the stress on the universality of the Declaration many times. Six months later he said in Lewistown: "[the original states had an] interpretation of the economy of the universe [that all men are equal]. This was their lofty, and wise and noble understanding of the justice of the Creator to His creatures. [Applause] yes gentlemen, to *all* His creatures to the whole great family of man. In their enlightened belief, nothing stamped with the Divine image and likeness was sent into the world to be trodden on, and degraded and inbruted by his fellows" (ibid., 125ff). As Douglas continued to speak of inferior races and of confining citizenship to white men, Lincoln warned that this would only provoke revenge from those deprived of hope that they could be anything but the beasts of the field. What was at stake was the eternal fight between good and evil principles, between right and wrong. Douglas really wanted slavery to continue forever, and that was wrong.

So Lincoln saw adherence to the Declaration as unifying a diverse population in an American dream. He believed that all those living in the United States should participate in making its future. It was a land of opportunity. He believed in equality of opportunity so that men and women could make of themselves anything they wanted, as he himself, once a hired labourer, had done. It was a country of innovation, discovery and manifest destiny. It was world where the Republicans believed in the man and the dollar but placed the man first (Cuomo and Holzer 1991, 155, 159) and blacks were humans.

In sum, Lincoln preached equality of opportunity, not equality of outcomes. He was no believer in economic, social and educational rights, and here we come to a fundamental contradiction in his thought. He stated many times that he considered the Negroes to be inferior to whites although they were men, but he wanted that they have the civil and political rights of "white" Americans despite that inferiority. He did not want intermarriage. And he therefore believed that the task of the state and the people was to "leave him [the Negro] alone" (ibid., 129–30). In July 1858 he declaimed: "I have said that I do not understand the Declaration to mean that all men were created equal in all respects. They are not our equal in color; but I suppose that does mean to declare that all men are equal in some respects; they are equal in their right to 'life, liberty and the pursuit' of happiness. Certainly, the negro is not our equal in color – perhaps not in many other respects; but still in the right to put into his mouth the bread that his own hands have earned, he is the equal of every other man, white or black…All I ask for the Negro is that if you do not like him, let him alone. If God gave him but little, that little let him enjoy" (ibid., 120).

Lincoln argued for the "hope" that comes from free labour, for all human beings, even as farmers, something he detested himself. Among the most important innovations of his first presidency that started in November 1860 was the Homesteading Act of 1862.Correspondingly, he believed in small government and limited federal power, neither of which were consistent with second generation rights within a nation-state. This would pose problems for rights for blacks in the future.

Lincoln won the presidency by, among other things, convincing the electorate that they should stick to the old standards of the Declaration and portraying his opponents as people who wished to depart from the past. He warned that not to adhere to those rights would provoke more violent insurrections by slaves. Emancipation would avoid such problems and the nation wanted it. The pro-slavery advocates would break the union by insisting on constitutional rights as they understood them. In fact, his view of the Declaration was sustained by the conviction that slavery was morally wrong and that all laws in favour of it were themselves wrong and should be swept away.

This *aut–aut* set the stage for the terrible civil war that ensued and that is not part of our story. The victory of the North over the South and the abolition of slavery that followed did, however, meant the triumph of Lincoln's view as "the second revolution" of the United States. It was not a view where human rights triumphed over democracy; rather, the popular sovereign chose in favour of rights, whether they were aware of that or not, first by voting Lincoln into office and then by fighting to victory. If the majority in a nation-state wished for rights for all, they had the right to impose that on those of other views. So this "third model" is significant for blacks and Asians, whom Lincoln directly included in his argument. Being black or of another ethnicity did not mean complete exclusion from national rights. The implications demand some elaboration.

To include other races than those of white "blood" or heirs to a supposed aboriginal history among those having rights, was a gigantic step towards universalising rights. To place the Declaration above the state and the rule of law it created was also a timely reassertion of what the document's contents. To further assert that

those rules are inscribed by God in all humans and that all people, regardless of where they come from, know and understand that, and aspire to them as a protection even while knowing that their attainment called for an impossible divine quality, was also crucial to strengthening the right of the individual against the state and its rule of law. We can simply affirm that Lincoln had reasserted as a generality the position we have ascribed to the French declaration of 1789 and extended it to other races by asserting that to be a human being was all that was required for rights. On the other hand, Lincoln had done so by according blacks, through democratic power, a part in a national project of radical individualism, the American dream, in which being ones brother's keeper, fraternity, did not extend to equalising chances through social engineering. Or, if the policy of nearly free land for each new arrival, occasionally extended to blacks by the policy of "forty acres and a mule", is considered social engineering, it was not at the expense of redistributing already-existing wealth.

So when, in 1863, in the midst of the Civil War, Southern slaves were emancipated, they were thrown into a free enterprise world where most could only be victims. They were illiterate, unskilled and frequently unhealthy. They had known only slavery for generations. Lincoln knew this and yet expected them either to fit in as inferiors, as had been the case in Latin America, or to haul themselves up by their bootstraps, as he himself had done. And they were to do this in an America that he and most whites thought of as a new "white" continent. The great western spaces that Lincoln promised to his European audiences, like the Germans of Illinois, were seen as being empty, uncultivated and there for the taking. Lincoln's Young Americans were a people whose Manifest Destiny it was to go forth, produce and multiply. So he ignored the 1793 Declaration and denied its rationale, in the name of popular sovereignty. Without guaranteed economic and social rights, blacks were doomed to fall behind in the race ever further and not to exercise their active citizenship rights. Even had the southern states abided by the new equal rights imposed by the North, blacks would have been excluded from rights.

Faced with mass unemployment in the chaotic aftermath of the war, thousands of blacks fled north, many to Lincoln's Illinois, to make new lives and, symbolically, to create new ghettoes as a de facto apartheid started in the United States. The rights they had been given did not empower them and even in the North their absence at elections was already remarkable by the end of the century. Voting did not bring them national rights like those of other citizens.

Slaves were finally given national citizenship, that is civil and political rights, in the Civil Rights Act (1866), which overturned the Dred Scott decision, and in the Fourteenth Amendment to the constitution, passed 2 years afterwards, when the constitutionality of the 1866 Act became unclear (Birley 1951, III, 17–23). Yet from the 1870s onwards, blacks were democratically excluded in the South from freedom of expression, assembly and the vote by different mechanisms. There was first the violence of the Ku Klux Klan, formed out of similar groups in 1868 to terrorise Negroes and to prevent their enjoying any rights except those decided by racist whites. Then there were laws, collectively known as Jim Crow laws, like the Black Codes that introduced vagrancy and other laws for the newly enfranchised that were

worse than those abolished 50 years earlier in the British possessions. Freedom just meant a new form of bondage under such rules. Finally, there were laws, deemed constitutional, that excluded from the vote illiterates and those who could not answer simple questions about the Constitution (Birley 1951, III, 9ff, 77ff, 91ff). The bulk of these acts were endorsed by the Supreme Court in challenges between 1876 and 1884 by the states to new civil rights acts on the ground that they were beyond the powers of the federal government under the constitution. In cases about the penalties imposed for segregation laws and preventing blacks from voting, the court held that these laws were unconstitutional. The *Nation* (17/9/1874) indicated the new flavour among progressives: "In light of these decisions, it may be safely inferred that the Supreme Court must look with extreme suspicion upon a law, upsetting the domestic law of States on the subject of schools, of common carriers, of innkeepers, and substituting for them the new and strange system invented by the authors of this Bill [banning segregation AD]. In the interest of the Negro, we trust that it may never reach the Court. Deeply as we sympathise with his wrongs, we have no expectation or hope of seeing them righted, by hounding on his old masters to acts of violence and lawlessness, by the passage of equally violent and lawless Acts of Congress. The Reconstruction period is ended, and the Negro in future will occupy such a position as his industry and sobriety entitle him to. Such bills as the one we have been considering [later Civil Rights Act 1875 AD] do nothing for him but turn his friends into his enemies" (cited in Warren 1922–26, II, 601–2).

The Southerners and their supporters, even the Ku Klux Klan, portrayed themselves as defenders of the constitution. In fact, the primacy given by Lincoln to the Declaration and its principles was gradually undermined in favour of the constitution and its separation of powers. This was done by a conservative Supreme Court, which, as the upholder of the rule of law that made it the final interpreter of the constitution, could only arrive at a reading down of inalienable rights. Its judgments were legalistic and did not import Lincoln's belief that universal human rights were higher than a rule of law that contradicted them. So, despite their formal empowerment as citizens and the abolition of slavery, blacks did not obtain the rights required by their condition through the national and local legislatures. The reformist path followed successfully by the women was closed to them. Attaining citizenship did not overcome inequality based on "natural" difference. The third model for the empowerment of blacks was a failure despite their formal admission to rights.

The Rights of Slaves: The British Model

The Haitians freed themselves in a national liberation struggle in which they ethnically cleansed the island of whites. This left the slaves in France and its other colonies. The contradiction with the rights proclaimed in the various declarations called for a solution in which their demand for freedom was squared with the overriding national interest of the French state and its economy. In the metropole the solution was simple since there were very few slaves. There slavery was abolished, but it

continued in the colonies for another 60 years. So, began what became characteristic of all states with empires, French, British or American. They had a two-speed movement towards rights for slaves and other "races". Freedom for slaves was granted "at home" and the imperial population could and did feel that it was virtuous and that even other races enjoyed a high level of rights in some places. Slavery and oppression for other ethnicities continued in the more populated colonies. The feeling that the imperial powers were righteous was not shared among the still enslaved colonial populations who continued to face tyrannical treatment. This reality lasted even after slavery was formally abolished and replaced by indentured labour in most places. There, while the murder of slaves was not ignored in the same ways, thuggery and torture continued unsanctioned well into the twentieth century.

The "progressive" solution in the nineteenth century for slaves in the French colonies was a compromise that revealed the limitations of the notion of individual rights being subject to duty to the collectivity. Slaves were freed if they paid for their freedom and continued to work for the old perpetrators. This solution was taken by the French from the British for whom the notion of rights that trumped community interest, in this case economic, had not been part of their rule of law.

Well before 1789, British reformers had set up the Society for the Abolition of the Slave Trade (1783), led by William Wilberforce and John Clarkson, the first a religious conservative, the second a Quaker. They were seen as allies of the decolonisation forces around Paine, Price and Wollstonecraft and their views were suspect in Pitt's nationalist Britain. The hostility was despite the fact that Wilberforce was a pragmatist who did not believe that slavery could be abolished quickly or without compensation. He was close to Edmund Burke who had proposed a code for slavery whose most striking feature was that any free black who had been found drunk and disorderly twice would be returned to slavery where he could be beaten. His other close friend was John Newton who had been a slaver and, after various confessed crimes, including torture to keep slaves submissive, had seen the evangelical light and became an abolitionist. None of the Britons was concerned with equal rights for blacks. Their goal was the abolition of the slave trade (Pollock 1977, Part II; Walvin 1992, Part VI). The British Abolition of Slavery Act of 1807 – banning the trade in slaves – took years of work by men like Wilberforce and Clarkson, whose dedication was undeniable.

What Wilberforce and his allies were prepared to do was to pay the slave owners substantial compensation for abolition. This posed a continuing problem for blacks: It left their old owners, the old torturers and their system, intact, only slowly to transform itself. There was no feeling of justice done for former slaves. Wilberforce and Charles Fox had started their weary struggle for abolition by proclaiming the need for justice and that "personal freedom [is] the first right of every human being" and pointed to slavery's horrors (Wilberforce 1835, 36–7). Even then, however, they had argued that its abolition would cause economic harm; and this allowed the "cost of rights" argument to appear (see Holmes and Sunstein 1999 for a recent defence of this common law tradition) where human rights were subject to a cost-benefit analysis (how much would freedom for slaves cost the national economy?). It was an argument in conflict with the Abbé Siéyes-led majority view of

1789 in favour of rights without duties. It certainly subordinated the victims to a possible community interest.

When the notion that it was legitimate to ask how much human rights would cost the national community was coupled with Wilberforces's rosy view of Christianity's complicity in slavery and an emphasis on reconciliation (Wilberforce 1835, 47) as well as the exaggerated portrayal of the 1807 Act abolishing the slave trade as a Magna Carta "for Africa", it guaranteed that no solution would be found – that is, no viable human rights for blacks – unless the tyrants were themselves satisfied with a new deal, and this took over 20 years. In the British empire, abolition only came formally in 1833. It was many more years before field slaves were totally freed.

The British organisation had inspired the creation in 1788 in Paris of the Society of the Amis des Noirs, whose protagonists were Brissot de Warville, Lafayette and Condorcet, who far from being Christians, were followers of the Enlightenment. They had been horrified by the reports of a trade that had destroyed the economies of West Africa; led to the transportation of 12 million blacks to the New World, and even in the nineteenth century would cause 5.5 million deaths (Dorigny and Gainot 1998, 59ff; Walvin 1992, ch19). Their general views earned them the hatred of French nationalists who pleaded the right of the nation to deny slaves automatic and unlimited freedom. The nationalist view was criticised by Charles de Rémusat, who simply made clear the dangers of realism when what was at stake was justice for the oppressed (de Rémusat 1977 [1824]). In his play, the young planter's son, Léon, proclaims in 1789: "To serve the fatherland, one must have peace at home; if there were no order imposed, I think that the blacks would end up by telling us what to do. Thank God all will henceforth go OK. No more abuses, no more favours or protection. A firm, equal and liberal law, which will make all refractory slaves tremble. In this regard, the envoy [for the National Assembly] told me that it will begin by a proclamation of the rights of man" (ibid., 19). When the envoy of the national assembly shows some interest and concern for individual slaves on Leon's property, Leon tells his sister that these people are too quick to talk about things they do not know about, like cane farming; and when told that "man's freedom is imprescriptible", replies that "that is a vague and sonorous proposition. Before thinking of freedom we must be fair" (ibid., 74, 77). De Rémusat's perceptive sensitivity was no more common then than today, when again, in the face of those who talk the language of rights, the protagonists of "fairness" and realism have the upper hand in rights' discourses, minimising the victims' view of rights.

In the 1790s, even the Haitians temporarily accepted such reasoning. Toussaint had accepted the argument that the colony was agricultural and had to have convivial labour relations. Therefore he favoured obligatory contractual labour. This amounted to injustice, since the only way that the slaves could contribute was by continuing their labour, once "free", as a form of conscription called "apprenticeship" (Lamartine 1857, 273). This is what had been done in the British colonies. The servitude embodied in real social relations thus continued. Moreover, it encouraged an illegal trade in "slavery" to continue. This illegal trade was often not enough: the reintroduction of slavery and the slave trade through the French empire took place after 1802, justified

on the grounds that extending rights to all colonial inhabitants had made matters equally unhappy for all (Martin 1948, 246).

After the defeat of Napoleon, British attempts to secure French agreement to stop the slave trade always met stonewalling. In 1817 an order was introduced to confiscate French vessels involved in the trade. It was not really policed because opposing economic interests were too great. In Paris, planters organised under the Bourbons and then Louis Philippe to argue that the interest of 29 million French should not be sacrificed to a "few thousand Africans; to vain utopias dreamed of by imprudent innovators." Abolitionist societies like the Société de la morale chrétienne could make little headway against the naked selfishness of the planters who preached that the end of slavery would cause a downturn in national prosperity. Millions of slaves continued to live in conditions that they had always known, singing about old Toussaint.

Slowly, faced with the national support for continuing slavery, the French abolitionists shifted their argument to a solution that would be in the interests of all parties following the British model. Alphonse de Lamartine, who as minister in the 1848 republican government in France, finally had a law passed abolishing slavery in the French Empire, showed the logic of such compromises. Deeply influenced by Wilberforce and the English example of paying slave owners millions in compensation, he built up a policy after 1835 around a buy-out of slaves, to be paid for not only by the colonists and the French state but also by the slaves themselves (Lamartine 1857, 247). When he warned that "we must not awake in the slaves more hope than we can satisfy without commotion in the colonies, without ruin for property, without trouble or agitation"; condemned as fanaticism the revolutionary exclamation "let the colonies perish before we give up our principles", and declared that the issue of slavery was always "relative"; he gave a voice to the slaves' oppressors and introduced the right to private property as an overriding consideration. He ended by saying that society had to "buy back" their freedom in the interests of social harmony. Thus both "the colonist and the slave must participate in setting the law to right, and pay their part in compensation and indemnity". Lamartine's "solution" was one "where the master should not be forgotten" (Lamartine 1857, 258, 260).

The oppressors were let off the hook by a reasoning process that deserves note because it continues to this day in human rights discourse. It was the opposite of the language of Toussaint, who declared the need for a day of vengeance.

> What do we want then? Not to make but to prevent a revolution, to restore a principle and keep colonial society…Those are the sort of revolutionaries we are…We say to the colonists; fear nothing, our justice and strength are here to guarantee your property and safety. We say to the slaves: do not try to win anything in a way other than by public sentiment, you will only have the freedom which we have prepared for you, only that freedom associated with good order and work (Lamartine 1857, 301).

This brought the state back in as the maker of order, the final definer of freedom, in defiance of 1789. Such language as Lamartine's could only make blacks who had not freed themselves by arms like those in Haiti, feel that nothing had really changed. Bad faith became for 20 years a canon among French romantic intellectuals,

who started, like Francois-René de Chateaubriand, to stigmatise Negrophiles by recalling the vengeance of the blacks. Lamartine made bad law rather than men responsible for slavery (ibid., 274). Thus the excuse of a higher command or authorisation could be used effectively by wrongdoers. Only the *superior* rule of law was responsible. Who was a victim and who a perpetrator were confused as all humans became cogs in a system without an author. Primo Levi later made a damning condemnation of that position when discussing his experience in Auschwitz, insisting that he was a victim and not responsible for his own suffering. A position like that of Lamartine, once adopted, would always leave in place the social network which allowed repression.

The slow progress to freedom of blacks in the colonies of Britain and France, in 1833 and 1848 respectively, was rapid compared with societies whose entire economies rested on slavery. The cosmetic grant of freedom to the few slaves who lived on national territory – the salve for tender souls – while continuing slavery out of sight and out of mind in the colonies, was not an option. In states with huge slave populations, guaranteeing rights to blacks meant damaging local and often national interests. Within a national popular system of rights – even in a democracy – there was no solution that would not damage the community. So formal emancipation for slaves took 100 years. They often obtained the rights of nationals at about the same date as did workers and women. But, even then, they obtained the rights only in form and not content, not obtaining the same rights as other citizens until 1948. This exclusion was explained even by protagonists of human rights for citizens as a compromise required by the superior interest of the national community, and above all, the economies based on private property.

Towards Separate Development

The Caribbean, much of Latin America, and North America (even Canada had about 5,000 slaves) governed by the *Code Noir* until 1753 (see Trudel 1960) had economies were built on slavery. This had created large populations of others inside national territories. Because they were not completely accepted and equally treated, because rights were not culture- and colour-blind, blacks could not obtain adequate human rights, by either the measure of 1789 or, more importantly, 1793.

The solution of blacks on Santo Domingo had been to throw all whites into the sea and thenceforth exclude them from national rights. It was only possible because the blacks were the majority, but it proved an economic and political disaster. The solution in Latin America had been to profess adhesion to rights for nationals and then to set up dictatorships that subordinated blacks to other, lighter, races in a supposed civilising project, one version of which was the blending into a "coffee-coloured" people. This was also proposed in Australia even in the 1930s. But it was impossible for the blacks or the *indios* to throw the others into the sea because they were not numerous enough to do so. They remained enslaved and without rights until the end of the nineteenth century. Their rights were subordinated to the majority

interest. Excluding them from rights led to incessant revolt and, indeed, as North Americans discovered, to war. The solution of the North Americans had been to persuade the white nation as a whole to accept a truncated list of civil and political rights for blacks and then, having freed them, to leave them to sink or swim in a society whose laws were directed at not allowing them to enjoy those rights or to succeed in a system designed for the overwhelming white majority. Again, it proved a disaster politically and economically for the blacks. All three models showed the difficulty for blacks, deemed natural others, of attaining equal rights via national citizenship and reformism.

Sending Outsiders "Home": Early Ethnic Cleansing

If a national liberation war was not practical for black minorities in the two Americas, then the only way to have human rights without voluntary subordination to a national interest decided by a majority that self-identified by its difference from the blacks, was apparently to leave for a destination where blacks could obtain their own rights by creating a homeland for themselves – a new state for their "nation". Increasingly, people who wanted human rights for all saw that as a way to give large slave or ex-slave populations rights. Concern for those who would have to be displaced to make room for them – since nearly all the world was inhabited – was not regarded as creating an even greater problem.

So "repatriation" was promoted as a solution for blacks, proposed by both pro-slavers in the US, who thought that the presence of free blacks would create discontent among slaves, and abolitionists in the American Missionary Society, who thought that such people should be returned "home". Among models was Sierra Leone, set up by the British to get rid of freed slaves repatriated to Britain after the American war and regarded as too difficult to integrate into the British nation because of their "colour" (The British also "philanthropically" transported freed American slaves to Nova Scotia). The acquisition of land in West Africa was financially backed by the US government. Over 50 years, deracinated American blacks were returned to the West African territory that became Liberia. Thereafter, Liberia remained Christian, ruled by US-born or -origin mulattos, and faced by a hostile animist tribal interior. It was thus an early attempt to found a new nation-state to which a problematic minority people could be sent en masse. Liberia is an interesting example of an early attempt (1816) at ethnic cleansing. In a sense, Liberia was the white obverse of Dessalines' vengeful hurling of whites into the sea, although Americans did not register that when creating Liberia. It rapidly turned into a disaster and was saved from collapse only by outside philanthropy and by US money. Both new countries for blacks – Haiti and Liberia – showed the serious difficulty of creating viable nation-states to attain effective human rights for their citizens in a world whose economic and social inequalities were already structural. Today both are still listed as "failed states". The other solution was to find such "intellectually inferior" humans – what

even Lincoln considered Negroes to be – spaces that would be colonised under US aegis. Among the areas considered under Lincoln's administration were Panama, Guatemala and the disconcertingly named Ile à Vache. The Guatemalans refused and only 450 went to the British island. This policy highlights the limitations of a system in which popular sovereignty and the nation is privileged over human rights. Even the progressive Lincoln believed blacks to be inferior who would therefore would sink rather than swim in the white host society. The only solution was to expel them to areas outside the US, where they could construct their own nation with rights appropriate to "lesser" humans.

Since this proved impracticable, the bulk of blacks remained inside a white society that had already decided that they were inferior beings. This took on a new sense with the integration of women into the nation described in the previous chapter. Where men were mainly concerned to exclude foreigners from national economic and social rights because they had not contributed to the nation, the women's struggle shifted the emphasis. The outsider was designated unable to become a citizen because of certain attributes of a social nature: inadequate education, drunkenness and vice that showed inferiority. These were seen as inherent or natural and used, even by Elizabeth Cady Stanton, to exclude from those meriting acceptance in the city both immigrants of other religions and ethnicities, and black men and women. It seemed that they could not be integrated into a national family defined by hard work, thrift, cleanliness, self-reliance and active citizenship. The distance from the ideal of American womanhood was great. It ended the community of feeling between woman and other races that had existed since 1789 on the basis that they all were excluded from the rights by men on the ground of "natural difference". None were "Men" even in 1789, but the definition of men had changed so much by 1918 that women could be clumsily fitted into it. They had shown their "complementarity" to the hitherto male project in nation-building by agreeing on a common set of those humans who were to be excluded from national rights, aliens, who remained inhuman. That quality was shown by their social traits. Black leaders felt that women were often their greatest enemies where they had been their best allies.

Women of the eighteenth century seeking equal rights with men often described themselves as slaves. The parallel should be understood metaphorically. In no way did the worst oppression of men or women as a group under the *ancien regime* resemble that of slaves of the epoch. Indeed, it is of the greatest importance to make this distinction so that the implications of being deprived of rights on the ground that you are not really human is understood in all its seriousness. A direct line can be drawn from the treatment of slaves in the eighteenth and nineteenth centuries and the concentration camps of Nazism. There is no equivalent connection between women's treatment and that of "inferior races" in Auschwitz. When men considered women as inferior in the discourse of the nineteenth century, the distance was never seen as unbridgeable. Whites equated blacks with orang-utans and openly suggested that they were sexual partners (Edward Long cited in Craton et al. 1976, 262–3). This was not how women were thought of by those excluding them: they belonged in another sphere, not in cages.

From de Gouges onwards, women had associated their struggle with that of blacks because of the "natural" difference argument which excluded them both on similar grounds. They had been active in the anti-slavery movement of Britain, where they provided one-tenth of its funds and were in favour of outright abolition well before the more cautious and conservative male abolitionists. Emmeline Pankhurst's earliest political memory was of attending a fund-raiser for the newly enfranchised blacks of the USA (1865) (Roberts and Mizuta 1993, 1). Stanton's fury at her exclusion, with other women, from the World Anti-Slavery Convention in London led to the Seneca Falls Declaration. Jane Addams recalled that the idolisation of honest Abe Lincoln in her family spurred her to feel community with oppressed blacks (Addams 1957 [1910], Chap. 2). And, of course, Beecher Stowe's literary work was the staple reading of hundreds of early women activists. As we have seen, this community of feeling disappeared over the nineteenth century as women became nationalist and then racist. The sentiments of du Bois, the black leader, reflected this desertion of blacks. In a letter to Miss M. B. Marston dated 11/3/1907, he wrote: "I sympathise too with the women in their struggle for emancipation. I believe in full rights for human beings without distinction of race or sex. At the same time I hesitate to say anything concerning women's rights because most women in the United States are so narrow that anything I should say would be misinterpreted. The Negro race has suffered more from the antipathy and narrowness of women both South and North than from any other single source" (in Aptheker 1973, 127).

What made for this common sympathy of women and blacks immediately after 1789 was that both were excluded from rights on the grounds of their "natural" difference from men. They were not seen as part of universal humanity but in varying degrees as things and as property (for slaves see for example, "A statement of the laws that at present subsist in the West India islands respecting Negro slaves prepared by John Reeves, 1789" in Craton et al. 1976, 181ff; see also Walvin 1992, 19ff), and thus civilly dead (*civiliter mortuus*).

Women were finally included in national humanity because their "natural" difference was no longer seen as sufficiently great to warrant their exclusion from national citizenship. Put another way, they had always been seen as human but different. History worked in the other direction where blacks were concerned. Until the rights of the citizen replaced the rights of man, above all after Napoleon was made emperor in 1802, they were included among its beneficiaries; then they were excluded. Yet the initial inclusion was mainly because the issue was not addressed in the mental universe of the average Frenchman. Once the status of slaves under the Declaration of the Rights of Man and the Citizen was addressed, it was rapidly decided that blacks could not be citizens. They were rejected on much the same grounds as women had been. Their "natures" made it unimaginable that they could reason with the autonomy required of active citizens. Even their progressive supporters, like de Gouges, thought that they would have to be civilised first (Blanc 1993, I, 80, 130ff, 136–7; Singham 1994, 137–8).

Conclusions

If rights were obtainable only through a national citizenship that demanded the suppression of one's difference, then minorities that wished to keep their cultures – let alone their skin colour – would not obtain rights within any framework of nation-states. More than this: if it were possible for, say, American blacks to follow a path like the women and show that despite "natural" difference, they acted exactly as required by the national community even down to assuming its prejudices – as many ex-slave slave-owners did before 1865 – and added to it, as would be argued later by protagonists of the richness of multiculturalism, they would still only create new excluded out-groups, of those who still did not conform sufficiently to the extended definition to merit citizenship rights. As they reinforced the nation by making it cover more humans, they also made complicated its identity. This was a recipe for continuous strife in a world of mass migration where the last comer and the migrant would probably be the least integrated and whose difference would have to be purged from the national body politic.

The more general importance of these black histories of the Caribbean and the Americas and the solution of creating new "homelands" like Liberia is, then, how they showed the inadequacy of providing human rights limited to national citizens in a world of mass immigration. In one respect, the history of black slaves pointed to the future experience of all immigrant communities, whatever the skin colour. The assimilation of difference was difficult when populations arrived in successive waves that could not be easily blended and were too numerous to have their traditions ignored.

The main problem for universal human rights was no longer how long the list of rights should be; whether economic and social rights should be added to civil and political rights, but whether "Man" meant a "Man like us" or something more. If it were the former, national rights would never have a place for outsiders. If they were already within the nation-state, they would have to remain excluded from rights or leave the territory. Ethnic cleansing became a necessary corollary of rights within the national system. No nation-state was going to complain if another forced its "outsiders" to leave. This opened up the possibility of more horrendous solutions. If some humans are not really human, then a belief in rights is quite consistent with their inhuman treatment.

Chapter 10
It Could Happen to Us: The Uniting Force of Genocide

Ethnocide in the United States and Australia

The French revolutionaries regarded the United States as ideological allies. After all, the 1776 revolution in the colonies had started from declarations about human rights and soon established a national-popular democracy. Alexis de Tocqueville visited that country in 1831 and pronounced it "essentially" and "eminently" democratic (de Tocqueville 1966, I, 58), stating that there the people were sovereign and all states had adopted universal suffrage. It cannot be gainsaid that by the standards of that era, the US was *the* democratic polity – that in France having been crushed by 1795. Tocqueville, who disliked the egalitarianism of the Americans, also noted that this democracy had created the feeling that the citizen should participate politically and did in fact control the state. Americans were patriots with a strong sense of their rights: "democratic government makes the idea of political rights penetrate right down to the least of citizens, just as the division of property puts the general idea of property rights within the reach of all." Since everyone had or could own a plot of land and controlled the government, they were doubly law-abiding and legalistic (ibid., 290–4). Indeed, where he describes the rights so dear to them, he foreshadows the concept of possessive individualism latent in Locke's work and developed by the late C. B. MacPherson (1964).

As we have seen, the United States and other nations, without much sense of wrong doing, had proposed and conducted ethnic cleansing of resident minorities who did not or could not meet demands for conformity to the national identity. Where mass deportation proved impractical because there were too many, or for some other reason, for example, that they were already "at home", ethnic cleansing led almost seamlessly into genocide for the recalcitrant.

So Tocqueville's observations are highly significant as he traces the slide from ethnic cleansing – where the "reasonable" solution for attaining human rights was that each people should have its own territory and its own rights – into a history of genocide. By 1835 it was clear that the *democratic* United States with its advanced human rights for white citizens had embarked on a policy of ethnic cleansing and

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genocide of the Native Americans. The year before Tocqueville arrived, Congress had passed the Indian Removal Act, effectively forcing native Americans off their land as hordes of whites started to arrive after 1800. The government simply "persuaded" the Indians to leave traditional lands by blandishments, bribes and coercion. They left for "new wildernesses". The cleansing was described as being in the national-popular interest of the white colonists, which justified forced removal and slaughter when the natives resisted. This policy was advanced by democratic American whites who were, indeed, so savage and unjust on occasion that the state attempted to rein in its murderous citizens.

Tocqueville had visited the frontier and seen the surviving Indians who lived there, often after having been pushed there by the advance of the white invaders (Tocqueville 1966, II, Appendix 4, "A Fortnight in the Wilds", 968) intent on taking their land. In the face of this dispossession, he felt that the "Indian race is doomed to perish" (ibid., 404). They had no option but war, which they would lose, or civilisation, that is, settling down as private proprietors to till soil that they considered inalienable and belonging to all. The latter option was inconceivable for men who thought "hunting and war the only cares worthy of man" (ibid., 406). He thought that Indians were like both the lords and men of Europe's pre-feudal and feudal times.

The Rousseauian belief in the good of the people had been replaced in Tocqueville by another notion. The source of the ethnic cleansing and genocide, in his view, was the people and the national culture itself, not elite manipulation by US leaders. He noted that the greed of the Americans as a whole prevented their listening to the appeals of Indians who, aware of the inequality of forces, pleaded that they be left some land. "In the midst of this society, so well policed, so prudish, and so pedantic about morality and virtue, one comes across a complete insensibility, a sort of cold and implacable egotism where the natives of America are concerned. The inhabitants of the United States do not hunt down Indians with hue and cry as did the Spaniards of Mexico. But it is the same pitiless feeling that animates the whole European race here as everywhere else" (ibid., 971). Whatever they did, the Indians perished. So, Tocqueville remarked, the *democratic* intention of exterminating all Indians was as patent as that of the Spaniards in Latin America although the methods were different (ibid., 397–422). He gave this damning summation of what a democratic national popular people had done:

> As long as the Indians remained in their savage state, the Americans did not interfere in their affairs at all and treated them as independent peoples; they did not allow their lands to be occupied unless they had been properly acquired by contract; and if by chance an Indian nation cannot live on its territory, they take them by the hand in brotherly fashion and lead them away to die far from the land of their fathers.
>
> The Spaniards, by unparalleled atrocities which brand them with indelible shame, did not succeed in exterminating the Indian race and could not even prevent them from sharing their rights; the United States have attained both these results with wonderful ease, quietly, legally, and philanthropically, without spilling blood and without violating a single one of the great principles of morality in the eyes of the world. It is impossible to destroy men with more respect to the laws of humanity" (ibid., 420–1).

"Nowadays the dispossession of the Indians is accomplished in a regular and, so to say, quite legal manner" (ibid., 402 and ch3). Yet even this was too generous. The

Frenchman had been deceived about the peacefulness of the methods employed. They were often just as atrocious as those described by Las Casas and would become worse after 1835 (when Tocqueville's book was published). The Indians who refused to give up their lands were demonised as "savages" and monsters. Many Indian nations then chose war as it became more and more evident that the US government and people would not keep any promise to leave them any land. Thereafter they were physically exterminated, culminating in the infamous massacre at Wounded Knee in 1890 that we discuss below.

We return to the origins of this democratic national-popular genocide. We have seen in earlier chapters how the first whites in North America had been impressed by the warring native Americans. The first accounts described them as "marvellous". Their savagery was noted in the sixteenth century, but then it was little different from the everyday savagery of a European and this quality was not decried. Moreover, at first the whites recognised that the land belonged to the Indians and that they cultivated it. Yet, while by the seventeenth century the whites were fleeing persecution in their own homelands and were often received generously in North America; barely surviving in New England without Indian help, they saw no injustice in taking and cultivating land. There was, therefore, never a relationship without friction and this friction increased with the numbers of white arrivals and as cultural incomprehension developed over matters like the exclusive ownership of land and individual property rights. Even before Locke wrote his work and before the bill of rights of 1689, both Indians and whites had committed atrocities of a hideous sort against each other as a local tradition of rights faced that of "possessive individualists". So the whites of the early seventeenth century – who came from the then-most advanced national rights regimes in the world – started to commit crimes against humanity on a par with anything reported about the Indians. This is not to gild the lily of the savagery of inter-Indian warfare.

The Pilgrim Fathers, 17 years after landing in Connecticut in 1620, set alight an Indian village at Mystic River, roasting 500 Indians: "It was a fearful sight to see them frying in the fire…and horrible was the stink and stench thereof. But the victory seemed a sweet sacrifice." Then 8 years later, Dutchmen from New Amsterdam (New York) on a reprisal raid, after killing over a hundred men, women and children, caught a hapless Indian. "The Indian was publicly skinned in strips and fed with his own flesh while he tried to sing his death song, until, skinned from hands to knees, castrated, and dragged through the dusty streets by his neck, still alive and singing; he was placed on a millstone and his head crushed to a pulp. Dutch women played kickball with other Indian heads brought from Long Island and New Jersey" (Burnette (Sioux) and Koster 1974, 2–3). So, in savagery, whites matched anything ever reported about the peoples whose land they were taking and holding by force. And, the women equalled the men in this savagery. The atrocities continued into the twentieth century. In 1778 General George Clark stated that "the Absolute orders of Congress to the Army now in Indian country is to Shew no mercy to those who have been at war against the States." Adding "to excel them in barbarity was and is the only way to make war upon Indians" (cited in Kiernan 2007, 321). In 1910 "old-timers" in California still boastfully displayed blankets made of Indian scalps (ibid., 4) A war that has not ended had started.

These constant wars that were fought against the original inhabitants became a major drain on imperial funds. It was mainly guerrilla warfare in the early years of settlement. Those in isolated spots and on frontiers were most at risk of attack by dispossessed tribes. This sometimes had curious consequences. Because Quakers in Pennsylvania were pacifists, they deliberately abdicated direct political power to others prepared to wage merciless reprisals against Indians (see Franklin 1998, 115–9 who describes how this was done). But many, if not most, of the men who would become known as the "fathers of the revolution" and the founders of the new nation and its rights, grew up and won their spurs in the French and Indian wars. The most significant was when a major confederation of Indian tribes loosed the war of 1763, which devastated much of Pennsylvania and Virginia. The New England colonies refused to come to the aid of the two southern colonies in 1763 (see Burke 1924, 23). George Washington, an admirer of all that was British in politics and rights, and a major slave owner whose slaves were discreetly housed in two unobtrusive buildings in what is today a national monument to the revolution and its achievements, won his reputation in the Indian war of 1763. We might say that in his rise leaders and people can be seen to come together in their fear, hatred and determination to kill all Indians in the new righteous republic. For 3 years he ruled the frontier with an iron fist in the face of "A crafty, savage Enemy" (Wieneck 2003, 62–5). And Thomas Jefferson, a founding father of the republic, stated a month after the declaration of independence in 1776 that if any Indian having left his land "out of our settlements" on this side of the Mississippi, should return, "we would never cease pursuing them with war while one remained on the face of the earth" (Boyd 1950, I, 485–7). Again and again he called for their "extermination" (Kiernan 2007, 323).

As we have noted, contending European states hired the Indian tribes as mercenary troops in the wars that they fought increasingly in their empires. They encouraged their savage "take no prisoners" customs because these differed practically not at all from their own where other "races" were involved. Natural man was the same either in Pall Mall or the wilds, as one writer of the late eighteenth-century Australia put it (Tench 1979, 294). When the French conquered Corsica, any rebel taken was liable to be "halved" that is, tied to two bent saplings that were released, tearing him in half (de Cesari Rocca 1993, 72). Nevertheless, the demonization of the Indians, who proved formidable fighters, proceeded apace with the theft of their land.

As the whites pushed the Indians westward, they continued to think of them as other, as separate nations outside the system of rights that were either claimed or in fact existed for themselves. Even when the federal fathers were discussing what the political arrangements should be for the new nation, they discussed native Americans in this way. They were seldom thought of as citizens with rights, even less so than the blacks whose enslavement was already an issue. But that citizenship was implicit in the generalities of the constitution and the bill of rights and prompted some concern about what Indians might be deemed members of a state (*Federalist papers,* No XLII, 276–7).

The expulsion policies are clear from the treaties that the British signed with the Americans in 1812. They had used the Indians in their war. The republic was thus

built on the belief that the "savages", as Jefferson was wont to call them, were barbarous enemies. Madison, in his war message to Congress in 1812, stated: "In reviewing the conduct of Great Britain toward the United States our attention is necessarily drawn to the warfare just renewed by the savages on one of our extensive frontiers – a warfare which is known to spare neither age nor sex and to be distinguished by features peculiarly shocking to humanity. It is difficult to account for the activity and combinations which have for sometime been developing themselves among tribes in constant intercourse with British traders and garrisons without connecting their hostility with that influence and without recollecting the authenticated examples of such interpositions heretofore furnished by the officers and agents of that government" (Birley 1951, I, 277–8). So, while in the Treaty of Ghent ending the war with Britain in 1814, the United States promised to cease hostilities against the tribes and nations of Indians and to "restore to such tribes or nations…all the possessions, rights, and privileges, which they may have enjoyed of been entitled to, in [1811]" it was only on condition that the Indians cease all hostilities against them and that the British also return possessions, rights and privileges to the Indians (ibid., 281). In the American people's minds, the Indians remained enemies of the nation. So even while they established their own national rights in all the territories they settled, Indians were excluded as if they were another nation. This is what made the proclamations in 1829 of Andrew Jackson, the national Republican leader and darling of the people, that he would see to it that those within US power were treated humanely and established a Bureau of Indian Affairs in 1834, yet another example of hypocrisy by the whites (ibid., 65). Jackson's policy could only be implemented consistently "with the habits of our government and the feelings of our people"(ibid.). In 1830 he made Indian removal legal in the act of that name. It was supposed to encourage Indians to relocate westward. In fact they either agreed or, like the Seminoles who resisted, were killed.

The national interest encapsulated in Jackson's statement was quickly made clear. The views of Locke and Emmerich de Vattel, who by this time had become the authority in international law concerning the rights of original peoples, was that they were not entitled to ownership of their land since they did not work it. On the other hand, the American whites claimed that they had a divine manifest destiny to occupy, cultivate and make the entire continent their own. Jackson, as spokesman of the common man, made the notion the title of a book of 1839, the platform of his Jacksonian democrats in the 1840s. And Lincoln spoke of it enthusiastically as the core of Young America. It boded ill for Indians. Lured there by gold discoveries, whites settled California before they settled great plains. Its tribes, mainly coastal, were inoffensive. Despite this they too were exterminated, down to less than one-third of what they had originally been by 1850, and to just 16,000 people by 1910 (see Kiernan 2007, 50ff).

As the whites fought the native Americans to a standstill and, having pushed them off their land, settled it, often despite earlier promises not to do so, a concentration camp policy of forced resettlement on reserves became the norm. The Bureau of Indian Affairs was established to manage these matters. Under military control in 1849, it became not only a refuge for rogues intent on stealing the food on reserves,

but also the controller of a concentration camp regime in the proliferating reserves onto which the remaining Indians east of the Mississippi were driven until they died of disease and starvation. The policy of the BIA has been described by an Indian spokesman today as having become late in the century "to obliterate the traditional Indian culture and religions" (Burnette (Sioux) and Koster 1974, 9).

The ethnic cleansing and genocide of the original inhabitants only came to a brief halt when, after the Civil War, the state attempted to seize the lands west and south of the Mississippi and met a fierce resistance led by men like Red Cloud, Sitting Bull, Geronimo, Cochise and Crazy Horse, whose exploits have gone down in myth. On earlier occasions, Indians had been victorious and wrung concessions and recognition of their rights. But in the decades 1860–80 the whites nearly lost the war. This redoubled their fury and determination to exterminate the Indians of the mid- and south-west. Again the wars were brutal and, as had been the pattern in the past, neither women nor children were spared. "Nits make lice" one US Colonel pronounced before killing 217 Montana Indians in 1870.

