The self, the other and human rights: Lacan, Levinas and the ethics of alterity

Author:
Indaimo, Joseph

Publication Date:
2011

DOI:
https://doi.org/10.26190/unsworks/15170

License:
https://creativecommons.org/licenses/by-nc-nd/3.0/au/
Link to license to see what you are allowed to do with this resource.

Downloaded from http://hdl.handle.net/1959.4/51530 in https://unsworks.unsw.edu.au on 2024-04-28

The Self, the Other and Human Rights

Lacan, Levinas and the Ethics of Alterity

Joseph Andrew Indaimo

(BAHon, LLB, MAHon)

Thesis presented for the fulfilment of the degree of Doctor of Philosophy, University of New South Wales, School of Law

2011

THE UNIVERSITY OF NEW SOUTH WALES
Thesis/Dissertation Sheet

Surname: INDAIMO

First Name: JOSEPH Other Name: Andrew

Abbreviation for degree as given in the University calendar: PhD

School: Law Faculty: Law

Title: *The Self, the Other and Human Rights: Lacan, Levinas and the Ethics of Alterity*

Abstract

This thesis explores the impact of the conceptualisation of human identity upon our understanding of human rights and how the notion of human identity informs the ethical goals of human justice in such rights. Beginning from the position that our contemporary human rights' discourse emerges from the epistemological shift in Western history from pre-modernity to modernity, our contemporary understanding of modern rights stem from the liberal philosophy of Western humanism and the *rights of man* thesis. With these influences there is the philosophical and political focus in modern human rights on the individual subject and the ontological signification of its (potential) autonomous presence of being, expressed through the so-called universal trait of intentional self-will in human identity.

Yet since the mid-twentieth century, post discourses (such a poststructuralism, postmodernism and post-humanism) have challenged such liberal notions of human identity. Such post discourses focus on the radical quality of *alterity* within human identity. In this thesis I argue that with alterity, rather than promote the atomised individual of autonomous powers of being and its ontological presence of self, postmodern ethics brings human identity under the subjugation of the "beyondness of the other." It is the distinction of the other, rather than its reduced Sameness to the self, which animates a potential post-humanist ethical inter-subjectivity.

Two such post-humanist thinkers of ethical alterity which this thesis explores are Jacques Lacan and Emmanuel Levinas. Lacan focuses on the other of unconscious desire and loss, while Levinas explores the face of the other human subject. In both cases, it is the alterity of the other which institutionalises a pre-foundational inter-subjectivity between self and other, which always already marks human identity with an ethical openness towards the other. In this way, I argue that such ethics of alterity contains the transformative potential of re-orientating the conceptualisation of human identity and the architectural aspect of our contemporary human rights. Rather than a right of the individual self, alterity animates a human rights of otherness, in which the ethical integrity of human identity and human rights rests upon a responsibility for-the-other rather than a right-of-self.

Declaration relating to disposition of project thesis/dissertation

I hereby grant to the University of New South Wales or its agents the right to archive and to make available my thesis or dissertation in whole or in part in the University libraries in all forms of media, now or here after known, subject to the provisions of the Copyright Act 1968. I retain all property rights, such as patent rights. I also retain the right to use in future works (such as articles or books) all or part of this thesis or dissertation.

I also authorise University Microfilms to use the 350 word abstract of my thesis in Dissertation Abstracts International (this is applicable to doctoral theses only).

Joseph Indaimo ..... Mon 12th Dec 2011...

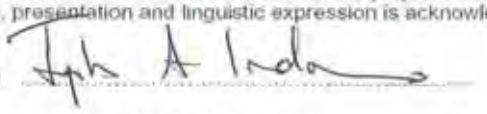
Signature Witness Date

The University recognises that there may be exceptional circumstances requiring restrictions on copying or conditions on use. Requests for restriction for a period of up to 2 years must be made in writing. Requests for a longer period of restriction may be considered in exceptional circumstances and require the approval of the Dean of Graduate Research.

FOR OFFICE USE ONLY Date of completion of requirements for Award:

ORIGINALITY STATEMENT

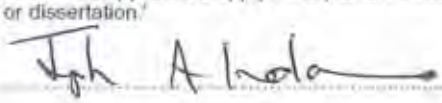
'I hereby declare that this submission is my own work and to the best of my knowledge it contains no materials previously published or written by another person, or substantial proportions of material which have been accepted for the award of any other degree or diploma at UNSW or any other educational institution, except where due acknowledgement is made in the thesis. Any contribution made to the research by others, with whom I have worked at UNSW or elsewhere, is explicitly acknowledged in the thesis. I also declare that the intellectual content of this thesis is the product of my own work, except to the extent that assistance from others in the project's design and conception or in style, presentation and linguistic expression is acknowledged.'

Signed 

Date Mon 12th Dec 2011

COPYRIGHT STATEMENT

'I hereby grant the University of New South Wales or its agents the right to archive and to make available my thesis or dissertation in whole or part in the University libraries in all forms of media, now or here after known, subject to the provisions of the Copyright Act 1968. I retain all proprietary rights, such as patent rights. I also retain the right to use in future works (such as articles or books) all or part of this thesis or dissertation.
I also authorise University Microfilms to use the 350 word abstract of my thesis in Dissertation Abstract International (this is applicable to doctoral theses only).
I have either used no substantial portions of copyright material in my thesis or I have obtained permission to use copyright material; where permission has not been granted I have applied/will apply for a partial restriction of the digital copy of my thesis or dissertation.'

Signed 

Date Mon 12th Dec 2011

AUTHENTICITY STATEMENT

'I certify that the Library deposit digital copy is a direct equivalent of the final officially approved version of my thesis. No emendation of content has occurred and if there are any minor variations in formatting, they are the result of the conversion to digital format.'

Signed

Date Mon 12th Dec 2011

Special thanks to Principle Supervisor Robert Shelly & thanks to co-Supervisor Ben Golder for all guidance, comments and support. Thanks to Jane Armstrong for editorial comments

To Aurelio and Catherine with love and gratitude & to all those lost on the way

CONTENTS

Introduction

Introduction: Rights' Claims and Counter-Claims: A Clash of Discourses 1-12

Chapter One: Tracing the Subject

Introduction 13-14

The Pre-modern Predicament 14-20

Hobbes and Locke and the Labour in Self 20-26

Rousseau and Kant and the Dignity in "I" 26-42

Marx and the Critique from within 42-50

Conclusion 50-53

Chapter Two: Modern Human Rights and Postmodern Agency

Introduction 54-56

The Postmodern Predisposition 56-68

The Power of Right in Contemporary Human Rights 68-82

Conclusion 82-88

Part A: Lacan's Subject-of-Lack

Chapter Three: The Subject Divided and the Subject of Loss

Introduction 89-91

The Topography of Self: the Borromean Knot of the Real, the Imaginary and the Symbolic 92-95

The Intervention of the Imaginary: the Rupture of Consciousness, the Other Side of Self and the Lost Real 96-103

The Imaginary Other: the Ideal Imago and the Duality of Self 103-110

The Symbolic Realm and the Subject in Language 111-114

The Symbolic Preview: The Entrance of Oedipus, the Biases of Law and the Objet Petite a 114-123

The Speaking subject: the Signification of Language and the Failing Signifier 123-128

Conclusion 128-131

Chapter Four: Human Rights through the Lacanian Specular

Introduction 132-134

Laying the Foundations with Ethics of the Real: Illusions, Fantasies and Human Rights of Ideality 134-147

The Dual Illusions of Possibility: the Ideal-I of the Cogito and the Signification of Rights 148-156

The Power of Right: the Law as Phallus and Rights as Objet Petite a 156-164

Conclusion 164-169

Chapter Five: The Ethical Interrogations of Impossible Desire

Introduction 170-173

The Threat to Human Subjectivity from Human Pleasure: Ailments, Ideologies and the Terror of the Real 173-183

The Constitutive Lack in an Impossible Desire 183-191

The Mediation of Ethical Desire through Identity and Human Rights 191-200

Conclusion 200-206

Part B: Levinas's Subject for-the-Other

Chapter Six: The Self, the Face, Alterity and Ethics

Introduction 207-211

Levinas and the Violence of the Self 211-219

The Incarnate: the Provocation of the Other in the Everyday 219-225

The Face and Infinite Alterity 225-231

Proximity and Alterity: Otherness and Ethics 231-245

Conclusion 245-247

Chapter Seven: Alterity, Human Rights and Responsibility for the Other

Introduction 248-250

Levinas's Critique: Human Rights and the Ego-I 250-270

A Human Rights of Otherness: Rights Grounded in the Responsibility for-the-Other 270-281

Conclusion 281-284

Chapter Eight: Ethics and Beyond: Human Rights, Law and Justice of the Many

Introduction 285-288

A Neighbourhood of Three and Justice for the Many 288-300

The Good State: Deliberative Democracy, Critical Justice and Ethical Alterity 300-314

Deconstruction in the Decision: the Provocation of Rights in the Judgement of Law and Delivery of Justice 314-327

Conclusion 327-329

Conclusion

The Self, the Other and Human Rights

From Self to Other: from Rights to Responsibility 330-341

The Trouble with Neighbours: Lacan with Levinas, the Unconscious and Ethics 341-350

The Sociality of an Ethical-Justice in the Critical Gaps of Democracy 350-362

Bibliography

363-379

****

List of Abbreviations

From Introduction, Chapter 1:

SC: Rousseau, J. *The Social Contract and Discourses*. (trans. G.D.H. Cole), J.M. Dent & Son, London, (1988).

MM: Kant, I. *The Metaphysics of Morals.* (trans. M. Gregor), Cambridge University Press, London, (1991).

CP: Kant, I. *Kant's Critique of Practical Reason*. (trans. T.K. Abbott), Longmans, Green & Co, London, (1967).

From Part B: Levinas's Subject for-the-Other

Autrement/AE: *Autrement qu'etre ou au-dela de l'essence*. Martinus Nijhoff, La Haye, (1974).

AV: *L'au-dela du Verset. Lectures et Discours Talmudiques*. Minuit, Paris, (1982).

BPW: *Basic Philosophical Writings* (ed. A. Peperzak, *et al*), Indiana University Press, Bloomington, (1996).

CPP: *Collected Philosophical Papers* (ed. A. Lingis), Martinus Nijhoff, The Hague, (1987).

DD/OG: *De Dieu qui Vient a l'Idee.* J. Vrin, Pairs, (1982), (trans. B. Bergo), *Of God Who Comes to Mind*. Stanford University Press, Stanford, (1998).

DEHH: *Discovering Existence with Husserl* (trans. R. Cohen), Indiana University Press, Bloomington and Indianapolis, (1988).

DHDA: 'Les Droits de l'Homme et les Droits d'Autruri.' (ed. M. Borghi), *L'Individibilite des Driots de l'Homme*. Fribourg, (1985).

DL: *Difficile Liberte. Essais sur le Judaisme*. Albin Michel, Paris, (1963).

EE: *Existence and Existents*. (ed A. Lingis), Martinus Nijhoff, The Hague, (1978).

EN: *Levinas, Entre Nous: Thinking of the Other*, (trans. M.B. Smith & B. Harshav), Continuum Press, London, (1998).

EFP: 'Entretiens Emmanuel Levinas — Francois Poire,' *Emmanuel Levinas: Qui etes-vous?* La Manufacture, Lyon, (1987).

HAH*: Humanisme de l'autre Homme*. Fata Morgana, Montpellier, (1972).

I: 'Ideology and Idealism,' (ed. M. Fox), *Modern Jewish Ethics: Theory and Practice*. Ohio State University Press, Ohio, (1975).

JG: 'Jacob Gordin.' *Les Nouveaux Cahiers* (1972-73), No. 31, 20-22.

LR: The Levinas Reader. (ed. S. Hand), Blackwell, Oxford, (1989).

MB: *Sur Maurice Blanchot* (Essais), Fata Morgana, Montpellier, (1975).

MT: 'Le Moi et la Totalite.' *Revue de Metaphysique et de Morale*. (Oct-Dec 1954), Vol. 59, No. 4, 353-73.

ND: 'Le nom de Dieu d'Apres Quelques Textes Talmudiques. Discussion,' *Debats sur le Langage Theologique*. Aubier-Montaigne, Paris, (1969).

NineTR: *Nine Talmudic Readings* (trans. A. Aronowitcz), Indiana University Press, Bloomington, (1999).

OTB: *Otherwise Than Being or Beyond Essence*. (trans A. Lingis), Duquesne University Press, Pittsburgh, (1998).

Outside the Subject: *Outside the Subject*. Stanford University Press, Stanford, (1993).

TA/TO: *Le Temps et l'autre.* Fata Morgana, Paris, (1979); (trans. R. Cohen), *Time and Other*. Duquesne University Press, Pittsburgh, (1987).

Totalitie/TI: *Totality and Infinity* (trans A. Lingis), Duquesne University Press, Pittsburgh, (1996).

Introduction

Rights' Claims and Counter-Claims: A Clash of Discourses

Understanding human rights necessarily includes an understanding of human identity. That is, human rights are not only engaged with and influenced by a philosophy of law and the legal discourse surrounding the nature of legal rights and obligations. In addition, human rights are necessarily engaged with and influenced by questions regarding the nature of being. That is, in order to understand the (legal) rights of a human being, one must first (philosophically) have an understanding/conceptualisation of what it is to be human. Hence, how we conceive ourselves as human is a constitutional feature of the paradigm of rights which we invoke when engaging in rights' talks and rights' claims. The parameters of the former inevitably guide and influence the scope of the latter. This, of course, signifies that human rights bear a philosophical question: the nature of who we are as human beings.

Within our contemporary human rights' discourse such philosophical enquiries and influences are often subsumed within the prioritised imperatives of rights: that is, the aim to establish the foundations of human freedom, justice and peace in the world.[1] Yet there still exists an assumed conceptualisation of human identity within our modern rights' discourse which impacts upon the nature of such rights as a means to such aims. This conceptualisation of human identity is one which is particularly Kantian inspired. That is, within our contemporary human rights' discourse there is an image of the nature of being and human identity which possesses a moral potentiality and an idealised capacity in and of itself. Grounded primarily upon a particular tradition of liberal individualism, invoked by modern humanism, within Western philosophy — primarily, along with Kant, a specific Anglo-French perspective — our rights exhibit an underlining ethics of authenticity about the autonomous human subject, in which rights reflect an ontological status of the universal essence of the individual *"in potentia."* This is the (assumed) soul of humanity within our rights' discourse — each individual equally and autonomously

[1] The United Nations, *The Universal Declaration of Human Rights*, Preamble.

marked by universal dignity, reason, moral conscience and self-will.[2] The emancipation offered within our contemporary human rights' discourse with such a conceptualisation of human identity is won through and for this image of the self-determined and self-sovereigned, autonomous individual.

Such a tradition of individual potential which grounds our contemporary human rights has been challenged on many fronts. For example, communitarians such as Burke and Bentham reacted against such individualistic notions in their own times. Marx challenged the individual of autonomous potential with his notion of class politics. And finally such concepts of individual potential have been challenged from the German tradition stemming from Hegel, including the more contemporary works out of the Frankfurt School from intellectuals such as Adorno and Habermas.[3] My interest in this image of human individualism within our contemporary human rights stems from the post-philosophies, such as post-structuralism, post-modernism and post-humanism. Since the mid-twentieth century the identity of "the self-promoting individual" has been challenged by such post-discourses, countering the centrality of this image with a focus on *alterity*, the very quality of otherness in "the other." Such a focus on the alterity of the other, on difference and otherness, has undermined the unity and stability of this image of human individualism with the plurality of identity politics. This plurality of identity is founded upon the contingency of the "human subject" — the multiplicity of human identity subjugated to a network of linguistic, social, historical and power discourses. These have become, what Laclau and Mouffe term,[4] the new social movements. In such movements it is the multiplicity (the alterity) of identity which is the regulatory principle of emancipation, won through the destabilisation of the traditional conceptualisation of the sovereigned individual bearer of rights. And though these rights' struggles usually

---

[2] Taylor, C. 'Condition of an Unforced Consensus on Human Rights.' *The East Asia Challenge for Human Rights.* Cambridge University Press, Cambridge (1999), 124-144, at 124; Douzinas, C. *The End of Human Rights*: *Critical Legal Thought at the Turn of the Century*. Hart Publishing, Oxford (2000), at 319; Bauman, Z. *Postmodern Ethics.* Basil Blackwell, Oxford (1993), at 26.

[3] For a detailed summary of the critique against the Enlightenment from the Frankfurt school's perspective refer to Horkheimer, M. & Adorno T. *Dialectic of the Enlightenment*. (trans J. Cumming), Continuum Publishers, New York, (1969).

[4] Refer to Laclau, E. & Mouffe, C. *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics.* Verso Press, London, (1985).

strive for the same socio-political egalitarianism and civil and political protections as the tradition of liberal individualism, such "struggles of otherness" reveal the contradiction at the core of our contemporary liberal, human rights. That is, that the value of the community and the alterity of the other is worked through the ego-centred, self-interest of dominant, self-serving socio-economic interests.[5]

My aim in this thesis is to critique and challenge our contemporary human rights' discourse through the perspective of these post-discourses of otherness. That is, I aim to challenge our contemporary human rights' discourse with the post-discourses' shift in the conceptualisation of human identity towards alterity. There are two main tasks to this thesis. Firstly, through analysing the works of Jacques Lacan and Emmanuel Levinas I highlight some fundamental contradictions and weaknesses within our contemporary human rights' discourse. I have chosen to focus on Levinas and Lacan as their works on alterity and its impact upon both human identity and human ethical potential are fundamental in the post-discourses. With a focus on alterity, both these intellectuals of otherness highlight fundamental contradictions and weaknesses in the traditional, individually autonomous, conceptualisation of humani identity. It is such contradictions and weaknesses which, I argue, are also found in our contemporary human rights' discourse, which presents and prioritises the individualistic traits of human identity. This presentation and prioritisation of autonomous individuality leaves care and consideration for the other as a "secondary after thought" within human rights' aims and practices.