It was in these wars against the Apaches, the Lakota Sioux, Cheyenne and the Comanches, who often acted in unison, that the "savagery" of Indians passed into the folklore of the Wild West, excusing the cold-blooded murder by whites of native men, women and children. Long described as irredeemable savages or animals like wolves, they were henceforth portrayed as monsters, that is, not human at all. This slide from seeing as savage a refusal to settle down to civilised ways, to a reduction of other human beings to a status of less than animals was not new. We have described it in the Middle Ages; and many new immigrants came from the remnants of those conditions in Europe. But the view was now that of a democratic nation-state. Every successful defence the Indians made of their land was portrayed as a massacre. Typical was the Fetterman "massacre" of 1866. Fetterman had announced that with 80 men he could defeat the Sioux, but his men were wiped out in an ambush (Brown 1974). The enraged General Sherman of Civil War fame swore to exterminate every Sioux man, woman and child in reprisal.

It is in the context of such statements that we should understand the brutality of Indian resistance. As the state sent out its punitive columns which took no prisoners, the tribes fought back. Even President Hayes recognised in 1877 that the native peoples were not allowed to settle down on land promised to them in the myriad treaties made by the state. They were "jostled off" that land. The battle of Little Big Horn in 1876 was provoked when General George Custer, in breach of a treaty made in 1868, entered reserved Indian territory. His troops were all killed, provoking outrage. It is instructive to read how the event was discussed, especially on the frontier. The Indians were not seen as in any way justified in what was tantamount to self-defence against an invading enemy. Their "fiendish atrocities" made them "worse than wild beasts" (cited in Kiernan 2007, 362). A cry went up for their extermination, especially of their women and children as this would dampen warrior ardour. State and people took up that solution in a frightful slaughter.

The remnants of the Indian tribes fled to fastnesses where they starved to death (Neihardt 1932, passim) or they were forcibly placed in a new network of reservations.

Only then did the United States discontinue its overall policy of treating Indians as separate nations or tribes and traditional enemies. Instead, it had to recognise that they were part of its population. A marker of this was the Dawes Act of 1887 which restated the policy of reservations and made each individual Indian who agreed to settle and become a small farmer – on the model that had created the rush to the west under the Homesteading Act of 1862 – a citizen with the rights of other Americans (see Birley 1951, III, 163–4). Those who refused to settle down were still excluded from citizenship and rights. The Dawes Act was, in the context of popular hatred and genocide, hypocrisy. Easterners, where the laws were made, had long since forgotten what had been done there and romanticised the Red Indian in the stories of Fennimore Cooper, and Longfellow's song of Hiawatha. The westerners took it all with a grain of salt, pleading that they knew that the Indians were irredeemable savages and destined to die out. The reservations were there to ease them out. Perhaps 250,000 Indians remained by 1900, while the white population had increased six-fold to about 75 million. The few remaining Indians became objects of ridicule and horror because of their drunkenness, dirt and poverty. The view of westerners prevailed over eastern do-gooders. This was revealed in the massacre of remaining Sioux, on a forced march to a reservation, which took place at Wounded Knee in 1890. Although practically defenceless prisoners, they were all shot down or hacked to death. Thereafter there were occasional desperate and hopeless rebellions until 1915, all of which ended in the death of the rebels. The genocide was complete. The Indian population was about 7% of what it had been in 1492 (Thornton 1987, 42). The white population had grown from nothing to 75 million, the biggest in the white world excepting Russia. Democratic America had apparently cleansed itself of at least one other race, the smallest, weakest and most defenceless on its territory. In 1924, all Indians were granted US citizenship, becoming the supposed beneficiaries of its national-popular rights regime, regarded as the most advanced in the world by most Americans.

What is striking is how much these bloody relations fostered white hypocrisy about who had rights. As the British nation became associated with certain virtues, above all Protestant and Lockean, so those virtues were endorsed in the colonies. Crèvecoeur's 1782 *Letters from an American farmer* describe what it was to be American in these words: "We are a people of cultivators…united by the silken bands of mild government, all respecting the laws…animated with the spirit of an industry which is unfettered and unrestrained, because each person works for himself" (de Crèvecoeur 1998, 41). Central to their identity was that which founded all rights on labour, the cultivation of land, which gave a man a right to it and was the expression of his individuality and free action. People who did not do this had no rights. There could be no place for rights for "wandering tribes", who lived by the hunt. Already this errant quality was seen as essential to the North American Indians. It was the identity attributed to them in practically all white accounts after the seventeenth century (see Takaki 1993, esp. part III). But it only became a sin to be extirpated when it stood in the way of human beings who wished to cultivate the land and multiply and increase its products through industry.

Australia

When Tocqueville visited the United States, Australia was still autocratically ruled. Only a few years earlier, NSW had introduced the common law in the place of rule by gubernatorial whim. But it was just as, if not more, socially democratic than the United States that the Frenchman described. It too was a vast territory where small-holding agriculture had become the norm from the first generation of settlers. Like the US, the eastern settlements were embarking on the democratic reforms that would see it become in 1856, with New Zealand (1853), one of the two first British democracies. And there too, a campaign of ethnic cleansing had started that would lead to genocide by the democratic national-popular regime that developed in the last decades of the century in the process of building a "nation for a continent" (see Ward 1977).

This process, though shorter, since Australia had been first invaded by whites in 1788, bore remarkable similarity to that in the United States, down to women kicking Aboriginal heads around. This overall similarity is notable, despite a number of significant differences that we note immediately. Nineteenth century Australia was made up of British colonies, only becoming a national federation in 1901 and only gaining political independence in 1931. Popular sovereignty remained a myth until the twentieth century as Australia had no revolution, no republican constitution and no declaration of rights establishing popular sovereignty. This does not mean that the ethnic cleansing and genocide on the southern continent was any less the work of a democratic people, "from below", carried out for the same principles. It merely means that the state was less the expression of a "people" there than in the United States and that the state, in particular while Australia remained a "more remote part of Britain", more often tried to rein in the excesses of its people.

Its inhabitants were British and Irish in the main, unlike those of the United States where only 40% remained of that extraction during its nineteenth century genocide. Where the immigrants to the northern continent came from countries still caught in the Middle Ages, where men and monsters were confused and extreme brutality the norm, the British, and to a lesser degree the Irish, transportees to Australia who were still a majority of the population into the 1840s, came from a newer, urban culture and were more homogeneous in composition. Yet they proved just as brutal and murderous as their North American counterparts, suggesting that the genocides of the democratic nation-state have more to do with its logics and system of rights than any cultural theory of the brutal mores of southern, northern and eastern Europeans in countries of new settlement. The genocide followed the same pattern: The whites arrived, claimed exclusive jurisdiction over and ownership of the land, and began to displace the Aboriginal peoples. The latter started to fight back in a war that never really ended, although until recently it was hushed up to allow the extinction of the local population to be attributed more to the fact that civilisation killed Aboriginal people)that is, by disease and drunkenness) (see Reynolds 1987, 1995). When they had been crushed on the seaboard and driven inland, a process of forced incarceration on reserves began. In Tasmania, where

resistance had been fierce, the state and its people tried to drive the entire population behind a "Black Line". The solicitor-general stated that to protect convicts, the Aborigines should be exterminated, if that were necessary (Boyce 2008, 275). The British government even had to sanction the Western Australian government for directions tending to the "extermination" of the natives (see Davidson 1991, 83). The reservations were in inhospitable areas and although run by "protectors", were widely recognised as places where the Aborigines, unable to adapt would, and did, die (see generally McGregor 1997). The incarceration of war-like Tasmanians on Bruny and Flinders Islands saw their destruction by the 1830s.

The state and its courts, applying the notion of rights in Locke and de Vattel, justified taking the land, indeed the entire continent, on the grounds that the natives did not cultivate the land but "roamed" over it and therefore had no right to it. Any theft of animals or goods brought the direst sanctions. The official policy of destruction in the name of bringing law and order and property to the country (and it was draconian in a land where most of the white inhabitants were convicts or ex-convicts), allowed the population, above all on the frontiers, simply to murder at will, and like in the US, their victims were often children, women and the aged. Practically never were they punished for such killings though on occasion, the numbers killed without reason were too many for there not be a sanction. In the infamous Myall Creek Massacre of 1838 in New South Wales, the convict perpetrators were brought to trial but they were backed by their "squatter" (large landowner), employers against the "do-gooders". They were given death sentences but popular opposition was such that five were reprieved. At a retrial, they convicted and hanged, more to re-establish state authority than to achieve justice.

The frontiers of "civilisation' moved to the north and centre in the 1870s. Again there was war and again resistance prompted vigilante and official reprisals. There was even systematic poisoning of Aborigines with strychnine. Soon, only the desert peoples remained beyond the reach of white tyranny, though even there they were not safe – the last massacre took place in the Northern Territory in 1928. The offender was acquitted. Those natives left behind after the slaughter, died out. They were then deprived even of the reserves they had been granted, as the land became too valuable to whites. The pattern in Victoria and South Australia was typical: almost no reserves remained by the twentieth century. By 1900 the ethnic cleansing and genocide had reduced the original population to about 12% of what it had been before settlement (see Butlin 1983; *Australian Historical Statistics* 1988, 3, 4, 104; see Davidson 2003a, 69–99). The survivors were then subjected to a determined policy to destroy their culture and have them subsumed into the white race. Children of "mixed" blood were forcibly removed from their parents and placed in homes and missions, some of which are now notorious. When retrained, they became near-slave labour, either as jackaroos on Northern Territory or Queensland cattle stations, or as housemaids in the southern cities. It is estimated that when this policy, of the "Stolen Generation", was ended in the 1970s, 70,000 children had been so removed.

The Australian whites were desperate to have the rights of Englishmen and built the drive to nationhood around that demand. They did not get even those attained

in 1688 until federation, but always claimed to embody the same tradition as those in the Old Country, indeed, to exceed it in democracy, which was quite true. But these rights were for whites only. Unlike the United States, the Aborigines were never treated as separate nations with whom one made treaties and had their own traditions of justice. Rather, while forcibly subordinated to the rules of common law, they were excluded from practically all the benefits of that system. Neither allowed to plead or defend themselves in court, they were governed autocratically wherever whites had power over them, throughout the nineteenth century. They were not granted citizenship at a federal level until 1967 and were ruled by a separate system under the constitution. Most, having been compulsorily sent onto reserves, were not allowed to leave them without a pass and only if they were deemed "civilised" by officialdom could they ever have the vote. Until the mid-1900s, in some states, proof that they were civilised was shown by their never seeing their tribal relatives again.

So much was the building of an Australian national identity associated with taking the land and destroying its original inhabitants, that the terrible story of the ethnic cleansing and genocide could not be described as such until the 1980s. A history of Australia as the "triumph of the nation and its decent law-abiding citizens" (who brought the boon of civilisation to a primitive and savage people) blotted out what had actually happened. What is horrifying about these genocides is not only the numbers killed, but also that democratic peoples committed them. While claiming to be the most advanced nations in rights for all citizens, they saw no connection between that view of themselves and the killing of others, whose murderers, when writing their own national-popular histories, proclaimed themselves the greatest defenders of rights.

Democratic Murderers

In democratic Australia, as in democratic America, what had happened was widely known, indeed, it provoked nation-wide debate. It is this that must be remembered in a history of *universal* human rights. Where Robespierre had tried to hide the story of mass murder of opponents in the Vendée (see below), in the "new worlds", the ethnic cleansing and the genocides were known from the moment they took place and debated widely. Typically, the Fetterman massacre was descried as "a nationally debated incident for 10 years" (see Brown 1974, 13) and the man who was made a scapegoat for not having saved the white soldiers became a "national figure" (ibid., 230). Similarly, the massacres in Tasmania in 1830 and in NSW in 1838 have been described in these ways: "there was a vigorous debate about its legality and intent" at a public meeting in Hobart (Boyce 2008, 274) and "five escaped hanging when the administration lost its nerve when faced by mass pressure" (Goodall 1996, 31, 34). Practically everything that was done to the victims was legal, by and under laws passed by the sovereign majority in parliament. Where it was mass murder, which was not sanctioned, the sanctions applied were so weak that in fact it remained a

crime with impunity, sometimes through pardon, sometimes through amnesty, sometimes because popular pressure in favour of the perpetrators made it politically impolitic to proceed. Obviously, the victims could not believe that rights and justice were attainable through this legal system.

The whites of democratic societies knew what was being done. Their misdeeds were excused by the "doomed race" theory where civilisation spelled the automatic demise of the other; explained by the unreasonableness of those who refused civilisation's benefits and by their invincible "primitiveness". The effects of "civilisation" in degrading them made it easy to regard them with contempt and loathing. This is quite clear in accounts from both continents where the earliest descriptions of noble, well-made peoples gave way to negative reports about their hygiene, smell, eating habits and any other difference from the norms of the invaders. By combining facts like the death of native peoples through disease and drunkenness (for which no one was "responsible") with, say, the forced removal of all children of mixed "blood", the latter policy could then be rationalised as in the interests of the victims. The destruction of another culture could be, and was, seen as doing good. Most Christian missionaries took that view. But, when it came to open slaughter of the old, women and children, also common knowledge, the only salve was to say that the victims were sub-human monsters who had to be put down. This was also done often by writing false histories where the story of the genocide was omitted. This was bad faith, especially among the people who knew the victims.

The native peoples who ended up often hated and reviled, but best off, were those who were warriors who fought the whites to a compromise. Among these were the Maoris of New Zealand, some groups in India and some North American tribes. Woe betide any gentle and inoffensive groups, they were not only regarded with contempt because of the warrior form that nationalism had taken and which they did not exemplify, but in the hierarchy of nationalisms that were emerging were nearly always placed among those who were destined to be "slave races".

The genocides in the United States and Australia are important for a history of universal human rights because they were all committed with popular support by formally democratic polities. The claim that genocides are committed only where there is no democracy, or that establishing democracies prevents such horrors, has no basis. All these genocides became popular knowledge; democracy is no guarantee of universal human rights. They are as likely to be breached by a democratic people as by a tyrant, as the following examples show.

Genocide in the Vendée

It cannot be stated too strongly in a history of universal human rights that ethnic cleansing and genocide are corollaries of nationalism. Both crimes took place concomitantly with the emergence of nation-states, expressly to make them strong. We have recalled that the first nation-state created in a national liberation struggle by blacks was Haiti, where blacks cleansed their island of whites in a massacre. This shocked and terrified

even progressives like Thomas Jefferson at the time and Haiti was placed under a trade blockade that destroyed the country over the next century. But this struggle came before the nation-state was seen as the solution for all ills and it was forgotten history 50 years later. Moreover, it was, when explained, attributed to black primitiveness and savagery. Genocides were, however, committed as often in the same decades by democratic nation-states as by non-democratic ones, starting with the democratic French revolutionary state itself. Indeed, the irony is that such crimes were committed in the name of protecting *national* human rights almost as soon as they were first stated to be the goal of a nation-state. One of the earliest examples of how the national-popular principle would slide quickly into genocidal policies came in France in 1792–5, where there are today sad memorial stones at Notre Dame du Petit Luc to hundreds of children, most under the age of 7 years, murdered because of the religious difference between the state that was committed to the nation and their parents' commitment to its Catholic opponents. According to the logic of Renan's view of nationalism, such events should be and are quickly forgotten.

The numbers massacred, burnt alive, tortured to death and raped in the Vendée were low (about 25,000) compared with later massacres such in the Congo (10–13 million) ("Genocide and Crimes Against Humanity: King Leopold II and the Congo", www.enotes.com/genocide-encyclopedia/king-leopold-ii-congo, accessed 8/04/09) but this genocide is important here because it was committed by whites against whites. Moreover, a democratically supported nation defended the massacres in the name of the defence of the rights of man and the citizen. Except for the inhabitants of the Vendée, whose survivors have generally remained reactionary, separatist and hostile to the French republic to this day, few French citizens really condemned the Jacobin disregard of these rights at the time. The genocide clearly expressed the will of the majority of the national-popular state *and* of its most democratic expression. It was an imposition of the rule of law according to the Jacobin/Rousseauian canon and it was presented as protecting the national interest against a tiny minority of traitors to community norms, those of the 1789 Declaration. It is significant for our account because it showed that where relatively few people are massacred proportionate to the national population, and they can easily be demonised, even if they are apparently "just like us", genocide in the name of the nation can have the general support of its citizens.

In 1791–2 Robespierre had not only earned the nickname the Incorruptible, but his realism and the consequent mildness of his views in face of the Brissotin raving about starting popular rebellions in other countries was striking. He believed that the French revolution and the Declaration could not be exported with guns because reason moved slowly, and even the most oppressive governments had powerful support from the prejudices and customs inculcated into its people. It was foolish to bring freedom to others before it had been won at home where the main enemies were to be found.

> The Declaration of Rights is not sunlight that enlightens all mankind at one time…It is easier to write it down than to establish in the hearts of men its sacred character effaced by ignorance, passions and despotism (Robespierre 1950-, VIII, 81ff, 100 (2/1/1792, 11/1/1792)).

Instead of platitudes about the attraction of the Declaration, Robespierre believed that France should think about its real situation and its internal structures. He supported equal treatment for all citizens but he was not naïve. The revolution could only be gradual. It had been started by the nobles, and the people had joined it because their interests coincided. Elsewhere, leaders opposed the revolution and insurrection. Nevertheless and despite such realism, so attached was Robespierre to rights that even when he started to lose power in 1793 he still took radical positions in support of them. However, even so moderate a man with such firm belief in rights betrayed them because of his nationalism and belief in the people. After France went to war and started losing badly, Robespierre began to think that in time of war what was of concern was public liberty, not private liberties.

> The principle concern of constitutional government is civil liberty; that of revolutionary government public liberty. Under a constitutional government little more is required than to protect the individual against abuses by the state, whereas revolutionary government is obliged to defend the state itself against factions that assail it from every quarter (Robespierre 1959, IX, 273–82).

His first step away from the primacy he accorded to rights was forced by what he thought was needed for the French people to defend themselves. He had always supported a popular army and argued that all Frenchmen should be allowed into the National Guard and should have to have the right to bear arms. This led to a policy of compulsory military service. His creation of a citizen army bore fruit as the enemy was stopped after its invasion. But the policy of conscription created problems: Areas that were heavily in thrall to Catholicism or had other reasons to oppose Paris, rebelled. Cities including Lyon, Marseille and Bordeaux rose against the capital. It has been estimated that 70 out of 83 departments opposed the government. But the most significant rebellions were in the west, in Brittany, where conditions had not changed much from those of the Middle Ages, and the mass conscription that Robespierre proposed caused great resentment among the peasants who needed to work when called up. The Bretons turned to other French rebels and the British for help. The British half-encouraged them to revolt while finally failing to give the expected support (Hutt 1983, I, ch5). It was in the face of such challenges that Robespierre declared that to defend the Declaration of the Rights of Man and the Citizen, rights for all and democratic procedures had to be suspended until the enemy was beaten. In 1793, executive committees, the Revolutionary Tribunal and the Committees of General Security and Public Safety, were established and began to rule by decree in defence of the nation and its people. Such policies have seldom been regarded as non-democratic – simply as war precautions needed to protect democracies, as the legislation in the British world in 1940–45 demonstrates.

The rebels fought for the values and rights that the church preached and against the Declaration. They were deeply attached to the church and its rites and festivals, and 50–80% of their priests were hostile to the regime. When asked to swear the "civic oath to the nation", only 159 of more than 1,000 priests did so in the Nantes department, 207 of 768 in the Vendée, 44 of 332 in Anjou. The non-jurors were replaced by those loyal to the regime but without ties to their parishes (see Sabatier, No 46, 8–10). Godechot suggests that the situation culturally was the same as in

Spain and Calabria. Thus the war they fought against the Republic in 1793–4 was ideological: against the Devil's work. It was ferocious (Godechot 1972, 205–13). One terrified object of their attacks stated "they want to kill all patriots" (Doyle 1987, 224). General Turreau, sent to repress the Vendéens, recalled: "they encircle you, cut you to bits; they pursue you with a fury, a bloodthirsty ferocity" (cited in Dwyer and Mc Phee 2002, ch12). "To the cry that all patriots should be killed like dogs, the Vendée rose as one. Anyone who refused to join them was cut to bits. Abbot Letort was killed with pitchforks, and the height of horror, a woman cut off his manhood." In just two villages, up to 800 villagers were killed in such fashion (see Gabony 1941, 206–11). With a similar fate promised for Paris and 20–40,000 in arms in the Vendée, Robespierre and the ruling party were understandably alarmed. The Convention therefore declared total war both on the Vendée and on the Breton *chouans*. It gave orders that the entire rebel population be exterminated. The reprisals were terrible. There is some suggestion that the atrocities committed by the insurgents prompted the savagery of republican response from the outset (see Chatry 1992, 149–50). And the contrary has also been alleged (Sabatier, No.46, 15). The ferocity on both sides culminated in the defeat of the Vendéens despite their skill as guerrilla fighters.

A*fter* their defeat, the Jacobins decreed that the survivors of the war should be exterminated. In October 1793, Barère ordered that the "brigands" be exterminated by the end of the month (see Fournier 1985, 22). While. during the campaign, General Westermann and his men took to this task with a gusto and sadism that has left horrified eyewitness reports, the command to bayonet the entire population in the area, including all women and children and, if necessary, "patriots", was sufficiently extreme for the general in command after the defeat of the rebellion, who claimed to have wished for a more conciliatory policy of amnesty, General Louis-Marie Turreau (1756–1816), to request a letter indemnifying him for what was done (Chatry 1992, 310–11; Fournier 1985, 43, " je ne suis que l'agent passif des volontés du corps legislative…S'il faut les passer tous au fil de l'épée, je ne puis executer une pareille mesure sans *un arête qui mette à couvert ma responsibilité*). Throughout the slaughter that followed the leaders involved sought and received legitimation from the state (Fournier 1985, 69). The Vendéens had no choice but to flee or fight for their lives. It was a "no take prisoners" battle in which women and children were frequently as involved as their menfolk. The frightful massacres by the republic are the more horrifying since they showed that the soldiers of the nation often took great pleasure in what they did as they considered it necessary for its defence. Men, women and children were burnt alive en masse, raped systematically, and cut to ribbons. The country was devastated and those left alive after the 12 columns of burning soldiers had passed were instructed to remove themselves into enclosed areas of resettlement on pain of death. Finally, enough were dead for the nation to declare that it had won. Other Breton rebels, the *chouans*, more criminal than principled, and known popularly as the *puans* or stinkers, continued to harass the Republic for further 10 years (Godechot 1972, 225ff).

The history of this first genocide made several matters clear. The Jacobins had already made the defence of the nation based on human rights a priority. The rising

in the Vendée terrified them, especially those among them who could only discern the hand of the foreigner, whether Rome or London. But they gave the order to exterminate everyone *after* the rebellion had been effectively crushed. The Vendée rising was thus seen as dangerous for its symbolic quality, not its real threat. The genocide was to defend the Nation. Barère's famous speech of July 1793 that led to the extermination decree made the perceived danger clear: "The inexplicable Vendée still exists…Destroy the Vendée! Valenciennes and Condé will no longer be in Austria's power; the English will no longer occupy Dunkerque; the Rhine will be liberated from the Prussians. Spain will be broken up…Destroy the Vendée…And Lyon will no longer resist. Toulon will rise against the Spanish and the English. The Vendée that is the coal which is devouring the heart of the Republic; it is there that we must strike" (Sabatier, No. 46, 18). The perceived danger was the example of a people who – against their own saviours – chose the old discredited values. This was too much of a threat not to be obliterated. The full force of the nation's law was applied and genocide ensued. Those involved, including patriots who were observers and potential victims of the campaign to destroy the national memory of the local opposition, constantly complained about this and about the breach of practically all of the declaration of rights. For example, on 29 March 1794 The Committee for Revolutionary Surveillance of Fontenay-le-Peuple wrote to Turreau: "It is our duty to tell you the truth. True republicans like ourselves are made to tell it, and you to hear it, you are our brother. The orders that you have given General Huché to burn the villages of Sainte Hermine, La Réorthe, Mareuil, La Claye…are from all points of view an attack on the public welfare…We have argued among ourselves for the honour of raising public anger against the actions of a general who disposes of human lives as if he were the supreme judge; who puts himself in the place of the laws…" They noted that "'the rights of man and the citizen' are outraged by a monster whose conduct exceeds, we must say, that of Nero" (Fournier 1985, 92–3). It was, however, national law and order that he was applying, like that applied in Auschwitz a century and a half later. Such law let loose men like him whose retort, in the world of hatred they all inhabited, was: "The Society has decided to denounce me as a Nero. It does me great honour because I would kill my own mother if she had supported the brigandage of the Vendée" (Sabatier, No.46, 18).

The privilege given to the defence of the nation in defiance of the rights that it was established to promote, was stated repeatedly by all the major leaders of the campaign. There is little evidence that their soldiers did not agree, whatever the feeling of local patriots. Only the fall of the Jacobins slowed down the pace of the destruction. It did not end it. Thermidor and its leaders were too implicated to conduct trials. They arrested generals Turreau, Huché and others. But all were quickly amnestied and Thermidor hastened to hush up any criticism. Napoleon later made Turreau a marshal and the latter died with all honours as a respected French general. A few sacrificial lambs, like Carrier, responsible for the Nantes drowning of around 5,000 people, were offered up to placate patriots like those of Fontenay-le-Peuple, but Tallien, Fouché and others who had been directly involved in the murderous policy escaped because the new regime was a shambles of contradictions. Thermidor was expressly in favour of a nation, albeit without democracy and with much

reduced rights, and it was not interested in criticising breaches of rights by that nation. In 1796 the remaining leaders of the rebellion were hunted down and killed. The rebellion became a struggle over a symbol.

What is important to remember is the early belief that the rebellion was manipulated and not a genuine popular resistance against the new regime or, more broadly, the declaration of rights. For the Jacobins to accept the latter idea would call into question the notion that the "people" is always good. Where it was possible to state that Spaniards, Austrians and Italians were savages and monsters and could therefore be exterminated without any real protest from Frenchmen, the same argument could backfire if applied to the Vendéens. While backward, they were Frenchmen and supposedly the backbone of the revolution. The men and women of Thermidor were anti-democratic but they had been complicit and were fervent nationalists, more so perhaps than Robespierre at the beginning of his career. So they too could not admit readily that Frenchmen were opposed to the new rights.

In the long run, until 1969, the nation-state won the battle for the history of the genocide in the Vendée, which was portrayed both as necessary for the defence of the nation and explicable by the manipulation of simple men and women by wily priests and the hand of foreigners. Historians today make clear that the thesis of "savages" manipulated by their clergy is not true. The mass of the peasants chose to fight for a particular tradition where rights were traditional and stated in their churches (Furet, in Furet and Ozouf 2007b, 354) The significance is that once the Vendéens had been presented as barbarous brigands and outlaws, the average French citizen justified what had been done or excused it. Only conservative and reactionary historians would state what had happened. In his *Origines de la France contemporaine*, Hippolyte Taine wrote "they were able to persuade the good public that crocodiles loved humanity; that many of them were geniuses, that they only ate the guilty and if on occasion they ate too much, they did not know that they were doing so, despite themselves or through devotedness, and sacrifice of themselves to the common good" (cited in Sabatier, No. 46, 21).

We may perhaps concur with the French belief that "horrified" British reports were crocodile tears and across the Channel the victims were certainly quickly forgotten. But we must note that despite claims like those of Westermann that he had killed 80,000 inhabitants of the Vendée in 1 year, this did not shake popular support for the policy of the state, overall adjudged necessary in the defence of the national people. One fact that should be made clear is that though Robespierre made sure that the reports of the massacres were never discussed publicly at the time they were committed, the events soon became common knowledge; the subject of several books other than Turreau's continual defences of his actions into the 1820s, notably in the *Dictionnaire critique* of 1800 and novels by Chateaubriand, Balzac (*Les Chouans*, 1972 [1829]) and Victor Hugo (*Quatre vingt treize*, 1960 [1874]).

It is thus not simply knowledge of what is done that matters in relating genocide to the drive for universal human rights. What matters who does who to whom. If the victims could be thought of as savage opponents of the nation then they deserved short shrift. They were brigands: people who were outlaws and beyond the pale. As

such, they could only be controlled by military force and the harshest application of the law. Indeed, since "terrorist" was a term already adopted in France, they were justifiably victims of terror of the sort that they and all such rebels sought to sow. Such people were outside or beyond rights as their views were unprincipled and irrational. Why else would they reject rights that were so self-evidently for their benefit? The notion that their own systems of social order and law were functional to the world they lived in and could not easily be divested was not easily admitted in a rational century.

The genocide in the Vendée had been carried out by a regime with the support of the people. This is what justifies its comparison with genocides committed by other white democracies, the United States and Australia, though there the victims were of "other races". In all three places, the perpetrators were democratic national citizens. It differs from the other democracies because in the Vendée European whites murdered whites and this is what was important for the history of universal human rights.

National Liberation in the Balkans

It was only when other "races" started to commit mass genocides of whites that the "white" democratic state and its citizens began to reconsider the national systems of rights and see new virtue in the universal claims of the 1789 Declaration. The first major example of this was the Bulgarian massacres of the 1870s, which aroused ire and condemnation among progressives in Western Europe and the New Worlds. This was an area where genocide for religious or cultural reasons went back into the mists of time as Muslims had slaughtered Christians and vice versa. But now, the significance of Turkish murder of Bulgarian Christians took on a different weight as the new Turkish nationalism explained its actions in the same terms as those argued by whites when they murdered outsiders considered disloyal and incapable of belonging to the nation (see Akçam 2007). Swarthy men of a different religion killed thousands of white Christians because, they claimed, of the latter's tendency treacherously to support Tsarist pretensions to liberate the area. Lurking behind all this was a *realpolitik* of balance of power relations between nations; the argument was that these could not be disturbed in the interest of oppressed minorities or individuals, or world peace would be threatened. Within 20 years of 1860, "Christian" protest about the ethnic cleansing and genocides of the Turks grew to a crescendo as William Gladstone, who became the British prime minister, built mass national unity and then an alliance with Russia partly on a condemnation of such infringements of the human rights of others. To have a state other than France do so and to carry its popular constituency with it was novel. Gladstone's *Bulgarian Horrors* (1877) enjoyed a mass readership, selling 200,000 copies, and it identified the problem as the militant nationalism of the Islamic Turkish state. France soon joined Britain in the fray against Turkey in a strange unity of former enemies. A new attitude was expressed in treaties ending the war

between Turkey and Russia that proclaimed that the object of the signatory nation-states was general peace, that condemned war crimes and tried to enforce new laws in the treatment of non-combatants. These built on earlier Geneva conventions but they marked a significant advance because they were initiated by nation-states rather than by private organisations. It is true that the main concern was with the rights of minorities rather than individuals. Moreover, the new unity was established only by treaty and in doing so it created a number of new nation-states – Rumania, Serbia and Eastern Rumelia – in central and eastern Europe, further exacerbating the problem of potentially warring peoples. But that concern with the treatment of the Bulgars marked a nation-state recognition that nation-state law was not necessarily the source of all good for minorities.

More significant than the response to the Bulgarian massacres for the development of a mass constituency for universal human rights was the ethnic cleansing and then genocide of Christian Armenians, again by the Turks, a process that began in the 1890s but culminated in the Armenian genocide of 1915–16 in which 1.5 million Armenians were killed by the ultra- nationalist Turkish state. This was done to popular Turkish applause, although the murders were committed mainly by Kurds from the same mountains as the Saladin who had defeated the Crusaders. The Armenians were massacred on direct orders of the state, again fearful about the reliability of those who were not committed to national norms, especially Islam. Again, swarthy "barbarians" were seen to be killing Christian whites, explicitly described in many reports as being "just like us". What was novel was not only the scale of the genocide but also that, unlike the millennial slaughter going back beyond the battles of Kosovo in 1389, it did not remain almost hidden and unreported. The new mass media, newspapers, telegraph and photos brought what was happening into the homes of America and western Europe. Henry Morgenthau and others on the spot denounced it to their national leaders in the context of a world war in which Turkey was allied with Germany and Austro-Hungary. They noted that the German Army offered advice and hardware to the Turks, and Germans were "people just like us". The report of the atrocities in that conjuncture meant that the victorious allies were obliged to hold war crimes trials of Turkish leaders after the First World War. Regrettably, these ended up being whitewashes for all but a handful of criminals and finally petered out inconclusively, leaving the Armenian diaspora to keep alive the memory of what had happened to them while the West discreetly forgot.

That oblivion was a check for *universal* rights despite the Armenian genocide thereafter being a point of reference for many proposals for innovations in rights. Indeed, for human rights, the wrong lessons were drawn in most quarters. Among the Germans present in Armenia were men who would join the Nazi party and become prominent in it. They and Hitler drew the same conclusion: that a national-popular state could get away with genocide and not be punished or even sanctioned. Vasa Culbrilovic, a Serbian, also drew the same conclusion when he drew up the plans for the ethnic cleansing that took place in the Balkans (Cubrilovic in Grmek et al. 1993, 150–85, 225–8).

The Rise of Slav Nationalism

The background to these massacres of "whites" by "non whites" and Christian co-religionaries by heretics were the national-popular revolutions that started in the Balkans and Middle East. They followed a similar pattern to those in the West. Protagonists of national freedom and rights took for granted that the unified homogeneous nation-state was either inevitable or a good thing and would guarantee rights for nationals. That was the unquestioned premise of the progressive intellectuals in that region the nineteenth century. But often they had to convert peoples for whom the nation meant little. This was especially so in the Ottoman empire. Balkan populations had for centuries lived in feudal conditions, mainly under the imperial rule of the Ottomans, Austro-Hungary or Russia. None had highly developed national feelings, having long lived in multicultural societies in relative tolerance despite inequality of treatment. Not for nothing did the first great critical theorist of nationalism, Ernest Renan, take as an exemplar of what was the opposite of nationalism and harmful to any people, Smyrna, whose different ethnic groups lived together in harmony despite differences of race, language and religion. For him. this tolerance of difference explained the corrupt decadence of the Ottoman empire, the "sick man of Europe" (Renan 1992 [1882], 42).

Like most "feudal" societies, local areas were left to themselves provided they paid in money or kind to their overlord. In the age of the nation-state such arrangements were gradually seen by intellectuals as backward, resulting in weakness. In the 1840s the views of some Serbians already expressed such a perspective. Although for centuries Serbia had been a semi-autonomous Christian area within the Ottoman empire, with whom relations had often been bloody in earlier centuries, the belief that liberation and rights could only come by the establishment of a Serbian nation-state took a new form in 1844. In that year Ilija Garasanin wrote his Plan for the Creation of a Great Serbia. This state would be built on the mythical history of the Slav Serbs united by "blood" with other Slavs and especially with Russia in a struggle against the Muslim overlords (Grmek et al. 1993, 59–60). The new state would annex adjacent territories while expelling non-Serbs in an attempt at homogenisation. This necessarily meant the destruction of the Ottoman empire. Garasanin chose to build the ideal identity of his new state on the Serbia that had supposedly existed in 1348 and been defeated by the Muslims. The battle of Kosovo in 1349 and its sequels had been horribly bloody and entered as such into folksong (see for example, Grmek et al. 1993, 28–9). He placed Serb "national character" "under the sacred historic rights" of Serbs (ibid., 66). The project of national liberation would require national unity under a prince. The secret desires of the population would be revealed to them by proselytising agents. Bosnians and others would be trained in the Serbian state machinery to serve the rights and constitution of Serbia. This was a hegemonic process (ibid., 75–6). Serbs won formal independence in 1878 for reasons discussed below.

Garasanin's project of building a national-popular revolution for greater Serbia was finally taken up as policy in 1906. By this time a further logical dimension had

been revealed by Nicola Stojanovic (1880–1969) in his 1902 article "Until your extermination or ours". Anti-Serb riots followed its publication in Zagreb. His ideas revealed a telos in the ethnic cleansing implicit in Garasanin. Nationalism was a "cultural work" (ibid., 85). Relying on authors of the racial struggle like Ludwig Gumplowicz (1838–1909), a Polish sociologist, he argued that "a nation was a combination of territory, origins, customs, language with a solid unity in its way of life and a consciousness of common belonging", all of which Serbs had, as revealed in their folklore and popular songs (ibid., 86–7). So Serbs would win their real independence only when they expressed their true national qualities. These were those of warrior nationalists who had and would fight to the death for a Serb nation. They had these qualities, unlike others, notably Croats, because, despite a shared language, the latter's history had been different. Serbs had always remained isolated and uncontaminated by contact with others, or the Other (see ibid., 80ff). Croats were half-caste "sons of Judas" who had welcomed others with open arms. Such Slavs had a completely different mentality from Serbs.

Stojanovic made clear how a national-popular revolution was seen as the only way to win the essential regime of rights appropriate to a people with a particular culture. In this, he was the end point of an argument that went back to Burke and de Maistre. The alarming additions were that this revolution necessitated the destruction of people otherwise identical because they were more welcoming and open to others and thus "not like us". Indeed, the military destruction of the former was good for the national-popular revolution and conducting it would strengthen the nation. Never could it have been made clearer that the national-popular revolution uniting "democracy and aristocracy" required ethnic cleansing and genocide. Of course, in Garasanin's project, the intended victims were foreign overlords. But in that of 1902, the need to purge the nation of outsiders made a foreigner of anyone who did not share the single national ideology. All those who did not adhere to the putative national identity and its virtues as encapsulated in the national history would also have to be purged. Extolling exclusion of the other and its pursuit by aggressive military measures leading to the inevitable extermination of the less bellicose as virtues, was pregnant with foreboding for the future. Croats were "Romanised, a tribe, the lackeys of foreigners". "The struggle between liberalism and ultramontane cosmopolitanism being conducted the world over is [thus] manifested in our area by the struggle between Serbs and Croats" (Grmek et al. 1993, 91). It had to be conducted until the one exterminated the other and the Serbs would win because they were warriors, superior in numbers (ibid., 93–4).

This led to the question: what should be done with the Turks? Here it was specifically those of Bosnia who were in question in 1917. By that date, new spokespeople had emerged who would lead the post-war self-determination in the Balkans. One, considered a moderate in his views, came up with this as the solution to what to do with the Turks in Bosnia, meaning Muslims, in the proposed new Yugoslavia: "leave that to us. We have a solution for Bosnia. What is that, Mr Protic?, Trumbic asked curiously. When our army has crossed the Drina, it will give Turks 24, maybe 48 h to return to the faith of their ancestors. And all those who do not wish to do that will be massacred, as we have done before in Serbia. Are you serious, Mr Protic?

Very serious, Mr Trumbic. In Bosnia, with the Turks, we cannot act in the European way, we must act in our way" (ibid., 126).

The description of Turks and Muslims in such documents never intimated that they too might be developing similar ideas. They were, in the national-popular ideology of Ziya Gokälp, who hammered the idea that Turkey could only recover from the parlous condition that rebel subjects like the Serbs had placed her in, by purging herself of all non-Muslim elements. And, like his Serbian contemporaries, he shared their view that this would be done by exterminating all weak and un-warlike minorities (Balakian 2005, 188–91).

Turkey

After 1815 Turkey had not modernised. It remained a vast sprawling multi- ethnic empire whose rulers were Muslims and where Islam ruled, leaving minority religions in subordination and relative tolerance. It became the particular object of territorial aspirations of the Russian and Austro-Hungarian Empires. The first wanted access through Bulgaria, one of the Ottoman's Christian tutelary states, to the Black Sea and encouraged pan-Slav sentiment among the Bulgarian clergy and intellectuals (see Masaryk 1955 [1913], I, 293–301). The second cast covetous eyes on Christian and Muslim areas on its eastern border and in particular on Bosnia-Herzegovina which had large populations that had converted centuries earlier to Islam. Garasanin's pan-Serb pretentions made him a determined enemy of the Austro-Hungarians. He wrote about Bosnia-Herzegovina: "that it was essential that it be joined to Greater Serbia", even hinting at a possible tolerance for Muslims, to achieve Serb hegemony(see Garasanin in Grmek et al. 1993, 73–6).

What started the Turks on a belated process of modernisation was the experience of the Crimean war in 1854–5. A renewed Russian incursion was only fought to a stalemate because the conservative governments of Britain and France were not going to accept expanded Russian influence in the Middle East. While this marked the beginning of unprincipled support of the Ottomans against the Russians, it also pushed the Turks into adopting a very short-lived liberal constitution and promising to join in a "civilised" Western respect for the rule of law. By the Hatt I Hamuyun of 1856, minorities were granted citizenship and promised equal access to what limited rights existed in the Empire. In turn, minorities, disappointed by the Turks' failure to deliver the promises of modernisation, including increased rights and freedoms to such peoples, became more and more rebellious, especially poor mountain people who refused to pay exorbitant Turkish taxes. This was why such peoples, for example, as Albanians, were included by Garasanin in his plan for the Greater Serbia.

The cycle of extortion and rebellion and repression accelerated in the 1870s, provoking new feelings of unity between Bulgarians and Greeks and southern Slavs. A series of wars between the Turks, and the Russians and the Austrians saw the Ottoman empire stripped of its many of its possessions. Summing up, Robert Melson

writes: "From an area of about three million square kilometres and a population of approximately 24 million inhabitants, in 1911 the Turks had lost about a million square kilometres and five million inhabitants. By 1913…the Ottoman government had lost all its European territories if we except a strip of land which protected the straits and Istanbul itself" (cited in Miller and Miller 2007, 67).

While the empire was being reduced to its Muslim core by other warrior national-popular states, we see the emergence of a new Turkish nationalism (see Akçam 2007, passim, esp. pp xvii–xx). It took time to take on its distinctive lay form and leave behind the centuries-old division between Muslims, Christians and Jews. Sultan Hamid II still spoke after 1878 of the "incessant persecution and hostility of the Christian world" (cited in Balakian 2005, 61). Indeed, as the years went past after the Crimean war, this was the way Turks would see what was being imposed on them and what would make them fierce nationalists within a generation. The Russians deliberately based their pan-Slavism on the notion of a shared Christianity which extended beyond the orthodox or Eastern Rite to encompass Roman Catholics. In 1860, Bulgarians, encouraged by Russia, demanded to be placed under the authority of their own patriarch rather than of Constantinople. This was granted and became a step towards "national independence" (see Thomson 1971, 345). It obscured an even older reassertion of pan-Slavism in the work of monks educated in Russia. A *History of the Bulgarian People* had been written in 1762 by Paisii and folksongs were collected throughout the eighteenth and early nineteenth centuries (see Masaryk 1955, I, 301). The Turkish response took the form of increasing repression of Christians and the removal of their rights as peoples belonging to "faithful millets" or self-governing communities. Early Turkish national parties were built around Islam but they took on more typical form in the 1890s, when, influenced by the theories of Johann Gottfried Herder and other romantics, the leaders asserted the notion of pan-Turkism to match that of pan-Slavism. Pan-Turkism was ultra-nationalist rather than racist, but it preached ethnic cleansing of all non-Turks and the extermination of any "disloyal" peoples. At first, these were mainly those who looked to Russia for support, including the Bulgarians and Serbs. But in time they included other Muslims, like Arabs, Kurds, and Jews, who were regarded as not fitting the national identity or not seeking the goal proclaimed in the name of the main party, the Union and Progress Party (UPP). So the trajectory was typical of a national-popular movement, from that of the Young Ottomans' slogan of "Liberty" in 1868 to its later statement in 1906 when, under Mustapha Kemal, it became "Fatherland".