It is this engagement with the other, the prioritisation or otherwise of the *inter-subjectivity* between the individual self and the alterity of the other, between the subject and community, which leads to the second, "ethical," task in my thesis. In this inter-subjective light, human rights not only bear a philosophical question on the ontology of self. In addition, there are questions of justice and what is fair and just — that is, equitable — in human behaviour within community. There are also questions of morality, that is, issues surrounding the general rules and principles of the criteria of right

[5] Roth, B. 'Retrieving Marx for the Human Rights Project.' *Leiden Journal of International Law.* (2004), Vol. 17, 31-66, at 53.

and wrong/good and bad of human behaviour amongst others. And finally, there are also ethical questions, that is, the "real behavioural codes and practices" of such measures of right and wrong/good and bad of human behaviour.[6] With the image of human identity presented as autonomous and self-sovereigned within our contemporary human rights' discourse, the human subject is presented as pre-social — a monad of potential power of autonomous self-willed and reasoned intentionality, prior to its relationship with others. This is the image of a subject split between abstract and concrete identity, with a focus in the tradition of our contemporary human rights' discourse on the alienated, automatist (that is, abstract) individual.

The corollary of this concept of abstract human identity is that human rights have become a formula in service to the ideal potential of being. Hence, what is "good" is not *primarily* concerned with the measure of our empirical inter-relational experiences with others, but rather, is consumed by legal justifications for the fulfilment of the autonomous "potential individual." Human rights have become legitimising devices of the law, devoid of — or at the very least, limiting — issues of inter-subjective ethics and justice in favour of politico-legal rights and duties amongst individual avatars of equal *potentia* of self-fulfilment.[7] Within this tradition of political philosophy and liberal humanism which animates our contemporary human rights, these avatars come together under the banner of "the citizen." It is this title which is the modern marker of equality of political and civil liberties, through which the individual potential of human identity is offered. Thus, moral and ethical potentiality within our contemporary human rights' discourse is a *morality of one* in an *inter-subjectivity of the Same*, which reduces the alterity of the other into coinciding categories of the similar. This discourse of human rights aims towards an image of human identity which orientates around the potential of singular and equal abstracted individuals of universal dignity, reason and self-will. The only limitation upon the potential of such (an) individual(s) becomes the parameters of regulative and normative sets of prescribed civil and political (legal) rights and duties.

---

[6] Bauman, above n 2; Appiah, KA. *The Ethics of Identity*. Princeton University Press, Princeton (2005). Although, it is difficult to give an exact distinction between morality and ethics and the two are often used interchangeably. Refer to Appiah, *ibid*, at x-xviii.

[7] Douzinas, above n 2, at 195.

But within the post-discourses of otherness there is an alternative ethic to this limited ethics of autonomous self within our contemporary human rights' discourse. This is the *ethics of alterity*, prioritising the otherness of subjectivity — both of other subjects and of the self. In the second task of this thesis I take up such ethics of alterity, as explored by Lacan and Levinas, and its possible impact on our contemporary human rights' discourse. Contrasted against the individualism still evident within our contemporary human rights discourse, both Lacan and Levinas offer an ethic which begins with a focus on the inter-subjective other, rather than the autonomous self. There are differences in the other which they examine — Lacan explores the other of unconscious desire, while Levinas explores the other human subject — but both challenge the liberal tradition within our contemporary human rights with the alterity of a *pre-ontological*, split subject, which marks the self *primarily* as a self of/in otherness.

Significantly, it is not so much the aim of such ethics of alterity to agitate for revolutionary destruction of the liberal democratic discourse of socio-political rights. For both Lacan and Levinas the ethico-political potential of alterity confirms the ethical potential of such a polity. However, like Marx, for Lacan and Levinas such a polity *is not enough* to ensure the security of the alterity of the other. That is, such a polity is not enough to ensure a human family of freedom, justice and peace for all in the world.[8] Thus, the goal of an ethic of alterity is to refocus the *architectural aspect* within the discursive structures of contemporary liberal democracy. The aim is *transformative*, not destructive, to ensure that the discursive structure of liberal democracy is always orientated around — vigilant towards — the unpredictable, undefinable and intrusive qualities of alterity and otherness, rather than exerting energy in the hegemonic struggle towards social and political, legal and ethical, homogeneity.

***

This dissertation is divided into four main Parts. Firstly, in this *Introduction Part*, I will outline the historical foundations of our current human rights' discourse. The function of

[8] *The Universal Declaration of Human Rights*, above n 1, Preamble.

this chapter is not to give a linear account of the history of our modern human rights. Rather, the aim of this chapter is to highlight some of the key historical shifts in the conceptualisation of human identity, and the notion of rights invoked by this conceptualisation, which have led to our current understanding, knowledge and language of human rights. To this extent, there is a focus on the shift from the pre-modern, natural law theory of rights to the period of the Enlightenment and the thesis of the *rights of man*. It is in this period that a particular Anglo-French socio-political philosophy — exemplified in the works from thinkers such as Hobbes, Locke and Rousseau, and then extended by Immanuel Kant — lays the philosophical foundations of our contemporary human rights' discourse. It is within this thesis of the rights of man where there is a clear articulation of a new humanism. The novelty of this humanism is found in its image of human identity as an independent, self-reasoned and consciously autonomous individual, who is regulated within a community of equal others by a newly configured Nation-State.

This image of this autonomous human individual received significant contemporary criticism, which is still relevant to our current human rights' discourse. Thus, in the final section of the chapter, I explore Marx's critique of the rights of man and his examination into the split subject within the identity of the autonomous individual bearer of modern rights. This critique is significant because it still informs the post-discourses in our own contemporary analysis of modern human identity and rights.

Finally, in chapter two of this *Introduction*, I will review the structure of our contemporary human rights' discourse by looking particularly at the *Universal Declaration of Human Rights* (*UDHR*). The significance of this text is that it is the primary international Declaration and articulation of our current conceptualisation and understanding of modern rights and the quality of human identity of such rights. As such, it has influenced all other international human rights' instruments developed since World War II. The purpose of this review is to highlight the *UDHR's* presentation of human identity upon which its understanding and conceptualisation of human rights rest.

In this review I also outline the main tenets of poststructuralism and postmodernism, particularly in relation to the notion of the alterity of otherness and how this informs an alternative concept of human identity to that presented in our contemporary human rights' discourse. Such post-philosophies have developed since the mid-twentieth century,[9] and although the terms refer to their own discourses of critical analysis, they work together in the sense that postmodernism "presupposes" and refers to many of the insights and workings of poststructuralist linguistic and textual analysis.[10] Thus, in this dissertation I use the term postmodernism to encapsulate both post-discourses. Central to postmodern identity theory is the notion of the de-centred and unstable subject. In this chapter I explore and explain how such a notion challenges the identity of the individual within our contemporary human rights' discourse with a multiplicity in and fragmentation of subject.

Next, in *Part A*, I explore Lacan's thesis of desire and otherness in the formation of human identity and subjectivity. The significance of Jacques Lacan (1901-1981) is that he exemplifies the shift in Western philosophy since the mid-twentieth century regarding individual identity. That is, a shift from humanism's image of the self-sovereigned individual, to a presentation of a subjugated subject — one who is subjected to a discursive network of signification and power beyond its own determination. Lacan's work is a fusion of phenomenology — stressing the notion of the (sensory) subject — Freudian psychoanalysis — the pre-dominance of unconscious desires and conditions — and linguistic structuralism — emphasising linguistic determinism.[11] For Lacan, the alterity of the human subject is founded upon the fact that the subject is split between the pre-conscious *Real*, the conscious awakening in the *Imaginary*, and the *Symbolic* realm of language and sociality. This *pre-ontological, intra-subjective split* subject does not

[9] Refer to Natoli, J & Hutcheon, L (eds.) *A Postmodern Reader*. State University of New York, Albany, (1993); Sarup, M. *An introductory Guide to Poststructuralism and Postmodernism* Harvester Wheatsheaf, New York, (1993). For a detailed genealogy of the term postmodernism and its different meanings/usages refer to: Best, S. & Kellner, D. *Postmodern Theory: Critical Interrogations.* Macmillan Press, London, (1991).

[10] Refer to Haber, H. *Beyond Postmodern Politics: Lyotard, Rorty, Foucault.* Routledge Press, New York, (1994), at 6.

[11] Sarup, *op cit*, at 6. Lacan's other influences included the structuralist linguist Saussure and the structuralist anthropologist Levi Strauss, along with other linguistic work from Peirce and Benveniste, and the philosophy and ethics of Hegel.

support the moral potential of the abstract ideal of humanity, as expressed within our contemporary human rights' discourse. Rather, this split — this alterity in human identity — marks human identity with the contingency of loss and desire, trauma and anxiety, and constitutes the subject as a negative — a *lack-in-being.* The split in/of human identity does not offer an ideal/idealised hope of individual capacity and potential, as traditionally presented. Rather such a pre-conscious, pre-ontological split in human identity promulgates an indeterminate subject caught in a continual *process of identification* for the fulfilment of its uncontrollable (unconscious) desires.