The Bulgarian Massacres

Throughout this progress the object had been to defeat the enemies of the nation and their "allies" within. It was necessarily accompanied by ethnic cleansing and then massacre. For the purposes of universal human rights the first significant events were the Bulgarian massacres of 1875–6, when the still traditional

Ottoman empire slaughtered thousands of innocent Bulgarians. There was little new about the massacres themselves, but these took place in the European part of the empire, expressly in its national interests, and involved the murder of peoples allegedly treacherous to their sovereign; that is, the massacres were national-popular in tenor. They were widely reported in the press. They were seen in the West as massacres of fellow white Christians and given rather different coverage from the massacres taking place simultaneously in Australia, the Americas and Africa. For political reasons, they were transformed by Western leaders into assaults on the principles of "universal humanity" and an offense to civilised nations.

News of the Bulgarian massacres first crept through to the West in letters written to the *Daily News* and the *Times* by Sir Edwin Pears, a diplomat with a long association and knowledge of Turkey (Pears 1916, 16–19). They were complemented by the reports of Eugene Schuyler, an American, also a diplomat with a profound knowledge of the region and Januarius MacGahan, who accompanied him to Bulgaria. Their eyewitness reports were so horrifying that progressive opinion in the UK and the US was shocked and outraged, and a demand for an adequate response made at a high political level. Schuyler's reports of one massacre at Bartak, where 5,000 innocents were killed by the Turks, described appalling brutality. Thousands of Britons and Americans held spontaneous mass meeting to condemn the atrocities.

William Gladstone, then leading the opposition to the Tory government of Benjamin Disraeli, went on a countrywide campaign to denounce the failure of the government to condemn the massacres ,whose details were made widely known in the news papers and through drawings. There were not many photos (see Larkins 2009). Mass condemnation and demand that something be done to prevent and sanction such actions against humanity were couched in a traditional form. The crimes were attributed to Islam and to the Muslim nature. This was stated by all the observers and in Gladstone's *Bulgarian Horrors*. For example, Pears wrote in his accounts that "In all the Moslem atrocities…the principal incentive has been the larger prosperity of the Christian population, for in spite of centuries of oppression and plunder, Christian industry and Christian morality everywhere make for national wealth and intelligence" (Pears 1916, 17). But it was noted that Easterners had been killing white Christians, "just like us"; it was this dimension that was important. Gladstone's solution was to establish international laws to protect minorities, thus ending the absolute right of a sovereign nation to decide what happened on its own territories. In 1870 he had already declared himself in favour of "a new law of nations…gradually taking hold of the mind and coming to sway practice, of the world; a law which recognises independence, which frowns upon aggression, which favours the pacific, not bloody settlement of disputes, which aims at permanent and not temporary adjustments, above all, which recognises, a tribunal of paramount authority, the general judgment of civilised mankind" (Gladstone 1879, 256; 1877, 9–10). A populist, he took advantage of the general horror to advance such views. Unfortunately, the strongest proponent of such views and of the protection of Christians living under the Ottomans was Russia, then Britain's major rival for

influence in the Middle East. The Russians were even more strongly in favour of protection of minorities than Gladstone and it was the Russian foreign minister Sazonov who first used the term "crimes against humanity" (see Bass 2000, 116). The conservative Disraeli, after first ineptly suggesting that the report of massacres were a beat-up, played a populist chauvinist game of protecting British interests against the Russians rather than allowing the Russian's imposed peace of San Stefano (1878), with its tendentially humanitarian terms, to stand. This peace is described in a leading legal text on treaties as violating an early treaty made with the French and British, who called for a conference of the major powers, all of whom were fierce defenders of the principle of national sovereignty (see Lord McNair 1961, 230).

Disraeli's campaign stirred up a "jingoistic" public (the ditty using this word dates from this international dispute) and the "nation became divided". It became clear that the horrified liberals faced a large mass who thought that what mattered was national interest, not the murder of 12,000 innocents in a country that no-one had ever heard of, people as unknown to them as those in Burundi are today (Larkins 2009, 1). All that the Bulgarian massacres had done was divide nations and their peoples about how far to protect the rights of others. In Berlin, a coalition of conservative powers, including Germany, forced the Russians to back away from the protection clauses in the treaty of 1878. While the rights of religious minorities were stipulated for the new central European states created by that congress, no general statements about individual rights were made (Aldous 2007, 283–5). The right of Jack to be master in his own house was reasserted with force.

Despite the popular support for warmongers, Gladstone, nothing loth, then began a famous election campaign in Midlothian in which he made central the matter of moral limits on claims to national sovereignty, though his own party leaders did not share his views. Finally he won, much to the chagrin of the queen and her conservative allies, and he established the first semi-democratic government in Britain, one that would introduce male suffrage in 1884. For rights, what mattered was the introduction into British politics of the notion that in dealing with others some moral standards had to be observed. What also mattered was that even after being elected Gladstone was harassed and attacked by jingoists from the popular classes (see ibid., ch22). This dented the self-righteousness of believers in national-popular rights, but remained no more than that. It also became difficult when Gladstone, following the logic of his professions about oppressed peoples, was obliged to consider home rule for the Irish whom the British had ethnically cleansed only 30 years earlier and whose treatment symbolised British bad faith about the treatment of minorities. Indeed, the first defeats of British forces by blacks at Isandhlwana and successful challenges to its pax Britannica in Afghanistan only reinforced chauvinism, especially among the working class. Freedom for the Irish was not popular. Still, the idea of rights for minorities had won considerable mass support in certain progressive circles, and their treatment in wartime became an issue in growing talk about the rules of war that built on the Geneva Convention of 1864. These were also further elaborated at Russian behest after 1868.

The Genocide of the Armenians 1895–1918

The Bulgarian massacres awoke nation-states in the West to the need to protect minorities and led to the emergence of the principle of self-determination for ethnic minorities. Some states began to assert an obligation to protect and defend minorities from what Gladstone called crimes against civilisation. Accompanying this development, which we might term the beginning of a notion that the nation-state should be benevolent towards others but did not transcend fundamentally the notion of national-popular rights, the idea of *universal* human rights re-emerged. The concern about rights for individual victims went beyond a concern with rights for other "peoples" who had not been allowed their independence. This continued and developed when the Ottoman genocides of the Armenians became common knowledge among Westerners in 1895. What made the treatment of Armenians more significant than the treatment of the Bulgars was the fact that with the growth of literacy, the mass media, the telegraph and photography, what was happening to the Armenians became everyday knowledge in many Western countries, where news of the massacres of the Bulgarians had taken days to reach them and were portrayed mostly in cartoons. that could be dismissed for political reasons as fakes by major spokespeople like Disraeli. Photographs – in those days before the sophisticated manipulation of which we are all aware a hundred years later – did not raise scepticism. Even more importantly than widespread awareness of the massacres through the media, the world had shrunk physically in the interim. Where in 1877 Bulgaria was a vague place in Western minds, by 1895 Turkey and the Middle East generally were well known to a white middle class that travelled in fast steamships through the new Suez Canal, ironically to Asian and Pacific empires where their governments were committing massacres themselves. A mass tourism from Russian *muzhiks* to English gentlemen had developed by the 1890s, much to the distaste of romantics like Pierre Loti, who observed it. For those middle classes, the Armenians were "people like us". Great numbers of Armenians had been educated to high levels in the West and were personally known and intermarried with Westerners, many of whom were opinion leaders in their own countries. When the Turkish state let loose its most brutal and savage members in the genocide, this could be seen almost as an attack on the family and on one's fellows. By way of comparison, the contemporaneous genocide in the Congo was hidden, reported by few, and the reports often discredited.

The Armenians were Christians who had lived for millennia in territories that overlapped the Ottoman and the Russian empires. Many remained poor peasants and lived just like the Kurds and Turks beside them. But a significant proportion in the great cities had been merchants and in the nineteenth century became obviously better off than their Muslim fellows (see Miller and Miller 2007, 49). They had from mediaeval times been involved in money-lending and banking and other trades forbidden by Islam. While they had their own language and variety of Christianity and tended to marry each other, over centuries they had become part of the social ethnoscape and many had become Turkified. Like the Jewish and

Greek minorities, they tended to live in their own areas while working with and blending into the greater Muslim community. Their prosperity and generally inoffensive qualities had frequently made them victims of Kurds and others who kept up traditional practices like the kidnapping of brides and extortion rackets. Their overall integration is summed up in a sad relic of the genocide, a tattered 1872 Bible printed in Turkish in Armenian characters, which to a Westerner looks quite "Oriental" (see Kouyoumdjian and Simeone 2005, 39).

They had benefited in previous centuries from their generally pacific and submissive style. They were regarded by the Ottomans as among the "faithful millet", those non-Muslim communities allowed to manage their own affairs provided they paid certain dues to the state. Among these was payment for an exemption from military service. Even when the state started to on its national-popular path, they remained relatively well off, benefiting from reforms in rights in 1856 although they remained second class citizens because this was all that Islam could allow infidels. The folk memory of earlier discrimination may have lived on in them but the memoirs of most children who survived the genocide were of well-off, happy, family lives before 1895 (Miller and Miller 2007, 49; Asso 2005, passim).

Matters took a turn for the worse with the defensive Turkish nationalism that arose after the Crimean War and, in particular, when Sultan Abdul Hamid II came to the throne in 1876. In 1878 Russia had withdrawn from conquered Armenian provinces under pressure from the West but had demanded that the sultan make reforms in the treatment of the Armenians, to protect them from the Circassians and Kurds. This made Armenia a stake in international power plays (Balakian 2005, 61). Turkish fear of Russia redoubled after 1878. As the demands of the Russians indicated, the main problem for the Armenians were the depredations of the mountain Kurds, especially in zones east of Sivas. As they had become richer, noted Western visitors like Arnold Toynbee and Sir Edwin Pears, the Armenians' relative autonomy had not protected them from the exactions of marauding, mafia-like mountaineers. They paid two sets of dues, one to the state and the other to their Kurdish neighbours, traditionally used by the Ottomans as their crack, brutal troops. The anti-Christian nationalism of Abdul Hamid saw the creation of the Hamidiye in 1891, "armed Kurdish bands whose job was to protect the Russian border but instead spent most of their time pillaging Armenian houses" (Miller and Miller 2007, 53). Armenians did not have the right to carry arms or defend themselves and were easily identified by their compulsory identifiable dress. In the vast empire, this did not mean that many Armenian peasants did not have the means to defend themselves and a readiness to use them.

After 1890, the middle-class Armenians who had studied overseas or had contact with Westerners had learnt new ideals about democracy and equal rights, and began to agitate through small groups and parties-in-exile formed to obtain the same rights as Muslims. In 1895, 2,000 Armenians in the capital marched to present a "Protest-demand" to the sultan, for fiscal justice, freedom of conscience, right of assembly, equality before the law, protection of individuals, private property and women, and the right to bear arms for self defence. It was the first time in Ottoman history that a non-Muslim minority had defied the authorities in the imperial capital to seek

individual rights (Balakian 2005, 79). Furious, the sultan and the local imams encouraged a slaughter of the petitioners. Finally, the Armenians rose, especially around Van. Their temerity in killing Muslims in self-defence provoked the dispatch of Kurdish troops who simply slaughtered the local population. It is estimated that by 1896, 300,000 Armenians had been killed.

All this was observed closely by resident foreigners, often Protestant missionaries, and reported extensively in the Western press. The reading public were appalled. Support for the Armenians became a theme of the US presidential campaign; Abdul Hamid earned a popular reputation as a bloodthirsty despot. The main theme was that this was a slaughter of Christians by Muslims. That was not new. The direct acquaintance with the victims of many Protestant missionaries who since the 1820s had established missions, hospitals and schools among the Armenians and converted over 40,000 to various protestant sects, was new. Nothing in Bulgaria 20 years earlier paralleled it. These converts were the most progressive and radical of the Armenians and consequently suffered greatly in the repression. The missionaries were often drawn from the same feminist circles that had sought women's rights in Britain and the United States. By 1896 they were well established and well connected; their views carried weight at the highest levels in political circles in Europe and America. The general condemnation from the West compelled the cessation of the massacres. Teams from the Red Cross of the United States and other relief agencies went in to succour the victims, further building up networks and friendships. Turkish fury at interference with its national sovereignty redoubled.

It is usually agreed that these massacres were directed at returning a formerly submissive minority to docility. The reports of extermination did not yet make clear that the object was genocide. There were some forced cleansings of rebels who retreated over the border to their fellow Armenians in Russia but this was not characteristic (for example, Miller and Miller 2007, 55; Asso 2005, 27). By 1900, the media reports and photographs of the massacres by Turks had created in the Western public an image of Turkey and its Sultan as barbarous murderers, who, because there was no law under a despotism, ruled as "assassins". Several times before the First World War, jihad was proclaimed by the mullahs and the overall impression given was that it was Islam's hostility to Christians that motivated much of the murder. Yet massacres at Adana in 1909 preluded a change. The jihadist quality of the massacres conducted there after Austria-Hungary annexed Bosnia and Herzegovina, gave way to a new, legal, national-popular motivation. The party that overthrew Abdul Hamid II in 1908, the UPP, built on an anti-Russia alliance established in 1881 by Germany, newly united, Italy, newly united, and the crumbling Austro-Hungarian Empire. It imported thousands of German military and technical experts to oversee the modernisation and laicisation of the Turkish state. Germans were, henceforth, explicitly excluded from *fatwas* and calls to jihad, which recalls the "honourable white" status accorded to Japanese in the British empire. One of the first ways that this modern nationalism affected Armenians was that they henceforth had to do their stint in the army and were thus subjected for the first time to the logics of nation-state building, especially around a warrior ethic (Balakian 2005, 178). And the alliance with Germany meant that when the First World War broke out,

Turkey entered on the German side. Turkey, crisscrossed with new roads and railways and whose army was well trained, and often commanded, by German generals, was victorious in the first battles. Gallipoli was a disaster on whose defeat the Australians and New Zealanders converted their democratic nationalism into a warrior creed. The Turks then faced as their principal enemy, Russia, long the self-proclaimed protector of all Christians in the Ottoman empire. There they were defeated.

Claiming, without much evidence, to fear that the Christians in border areas would not prove loyal to the state, the Turks disarmed all Armenian soldiers and turned them into labour battalions (Dadrian 1996, chs14–16). Shortly after, stories of their deaths from overwork and malnutrition started. The next step was to order all Armenians to turn any arms they had in to the police. Then they were arrested, tortured and killed in an attempt to obtain confessions that they were organising a revolt. Eventually, on April 24 1915, 2,000 leading intellectuals and community spokesmen were arrested and street riots took place in the popular Armenian quarters of Constantinople. News leaked out that they had been killed, being drowned en masse in many cases. Eyewitness reports of the murders in the street were numerous; soon after, reports started arriving from all over the country about mass deportations of all Armenians of all sexes and ages, towards eastern areas in what is now Syria. Some left in over-packed trains but most started walking no matter what their state of health. Survivors talk of an initial apprehension but do not recall any intimation that they were marching to their death. The reports, which came from missionaries and German officials, soon revealed a pattern: after 2 or 3 days walking, the soldiers, there to "protect" them, started looting and raping, and worse, let loose the envious Kurd villagers on the hapless and defenceless Armenians. Within days most were dead, killed in barbarous fashion, although women and children could sometimes save themselves by converting to Islam (see Hovannisian 1997, 116–17; Chaliand and Ternon 1983, 61–97). One typical excerpt from a German source that escaped censorship runs: "For a whole month corpses were observed floating down the River Euphrates nearly every day, often in batches of from two to six corpses bound together. The male corpses are in many cases hideously mutilated (sexual organs cut off and so on), the female corpses are ripped open…The corpses stranded on the bank are devoured by dogs and vultures. To this fact there are many German eyewitnesses" (Chaliand and Ternon 1983, 62). Later the very successful novel of Franz Werfel, *The Forty Days of Moussadagh* (1934), revealed that some Armenians had fought back and been rescued by French naval vessels.

When Western officials and journalists remonstrated with officials and asked for clarification of the reports; they were either denied; or explained as one-sided; or justified as necessary to Turkey's war effort. In private, Turkish leaders expressed their fury that Westerners should interfere. Some Germans were horrified and one army photographer, Armin T Wegner, brought much of the visual proof to the world; he wrote to Hitler in the 1930s begging him not to do the same to the Jews. These deportations were made under a law, not against the law (Miller and Miller 2007, 60). At least one German attaché stated that he saw nothing wrong in such deportations and several German spokesmen stated that the Turks were justified

(Balakian 2005, 312–13). Again, the nexus between *staatsraison* and ethnic cleansing was clear. US Secretary of State Robert Lansing took much the same position and when a distressed US ambassador Henry Morgenthau resigned in 1916 because nothing was allowed to override the sacrosanct doctrine of national sovereignty, it was regarded as good riddance of a loose cannon (Power 2003, 13–14). Power writes: "In American thinking at that time, there was little question that the state's right to be left alone automatically trumped any individual right to justice" (Power 2003, 140).

The evidence became overwhelming and on 16 July 1915, Morgenthau sent the secretary of state a telegram stating that "a campaign of race extermination is in progress under the pretext of reprisal against rebellion". He felt that his protests were going nowhere and that force could not succeed in stopping what by the end of the year had been dubbed "horrors unequalled in a thousand years" by the *New York Times*, the most influential paper in the world. By the end of 1916, one and a half million of the two and a half million Armenians had been killed. The rest had fled, ending Armenian presence in Turkey. Relative to total population, it was a worse ethnic cleansing and massacre than any other before or after.

The world press from Left to Right made the massacres front page news and thousands of photographs by John Elder and Armin Wegner and others were published. Balakian claims that, starting with *Harpers Bazaar*'s and the *London Graphics*' extensive coverage of the 1895–6 massacres, (Balakian 2005, 151–6) the press had become a major source of information about Armenia and explains the consequent widespread popular condemnation of what was happening (ibid., 309). Massive collections of aid to the victims were conducted. School children in the United States later recalled as memorable the ways in which money was collected. Articles appeared in struggling socialist circles in Italy, while James Bryce published his Blue Book of revelations about massacres under the Ottomans. In 1918, the aging lion Lloyd George made clear continuities in a significant *mea mulpa*:

> Armenia was sacrificed [in 1878] on the triumphal altar we had erected. The Russians were forced to withdraw…The action of the British Government led inevitably to the terrible massacres of 1895–97, 1909 and worst of all to the Holocausts of 1915…Having regard to the part we had taken in making these outrages possible, we were morally bound to take the first opportunity that came our way to redress the wrong that we had perpetrated, and insofar as it was in our power, to make it impossible to repeat the horrors for which history will always hold us culpable (cited in Dadrian 1996, 62).

So, the Armenian massacres were public knowledge and generated revulsion, horror and a sense of guilt. The Turkish leader Talat had "used means which seem intolerable to us Europeans", the means of a militarist, or warrior nationalist, which were no longer acceptable in civilization" ("Trial of Soghomon Tehlirian" www.cilicia.com/armo_tehlirian.htm). Yet what was not yet known and had been carefully obscured by the Turkish regime, was that these massacres, so obviously intolerable to a certain enlightened opinion (and which would lead to a short-lived independent Armenia on Soviet territory after the war), were carefully planned as necessary to the logic of nationalism. The state and its political leaders had deliberately released thousands of the worst criminals from the jails with express orders to

kill all Armenians. These "butcher battalions" were run by a special section of the nationalist party, the Teshkilati Mahsusa. Express orders had been given to them to kill even children, to cleanse Turkish territory of people who were pernicious because they differed from the majority. The leaders had then encouraged a resentful populace to murder at will, which they did. Even the women came out to torture to death women and children because, in the popular prejudice, it was a saintly act for a Muslim to do that to Christians. Besides you could then take anything they had, including their gold teeth. The routes to the concentration camps in the east were strewn with bodies whose stench spread for miles, the rivers were choked with bodies and red with blood. It is difficult to deny that most of the majority population along the way was involved or complicit. Leaders were aware of their ferocity and prejudice when they let them loose.

When the allies won the war, the leaders of the genocide, Talat Pasha and Enver Pasha, fled to Germany, where the Germans, although defeated, gave them haven and covered for them. The British, caught in the wave of popular anger, demanded that there be trials for war crimes and crimes against humanity. Though reluctant, the new Turkish government did so, until it found that the British insistence could be tempered by the offer to release several hundred British prisoners of war who were living in terrible conditions. Those trials led to the execution of Jemal Pasha alone and death sentences for the two other leaders who had fled. There were only a few death sentences of middle-level war criminals, most of whom were not in custody, and a few jail sentences that were quickly reduced or commuted. The Turks felt no remorse. A mausoleum was erected to Talat's memory "in the heart of Istanbul" (Dastakian and Mouradian 2005, 32). Hitler had his bones sent from Germany to Turkey during the Second World War.

The trials should have been a moral lesson that ethnic cleansing and genocide are the most heinous of crimes and that both result from national-popular policies enjoying majority support in the population. Talat Pasha was one of the three leaders of the UPP and personally gave the orders as minister for the interior for the extermination of all Armenians. While this had been admitted as a fact in the trials and the inquiry conducted by the Turks after the war, they had not made public the evidence. In 1921–3, the Andonian documents were published. Their veracity is now established beyond doubt (Dadrian 1986, 311–60). Three of the first documents in that collection make clear both the genocide and its roots in ethnic cleansing and nationalism. On 3 March 1915 the Ittihad Central Committee sent this: "the Dejemiet has taken the decision to rid the fatherland of the covetousness of this cursed race and to take on its shoulders the blame which will fall as a result on Ottoman history…[It] has decided to destroy all Armenians living on its territory without leaving a single individual alive". On 22 September 1915, Talat sent these words by telegram: "The right of Armenians to live and work on Turkish territory is totally abolished, the government which assumes full responsibility, has ordered that even infants in their cradles not be left…women and children even if unable to move, get them out, and give the population no way of defending them…" and on 29 September referring back to the decision of 3 March " the order of the Djemiet has decided to exterminate completely all Armenians living in Turkey. Those who

oppose this order…can not be part of the government. Without regard for women, children or the infirm, however tragic the means of extermination may be, without listening to the feeling of conscience, we must put an end to their existence". Any one helping them would themselves be executed (see Ternon 1989, 78–84).

Despite the failure of the regime to conduct adequate war crimes trials, the publicity and public revulsion at the massacres, after the import of these directives was registered, briefly created a popular Western constituency against genocide. When the glitterati of the epoch – for never had those concerned with human rights been so imbricated with world leaders up to Woodrow Wilson himself – met at the various galas in favour of aid for the Armenians, the idea that no-one should ever have certain rights removed even in national interest, took on a new, perhaps novel, strength. What we should note was the difference in the reception of the information about this genocide. The "monsters" in this tale were not the victims but the perpetrators. There could be no ethical or moral or even social justification for what had been done. Where the genocide in the Congo or, as recounted above, those in France, Australia and America were generally known and popularly applauded and their (im)moral message could be buried or popularly excluded, that of the Armenians could not. This provided food for thought for new approaches to human rights that were endorsed by significant new constituencies. Opposition to certain claims made by states against individuals gathered strength. The Turks knew of the reversal of sympathy from perpetrators to victims, and from 1917 onwards tried to hide or deny the genocide, ultimately to no avail. The official Turkish position, first stated in 1917, is that a "genocide" never happened.

Unhappily, the new public opinion of the 1920s in favour of defending victims was countervailed by the failure of the Western powers to ensure a new basis for the rights of individuals. The focus of progressive Westerners and their governments after 1919 became the self-determination of minorities, and little consideration was given to how to protect any individual against community outrages. Indeed, the League of Nations created in 1919 endorsed further ethnic cleansings, of Greeks and other nationalities.

Lessons of Armenia

While the genocide of the Armenians was undoubtedly important in the creation of an enlarged popular base for universal human rights, it did not go far enough. Shockingly, it was rather a negative lesson that was drawn and accepted by an even larger constituency whose tenets remained similar to those of the UPP, though it was now recognised as a contest between two principles of rights, that of a national community and that of an individual. We can sum up these negative lessons as a reinforced belief in the need for national sovereignty whose strength came from expelling all others from national territory, thus denying them human rights that had been won by and for national citizens. As noted, there were thousands of Germans in Turkey in official capacities. While they defended the Turkish policy on occasions,

most were shocked at what was being done and kept both Armenians and Jews in their employ protected (according to General Liman von Sanders). But some learned different lessons, which became important when the Nazis began their rise to power in Germany. Consul Dr Max Erwin von Scheubner-Richter had been an eyewitness to the Armenian genocide and later commanded a joint Turkish-German guerrilla expeditionary force. He was an early member of the Nazi NSDAP and through it had considerable influence, via Alfred Rosenberg, on Adolf Hitler. It has been claimed that his views of the techniques used by the Turks to kill the Armenians provided Nazism with models for their own ethnic cleansing. He was killed in the Munich putsch in 1923. Von Scheubner-Richter equated the Armenians with the Jews (see Dadrian 1986, 410–11).

The connection would have been tenuous had Hitler not made a cult of Genghiz Khan and his Turkic hordes and their slaughters. The Young Turks saw themselves as the continuers of that tradition. (One of the leading lights in the massacre had called his son Genghiz.) Hitler was thus well disposed to similar solutions to that of the UPP. It is almost certain that once, in meditating on what would become known as the holocaust of Slavs and Jews, he stated that no-one remembered what had happened to the Armenians and that any nation-state could get away with the same atrocities (ibid., 407–8). It would take the German genocide of the Jews, Slavs, Gypsies, and other minorities finally to make clear the oppositional nature of the rights of individual victims and the claims of a nation. This revived the forgotten lessons of the events in Turkey in 1915 and 1916 and finally constituted a mass who condemned genocide in all its forms. They had realised that it could happen to them.

The Final Solution of National-Socialism

The mass change of heart in favour of rights for all humans really started after the Nazis seized power in 1933 and after it became clear that they were ready to cleanse the world of *whites* who were cultured, lay and middle class but did not share Nazi commitment to the nation and its people. The Nazis also continued policies of extermination of all blacks started in West Africa years before but this has remained much less known (see Bilé 2005, chsI and II, and passim). The Nazis simply declared great numbers of people who had considered themselves German, first non-citizens and then non-humans whose very existence was subordinated to the community interest of the "ethnic" Germans. After 1935, when Goebbels stated to the League of Rights, in the discussion of the minority rights of a German Jew, that Germany was master in its own house and would decide who had rights, many national leaders decided that the League was finished and minority rights insufficient to protect individuals.

Hitler had learned from the Armenian genocide that no-one cared or remembered it. He was right and wrong. As we have shown, *insufficient numbers* of people had cared or remembered for it to lead to concrete results for humanity. But some

individuals and minorities had. When he extended the 1915 national-popular ethnic cleansing and genocide to destroy between 20 and 40 million whites in the interests of German nationalism, a *sufficient* mass finally realised that genocide could happen to it and decided to establish rights and institutions to ensure that it would never happen again. These were the rights contained in the Universal Declaration of the United Nations of 1948.

It is crucial, when explaining the mass support for a new sort of rights, to note that the crimes that Hitler and Nazism committed, and the rationales given for what was done, were not qualitatively different from what had been done before in Australia, the United States, Bulgaria or Turkey. What was different was the number killed, the fact that they were white and that the killing was done by whites who shared many if not most of the characteristics of their victims. In 1939–45 so many individuals were involved as perpetrators, direct bystanders, and as victims that what had been mostly known through newspaper reports and photos of previous genocides became a matter of direct experience for many more than those killed. Some measure of the ubiquity of the ethnic cleansing can be gleaned when it is recalled that practically all Jews had disappeared from eastern Europe by 1945, where they had been part of the ethnoscapes of those areas since time immemorial despite the persecution they had suffered there. Again, from another perspective that shows the extent of popular complicity, the proposed figures for those to be tried after the war in Germany alone for mass murder exceeded eight million. In the light of such statistics. it is fair to say that no longer was ethnic cleansing and genocide out of sight and out of mind for whites. It had not been for most other "races" for centuries.

The experience of nationalism in its Nazi form sowed a terror in humanity such that many eminent philosophers saw it as completely changing all human understanding of good and evil and as compelling humankind to embark on a new history. Fascism's crimes found their origins in the theory of the nation and nation-state as both the highest attainment of any culture and as a brutal realism in which a nation-state could only be strong when it destroyed any groups with which it came into contact that did not belong to the nation-people. The latter was increasingly given a single cultural identity: the folk. Nazism thus combined in its notion of the Aryan race romantic nationalism with a cult of the people, and its traditions as the source of all good that we have seen in Rousseau, Hegel and Mazzini (all of whom were made into heroic predecessors in fascist theory) but also a Renan-like realism in which a nation had to be built on the elimination of difference from its midst.

Nazism's ethnic cleansing had in common with all other genocides recounted here so far not only the assertion of the rights of an ethnic-national people to real and emotional living space where others lived and, logically, to their expulsion; but also the rationale that the others were inferior and inhuman, and could not belong to the nation or enjoy its rights. Exclusion on the grounds that another human was not human at all, but like an animal or monster – rather than an "undeveloped" human, as had been argued for women – ensured that rights could never be obtained by some even if they wished to conform to national-popular ethics. Once the outsider was seen as a microbe, the mass murder of millions was seen as a social good. Their destruction began with their exclusion, incarceration and starvation.

The Holocaust

Nazi rule throughout Europe and then the Holocaust marked the extension of genocide to "white" people, "just like us" in a way not seen before. National-socialism's popular success also marked the apogee of the worldwide national-popular revolutions of the previous 150 years. It explicitly stated that only those of the same blood or ethnicity could be citizens of Germany and its empire or enjoy the traditional rights of Germans that it claimed to trace back into the dawn of history. Moreover, it fostered a warrior nationalism built around the need to defend Germany and destroy its enemies, who were identified with other, "inferior" ethnic groups. It developed pseudo-sciences that maintained that they were not really human compared with Aryans. Its empowerment of Germans in the 1930s embodied a cult of the superman. Such beliefs, attractive to most Germans for reasons that are beyond this book, were translated into practice after 1933, first in Germany and then in other countries, as the forcible unification of all Germans and their "liberation" began.

The Second World War was the outcome of these national-popular pretensions. For universal human rights, the significance was the way that war galvanised sufficient mass support for rights for all human beings, regardless of national or any other attribute. These rights finally became the goal of a large coalition of the major nation-states of the world and, more importantly, of millions of individuals otherwise divided. In all European countries, simple people were the victims of a fierce and murderous nationalistic law and order imposed by the Nazis and their allies. Among the scores of millions killed in a what was deemed a "criminal" war by the victors, were the up to ten million deliberately murdered in the ethnic cleansing and genocide practised against Jews, Slavs, other "races", "deviants" and anyone who refused to share in the national fervour or its identifying attributes.

The people identified by national-socialism as the worst enemies of the Aryan race were denied any rights on the grounds that they were diseased or subhuman. Their suffering in Germany extended to the rest of Europe when the Reich declared war on Poland in 1939, provoking the Second World War. The logic of national-populism that demanded that the nation be rid of all "foreign" elements meant the expulsion of millions from their homes and communities, and, where necessary, their destruction. After the Nazis conquered Poland, Jews in Warsaw, Kovno and other ghettoes in Poland were simply starved to death. When this process was not rapid enough, the Nazi state let loose its "people" in the form of *Ordnung Polizei* (state sanctioned vigilantes) and individuals who had a license to kill and pillage the excluded groups wherever and whenever they wished.

A vast archipelago of concentration camps was established after 1934 by the German Reich in every European country, and frequently in proximity to villages and towns (see the *Historical Atlas of the Holocaust*, 1995, for the location of camps). The existence of these camps was well known to great numbers of Europeans, though many tried to turn a blind eye to the source of ill-gotten gains such as goods and houses bought for a song from the "foreigners' and traitors who "mysteriously" disappeared from the neighbourhoods in which they lived.

Finding such policies insufficient by 1943, the Nazi state, intent on purging all the national territory, including that taken by force, of all aliens, commenced the notorious Final Solution, the deliberate extermination of all Jews and other inferior beings in death camps, whose names are now infamous: Auschwitz, Treblinka, Sobibor and others. Possibly six million were killed in those camps, which were vast cities in themselves (Friedlander 2008). The undeniable knowledge of the ethnic cleansing and the complicity of the majority of the population in what was going on, did not mean that the death camps were as well known as the concentration camps. They were so horrific that the perpetrators did try to hide their existence and activities. Still, precise information about what was happening inside them was available as early as 1943 but was often dismissed as unbelievable, even by those shortly to become victims. Full knowledge about them only became general when the victorious Allies liberated the surviving inmates in 1944 and 1945, and the world was flooded with undeniable photographic, film and personal evidence. Then it became the central concern of the United Nations of the Allies in 1946–7 when victims sought private justice and war crimes trials were held.

It is generally accepted today that the majority of the general European population supported the Nazis and their national-popular allies in their claim that they had the right to ethnically cleanse their nations. The loosing of the national people, who were told that their actions were always legally endorsed, that is, committed under the national-popular rule of law of the different states, involved more than Germans. Practically every nationality in Europe became involved in crimes like those that had been committed against the Armenians. Celebrated episodes like the massacre at Jedwabne in Poland showed that local Poles were as bad or worse than the Nazi authorities (Gross 2001). No nation could claim not to have been involved. It has been estimated that a vast majority were bystanders who did nothing to prevent what they knew was going on. Only one per cent did anything to help victims (Tec 1993). They were quite aware of the crimes being committed. No post-war denials of knowledge of what was being done had any credibility among victims in 1945–8 and they do not now, despite the covering-up of the historical facts between the 1950s and the 1970s.

For universal human rights the novelty lay in the numbers of victims and perpetrators and bystanders who knew about the genocide and also knew that it could happen to them. The bystanders and perpetrators had observed how what started as an apparently anodyne persecution limited to a few obvious outsiders slid into a massive destruction of anyone, however innocent, deemed disloyal to the nation. One famous Christian victim, Pastor Martin Niemöller, who had been anti-Semitic but, nevertheless, spent the war in the Dachau concentration camp, summed this realisation up in words that are famous today:

> First they came for the communists and I did not speak out because I was not a communist. Then they came for the trade unionists and I did not speak out because I was not a trade unionist. Then they came for the Jews and I did not speak out because I was not a Jew. Then they came for me and there was no left to speak out for me.

This is the classic statement of a new awareness that genocide could happen to "people like us" that was a spur to mass support for *universal* human rights.

The millions of "white" victims were concentrated in Europe and especially central Europe. An examination of the massacres conducted by the Germans as they retreated into their heartlands shows that they took place everywhere. Some of those massacres have become legendary: Lidice in Czechoslovakia and Oradour in France. Others of even greater magnitude, like that at Marzabotto in central Italy, the largest single massacre of the Second World War, have received less press. But the people who lived there knew that they had happened and that they were done in the name of an untrammelled national sovereignty in which foreigners and outsiders were enemies who had no rights. Unsurprisingly, the resistance to the Germans which had been the first to experience being victims of German law applied with draconian severity, was also the first to develop principles that questioned the privilege given to the nation-state and its sovereignty, and the human benefits of laws limited to national citizens. The nineteenth-century belief that a person could have rights only by proving to the national majority that he or she belonged ended. It had become clear that under extreme nationalism, some people were forever excluded from the protection of human rights.

So, for the first time, the beginnings of the concern about the absence of rights for *all*, and the effects of claims of national rights regimes that was seen after the Armenian genocide, became a direct general concern of many people in Europe. Millions had experienced victimhood. Similar, though less dreadful, atrocities occurred in Asia, where the two main powers to have kept their sovereignty when the rest of the world became colonies of whites, China and Japan, went to war. The Japanese conducted genocides in China and Manchuria as well as throughout Southeast Asia. This awoke among their victims a desire for rights for all that they shared with the Europeans, who were otherwise usually seen as the problem. While the war in Asia was important in this sense, the decision-makers remained the whites for whom the Holocaust was a crucial experience. Future leaders of many states no longer believed unreservedly in the nation and the national-popular state. They identified the problem as a regime under which rights were limited to citizens only, and called for the end to an unrestricted nation-state system of law and rights. This led, as we see in the next chapters, to the emergence of organisations and human rights regimes that went beyond those proposed by the United Nations, notably in the Council for Europe and the European Union.

Conclusions

We can sum up by saying that nationalism fostered genocide on a hitherto unseen scale; that by 1945 the powerful democratic populations of the West realised that it could be done to them and that they then hegemonised sufficient of those of their peoples who had no direct experience of ethnic cleansing and genocide into sharing their concern.

By the 1920s, progressives had drawn up a balance sheet of the limitations of rights for minorities and begun an elaborate analysis of the nationalist basis of

genocide. The term itself was finally coined in 1944 by yet another victim of ethnic cleansing, Raphael Lemkin, but it had earlier formulations. Consequently, the problem of rights limited to citizens became a concern that was debated extensively in the West in the 1920s and 1930s before it coalesced in 1942 into a drive from many directions for the establishment of the universal rights of man. This time, however, the participants came from all the world's major cultures. Each group recovered some of the themes we have discussed in earlier chapters. Thus in the final drive to the Universal Declaration of 1948, Latin Americans recovered the traditions of Las Casas. The Indians and Chinese brought to the debate those of their great philosophical and religious traditions discussed in Chap. 3 above. Even Islam proved a source for the new formulations. It is striking that of the four major personalities associated with the document adopted in 1948, only one, Eleanor Roosevelt, came from a WASP background. The others were a Chinese, a Lebanese and a French Jew. They revived the near-forgotten traditions of universal human rights that had been just kept alive in the nineteenth century by the groups we discuss in the next chapter.

Chapter 11
Human Rights in the Nineteenth Century

A Spreading Stain: Rights from France

In 1793 the Jacobins adopted their *montagnard* version of the Declaration of Rights. While recognising the right to property, it added economic, social and education rights to the short list of 1789. Robespierre, whose more radical version was not adopted, pointed out that civil and political rights would be a chimera if all humans did not have sufficient for a decent life. How were the poor to keep the state faithful to its professions if they lived in misery? He limited this to a threshold of minimal standards to be imposed by law on all citizens (Robespierre 1959, vol. IX, 459–60). These new rights directly threatened property owners with a forced redistribution of wealth and well-being. Consequently, when the Jacobins were overthrown in 1795, a new declaration ended such rights and subordinated all rights to the laws of the state, which the middle class dominated henceforth. This document stated that every individual was entitled to all the fruits of his labour and could do what he or she wished with it. Any loss of property had to be justly compensated (articles XIV; XVI see Jaume 1989, 305ff). The supporters of the Robespierrian view were hunted down and jailed or executed.

The most prominent of these was Gracchus Babeuf, from a poor rural family, who had been more radical than and even critical of Robespierre for his failure to adhere strictly to the 1789 version (Babeuf 1988, 227). He was accused of plotting to set up a communist state in what became known as the "conspiracy of the equals". In reality, the conspirators had sought a return to the constitution of 1793, with some amendments, in order to attain the rights in the declaration. Babeuf's newspaper, entitled *Tribune du people ou défenseur des droits de l'homme*, constantly defended the declaration of rights (Buonarroti 1971, 89–90 and *passim).* At his trial in 1797, Babeuf stated,

> I have dared to entertain, and to advocate, the following doctrines: "The natural right and destiny of Man are life, liberty and the pursuit of happiness…society is created in order to guarantee the enjoyment of this natural right. In the event that this right is not so guaranteed to all, the social compact is at an end" (Babeuf 1965, 120).

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Babeuf stated that his declaration was based on that of Robespierre and behind him, "our co-conspirators", Rousseau and Mably. By 1797, then, any pretence that the declaration of rights was not Rousseauian could no longer easily be maintained (ibid., 23, 60–2, 67; Mathiez, "Robespierre and Babeuf" in Mathiez 1988, 229–30). Moreover, Babeuf pushed the development of rights far beyond Robespierre. By the mid-1830s, rights meant the versions proposed by Robespierre and Babeuf, even in England (see *Poor Man's Guardian*, 16 May 1835, 530; 13 June 1835, 565). Claiming that he and his myriad followers wanted rights for all people and in particular for common folk, Babeuf developed his mentor's views in an openly communist direction. However, at his trial he maintained that he had argued for a threshold of minimum economic, social and political rights for all on the grounds given by Armand de la Meuse on 17 April 1793.

> Honest men will admit that next to winning equal rights before the law, the most burning need is for social and economic equality. Equal rights before the law are only a cruel deception unless they are to constitute a stepping-stone to this higher social goal. Without this equal rights will not guarantee happiness…to enjoy equality in the law but to be deprived of it in life is an odious injustice…it is an eternal truth that equal rights, the rights of man, are a gift of nature, not a benefit conferred by society…these equal rights have been violated in the state of nature…For this reason men have joined together so that through collective action they may win social rights, the rights of the citizen (Babeuf 1965, 80–82).

Babeuf knew that the charges against him were trumped up and yet he persisted, a little forlornly, in hoping for more from a court set up to "to defend the people". But he probably knew that he was doomed, recalling that "Christ's trial amounted to nothing more than a brief interrogation by Pontius Pilate" and, with his fellow-accused A-A. Darthé, he was condemned to death and executed on 27 May 1797. He noted in almost the same breath as he recalled Christ's fate, that "Sydney, Margarot and Weldon heard sentence pronounced only a few moments after they had appeared before their judges" (Babeuf 1965, 22–3). These men shared similar beliefs in rights to Babeuf – beliefs that took them as convicts and exiles from Great Britain to the antipodes, a world far removed from Babeuf's.