In dealing with Lacan, it is significant to note that there is some debate as to the philosophical nature of Lacan's writings. With his focus on both the psychological and linguistic structuration of the human subject, Lacan is traditionally viewed as a *structuralist*. Yet Lacan's uncovering of the "gap in human identity" — the missing and desired other of the Real — which invokes an uncontrollable and indeterminate subject, also links his works to the themes of otherness and alterity within *post*-structuralism.[12] Hence his works reflect a tension in the philosophy of self. Firstly, there is a structural limitation of the subject within language and unconscious desire. And yet also Lacan offers a possible (post-structural) agency of self within the discursive processes of linguistic signification and through the unrepresentable indeterminacy of the unconscious other (the Real) of human identity.[13] As such, I would argue that Lacan is best understood as *on the threshold* between both structuralism and poststructuralism

[12] Refer to Fryer, R. *The Intervention of the Other: Ethical Subjectivity in Levinas & Lacan.* Other Press, New York, (2004), at 1-31; Stavrakakis, Y. *Lacan and the Political: Thinking the Political*. Routledge Press, London, (1999) at 1-71.

[13] Refer to Caudill, D. 'Identifying Law's Unconscious: Disciplinary and Rhetorical Contexts.' *Washington & Lee Review*. (Summer 2004), Vol. 54, No. 3, 1075-90; and Fryer, *ibid*, at 9-13. The debate as to how to categorise Lacan indicates how his work moves beyond both structuralism and poststructuralism to a typically unique Lacanian position, which Stavrakakis describes as "post-fantasmatic". Refer to Stavrakakis, *ibid*, at 13 & 144. In fact, Stavrakakis argues that Lacan does offer a locus of human identity in this otherness of the split subject: the non-essentialist, non-ontological subject of lack — the other of the Real — which is beyond conscious comprehension and calculability, placing Lacan more within the discourses of poststructuralism and post-humanism rather than simply within the anti-humanism of structuralism. Refer to Stavrakakis, *ibid*, at 14-16. However, through my own research I agree with Cornell's position that Lacan fails to radicalise the openness of the otherness of the Real — something which Levinas's conceptualisation of the pre-original ethical other does and, thus, which allows a "supplementation" of Lacan with Levinas.

(modernism and postmodernism). It is from such a perspective that I use his works in this thesis.

It is the indeterminate otherness of the Real in human identity which leads Lacan to propose an ethics of alterity orientated around human desire. This *ethics of desire* aims the subject *not* to any teleological idealised end of potential human fulfilment. Rather, such ethics of desire lead to the reality of human loss. That is, that the human subject never attains a secure and stable identity of being. Rather, the human subject and human identity are always already caught within the oscillating forces of *coming-into-being*. Yet this leaves Lacan's interrogation of human identity as *intra-subjective and negative*. Lacan fails to invoke any positive signification to the human subject-of-lack or within the social inter-actions amongst others. Rather, Lacan limits subjectivity to the negative impossibility of the pre-ontological split subject of intra-subjective loss and unfulfillable desires. In this way, his thesis of human identity remains firmly *anti*-humanist, rather than inspiring a positive and constructive *post*-humanist position of human identity in community with others.

Next, in *Part B* of this dissertation, I review Levinas's (1906-1995) meditations on alterity, an alterity based upon the otherness of the other human subject. Levinas's work is influenced by, and is an attempted axiology of, theological metaphysics and philosophical phenomenology. Like Lacan, Levinas counters the liberal tradition's presentation of the image of human identity as the autonomous individual of moral *potentia*, with a radical, *pre-ontological split in subjectivity*. However, unlike Lacan, this pre-ontological split subject is marked by the intrusion of an *inter-subjectivity with the face-of-the-other*. This is the other human subject facilitating a *prevenient proximity* between the subject and the alterity of the other. This proximity extends Levinas into a positive inter-humanity and ethical responsibility which is lacking in Lacan's work. For where Lacan remains fixed on the subjugation of the human subject to the negativity of the structuration of psychological lack and linguistic signification, Levinas offers a more positive *inter-communal grounding of human identity*. Where Lacan focuses on an unfulfillable gap within the internal structure of human identity, Levinas places the

constitutional fulcrum of human identity in the ethical externality of the gap of proximity between the subject and the other. For Levinas, the foundational marker of human identity is this *anterior, pre-original ethical inter-humanness*. Thus, Levinas attributes to the human subject a pre-disposition towards an asymmetrical ethics of *open responsibility* directed towards-the-other, prior to and beyond the self-reflexivity of the singularity of moral potentiality encapsulated within our contemporary human rights' discourse.

It is in this anterior, non-ontological aspect of human identity where Levinas offers a radical understanding of the human subject and human rights, beyond the limitations of our contemporary human rights' discourse (and the negative limitations of Lacan). This is Levinas's transformative "inter-subjective existentialism."[14] This is Levinas's new humanism — a post-humanism of the other human subject — which turns the tradition of moral potentiality within our contemporary human rights on its head. In attempting to move away from the restrictions and the potential dangers against alterity within the tradition of ideality expressed in dominant ontological philosophies of being, Levinas presents a philosophy of ethics based upon the proximity of alterity. This *ethics of alterity* (also termed an *ethics of proximity*) does not deny the subject (as perhaps structuralism generally and Lacan's negative split subject of loss specifically does). Rather, Levinas's ethics of alterity ruptures the "self-other-self" ontological circle of the Same of moral potentiality with an *otherwise-than-being* aspect of ulterior/anterior responsibility within human identity, which challenges self-interested rights' claims.

It is at this point where Levinas's ethics of alterity can potentially offer a transformative possibility of our contemporary human rights' discourse. Levinas's ethic of alterity returns to human rights a sense of ethics and justice separate and beyond from, and yet remaining the pivotal critical guide to, our conceptualisation, understanding and exercises of legal and socio-political rights' claims and rights' law. Within the ethics of proximity, human rights become the ethical marker of responsibility and openness within inter-human relations — with an endless vigilance of critique, provocation and interrogation of

[14] Purcell, M. *Levinas and Theology*. Cambridge University Press, Cambridge, (2006), at 158.

the individual, society, the State and the law. This ethics of alterity focuses on the priority of the *dignity of the other* above the certitude of the self. It marks human identity with the exteriority of otherness — with the other as the potential ethical grounding of the self. This ethics of otherness does not deny justice and human rights from the individual. Rather, and most significantly, it conceptualises a human identity in which the individual self gains ethics, justice and rights through an "uncertain and open detour" with the prioritised other in the sociality of the inter-human relationship.[15]

Finally in the *Conclusion* of this dissertation I draw together some of the themes in Lacan and Levinas and the possible impact of the post-discourses of otherness upon our contemporary human rights' discourse. This reading of Lacan and Levinas together is not without difficulty as there are many differences in their meditations. But perhaps the distance between Lacan and Levinas is based more on their divergent institutional perspectives and their distinct questions of exploration, rather than the difference in the substance of their work.[16] Lacan, beginning from the perspective of psychoanalytical structuralism, is more interested in questions *"of how"* the subject's subjugation is internally structured into the processes of human identity. Levinas, on the other hand, with his theological and phenomenological background, explores the question of *"to whom"* the subject is subjected and the ethical implications upon identity of such subjugation. Such distinction leads Lacan to the negative of a split subject of internal, unfulfillable lack. Conversely, Levinas's ethical exploration aims towards the positive possibility of an externalised (ethical) unicity between the subjected subject and subjugating other. Hence Levinas's emphasis on the potentiality of the beyond-being of human identity — the *proto-sociality between self and other* — contrasted against Lacan's impossibility of beyondness — the impossible break beyond the linguistic Symbolic and the return to the Real.

But perhaps, despite these distinctions, there is a proximity between Lacan and Levinas. Each of these intellectuals has a pre-ontological, intra-subjective image of human

[15] Bauman, above n 2, at 85.
[16] Fryer, above n 12, at 21.

identity, which places them in the neighbourhood with the other, in an "ap-proximate," non-humanism affinity with the other.[17] In this light, Lacan and Levinas are complimentary alternative contemporaries.[18] In this ap-proximate relationship, each is marked by a distinct otherness — Lacan's unconscious and Levinas's face — and yet each positioned on the horizon of the other. Lacan and Levinas are a supplementation and subalimentation of each other, and yet they remain irreducible to each other.[19] For Lacan, without Levinas, presents a subject too focused on internalised disruption and its own insatiable desires for a return to harmony. At the same time, Levinas without Lacan presents a subject verging on the neurosis of self-dis-interestedness and self-sacrifice. And hence the importance of reading "Lacan with Levinas" in order to augment the one with the other. In this way, their works come together in this asymmetrical disjunction in which there is a distinction as impossible to bridge as Lacan's split subject-of-lack and Levinas's infinite alterity. Yet in this way, they sit apposing each other — not side-by-side, but rather, face-to-face and informing the other on the subjectivity of human identity.[20] In this alterity of human identity which they present, both Lacan and Levinas inform us of a potential transformation of human rights. This is a human rights not of the self — the conscious, autonomous self of independent, self-assertive moral potential — but rather, a *human rights of otherness*. In such a transformation, rights become, first and foremost, an expression of care and consideration, responsiveness and responsibility, aimed towards the alterity of the prevenient other. It is from this ethical effort engaged with the alterity of the other that human rights reminds and challenges the individual of and with a sense of *being-in-community* rather than, as traditionally understood, *being-for-self*.