Babeuf and his fellow radicals knew that upholding the rights of Man had become a matter of life and death for all supporters. This made them ever more radical. Sylvain Maréchal wrote a manifesto that was too radical even for the Equals, warning that "men would live and die" equal or they would seek death. A community of goods would be their future goal (Buonarroti 1971, 57–60, 89–90; Babeuf 1965, 92). Another plotter, Filippo Buonarroti, an Italian Tyrolese nobleman, escaped with a prison sentence and on release, full of hatred for the Napoleonic regime, fled to Switzerland to continue the promotion of rights. He built up alliances of secret societies that were meeting places for opponents of Napoleon. In 1808–9 he transformed the Philadelphes into the Sublime Perfect Masters whose credo was: (1) a belief in God (which he shared with Babeuf and Robespierre); (2) only when the people ruled would true freedom be attained, and (3) all evils came from the "improvident division" of land (Lehning 1970, 45–6). A network of supporters and contacts was established throughout Europe. Until the Restoration, their main object was to return France to 1793. Carl Follen went to France to make contact with the

French Charbonnerie and notably with Pierre Leroux, Voyer d'Argenson and, later, Joseph Mathieu in Lyon. That city's mayor had been a leader in Babeuf's plot and one of its main radical organizations into the 1830s was the Society of the Rights of Man. In 1821, the Charbonnerie adopted these principles: "Freedom is the right of all men, they are born equal before the law. Governments are made for peoples, not peoples for governments. Sovereignty lies in the people and all power emanates from it. No government will be regarded as emanating from the people unless the following freedoms are guaranteed" (Lehning 1970, 50). These followed the list of the rights of 1789.

Most of these little sects believed strongly in democracy and national liberation. This led to premature revolts – starting with the one in Naples in 1820 – all of which were defeated or had collapsed by 1823 (see Johnson 1904, vol. 2). The members fled to safer places when they could. Buonarroti moved to Belgium where the publication of his *Conspiration des Egaux* in 1828 made him a significant figure for working class movements throughout Europe. Marx and Engels proposed its translation to Moses Hess; Bronterre O'Brien, the leader of the Chartists, translated it in 1836; Auguste Blanqui became personally acquainted with Buonarroti as did Etienne Cabet, soon notorious in North America for his utopian experiments in living. Buonarroti claimed that his ideas were akin to those of Robert Owen, whose New Lanark was the culmination of socialist experiments going back more than 20 years. Until 1841, Buonarroti's book on the conspiracy was the most read of all tracts in secret radical circles (Dolléans 1957, I, 179). In 1830 the supporters of rights again had their hopes of a return to 1793 crushed when the Holy Alliance finally collapsed and constitutional regimes, often vaguely in imitation of the British model, were won by the bourgeoisies of France, Belgium and, in the first Reform Act, developed further in 1832 in England. Their creation did not mark any advance for rights.

Hiding in their secret societies, the supporters of the rights of man started to build an international movement. The new Charbonnerie Démocratique Universelle of 1830 was, in Lehning's words, "the first attempt at an international organization…the first link in a chain of international manifestations and organizations which led three decennia later to the formation of the First International" (Lehning 1970, 98). The Charbonnerie was crucial in keeping rights alive in the 1830s and 1840s, though by 1839 it had to vie with the German League of the Just, where Marx cut his teeth, that had fled to London. In the Charbonnerie we again find an insistence that freedom consists in equal participation in the "benefits of nature" and the rights that arise in it. Albert Laponneraye's Declaration of the Rights of Man and the Citizen of 1832, written while he was active in the Société des droits de l'homme, was typical. He had known Robespierre and was a Babouvist, and he repeated the Robespierrian version to the letter, with his own commentary stressing the legal limits to property; the need for progressive taxation; fraternity; and the duty of resistance to oppression (see Bravo 1979, I, 191–9).

But by 1840 the old generation was dying out and faced merciless persecution by the new constitutional regimes; Buonarroti's belief of 1830 that rights would be attained when hereditary monarchs disappeared and the people made the law was

losing credibility for a new generation (see Buonarroti's letter in Lehning 1970, 110–21). In the same two decades, 1830–50, the green world in which most people were peasants and land distribution was seen as a solution to poverty, disappeared almost entirely in England and was fading in France and soon after in Germany. The workers of Britain already worked in dark Satanic mills and their leaders were giving a new twist to the notion of the means to attain the rights that they still preached. Industrial workers did share common problems and lived in similar conditions, no matter what their nationality. The idea of brotherhood across borders began to gain support and found its spokesmen, notably Karl Marx and Frederick Engels.

Marx and Engels kept a little apart from other radicals. They started instead the crucial debate for rights of the next half-century. What did "brotherhood" mean in the context of nation-states? Their own views followed from the thesis Marx stated in his most famous work on the rights of Man, a reply to Bruno Bauer's work *On the Jewish Question* (1843).

Marxism, Internationalism and Rights

It is often maintained, quite wrongly, that in *On the Jewish Question* (published the same year as Bauer's essay) Marx rejected the notion of rights completely as bourgeois, and embarked on the communist project. In fact, there is practically nothing in his article that does not fit into the Babouvist position on rights that had been kept alive by little sects, in the ways described above, for 40 years. In his and Engels' many writings at the time, they advance the thesis that without economic and social rights, civil and political rights are a farce; that the bourgeoisie is the enemy of rights; and that the new constitutional states of the bourgeoisie will never concede those rights unless forced to do so. Engels even states explicitly that the Babouvist is the communist view (Marx and Engels 1975, vol. 3, 393; 1976, vol. 6, 5–7, 321ff). But Marx, a more powerful thinker than any of those discussed so far, developed the implications of the Babouvist position, which he shared with the left-Chartists, to a new level of sophistication (ibid., vol. 3, 146ff, esp. 160, 167, 168). His critique of the 1791 version of rights, the *montagnard* version in 1793 and the 1795 declaration, is like Babeuf's critique. All those declarations remain concerned solely or too much with the individual's political rights and did not grasp the person as part of a community and so much at its mercy that a community restructuring of property is required. But Marx makes clear that the real problem for rights is always *the state* (even the democratic one that Babeuf believed in), not *the type* of state. This remains the fundamental view of protagonists of universal human rights. Marx' loss of faith in the democratic solution thus came 5 years earlier than that of his colleagues, who nearly all came to the same view after 1848.

Bauer's article contained the central assertion that if Jews would give up their Jewishness, that is, their difference (their otherness), then they would become citizens and enjoy the rights guaranteed in the 1789 Declaration. The way to human rights, according to Bauer (and even to Marx' progressive allies), was via citizenship,

or, according to the radical Chartists, when there was democracy, or citizenship, for all. Marx countered such views in a careful analysis of the French constitutions and declarations up 1795 leading *back* to the US constitutions and declarations. He hammered his readers with this reminder: the state was meant to be the *means* by which to attain rights but instead, that order had been reversed when the rights of the citizen had been made superior to the rights of man (Marx and Engels 1975, vol. 3, 164–5).

Marx pointed out that the civil and political rights created by such declarations, when expressed "constitutionally" by the state, always addressed, that is, created, only one privileged interlocutor, an abstract individual, the citizen. The state could not promote rights except for the "natural" abstract citizen, a juridical fiction, to the exclusion of the real beings who lived in society. In sum, if the two terms were state and citizen, then the problem was that the community of men was seen as no more than an aggregate of individuals, united only as citizens. Political emancipation was good but it did not go far enough. The state itself was the problem for the attainment of rights in practice. In practice, even Robespierre, by privileging the survival of the state and its citizens, denied rights for all. "The right of Man to liberty ceases to be a right as soon as it comes into conflict with *political* life, whereas in theory political life is only the guarantee of human rights, the rights of the individual, and therefore must be abandoned as soon as it comes into contradiction with its *aim*, with these rights of man" (ibid., 165). There can be no clearer statement of what universal human rights are about. Where national rights demand the elimination of difference in individuals – their conformity to a single national identity – universal rights preserve the right of difference through guaranteeing rights for all regardless of their continuing different beliefs and characteristics.

In a short *coda*, Marx suggested that the only way this contradiction could be overcome was through a recognition that the starting point for rights is man as part of a species:

> Only, when the real, individual man re-absorbs in himself the abstract citizen, and as individual human being has become a *species-being* in his everyday life, in his particular work, and in his particular situation, only when man has recognised his "*forces propres*" as *social* forces, and consequently no longer separates social power from himself in the shape of *political* power, only then will human emancipation have been accomplished (ibid., 168).

A year later, Marx elaborated on the way that capitalism and its state forms create an alienated human being who is inhuman in his relation to others precisely when he or she sees him/herself as an individual without social ties or need for others. Implicit in the argument was a thesis that the democratic state rested on majorities whose real, sensuous life was so impoverished that it led not to concern for the other members of the species (the man of rights as an individual is egotistical) but to a tribal exclusion of anyone not a citizen of the democratic polity. Eventually, this led Marx to the belief that a total change of society to communism was needed.

In 1843, these two major breakthroughs provided new parameters for the history of rights in the next 50 years. The first was that no state could guarantee rights for all because rights as the rule of law constituted abstract, juridical beings, were limited to citizens and had to deny truly universal human rights. The second was that,

like political and civil rights, economic and social rights had to be won *against* the state, not through it. Logically this ended any way to rights through winning state democratic power within a system of states. It required a universalisation of rights across national borders. The first view was spelt out in *On the Jewish Question*; the second was clarified over the next 5 years as it was recognised that the problem was the state and its rule of law, not what sort of state held power.

By 1844, it was a generally held view among the radicals with whom Marx and Engels associated that support for civil and political rights without economic and social rights was the mark of a conservative. But what were "rights against the state" as a universal, supra-national, political program? Here radical unity began to break up. Those who, like Marx and Engels, believed that henceforth the whole world would be transformed into workers and capitalists, argued for an international unity of all workers and a social revolution. Their move was towards the view expressed by Engels in 1848 that "brotherhood lasted only as long as there was a fraternity of interests between the bourgeoisie and the proletariat" (ibid., vol. 7, 147). The June 1848 revolution in France ended all national popular illusions and all enthusiasms. "The people are not standing at the barricades…singing 'Mourir pour la patrie'. The workers of June 23 are fighting for their existence and the fatherland has lost all meaning for them" (ibid., vol. 6, 585, 633, 11–12; vol. 7: 130; Lehning 1970, 171, 259).

Up to and beyond 1848, we see the gradual replacement of the words "brotherhood of peoples" by "workers of the world" in new organisations like the Communist League (1847) and its successor the International Association (1855–61). These new bodies also made membership conditional on renunciation and hatred of nationalism and the nation-state. But former allies continued to argue for the "brotherhood of peoples" and reforming the state from within. Harney and the radical Chartists only followed this trend inconsistently. At the Chartist-organised festival of the nations (1845), Harney declaimed: "We repudiate…national antipathies. We loathe and scorn those barbarous claptraps, 'natural enemies', hereditary foe' and 'national glory'…*we repudiate the word foreigner – it shall not exist in our democratic vocabulary*". Weitling still called for universal brotherhood.

The future for the rights of man would have been bleak in the second half of the century but for two things: First, their spread throughout the world as an idea and then their gradual reconciliation with certain religious traditions, notably the Christian.

Global Reach

While 1848 was a dreadful defeat for the Babouvist project, through the promotion of Babouvism, a vast international network of supporters was built up from the US to tsarist Russia. They started with the associations and journalism of the highly mobile radicals, who all knew and wrote for each other and remained united as refugees for two decades. Bitter divisions did not emerge until the 1890s despite the

differences expressed in private. These men and women carried their ideas to the US, which Weitling, Marx and followers of Cabet visited, and where Harney lived out his remaining, disillusioned years. The Chartists fled or were transported from a hostile England to the US, Australia, New Zealand and Canada (*FP*, 3 May 1851, 184). Kay Boston (Boston 1971, xiii) claims that 70 went to the US. The Irish, emigrating after the most lethal famine ever in history (Kinealy 2002, 10), and also often transported for their belief in rights or national liberation, went in their thousands to the New Worlds.

While still a European export in the main, the goal of rights like those of 1793 attained global reach. Its spread from France into the Caribbean and into Latin America was described in a previous chapter, as it is intimately associated with the problem of slave labour. Here, we trace some of the patterns as the idea spread from England to its white colonies.

In Pitt's England, Paine's followers were persecuted. It was declared seditious even to read his work and those caught promulgating his ideas, often workers or of petty-bourgeois origin, were treated as traitors (for example, the Treasonable and Seditious Practices Act, 1795, 36 Geo III, c7; Seditious Meetings and Assemblies Act 1795 36 Geo III, c 8). Paine himself declined to return to England to be tried for the content of his *Rights of Man*, but his Irish and Scottish followers especially, caught by draconian laws directed at crushing propagandists of rights, were arrested, given travesties of trials and transported to Australia. The Scottish martyrs like Margarot (singled out by Babeuf), Thomas Muir and others, were enjoined on arrival in New South Wales not to speak about their views (see Howell 1816–, vol. 22, 357ff, vol. 25, 117 ff, vol. 25, 603ff; and esp. 229 for Lord Braxfield's extraordinarily chauvinistic judgment in Muir's trial; Cobban 1960). But they did start a connection with rights as understood in 1789 (Rudé 1978, 182ff; see generally Part 4). When finally they escaped or were released, some went on to other countries. Muir died an honoured man in France in 1799. Margarot continued to be politically active and was involved in an Irish rising at Castle Hill in NSW in 1804 where one of the cries was "liberty or death!"

Rights as understood by Babouvists also arrived in the antipodes with transported Chartists, starting with the Tolpuddle martyrs of 1834 and continuing throughout the 1840s (on the Tolpuddle martyrs see *The Times*, 20 March 1834). Even more influential were the young Irishmen transported after the failed risings, culminating in the one provoked by the events of 1848. One, Charles Gavan Duffy, became very influential in politics in the Australian colony of Victoria (Duffy 1881), mainly through his continuing commitment to democracy. Chartists helped South Australia become the first British colony with universal male suffrage, in 1857 (*FP*, 3 May 1851, 184). Another escaped to the United States, only to reveal the limitations of the middle-class commitment to rights: these did not extend to property, even in slaves (John Mitchel; see *ADB*; O'Tuathaigh 2007, 17–180; Woodham-Smith 1991, 343–5). Overall, these migrants, like their sources of inspiration, saw democracy as the way to rights and remained committed to that view even as it revealed its nationalistic and exclusionary qualities. Other Irishmen of more modest origins had experienced not only the starvation of the famine and earlier

the clearances, but also the racism of British imperialism. As already noted, the Irish were often portrayed as simian in cartoons. They were therefore unambiguously anti-imperialist, unlike Ernest Jones, and saw the contradictions between a national working-class interest and rights for outsiders.

Even more important than this geographical expansion of the idea of rights was their spread to new constituencies. The error of Marxism was to assume, as Engels had in an essay on the Silesian weavers, that the whole world would soon be one big factory. Only in the 1890s was that constituency big enough to support the policies of the Second International (1889–1914) and by that time the largest organisations of the industrial working classes of Europe had become nationalist, racist, imperialist, and soon, chauvinist. In fact, until the twentieth century the bulk of the population in Europe and the rest of the globe remained rural, which partly explains the dominance of the ideas of Mazzini and Bakunin in the First Workers' International (1864–72) (Lehning 1961, vol. I; see also vol. 2). The rural majority saw their salvation in owning a plot of land, not in a social revolution and the end of private property; this explains the attractiveness of Chartism's Land League, headed by O'Connor. It also explains the success of various utopian schemes like those of Cabet's New Harmony and Icarian experiments in North America, which were attempts to escape the evils of the Old World rather than seek rights within it. Although condemned as impossible by Marxists, they proved attractive until the twentieth century (see Lehning 1970, 145; for less-known examples in Australia see Scates 1997, ch4).

Even before 1848 the strongly traditional views of peasants and small proprietors had found their way into rights discourses, above all in discussions of property, religion and the family. The attachment to Christianity of the majority of working people had been endorsed not only by Robespierre and Babouvism but also in the work of Saint-Simon, Weitling, Blanc and others. Nearly always, the claim to rights was prefaced, even in Chartism, by an appeal to the principles of Christianity and an assertion that, ultimately, rights were found in the Gospel. The first Christian socialist and "feminist" spokeswomen cut their teeth on Chartist papers, bringing together the Babouvist tradition of "brotherhood" and a more traditional understanding of the argument for universal humanity (see *RR*, Introduction, xi–xii; *FP*, 12 December 1850, 18–19). This association led to a campaign for particular rights for women, which had been suppressed in general claims for all men (discussed in Chap. 8 above).

Weitling's work is of particular interest here as it is a bridge from rights to "right-minded" Christians appalled by the first genocide that preoccupied them, that of black slavery. Weitling argued the following case, linking the Gospel and rights: Love was the first commandment of God and, in Christianity, led to Jesus imposing on us the suppression of private property.

> [A]ll the passages in the Bible…tend to show this first axiom: Jesus could say even more clearly than Luke XIV "Whosoever does not renounce all that he possesses cannot become my disciple." No communist could state the principle of the need to abolish private property more rigorously than the earliest Christians.
>
> To be rich and powerful means to be unjust…The kingdom of heaven is reserved for the just (Weitling 1895, 72–113 and *passim* and see Weitling [1843] cited in Bravo 1979, II, 113–29).

These books never became chapbooks like the *Communist Manifesto* or even Blanc's tedious *Organisation du travail* (1839). They expressed, rather, the traditional values of a rural world for whom care for others was a Christian value with universal applicability. This allowed links between socialism and the second-generation rights of Babouvists and the radical popular nationalists, who had a much greater following and who often placed "the people" before individuals in their call for self-sacrifice before egotistical individualistic claims. They were expressed particularly by Mazzini, whose views enjoyed great favour in the 1850s.

Mazzini had grown up in the anti-French movement of the *carbonari*, whose distant roots lay in the experiment of the Parthenopean Republic. He had read Cuoco in 1804–5. In 1820–1 and again in 1830 he participated in ill-fated nationalist risings against the system returned to power by the Holy Alliance. His programme for the future was embodied in the slogan "God and the People", for which young Italians died in the thousands between 1820 and 1870. His nationalist legacy, with its emphasis on self-sacrifice of the individual to the nation, was deleterious in the extreme for rights and one of the sources of fascism. But the religious dimension of his programme appealed throughout the world to idealist nationalists.

In 1820–21, Mazzini wrote: "Great revolutions are achieved more by principles than by bayonets…ours is still a religion of martyrdom" (Mazzini 1941, 23ff. Note that this was a Fascist edition for schools). But in his great manifesto, *The Duties of Man*, he reminded the workers that they had duties as well as rights. Why did the first come before the second? Because after 40 years of struggle, the declaration of rights, with its emphasis on the individual, had seen no changes to their conditions at all. In fact, human beings depended on one another and only after uniting as a free nation could rights be commanded. Human beings should not assert their rights, in Hobbesian fashion, but should work together without violence to attain a new order through education. "I do not ask you to give up your Rights but I maintain that they are a consequence of your duties" (Mazzini 1962, 17). Rather than seeking material happiness, the workers should seek to become better people: "When Christ came and changed the world he did not speak of Rights…he spoke of Duties, love, sacrifice, faith".

This sounds very contradictory with rights and it has been read as such. But, after Robespierre and experiences like that of 1799 in Naples, the important part of these precepts was its emphasis that God's law is the only law; that human law must conform to God's law. Though this did not mean following a book, much less accepting the generally-held opinions of the mass of men (Mazzini 1962, 35ff), all progress came from an individual recognition of such authority. A balance had to be attained in human beings in which the intellect was subordinated to *humanity*, by consulting both the "conscience of humanity" and individual conscience. The primary duty was to humanity, a wider realm than that of the nation, the clan or the family. All nations had excluded those they considered "barbarians"; millions were "excluded from the rights of citizens, slaves among the free". To such people we had duties as our "brothers". "There is no hope for you except in universal improvement, in the brotherhood of all the peoples of Europe, America, of humanity. Free and slave you are all brothers" (ibid., 51–5).

Such universal values captured young Europe with their call to obligations towards others. Unfortunately, Mazzini's belief in the people led him to suggest tactics of self-sacrifice by small groups of idealists, whom the people were expected to join once they had started a rising to obtain their freedom. Italian cities today have many street names in memory of the Fratelli Bandiera and other idealist Mazzinians who were killed by "the people" and other forces, including those of Bonaparte who butchered their way into Rome in 1849 after a rising there. When Attilio and Emilio Bandiera and a handful of others were executed after attempting to apply Mazzini's theories in Calabria in 1844, he wrote: "Martyrdom is never sterile. Those sacrificed at Cosenza have taught us that men must live and die for their beliefs; they have proven to the world that Italians know how to die and that one day there will be an Italy" (Pattarin 1959, 147; Woolf 1981,vol 2, 585).

From Babouvism to Mazzini via Weitling proved but a short step. From Mazzini's view that duty to God and all humanity was a premise for rights, to a more general espousal of rights by religious idealists was then easy; Christians had long been preaching that even slaves were brothers. The relationship between rights and duties, or, more correctly, obligations, broached by Weitling, Mazzini and others, would become the central theme in the history of rights in the next 50 years.

Lessons Learned

After 1848 the continuing struggle for universal rights rather than rights for nationals alone had passed into the hands of the defeated revolutionary wing of the working class movement. This was a decided minority of the working class until 1917. Universal rights were again kept alive by a small number of idealists, who battled an overwhelmingly strong reformist majority in the First (1864–72) and Second Internationals (1889–1914). It was in that struggle that the revolutionaries, who were hunted from pillar to post, and lived as internationalists, developed an awareness that the main enemy of universal rights was the rule of law of nation-states with constitutional regimes and mass democratic support. In such states, even most of the working class could be won over by bribes of economic and social rights frequently based on the appalling exploitation of imperial populations that they would endorse or, at best, ignore. They supported genocides of individuals whom they had insisted, from 1789 to 1848, were their brothers. As victims of their laws, the revolutionaries necessarily became defenders of the excluded others. They found unexpected allies among religious idealists. Together, they kept the idea of universal rights aglimmer.

In sum, for nearly 20 years after 1848 another way to rights than reformism was advanced, but by increasingly marginalised groups. Men like Blanc, Caussidière, Félix Pyat and their German and Italian colleagues had fled to London and set up, first the International Committee (1852) together with Harney, Jones and Poles like Count Ludwik Oborski, and then the International Association (1855–9). Nearly all the protagonists were middle-class intellectuals who had little contact with the

working class, and they were aware that they had lost the democratic battle to Napoleon III and his avatars, recognising the "moral putridness" and defeated feeling of the masses. Having become convinced that "the present system of society must be changed before a nation can begin a career of liberty, we resign ourselves to a policy of neutrality as long as selfishness fights with selfishness and as long as only the false profits of a rotten civilisation are at stake" (Report of the International Association to the Democratic Party, 13 June 1859 in Lehning 1970, 257), they condemned association with the so-called progressive bourgeoisie of other parties. "What do they think of us, the disinherited of the earth, the pariahs of the universal Society. Yes, *universal*, because our idea and aspirations are the same on the whole of the globe's surface…the bourgeoisie ignores…our social rights and wishes to use democracy as it has in all revolutions, only to satisfy its personal interests. We say it again: to unite with the bourgeoisie would be to give up justice and truth and misunderstand our rights at one and the same time" (cited in Lehning 1970, 250–1).

Reform was a "derisory cry". Marx, whom we meet again and again hovering around such groups, pointed out the Achilles' heel of reformism for rights. When reformism, with its goal of obtaining rights for citizens through parliament, started its career in France, he wrote:

> each of [the] liberties is pronounced the *absolute* right of the *French citoyen*, but always with the marginal note that it is unlimited so far as it is not limited by *the equal rights of others and the public safety* or by "laws" which are intended to mediate just this harmony of individual liberties with one another and with the public safety. For example: "The citizens have the right of association, of peaceful and unarmed assembly, or petition and expressing their opinions, whether in the press or in any other way. *The enjoyment of these rights has no limit save the equal rights of others and the public safety*"…The Constitution, therefore, constantly refers to *organic* laws which are to put into effect those marginal notes…And later these organic laws were brought into being by the friends of order and all those liberties regulated in such a manner that the bourgeoisie in its enjoyment of them finds itself unhindered by the equal rights of the other classes (*The Eighteenth Brumaire of Louis Napoleon* in Marx, 1951a, I, 235–6).

The International Association (IA) adopted firmly anti-nationalist policies – as one US IA resolution put it: "We recognise no predilections for nationality or race, for caste or condition, for complexion or sex; our aim is nothing less than the conciliation of all human interests, the freedom and happiness of all mankind, and the achievement and perpetuation of the Universal republic" (Lehning 1970, 246) – and looked forward to the end of the nation-state. In its place they foresaw the establishment of a universal democratic and social republic that would start in Europe and then be extended to the rest of the world. So they called for solidarity and an alliance of all peoples pending the creation of a world-wide, universal system of democratic and social rights.

They certainly kept alive the notion of universal rights, but their tiny numbers and their isolation from the mass of men and women (despite relative success in North America) meant that they remained little-known or regarded as passé in most socialist and working class quarters. They could not avoid compromise with ruling attitudes when they started to establish links with the workers. When the First International was established in 1864, replacing the IA, the dominant trade union

"know nothing" pragmatism, replaced that of the last of the Babouvists. The IA Manifesto of 1858 had proclaimed the law of God or Nature to be that of solidarity; that it was mad to deny that law or to call people born in other places "foreigners" whose enslavement was no concern of other men; and had proclaimed: "Down to our time, that false, absurd, tyrannical, anti-human idea of *Foreignness* has, in spite of the Christian brotherhood taught by the Gospel, been all-powerful in the world, and this because the true laws of society were not known before the coming of modern socialism"; and had announced that socialists would work to create "such an international state of things that every man and women may enjoy everywhere the same rights, all the right, that by their nature appertain to them" (Lehning 1970, 243–4). But the First International accepted a national organisation of struggle (see Provisional Rules in *The General Council of the First International 1864–1866, London Conference 1865 Minutes*, 1965, 291). Despite a futile struggle by Marx and his followers against British trade unionists, the IA moved first towards economist and reformist policies, and then anarcho-syndicalism (ibid; passim). Thereafter, the radical left was no longer so important as continuers of the rights tradition, as it shifted its attention to making a proletarian revolution. Nevertheless, it unwittingly continued to fight for universal rights in its effort to make a world revolution that would unite all humanity in a just world. The first form this took was an increasing and unrelenting critique of the nationalism that was translating itself into imperialism and the oppression of other peoples on the one hand, and the chauvinism that was leading to increased military conflict between the great nation-states with the most developed rights regimes for nationals, on the other.

As we recounted in Chap. 7, after 1848 the drive for rights for all workers of the world took place in a global context where nation-states increasingly became the norm. Outside tiny radical circles, there was no further move towards the universalisation of rights for decades after 1860. Even within the international organisations, based on the universalisation of rights through the international proletariat, radical proponents of these rights were often in a minority, against anarchists who expressed a different, peasant, view. The continuity through Babouvism with Jacobinism was itself broken when belief in democracy ended in many revolutionary left circles.

While the bulk of the workers and their organisations pinned their hopes on getting the vote, even after 1848 and Marx' strictures, it eventually became clear to the ever-dwindling groups supporting universal or even fraternal rights, that the automatic Jacobin correlation between universal suffrage and a regime of rights was false, unless it was preceded by re-education of the mass. But then the problem became that such social engineering was necessarily elitist. Marxism had the most interesting reaction. In the shape of Marx, it disappeared into the library to search for laws of social development that would explain how the education in justice would come out of the general working of society. Then, in a richer vein, which picked up on the lessons learnt by Herzen 50 years earlier, a later generation argued that a revolution could only be made after a vast exercise in creating a counter-hegemony. This would break the hold of nasty, individualist egotism among the masses, replacing the citizen with the comrade. But that would be a different project from the one of establishing rights against both state and community. For rights and

justice, after 1848 the emphasis would again have to be on the individual and his standards against that of the majority or masses, when he knew himself as an enemy and a stranger and not a member of "a large family"(Herzen 1963, 128).

The tradition of universal human rights that went back to 1789 appeared to have petered out by 1870. Reformist policies within the working classes had triumphed such that even diehard socialists who harked back to Babouvist traditions, like the marxists, had started to compromise with national-popular majority prejudices. Only the smallest rump had some abiding commitment to that solution to human ills. Marxists and anarchists had shifted to a solution of destroying the state in a massive revolution after which there would be no need for human rights that protected the individual from the source of power. The significant change came with the reorientation in marxist thought at the time of the Paris Commune, at least as it was interpreted by an embryonic Russian revolutionary movement in 1902.

But states and their sources of power continue to produce victims who, be they ever so isolated, have no choice but to assert their human rights to protect themselves against majority norms. This proved to be the case, again in France, in a way that highlighted the perennial demand for human rights once they have been invented. Like Charles Stuart, the individual whose struggle almost kick-started by itself the whole diluted tradition of human rights, was the victim of a rabid nationalism that slid into racism. Universal human rights were revived as a defence against the national-popular system of power described above and which led in a straight line to the Holocaust; again they took the form of a fight against a (monstrous) rule of law. Ironically, it took place in France, where they had started, but where national-popular traditions had triumphed in their most democratic form. As the candle of rights died out among the socialist sects that had kept it alight for 60 years, it sputtered into life again, like one of those magic candles that reignite no matter how hard someone tries to blow it out.

Excavating the Rights of Man

Even as the traditions of 1789 and 1793 seemed to end when idealists of the Left who had continued them turned from democracy to revolutionary solutions after 1871, public consciousness of some uneasy connection between genocide, ethnic cleansing and nationalism grew, as we saw in Chap. 10 above. Some socialist reformists began to adopt contradictory positions because of their continued concern about right-wing nationalism. Again, it was in France that the most significant developments were unfolding. There, right-wing nationalists attempted to roll back even the remnant of a national-popular tradition of rights, the basis of French post-revolutionary national identity. They were intent on creating a more reactionary notion of what it was to be a Frenchman, in which the revolution was to be forgotten. Against such reaction, a *marxisant* Left kept alive the tradition of human rights and the individual in the face of the chauvinism that developed in the following decades. While they were not consciously concerned with universal human rights,

but rather with human rights for nationals, their defence of the latter made them unconscious protagonists of the former; above all, in the Dreyfus case.

The chauvinism that the Left opposed illustrated how democratic national-populism led directly to denial of rights to outsiders, even where we would least expect it. As has been made clear, France was the only state that on two occasions, 1789 and 1848, had made human rights for all the object of its political arrangements. Although short-lived, because crushed by an almost unanimous international and national opposition in 1789 and 1848, without France as the protagonist of universal human rights, they would have no history. Yet, despite this, France became one of the most nationalistic states in Europe. After 1848, having by democratic decision rejected the state's commitment to human rights, France became extremely nationalist, even making common international currency its own word for a bellicose nationalist: "chauvinist", which dates back to Napoleon I. This French warrior-nationalism meant increasing oppression and exclusion from rights and persecution in 1870–1900 of those deemed non-nationals.

The persecution and denial of national rights was opposed in a striking way by an individual belonging to the Jewish minority. His fight led to a restatement that human rights were needed to protect a person against national-populism. He was only one of many but his courageous and tenacious battle to defend himself and claim his rights as a human being became a worldwide *cause célèbre*. Out of this case came the very first non-party political organisation for the defence of human rights to be established for a century. The Ligue des droits de l'homme (1899) was established by men involved in his defence. With its backing, he was successful in 1906 in winning a battle between the David-like individual and the Goliath-like state. The Alfred Dreyfus case made clear that human rights for individuals are not the same thing as rights for minorities. A large international public followed the saga and made the denial of justice to one individual the basis for claims about general rights for all humanity. In one of the last entries in his *Notebooks*, in which he summed up the import of his case, Dreyfus wrote: "My case was over. All those who struggled for justice…even if they appeared forgotten…struggled not only for the cause of an individual, but contributed in large part, to one of the most extraordinarily lofty achievements that the world has seen, one of those achievements that will resound until the end of time, because it marked a turning point in the history of humanity, a grandiose step towards an era of immense progress for the ideas of freedom, justice and social solidarity" (Dreyfus 1998, 265). We return to the Dreyfus case below.

France from Nationalism to Anti-semitism

The restatement of the declaration of 1789 by the revolutionaries of 1848 was defeated not so much by a bloody repression as by a democratic majority who voted against social solidarity, justice and, in the end, freedom. In the first democratic elections since the revolution, the great majority rejected the principles of 1789 in

favour of a defence of private property and a cross-class alliance. Their chosen vehicle for a new, conservative democracy was Louis Napoleon, the nephew of the great Napoleon, who, in 1851, by referendum, was made emperor in what an angry and marginalised Marx called a "farce", noting that a new form of government was being born – a variety of "Caesarism".

Emulating his forebear, Louis Napoleon soon became the darling of the average Frenchman, who was still a peasant. Like his uncle, he embarked on a series of warlike adventures, re-evoking the traditions of the *grande nation* that had been in the shade after the terrible defeat of 1815, bellicosely fighting wars in Italy and against Prussia. Consequently, the 1860s saw the re-emergence of the power of the army, which had been dormant in France since 1815. His adventures quickly turned to disasters after minor successes in 1859 supporting the national revolution from above in Italy, led by Camillo Benso di Cavour. While at first not pretending to govern, the army's nature was changed by the disastrous rout at Sedan in 1870, during the Franco-Prussian war, when the French were defeated and their frontiers rolled back from those established 55 years earlier. The army and its leaders were humiliated. After all, the first Napoleon had beaten the Prussians on many occasions.

Political conservatives ended Louis Napoleon's rule in a hasty and disastrous peace with their Prussian enemies, and then turned to crush a popular revolt by the Paris Commune. The repression of the Commune by the defeated army expressed the savagery of the Vendée once again, to which the memorial at the Père Lachaise cemetery, on which flowers are still placed, is a mute testimony. It was an angry army that in the 1870s turned the democratic national-popular state into a warrior nationalism bent on revenge and, in particular, on recovering the lost regions of Alsace and Lorraine. General Patrice de MacMahon, a professional soldier, had been elected in 1873 to succeed the interim premier, Adolphe Thiers, on a monarchist platform that blamed France's ills on its revolutionary tradition. So, hand in hand with the rise of warrior nationalism came an attack on the French tradition of rights. "The new police-state was rapidly taking shape by the spring of 1874" (Thomson 1964, 88). In 1877, the Right attempted a peaceful coup d'etat, led by General MacMahon, to save the *patrie* from what they thought was its irreligious bourgeois degeneration and general ignominy. The ruling group had assured its own discredit in army circles by its close association with highly dubious capitalist ventures; the Third Republic was vexed by major scandals from the outset. But the republican tradition proved still too strong and MacMahon resigned, leaving the de Maistre-inspired monarchists licking their wounds and the army nursing its belligerent resentments. The League of Patriots, led by Paul Deroulède, kept the fires of resentment burning. The Right and the army tried again, this time with General Boulanger as their figurehead. Boulanger was minister for war in the most republican of ministries since 1870, appointed to control any Caesarist military pretensions. He purged the army and introduced universal conscription in order to modernise and democratise it. His reforms and parades made him another darling of the people. His popularity can be gauged from the fact that he was elected in several constituencies in 1888–9. Many hoped that he would revenge France against the

Germans. First, he tried to reform the constitution to allow him to become a popularly elected head of state. When this failed, he resigned and started plotting a coup d'état together with the Bonapartists and monarchists. It appears that his nerve deserted him at the last moment and the republic was saved. Again the army nursed its hatreds and plotted with the Right.

It is arguable that they would have been successful in placing their stamp on France had not the radical politicians who dominated the country at that time not assuaged the warrior nationalism of their populace by imperial conquests in Indo-China, and some forays into Africa and the Pacific. As it was, the defeat by Prussia and the great strength of the new Bismarckian German nation-state, as well as the much weaker Italian state created in 1870 under Piedmontese hegemony, made the French army and the nationalists view the two nations as their enemies. Facing the Triple Alliance of Germany, Austria and Italy made in 1881, the French replied with the rather feeble Entente with Russia and Britain. Its garrisons and defences were built on its eastern frontier, facing Germany. The battle lines between nation-states based on a Carl Schmitt-like view of international politics, where all outsiders to the nation are enemies, were drawn up in the last two decades of the century.

In France, the demand for loyalty to traditions that went back to Clovis and were embodied in slogans about the nation, the church, the family, grew stronger over a generation after 1870 as the republican traditions were challenged by others that harked back to Napoleon.

This change took place as there was a massive influx of foreigners into France. First, there had been the refugees from Alsace Lorraine; then Poles who arrived to work in the mines of the north, and Italians fleeing poverty in Italy who poured into the Midi. Their memoirs tell of hardship and discrimination of the sort that culminated in murders of Italians in race riots in Aigues Mortes (1893) and were used as excuses for both Italy and Germany to advance claims to protect their citizens from a nationalist France. Among the new arrivals in France were significant numbers of refugees, often Jewish. Those from the former French provinces of Alsace and Lorraine were often secular and rich, but those from Germany and eastern Europe were religious and poor, fleeing pogroms that were an ubiquitous feature of Russian rule as it embarked on its Slav nationalist programme.

For foreigners, life became much more difficult. Census data of 1866 showed that 35,000 Germans lived in France, although the figure was probably more like 80,000. But then, no-one was very concerned. Napoleon had insisted that Russians in France be accorded full rights during the Crimean War. It took a decade of the Third Republic for this comparative tolerance to change into tighter control of resident immigrants and for a new nationality law to be introduced in 1889. This made naturalisation possible for foreigners in order to impose on them the obligations of French citizens, although they were excluded from holding public office for 10 years after naturalisation. The law created a new group of second class citizens, so loyalty to the nation-state became an imperative for them. Those who did not take French citizenship were obliged to register with the *mairie*, the basis of the still-existing *permis de séjour* (see Noiriel 1991, 78–93, 166–9).

The logics of a nationalism built on a desire for revenge led to a cultural ethnicisation of French politics and law. The French high command and its nationalist supporters were greatly concerned that these newcomers were potential seedbeds of revolt, disloyalty to the nation and, as the military build-up increased on all sides, spies. Ideologues of nationalism like Maurice Barrès were joined by the authors of a new literature about the unreliability of certain races of outsiders. The Boulanger crisis had seen the Right become ultra-nationalist and popular where earlier it had been suspect because of its connections with Church. Thereafter it made the ideas of Edouard Drumont's 1886 book, *La France juive* part of its canon. This expressed a virulent anti-Semitism that attracted a large Catholic readership. "The vast majority of Army officers were avowedly anti-Semites" (Soltau 1933, 338). The great military academy of St Cyr admitted no Jews to its ranks.

To some degree, this altered the status of Jews in France. They had been as much the victims of discrimination, denial of rights and slaughter in the Middle Ages in France as elsewhere in Europe. But, despite some humming and hawing, they had been made citizens with all the rights of others in 1791, although under the Jacobins they suffered as much as other communities for their difference from "typical" Frenchmen. The Abbé Grégoire was a protagonist in their admission to citizenship on the ground that the rights of man entitled all humans to the same rights. But their admission in 1791 was partly explained, especially where the Sephardic Jews of Bordeaux were concerned, by their wealth and by their non-religious and lay quality (Singham 1994, 114–28). Though reluctantly granted, citizen rights for Jews in France still preceded Jewish emancipation in Britain by 40 years. During the nineteenth century, their communities had flourished and many had become rich and embourgeoisiefied. They felt that they were French and many no longer observed Judaism even if they often intermarried. They were fervent patriots and often nationalists.

The Dreyfus Case

One such person was Captain Alfred Dreyfus of the Artillery, from a very rich, bourgeois, Jewish family. They were such patriots that they had left Alsace when it was occupied by the Germans in 1871. Dreyfus demonstrated the depth of his commitment to France by choosing an army career. He benefited from the modernisation of the army, which had opened up prospects to bright, middle-class men like himself, excluded from bastions of military conservatism such as Saint Cyr. In the ordinary course of events he would have had a brilliant career and ended up a general. He had recently married and had two small children when he was summoned to a meeting with his superiors. Without any sense of what would happen, he went, was presented with a request to write certain lines by two officers and then immediately arrested for spying and high treason. He did not go home to dinner. His wife, Lucie, only saw him just before he was transported to Devil's Island – a hell-hole prison off the coast of South America – and even then it was a visit under guard with

her husband manacled. Dreyfus was judged by a court martial, formally degraded and sentenced to life imprisonment, without being allowed either to call a lawyer or to see the evidence proffered against him (Dreyfus 2005, 55–60). On his journey to the prison at the Ile de Ré off La Rochelle, and thence to his final place of confinement, he was attacked by crowds and badly treated by his guards. By this time the press had made front page news of his arrest as a spy for the hated enemy, Germany. Stumbling forward under these blows, this "terrible nightmare" (Dreyfus 1998, 67), he had considered suicide, but was dissuaded by his wife who asked him to fight for his honour until he won. To suicide would be to admit his guilt. Dreyfus was a conservative man, with an intensely private family life. Initially, there were just three of them, Dreyfus, Lucie and his brother Mathieu, struggling for justice, starting with a fair trial for Alfred. For 5 long years it would be a lonely fight from a distant exile. All their correspondence was either censored or simply shelved. He was allowed to speak to no-one, not even his guards, who on the whole showed the brutality of all towards a "traitor". Dreyfus was held in solitary confinement for 5 years, on a starvation diet and, after a false story about an escape attempt, in irons. The object was to kill him and indeed, he almost died a number of times. Besides, solitary confinement for so long normally drives a human being mad. Dreyfus feared he would go mad (ibid., 110). He had shouted his innocence and bewilderment from the start and every attempt to have his case reopened went nowhere. Today, it is recognised that it was the devotion of his wife, brother and wider family, and their tireless work to have his case reopened that ultimately led to allies being found. By 1896, Bernard Lazare, a prominent publicist and writer, had been won over, and a small group of progressive left intellectuals began to support the Dreyfus family in their lonely struggle, mainly through articles and books.

Although Dreyfus never mentioned anti-Semitism, he was the victim of both a general anti-Semitism and specific anti-Semitism against himself. In 1892, Drumont's paper *La Libre Parole* had stated that there were too many Jews in the army and that they were not good Frenchmen (Duclert 2005, 28). Dreyfus had once experienced how prevalent was this view in the army when, having succeeded brilliantly and come first in his exams, he was openly marked down because he was "Jewish". He protested, but a superior assured him of the army's impartiality, which was officially state policy. Perhaps it is evidence of his conservatism or his belief in France that he accepted this reassurance, but it was certainly misplaced. Indeed, although the evidence was not produced on grounds of state secrecy, the high command having become aware that there was a spy high up in the branch where Dreyfus worked, simply allowed anti-Semitic officers to assume it was a Jew. A single written comment on a document whose writing was alleged to be that of Dreyfus; followed by a kangaroo court, had been sufficient to convict him. Due process had not been observed, but a decision had been made and he had been spirited away.