****

[17] Reinhard, K. *Kant with Sade, Lacan with Levinas*. *Modern Language Notes — The John Hopkins University Press*. (Sept 1995), Vol. 110, No. 4, 785-808. For some interesting points regarding the proximity between Lacan and Levinas, refer to Harasym, S (ed) *Levinas and Lacan: the Missed Encounter*. State University of New York Press, New York, (1998).
[18] Fryer, *op cit*, at 21.
[19] Reinhard, *op cit*, at 785.
[20] Reinhard, *ibid*, at 788.

Chapter One

Tracing the Subject

Introduction

It is not necessary for the task of this dissertation to give a full account of the evolution of the concept of human rights from pre-modern natural law, through to the Enlightenment's thesis on natural rights, to today's law of human rights expressed through our contemporary human rights' discourse.[1] My focus is not on such an account, but rather, on the shifts in the conceptualisation of human identity within the discourse of human rights and, thus, the substance of rights involved with such identity. That is, my interest in this chapter is to trace a genealogy of a certain philosophy of the nature of being which is now assumed (subsumed) within our contemporary human rights' discourse. Consequently, my aim in this chapter is to review some of the key shifts in the concept of the human subject within human rights' evolution. Beginning with a brief consideration of pre-modern natural law, this aim necessarily leads to a focus on the period of the Enlightenment and upon a particular tradition of liberal individualism which emerges from the history of humanism. In particular I will look at the works of four authors — Hobbes, Locke, Rousseau and Kant — and their significant impact on our understanding of the identity of the human subject in our contemporary human rights' discourse and the content of rights which such an identity invokes.

This (philosophical) tradition of this concept of the individual and the autonomous self-centred nature of its rights has received much criticism over time. Hence, I conclude this

[1] There is some debate as to whether or not natural law is the historical foundation to our contemporary human rights law, or offers an alternative approach to issues and questions of justice and ethics. Finnis, for example, traces modern human rights back to the ancient Greeks and their concept of natural law. Scholars such as Leo Strauss and Michel Villey disagree. Refer to Finnis, J. *Natural law and Natural Rights*. Clarendon Press, Oxford, (1980); Strauss, L. *What is Political Philosophy*. University of Chicago Press, Chicago, (1988). From my own research, I take the position that the changes in law up to and during the Enlightenment — from natural law to natural rights — represent an epistemological shift in the conceptualisation of human identity, ethics, justice and rights, which disjoins modern human rights from pre-modern natural law. There are a number of texts which give a detailed account of the evolution of human rights. For example, refer to Douzinas, C. *The End of Human Rights: Critical Legal Thought at the Turn of the Century*. Hart Publishing, Oxford, (2000); Tierney, B. *The Idea of Natural Rights*. Scholars Press, Atlanta, (1997); Herbert, G. *A Philosophical History of Rights* Transaction Publishers, New Brunswick, (2003).

chapter with an outline of Marx's critique of the prevalent human rights' discourse of his own contemporary time, the *rights of man* thesis. This critique of Marx is important because such a critique still holds significant relevance and insight to our own contemporary understanding of human rights, particularly when reviewed from the post-discourse perspective which I employ further in Part A and Part B in this thesis.

The Pre-modern Predicament

Before the European enlightenment, the idea of human rights was not known as we know it today. What was right, just and ethical, and what was *a* right of the individual, in the pre-modern *ancien régime* of Greece and Rome was that which accorded with nature and the notion of natural law and *"naturale ius"* (natural justice).[2] Generally, the concepts of natural law and rights emanated from an understanding of nature — the cosmos — as a balanced harmony in the unity of the fundamental forces in nature.[3] It was this notion of a natural balance which informed the idea of what was "naturally right, ethical and just" and was the natural "general law" and "general justice" to guide specific human society. This general law and justice of nature was a type of pre-historical/a-historical myth of unwritten laws distinct and separate from "man-made," particular law.[4] This cosmological balance was organised and arranged through a hierarchy of perfect harmony revolving around the notion of *"telos"* or purpose/end. Everything in nature had a purpose and it was the *telos* of each entity which determined its place in the whole.

---

[2] It is not easy to give a precise definition of the concept of natural law. An indication of the complexity of defining this concept of natural law is Erik Wolf's study of the term. Wolf observes seventeen different meanings and usages of the word *"naturale"* (natural) and of the word *"ius"* (justice/just), suggesting a totality of 255 possible meanings of natural law or *"naturale ius"* (Refer to Tierney, *ibid*, at 48).

[3] Heracleitus of Ephesus (540-475) is often cited as the founding father of natural law. Refer Crowe, M. *The Changing Profile of the Natural law*. Martinus Nijhoff Press, The Hague, (1977), 3-5. His main thesis is that nature is a force in constant flux. He famously gives the example that one cannot walk in the same river twice as it is actually continually changing waters. Thus, for Heracleitus, natural law is the balance of such natural forces.

[4] In his works, *Rhetoric* and *Nicomachean Ethic*, Aristotle calls natural law "general law/justice" and distinguishes it against "particular law/justice," which is human made, local law. Particular law should reflect general law and aim to facilitate a harmonious balance within community. There are three main influences on the conceptualisation of natural law in the pre-modern world: the Sophists and their idea of natural balance; Aristotle and his idea of *telos* and purpose; and, later, the Stoics with their idea of divine, natural reason. Note, in this section I shall write in the *gender specific language* of the period and use the term *"man,"* rather than use more contemporary gender neutral language. Refer to Aristotle, *Nicomachean Ethics* (trans. H. Rackham), Harvard University Press, Cambridge, (1962); Aristotle, *The Art of Rhetoric*. (trans. H.C. Lawson-Tancred) Penguin, London, (1991).

What was right and just was whatever contributed to and facilitated the movement towards this ideal teleological end and the natural, balanced harmony amongst all things.[5]

In the same light as the balance in nature, natural law also dictated that the pre-modern community was considered its own natural whole, which in-turn was part of the greater harmonious whole of nature, with a purpose of natural balance and harmony in itself. In this balance of community, humans were not conceptualised as isolated (autonomous) individual personalities and, thus, did not have individual human rights as such. An individual was a member of a larger, established group or community (a *polis*), beyond their own intimate, autonomous self, and rights were privileges of membership in the community.[6] Like nature itself, every individual had a *telos* and purpose and the rights of each subject reflected their purpose. Thus, the identity and essence of each being was tied to its *telos* and potentiality for growth towards its *telos* within the community, rather than invested in its own individually autonomous sense of being. Reflecting nature, society and community was arranged into hierarchical structures ordered under god, nature and a divine Royal. For example, there were the social hierarchies found within the great chain of being and the divine cosmos. Or the social structures enforced by the feudal system's pyramid of power. Such communal structures of natural hierarchy organised different social positions, different roles and different rights for each individual in order to facilitate the teleological end of each subject and the greater community. Every individual was impressed into a different class within the hierarchy of community — a different social station with a different teleological trajectory and a different human value. It was the moral virtue — that is, it was a "life of honour" — of an individual to live a "good life" according to his/her pre-ordained purpose and station.[7] This natural law of teleological signification was the natural, moral binding of community and constraint upon the individual and each class to the limits of their station in life. Thus,

[5] Douzinas, above n 1, at 29.
[6] Hinchman, L. 'The Origins of Human Rights: A Hegelian Perspective.' *The Western Political Quarterly*. (Mar 1984), Vol. 37, No. 17-31, at 9.
[7] Hall, D. *Subjectivity: The New Critical Idiom.* Routledge Press, New York, (2004), at 8.

through pre-modern natural law, one's natural value and worth was beyond one's autonomous will and one's rights were limited to such pre-established social structures.[8]

With such natural law, the task of man-made, particular law was to promote a type of proportional and distributive justice, to reflect the natural law's balance and to harmonise the community. The task of law was to reach a just and ethical outcome — a balanced response — in the distribution of goods, benefits, burdens, rewards, rights and duties, etc, in accordance with the natural hierarchical structures of the community.[9] Similar to modern common law, this was a justice which worked within the particular circumstances of the specifics of the people in community. However, pre-modern natural law was not a fixed procedure of prescriptive, written rules like that of precedent, but rather, worked in the concrete particulars of disputing citizens to reach a just and ethical — a balanced — outcome for the parties and the community, based upon their differing stations and roles, rights and duties.[10]

But in addition to structuring society into a balanced whole and promoting a justice of ethically balanced distributions, natural law also had another important purpose. As it was pre-history and beyond man, natural law was a regulatory principle beyond law and State, from which to judge law and State. That is, natural law was also an "objective," external source from which to critique and measure human society and law.[11] Natural law was the pre-original and pre-human ethical and moral marker, which measured man and State, sovereign and law, from the teleological point of fair distribution and fair treatment of/for the human individual, human society and nature at large.[12] This role of

---

[8] Taylor, C. 'Condition of an Unforced Consensus on Human Rights.' *The East Asia Challenge for Human Rights.* Cambridge University Press, Cambridge, (1999), 124-144, at 125. The story of Adam and Eve is a good illustration of the confines upon human subjectivity found in natural law. In the exercise of their self-will — in their own "free" decision to eat from the tree of knowledge and gain (self) consciousness — they act against the divine, natural law and, thus, are punished. Refer to Hall, *ibid*, at 8.