On Devil's Island, Dreyfus had no news of what was taking place in France. Unbeknownst to him, there were two positive developments in 1896. His case was taken up by a handful of highly-placed politicians who were convinced of his innocence by a book written by Lazare, *and* investigations into espionage in the army undertaken by Lieutenant-Colonel Georges Picquart revealed that the highly-placed

spy was, in fact, one Colonel Esterhazy. Picquart recognised that this raised important questions about Dreyfus' imprisonment and required that his case be reopened. But when he raised this with the high command, he was transferred and then, when he persisted, was himself sanctioned. Picquart was simply an honest officer, who himself was reportedly too French not to be without anti-Semitism. But when he was asked by his superior why he was concerned about a Jew, he stated that he would not die without revealing what he knew. When the opposition to Dreyfus' imprisonment grew in 1897, the army and the state made further efforts to cover up the miscarriage of justice, by fabricating a whole series of documents designed to show that whatever Esterhazy's guilt, Dreyfus was also a spy. Since these were never made available to the victim – Dreyfus' supporters learnt of Picquart's concerns through chance conversations and leaks – and all requests for a legal review were denied, for Dreyfus a legal vindication started to become a political matter. The turning point in a campaign that involved increasing numbers of prominent intellectuals of the left who were becoming convinced of his innocence came when Emile Zola, the literary lion of France, published his *J'accuse* in 1898. This was the opening shot in a critique of the entire warrior national Right and its increasingly racist views. *J'accuse* was an open letter to the premier, which appeared on the front page of *L'Aurore*, the newspaper of Georges Clemenceau, leader of the leftish Radical Party of France. It called on the premier to save the honour of France as the country of human rights from the frame-up of an innocent man by anti-Semitic army. Zola named names and was tried and convicted and sentenced to a year in jail for his honesty. He fled to England. But it was too late for the army and state; the cat was out of the bag and a national and international outcry started, with questions in parliament and a newspaper campaign that spread even to North America. Desperate, the army made things worse for itself by acquitting Esterhazy after a court martial that was not impartial and forging further documents to inculpate Dreyfus.

The public furore from progressives and the left eventually forced the state to reopen Dreyfus' case. Overjoyed, Dreyfus was brought back to France for a retrial in open court. He expected to be acquitted. Instead, on the basis of further hidden evidence and under pressure on the Court from the authorities, he was again found guilty. The public clamour grew. In reality, the state and the army just wanted the problem to go away and offered him a pardon. Dreyfus refused to sign and was pardoned anyway, despite his promising to fight on until he was finally recognised as innocent. A further 7 year battle began. Dreyfus knew that he was challenging the entire rule of law once he embarked on his fight (see Dreyfus 1998, 46). Unfortunately for him, his case had become a symbolic political battle in which critics of the nation-state in its warrior and racist dimension wished to put the entire system on trial. From the Zola trial onwards, the chief lawyer, Maitre Fernand Labori, had made a "ruptural" defence in which the individual case disappeared in a general indictment of the state and perpetrators who had victimised him. Dreyfus just wanted to be declared innocent and believed that this goal would best be achieved by his winning his case, so he broke with Labori. This caused a division in the ranks of his supporters, many of whom thought that he should have sacrificed himself to a principle and not accepted the pardon. In vain, he pointed out that it was not a

solution that he had sought but one that the state had decided upon. Painstakingly gathering evidence even from the German embassy, Dreyfus and his remaining supporters built up the basis for a retrial before the Cour de Cassation. Finally, the court decided that he was innocent and had been framed. He was vindicated (see ibid., 243). Later, he was decorated and left the army. The world's progressive press applauded the court's decision. The anti-Semitic and right-wing groups simply saw a left-wing plot and this redoubled the nastiness of their comments. They were not sanctioned in the way Zola had been.

Dreyfus declared: "My case is finished" (ibid., 265). The political argument and the one about human rights were not. Dreyfus was a conservative and a believer in the nation; this shines through in his letters. When, on being formally reinstated to the army, the observers cried "Long live Dreyfus". He cried "Long live the Republic and the truth" (ibid., 264). Many of his political supporters, for whom he was symbol rather than a flesh and blood individual who had suffered enough, shared the underlying belief that there could be a good nationalism, that of the "open republic". Clemenceau, Jean Jaurès, the socialist leader, and even Zola, who had condemned his acceptance of the pardon in 1899, all believed in the notion of a good France. But the problem was the structure and logic of the nation-state itself, as we discuss below.

In the course of the Dreyfus campaign, Jaurès, who met and organised Dreyfus supporters, built a new cross-class notion of socialism as the heir to 1789. His newspaper was called *Humanité*. Socialism attracted many leading intellectuals and close contact existed between Dreyfus, Jaurès and Clemenceau, the dominant personality in French progressive politics (see Dreyfus 1965, 185–6; Lichtheim 1966, 45 fn18). In his book on the case Jaurès had stated: "we have the right to stand up, we socialists, against the leaders who for years have been fighting us in the name of the principles of the French Revolution. What have you done, we say to them, with the declaration of the rights of Man and individual liberty?" He continued that there were older laws than those of capitalism and they contained the progress of humanity. It was in the name of the laws that did not allow a man to be condemned without reply, that he would defend Dreyfus, a bourgeois, yet still a man. That was "only humanity itself". The entire proletariat was threatened by the rule of generals. There was no national interest at stake and the trials should have been conducted according to French law, without all the concern about foreigners (Jaurès 1970 [1906], 11–15).

Jaurès said no more about anti-Semitism than did Dreyfus, couching his action as a defence of humanity without criteria of nationality or foreignness. It was, however, a given that behind the whole affair was the anti-Semitism of the ruling castes of the army, state and church. It is also a fact that the support for Dreyfus did not come from his fellow Jews, who took a very low profile for reasons like that noted in Mathieu Dreyfus' book (Dreyfus 1965, 28, 80ff). As Jaurès made clear, the case revived concern for individuals' rights against the state, for the declaration against the nationalist principles of the French Revolution. Many of Dreyfus' early supporters had had their consciences aroused by the blatantly unjust treatment meted out to him. More of them, who observed the shocking conduct in the court at Rennes that

confirmed the judgement of 1894 on the basis of undisclosed and often known forgeries, thought that some general action had to be taken to defend all humans in Dreyfus' situation. This was, after all, the most democratic and advanced state in western Europe at the time, by general French consensus. One such man was Ludovic Trarieux, a Bordeaux lawyer, a moderate, who was Garde des Sceaux. Trarieux had been appalled by Zola's trial and wrote in 1900 to Dreyfus later in these terms:

> The painful spectacle of your tests have awoken the feelings of solidarity and goodness that slept within us. You appeared to us as an example of the impotence of individual resistance against the fatality of certain injustice. It was not only to you that our thoughts became attached; they went out to the host of disinherited and little people for whom, in their abandonment and weakness, it would be even more necessary than in your case to tend the hand of help; and we have offered ourselves to protect and support them. Henceforth, any victim of an abuse of power, of illegality, of lawlessness can find help at the association that we have set up, and so it is to you that all those people who we may be called to help owe a debt for this help. Once again Good will have come out of Evil, and your long torment will have served to relieve others of their misfortune and misery (cited in Dreyfus 1998, 44).

Trarieux and some friends, perhaps eight in all, had set up the first organisation for the rights of man. Its first meeting took place 24–25 of February in 1898. While composed mainly of intellectuals, including Paul Reclus, Lucien Herr, Gabriel Monod, Eduard Grimaux and Paul Viollet, another lawyer with a Jansenist background, it also rapidly attracted powerful political figures, including Clemenceau himself. There were 2 women among the first 36 member committee. By April, it grew to 300 members in 17 regional organisations.

The new organisation, whose articles were drawn up by Viollet and Trarieux, based itself on the 1789 Declaration, declaring that its object was to teach the people their "natural, inalienable and sacred rights again" (see Reinach 1903, vol. II, 548–9; see generally Rebérioux 1994, 414–5). While its members were in no general sense radical, the goals of the new organisation were a significant advance on those of the people who struggled for self-determination of minorities. For the first time in 50 years, the defence of the individual, in the name of a higher justice, against the state, was proclaimed as a goal by men and women with power and position who were not anti-system. The contradictions in their views cannot hide how important this was. The conservative Dreyfus replied to Trarieux's letter cited above: "The League of which you are President has taken on a great and noble task, that of bringing a helping hand to all victims of injustice and I am with you heart and soul in this admirable work of human solidarity and fraternity" (Dreyfus 1998, 45).

Dreyfus' struggle for justice was crucial to the further development for universal human rights; it made clear what the contending forces had become after 1894. On the one hand, there was the Goliath of a modern, warrior, nationalist state supported by the majority of the citizens. As Michelle Perrot writes in the preface to the new complete letters from Devil's Island of Dreyfus and others, "there was a desire to cleanse, to excommunicate, to efface: it was necessary to excise the traitor from national community that he was gangrening, to bring the monster to ground; to wash out the stain that dirtied the tunic of the Army" (Dreyfus 2005, 10–11). On the other

was, David-like, a single individual that warrior nationalist logics had to victimise because he belonged to a distrusted out-group. When, over a decade, mass support for Dreyfus gathered and ended his victimisation, it was a support for the rights of a single individual, not, as had been the case with the Bulgarians and Armenians, for a victim "people". It challenged the systemic assumption that a national-popular system of justice was adequate; that the national rule of law should be the last place of resort for individual victims. Dreyfus' case therefore compelled a return to the universal human rights tradition of 1789 that had been buried in the second half of the nineteenth century. A rich new theory of justice emerged as a result.

If the formation in 1899 of the League of the Rights of Man to defend Dreyfus and others was not front page news, it did resemble a baton change and a broadening of concern about rights for individuals who were victims of nationalism. And this too was given impetus when the First World War reminded millions of troops that national interest is costly in life and welfare. That war, which saw the weak anti-war movements of the previous decades win mass support, especially on the eastern front where the Russian revolution of February 1917 began in the trenches with the propagandising of the heirs of marxism and radical socialism, revived the notion that humanity had too much in common for "others" to be sacrificed without a thought. The repression of minorities by national majorities was seen as one of the root causes of the conflict, with particular concern about areas like the Balkans, where the connection between nationalism and genocide was patent. Yet, the real revival of the universal human rights tradition began because of the continued failure during and after the First World War of the nation-states who controlled world destinies to do anything about genocide, much less its basis in the unwieldy nation-state system.

Private Justice and Human Rights

Even the mass murder of white Christians was not enough to revive mass support for universal human rights before the appropriate lessons had been learned. The ambiguity of international response to the genocide of the Armenians (see Chap. 10 above) meant that the logic of national systems of rights was not understood by large numbers of whites. The stress on state sovereignty, even where it meant death for outsiders who would not be protected either from within or by other states outside their place of domicile, was still not seen as a problem that could not resolved by national self-determination. In the 1920s and 1930s the majority of Westerners still turned a blind eye to the problems of the limits of national-popular laws which gave only citizens rights, despite the fact that these were defined increasingly as those of the same "blood". (In the US this took the form of the "single drop" rule, according to which any one with a "single drop" of "non-white" blood could not enjoy the same rights as white citizens). The failure to replace the national-popular system of rights can be ascribed to a continuing belief in the "good" nation, or that it was possible to create it through democracy and a rule of law. The Rousseauian view died hard. *Universal* justice through *national* systems of law was still seen as

achievable. Consequently, despite the national rivalries that had led to the First World War, the solution to international strife and the mistreatment of minorities was not to make human rights for all the goal of states. Instead, the Versailles settlement of 1919–20 created the League of Nations, dedicated to preventing war through a new international law that would cater for minorities. Most Western nations joined. Its principles set off a renewed series of national liberation movements (see Manela 2007). The League of Nations' concern for minorities became a sort of alibi for doing nothing about the human rights of individuals. Accounts of the League's failure remember the partiality and political partisanship in its policy of self-determination. Woodrow Wilson did not even reply to Ho Chi Minh's pleas for Vietnamese independence and the League did nothing for Indian leaders like Tilak who noted bitterly that they were not welcome aboard the ship of self determination (Manela 2007, 3–4, 165). It also did not end internationally-endorsed ethnic cleansing, which continued in Greece and Turkey in the 1920s (see Clark 2007). Because of these failures and the inability of positive national minority policies to defend victimised individuals, restatements of the need for universal human rights were made occasionally in the 1920s and 1930s.

The most visceral form of reaction to these failures came when some individuals took justice into their own hands and awakened some public opinion to the problems of inefficacious war crimes trials and the denial of rights to outsiders even under the new post-war order. Two notable cases were those of Tehlirian, an Armenian who killed Talat Pasha, one of the leaders of the Turkish genocides, in 1920. Tehlirian was acquitted by a court that recognised that there was a justice higher than that of the rule of law. The second was the case of Hershel Grynzpan, who avenged the deportation of his parents from Germany under the 1935 ethnic cleansing laws of Nuremberg by killing the Nazi attaché in Paris. Unfortunately for him, he was arrested by the French state, condemned and disappeared once the Nazis entered Paris in 1940. But, comment then and afterwards used his act to state that there is a justice even higher than that of a state's rule of law or any international law. These acts were little steps towards the universalising of human rights. At the same time religious groups (and again Quakers were important, as they had personally seen the genocide in Armenia), continued to beaver away to attain such rights. In the 1920s, individuals who had been victims of ethnic cleansing, including Andre Mandelshtam and Antoine Frangulis, started organising in Paris for human rights. But they were not well known and often have remained almost forgotten figures.

Tehlirian

The Armenians of Turkey had been destroyed and scattered into a diaspora, but as a spur to a retrieval of the French tradition of universal rights, the genocide was crucial. Armenians felt that they had been forgotten; failure of the regime and the Allies to provide justice, and disappointment at the League of Nations were evident in the attempts to wreak private justice. Notable was the assassination of Talat in Berlin by

Soghomon Tehlirian, who had lost his entire family in the genocide. Tehlirian was a student described by witnesses as "quiet", "kind" and "modest". He had become what was called an "epileptic" after the horrors he had seen. While the German state had covered for Talat and, in its trials of its own war criminals at Leipzig, had failed to meet elementary standards of justice, the trial of Tehlirian before a German court revealed a dawning challenge to national rules of law that allow the denial of human rights. It was the *obiter dicta* in the argument and judgement, especially in the defence's summing up of this case, that revealed a certain tender conscience in the courts and public opinion more widely. Its proceedings were observed closely by several people who would go on to provide basic concepts for a truly universal human rights. Talat was adjudged as having committed "the most odious crime in the history of humanity" and his lawyers, who had seen Andonian's documents and who called Johannes Lepsius, who had been an eyewitness to and written an important book condemning the massacres, argued that it was necessary for Germany never to support regimes that committed such crimes (www.cilicia.com/armo_tehlirian.htm). The witnesses at the trial made clear that, for them, Tehlirian was a hero and he remained a hero figure among the Armenian diaspora until and after his death in 1960. His had been an assertion of individual right to a higher justice against that of any rule of law and any claim of a national community, as his lawyers made clear. No argument about national sovereignty could defeat that of justice for individuals. Clearly, the solutions of inquests, war trials and commiserations were not satisfactory to the victims.

Several other assassinations took place and other avengers were acquitted, notably Misak Torlakian, in Rome. In 1922 Arshavir Shirakian and Aram Yerganian assassinated two of the leaders of the "special organisation" responsible for the genocide. These acquittals and immunities made clear that public opinion, as expressed in the decision to acquit of the jury at the Tehlirian trial after listening to what has become known as the "ruptural defence" (where the perpetrators are put on trial by the defence), shared the defence view that the genocide justified the killing in the name of human morality: Tehlirian had not committed murder, he had committed "a humanitarian act…as the avenger of his people [who]…carries with him in his thoughts the flag of justice, the flag of humanity, the flag of vengeance" (ibid.).

Other refugees from places where minority ethnicities had been victims of a new ethnicised nationalism and who observed these trials then also started to develop new, anti-nationalist theories of human rights. In the 1920s, two of the most important were two lawyers – the Russian Andre Nicolayevitch Mandelshtam (1869–1949), and the Greek Antoine Frangulis (1888–1975), both of whom lived as émigrés in Paris. Mandelshtam had been a diplomat in Constantinople before WWI.

Mandelshtam, Frangulis and Universal Rights

Both Mandelshtam and Frangulis had been victims of state persecution. The Armenian massacres had alerted them to the general danger to others of nationalist denial of rights for all people. They lived in a Paris for which the Dreyfus case was recent memory and Clemenceau still the great political light.

Mandelshtam set up the International Law Institute in 1921 to study the protection of minorities and human rights. Frangulis founded the International Diplomatic Academy in 1926 to do much the same thing. Several other refugees to France were among their associates and disciples, including Boris Mirkine Guetzevitch, a Russian who edited a collection of human rights articles in the constitutions of all countries in 1929; Eduard Benes, future president of Czechoslovakia; Alejandro Alvarez, a Chilean jurist who in 1917 had submitted to the American Institute of International Law a document that contained a section "on the international rights of the individual"; and President Wilson's advisor, Colonel Edward Mandel House. They collaborated on a commission to study human rights from 1926. No direct mention of human rights was put into the Covenant of the League of Nations. But these men built on the minority clauses of the covenant, which contained some rather ambiguous clauses about individual or universal human rights within the overall concern for minorities. Major states like the US and Britain had blocked Japanese proposals to protect resident foreigners. In 1929 Mandelshtam had the Institute adopt a declaration of the international rights of man in New York. It contained a preamble and six articles protecting life, liberty, property, religion, and language, and a list of obligations of a state to its own citizens. Its wording made clear that such rights "solemnly defied the notion of absolute state sovereignty". Several books arguing that thesis were published in the early 1930s and an international Federation of Leagues for the Defence of the Rights of Man and the Citizen endorsed them in 1931.

These views were like voices in a storm as nationalism grew to a crescendo with the rise of fascism and then Nazism. Nazism had embarked on the genocidal policies described by Raphael Lemkin (discussed below) and which earned him the disapproval of the violently anti-Semitic Polish government. As high-level jurists with progressive opinions, Mandelshtam and Frangulis were directly involved in the debates of the League on the treatment of Franz Bernheim, who had been dismissed from his employment under new Nazi laws because he was Jew. Also present at those debates in an official capacity was René Cassin, a Frenchman whose secular and Jewish background was very like that of Alfred Dreyfus. They all knew of each other.

Franz Bernheim

By the time Bernheim, a 32 year-old German of Jewish origin, was dismissed from his job, the anti-Semitism that was the social background to many nationalisms had become open law under Nazism. Genocide, as then stated by Lemkin, was open and lawful and justified as being in the interest of the German people. Bernheim petitioned the League of Nations on the grounds that his dismissal broke the terms of a German–Polish agreement for the protection of minorities in Silesia. Since the 1933 Nuremberg laws excluding all Jews from the professions could not be denied because of the doctrine of national sovereignty, Bernheim and his supporters argued that in the case of Silesians, the German state had guaranteed, by treaty, life, liberty

and equal treatment to all German nationals in civil, political and legal rights, and guaranteed them in their jobs. Finally, the matter was composed for a payment of 1,600 Deutschmarks. But not before Joseph Goebbels, the new Nazi propaganda minister had made an infamous speech in a Geneva hotel that revealed the impotence of the League to prevent the genocide of the Jews which began with measures such as the Nuremberg Laws. He simply stated, citing the doctrine of national sovereignty, that the German state would do what it liked and make the laws that it liked on its own territory. Many observers were aghast, regarding that moment as marking the demise of the League and its nationalist solutions to victimisation through self-determination for minorities.

Frangulis was a delegate for Haiti to the League of Nations and in response to Bernheim's treatment he tabled the resolution made by his Institute in 1928, proposing that the rights it enumerated be adopted by the League and that a world-wide convention to enforce them be held. In the ensuing debates about Nazi treatment of its own Jewish minority practically no reference was made to Frangulis' draft proposal. Although the Greek and Irish delegates did support the idea of a universal convention to protect human rights, the majority preferred lame restatements of the minority clauses of 1922 that had already been rejected implicitly and explicitly by most member-states. Benes also spoke in favour of protection for human beings. So Haiti withdrew the proposal when faced with the US concern about its implications for the treatment of blacks there, and British and French concerns about the treatment of their colonial subjects. Frangulis' proposal apparently received no coverage in the world press and in 1934, after Germany had withdrawn from the League, a renewed proposal by Frangulis fell on deaf ears. Jan Herman Burgers, the author of the major article on this history, writes: "Apparently even democratic governments were wary of the idea of an international status for human rights, an idea which has yet had no base of support in public opinion" (Burgers 1992, 447–77). He goes on to argue that the literature of the 1930s showed that the solution to totalitarianism of both Left and Right was democracy and more democracy. Little was said explicitly about human rights. At best, from democracy was inferred, as by Sir Ernest Simon in July 1937, that "the essence of democracy is the belief in the ultimate importance of every individual; that the state exists for man and not man for the state".

In sum, the experience of the Armenian genocide had not been enough. It would take the Nazi Holocaust to push the theory of universal human rights onto centre stage, displacing that of democratic republicanism. In the meantime, there were only a few further, well-intentioned contributions to the debate. The most interesting evoked the French tradition, made in France in 1936 by the heirs to Jaurès. During the war many protagonists of the 1948 Universal Declaration would return to it. It appears to have been quite separate from the projects of Mandelshtam and Frangulis. We discuss this below.

The major figure to draw out the connection between nationalism and genocide was again an individual from a persecuted minority, the Jews of Lithuania. In the 1920s, Raphael Lemkin laid the theoretical basis for what later became known as the crime of genocide, after a close study of the Armenian massacres and his lived experience of a Jew in Eastern Europe. He wished to know why

nation-states allowed such massacres to happen. But it was his direct experience of the pusillanimity of the League of Nations, and of the Holocaust, that led him to formulate his theory and the word "genocide".

Lemkin and Genocide

Lemkin was born on 24 June 1901, and educated in languages and law in Poland and Germany. He had been deeply disturbed by reading about the Armenian massacres and by the news of the slaughter of Christian Assyrians by Iraqis in 1933. He was sympathetic to Tehlirian, although worried about the principle of "private justice". In his book *Stay the Hand of Vengeance*, Gary Bass (2000, ch4, esp. 128ff) makes the point that more could be learned from the failure of the Turkish trials for crimes against humanity (a term apparently invented by the Russian official foreign minister, Sergi Sazonov after the Bulgarian massacres of 1876 (ibid., 116) after 1919 than from the success in holding them. As we have seen, the British, basically for altruistic reasons, insisted on trials of Turkish war criminals and those involved in the massacres, but their legalism turned the process into a farce in which even the worst criminals escaped punishment. The parallels with the later Nuremberg trials are striking. Already subject to the deeply-rooted anti-Semitism in Poland, Lemkin's concern about those atrocities led him in 1933 to present a paper at a League of Nations-backed International Law Council conference in Madrid, at which he proposed the outlawing of "acts of barbarism and vandalism". He defined such a crime in this way: barbarity was "oppressive and destructive actions directed against individuals as members of a national, religious or racial group", and the crime of vandalism as the "malicious destruction of works of art and culture because they represent the specific creations of the genius of such groups". All signatories to such a convention would have jurisdiction (see Lemkin 1933: 48–56; 1933b: 117–19).

In the same year, Hitler came to power with the express programme of conducting such acts against "inferior races" in Europe. The League of Nations lamely accepted a nation-state's right to be master in its own home even where "barbarity" was involved. Lemkin's proposal was rejected even by the Law Council and he was forced to leave his university position in a pro-Hitler Poland. In 1939, after being wounded when Germany invaded Poland, he hid in the forest for 6 months before escaping via Sweden to the United States, crossing Russia, Japan and Canada. By 1941, he was on the faculty of Duke University; his main work became to collect evidence of German barbarism throughout Europe. Forty members of his family were lost during the Holocaust, which started Lemkin off on a single-minded crusade to have the crimes of barbarity and vandalism added to international law. In 1943 he replaced those words with that of "genocide", a Greco-Latin neologism. He wrote in his book of 1944, *Axis Rule in Occupied Europe*:

> Genocide (the modern crime) tragically must take its place in the dictionary of the future beside other tragic words like homicide and infanticide…the term does not necessarily signify mass killings although it may mean that. More often it refers to a coordinated plan

> aimed at the destruction of the essential foundations of the life of national groups so that these groups wither and die like plants that have suffered a blight. The end may be accomplished by the forced disintegration of political and social institutions, of the culture of the people, of their language, of their national feelings and of their religion. It may be accomplished by wiping out all basis of personal security, liberty, health and dignity. When these means fail the machine gun can always be utilised as a last resort. Genocide is directed against a national group as an entity (Lemkin 1944).

Lemkin made clear in his book that while genocide was committed against a group, the actions were against individuals identified as belonging to a group. "The confiscation of the property of nationals of an occupied area on the ground that they have left the country may be considered simply as a deprivation of their individual property rights. However, if the confiscations are ordered against individuals solely because they are Poles, Jews, or Czechs, then the same confiscations tend in effect to weaken the national entities of which those persons are members." He went on to say that genocide is the antithesis of a view that sees war as something waged between states and not against subjects and civilians. Indeed, if Hitler's object was the biological destruction of other peoples in order to ensure German dominance, to win the peace if not the war, then it is difficult to read Lemkin's concerns as ignoring individuals, the biological beings. The problem arises from treating individuals according to their group characteristics, precisely the concern of universal human rights (Lemkin 1944, chIX).

Lemkin pointed out that Nazism had just such a programme and conducted it with murderous effect by transforming the ancient practice of slaughter of barbarians into the principle of government, "the sacred purpose of the German people". His shift from concern about individuals to concern about groups between 1933 and 1944 is only apparent. The real problem remains unequal treatment of individuals through claiming that one's own people have a superior claim to rights over another on a national territory. National sovereignty, then, is a cloak behind which individuals can be destroyed (for example, by not feeding them as much as compatriots) on the grounds that they belong to a different identifiable group. This genocide should be a matter of international concern because, if tolerated under the principle of national sovereignty in a world of minorities and mass migration, it is "an admission of the principle that one national group has the right to attack another because of its supposed racial superiority." So strongly did Lemkin believe in the right to sanction as a universal principle that as early as 1934 he wanted all Nazis punished as soon as they left Germany and set foot in another jurisdiction.

Important for human rights is Lemkin's point that the goal of such slaughter is not only an attack on "liberty" and "dignity" but also on biological being ("health"). Deeming one's own "people" "superior" and denying freedom and dignity to others had resulted in the mass extermination through *starvation* and gas of (he already had the figures by 1943) some five to six million Jews and two million Poles.

Lemkin's crusade to have genocide made a crime earned him a reputation as a fanatic. He first had to overcome disbelief among Americans and other English-speaking allies that the Final Solution was really being implemented. The facts revealed by 1945 forced the grudging admission that what he called genocide was a

reality. He was then appointed an unofficial adviser to the Nuremberg prosecutor of Nazi war criminals, Robert Jackson. His indefatigable efforts pushed the court to a reconsideration of a legal tradition that went back through Grotius to Vitoria and Suarez – all of whom considered that there was a universal right to punish crimes against humanity like genocide (see de Vabres 1947, 521). Yet, the court cautiously preferred not to innovate legally but to stick to existing rules. Lemkin then focused his action on the United Nations and the opportunity created by the shock of the revelation of the concentration camps. At the UN he met other Jews who also were direct victims of those horrors and no defenders of national sovereignty, including René Cassin and Hersch Lauterpacht. Cassin may have known him or his work already, from working at the League of Nations – whose defects they assessed in the same way. The UN ad hoc committee draft of the genocide convention recognised that Nuremberg had proceeded on a "different" legal basis and that the testimony heard there showed that the prevention of such genocides in the future would require international cooperation (see http:/www.preventgenocide.org/law/convention/drafts/). When finally the Genocide Convention was voted in October 1948 (it became law in 1951 only), the definition it gave of the crime was close to that given in Lemkin's *Axis Rule in Occupied Europe*, which was that genocide takes certain forms, all of which had already been practiced in Armenia and during the Holocaust.

> Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when it is accomplished by mass killings of all members of a nation. [Lemkin carefully distinguished a "nation" from "nationalism", the first corresponding with "individual liberty" and the second with "egoism".] It is intended rather to signify a co-ordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be the disintegration of the political and social institutions of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity and even the lives of individuals belonging to such groups, Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group (Lemkin 1944, chIV).

Lemkin's work made clear that genocide was carried out under and by law, listing in evidence 334 laws from 17 countries. Fifty-five nations ratified the convention at the outset. But, to the disappointment of Lemkin, Cassin and Lauterpacht, the UN left the jurisdiction in the hands of national municipal courts who followed national law, although it had become clear that these were ineffectual (see Morsink 1999, ch2, pp. 52ff). It was several years before most member states introduced its principles into domestic law, although they were directed to do so immediately in 1948.

In 1950, and again in 1952, Lemkin was nominated for the Nobel peace prize, and in 1950 and 1951 he was honoured by both the Cubans and the American Jewish Council. But the times were against those hostile to international primacy. In a disgraceful coda, we note that Lemkin died neglected and in hardship in New York in 1959 (see Power 2003; chs1–6).

Lemkin made a long list of recommendations about how to avoid genocide in the future: There should be a convention banning genocide as a whole, and first, anyone guilty of the acts should be tried and found guilty whenever he put foot in a signatory state; no policy that led to the aggrandising of any national, religious or racial groups to the detriment of another should be permitted; international control and supervision of all occupied territories should be a rule and the convention enforced. Lemkin was a linguist who spoke nine languages. His choice of words in his definition is significant and careful, which is why it is still is better than any revision made since (see ibid., 40–5). But, if genocide was recognised as a consequence of certain nationalist doctrines, what was still not so clear were the best solutions.

Reviving the Tradition

As the memory of Armenia faded and voices like Frangulis and Mandelshtam were shut down in the early 1930s, explicit discussion of universal human rights disappeared from the debate – as Burgers (1992) says. Most spokespeople for the concept reverted to the "default position" of seeking national human rights, or rights for citizens. Then, events slowly forced many back on to the terrain of their French-based fellows and the rediscovery and reaffirmations of the 1789 Declaration. The reasons for this shift were clear: A wave of invasions started after the Nazi Germany withdrew from the League of Nations. Many of these were irredentist, that is, supposed to liberate fellow nationals living on foreign soil and to reintegrate them into the nation. The unredeemed territories and peoples were many, but then, with world migration, one's fellow nationals had settled everywhere. Italy started with abortive forays into Fiume and Dalmatia as early as 1919. A civil war broke out in Spain in 1936 and the country was reconquered from Morocco by Spanish fascists claiming to protect its own people. In 1938 Germany joined the other fascist nations by invading Czechoslovakia and Austria to "liberate" its co-nationals. The argument that a nation had the right and obligation to protect its fellow nationals and bring them "home" could quickly slide into a policy of invasion of countries where there were only a handful of co-nationals. Italy followed this pattern with the invasion of Abyssinia in 1935 and by withdrawing from various international agencies. Then Japan invaded China and Korea. Unrestricted national sovereignty was clearly not going to lead to peace. By 1935 many observers already saw a helter-skelter to war. With the outbreak of the Second World War, the critique of the warrior nationalist state became sharper. It was increasingly seen as a threat to peace and a denial of rights, which shifted the opinions of those who had believed that rights would be attained through national traditions of law. What brought them even closer back to the French tradition of universal rights was the failure of the League, which they saw was powerless to stop these wars and was clearly finished as a peace-keeping mechanism. The League's solution for avoiding genocide, self-determination for minorities, had not worked. Indeed, with over 3,000 ethnicities in the world – measured by language difference – by itself it could never have been viable.

The critique of the national route to rights for nationals took a number of forms, but in each, we see how after starting from this traditional position, pro-rights forces were made eventually to recognise that the only solution was *universal* rights. All the individuals and organisations discussed below began with the fact that a world of nation-states was here to stay. But there developed the dominant view that an untrammelled assertion of national sovereignty and national rights like that claimed by totalitarian nationalisms should no longer be tolerated. If the nation-state were here to stay, then it would have to be a nation-state whose powers were clearly limited by a new international law that could override it. So the goal became one of creating a "good" nation-state committed to human rights and democracy, to which was opposed the "totalitarian" state that insisted on national traditions that often had no space for such notions. Some thinkers, quite common in countries of continental European tradition, thought that the way to create a "good" state was to insist that all states have a bill of rights and that the goal of a constitution is the attainment of human rights. This often "revived", to use H.G. Wells' term, the tradition that went back to 1789. It was accompanied by another view, most common in states of Anglo-Saxon origin, that the good state could be attained by resuscitating the common traditions of the rule of law going back to the mythical Magna Carta and continued through the American declaration of independence. Many national liberation movements in colonies demanded the famed rights of Englishmen in bills of rights; as early as 1923, for example, the African National Congress adopted such a bill.

Since no group went completely beyond the reality of the nation-state as the vehicle for new human rights, all faced the truth that an appeal to national traditions was more palatable to national populations than any vague and philanthropic appeal to rights for all humanity. They shared a belief that the public opinion for human rights should be created in programmes of national education to create political constituencies that, while remaining national, would empower only a liberal democratic and not a "totalitarian" state. Of course, since the main object was social peace and happiness, and since one of the weaknesses of the League had been that its machinery could not override any breaches by states, this led to a belief that "good" states should interfere by force inside the national borders of "bad" states to protect victims of injustice. If they did not act as rule makers then the "bad" totalitarian states would not be controlled and breaches of rights would proliferate.

Winning Over the Rest

We see how the shifts in non-victim and decision makers' opinions took place through the history of an organisation set up in the United States in 1939 by James Shotwell, William Allan Neilson and others. Shotwell's committee (later, the Commission for the Organisation of the Peace) became influential at the White House by 1943, although it seems that Roosevelt, a fierce nationalist, may also have used Shotwell's reputation while keeping him out of consultations on occasion (Shotwell was also chairman of the Consultative Committee of the President at the

UN San Francisco Conference) (see Normand and Zaidi 2008, 75, 101–2, 116–17). The initial goal of Shotwell, Neilson and his colleagues was to "study the organisation of the Peace", assuming as an unavoidable constant a system of nation-states. Their organisation had had some contact with Mandelshtam and Frangulis. To attain the goals it had set itself, it stated: "Nations must renounce the claim to be the final judge in their controversies with other nations and must submit to the jurisdiction of international tribunals. The basis of peace is justice; and justice is not the asserted claim of any party, but must be determined by the judgment of the community". The community was an international community since "national sovereignty is clearly no longer adequate" (Shotwell, COP 1940, 10–12). The organisation's second report, made the year after the US entered the war against Germany, stressed that a new international law and jurisdiction "needs as well the support of an enlightened public opinion" and that the Americans and the British would have to take the lead in any new order to enforce the rules (ibid., 4, 19). In its third report in 1943, which came after the Allies had united in January 1942 as the United Nations, informed by the goal of a post-war order that would not permit war and injustice, the goal of universal human rights became explicit:

> The stated aims of the United Nations will require international law in many areas where it has not hitherto operated; and authority must be provided for the enforcement of this law… In the Declaration of the United Nations, the preservation of "human rights" is referred to as a post-war aim. The fact that statesmen of the United Nations have repeatedly asserted the values of human freedom and have looked forward to "the century of the common man" suggests that they intend the Atlantic Charter to outline a policy of enlarging the protection offered by the world community to the individual. To enlarge this process, to maintain loyalty to itself, and to prevent national inculcation of opposition to its law, it may be necessary to promulgate a Bill of Human Rights, specific in such cases as freedom of information and discussion, broad in the protection of the "four freedoms". The procedures by which international laws is interpreted and applied must also be protected (ibid., 12–13).

The bill was seen as an alternative to self-determination, although that was also a subordinate goal. For example, it was stated that "the colonial question is a complicated one…It will clearly not be solved by the demand that [a colonial power] give up its colonies. The real aims are to protect and advanced human rights, to give positive assistance towards self government and economic welfare, and to establish security and order in the community of nations" (ibid., 20). The rights envisaged were those of President Roosevelt's speech of 6 January 1941 to Congress to raise more money for the war effort. There, he had stated that the goal of the war was to establish four freedoms:

> The freedom of speech and expression everywhere in the world; the freedom to worship God in his own way everywhere in the world; the freedom from want which, translated into world terms, means economic understandings that will secure to every nation a healthy peacetime life for its inhabitants everywhere in the world, and the freedom from fear, which translated into world terms, means a world wide reduction in armaments to such a point and in so thorough a fashion that no nation will be in a position to commit an act of physical aggression against any neighbour-anywhere in the world.

These were anodyne and could have come from many sources, but they were important because of their *universality*. In this regard it is important to remember Roosevelt's advisors had also had contact with Frangulis' Institute.

The problem with this two-pronged policy of a decent nation-state pursuing human rights as a goal remained what it had always been since the French revolution: that national interest might tend to override rights for all. The Commission for the Organisation of the Peace put its finger on what would remain an abiding problem in a world of nation-states (Shotwell 1943, 31). Everywhere in the world, there were refugees, displaced people and mass migration. "Refugees may be returned to their former homes, allowed to stay where they are, or removed to other places. All three methods will doubtless have to be utilised" (ibid., 22). The solution proposed was porous frontiers and relaxed nationality rules. The scenario of a world of mass migration immediately shifted focus onto the Oriental and Asian worlds, whose populations had most been victims of closed immigration rules. Shotwell was not naïve about white fears that they might be outnumbered by a majority Asian constituency; racism would have to end and moral equality be made a reality and this could only be achieved through "protection of human rights" (ibid., 24) for long-hated and oppressed racial minorities. For the Commission, this would mean a vast movement, with the ensuing social, legal and political problems, inevitable in a system of nation-states. It found the solution in an education programme in which "individuals have been taught the value of civil liberties, and the worth and dignity of the individual human being". The recreation of the nation-state as a beneficent force through mass education for human rights and respect for human dignity raised further issues: Whose traditions and understandings of justice should provide the basis for that? The solution was not to allow the new UN to be democratic in its initial phase.

A Civic Education in Human Rights

The practical problems posed for the nation-state by mass migration and multiethnic populations could apparently be overcome by a legal commitment in all constitutions to human rights. This became a chorus, strongly chanted in many Latin American states (see, for example, the American Declaration of the Rights and Duties of Man 1948, drafted in 1946, in Brownlie and Goodwin-Gill 2002, 645–70). The complication was that this policy had been tried for over a century without overcoming nationalist hatreds in an everyday way. Many European countries, influenced by the French example, had made the goal of their states human rights and then ignored them in practice. Lauterpacht listed several: Sweden, Spain, Norway, Belgium, Sardinia, Denmark, Prussia and Switzerland (Lauterpacht 1947a, 14; 1947b). But, as he emphasised, they were not easily put into practice because of the prejudices of nationals, especially in democracies which favoured themselves and fellow citizens (ibid., 13, 23). What was the starting point for this civic education of racist and nationalist peoples? How should a bill of rights be taught to any people? By 1939 there were two main responses; the first of which was Lauterpacht's, close to the barely-remembered views of Mandelshtam and Frangulis. Lauterpacht saw rights for all as something that had to be constructed – "the sovereign was subjected to the higher law conceived of as a guarantor of the inalienable rights of man"

(ibid., 14, 24) – so he was concerned about how the right values could be inculcated in the public.

Lauterpacht was a brilliant lawyer with the advantage of being trained in both civil and common law systems. He could not easily believe that simply making human rights a goal of a state would have much value. A declaration in itself in a system of nation-states, even "good" ones, required for its efficacy an understanding of it as a strong international law that could override state interests. Since his knowledge of history was vast – "Historically the doctrine of natural law is rooted deeply in the claims to freedom against the tyranny of the State and the injustice of its institutions" (Lauterpacht 1947b, 40) – he recognised that human rights had been won in a struggle. This led him to conclude that "the rights of man cannot but, in the long run, be effectively secured by the twin operation of the law of nature and the law of nations – both conceived of as a power superior to the supreme power of the state" (ibid., see also 40). In 1939, there was, he believed, only one real place that human rights were protected by international law, and that was in the law of aliens. More was needed. While this could appear a *pis aller*, it was not without hope. Since, as Shotwell had indicated, the *heimatlos* were the problem category for human rights based on a nation-state, Lauterpacht's commentary was useful. It pointed beyond the nation-state solution to a revived French revolutionary tradition of law.

The rival tradition, more palatable to the British and the US, already identified by Shotwell as necessarily the world leaders in any new human rights system, was advanced by English luminaries, Lord John Sankey, H. G. Wells, Lord Ritchie-Calder and aging peace activist Norman Angell. Sankey had been a member of Frangulis' International Diplomatic Academy. Ritchie-Calder, later director of plans for political warfare at the Home Office, recalled how this group of anti-war activists, from all political parties, came together and drafted their declaration of human rights, whose avowed goal was to end the cause of war.

> One night in the winter of 1939–1940, Wells came to see me at Clifford's Inn…he carried out the time-honoured ritual of writing a letter to the *Times*, about war aims. And, typically of H.G. he made his war aims – what we were fighting for – the necessity for the reassessment of human rights…the letter…called for a great debate on the Rights of Man in the Twentieth century…We got together, Wells and others of us, and H.G. drew up a "cockshy" draft of the "Rights of Man in the Twentieth Century" (Ritchie-Calder 1967, 3–4).

The novelist had for some time been concerned about the failure of the League of Nations and about the need for human rights, compiling all the human rights documents he could find in support of his draft declaration (Normand and Zaidi 2008, 76–9). This ended mainly as a reaffirmation of the British traditions going back to Magna Carta, but it did also refer to the French declaration. After a mass consultation, discussed below, the committee then drafted an official declaration that has become known as the Sankey Declaration, published in 1940. It started from the "good" state, a Western lesson for all mankind. This was a state that as it had become more democratic had also made "a definite and vigorous reassertion of the individual rights of man. These were the inalienable rights to life, liberty and the right to property, work and education. They were accompanied by a 'duty to the community'"

(see Appendix in ibid., 15–18). Overall, the Hobbesian and Lockean stamp was clear. A further and more fundamental code was proposed for the future.

What became important was the publicity and public education campaign that these leaders believed necessary, and what they saw as baffling responses. The *Times* was not interested in promoting a debate. But the *Daily Herald*, with its two million readers was, and it later published the Sankey Declaration as well. One hundred thousand copies were distributed in Britain: "they debated it in village schools, in parish halls, in adult education classes". Ritchie-Calder recalls that there were 3,600 people at one meeting. When the consultation was finished, the declaration was translated into ten languages and distributed in 48 countries. It was translated into practically all European languages as well as Chinese, Japanese, Urdu, Arabic, Hindi, Bengali, Gujerati, Hausa, Swahili, Yoruba, Esperanto and "Basic English". Penguin published the declaration together with other declarations including that of the Ligue des Droits de l'homme of 1936 (see Burgers 1996). In 1940 Wells went on a lecture tour to promote the idea in the US. The education of the good citizen went further. Ritchie-Calder arranged for the document to be copied onto microfilm and parachuted into occupied Europe. It was published not only in French papers but also in Dutch in the *Nieuwe Rotterdamsche Courant*. He takes some satisfaction in recording: "We were attacked (thank goodness) in Mussolini's paper *Il Popolo*. but at least the arguments got into the hands of the readers of *Il Popolo*. And we were lambasted regularly by Frisch on Goebbel's radio. Then came the Blitz and Europe was overrun" (Ritchie-Calder 1967, 4).

Wells was a social democrat and tireless in his work despite the apparently more pressing concerns once the war started. His view was probably closer to that of the French than was his fellows. Insisting on free speech, he attacked Neville Chamberlain and Lord Halifax mercilessly. The others in his group therefore sacked him, concerned with the need for national unity and not to "rock the boat". This was one warning about the dangers of thinking that an international system of rights would triumph over democracy. Another was the response to what Ritchie-Calder recognises were limitations in Wells' views. Wells had engaged in the necessary work of winning over public opinion; in 1947 René Brunet acknowledged that this had created a great movement of public opinion in favour of human rights in the US and Britain. But it did not win the vast majority of the world who lived in Asia and Africa. Their leaders responded with reservations to the Sankey Declaration because it was seen as too Western and British, and had set what were limited national traditions as standards that other should conform to.

> In India…both Gandhi and Nehru came down for duties as against rights…And the Chinese reacted in an equally strange way. I mean from our point of view. Then we realised – I think it was pointed out very firmly by some of the Chinese writers – that in point of fact we were indulging our Western democratic attitude towards them…We were assuming that the things that are implicit in our Graeco-Romano-Hebraic thinking were general…We had already had the Declaration translated at the School of Oriental Studies; but it was not a question of translation but of philosophical language…we unwittingly expressed the Rights in the idiom of Western parliamentary democracy…We then had it reconsidered, re-examined, and reissued in the East in the orientalised sense, and we found that in fact there was then very little basic contradiction (Ritchie-Calder 1967, 6).

Ritchie-Calder was gilding the lily. He recognised that nine-tenths of the Sankey Declaration found its way into the 1948 UN Declaration but even that, as he acknowledged, still had not solved the problems of its Eurocentrism (ibid., 6). The reservations had not changed when in 1948 UNESCO published its *Human Rights Comments and Interpretations* (see introduction by Jacques Maritain in UNESCO 1948, 18, 184–194, 195–8). Winning mass support through education was not easy when one or two nation-states proposed and others disposed. It was downright offensive when "primitive" peoples had their views summarised in this semi-official UN text by a white who was on record as denying that Australian Aborigines were ready for citizenship, that is, for the national rights enjoyed by whites.

Conclusions

Nevertheless, the conditions for a formal declaration of universal human rights had been established by the middle of the Second World War. Sufficient numbers of individuals from the big "white" nation-states supported the idea because they had been, or feared that they could become, victims of other national pretensions, and their leaders were prepared to accept the proposal. A new opportunity had arisen for protagonists of what was only a vague idea for the rest.

Chapter 12
Fathering the Universal Declaration of Human Rights

Limits to National Rules of Law

For universal human rights, the lesson learned from Nazism was that they could not come through the nation; existing legal systems based on a popular-democratic tradition were not only inadequate but often denied millions their rights. This lesson was clearest in German-occupied Europe where the entire legal system was a farce: judges simply condemned outsiders to death on the basis of laws that instructed them to do this in the national-popular interest. Most Germans knew this and most applauded that rule of law. It should be remembered that thousands killed each day at Auschwitz had been through courts that condemned them according to legal rules. After the war victims clamoured that this was a charade of justice. It became politic for the victor democracies to chime in. But non-German and non-fascist rules of law soon came under similar criticism too, particularly when the war was ending and punishment had to be meted out. Then, as many observers noted, national rules of law proved unable to meet victims' clamours for justice, and private justice replaced it. Practically none of those *prima facie* involved in the murder of millions were punished. The facts for Germany tell a more general story: In his monumental three-volume history of the destruction of the European Jews, Raul Hilberg gives the following indicative figures of the numbers sanctioned by mid-1949 in official trials and other state procedures:

Registrants	13,199,800
Charged	3,445,100
Amnestied with trial	2,489,700
Fines	569,600
Employment restrictions	124,400
Ineligibility for public office	23,100
Property confiscations	25,900
Special labor without imprisonment	30,500
Assignments to labour camps	9,600
Assignees still serving sentence	300

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He adds to the great numbers of those who "got away with it", pages of lists of criminals who rapidly returned to success and prominence, one of whom, Hans Globke, became a member of Konrad Adenauer's post-war German government (Hilberg 1985, 1081, 1084–5; see also 1088, 1090–109). This meant that the victims saw their oppressors walking around not only free, but also rewarded and protected. Since many perpetrators were less than 20 years old when they committed the crimes this meant that in the 1970s and 1980s the offenders were only middle-aged. Simon Wiesenthal, a concentration camp survivor, recounts that in 1989, just up the road from his home a man who had performed medical experiments and euthanasia on hapless victims, openly practiced in a psychiatric clinic (Wiesenthal 1989, 117–8). The failure of the courts to prosecute was common knowledge among victims. Typical was this observation of Wiesenthal, who remorselessly pursued those guilty of crimes against humanity and was dismayed at the pusillanimity of the victors' courts:

> The criminal laws of all civilised nations know the definition of murder. The lawmakers were thinking of the murder of one person, or two, or fifty, or maybe a thousand persons. But the systematic extermination of six million people blasts the framework of all law. It is like the explosive force of an H-bomb – something people don't want to think of. Eichmann understood this very well. In Budapest he said to some friends in 1944: "One hundred dead is a catastrophe. Five million dead is a statistic" (Wiesenthal 1967: 98).

Challenges to the Rule of Law

The combination of the numbers of victims and the discredit that existing rules of law fell into in the period 1945–7 was crucial in the adoption of universal human rights. By 1945 there were more victims and a stronger awareness of possible victimisation among large populations. But it cannot be emphasised too much that where national-popular traditions of law had not been fundamentally criticised as inadequate before the experience of national-socialism, except by the out-groups that they victimised, by 1945 all those families of law came under increasing criticism from many quarters. They simply could not provide adequate justice for millions of victims of genocide and crimes against humanity committed in the name of the right of the nation-state. It was not only the losers who mattered in this criticism of national-popular systems of law, but also the victors who often, as was the case with the North Americans, had no direct experience of Nazi genocide and indeed disbelieved it until late in the war. Americans started to reconsider the virtues of the sacrosanct common law. Most of the critics saw the limitations of national-popular systems of rights for dealing with such enormous crimes as requiring an addition or extension – a new rule of international law protecting human rights – and international law, once the Cinderella of the profession, became temporarily its princess in 1945–8. The leaders of the United Nations that had defeated Nazism, fascism and their allies conceded the need to surpass existing legal traditions, creatively extending and inventing new rules. While cynics may see representative democracy as

Rousseau did – a tyranny between elections – we need not go so far in denying any accountability of leaders to people. In 1944–6 there was an unusually active popular voice "from below" demanding human rights from world leaders whose legalistic moderation might never have led them to consider universal human rights. We can no more than speculate that, say, Winston Churchill also shared the feelings of victims because he and other Western leaders were on a Nazi death list as part of the global "Judeo-Bolshevik, capitalist, liberal plot" perceived and decried by Nazism. However, we can affirm that he and American president Franklin Roosevelt faced a dilemma at the end of the war. Plans simply to execute 50,000 or more Germans and Nazis summarily in the fashion discussed by Churchill and Stalin in an attempt to still the popular clamour for justice, could not be carried out, if only because allied soldiers could not be trusted to carry out such punishment. This left the leaders with the solution of fair trials for all who were *prima facie* guilty of crimes against humanity. But then there were too many for this to be feasible and those tried in both Europe and Japan were nearly always acquitted. A not so cynical way of seeing from the point of view of national leaders the enshrinement of universal human rights in a joint declaration by the world's states is that they provided an apparent solution that assuaged the clamour for justice once firing squads and farcical trials had been ruled out.

It was clear after the crimes committed under the rules of law of fascism and its allied countries, that is, most European nation-states, that law as procedural justice whereby all individuals had the same rules applied to them, was insufficient. This much was obvious: the content was as important, if not more important than equality before the law. Moreover, from the first trials of war criminals, it became clear that an understanding of justice as the writs and the courts – which applied not only in Germany but also in all common law countries – could not cope with monstrous crimes of the sort considered by Wiesenthal. Direct victims like Wiesenthal himself quickly realised that existing legal systems were inadequate. More importantly, the mainstream lawyers of the states that judged fascism's crimes against humanity themselves adopted that view. One example was Bradley Smith, the US prosecutor at Nuremberg where the senior Nazi war criminals were tried: "As the judges surely realised, none of the occupation authorities was going to proceed very far with the task of prosecuting two million to three million cases, in each of which they would have to prove that the defendant was a voluntary and knowledgeable member of a criminal group" (Smith 1977, 164). One of the judges at Nuremberg, Donnedieu de Vabres, stated explicitly that the existing rules about conspiracy designed to extend the potentially guilty to the maximum simply could not work adequately (de Vabres 1947, 531ff). Yet a third, Raphael Lemkin, specially attached as an advisor to the US team at Nuremberg, was so disappointed at the inefficacy of those trials and their apparent failure to bring justice, that he determined to seek a convention to ban genocide at the United Nations. They all pressed the new UN to establish some new principles.

The efficacy of earlier national-popular traditions of law in punishing massive crimes against humanity was under question. If they could not work to defend individuals, a new, universal human rights system might. Further impelling post-war

planning by the Allied states along that route was the pressure from victims who, after 1945, began to pursue private justice after the failure of the courts to punish perpetrators adequately. The exact figures of those executed summarily or after unofficial trials will never be known, but it probably amounted to hundreds of thousands in Europe alone. Jewish execution squads even used British army materiel to carry out such punishments (Blum 2001, chs35–40). The principle that justice should be prompt, going back within the common law to Magna Carta, clearly could not be met by war crimes trials. On the other hand, private justice, although; prompt, could get out of hand.

In sum, the experiences of Nazism pushed the leading nation-states of the world to consider a new regime of universal human rights that would ensure that genocide would not recur without terrible sanctions for perpetrators. It would lay the basis for a new rule of law to trump all national-popular rules of law by ending the connection between belonging and rights. No longer would any individual have to prove that they shared any characteristic with a majority in order to enjoy their human rights. Nor could that majority decide democratically that anyone in the areas covered by the novel realm of these universal rights was subordinate to a democratic decision. Less widely shared was the view that nationalism, the nation-state and the "people" were the roots of genocide in the modern era.

Nationalism and Genocide: A New Look

In the late eighteenth and early nineteenth centuries, Johann Gottfried Herder, Georg Wilhelm Hegel and others whose dream was the creation of a German nation-state, argued that the nation-state and its traditions were an expression of an inescapable genius of a people, the way in which the riches of its human achievement found particular expression. The nation-state was seen unilaterally as a positive force and no downside to its creation was emphasised. There were elements of wishful thinking in the theories of Germans intent on creating the nation-state that they thought the French had achieved. Among the French theorists of state and nation, like Montesquieu and Condorcet, the explicit corollary had been that there were hierarchies of civilisations and nations in which the height of human creation was usually stated as represented by one's own nation-state. In Hegel, this latter idea became central: Germany was the nation-state par excellence and all others were inferior. It was a view pregnant with the danger of war and forced civilising conquests of the more backward.

Theories like these became practical political programmes, typically in the Italian Risorgimento, where the process of nation-state building through battle was presented through the ideas of Giuseppe Mazzini as the most noble endeavour for humankind. It was duty imposed by God on the people. The key belief was that all peoples wanted to be liberated from their foreign oppressors and united as nations with common traditions and language. All that was required was the readiness of a few idealists to sacrifice themselves in risings that would trigger a latent popular

revolt. Mazzini, who never made it to fight himself, was always extolling the blood sacrifice of young intellectuals inspired by his ideas. His organisation "Young Italy" was soon joined by a "Young Ireland", a "Young Poland" and other similar groups that together formed "Young Europe", which rose in revolt several times, only to be totally crushed in futile risings made throughout Europe in 1844–48. In Italy, the best known of such rebels were the fratelli Bandiera, mentioned earlier, who were officers in the Austrian Army executed for treason after a ill-advised landing in 1844 designed to make the peasantry rise against the Austrians. The "people" were usually not interested and joined in savage hunt of the defeated nationalist intellectuals. Garibaldi's memoirs recount a fearful escape through the marshes in 1849, pursued by the local peasants (Garibaldi 1932, ch9). Mazzini saw these disasters as positive – the shedding of blood by nationalists would fertilise the soil for further risings against oppressors. Such "Mazzinian" national-populist politics from below only really ended in both Italy and Germany when Piedmont and Prussia united the Italian and German states – not after popular risings in favour of national ideals, but by conquest of areas supposedly united by a false shared history. After 1870, Mazzini expressed disillusionment in the people and despaired for the states that were being born. Rarely was nationalism and nation-state building recounted from the point of view of its victims during the heroic period of national liberation.

So, in Western Europe the period of national-popular liberation was over by 1870, through the forcible imposition of unity from above in many states. Only then did a more realistic assessment of the nation-state's construction begin. In 1882 Renan wrote his celebrated essay *What is a nation?*, which ended the unilateral, romantic view of nationalism, where the losers in the process had been ignored. Renan's point was that all nationalisms and nation-states are built on the repression of minorities; on compulsory national oblivion about what had been done to the losers and, therefore, on the obliteration of the cultures that bore those memories (Renan 1992, 41–2). The thesis was not only a statement of what is involved in the construction of the nation-state, it also had his approval as necessary and ineluctable for human progress. For example, he expressly shared in the general anti-Semitic climate of France (where he lived) and in Western Europe more generally, for which the expulsion and destruction of the Jewish minority was essential to the health of the nation-state. His essay merely expressed what was generally held among Western intellectuals. It remained a chapbook for many progressive individuals and organisations who suggested that the solution for rebellious minorities was self-determination, even if this meant that those within states should be forcibly removed to new areas. Though ethnic cleansing is regarded as shocking today, it was regarded as a positive policy until the 1920s. The League of Nations endorsed or approved of mass transfers of minority ethnicities out of states where they had lived for centuries, including Greeks from Turkey. The Balfour Declaration of 1917 promised the creation of a homeland for Jews in territories occupied by Muslims for centuries. The Nazis would later state that they approved of French proposals for shifting populations (for example, Jews to Madagascar) to give them space or *lebensraum*, although this logically meant, *inter alia*, the destruction of peoples already living there.

Renan's recognition that the creation of viable nation-states had required ethnic cleansing and even the extermination of minorities began to be seen negatively only after the Armenian massacres. The real theoretical shift to a critique of the nation-state and rights systems took place when national-socialism began to impose policies based on its theories in conquered countries in Europe. Resistance to such policies was ruthlessly crushed and it was Resistance figures who, from their places of confinement, often on the eve of their own executions, started a thoughtful critique of the principle of the nation-state. Many later became leaders in the creation of the European Union. Altiero Spinelli, Jean Monnet and others advanced complementary arguments. In August 1941, Spinelli and his friends wrote the Ventotene Manifesto, which provided one of the theoretical bases for a post-war Europe without nation-states. It argued that the nation-state had become a harmful force whatever its virtues and importance in the nineteenth century. In its developed form it always tended towards totalitarianism – Nazism showed that. So a future Europe that was peaceful and protected its people from crimes against humanity would have to be transnational, with rights and an administration of justice that was superior to any nation-state claim: a Europe under a new international law. Spinelli proposed a federal united states of Europe; he also warned that the victorious powers would do their best to re-establish the old discredited system of nation states after the war (see Lipgens 1985, I, 471–89). Jean Monnet and Robert Schuman, considered the founders of the European Union along with Konrad Adenauer and Alcide de Gasperi, had similar hopes. But they did not go as far as Spinelli, hoping rather for a minimisation of the claims of states and the practical disappearance of border controls against outsiders (Monnet 1978, 524; Schuman 1963). They all insisted on privileging the individual and his or her rights against those of the community, although in their practical politics they also advocated returning power to local communities. Many were liberal-socialists. Their reservations about the state were important when the post-war European system was established. In it figured the memory and fear of the genocide that had resulted from the nation-state and in which many, including co-author of the Ventotene Manifesto, Eugenio Colorni, who was Jewish, paid with their lives.

The Legacy of the War

In 1945 the Second World War ended with the unconditional surrender of Nazi Germany (August) and its Japanese ally (September). It had cost at least 60 million lives; and had been the first truly "world" war, involving practically all of humanity. In the First World War, troops from all parts of Europe and their empires had fought each other in the trenches, but the theatres of war were in western, southern and eastern Europe, spreading into the Middle East. So that "world" war had in fact been a European war, affecting directly only the civilian populations of some nation-states. The long Second World War stretched back 10 years to 1935; it had begun in peripheries; spread to Europe and thence back into eastern Europe to Moscow and

beyond; into Africa and the Middle East, and from near east Asia into far east Asia and thence to Southeast Asia and the Pacific. Even countries that had built up their national identities on the myth that they were free from the ills of the old world, including the United States and Australia, were attacked directly on their national soil, in the famous attack on Pearl Harbour in December 1941 and on Darwin in February 1942, with significant civilian casualties. The map of the areas controlled by the Axis powers in 1942, when it was widely believed that they would win the war, covered much of the globe.

This was a war that affected practically every human being on the globe, in unprecedented fashion. Rather than being limited to all the men aged between 16 and 45 years who were conscripted, it was a total war pitting national populations against other national populations. The object of the contending states was to win by attacking and destroying the morale of the civilian populations of their enemies. It was deliberate policy among the Axis powers who started the mass massacre of civilian populations in Nanking and Abyssinia in 1935–6 and continued with the deliberate targeting of civilians in the saturation bombings of Coventry and other British cities. The Allies, as the United Nations, emulated that attack on non-combatants in the carpet bombing of German cities that began in 1942 and reached a crescendo with the bombing that destroyed Dresden in March 1945. Even more notorious and horrific was the use of atomic bombs to destroy Hiroshima and Nagasaki in August 1945. Even as they were being defeated and forced back into the Reich by the advancing Soviet armies, the German forces conducted a scorched earth policy that emptied whole regions of human beings. The express intention in all these policies was to terrorise individuals into submission; often, it was simply irrational vengeance. Armies took no prisoners in the deciding battles of the war. This was widely publicised when the enemy did it – American public opinion was galvanised on reports of the massacre of GIs at Malmédy in the battle of the Bulge late in 1944. The victors were correctly accused by the defeated nations of similar crimes but this was denied for 50 years (Beevor 2009).

Civilians fared little better than captured soldiers; they were aware that death was just a whisker away, above all of the possibility of being killed for nothing because of genocidal politics. As the literature of the so-called bystanders shows, a person does not have to observe directly someone being beaten to death to know that something appalling is happening "over there". When the countries that had been conquered and occupied by the Reich were "liberated", the monstrosity of national-socialism was revealed in the concentration camps all over Europe from north to south and east to west. The extermination camps were novel revelations to some people, including the Americans and Australians, when film of them started to arrive in 1945, but local populations had known they were there as whole ethnic groups disappeared in the fog of the night. They were shown to be so ubiquitous that everyone in the neighbourhood knew they were there from the first constructions in 1934, even if the "extermination camps" for "inferior outsiders" – Jews, Slavs, blacks, homosexuals, the mentally and physically incapacitated – did not become known to the distant public until 1943. The victors' crimes only became known well after the war, and then only to specialists. The popular direct participation in the hunting

down and slaughter of outsiders in Germany, Poland and the USSR has provoked widespread debate in Allied countries (see Goldhagen 1996). Less known is the way in which Japanese POWs, who escaped en masse from a camp in Corowa in NSW, Australia, were hunted down by farmers in August 1944. Of 359 escapees, most were murdered, only 20 returned, unharmed, to their camp.

The hatred between and within national populations had become intense after 10 years of such butchery. A war involving whole national populations made it extremely difficult to draw clear lines between those who should be considered complicit in war crimes and those who should not. One eye witnessed stated that in Poland the "good German" was never seen. The mass complicity explains why victims continued for years to conduct reprisals and hunt down the "murderers among us" (the title of a book by Simon Wiesenthal 1967). At the end of the war, civil conflicts broke out in many European countries, mainly in the east and south, but also in the west, where summary execution of thousands of "collaborators" became the rule as each country was liberated from the Nazis. These wars continued for up to 5 years after peace was officially declared, opposing diehard supporters of the defeated regimes to the fiercest of those who had resisted them, usually the Communist resistance forces. The hatred was so intense that the victors, who defined themselves as "good" nations, even considered, both in private and at an official level, the extermination of the entirety of the enemy population or, at least, summary execution of hundreds of thousands. The scope of the numbers envisaged for that fate in Nazi Germany can be appreciated when we remember that it was officially estimated that up to eight million Germans had been complicit in war crimes and crimes against humanity. At least part of the reason why such proposals for disregard for legal niceties were not adopted was simply logistical.

Popular reactions to the genocidal war varied. The strong took the militant attitude that they would never allow themselves to be victims again. Many Jews set about creating their own nation-state in a continuing war against Palestinians and their British protectors. Many Asian peoples, hardened by their resistance to the Japanese, again in a total war, did the same by seeking independence from their colonial masters. By 1949, China, Korea and India had established themselves as nation-states, together with Indochina, Indonesia and the Philippines, in a mix of diplomacy and military struggle. The warrior-states that were created in the different wars of national liberation against both Japan and the former imperial masters manifested one sort of response to the long world war. Their creation of new nation-states was no solution where the rights of individuals were concerned. Indeed, the unprecedented ethnic cleansing of Muslims out of India and Indians out of Pakistan after independence and partition in 1947 confirmed the thesis of critics that national independence and ethnic cleansing have always been a couple.

Another response was that of further millions of average human beings sick of war, particularly the skeletal figures seen in films from around the world as they were freed from camps across Europe to Manchuria. As we look at them picking over the ruins, foraging for food, deserting traditional moral codes and ethics to survive, or fleeing from main centres of battle to places so far away that they would be too far for the war to catch, what we see as the common response is an immense

tiredness and a desire for peace at almost any price. There were doubtless as many responses as there were individual stories, but there was a common recognition that peace would require new forms of protection.

Personal reminiscence is not common in a book like this, but I shall break the rule to make real the general point here. In 1946–7, in the Fiji Islands, my mother began to receive letters from a friend who had gone into the Ravensbrück concentration camp with UN Relief and Refugee Agency teams. Soon, after a long voyage, British papers arrived with the first photos of the camps. This was talked about with bated breath; and yet before those reports such realities were not entirely un-intuited in a distant Pacific island where the real fear had been the "Japs" who had plans for an invasion from the Solomon Islands. My mother had been in Nazi Germany in the 1930s and in our house the really frightening figure was the Nazi, about whom I had bad dreams, reinforced by looking at photos in books about the concentration camps in the school library in the late 1940s.

The new protections guaranteeing peace would be decided by the victors: if hundreds of thousands of the vanquished died in recycled concentration camps after the war, there was scant concern for them. They were excluded from any solution. The victors had been the United Nations since 1943 and in the following years the leaders had had many meetings to decide how to secure the peace after the war. The first major, world-wide consultation at a lower level than that of heads of state, foreign ministers and major military and diplomatic figures, came at the San Francisco conference of the UN in April-June 1945. Two hundred and eighty-two delegates attended, together with 1,444 others from 50 countries, and 50 NGOs. What must be noted immediately is that those at this conference were almost exclusively "white" although representatives of China, India and a few other Asian nations were also there as they would soon be independent nations. Their contributions were in many cases substantial and we discuss those below. But, on the whole Lord Sankey's strictures discussed above (in Chap. 11) about the Wells' Declaration still held: the solutions were Eurocentric. Planning for future world peace would be in the hands of Europeans and Americans. The implications for universal human rights were not as awful as this might sound. It is true that the representatives of a majority of the world's population did not have a chance to discuss them. But, they were concerned to have national independence and thus their solution was not concerned with universal human rights, as even those Asians who were consulted made clear. However, as each colonial nation won independence and sought to join the UN, it was obliged to subscribe to the universal human rights declared in 1948. If this means that since 1948 a minority of Europeans have imposed Eurocentric values on other cultures it is only in the sense that the new nation-states freely subscribed to them as applicable to themselves, and thus in that sense, as of universal, not simply European, value. In 1948 several Middle Eastern states accepted the UN Declaration. So, if Asia, Africa and the Pacific are not a central part of the history that follows, this is not an oversight. They did not participate in making the new protections except in the way discussed below.

It is useful to distinguish three main groups among those present. They had an uneven influence on the solutions adopted and all had not learned the same lessons.

Only a few wanted a radical new solution; most wanted new rules but thought that they should be grafted onto their own rules of law. A decided minority sought universal human rights and that remained their focus throughout the establishing of the United Nations as a peacekeeping body. All that united them was the statement in the charter, which affirmed UN commitment to fundamental human rights, and that an international bill of human rights should be part of the strategy for maintaining world peace in future. They understood this in different ways.

First, there were the leaders who had led the United Nations to victory; then there were lesser figures on the Allied side; and finally there was a voice from below. The first simply saw the solution as the establishment of "good" nation-states and thus, since at least the US and the USSR regarded each other as the problem, in containing what the other wanted. The second, lesser countries of Latin America, Australasia and south Asia, often wanted an overarching and superior international law to which all states were subordinated; but they too assumed the notion of virtuous states that conformed to the proposed rule of law. The third were almost exclusively from Europe and they were firmly post- or anti-national. They sought universal human rights and no state sovereignty in the application of such rules. The first proposed, the second disposed and the third seized an opportunity to sneak their solution through as a standard for the future.

The Main Players

We are interested here in the third group – those individuals for whom the main new protection should be universal human rights. However, since this white minority within a white majority of main players at the United Nations had to wrest that solution from, or sneak it past, the others, we must consider what the goals of the latter were.

The two major victorious powers were the United States and the Union of Soviet Socialist Republics, led by Franklin Delano Roosevelt and Joseph Stalin. The former was a progressive in the context of US politics. He had introduced the New Deal in the 1930s to combat the effects of the Great Depression that had begun with the collapse of the Wall Street capitalist market in 1929 and put millions out of work. He had also, as we have seen, proclaimed early in the war that all human beings should be guaranteed four freedoms in the future. In the same decade, Stalin had built the USSR into a world power through industrialisation and a forced transformation of agriculture that had cost the lives of millions of peasants by starvation. In one sense, these leaders were similar. Both were fierce nationalists and both believed that the other system was responsible for the world's woes. At meetings in Yalta and Potsdam in 1945, together with the British prime minister, Winston Churchill, who was presiding over the decline of the British empire but who had led the third major force opposing the Axis, they had shown themselves nationalists concerned with *real politik*. They had agreed during the war to create areas of influence in which they would not interfere with the other's dominance.

Broadly speaking, eastern Europe would go to the Soviet Union and the west to the Western Allies. Neither was greatly concerned about the suffering that this would cause those arbitrarily ascribed to the other power, or the betrayals of trust involved. To some extent, this explains the bitter civil wars that ensued after 1945 in countries on the periphery of the eastern and western blocs – Greece, Italy, Yugoslavia, Korea, Vietnam.

The other major powers at the United Nations – France, China and Italy – played a much smaller role, as France had been conquered by the Axis, Italy had been an ally of Nazism and China wracked by a civil war between nationalists and communists.

At the San Francisco conference and, even more in its immediate aftermath, it became clear that the great powers' main interest was in containing each other and consolidating national power. They were not interested in a new rule of law based on universal human rights that would interfere with national sovereignty. Through their foreign ministers and negotiators, Stalin and the new US president, Harry Truman, a fierce anti-communist, started the mutual recriminations that would end, by 1946, in a climate of no compromise. Truman's major negotiator, Secretary of State, Edward Stettinius, was also a fierce anti-communist. He met his rival in Vyacheslav Gromyko, who spoke for the USSR. Neither believed the other was willing to sacrifice any national interest to a higher principle. That shines through in the reports of their exchanges. They therefore did not compromise – Gromyko becoming known as Mr Nyet or Old Stone Ass. They had been advisors at Yalta when Europe was carved up. The idea that national interest should be subordinated to new international protections was not the primary concern of either, convinced as they were that their own nation embodied virtue. In multiple statements about communism and the "American way of life", the national community overrode any claims to defend individuals. The object of both was to use the UN and if they could not, then they would simply withdraw. Churchill's famous speech at Fulton, Missouri, in which he referred to the "Iron Curtain" that had descended over Europe by February of 1946 is usually regarded as marking the beginning of a Cold War between East and West. What is often neglected is that in the speech he had already proclaimed the UN the tool of the "English-speaking peoples". The entire Soviet bloc eventually abstained from voting on the Universal Declaration of Human Rights when it was adopted *nem con* (48-0) in 1948.

The US had emerged unscathed and reinforced from the war. It had the A-bomb; others did not. They had seen what damage it could do. As Cassese notes in his magisterial history, the US dominated the early years of the UN. What it wanted, happened. A propos the US endorsement of an international bill of rights at San Francisco in 1945, he writes:

> the very state that championed the inclusion of human rights among the matters under the jurisdiction of the UN, proceeded with utmost caution and took pains to spell out that the organization should have limited powers only, and that in addition the standards on human rights by which member states should be guided were to be first accepted by them through the traditional process of treaty making, or, at any rate, by agreement (Cassese 1992, 25).

The US was going to subordinate human rights to the lowest common denominator agreed to by sovereign nation-states. Contemporary observers noted wryly that the US used its Johnny-come-lately friends like Argentina – who as Allies had equal rights at San Francisco – to gain the majority. Since such states were proto-fascist and had been Nazi sympathisers until it became clear that Hitler had lost the war, the standard for human rights would sometimes be that of the victimisers and not the victims.

The Soviet Union might have been expected to be more interested in a novel defence of individual rights from tyrannies of state after the loss of 16 million of its people. But, the USSR had been exhausted by the war in a way the US had not and the populations in its area of influence had been deeply divided. Many had been allies and supporters of Nazism and the genocidal policies it promoted: Hungary, Rumania, Yugoslavia, even Poland. So the USSR could not insist too much on its own virtue. To promote human rights in any consistent way might open the can of worms of crimes by its own nationals. On the other hand, neither did the US hold the moral high ground. It was still a racist society based on a blatant discrimination against its black population that few whites seemed ready to acknowledge. The other major powers (Britain, France) had already refused any consideration of their imperial records and practices, and embarked on a murderous military repression of national liberation movements in several colonies. This was explicitly stated to be in the national interest which was never to be regarded as subject to any new international protections. From the outset, they tried to stymie any proposal for a new international law that would override national sovereignty.

The Second Division

The rule of law of each country was not regarded as in question except by others. It is in this regard that the views of the spokespeople for some lesser powers were much more interesting than those of the leaders of the great powers. There were three main progressive positions at the UN in 1945: (1) those of President Roosevelt, who died before his views could really be heard; (2) those of the Australian foreign minister and later president of the UN General Assembly, H. V. Evatt, and the Canadian, Escott Reid; (3) those of direct victims of Nazism who were, nevertheless, nationalists. All these progressives wanted no more than a world of "good" nation-states that would not make war. They wanted a new rule of human rights law but shared a common weakness: they did not believe that human rights obliged the end of all national sovereignties and nationalisms. Many had only an indirect experience of the dangers of the "total" nation-state.

To highlight the vision of these lesser players we start from the famous Four Principles of Freedom proclaimed by Roosevelt in 1941, of freedom of expression; of worship; from fear, and from economic and social want. He also proposed the notion of a United Nations in which the four great powers would police the world to ensure peace (Luard 1982, 24–5). Roosevelt was without doubt a progressive,

perhaps even deserving the appellation "liberal-socialist", a combination to which neither Stalin nor Churchill could aspire. But there were limits to his vision – not surprising for an American whose real concern was the horrors perpetrated by one nation on another, rather than the treatment of internal "enemies". For even Roosevelt was a strong nationalist and believer in the American people, as the concluding lines of his speech on the Four Freedoms make clear. His world was a world of "peoples" who should manage their own communities. After his death in mid-1945, the main planners of the post-war organisation were the leaders of the victorious nation-states. Some were progressive, "on the left", and admirers of Roosevelt. One such was Herbert V. Evatt, who was instrumental in the drawing up of the Charter and the negotiations about UN institutional structures. A labour leader and one of the leading Australian common lawyers of the day, Evatt saw himself as a legal progressive. Any acquaintance with his career and the decisions in which he was involved makes clear his radical view of the common law.

An admirer of Roosevelt, Evatt presided over planning for the charter of the United Nations at San Francisco and the UN General Assembly in Paris in three crucial months of 1948, when the UN Declaration was adopted. But he quickly lost confidence in the virtue of the United States, when the US–USSR standoff led to a wide veto power for each state on the Security Council (Evatt 1949, 56–7, 114). American determination that human rights not override national sovereignty and that the UN remain a group of sovereign nation-states found expression in article 2 (7) of the charter. In place of an organisation of the people of the world, Evatt saw drawn up a charter that privileged the continuance of nation-state sovereignty and the dominance of the nation-states in the new organisation. Art 2 (7) runs: "Nothing contained in the present Charter shall authorize the UN to intervene in matters which are essentially within the domestic jurisdiction of any state and shall require members to submit such matters to settlement under the present Charter" Nevertheless, Evatt, seated at the debate with Frank Forde, the Australian spokesman, endorsed the latter's proposal when he described the UN's goals in these terms: "[T] he Charter, could, therefore, properly declare that the organization should exert its powers for the promotion of justice and the rule of law. In the Charter should also be inserted a specific undertaking by all members to refrain in their international relations from force or the threat of force against the territorial integrity or political independence of another state" (ibid., 111). For Evatt, a radical amendment to existing law could still be a matter of creating a rule of law between states (Allen 1945, 39).

In 1945, the Canadian Escott Reid had all the virtues of the naïve observer. He was shocked at the US bulldozing tactics, led by the inexpert Stettinius. He saw it as provoking an equally fierce Soviet refusal to subordinate national interest and sovereignty to human rights (Reid 1983, 25, 31, 44, 49), writing: "To the friends of the United States the American performance at San Francisco was not calculated to create confidence in the ability of the United States to provide wise leadership for the western world in the U.N" (ibid., 26). He came away from San Francisco puzzled about how anyone could hope for anything from its decisions.

Reid advanced more radical views than those of Evatt while being on the same side. He admired Evatt and the Australian delegation's clear liberal-socialism, and

noted, when Australia beat Canada and the UK in the elections to the Security Council in 1945: "What Ottawa failed to recognize was the special place which H. V. Evatt, the foreign minister of Australia, had won at San Francisco for himself and his country among many of the smaller countries, especially the Latin Americans, by his attack on the great powers" (ibid., 134). Reid's draft of a speech written for the Canadian foreign minister to give at the UN stated three principles as a proposed preamble for international human rights: (1) "the individual man, woman and child is the cornerstone of culture and civilization. He is the subject, the foundation, the end of the social order. Upon his dignity, his liberty, his inviolability depend the welfare of the people, the safety of the state and the peace of the world;" (2) "in society complete freedom cannot be attained. An individual possesses many rights but he may not exercise any of them in a way which will destroy the rights of others. No right exists in isolation from other rights. The liberties of one individual are limited by the liberties of others and lay the just requirements of the democratic state. The preservation of the freedom of the individual requires not only that his rights be respected, preserved and defended but also that he respect, preserve and defend the rights of others by fulfilling his duties as a member of society"; (3) "the state exists to serve the individual. He does not exist to serve the state, the state exists to promote conditions under which he can be most free" (ibid., 22–3). Again, we see a faith in the "good" nation-state's capacity to protect human rights for all.

These second-level players are important because of their opposition to the attitudes of the major powers who really wanted legal arrangements to remain what they were. But they would not have been significant if not for a third group, which provided a wave of support in what was no more than a series of linked compromises. The views of the more interesting third group provided a bridge with those of the Resistance. It is from them that the real push for universal human rights came. We go back a little in history. In a sense, all humanity was a victim of Nazism. However, those who had directly experienced Nazi/fascist rule *knew* in a quite different sense from even combatants what the enemy was, and who directly experienced breaches of the right to dignity and respect due to all human beings. When they returned home after 1945, together with the millions of refugees and displaced persons who poured into new homes in one of the greatest migrations in history, they carried with them some of that experience. Those in or from occupied Europe who resisted Nazism/Fascism experienced in extreme form the deprivation of all rights when having been stripped of rights to free speech and assembly, to fair trial, to political organisation, they were tortured and murdered, together with innocents whose only crime was that they could not, because of their "blood", belong to the nation.

Some such people made it to the first meetings of the UN. Among them was Jan Masaryk of Czechoslovakia, whose understanding of the UN and its proposed rights was coloured by the experience of a world that had been "one concentration camp since 1939" (Allen 1945, 50). V. M. Molotov, the Soviet foreign minister, also recalled the "mass murders of children, women and men, the extermination of whole nations in their entirety, the wholesale destruction of peaceful citizens who were not to the liking of Fascists, the barbaric destruction of culture and of recalcitrant men, prominent in culture, the destruction of many thousands of towns and villages, the

dislocation of economic life of nations, and incalculable losses, all this cannot be forgotten" (ibid., 21). George Bidault, speaking "as a man who only a few months ago was still being hounded down in his own country, then entirely occupied and savagely oppressed by a foe who today stands at bay", recalled that those to whom tribute should be paid were not only the armies of the UN, but also "all those soldiers without uniform, the men who carried on the resistance in oppressed countries, my own comrades in France, all those who died mute under torture, all those who were deported to German concentration camps, my comrades, my brothers, who in the temporary defeat fulfilled their duty as Frenchmen and as citizens of the world" (ibid., 72).

Brigadier Carlos P. Romulo recalled the experience of the Philippines' occupation by Japanese fascism: "We have seen the ultimate achievement of aggression in the human bonfires of Manila and Essen. These living torches lighted the road back to savagery, no, beyond a savagery we never dreamed human beings could be capable of repeating. It is impossible for minds to grasp the monstrous agony of these things. The charred bones of men, women and children that are now being shoveled under German and Philippine earth – *they* are war." Significantly for universal rights, he went on: "We have seen in this war how effectively boundaries and nationalities and racial division have been forgotten while achieving a common end against a common enemy. In the ultimate effort to save our lives, it is the shared understanding that matters, and not the heritage of blood or country." His almost unique linking of the experience of *German* and Philippine civilians took on further dimensions as he pleaded:

> Today, one billion oriental faces are turned pleadingly toward us for recognition of their human rights. It is their hope and their prayer that the peace which this conference is seeking to secure is one that will not neglect the uplift and development in all socially and economically depressed areas and peoples, but one that will help raise them to a place of living where they can become not merely bystanders but effective collaborators in the promotion of human welfare and advancement. Theirs is the plea, my fellow delegates, that such a peace may not be appropriated for the purpose of freezing the political, economic and social order of that part of the world (ibid., 53–4).

Such voices were notable yet exceptional when the United Nations was being created; they expressed a view "from below" of its motives and purposes. All of their names except that of Molotov have disappeared from major texts on who played a role in deciding what the UN would become. Romulo was a conservative, anti-communist; Bidault a staunchly pro-Gaullist Christian Democrat who knew little of diplomacy; Masaryk would be overthrown within 3 years as communism came to power in Czechoslovakia; and Molotov, a Stalinist. They shared a common characteristic: they were also all defenders of national sovereignty despite their experiences. They all saw the strengthening of national power as the best defence against experiences like that of Nazism and fascism. It was partly due to their inability to see the contradiction between commitment to universal human rights and national sovereignty or nationalism, that their views lost out to the more coherent and powerful conservative voices of big power leaders in the UN intent on maintaining nation-state power and sovereignty despite the historical contradictions with universal human rights. They differed from the more important decision-makers in this: their

populism meant that they did talk a lot about human rights. The concrete proposal that the Charter proclaim the defence of human rights was made central only by small Latin American states. In the climate of the time, this resulted in the UN Charter containing a proposal that a human rights-based regime be established and that an international human rights bill be drafted (see Truman's closing speech in ibid., 170; Alston 1992, 126–7).

All these positions left the experience of the *anti-nationalist* Resistance out, and thus its understanding of rights was given only weak expression in discussion, never seen as overriding Art 2 (7) of the Charter: "Nothing contained in the present Charter shall authorize the UN to intervene in matters which are essentially within the domestic jurisdiction of any state and shall require members to submit such matters to settlement under the present Charter". This is the view that dominated in all the instances of the UN thereafter, even its General Assembly. As Cassese points out, it was only when the US no longer played the decisive role at the UN that human rights became a central matter on its agenda. He observes that the General Assembly went through three historical stages: (1) to the late 1950s; (2) 1955–1975 and (3) 1975–1992. In each successive stage the Assembly took an increasingly less restricted view of human rights and gradually became a greater force in practice. To the first stage corresponded the dominance of the US and the West; to the second that of the Soviet bloc and its newly-liberated, popular, Third World, ex-colonial allies; and to the third "the prevalence of the third world and their launching of the doctrine of human rights that eventually gains the upper hand and aims at supplanting the views previously upheld by the General Assembly" (Cassese 1992, 29).

So, despite the general climate and mass desire for new protections, protagonists of universal human rights were few and far between in the United Nations in 1945–8. The lip service made to such notions by the great powers and many of the lesser did not mean strong commitment to a radical new rule of law that broke with past traditions. Some were hypocrites and revealed to be so; others simply did not understand that a radical break with the past national-popular systems was required. Only those directly victimised by Nazism were prepared to seek a radically new set of rights for all humanity with the passion that allowed them to succeed. The voice from below of the Resistance did make it into the drafting of the UN Declaration of Human Rights of 1948, only one of whose five-person drafting committee had experienced the world of the concentration camp – René Cassin, a French Jew of whom more anon. Nevertheless, the US had conceded the need for fundamental human rights for all. Roosevelt appointed his wife Eleanor to represent their interest and when he died, Truman kept her in that position.