[9] Finnis, above n 1, at 27.

[10] Tuck, R. *Natural Rights Theories*. Cambridge University Press, Atlanta, (1979), at 37. Of course in this function, the politico-legal procedures and institutions functioned as a buttress to the oppressive hierarchical structures within the pre-communities.

[11] Gordon, J. 'The Concept of Human Rights: The History and Meaning of its Politicization.' *Brooke Journal of International Law* (1997-1998), Vol. 23, No. 3, 691-791, at 757.

[12] Gordon, *ibid*, at 757.

natural law is perhaps best illustrated in Sophocles's play, *Antigone*,[13] in which Antigone wishes to bury her brother against the commands (the "man-made laws") of the King, Creon. She justifies her actions on the basis of "natural law:" "Nor did I think your orders [Creon's orders] were so strong that you, a mortal man, could over-run the gods' unwritten and unfailing laws. Not now, nor yesterday's, they always live, and no one knows their origin in time."[14] Significantly, in characterising natural law Antigone is not claiming a personal right, "her own individual human right," nor a right in a particular written, man-made law. Rather, she claims an eternal, natural and divine right separate from (and superior to) human law and which may be legitimately called upon and used against the dictates of human law.[15]

But it was the constraints of the social hierarchy against individual subjectivity found in natural law which following generations attacked. Yet these attacks signalled more than historical and social unrest against ruling elites and arbitrary power. In addition, they also indicated a shift in the contemporary understanding of human identity — a shift in which both the understanding of the capacity of the human individual and of the rights of the subject altered. By the sixteenth century Renaissance man was beginning to experience and express himself beyond the confines of the social order of the *ancien régime* and the ecclesiastical proscriptions of the Church which replaced such *régimes* by

[13] Refer to Sophocles' *Antigone*, in Grene, D. & Lattimore, R. (ed.) *The Complete Greek Tragedies, Volume III, Sophocles I: Oedipus the King; Oedipus at Colonus; Antigone*. (trans. E Wyckoff), Modern Library, New York, (1954). The play, *Antigone*, was written in approximately 441 BC. Polynices, son of Oedipus and Jocasta (wife and mother to Oedipus), had shared rule over Thebes with his brother, Eteocles, but after a falling out Polinices was expelled from the city. He attacked the city and lost, but in the battle both brothers died. Creon, relative of Oedipus and now King of Thebes, orders that Eteocles be honoured, while Polynices be disgraced. As punishment for his rebellion, Creon orders Polynices's body be left on the battlefield to rot — without burial and any sanctified holy rites (one of the harshest punishments in ancient times). Antigone, sister to Polynices and Eteocles, is betrothed to Creon's son, Haemon and defies Creon and buries her brother. Creon condemns Antigone to be entombed alive as punishment. Arguing she had done nothing wrong, as she obeyed the "natural law/right" of ancient burial rites, Antigone hangs herself rather than be entombed alive. For "disobeying the gods," Creon endures a terrible fate. His son, Haemon, takes his own life. When Creon's wife, Eurydice, is told of Haemon's death she too commits suicide. And Creon himself goes blind. Eventually, Creon also loses the Crown, when Lycus, a descendant of an earlier king, invades Thebes and kills Creon. Significantly, this is not only a story of a moral and ethical duty beyond man made laws (the story of Antigone), but also, a lesson in the dangers of individuality and self-will: for it is Creon who has disobeyed the divine law and gone beyond the bounds of the community/natural balance of rights and duties, and so it is he who is punished. Refer to Hall, above n 7, at 8.

[14] Sophocles' *Antigone*, *ibid*, at 202.

[15] Crowe, above n 3, at 10.

the Middle Ages.[16] The pre-modern natural law, which placed the individual subject into an irrefutable "place in the world" within strict hierarchies, was being questioned.[17] The idea of man being "imprinted" into a greater, social order — the divine cosmology, the great chain of being, and/or the feudal pyramid of power — was being challenged. The image of man was changing:

> Is there anyone who would not admire man? Not without justice is he sometimes designated in the sacred writings of Moses and the Christians "all flesh," and sometimes "every creature," because he himself fashions, forms, and transforms himself into the shape of all flesh and into the essence of every creature ... I emphasise this ... so that we may understand that after we have been born into this condition we become what we will ourselves to be.[18]

As Carroll suggests, by the sixteenth and seventeenth centuries European history had moved from the fall of Rome, through the Dark Ages, the Black Plague, the Inquisition, the Protestant Reformation, the English Revolution and a King beheaded[19] and into an age of new trade and commerce, new Italian city States and a new elite in banking, finance and trade.[20] A culmination of such socio-historical factors led man to begin to see himself as someone who could fashion himself as he saw fit, someone who could do as he freely willed, beyond the traditional limitations of social structures dictated by natural law, divine cosmology and god.

This shift in the concept of man's identity was facilitated by the philosophical works of early Renaissance thinkers, who began to place more emphasis on man's freedom, will and right of self-interest. The works of the fourteenth century Franciscan monks Duns Scotus and William of Ockham are often cited as key figures during this time. Duns

---

[16] The idea of "the individual" was not new. However, pre-modern expressions held a different meaning to that of the individual and his potential capacity (and, thus, rights) as expressed in the Renaissance and then in the Enlightenment and into today's conception of the individual.
[17] Davies, S. *Renaissance View of Man* Manchester University Press, London, (1978), at 12.
[18] Giovanni Pico della Mirandola, in 'Oration: On the Dignity of Man.' (1572), cited in Davies, *ibid*, at 69.
[19] Charles I of England was captured and tried for treason and beheaded in 1649. After being defeated by Cromwell in 1646, Charles I signalled his right to divine, ancient rule by authority of the *ancien régime* and the "Natural Law" of hierarchy and position when he stated at his trial for treason "… by what power do you call me to give answer, I am your lawful King, let me see your legal authority, by the Word of God, by Scripture, by ancient laws …"
[20] Carroll, J. *Humanism: the rebirth and wreck of Western culture.* Fontana Press, London, (1993).

Scotus, reacting against the neo-Aristotelian works of St Thomas Aquinas, emphasised the character of liberty in god and man. God's will could not be limited and, thus, man's will, which reflects god's will, was also independent and acted freely beyond reason and nature. This "voluntarism" was taken up by William of Ockham who pushed it into "nominalism."[21] Man was free to will or not will anything he desired, free to will even in the face of the judgement of his own intellect: "… no act is virtuous or vicious unless it is voluntary and in the power of the will, because a sin is a sin only because it is voluntary."[22]

Such ideas were influential in the sixteenth century and the time of the Renaissance. The Spanish thinker Suarez tried to unite the intellectualism (reason) of Aquinas and the voluntarism (will) of Scotus and William of Ockham. He argued that man's reason — a quality of his own nature — was an "indicative measure" of the distinction between good and evil within the "true," divine law.[23] By the mid-seventeenth century there was Descartes and the self-confidence of the *cogito*: *"I think therefore I am."* The abilities of man were becoming self evident to man himself; man was becoming transparent to his own reasoning and will. At the same time Grotius also argued that it was "self evident" that it was the "reasonableness of human nature" — and not nature or the divine — which was at the basis of law:[24]

> What we have been saying (viz. about natural law) would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of man are of no concern to him.[25]

With more focus being placed on the individual subject and on his autonomous, natural qualities — such as reason and will — more emphasis was also beginning to be placed on

---

[21] William of Ockham was writing in defence of the Franciscan monks in their struggle regarding property ownership and possession against the Catholic Church and Pope Nicholas III and Pope John XXII.
[22] William of Ockham, *Philosophical Writing*. (trans. P. Boehner) Bobbs-Merrill Company, (1964), at 161. Significantly, as both William of Ockham and Duns Scotus were clergymen they still subjected their concept of "free man" to god's divine will.
[23] Raphael, D.D. *Political Theory and the Rights of Man* Indiana University Press, Bloomington, (1967), at 217-18.
[24] Herbert, above n 1, at 75-77.
[25] Grotius, *The Law of War and Peace*. (ed. J. B Scott), Clarendon Press, Oxford, (1925) at 9.

man's natural rights and freedom. These were the very qualities which indicated that man could govern himself, both as an individual and socially — without god and without the traditional, hierarchical social orders. And more than most in his time, Hobbes clearly articulated a notion of human identity and human governance which decisively broke from the past and looked to the future of a modern independent, individual subject under a new, modern sovereign State.

Hobbes and Locke and the Labour in Self

Writing in the seventeenth century, Hobbes's (1588-1679) meditation on rights focuses on man in nature — that is, natural man who is pre-social and pre-society. In such a state, the natural right of this individual is the right to satisfy his own desires of/for self preservation, a right to the self-concern and the effort to exist:[26]

> The Right of Nature, which Writers commonly call *Jus Naturale*, is the Liberty each man hath, to use his own power, as he will himself, for the preservation of his own Nature … and to do anything, which in his own judgement, and reason, he conceives to be useful toward that end … every man has a Right to every thing."[27]

This is man's primary, natural right — a right as freedom from interference into "his own power" to will anything for himself, to labour as he sees fit, to fulfil his desires "to be."