Drafting the Declaration

Eleanor Roosevelt was an independent and progressive woman who had been militant in campaigns against racism, and for migrants and women. So while she was obliged to carry out the mandates of the United States, and defended them, for

example, when the USSR attacked the American treatment of blacks (see Black 1999, 168–71), in her private and published papers she had great reservations about US policies in the UN and about those regarding blacks at home (see Roosevelt 1990, 79–90; Glendon, 2001, 54–5, 82 and passim). While the US thought it alone should decide what human rights would be, and she felt that the USSR and the Arabs were constant thorns in her side, she took the view that her job as chairman of the commission that would draw up and have final responsibility for a declaration of human rights, was to satisfy 58 countries, and not just her own (Lash 1984, 294). Indeed, while a "good American", she did not consider the US to be the emblematic "good nation", comparing it unfavourably on some occasions with others. Practically, she seems to have decided to have two faces. When she faced the administration she generally did what she could for masters with whom she was not totally in sympathy, and when she faced her fellow drafters she allowed them to work around the constraints as best they could. One way she did this was by becoming the manager of the process, working the others very hard while recognising that they would have the major intellectual or theoretical input. As she wrote: "The work of the Human Rights drafting committee is very difficult because it really requires legal training and I have none and at this point every word and every phrase of the Covenant is analysed for its legal meaning" (ibid., 262). While in the end she was obliged to recognise, despite her misgivings, that the national interest in Article 2 (7) of the Charter had triumphed and that this ended hopes of a new legal order, she also took the positive view that "If the Declaration is accepted by the Assembly, it will mean that all the nations accepting it hope that the day will come when these rights are considered inherent rights belonging to very human being, but it will not mean that they have to change their laws immediately to make these rights possible" (Black 1999, 160).

Eleanor Roosevelt thought that the triumph of the principle of national sovereignty would protect the US and she convinced the American people about the Declaration on that basis (ibid., 173). On the other hand, she asserted that the Declaration would be the yardstick for all national conduct (ibid., 163). She was therefore prepared to let others make the running in the drafting process and to protect them as much as possible in their endeavours from the *real politik* of her, and their, governments. Several remember her in that way. She shared strongly the view that national self-determination was already accepted and that new rights would have to be for individuals. Later, after she had been shunted aside by the Cold War, she expressed her disappointment at the policies based on the naked national interest of the major powers. In time, these made the UN ineffectual in implementing universal human rights. By then, she had identified this as the problem of the self-declared "good nation" (the US) whose standards were already so high that it believed that it did not have to subordinate itself to those of a higher universal body. Those who drafted the document were fortunate in having such a progressive protector.

The drafting of the declaration took nearly 4 years. Between February 1945 and its adoption on 10 December 1948, thousands of people were involved in the debates and drafting in a seven-stage process. They included the heads of 58 states; their

myriad representatives in all venues of the drafting process; hosts of experts; petitioners, consultants and grass-roots organisations. They debated, argued, horse-traded and compromised to arrive at a final formulation acceptable to all. A recent French work reminds us that the Universal Declaration of Human Rights was not the natural and necessary fruit of the victory of the UN over Nazi barbarity. On the contrary, it was the product of a relentless fight led by people whose "pugnacity, courage and political clairvoyance enabled it to be read and adopted" (Pateyron 1998, 15). Not all the participants had an equal say in deciding the final form. As already noted, the most powerful players were the states that had been the victors in WWII. Their leaders instructed national representatives on the various committees of the United Nations on the attitude they should adopt in the drafting. One participant recalls listening to a speech in September 1947 by Eleanor Roosevelt:

> [we] heard a speech that had obviously been written by the State Department and ninety per cent of which was devoted to an attack on the USSR. I do not blame the Americans for talking back; but I regret that they are using Mrs Roosevelt [the widow of "a very great man"] as their spokesman in these polemics. She has been a symbol that stood above the quarrel around which reasonable men and women could have rallied in a final effort to find a basis not for compromise so much perhaps, as for an understanding. This position has been seriously shaken by tonight's speech (Hobbins 1994, I, 50).

These representatives of Allied power became the most influential individuals in deciding what human rights would be. They either worked with or around the directions they received from their governments (Morsink 1999, ch1). Idealists among them, who often saw matters differently from their governments when the latter started to renege on promises, could manoeuvre and establish bridgeheads for future development. There was an opportunity to have their own views accepted in the immediate aftermath of the war, while the memory of the Holocaust was fresh. They found allies in popular grass roots movements; in the heirs to the popular resistance to Nazism and fascism; in colonial peoples recently empowered to speak; and among the representatives of other states whose national interests did not conflict directly with the new universal human rights.

Among the myriad participants who crossed each others' paths during the drafting process were a French state representative and a Canadian who headed the secretariat responsible for administering all the inputs and drawing up interminable drafts and redrafts of human rights documents. In many ways, these two men seem very similar: both were professors of law, social-democrats, trained in France, and they had friends in common. The diaries of the Canadian, John Humphrey, director of the UN's First Division of Human Rights, evoke sympathy: he was a quiet, thoughtful, bookish man who felt ill at ease when his wife was not with him at one of the interminable cocktail parties he had to attend. His idealism and commitment to a notion of human rights that covered not only legal and political rights but also economic and social ones is clear. He did not hide this in his public speeches, and was shocked and hurt by suggestions that this made rights communistic and, by implication, himself unreliable. (The widespread hostility to human rights outside the Left was startling. After Humphrey, a moderate social-democrat, had delivered a lecture at Ann Arbor in July 1947 in which he suggested that human rights were

"revolutionary in character" the American Bar Association was reported as stating that the programme of the United Nations sought to introduce state socialism "if not communism" (Hobbins 1994, I, 45).

René Cassin, French envoy and head of the final Third Drafting Committee of the declaration, is also striking for his honesty, determination and dedication to the creation of an almost identical list of rights to those that Humphrey sought. In a preface to the first book about him, which dubbed him a "foot-soldier" of the rights of man, its author added "certainly [he was that], but even more so a prince of the mind…Cassin counts among those rare elect figures, the creators of history, who enter the pantheon of humanity, their hands bare and clean" (Lhouraqui 1979, 11). These were two idealists, then, who, it should be added, greatly respected each other. Humphrey wrote in his diary on 18 November 1948: "Cassin presided…[M] y admiration for him increases every day. He has one of the quickest minds that I have come into contact with"; and when Cassin was presented with a sword of honour at the Palais Royal, Humphrey noted: "His faults are small ones, his qualities great" (Hobbins 1994, I, 80, 87). Cassin reciprocated: "Having worked on [the Declaration] for months, the staff of the Secretariat (John Humphrey) is entitled to have us, the delegates, pay it the homage it deserves" (see AN, Fonds Cassin, *AP* 382; *AP* 128; UNESCO 1968, 4). Humphrey, the less "pushy" of the two, quickly perceived ambition in Cassin (Hobbins 1994, I, 87) and perhaps because he was himself so good an administrator – and of a different phlegm – also made the reservation that Cassin was "a bad Chairman" (entry of 4 December 1948 in Hobbins 1994, I, 88). Others who knew Cassin at the time say that he was ambitious only for human rights and saw himself as a bearer in the struggle. When an interlocutor asked him what it was to be a militant for human rights, "he said to me, 'Madam, I am an intermediary'". His interlocutor then explains that none of his work for human rights can be understood unless we remember that he belonged to the generation that had survived WWII and dedicated themselves to preventing anything like it happening again. He used fighting terms to get the declaration through: "the word universal was essential and all the rest was only a means" (Questiaux 1981, 105ff). I have found no reservations about Humphrey by Cassin dating from before 1948.

The Allies, having agreed in the UN founding charter that a declaration about human rights should be made, Humphrey was appointed the task, among other matters, of collecting from around the world models for a document on human rights and their possible implementation. He solicited a great number of opinions on what should go into it. He drafted a final version (May 1947) after much debate in the two previous years and sent it to the Third Commission, presided over by Cassin (the draft is in Agi 1998, Annexe 8, 353–7). The declaration that was finally adopted (Res 217 A) differs in only three articles (28, 30 and 44) from the draft submitted by Humphrey and closely scrutinised by Cassin (Morsink 1999, 8). This means that three-quarters of the contents of today's document was the work of the secretariat.

After the mutual respect and admiration for one another, and the unavoidable awareness that the declaration was the work of multitudes of men and women, it is something of a shock to discover that Humphrey and Cassin broke off relations brutally when, 20 years later, Humphrey accused Cassin of plagiarising his draft.

The cause was the claim of others that Cassin was the "father" of the declaration, and his failure or refusal to disavow such claims. Since others closely involved in the drafting, including Charles Malik, also wished to claim paternity (see the entry for 5 August 1948 in Hobbins 1994, I, 24) and commentators have taken sides about whose document it really is (see, e.g., Morsink 1999, 29–30, 213 notes 56–7; Agi 1998, 230ff)[1] it could all seem an irrelevance occasioned by overstated claims to boost Cassin's chances of a Nobel prize – which he won anyway. But the fierceness of the debate and the way it continues to this day hints at a greater significance. Since no-one could claim that they had produced the declaration on their own – and to my knowledge, no-one did – we need some other explanation for a rather distasteful brawl. Perhaps the two sides were talking past each other? The sort of evidence used in the debate suggests that different claims were being made.

Cassin had been asked by his colleagues to "draft on my sole responsibility a rough draft of the Declaration" and Humphrey had sent him a working draft much as a head of department might send his minister the draft of a bill (Cassin 1972, 108). Cassin had made only minor changes to the articles listed as 7–48. In itself, the claim that final responsibility rested with him would not be enough to explain a claim to "paternity" after the acknowledgements of the work of all others involved. Humphrey's office had come up with the list of rights in the document; and it seems that his supporters usually claim authorship of that list. Cassin's supporters claim, on the other hand, that he gave order or logic to that list and that this was found in the preamble and the general part (see Agi 1998, 217 and also Glendon 2001, 64). He had described the declaration as akin to a temple (the "religious" imagery merits the attention given it below) and even proposed that propaganda using this image be widely distributed (the temple notion and various letters concerning it are found in Fauré 1997, 309–12). While his sketch unfortunately has been lost, Cassin described the declaration as a temple whose entrance and foundations contained the main principles on which stood four pillars of rights: civil; social; political and economic, and cultural. The pediment (*fronton)* expressed the links between individual and society. The foundations stated that regardless of race, sex, language or religion, all humans enjoy equal rights and should regard each other as brothers. The object of society was the full development of those human beings. He put these in Articles 1 and 2, which came after the preamble, which explained that ignorance of such rights is what had caused the suffering and massacres that led to the Second World War. What interested Cassin was the structure of human rights that distributed and gave sense to the different rights on the list and related them together in a hierarchy (Agi 1998, 359).

We can therefore join Glendon in giving Humphrey the right to claim "authorship" of the list while allowing to Cassin a claim to having given a logical structure to human rights. So Humphrey provided the contents and Cassin the order. But rather

[1] Others have also claimed that Eleanor Roosevelt was a key figure, and in a balanced way have made Humphrey and Cassin complementary; see Glendon 2001, 61–65.

than closing the matter, that opens up a can of worms for the meaning of the Universal Declaration. We can perhaps begin to make sense of what is further at stake after sharing out the responsibility in a way that honours both men's contributions and that of the myriad people behind them, by looking more closely at what drove their idealism.

Genocide

At the same time as the drafting debates started, the Nuremberg trials of leading Nazis for war crimes were making daily headlines. The news and photographic evidence of the death camps in which at least six million Jews, Slavs, gypsies and political dissidents had been murdered, revealed the monstrosities of Nazism. Contemporaneously with the debate on the declaration then, a convention banning genocide was also being discussed. Support for it gathered force because of the feeling that too many people were involved in the crimes of the Nazi/fascist regimes for trials after the event to have a deterrent effect. For some protagonists, including Cassin and Humphrey, the aim of the declaration became to impose a new set of principles, *universal* rights, as a screen to protect and defend the life and human dignity of individuals. Those who debated and voted the declaration became determined that standards be set that would never again allow such horrors as were being seen at the time. The standard work on the drafting of the declaration states: "During the Final General Assembly debate in December 1948 the drafters made it abundantly clear that the Declaration on which they had been about to vote had been born out of the experience of war that had just ended" (Morsink 1999, 36).[2] Its author adds that no other factor could match the Holocaust in importance. Two of the people involved wrote that the Declaration "was inspired by opposition to the barbarous doctrines of Nazism and Fascism" (Charles Malik cited in ibid., 36) and that "the Second World War had taken on the character of a crusade for human rights" (Cassin 1951, 16).

Among the people that Cassin and Humphrey came across in their work was Lemkin, whom we discussed at length in an earlier chapter. A Polish Jew who had fled Nazism and lost most of his family in the Holocaust, Lemkin had made it his life's work to have genocide – a word he coined for the "modern crime" – banned by international and national law. He had been an adviser to the chief prosecutor at the Nuremberg trials of Nazi war criminals, Robert H. Jackson, and been disappointed that the crime of genocide had not been a head of inculpation there. Humphrey noted in his diary on 16 August 1948 that "partly because of Lemkin's lobbying and other efforts the public has become extremely interested in genocide and any postponement of the question by the Council [Economic and Social Council,

[2] Here, Morsink's whole chapter has the title "World War II as Catalyst".

the institution charged with creating both the Declaration and a convention prescribing genocide] would affect the latter's prestige" (Hobbins 1994, I, 30). Cassin shared Lemkin's horror at the *doctrines* that had led to the extermination of millions of men, women and children because those of one's own nation were considered superior to others. In a press conference on 8 July 1947, Cassin stated: "The last war was essentially a war for "the rights of Man" imposed on the people by believers in a monstrous racist doctrine and conducted against Man and the community with a methodical barbarism without equivalent" (reprinted in Fauré 1997, 297–300). Similar views were expressed in other places: "Hitler…started by asserting the inequality of men before attacking their liberties". Humans were united "across frontiers by liberty, equality and fraternity" (see Morsink 1999, 39).

As determined anti-Fascists, both Humphrey and Cassin shared a horror of Nazism/fascism and the doctrines that had led to the Holocaust. They also agreed that existing national and international law was not adequate to protect human beings from states that espoused such doctrines. This explicitly drove both to seek a declaration. But there were some not-so-subtle differences that we can sum up as a greater realism in Humphrey and a greater idealism in Cassin where law or the implementation of their shared principles was concerned. The former thought that rights could only be attained through the existing system of nation-states; the latter, tended to believe that they could only be obtained against the nation-state. Humphrey saw human rights as an extension of existing law, Cassin as superseding and over-riding that system.

Humphrey's realism meant neither lack of agreement with those who thought that the war and the Holocaust were the driving events necessitating a declaration, nor that he did not share their ideals. But he had to work with others who did not and he considered that practical difficulties arose from philosophical rather than legal objections to his careful draft. When Cassin altered the order of the secretariat's draft by adding a preamble and preliminary articles, Humphrey noted: "The greatest harm that resulted from the introduction of unnecessary philosophical concepts was the needless controversy and useless debate that they invited particularly in the General Assembly" (Humphrey 1979, 21, and note 7; 23–25).

The nature of Humphrey's realism was never more evident than when he met and argued with idealists in the corridors of power in the debate. For him, one had to work with reality of great power dominance and the nation-state generally and not against it. He lamented the lack of realism when the political task was to win acceptance of a politically driven document. Thus he noted about another protagonist in the debates, another lawyer:

> Lauterpacht delivered a brilliant but devastating talk to the International Law Association on Human Rights. But he fails to appreciate the political difficulties of our work and hence does not understand that the commission has already achieved important results. I am afraid that in spite of his good intentions he is colouring the thinking of many people against us. I was invited to participate in the debate this afternoon but in view of the turn the discussion took decided to abstain" (cited in Hobbins 1994, I, 36).

What was so unrealistic about the views of men like Lauterpacht beyond the political difficulties they raised for Humphrey? We need to answer that question to

avoid misunderstanding. Humphrey's reservation about "philosophy" concerns philosophy of and within law as much as philosophy *per se*. This debate was taking place between lawyers. Lauterpacht was a lawyer, Lemkin was a lawyer and Cassin was a lawyer. But Humphrey was a common lawyer who thought in terms of its logics and hierarchies, where Cassin was a civil lawyer for whom those terms were different. For the first what mattered were the practical procedures for the attainment of principles, for the second their statement as a "performative utterance". Humphrey's view of Lauterpacht, who came from both traditions, is illuminating because Lauterpacht thought that the lesson of the war and the Holocaust included a lesson about legal philosophy and existing legal assumptions and therefore required the changes that Humphrey regarded as irksome or likely to fail to gain agreement.

Hersch Lauterpacht

Lauterpacht was a Polish Jew, who in the 1930s had established a reputation as the leading English-language human rights lawyer. He exemplified those people for whom the object of the UN Declaration was that events like the Holocaust should never be allowed to happen again, but should be nipped in the bud by a law of universal human rights. Human rights should make respect for individual humans and their dignity mandatory everywhere (Lauterpacht 1947c, 438–9). By 1947 he had made clear the *telos* of his thinking in terms like these:

> The Charter of the United Nations introduced an innovation of the most profound significance: it solemnly recognised "fundamental human rights" and "the dignity and worth of the human person" and made repeated provision for the promotion by the United Nations of "universal respect for, and observance of human rights and freedoms". In thus bringing within the province of the United Nations the crucial aspect of the relation of Man and the State, the Charter opened up the possibility of a new era in human government."

The task of the international lawyer was to maximise this opportunity and to "eschew the tendency to juristic pessimism and timidity in a period of political uncertainty and disillusionment." The object was to prevent "the potentialities opened up by the Charter from being thwarted by obscure dogmas of legal doctrine. Of these, the traditional doctrine that only states are subjects of the law of nations merits specific attention." The science of international law should not allow such 'outworn theory' to act like a dead hand on a progressive interpretation of the Charter. "There is no rule of international law which precludes individuals and bodies other than States from acquiring directly rights under, or being bound by duties imposed by, customary and conventional international law, to the extent of becoming subjects of the law of nations." Lauterpacht believed that after the experience of the war the belief had developed that the individual should be the ultimate unit in all law. As states became interdependent, the doctrines of national sovereignty and the state could no longer protect an individual in all circumstances. To claim that all rights of individuals as legal subjects had their source in the state was no longer acceptable.

"It is inadmissible, [he continued] that the State should claim, in the conditions of the modern world, that it is the best instrument for protecting all those interests and that it is entitled to exclude from the international legal sphere individuals and non-governmental bodies which it may create for the purpose."

Lauterpacht admitted in 1947 that until the Charter was adopted it was a matter of controversy whether there existed fundamental rights. Even influential thinkers like Grotius, who had argued for the right of one state to interfere in the jurisdiction of another, had never had this accepted in practice. But the Charter made clear the right of one state to interfere or intervene in another to keep the peace. Peace was kept by enforcing the rights of individuals against errant states. Lauterpacht even stated that such intervention to protect rights overrode the clear statement in Article 2, 7 (Lauterpacht 1947a, 70, 5–11; see also 1947b and 1948, 101–2). He thus insisted that individual/universal human rights marked a rupture and innovation in all traditions of national and international law and that the substance of a Declaration was to end the claims of national sovereignty and jurisdiction in their domain. Already in 1933 he had criticised the claims of national sovereignty to an exclusive legal jurisdiction in domestic matters (see Lauterpacht 1933, esp. 66ff). In his work popularising an international declaration he was even more direct than in his arguments to fellow lawyers. "[I]t implies a more drastic interference with sovereignty of the State than the renunciation of war and the acceptance of the principle of compulsory judicial settlement" (ibid., vi). He assumed the risk involved in propounding fundamental legal changes that would disturb "orthodox thought" in their challenge to national sentiment and the right of states to decide their own forms of government democratically. Rights, as expounded in the documents of the eighteenth century in America and France, protected individuals not only against their state but against " the intolerance of democratic majorities" (Lauterpacht 1947a, 23).

But he went even further. Human rights as Lauterpacht envisaged them could not simply be declared and then left to existing states to enforce. The state itself had to be limited by natural rights and the law of nations as evolving philosophies (ibid., 27–8). These two traditions were intertwined, practically and historically based in resistance to state tyranny and oppression. "We cannot hope to understand adequately the law of nature unless we disabuse our minds of the idea that it has been exclusively, or predominantly, speculative, deductive, and fanciful; that it has been divorced from experience; and that its exponents have attempted to engraft upon the living body politic the products of abstract *a priori* speculation" (ibid., 31–2). His "philosophy" was an insistence that human rights were novel and overrode other rights. The enemy of such human rights was the claim to sovereign jurisdiction over a national territory – even by "good" or democratic states. Human rights meant an end to the claims of national states to monopolise the administration of rights in their own jurisdictions, including any new rights. The states with whom the Canadian, Humphrey, had to work, refused in nearly all cases to see human rights as entailing such a rupture with national sovereignty. Theirs was the view that would triumph in the United Nations, as Lauterpacht recognised in a long defence of his own views over 20 years (see for example, Lauterpacht 1973, passim, esp. 397ff).

René Cassin

Cassin's position was much closer to Lauterpacht's than to those of Humphrey on the relationship between practicalities and principles of human rights. Haim Cohn had compared him to the prophet Ezekiel on his "fiery chariot", adding, "any concession committed in the name of realism ran counter to the character of René Cassin; the force that impelled him came from an idealism that was sufficiently robust to capture all the citadels of sceptical reserve" (cited in Questiaux 1981, 108). The Canadian and the Frenchman both shared a horror at the Holocaust, though we may be forgiven for surmising that the desire to ensure that it could never recur was stronger in Cassin than Humphrey. Cassin was a Jew, though not religiously so. Many of his family and friends were murdered during the Holocaust. As a leader of the French resistance, he was condemned to death *in absentia* and after the war left the notice to that effect on his door. During the war his office had collected evidence about war crimes. He was thus better informed about those crimes – including explicitly that of "genocide" – than the North Americans (AN, Fonds Cassin, 382, AP 68). We cannot imagine Cassin treating certain matters with the levity of this note passed to Humphrey during a debate in which P. C. Chang, the Chinese delegate, was speaking:

> DD 'H, DD'.H [the Declaration]
> Servis plein de sang,
> Par le chef de délégation,
> P. C. Chang (Hobbins 1994, I, 32).

What Cassin shared with Lauterpacht, whose work he regarded as an inspiration for his own draft ("an exceptional place must be reserved for the book by Professor Lauterpacht, *A Bill of Human Rights,* published in 1945"; (Cassin 1951, 272)) was a belief – not shared by the victorious democracies – that the problem for human rights was the state and its claims to have jurisdiction over all claims to rights on its own territory; or, as Lauterpacht put it, its claim to decide what fell within domestic jurisdiction (Lauterpacht 1973, 181). This, if accepted, would effectively mean that it was not the individual who would be the measure of the range and limits of rights, but the state authorities.

As mentioned, Cassin's critique of the claims of "Jack to be master in his own house" dated back to 1933, when he heard Goebbels argue against suggestions by members of the League of Nations that there existed a right under existing treaties protecting minorities to defend an individual – in this case a Jew – against injustices perpetrated by the Reich. Cassin was shocked at the pusillanimous League deference and concession to this claim to national sovereignty. In the event, the Reich left the League soon after and it effectively collapsed even as a body for securing peace between nations (Agi 1998, 70–1).

In a now-famous article of 1943, Cassin traced the steps in the further evolution of his views. His understanding of human rights as a response to Nazism soon went beyond a condemnation of what became known as "totalitarian democracies". He saw human rights as a result of a battle against what he expressly called the

"leviathan state", which "broke into pieces the unity of humankind". A common humanity united all mankind and no racial, sexual or social attribute could override that unity. Human rights came from that assertion of a common humanity. Nationalism and the nation-state had also built on the latter notion but they had culminated – as in Hegel's philosophy – in the view that in a true state "individuals could not exist" but rather must be subordinated to plans for uniformity and homogeneity, to community and sovereignty. Claims by individuals to have their rights respected were seen as a threat to states claiming sovereignty. By the refusal to recognise and authorise "the forces that went beyond the frontier of each competing state", the human masses, the League of Nations had failed in its attempts to combat the primacy accorded to sovereignty. This being so, its refusal to protect the rights of individuals on the ground that humanity had to be protected, led states from democracy to totalitarianism (in Cassin 1972, 63–71).

So, the nation-state claim to exclusive jurisdiction over rights had been anathema to Cassin for some time before 1945. He was so far committed to the idea of respect for each human being against communitarian claims that he blamed the failure of the League of Nations, to which he had been a delegate in several capacities, partly on its focus on the protection of minorities rather than individuals (see Agi 1998, 194–8). His criticism of communitarian claims amounted – well before the debates on the Declaration began – to an insistence that the equality and human dignity of *individuals* had been denied by Hitler and by Nazi doctrine: "Hitler had started by asserting the inequality of men before attacking their liberties" (Cassin, Press Conference 8 July 1947 in Fauré 1997, 297–307; see also Morsink 1999, 39). During the war his deputy, André Gros, had written a report stating that national and international law was inadequate to punish German war crimes and that Germans as a whole would not accept any punishment because they believed that "for Germany there are no nations, no community of nations…but a *herrenvolk* and peoples to enslave." Instead of simply cleaning up existing international law, there would have to be a political decision to replace it with a law based on "a personalised notion of responsibility". The important object was to declare the human rights and dignity of all individuals since they were united across frontiers in liberty, equality and fraternity and to impose the new rules on all those who disagreed – henceforth to have the victims, the popular resistance, call the tune (see Gros in AN, Fonds Cassin, 382, AP 68). After Nazism, Cassin could no longer accept that human rights could be seen as coming from above or as being subject to a state that sieved them to make them fit the wishes of a democratic majority. They were sacrosanct.

The revelations about the Nazi death camps at the San Francisco conference in 1945 strengthened Cassin's belief that the UN mission could not be fulfilled without interfering in what had formerly been the domestic affair of each state.

> We can no longer accept, as in 1933, that, as Germany argued, the state may interpose an impenetrable screen between the human being and the international community that wishes to protect him, a screen that the international tribunal at Nuremberg did not dare break down to chastise "crimes against humanity" committed by the Nazis before the war in 1939 (Report by Cassin of the Plenary Commission of Commission of Human Rights of the United Nations, 27/1-10/2/1947 in Pateyron, nd, 181 ff see esp. 182).

The anti-Hobbesian resonances are great in his overall outlook: a social contract can not override the claims of an individual. The Nazi state had emerged from and was the culmination of the leviathan state that had developed around the world in the nineteenth century. And in the absence of certain measures designed to reduce the privilege given to national or communitarian claims over those of the individual, such a state could always move from democracy to totalitarianism. One such measure could be universal human rights in a world federation.

Summed up, for Cassin the main threat to human rights was national sovereignty: "The person really responsible for all these crimes, who will never be judged at a Nuremberg trial and who will continue to defy universal conscience with impunity, is the leviathan of national sovereignty" (Agi 1979, 213). A new form of world-wide ethics and politics would have to be created. As his colleague Nicole Questiaux says, Cassin's essential goal was "universal" human rights. The rest was just means to that end (Questiaux 1981, 106). If the object were the protection of all individuals by human rights against any power whatsoever, then attempts to protect an individual within the confines of national, sovereign states would not suffice. A new declaration had to be something qualitatively more than a compendium of all the previous declarations made in such contexts. This compendium was expressly the task with which the secretariat had been charged and fulfilled meticulously, collecting as many models comments about rights from around the world as it could find. Cassin knew of many of these examples and referred to them (see AN, Fonds Cassin, 382 AP 68. The main less-known sources are in Agi 1998, 336–47). But he made explicit that the object was to protect the life and dignity of the individual against all powers by the political creation of a "personalised notion of responsibility" (see the Gros Report in AN, Fonds Cassin, 382, AP 68). His political notion of the object of law was remarked on by many who dubbed him an idealist: "René Cassin had a very engaged notion of the law, that is to say, that the law was the main lever for making things advance." When he saw his idea of a supranational regime, or world federation, slipping away in the face of the great powers' attachment to national sovereignty with its "rich" legal traditions, he reproached both Western and Eastern powers for sharing the same "legalistic" conceptions (Questiaux 1981, 106).

Cassin's Sources

His object was thus to give an order to the Declaration that would ensure *universal* human rights, understanding these as involving a denial of national sovereign right to override such claims. Being a lawyer, he sought in the history of law, especially in the civil law in which he was trained, models for what he wanted to do. His international bill of human rights, as he first called it, was based on a close reading of many similar documents. His choice among them was the French/European view over that coming from the American/Anglo-Saxon tradition. Already during the war he and his team working for de Gaulle's legal office in London had insisted on this (14/8/1943):

> Since the beginning of the war a group of Frenchmen, convinced that the victory of the totalitarian powers would ruin the fundamental freedoms won by men, proclaimed that on

> the contrary their defeat would imply not only the reaffirmation of the principles of 1789, but also an international declaration of the rights of man. In March 1940, Professor René Cassin took the first step along this path during the course of Franco/British meetings held in London under the auspices of the old associations of the League of Nations. When, after the military reverses met by France, the London International Assembly was founded…he demanded there be a new universal charter that unpacked [degageât] the meaning for human freedoms of the struggle of the allied nations. We thought that the French should set an example by proposing a text, that, drawn up for their compatriots, could then be discussed, amended and proclaimed by the allies.
>
> In the course of our work, we naturally went back to the Declarations of '89 and '93 as well as to their less well-known successors, other French Declarations. At the same time we were inspired by the principal foreign Declarations contained inter alia in the Bill of Rights and the Constitution of the Soviet Republics. The Atlantic Charter, the defining by President Roosevelt of the Four Freedoms, were constantly on our minds. The thoughts contained in the speeches of President Benes got our full attention. We did not fail to read, as well, the Declarations of H.G. Wells of 1940 and the suggestions of J. Maritain in 1942 (AN, Fonds Cassin, 382, AP 68; some of those declarations are in Agi 1998, 336–47).

It should not surprise us that in Cassin's search for a declaration whose main object was the defence of the individual against the claims of the leviathan-state, pride of place given to the French Declaration of the Rights of Man and the Citizen and its Jacobin sequel in 1793. There was no *arrière pensée* in Cassin's teams' choice of documents. These were the basic statements of rights for Frenchmen and women, and the team had been brought up on the 1789 statement. Cassin stated repeatedly that it provided him with his main model. For example, in a radio interview in May 1948 he said, "I am working according to the tradition of '89 – to draw up an international Declaration of the Rights of Man, but also to prepare the practical means to make it respected under the control…of the United Nations, a community above the old murderous sovereignties" (17/5/1948 in Agi 1998, 224). In his book *Des Hommes partis de rien*, he made clear the centrality of the 1789 document "adapted to modern times." He believed that from the 1930s, "the inheritance that had enriched humanity for centuries and particularly since the French revolution had been imperilled by the advent of Hitlerism and its consequences" (Cassin 1975, 7). Even in his old age, when giving talks to school children, he asserted that what he had done in 1948 was to update the 1789 Declaration in order to meet the challenges presented by Nazism and the Holocaust, and he had written to his wife Ghislaine that the sub-commission that he had set up in the Commissariat of Justice and Education (in de Gaulle's government in exile in London) "would be directed particularly towards the problems of the Rights of Man that he had raised already in an official capacity before the Inter-Allied conference of 24 September [1943] and had led to the project for a document inspired by that of 1789" (Ghislaine Cassin, preface to ibid., and also II, 412).

Perhaps a little more surprising than his going back to the 1789 declaration as the starting point for a modern universal declaration, was the almost equal status he gave to the Jacobin 1793 reformulation of it. We discussed the latter extensively in earlier chapters. Here, we recall that it added economic and social rights to the list of civil and political rights, bringing in the notion of the state as a redistributor of well-being

and, at the same time, the duty of all human beings to ensure their fellows' welfare. The document of 1793 had enjoyed nothing like the fame of the declaration of 1789 but it had been resuscitated as the original source for economic and social rights, and how they related to other rights, by the League of the Rights of Man in which Cassin was a protagonist, in a model declaration in 1936. Cassin explicitly acknowledged the latter document as a source of inspiration for his work on the Universal Declaration (see Agi 1998, Annexes, 333–4).

The document that Cassin's office drew up in London in 1943 is almost identical with that of 1789, with the notable omission of the preamble of the 1789 statement that the goal of the French people and their representatives is the "happiness of everyone" and the maintenance of the constitution via raising the individual from the "misery and evitable suffering" that came when they let themselves be oppressed by tyranny (compare Morange 2004, 117; Agi 1998, Annexe 4, 338). The 1943 draft is more clearly a defence of individual subjective rights against the state than that of 1789. It has, however, a whole section on duties, where the distinguishing feature of the 1789 Declaration was its refusal to list any such duties. Here we should note that the main duty in the 1943 document, that of insurrection (art 11) against any state that violates the constitution, is accompanied by a long list of other obligations to respect other individuals. The appeal to the 1789 example is explained thus: "we were not afraid to put together new [ideas] to define the rights that social developments and the experience of the war led us to proclaim. You will see that our declaration sought to guarantee individual liberties more effectively than in the past…the henceforth recognised right to social security made it necessary for us to draw up a series of articles that summed up their conditions" (Agi 1998, 213). The horror of Holocaust demanded the "universalisation" of rights, where the 1789 document had slipped back from a claim to universal application to become no more than rights for "national citizens".

Cassin thus found a starting point for his views in the Declaration of 1789 though they did not stop there. The other force driving him to his updating of the original principles – evident in the greater concern to defend the individual against the state – were "social developments and the War". What was the history he referred to here? We have already seen that he considered the emergence of the leviathan state the greatest threat to the patrimony of rights and that the most important lesson came from the Nazism that arose from it. Cassin believed that there had been a battle for human rights against totalitarianism. Correspondingly, he saw the renewed demands for human rights as the by-product of the resistance "from below". This explains his genuflection to Eduard Benes' views, otherwise seldom referred to in books about the Declaration. Benes was a leader of the Czech resistance to Nazism. Both men expressly believed that a new declaration of human rights originated in the Resistance as much as in that of the Allies. For them, universal rights thus inherited the militant notion of rights of 1789. In a speech on 7 August 1947, Cassin stated that the radical innovation of the Charter was that "the human community can no longer run up against a staunch barrier set up by this or that state in the name of sovereignty, if in that state the rights of man are systematically and seriously violated" (reproduced in

Fauré 1997, 298; Cassin 1951, 272). In one passage in his memoirs of the Resistance, Cassin recalls General de Gaulle saying to him:

> remind the democratic governments of their duties towards the forces of Resistance France. A France in revolution will always prefer to win the war with General Hoche than then to lose it with Marshal Soubise. In a war to proclaim and impose the Rights of Man, revolutionary France has always preferred to listen to Danton than snore to the formulae of earlier times (Cassin 1975, 415).[3]

The Resistance thus had a right and duty to express its anti-nationalist pro-rights point of view.

In a report of January-February 1947 we see a deliberate emphasis on the source of rights being the "peoples" or "individuals" who established them against the Nazi *état de droit* (Cassin 1951, 279–81). Cassin and some French grassroots organisations sought to give the mass of people who had fought and suffered under Nazism a major input into the declaration and to have the last word where definitions of rights and justice were disputed. Their main fear was that the state would again become the measure of rights. At the end of the war Cassin became deeply involved in the promotion of local committees of citizens in France. Simultaneously with his work at the UN, Cassin and his followers had therefore established a network for grassroots involvement in UN work. He hoped that this was a way to get around Article 2, 7 of the Charter that prevented a State "intervening in matters that were essentially within the competence of [another] State". During his drive to have the final meetings about the draft declaration shifted from Lake Success in the US to Geneva, on the ground that this would allow those people who had suffered directly from national-socialism to have a greater say than the Americans about the nature of human rights, he demanded that rights emanate from a world-wide network of popular committees.

> In choosing Geneva for a formal vote in February 1947, the Commission obeyed reasons of a general higher interest. It recognised, notably, that the work of the Second Plenary Session would need, to succeed, the support of public opinion and particularly that of populations tested by the war and who have the most to suffer from violations of the Rights of Man and who will be greatly comforted by seeing for themselves (*de visu*) that a sincere effort has been made the meet the promises of the Charter…I am assured of being the interpreter for numerous colleagues and well as Leagues and national and international groups who are interested by civil liberties" (cited in Pateyron n.d.,109, fn 59).

We reiterate that after the Holocaust, no longer could rights be seen as coming from above or as being subject to state control in favour of a majority opinion or prejudice. They came "from below" and were thus political and revolutionary in their defence of the little man or woman against those with power.

Summed up, the beginning of rights for Cassin was the Declaration of 1789. This had to be updated to incorporate the lessons of the history that led to the Holocaust,

[3] Hoche was the general who successfully defended France against the reaction of the Vendéens fomented by the Alliance of other European nations hostile to its new rights of man (discussed in Chap. 10 above), while Soubise was Louis XV's marshal who lost the crucial battle in the war with Austria in 1757.

the subordination of individuals to communitarian nationalism. Lists of rights collected from everywhere were simply not enough without an order that made clear the subordination of state claims to those of individual rights. It was this belief that contradicted Humphrey's, even while they worked together.

The Order of the Declaration

First, we consider the issue of "ordering". We should recall Cassin's precise words that have led to the misplaced claims and counter-claims about the "paternity" of the Universal Declaration. He stated: "The representative of France has been charged with presenting *alone* before a working group, an *ordered* plan for a Declaration, taking into account the work of the Secretariat, and all the other propositions and group demands. This plan, preceded by a Preamble and a general part that were entirely new, extended by design to 45 articles divided into chapters, was revised many times by the Editorial Committee" (Cassin 1951, 274, emphasis added). Again, in a speech on 7 July 1947 (see Fauré 1997, 299–300), which acknowledged the contribution of Humphrey and of Henri Laugier, a colleague and friend, in collecting together all the previous models and points of view about human rights, Cassin wrote:

> an international Declaration could not be a photograph, even enlarged, of the numerous national Declarations of the Rights of Man, made outside or within the Constitutions of the majority of countries, in the image of the famous declaration of 1789, or of the American Declaration of Independence. The international community, juridically organised, has rights and duties that rise above each nation. Thus it cannot remain silent about the rights of all men to have a nationality, to find asylum in the case of persecution or to emigrate; all matters that the majority of national laws pass over in silence…If the documentation of the Secretariat has thus furnished us with an excellent basis, notably through gathering and classifying projects that emanate from certain governments like Panama and Cuba and those that come from numerous international committees and associations, it goes without saying that the principal responsibility lies with the members of the Drafting committee… That is why, while my British colleague has provided a very remarkable plan for a *Convention* between states, designed to tie them legally to certain rights of Man defined with precision-I, on my side, having been asked to draw up a plan for a Declaration that will be put to the vote in the Assembly of the United Nations and which will be like a sort of Decalogue (Ten Commandments?) of the great human society, limit myself to affirming fundamental principles that must serve as a guide for the politics of state.
>
> The project, preceded by a Preamble strongly inspired by that of the Declaration of 1789, announces immediately the fundamental idea: All men, all members *of the same* humanity, are free, equal in dignity and in rights and should consider each-other as brothers.

Cassin further told his audience that the drafting commission had followed his suggestions on both "method" and "substance" and had adopted a preliminary project that was not limited to "following tradition" and that was fairly audacious in certain respects. Moreover, he had ensured that the meeting to discuss it would be held in Geneva in August 1948. "Thus the people who had been most tested by the war and none of whom have yet recovered from the tragedies suffered for 30 years,

will be able to participate more closely in an enterprise that cannot succeed without the support of public opinion" (Fauré 1997, 299–300).

The claim that his object was to order the Humphrey draft to make it a defence of individual rights of a radical nature could not be clearer. Nor can his statement that this was done through the new preamble and the "general part" that he had added himself, borrowing from the 1789 declaration. We also note that he admits that it was revised several times before being accepted. We can see by comparing the draft finally adopted to be put to the vote with Cassin's version that several modifications were made.

Cassin's Draft

We find in Cassin's preamble a combination of the words of the preamble of the Declaration of 1789 with the lessons of the Holocaust.

> Whereas, 1) ignorance and scorn for the Rights of Man have been one of the most important causes of the suffering of humanity, and, in particular of the massacres that have soiled the earth in the case of two world wars; 2) there can be peace only if the rights and liberties of men are respected and, conversely, that these rights cannot be fully respected while war and the threat of war have not been abolished; 3) that the establishment of a regime where human beings, free to speak and to believe, sheltered from terror and misery, has been proclaimed the ultimate stake of the recent struggle; 4) at the head of the Charter of 26 June 1945, we reaffirmed our faith in the fundamental Rights of Man, in the dignity and value of the human person and in the equality of rights of all men and women; 5) one of the purposes of the United Nations is to achieve international co-operation in developing and encouraging respect for the Rights of Man and for fundamental liberties for all, without distinction of race, sex, language or religion; 6) that it is important that these be protected by the community of nations and guaranteed by both international and national law.
>
> We have resolved to define, in a solemn Declaration, the essential rights and fundamental liberties of human beings, so that the Declaration, being constantly present to the minds of members of universal society will unceasingly remind them of their rights and duties and so that the organisation of the United Nations and its members may constantly apply the principles hereby formulated.

Then followed the general part that he considered equally important. Article 1 reaffirmed the principles of Article 1 of the 1789 Declaration with the addition of the exhortation to all humans to regard all others as their "brothers". Article 2 made clear the meaning of the addition. The object of society was the full development of every individual, physically, mentally and morally, without that individual being sacrificed for the sake of others. The next five articles clarified further that no discrimination should take place and that there were therefore fundamental duties to others of a social nature that placed a limitation on rights. None of these duties are in the 1789 Declaration. But they exist, in similar form, in the Declaration of 1793 and in the draft declaration of the League of the Rights of Man of 1936, one of the late sources of inspiration for Cassin.

It is striking how much this preamble and general part differ from those in the Humphrey draft, which Cassin acknowledges as one among many of his sources. Most notable is the emphasis of Humphrey's draft on the sovereign nation-state as

the source of rights. The preamble there is given a much lesser place, "[it] shall refer to the Four Freedoms and the provisions of the Charter referring to human rights." There is no explicit reference back to the Declaration of 1789. There is no General Part but four articles follow that more or less correspond with Cassin's General Part. The first article runs: "Everyone owes a duty of loyalty to the State to which he belongs and to the (international society) of the United Nations. He must accept his just share of such common sacrifices as may contribute to the common good." Apart from where they were placed, the subsequent 48 articles are substantially the same as those in the Cassin draft.

There can be no question that the Humphrey draft sees rights as a matter of law emanating from a sovereign state, where Cassin's preamble sees them as asserted against the state. Close friends of Cassin support the view that for him, the motor force was political and that he was not thinking in exclusively legal terms. His later history, which we discuss below, also supports such a view. His collaborator, Nicole Questiaux noted that "there was…a legal tradition, a frowning respect for State sovereignty, that, need it be said, was in complete contradiction with principles of which René Cassin made himself the symbol" (Questiaux 1981, 107).