Significantly, this is a right which is attached to man personally and subjectively. Hobbes denies the imposition of the *telos* of pre-modern social hierarchy and ordered community and the limits of divine regulation. Rather, for Hobbes man has little natural aim beyond the ceaseless energy and right for self-interested self-preservation.[28] This is man and these are rights experienced in intimacy and in isolation, in his own natural attributes, atomised and alienated and autonomous from others. Such natural rights do not come to man from the greater hierarchy of nature — as within the pre-modern, natural order of things — but rather, emerge from the very nature of man himself.

---

[26] Hinchman, above n 6, at 10.
[27] Hobbes, T. *Leviathan*. (ed. Tucker, R.) Cambridge University Press, London, (1996), at 116.
[28] Hinchman, *op cit*, at 11.

And more, these are rights motivated by personal, natural desire and fear: the desire for self-preservation and the fear of others restraining such desire. But it is also an image of man with the natural trait of reason: reason as judgement and calculation to make decisions and take action for his own interests and well being.[29] This is an image of man as self-sovereigned: the autonomous source of his own law through reasoned choices and self-interested actions. With his own natural capacity to freely exercise his own reason as he sees fit to meet his own self-concerns, this image of man reflects a human identity understood as the autonomous potentiality of one's own product and project.

All men have such natural attributes of personal, potential power and, thus, all men naturally have such rights. Thus, man is characterised by an inherent and natural equality: "Nature hath made men so equall, in the faculties of body, and mind … For as to the strength of body, the weakest has strength enough to kill the strongest …"[30] However, this places man in a vulnerable and constant state of fear from/of other equal men with the same autonomous desires and rights of/for self-preservation. The result is ongoing war: man against man, ego against ego, in the struggle to survive. This is a state in which "every man is enemy to every man … [living in] continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, bruthish, and short."[31]

To resolve this potential danger, man — inspired by fear and desire and through his own calculating reason of/for self-preservation — consents to enter into community. This community is that of civil society governed by a sovereign, the *Leviathan*. This is Hobbes's commonwealth of man, in which each man exercises his natural free will and consents to limit his natural, autonomous right of/for self-preservation, in order to create the one, unlimited sovereign — the *Leviathan*. The *Leviathan* represents a common power to guarantee peace and common defence to all against all under civil law:

---

[29] Douzinas, above n 1, at 72. As I shall outline in Chapters 7 and 8 to follow, Levinas turns this "calculation of reason" on its head. For Levinas, reason is (or, at least, should be) the calculation of responsibility for others and not the rights for oneself.
[30] Hobbes, above n 27, at 183.
[31] Hobbes, *ibid*, at 186.

> [a] Common wealth is said to be *Instituted*, when a *Multitude* of men do Agree, and *Covenant, every one, with every one* … to submit to some Man, or Assembly of men, voluntarily on confidence to be protected by him — the sovereign — against all others. [32]

Here, Hobbes distinguishes between natural man and the man of the Commonwealth, between law and right. And yet this split is immediately united — the latter under the former: "… law and Right differ as much as Obligation and Liberty."[33] Man gives up (natural) Right for (political) Liberty. And in contrast to the active power of man's rights, laws become prohibitions (obligations) and restraints against the individual: laws are the negative liberty imposing civil duties on the positive freedom of man's natural right.[34] For Hobbes, his conceptualisation of man as self-interested, with the rights of self-interest, is not for the benefit of man himself, but rather, the excuse for the need of an oppressive sovereign. The *Leviathan* is not authorised by nature or god as in the *ancien r`egime*. Rather, the *Leviathan* is authorised by the contract with man. But of equal significance, the contract is the acknowledgement that man must "heed" his natural rights for the security found under the *Leviathan*.[35]

Writing in the aftermath of the experiences of England's *Glorious Revolution* in 1688-89[36] — a generation after Hobbes — Locke (1632-1704) is considered the precursor to modern liberalism and the liberal perspective on individual human rights.[37] But even more than Hobbes, Locke focuses the notion of man's natural rights on the bourgeois ideals of individual consumption, (property) ownership and the right to the accumulation of wealth and property. Locke saw the violent outcomes of Hobbes's "total war" amongst men in their natural state and the potential of an authoritarian sovereign —

---

[32] Hobbes, *ibid*, at 228.
[33] Hobbes, *ibid*. at 91.
[34] Douzinas, above n 1, at 72-73.
[35] Hinchman, above n 6, at 10.
[36] The *Glorious Revolution* was so called as it was England's "bloodless revolution," which saw the overthrow of the English King (James II) and the declaration of the Statute of the *Bill of Rights*, 1689. With this Statute, English monarchical rule was only lawful with the consent of Parliament. The *Bill of Rights* also cemented the two founding principles of modern democracy: the rule of law and the separation of powers.
[37] Although Hobbes and Locke wrote in very different historical times during the seventeenth century: Hobbes, during the English civil war in the mid-seventeenth century; and Locke a generation and a half later in less revolutionary and violent times.

transforming "citizens" into "slaves" — and, sought to avoid such possibilities.[38] However, similar to Hobbes, Locke begins at the "origin of man and right:" man in nature, with a natural and essential quality of freedom: "… a *State of Perfect Freedom* to order their Actions, and dispose of their Possessions, and Persons as they think fit …"[39] And like Hobbes, man has the natural attribute of reason to guide his calculations and decisions in the exercise of this natural freedom: "Reason … is able to instruct him in that Law he is to govern himself by …"[40] Also like Hobbes, Locke confirms that such natural rights of man are inspired by his own desires for self-preservation, the right to happiness in his existence of being: "Nature … has put into man a desire of happiness, and an aversion to misery; these, indeed, are innate practical principles."[41]

However, to avoid Hobbes's extremes, Locke presents the idea of a primary, moral natural law, which imposes obligations upon all men to respect each other and not infringe upon each others' natural rights.[42] This is a return to a "reciprocal liberty" which Hobbes had excluded:[43]

> … for men being all the workmanship of one omnipotent and infinitely wise Maker … they are his property whose workmanship they are, made to last during his, not one another's, pleasure … [thus] … there cannot be supposed any subordination amongst us that may authorise us to destroy another …[44]

[38] Herbert, above n 1, at 105. Locke not only wrote his *Second Treatise of Government* (1690) against Hobbes's *Leviathan* thesis, but also in response to Robert Filmer's argument which supported the legitimacy of the divine right of the King of England to rule.
[39] Locke, J. *Second Treatise of Government*. (ed. P. Laslett), Cambridge University Press, Cambridge, (1988), at 148.
[40] Locke, *ibid*, at 309.
[41] Locke, J. *An essay Concerning Human Understanding*. (ed. P.H. Nidditch), Clarendon Press, Oxford, (1975), at I, 3, 6-9. Locke commences with the notion that it is human nature to engage in the "pursuit of happiness." This pursuit, however, returns to the (Hobbesian) desires of self-preservation because, for Locke, it involves man having a right to exist and, thus, a guarantee of his own "life" and effort to secure his life.
[42] Raphael, above n 23, at 9-10.
[43] Edmundson, W. *An Introduction to Rights.* Cambridge University Press, Cambridge, (2004), at 28.
[44] Locke, *Second Treatise of Government,* above n 39, at 6. In this way, where Hobbes sees natural rights emanating from man's desire alone, Locke argues that natural rights derive from both the desire of man, but also, the intention of the creator. Refer to Raphael, *op cit,* at 6.

This is a natural law of rights and duties divined by god: all men are "created by god" and are the "creator's property" and, thus, there is a natural obligation to god that limits one man's abuse of another man.[45]

By linking god with the rights of man and the idea of ownership in man, Locke's meditation on natural rights becomes a justification for individual ownership and property accumulation. Hence there are certain concrete, natural rights which are self-evident and inalienable. These are, for example, the right to life (happiness); the right to liberty (freedom from interference to accumulate wealth); and the right to property/wealth (the means to life and happiness). In the image of man presented here, man himself has a kind of property right over/in himself. Here the identity of man is one expressed through the exercise of this right in the accumulation of wealth and the acquisition of property:[46]

> Man, by being Master of himself and proprietor of his own person and the actions of labour over it, has in himself the great foundations of property.[47]

Man is an investment in himself. It is his autonomous efforts of labour in his own being, through the property he accumulates to support his pursuit of being (the pursuit of preservation/happiness), which are the very significations of his own natural rights and freedoms to be.