Like Lauterpacht, Cassin found the origins of the claims to universal individual rights in natural law and the law of nations. He did not discuss such matters much in the debates and stressed the practicality of his concerns, which is notable in the context of Humphrey's allegation that he focused on "philosophy". Cassin believed that human rights would only work if the claims to national sovereignty were subordinated to the claims of natural justice. But the references here are more oblique than they are in Lauterpacht. There are items such as the specific reference to the work of Jacques Maritain, the Roman Catholic philosopher, and, more implicit, the Periclean belief that justice was found in the hearts of all free men, obvious in his privilege for the armed resistance, and, in Article 26 of his draft, in the right to insurrection by "individuals and peoples" against a tyrannical government.

Given his belief that human rights must be imposed on those who opposed them for whatever reason, throughout the drafting stage of the declaration, and especially with the revelations about the concentration camps that caused uproar at the San Francisco conference, Cassin pushed his militant political view by urging the punishment of all those who carried the nation-state principle to such horrifying consequences. This did not mean that he expected the state to disappear. Instead his object was to get around state pretensions to interpret rights. We should acknowledge here that he failed to achieve this; that he was forced to compromise; and that in the end he moved into opposition even to his own state's policies and sought rather the attainment of his views through the European Convention (and Court) of Human Rights.

National Sovereignty and Politics of Rights

So direct a challenge to the claims of national sovereignty and national jurisdiction as Cassin's was not well received by the major powers. Even many of the smaller states felt threatened by the creation of a realm of supranational law binding on the

domestic realms. The great powers' refusal to reconsider the claims of national and domestic jurisdiction was not simply due to the Cold War, although it was greatly exacerbated by the rivalries and the distrust that had intensified by 1946. Most of the "democratic" powers who dominated the UN were not going to have their records in their colonies examined or interfered with by any new international body. When both the British and the Australians proposed drafts that would have made the declaration more than it was, by setting up institutions to enforce the observance of rights, their proposals rapidly ran into opposition. The conventions that would have turned the contents of the declaration into law were blocked and did not become law until 1966–7.

Cassin and other idealists who had sincerely believed that it was obvious that the leviathan nation-state had led to the Holocaust and that the world required a new realm of law and order, gradually realised that this realm would not be created. They then shifted their efforts to secure a bridge-head – through a generally-endorsed declaration to which reference would be obligatory once a new domain of human rights law were created. It is clear that Mrs Roosevelt, who was more nationalist than Cassin, although bridling at the directions of her government, in her capacity as head of the UN Commission of the Rights of Man allowed him to pursue acceptance of his version of the declaration without hindrance. It is also clear that Cassin, faced with the betrayal of his ideas, made compromises to have the declaration he had drafted accepted (Agi 1998, 272; AN, Fonds Cassin, 382, AP 128). Both Roosevelt and Cassin saw each other as "practical" and not "philosophical" in their approach to the concrete realities.

We know that Cassin resisted a US role that tended to marginalise the European input; this is why he had the final drafting meeting shifted to Geneva. But more disillusioning still was the position of his own government. France, under de Gaulle's leadership, had become extremely nationalistic after the war and intent on re-establishing itself in old colonial territories, notably Algeria, Madagascar and Vietnam. It too, refused support for any radical diminution of national sovereignty. Cassin had worked loyally for de Gaulle and been central in securing the inclusion of a bill of rights based on that of 1789 in the new 1946 French constitution. This constitution was remarkable for its almost open door policy towards refugees (Jaume 1989, 325ff). He had good reasons to hope for support from home. In 1948 he was still making statements in favour of an implementation of human rights as law rather than a simple declaration: "I am working according to the tradition of '89 – to draw up an international Declaration of the Rights of Man, but also to prepare the practical means to make it respected under the control of the community of the United Nations *above* the old murderous sovereignties" (Radio interview 17/5/1948 in Agi 1998, 224). But by 1947 the French state had started to think that he was "aiming too high" in continuing the French tradition of rights against nationalism. A stand-off developed between him and the foreign affairs office, in which he would periodically threaten to resign if they tried to direct him in the way that the US directed Eleanor Roosevelt, but they, including the minister, would not accept the resignation, choosing rather to use him as a sort of alibi for its policies of re-colonisation (Pateyron n.d., 72–5). By 1948, it was clear that such mechanisms as Cassin wanted would not be accepted. He quarrelled with de Gaulle and lost more and more

support in government circles. His disfavour was compounded by his support of unpopular causes, first that of the Jews and the creation of Israel, and then, more generally, for colonial peoples seeking freedom. By 1951 the antagonism reached its height when the French government refused to support him for president of the Human Rights Commission, a position he was ready to accept subject to the condition that France accept petitions to the Commission from individuals and NGOs. French Secretary of State for Foreign Affairs Maurice Schumann, wrote

> The Commission of the Rights of Man risks more and more, you know this: devoting most of its work under the cover of respect for human beings to the development of political tracts that only harm the permanent interests of our country, but also, tend, above all, to paralyse France in the accomplishment of its mission…I leave to you the care of considering the opportuneness of accepting…[the] Presidency this year" (cited in Pateyron n.d., 73).

Cassin was shocked and embittered. "Partisan politics had invaded everything, including the Commission of the Rights of man where, however, it should have had the smallest role" (Agi 1998, 281).

At the UN, Cassin and his allies had moved in 1947–8 to an openly political position, seeking to have human rights as they saw them declared, even if the major powers would not pass them into law. Questiaux claims that, though still lawyerly in his demand for signed texts and contracts, Cassin was increasingly irritated by the great powers and their "rich" juridical traditions. "This reproach was directed not only at the great Western powers but the Socialist states, that were pushed back into the same 'legalistic' view of things" (Questiaux 1981, 105ff at 108). The turn to politics – or a view that the declaration was to be attained in political battle – meant that he had to look for allies and to get around the nation-states that blocked his views. Such allies obviously had to come from outside the great powers, including France. But the others were few and far between at the UN. States like Czechoslovakia had little power and the former colonies struggled to gain a real hearing, although Cassin appealed to both. While former Resistance members understood and supported him, others simply did not see why he was so intent on challenging the pretensions of national sovereignty through an unrelenting emphasis on power "from below" and rights for the individual (ibid., 105ff). But he found support – as did Humphrey with whom he was still on amicable terms, remaining indeed a sort of ally – in unexpected places.

The demand prompted by the Holocaust that the dignity of man be respected through universal rights, required that its protagonists from Humphrey to Lemkin to Cassin find allies who believed that human beings should be treated equally without having to attain to some general yardstick such as citizenship as proof of their merit. They found those allies among the Latin Americans, who, as roughly one-third of the nations in attendance, formed the largest bloc in the nascent United Nations. They also held 3 of the 18 places on the Commission on Human Rights (Morsink 1999; ch4; Glendon 2003).

Why did Cassin find his support there rather than with exponents of Enlightenment and "natural law" egalitarianism that underpinned the 1789 model that he wanted? A first and obvious reason was that the Latin Americans were strong supporters of the economic and social rights that both Cassin and Humphrey wanted in their

declaration. Indeed, Humphrey's first draft took incorporated almost verbatim the different proposals of Chileans, Cubans and Panamanians in the so-called Bogota Charter (Morsink 1999, 135). But the alliance went further than the agreement that a declaration should contain the social and economic rights that many Western nations were not ready to accept. It was the surplus that came from Cassin's association with the Latin American tradition of rights that is of fundamental importance for the declaration as a political statement about universal human dignity. We turn next to how they reinforced and gave sense to Cassin's insistence on the universality of rights for all human beings as against rights for citizens only.

The Latin American Tradition and Universality

The Latin-American participants in the debates about the UN declaration came from a tradition that went back via Simon Bolívar to the view that natural law and religion were not in conflict. Carozza writes that

> the more radical strains of revolutionary ideology in that era [the Enlightenment and nineteenth century] were filtered through the educated minority, which did not accept them uncritically. Among other things this meant that the [1789] French Declaration in Latin America was not understood to have the same strong anti-clerical orientation that it did in France… political ethics taught in the universities and preached and published did not present the Declaration of 1789 as a rupture but as a continuation of work by Aquinas, Suarez, Francisco Vitoria, Juan de Mariana and Luis Molina, all from the scholastic tradition. It was commonplace to teach doctrines such as the priority of natural law, the legitimacy of resistance to tyranny and unjust laws, and the existence of certain imprescriptible rights and guarantees to every man by virtue of his humanity…We know that Antonio Narĩno, after he was arrested for having translated and disseminated the Declaration, defended himself by arguing that the most important articles of the Declaration were merely selections of the doctrines of Thomas Aquinas that were being taught in the universities (Carozza 2003, 281–313 at 299).

So the assertion that 1789 grew out of natural law was given a very special sense by the Latin Americans, which was influential in the Cassin drafts. The argument that rights exist over and above those of particular states in a law of nations, that reaches back beyond Suarez and Vitoria, whose works were certainly known to both Cassin and Humphrey as they were staples of legal training, led back to the most forgotten part of the "forgotten crucible" of Latin American contributions to the Universal Declaration. This was the work of Las Casas. As Carozza writes: "If the dominant genes came from the French Revolution and from Rousseau, the other main source for international relations and for most Latin American constitutions was Las Casas" (Carozza 2003, 289ff).

Rereading Cassin

It is undeniable that the Universal Declaration in its broad order embodies what Cassin sought in his draft, whatever its list of contents. This brings us back to the status of the claims to paternity of the 1948 document. It means no more than that

he was bearer of a tradition concerning the order given to a document and not to its contents: the catalogue of rights so important to Humphrey, Morsink, Sheldon and other common lawyers. Cassin certainly wished to impress the French/European view of the nature of rights rather than the American/Anglo-Saxon view. He achieved this object and thus all that it entails for human rights. From his actions during the WWII until the end of his life, what was important to him was the novel nature of universal human rights. Their novelty and forward-looking "performativity" was crucial to him. If he used many earlier models, especially that of 1789, to assert rights without duties to any state, he did so because of their significance as political ruptures with a seamless web of law based on continuity. Their source lay in and was the guarantee of power "from below" of many individuals against sovereigns like Leviathan.

However, more is at stake for a history of human rights than a squabble about the "paternity" of the declaration. In the first place, what is primordial is whether human rights should be studied as a matter of law (their contents) or of politics (the climate expressed in their ordering) or of both and in what relationship. On this matter, the tradition that goes back via Cassin to the French revolution is clear. The rights of man are *political* matters fought for and won and imposed by, above all, those who resist the state and its tyranny. In Cassin's context, this was the Nazi state and its denial of human dignity. Human rights are also political in the sense that they are contested They are basically the expression of *anti-state democratic political values*. Such values come from below and are *against.* But they are more than such collective expressions of power. They are for individuals to assert and defend their "human dignity". Cassin uses the latter term to stress what unifies individuals, who only exist concretely.

To assert such a political view of rights was not to deny the need – which as a lawyer, Cassin recognised – for instruments that make, establish and enforce rules or laws for their observation. But the second follows from the first, as the eighth consideration of his draft showed. Here he stated: "The General Assembly proclaims the present Universal Declaration of the Rights of Man as the common ideal to be attained by all peoples and all nations so that all individuals and all organs of society, having this Declaration constantly on their minds, make themselves through reading and education, develop respect for these rights and freedoms and ensure, by progressive measures of a national and international sort [*ordre*], the effective universal recognition and application of them, both among the populations of the member states themselves as well as among those of the territories placed under their jurisdiction" (Agi 1998, 237).

Cassin's interest in the preamble and the "general part" is not surprising for a civil lawyer. In the civil law tradition – especially that of the rights of man – they are the important parts of any document while in the common law tradition, even in constitutional law, they are not usually regarded as being as important as the text. Cassin insisted that the goal was the basis for rights: "to make the enumeration of the particular rights of man, even the most important, [preceded] by a very brief statement in Articles 1 and 2, of general principles, proclaiming the liberty and equality of man and dignity and rights, the duty of fraternity and the condemnation of discriminations" (Cassin 1963, 606). Agi saw in this a "lay dogma" paying direct

homage to the 1789 Declaration (Agi 1998, 238). We can thus understand the preamble and the general part of the declaration as the links between the political view of rights and its legal expression as a list. The adoption of the declaration was important in Cassin's vision even after he had been defeated in his plan to have it declared by "we, the peoples of the UN" (which marked a formal rejection of his view that rights come from "below" to protect "below"). But its title, the *Universal* Declaration, which he succeeded in having adopted, was more than a *pis aller* for a civil lawyer. It kept alive the notion that the new rights were made over and or against any claim of a state power to override them. This deserves particular attention since assertions about the meaning of a history of human rights that emphasise Cassin's political as well as Humphrey's legal understandings of the Declaration have serious ramifications for the nature of human rights as law and in philosophy.

Two Traditions Converge

It should be apparent by this point that the explicit and implicit views of Cassin were centrally important for understanding the declaration that was finally adopted. The history of universal human rights must go back initially to the 1789 French declaration to understand "rights", and to the pitfalls of "rights for citizens alone" revealed in the history of the attitude to rights of the nation-state and in the Holocaust, and thence to the views of Las Casas two centuries earlier to find the bases of the claim to "universal" rights. We might be forced even further back in history, but those are our starting points not only for establishing what universal rights are but also what they are not. We already have some stepping-off points to separate a history of human rights from the entire history of human aspiration to justice. Once we accept the fact that the Universal Declaration was based on the 1789 model, we no longer need to reconsider all other contributions to rights in the history of law.

Fortunately, debate on the sources for the understanding of rights in the French Declaration has been sophisticated, intense and goes back to late in the nineteenth century. The debate shows that the choice of the 1789 model excludes certain facts and events from our history. The story of those exclusions must be recognised as well. Cassin and most French protagonists at the UN were broadly aware of the argument it contained but the English language literature on human rights ignored that debate. The theme of the debate about 1789 and its answers can be best summed up negatively. *The declaration of 1789 marked the rejection of the communitarian traditions of rights expressed most clearly in the Anglo-Saxon common law and its procedures, in favour of European civil traditions that privileged the individual over community.* Once this is understood, we can comprehend better both why there was tension between Cassin and Humphrey, and why the nation-states that dominated the UN saw to it that no institutions that would challenge their sovereignty or override their domestic law for more than 20 years after 1948.

Conclusions

We conclude then that the history of human rights as positive law started from the political creation of human rights in the French Declaration of 1789. However, with respect to the claim of rights applicable universally, the origins of their history lie much earlier, above all in debates at the time of the Spanish conquest of Latin America and the greatest holocaust ever recorded. The notion of universal human rights in the tradition goes back to Las Casas – as the articles on the "discovery" of the Latin American contribution to the Universal Declaration suggest.

Such rights were fought for and imposed by a minority on a majority that opposed them until the breakthrough of the Universal Declaration of 1948. They were not the expression of a general world-wide movement of humanity, and all that was done for justice everywhere does not become part of their history just because today the Johnny-come-latelys have decided that expressing support for universal human rights is a good thing after all.

Epilogue

We have come to the end of our story about how the Universal Declaration of Human Rights was won and what its sense might be. This epilogue points to the future for universal human rights that it opened up. It can be no more than a sketch.

After 1948 it was clear that the writ of the declaration would run as far as nation-states' rules of law and courts allowed. Yet there had been an advance on what prevailed before. There had been a separation of nation-states into "good" and "bad". This belief had become hegemonic by 1945 among the victorious allies and it limited the doctrine of untrammelled national sovereign rights. Only "good" states, the United Nations, would make world policy in the future. The main characteristic of "good" states was (1) that they were democratic, which in the debate on the matter, even the USSR claimed to be, and (2) that all democracies should and would honour and respect fundamental rights for all. If the formal incoherence with universalism was patent – "good" nation-states still had frontiers and borders that by definition included some people and excluded others from the rights and benefits within – henceforth state practices would be subject to scrutiny in terms of an overriding obligation to respect universal rights.

Universal human rights had been established as a principle. After 1945, many states adopted bills of human rights anticipating, reflecting or corresponding with the Declaration. These were accompanied by regional declarations of human rights in the Americas (1948) and Europe (1950). However, there were intractable states like those in the Middle East that refused to adopt all human rights. Also, some "democratic" states like Australia did not pass bills of rights on the grounds that their constitutional arrangements made that impossible. Protagonists of these rights would have to work in and around that reality while continuing to recognising the incompatibility of the principles of universal and national human rights. The avenues open to them were limited.

The task after 1948 was how to make observation of universal rights practical in face of a nation-state's refusal to respect the principle. We have noted how many states began to resile from the undertaking even as the declaration was being drafted. Unfortunately, the US and the USSR were quick to do that, especially the first,

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which defined itself as the "good" nation-state. The United States simply refused to sign any treaty based on the Declaration that did not fit its perceived national interest and values, nor would it act to stop crimes of which it was quite aware (Power 2003, xx–xxi). To this day, it shares the dubious distinction with the Peoples' Republic of China and Iran, "bad", because totalitarian, states of killing more individuals by judicial execution than any other country. It defends this breach of the primary human right, to life, conceded even by Hobbes, by claiming that this is a domestic matter and that the American people want judicial murder. Even in 1948, its credibility and that of the notion of a "good" state was completely undermined for many of the drafters of the declaration.

Having seen the writing on the wall already in 1948, many supporters felt that the declaration was doomed to impotence. They recognised the inevitable continuation and centrality of the nation-state and sought to build on "good" states, concentrated in Europe, which to some degree tried to live up to that ideal rather than preach it hypocritically, like the superpowers. In 1949, disappointed and defeated, some individuals turned to drafting and implementing a European convention on human rights. One was Cassin, who had at first opposed such a document because he thought it would undermine the greater project he hoped for in the Universal Declaration (see Cassese 2009, 110–11).

Drafting the Convention

Turning to the European states and peoples was understandable. Unlike Americans, they had had direct experience of the horrors of war and genocide, expressly committed in the name of the nation. They were prepared to do more to prevent those tragedies happening again. But it was not their desire for organisations seeking peace and justice that separated them from others. It was their solution, which came more "from below" than did those of the United States, despite Roosevelt's Four Freedoms speech. Those who had fought in the Resistance were given more of a say than they had at the United Nations. Some heroes, like Czech leader Masaryk and Romulo, had been present at the drafting of the Declaration of Human Rights and, while aware that Eleanor Roosevelt was being blackmailed by her government not to make it the radical statement that Cassin wanted, had been allies in that project (Romulo and Romulo 1986, 71–82). Humphrey lunched with the editor of *Het Parool*, the Dutch resistance paper responsible for distributing H. G. Wells' proposals, discussed above. But, the Resistance voice was lost in the face of the *realpolitik* of the great powers, above all the US and USSR. The most that we can say, with the conservative Romulo, is: "what the Europeans and the Americans failed to realise was that, in Asia at least, the white man by 1945 was no longer ten feet tall…the early military successes of Japan had destroyed the myth" (ibid. 1986 34).

To grasp the difference between the way Europeans saw matters from those of the majority at the United Nations, we have only to remember that all the European victors except the British came from occupied countries and had lived in a world

which for them, in Masaryk's words, was "one big concentration camp" (Allen 1945, 50). The majority within European populations had supported fascism and national sovereignty in its extreme form until late in the war and most were quite aware of the ethnic cleansing and extermination of non-nationals that took place. France under Vichy had, for example, murdered proportionately more of its Jewish population than had the German themselves. But in 1945 the victors were the men and women of the Resistance. They were intent on remaking the world and they had the temporary support of some European great powers. Once the proposals were limited to Europeans, the minority at the UN became a majority. They certainly wanted peace. The British prime minister, Churchill, otherwise a nationalist, was a fervent supporter of European unity, seeing it as the best way to guarantee peace on the war ravaged continent. But beyond the shared desire for peace among nations there was another concern. Pierre-Henri Teitgen, another major figure in the construction of post-war Europe, wrote:

> When the great scourges of the modern world came: fascism, hitlerism, communism, they found us relaxed, sceptical and unarmed. It took the war, and for some of us, occupation, for us all to take the measure of our humanism anew…Three threats still weigh on our freedoms. First, the primary menace, the eternal raison d'Etat; then the second menace, the public opinion that, alas, has been infected by fascism, Hitlerism. These doctrines of death have filtered into our countries. They have left their traces there. Above all and last, freedom is in danger in our countries – we have the courage to recognise this – because of the economic and social conditions of the modern world (UN 1975, 39, 41, 43).

In other words, men and women of the Resistance believed that the source of the crimes against humanity of the three decades before, nation-state promotion of national interests while denying human rights to non-nationals, still existed and had too much popular support to be easily eliminated by a wave of a democratic wand. From the centre to the left of a Resistance that came from many political positions, they believed that the continuing problem was national sovereignty and its claims. At the beginning of the war even moderates held to Jean Monnet's view expressed in *Fortune* magazine in 1941 and restated with force in 1943:

> There will be no peace in Europe if states re-establish themselves on the basis of national sovereignty, with all that this implies by way of prestige policies and economic protectionism. If the countries of Europe once more protect themselves against each other, it will once more be necessary to build up vast armies. Some countries, under the future peace treaty, will be able to do so, to others it will be forbidden. We experienced such discrimination in 1919; we know the results…Europe will be born yet again under the shadow of fear…To enjoy the prosperity and social progress that are essential, the States of Europe must form a federation or "European entity" which will make them a single economic unit (Monnet 1978, 22–3).

The rejection of the notion of national sovereignty was widespread.

During and after the war much of the Resistance had supported a federalist solution for post-war Europe, whose states would be subordinate to a supranational legislature. We touched on this in the previous chapter. What they wanted to replace national sovereignty and national systems of law was first of all a particular sort of European federalism with power from below and strong local democracy. The authors of the Ventotene Manifesto of 1941 did not accept the idea of good and bad

nation-states. They argued rather that the US and Britain would try to rebuild the old system, responsible for war, ethnic cleansing and genocide:

> The point they will seek to exploit is the restoration of the nation-state; they will be able to grasp [exploit] that most widespread of popular sentiments, most deeply offended by recent events, most easily utilised for reactionary purposes: the patriotic sentiment. In this way they can also hope to confuse their adversaries' ideas more easily, since for the popular masses the only political experience acquired up to this time has been within the national context, and it is therefore fairly easy to converge them and their more short-sighted leaders into the terrain of the reconstruction of the states felled by the tempest [i.e. persuade them to rebuild nation-states on the old model].
>
> If this purpose were to be [achieved], the reaction would have won. In appearance, these states might well be broadly democratic and socialistic; [but] it would only be a question of time before power returned into the hands of the reactionaries. National jealousies would again develop, and [each] state would again express its satisfaction at its own existence in armed strength.
>
> The question which must first be resolved, if it is not then any other progress made up to that point is mere appearance, is that abolition of the division of Europe into national, sovereign states (Lipgens 1985, I, 478).

A federal Europe with its own non-national army was the institutional form they envisaged as a replacement for the nation-state and international law. The authors saw the end of nation-states as ushering in "liberty" and proceeded to enumerate the human rights minimal for that liberty: freedom of opinion, speech and organisation; representative democracy; and an independent magistracy (ibid., 473–84). The solution would be human rights throughout a federation.

Such views were continued and amplified. In 1943 the proposals for a post-national federation in Europe were sent to all other European anti-fascists, via the Swiss journalist Francois Bondy (ibid., 666–67). They influenced both the French and Dutch resistance and the Germans via Helmut van Moltke and the Kreisau circle. One thousand copies of the French edition of Ernesto Rossi's book *L'Europe de Demain* (*Gli Stati Uniti d'Europa*) were distributed after May 1944, exceeding in influence the views of Jacques Maritain. In 1942 the bookshop of a Communist Party worker Silvio Trentin in Toulouse became the headquarters of the southern French resistance whence they influenced Vincent Auriol, later premier of the Fourth Republic, and colleague of Leon Blum, the SFIO leader who had been expressing similar ideas to those of the Italians since 1941 (ibid., 289–90).

Blum made clear his disillusion with the pretensions of democracy as well as its nation-state expression. He had warned that government on "a human scale" had to replace that of representative nation-states (ibid., 278). "The representative principle, using that term in its narrowest sense – that is, in the sense of the wholesale delegation of popular sovereignty to an elected house, and its expression through the sole medium of legislative assemblies – will in all probability, not survive the experiment in bourgeois democracy which has now lasted more than a century" (ibid.). To his call for federation on the American or Swiss model, he added his support for Walter Rathenau's views of 1917 that nationalisms should be subordinated to a functional economy based on *liberal socialism.* Social democracy in France would therefore have to be subordinate to an international organisation. He expressed – unlike the

Italians – a belief that a league of nations that had the full support of its constituencies would create peace. It would have to be a "super-state" (ibid., 282) to overcome the weakness of the past. This could only be achieved when there were no "sovereign powers". These views were very close to those of Monnet, who laid the causes of past human failures at the door of nationalism and the nation-state. In sum, they knew that the majority of even a post-war democratic state could be and was likely to be nationalist and *fascisant* and they saw therefore a continuing struggle to defend the individual against the state.

As the Ventotene Manifesto suggests, the direct victims of Nazism had a particular, neo-Kantian idea of what it is to be an individual. Their understanding of the need for change went further than a simple of nationalism and the nation-state. Their notion of rights was built around the privilege they gave to the individual, rather than any community, as the source of ethics and morality. This was also found among Resistance members of other persuasions. We can usefully compare their views with those of Maritain. Maritain was a Roman Catholic refugee in the US when he wrote his book on human rights. The leitmotif of his argument is that (1) each individual is a whole, open to society and other human beings whom he or she needs; (2) the common good that each seeks and needs is not like that of bees, but a *human* common good, of real different unique individuals, of a multitude of flesh and blood beings; (3) therefore, fundamental rights had to be recognised, allowing them to flourish through redistribution (Maritain 1988, 619–32). Roosevelt had similar views and might even have agreed that the war had made essential a distinction between totalitarianism and Christianity. But, then a difference in perspective opens up. Maritain is hostile to all state religions and to the idea that any Christians have got it right, that is, there can be no collective morality created by a hegemonic process. No conformism, no coercion was acceptable, and he proceeds to say that the essential purpose of civil society is "to procure the common good of the multitude in such a way that the real person, not only a category of privileged people, but the entire mass, can really obtain the measure of independence which is suitable for civilized life, and which ensures both economic guarantors of life and property, political rights, civic virtue and the culture of the mind" (ibid., 647; emphasis in original).

Maritain projected further the implications. Freedom as the flowering of the individual, the object of political life, had as a corollary the flowering of the internal moral being as its object. Against the nationalist Nazi myth, for him the freedom of individuals from fear, want and to make their destinies without falling into the myth of democratism and subordination to the state, led to an assertion that obedience to conscience is more important than obedience to any positive rule of law. Such priority to the natural law led him to affirm that "Antigone is the eternal heroine of natural law, which the ancients called the *unwritten law*…", though he traced it through the Stoics, to St. Augustine and Aquinas, thence to Suarez, de Vitoria and Grotius (ibid., 657). As if this were not enough, he spelt out the implications that there was an "order or a disposition which human reason can discover and according to which human will must act to be in accord with the necessary ends of human beings. The unwritten law or natural law is nothing but that" (ibid., 658). Paraphrasing Pericles,

he declared that it is "written in the heart of man" and antecedent or superior to the written law. Some things are "due to men because they are men" (ibid., 661). Positive laws could not have that indeterminacy by reference to reality which natural law had. They were contingent and their force depended on their correspondence with the natural law.

Maritain made clear that Roosevelt's Four Freedoms were intermediate positions between his own human rights based in natural law, and positive law, being in fact like a *ius gentium* "which follow from the first principle in a *necessary* manner, but *presuppose* certain factual conditions, like, for example, the state in civil society or relations between peoples" (ibid., 664). Here he touched on the compromises of those people whose understanding of rights started in positive law, including, common lawyers whom he mentioned explicitly.

Both Monnet and Spinelli went on to become architects and leaders in the organizations that formed the European Community in 1950. Monnet was realistic by then: nation-states would not disappear, but borders, those markers of exclusion, would be less and less relevant. Spinelli, who was a European commissioner in the 1950s and then went into both national and European parliaments, wrote these words in a famous book of 1966, *The Eurocrats*, developing explicitly on Monnet's views: Europe was, he wrote, the product of the experience of Europeans before, during, after WWII.

> In the interval between the two world wars, nationalism furiously destroyed democratic institutions and substituted tyrannies in a widening circle of countries. Then, with the exception of England and a few small states which were miraculously saved, all the prideful nation-states, which had claimed and obtained the most complete loyalty on the part of their citizens, were ignominiously crushed under brutal German dominion, whether they were friends or enemies of Germany. And, finally, Germany itself was culpable for such terrible crimes that the victors decided to suppress it entirely, converting it purely and simply into an area of military occupation…These circumstances very greatly reduced the habitual respect of citizens for their states and their myths and opened the way to the united European transformation. It is significant that the British, Swedes and Swiss, who each in their own way surmounted the trial of World War II without experiencing total defeat and without, therefore, losing respect for their states, are the very people among whom the united European transformation did not take place, either among the political classes or in public opinion.
>
> …[E]xaggerated nationalism had been swept away in ignominy during World War II and today is fostered only by a few who are nostalgic for that era.
>
> …Schuman, de Gasperi, Adenauer, Spaak, Beyen were for a few years the leaders of a united European action if not of a European unification doctrine. Nevertheless, for all of them, the reconstruction of the nation-state meant moving in a familiar sphere, whereas creating a united Europe meant moving in the unknown or at least in obscurities and complexities. They therefore undertook, or at least tried to undertake, integrated European measures in exceptional circumstances but dedicated their greatest effort not to the construction of a united Europe but rather to the restoration of the old nation-states.
>
> National restoration and the construction of a united Europe are complementary, however, only up…to the point at which one encounters…problems for which the decision must be made whether to deal with them at the national level with national instruments or at the European community level with unified European instruments. Beyond this point the two activities become alternatives: one suffocates or, at least, obstructs the other, and the results of one are different from the results of the other.

> Yet, European political life has moved forward precisely in this paradoxical and contradictory fashion. On the one hand, there has been the restoration of the nation-state and, concomitantly, the old national political and economic groupings, the old national myths and taboos; on the other hand, there has been the establishment of supranational politics and institutions (Spinelli 1966, 5–10).

And, we add, nothing could be more typical of the supranational institution than the Council of Europe set up in 1948–9 to achieve the supranational standards and rules sought by people as diverse as Churchill and Spinelli. Its first task was to draft the European convention of human rights to protect all humans on the territory of signatory states. Today, the Convention is recognised as its crowning achievement. The intertwined destinies of all Europeans had brought such benefits that other countries clamoured to sign it. From the original signatories, ten in all, forty-seven states had signed it by 2009. The European Convention became the model for the future, although it was a compromise with the reality of the continuation of nation-states (a topic beyond the scope of this book). But the new regime did not please resurgent nation-states who tried to avoid its rules. We look at Britain, whose reluctance had been foreseen by many of the drafters, and France.

Diehard Nations

The new convention of 1950 broke with the existing traditions of giving human rights to nationals only. With it, all people could bring actions for breaches of their human rights by member states. It is true that those outside those territories who could not get in did not always have the protections that a universal system would guarantee, but nation-states were now subordinated to the rulings of a court that was doubly non-national since its judges were not only from all the states but also could be and were chosen from states outside the Council of Europe members because of their records on human rights. It sought to create to the fullest a regime of rights for all human beings within a greater space than the nation and not governed by the national interest of any single state. As it was limited to only the states that signed it, those rights were regional, not universal; but in other ways it came close to Cassin's dreams. Any person – regardless of attribute – who was within the regional space had those rights. As Cassese writes: "Thus, a Chinese, a Japanese, an American, a Chilean whose fundamental rights the Italian, French, or Russians deny or trample on can apply to the European Court to have their rights recognized " (Cassese 2009, 109). The list of human rights protected, with its succeeding protocols, soon surpassed those of the Universal Declaration. These standards were subscribed to over an area much greater than any state and marked a restriction of national sovereign jurisdiction even among "good" states, since the Convention was more than a normal treaty. Unlike the Declaration, the Convention was a treaty with the power to impose sanctions for a breach, through Article 50, where until 1966 there were no treaties turning the Universal Declaration into law. Moreover, even then, both the two UN Conventions on Civil and Political Rights, and Economic,

Social and Cultural Rights had not been signed by many powers and had no real sanctioning capacity. Above all, only states were parties to matters raised under the United Nations agreements while, though not right from the start, under Article 25 of the European convention, individuals could bring actions in the European court of human rights (ECHR) established in 1957. The Convention thus returned power to the individual victims in a way not seen before.

In the two decades after 1948, Britain's opposition to the new rights rested on the claims of the common law and the British constitution. According to the British government, which had majority popular support, these did not allow the ECHR to override the highest national court's decisions. In this, Britain advanced the same arguments for not subscribing to human rights standards as the Australians had when they refused to adopt the ICCPR in its entirety. Such exceptionalism effectively made the United Nations at best marginal in world politics until the 1970s and at worst a cynical rubber stamp for armed interventions by the great powers in countries deemed in breach of both their state obligations and human rights. The most obvious case was the armed intervention in Korea in 1950–3 that ended in a stalemate and caused three million deaths.

The European Court set up in 1957 had to cope with such exceptionalism and derogation from its standards since, as in most treaties, signatories could reserve matters on the grounds of national particularities that allowed a margin of discretion and/or on the grounds of unreasonableness: ie that the restrictions they made on human rights were "necessary in a democratic society". Over the decade of the 1960s, the Court gradually established its supremacy over national law. This was particularly important for *universal* rights, as behind the claims that national arrangements made one right or the other impracticable or inapplicable in a particular state was the unstated premise of the "good" democracy, that is, such arrangements were simply the expressions of a decent people doing its best. The naked hypocrisy of the United States in simply refusing to sign UN human rights treaties on the grounds that its own standards were even higher or that its own values better was the exemplar. Its exaltation of democracy made what was being achieved at Strasbourg less obvious. In a series of cases brought by individuals, common lawyers argued that according to British law the ECHR could not apply as protection in many domains. These culminated in the *Sunday Times* cases (1974, 1979) in which the highest court of appeals in Britain, the House of Lords, accepted that it was bound by the ECHR Article 10 on protection of freedom of expression. The facts were these: the newspaper, in the course of a case for damages brought by thalidomide victims, had an injunction placed on it not to discuss the matter. Failure to comply would make the journalists and newspaper guilty of the common law offence of contempt of court, that carried a jail sentence. The argument was that freedom of expression would interfere with the authority of the courts (see Cassese 2009, 120–2). The European Court held that the House of Lords decision was wrong. Its insistence that the limitations on human rights should always be interpreted restrictively by national instances subordinated nationalist claims to the ECHR (see Berger 1991, I, 108–12).

The British attempt to widen the margins of appreciation in order to make national cultural and legal standards predominant rested on the Convention's concession that some restrictions of human rights might be necessary in a democratic society. The European Court of Human Rights therefore had to establish what such a regime was in a world where both the USSR and South Africa claimed to be democracies. More particularly, it had to establish what the relationship was between democracy and human rights. In the so-called Strasbourg consensus of 1983, the Council of Europe promulgated long statements and guidelines to ensure that the basic concept of democracy was one person, one vote, one value. But it added that without all the main civil and political rights listed in earlier statements, no real democracy could exist. The necessary complementarity of the one to the other – without freedom of conscience, expression and organisation there can be no democracy and without democracy the former cannot exist – merely repeated what many influential political and legal theorists in Europe had been saying for years. The innovation came when the Court stated that human rights took priority over democracy, thus reaffirming the principles of the 1789 Declaration. The goal of any society and polity was human rights; democracy was merely the subordinate, though best, way to get there. This would have gratified many of the Resistance figures we have referred to. Where rights were concerned, the important decisions came in cases like the *Dublin Well Woman Association* case of 1992. Again the issue was freedom of information. The association had provided information for women seeking abortions in the UK because they were illegal in Ireland. They had been prosecuted and prohibited from further such activity. They appealed to the ECHR where the argument of the Irish counsel was that the Irish constitution protected the "right to life" and that the people by majority in a referendum had decided that abortion should not be allowed or promoted. At stake behind the lawyerly palaver was this question: was the European Court to overrule a democratic decision expressing national values in moral matters when the whole of the Council of Europe was set up to protect *democracy* and human rights? What was at stake can be gauged from M. Schermers' Commission Report:

> What is necessary for the State in question cannot be decisive. The Convention demands that any restrictions imposed on freedom of expression should be necessary in democratic society in general. We must therefore take into account other democratic societies…It is not only a question of other European societies or States. Since the middle of the XXth century, nation-states are no longer the sole societies in western Europe. More and more nation-states are transferring their sovereign powers to common institutions. Beside (or above) national societies European society is developing. In Europe, to decide if this or that restriction on liberty of opinion is necessary, we must also take into account European society as an ensemble.

He went on to say that freedom of movement was an essential principle in Europe and not to be interfered with (see Commission Européenne 1991). The court decided for the applicants and stated that democracy was not when one national majority expressed as its view in perpetuity but would change over time and into the future. Its democracy was thus, implicitly, a higher notion of an ideal sort. It was not deciding against democracy understood thus when it ruled for the applicants and the superior claims of rights over democracy.

If common law attempts to make national-democratic majorities predominate over human rights were thus stymied, it was only for a time. In the 1960s and 1970s, this policy hid the fact that Britain had become the greatest offender against Articles 3 and 6 of the Convention because of its policies and treatment of individuals in Northern Ireland. Article 3 ran: "No one shall be subjected to torture or inhuman or degrading treatment or punishment" and Article 6 guaranteed a fair trial and due process on principles that even common lawyers argue went back to Magna Carta. Article 3 was amplified by a convention against torture, open for signatories in 1987 (see Evans and Morgan 2001, 32–41).

France

France presented a similar nationalist challenge to supranational standards. Despite a new constitution in 1946 enshrining human rights and allowing automatic entry into France and French rights for all refugees (see "Refugiées et demandeurs d'asile" 1996, 10), the nationalist and imperialist France of de Gaulle, nostalgic for lost national prestige, engaged in massive breaches of human rights and wars, in Indochina, Madagascar and then in Algeria. On the day Germany surrendered (8 May 1945), the French army started the massacres in Sétif of Algerians who wanted no more than the vaunted national human rights of their French compatriots, Algeria being technically part of France but, unfortunately for its Resistance, both Muslim and dark-skinned. The Algerian war of national liberation with its subsequent ethnic cleansings and crimes against humanity had started. France was not going to allow universal human rights interfere with *raison d'état*. De Gaulle's pressure on Cassin at the United Nations has already been discussed.

This record has been explained by the continuity of personnel with Vichy officialdom and collaborators in the French state and judiciary up to this day. The problems of a transitional state returning to democracy were clearly different from those of Britain and breaches of human rights much more blatant. The ECHR could do little to rein in this nationalism until after the French defeat in Algeria in 1962. Even then the struggle between the democratic nation-state and rights-bearing individuals continued. From 1968 onwards a Left with softer views began to have more influence in France but the state itself had not changed and it simply disregarded fundamental human rights where political opponents or dissidents were concerned. Even after it adhered officially to the ECHR in its entirety in 1974, it continued to try to avoid its obligations. The conflict came to a head in the *Tomasi* case of 1991. Tomasi was a student who had been arrested in 1982 for an indirect connection with terrorist activities in Corsica. Since he had to exhaust all domestic remedies before he could appeal to the ECHR against his imprisonment without a fair and prompt trial, guaranteed by Article 5 (3) of the Convention, and it was clear that his rights under Article 5 (3) had been abused, the state dodged the day of reckoning in

Strasbourg by shifting him from jurisdiction to jurisdiction. Thus he could never exhaust the available remedies (see ECHR 1990).

The court found with damages for Tomasi, rejecting the strong French pleas that he had not exhausted all his remedies available nationally. No longer would it be possible for a state to keep the ball in the national court by such manoeuvres. Human rights matters would have to be removed to the supranational court.

Universalism v Nationalism: A Continuing Struggle

It would be gratifying if the assertion of the European Court of Human Rights that the human rights it declared had finally trumped national claims were true. However, despite such milestones as *Tomasi* and an ever-extending list of rights and institutions applying them, throughout Europe, the rise of nationalism since the 1980s has meant an ongoing struggle for even the rights it seeks to protect. Many states regarded as "good" and likely to apply human rights to all within their power, have developed tarnished records as they ignore the rights to life, liberty, freedom of movement and expression, freedom from torture, and so on. The case load of the ECHR is now overwhelming. The millions of individuals within its jurisdiction know that there are rights that they can assert but they can be a long time coming to court.

Yet, while the picture is mixed, and from the positive view of the 1970s commentators have arrived at a more pessimistic view, at least the following must be acknowledged. Pointing to the practical problems is not enough. Any state that wishes to join the European Community and reap the economic and social benefits that brings, must first pass by the Council of Europe and meet certain policed standards of human rights and democracy. It is obvious that denial of human rights can now be challenged by individuals, even if it is true that Europe itself excludes many from its rights through its immigration policies. The principle remains as a goal in theory and practice. In a state-to-state situation the Europeans, who have banned the death penalty, will simply refuse to extradite anyone, even to the US, if they thereby risk the death penalty.

Yet both the US and Europe are caught in the logic of having rights regimes that are not universal. We still await the open frontiers that would allow any outsider who wanted those rights to enter the Promised Land. What to do about other states that breach them? Both the US and Europe believe in ingerence, that is, forcible imposition of their standards in other places. In 1993 the secretary general of the Council of Europe, Catherine Lalumière, expressed the new militant interventionist view in these words:

> The state should be the principal custodian of human rights; its role is to respect and enforce those rights. But experience teaches us that it can be not only the protector but also the grave-digger of human rights. It was because the state has so often failed in its role as custodian of human rights and been transformed into an instrument of oppression that the international

> community was given a watching brief over the behaviour of states. These can no longer shelter behind the cosy screen of non-interference. Human rights have ceased to belong to the domain of "domestic affairs." Respect for human rights is a duty of every state, not only towards its people but also towards the international community (Lalumière 1993, 11).

Clearly, even the most advanced protagonists of human rights have yet to grasp the lesson of the Parthenopean Republic of 1799 that they must come "from below".

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Author Index

A. Davidson, *The Immutable Laws of Mankind: The Struggle For Universal Human Rights*, 509
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Subject Index

A. Davidson, *The Immutable Laws of Mankind: The Struggle For Universal Human Rights*, 513
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