But for Locke, under the moral law of the creator, natural man begins with an inter-human, social respect which is lacking in Hobbes's natural violence of ego against ego. But this respectable sociality extends only to the point of competing for common objects of self-interest:[48]

---

[45] Raphael, above n 23, at 6. Tully suggests that this obligation to the creator indicates that, for Locke, the right of self preservation is a duty to god — a moral responsibility deriving from god's ownership of man. In this way, Locke's natural rights could be read as a series of natural obligations: to god and to others and their natural rights from god. Refer to Tully J. *A Discourse on Property: John Locke and his Adversaries.* Cambridge University Press, London, (1980), at 107-08.
[46] Hinchman, above n 6, at 12.
[47] Locke, *Second Treatise of Government*, above n 39, at 44.
[48] Where there was competition, for example in situations of scarcity of resources, then man's natural right to self-preservation was superior to the reciprocal liberty invoked by the divine balance between natural

> Everyone, as he is bound to preserve himself, and not to quit his station wilfully, so by the like reason, *when his preservation comes not in competition*, ought he as much as he can, to preserve the rest of mankind.[49]

Thus, like Hobbes, there is still fear and desire lying behind Locke's image of natural man. That is, the desire of self-interest and the fear of competing against another, equal self-interested other. Hence, like Hobbes, man calculates and reasons to enter civil society, and consents to unite under a constitution and sovereign in the interest of the "public good."[50] But this contract is different from Hobbes's. For Hobbes, the natural rights of man and the social covenant were a justification to limit man's rights and to legitimise the absolute authority of the sovereign. Locke on the other hand, uses natural rights and this contractual consent to enforce the protection and preservation of private, individual, property and to justify limitations against the sovereign:[51]

> Men being … by nature all free, equal, and independent, no one can be put out of this estate and subjected to the political power of another without his consent.[52]

In contradistinction to Hobbes, Locke's natural rights of man are prohibitions against the sovereign from arbitrary interference on the expression of autonomous human identity (desire and self-interest) through the individual acquisition of property and wealth.

In the works of Hobbes and Locke there is a distinct break from the past — we see clearly an historical shift in which society is being organised around a changing concept

---

laws and duties. In other words, like today's human rights, Locke's natural rights were, first and foremost, of self-interest and then secondarily for the benefit of the other. Refer to Gordon, above n 11, at 738-39.

[49] Locke, *Second Treatise of Government*, *op cit*, at 6.

[50] Locke, *Second Treatise of Government*, *ibid*, at 160-164. Of course there is debate as to what Locke meant by the "public good." It should be noted that Locke also granted the sovereign prerogative powers which did not emanate from the consent of man or his natural rights, but rather, were prerogative powers to act in violation of such laws in the interest of the "public good." In his *Second Treatise of Government* (1690) he wrote: "… a good prince cannot have too much prerogative." (at 164).

[51] Herbert, above n 1, at 120. Locke, *Second Treatise of Government*, *ibid*, at 124. Here, in this quote, we see an obvious link between Locke's work on governmentality and rights and the *American Declaration of Independence* (1776), written primarily by Thomas Jefferson, who was deeply influenced by Locke's work. Locke had actually assisted Lord Ashley to write the *Constitution of Carolina* (1669) — the, then, *Province of Carolina* consisting of most of the land between Virginia and Florida today.

[52] Locke, *Second Treatise of Government*, *ibid*, at 54.

of individual identity. This is a shift from the *ancien r`egime* which perceived the individual not as autonomous, but rather, as part of a greater (natural) social whole and, thus, a being arranged and slotted into the strictures of society. There is a deliberate and stark shift from the pre-modern, natural law and its focus on social structures of hierarchy, to the autonomous natural rights of man and the limits of government in relation to such rights. And though they disagreed as to how these rights emerged — either in isolation or within a moral law of natural duties — both agreed that such rights were naturally endowed to the autonomous individual itself. That is, for both thinkers such rights emerged from the individual's own essential attributes and autonomous interests of being.

Here there is clearly the ontological focus (the *logocentrism* of the presence being) which is still present in today's human rights' discourse. Rights still today are conceived of as, essentially/primarily, rights about the individual's own autonomous powers to fulfil their own autonomous desires and self-interests. Here, rights are conceived around the individual's own capacity and their own labour of reason and will invested in their own existence and being. Such a concept of rights assumes an image of human identity — a certain philosophy of being — in which the individual is its own agent of actualisation. With such changes in the identity of the human subject reflected in the works of Hobbes and Locke, the law also begins to transform. During this time it was becoming a reflection of the individual's rights, rather than the reflection of a general law of justice and ethics beyond the State. Here, where once rights had the potential to stand outside the State and be "other" of the State from which to critique the State, the rights of man begin to reduce justice into the politico-legal and the limitation of the relationship the individual has with the State.[53]

Rousseau and Kant and the Dignity in "I"

The significance of Rousseau (1712-1788) to the evolution of human rights is his placing — his restricting — of both the human subject and his human rights at the centre of the socio-political. Where Hobbes and Locke focussed on the desire of the individual of

[53] Hinchman, above n 6, at 12.

rights, Rousseau attempts to localise these rights socially. Writing in the Enlightenment of the eighteenth century Rousseau, like Locke, was displeased with the alienated and atomised image of natural man which Hobbes had portrayed. Rousseau undermines Hobbes with his own contradiction: how could a pre-rational, natural man be motivated by natural desire but ruled by reason?[54] For Rousseau, Hobbes's had confused man's natural characteristics with what he saw were artificial characteristics (desires and self-interests) imposed upon man by sociality.[55]

Rather than Hobbes's natural violence, for Rousseau natural man was surrounded by plenitude, had all his desires met and was the image of an isolated simpleton: an independent, gentle, subhuman-animal type character.[56] Thus, natural man had no "natural right" of personal, private possession and proprietary to anything. Rather, he had a natural liberty to everything but not, as Hobbes and Locke had understood it, a natural right over anything. Natural man was pre-history, pre-rational and pre-self-conscious: "it appears at first view that men in a state of nature having no moral relations or determinate obligations one with the other could not be either good or bad, virtuous or vicious."[57]

Rather, for Rousseau, the so called "natural rights of man" are wholly social and artificial and superimposed on the nature of man by the historical transformation from natural man to social man. This transformation is caused by an alteration in nature — from plenitude to scarcity. This transformation invokes fear and desires for self-preservation, and inspires (self) consciousness and reason in the service of self, amongst others who are now competing for the same limited goods. It is this sociality which is competitive, not natural man. It is this sociality which makes man: "wicked, competitive and destructive against his fellow man."[58] Rousseau's socially transformed man is the counterpart to

[54] Rousseau, JJ. *The Social Contract and Discourses* (*SC*) (trans G. D. H. Cole), J. M. Dent & Son, London, (1988), at 156-57.
[55] Rousseau, *SC*, *ibid*, at 181.
[56] Rousseau, *SC*, *ibid*, at 181-82, 198, 222.
[57] Rousseau, *SC*, *ibid*, at 180.
[58] Rousseau, *SC*, *ibid*, at 203.

Hobbes's hostile, natural man.[59] It is in this post-natural state of social existence and self-interested competition where man begins to demand personal and subjective rights of ownership and possession, in the interest of self-preservation and self-determination.

Hence Rousseau proposes the need for a ruling sovereign — the legislator — not invoked by man's natural rights, but rather, by man's sociality. It was the legislator who safeguarded and protected men from each other in community with each other: "a Judge to adjudicate the competition amongst individual men in community."[60] This is the basis for the social contract:

> Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, as one we receive each member as an indivisible part of the whole.[61]

The social contract signifies the legitimate process of the sovereign authority of social man, rather than the Hobbesian (natural) need for tyrannical government.[62] Unlike Hobbes and Locke, this convention is not a mark of limitation against the subject (Hobbes) or the sovereign (Locke). Rather, it is the very grounding of rights themselves: "Nevertheless, this right does not come from nature, and must therefore be founded on conventions."[63] For Rousseau, the social contract is the very recognition of the nature of the sociality of rights and the legitimising of such rights within community and under the regulating legislator.

For human identity, Rousseau's meditation on rights has a "split" and "mirror effect." For in this process of contractual consent the human subject splits and becomes both the self-legislating author of laws (the citizen-sovereign) and the (obedient) subject of such laws (the citizen-subject).[64] The trick here is a mirror effect. It is in the creation of a unison between individual private inclinations, desire and impulses with the general

---

[59] Herbert, above n 1, at 136.
[60] Rousseau, *SC*, *op cit*, at 205-06.
[61] Rousseau, *SC*. *Ibid*, at 13.
[62] Rousseau, *SC*, *ibid*, at 20.
[63] Rousseau, *SC*, *ibid*, at 182.
[64] Rousseau, *SC*, *ibid*, at 193.

inclinations and impulses of community. Hence, the former reflects the latter and, thus, laws commanding the subject are laws commanded by the subject.[65] It is in the complete giving over to the community to form such a unity where the natural inequalities amongst men are transformed into political equality "under convention and by right" — a "moral equality" amongst all under law, for the protection of all:[66]

> For if each gives himself over completely, the situation is the same for all; and if the situation is the same for all, no one has an interest in making it difficult for others.[67]

Distinctive to Rousseau, it is through this socio-political modality that there is equality of man and not through his natural attributes or inclinations. And through such equality of rights there is a way to a harmonious and secure unity in a community for all.

For the human subject, this sociality of rights and this "split and mirror effect" of human identity mean a loss of self but then a re-gaining of self. Rousseau's focus is to invest human subjectivity (and rights) with polity, working only through the legitimate processes of the socio-political. Man loses everything he is in his autonomous self-capacities, to gain everything that he will become as citizen. Every individual gives himself and his interests totally over to the community in the legitimate expression of the common interest, Rousseau's "general will."[68] The social contract is the final cut from nature in terms of the pre-modern natural law and the ontology of the natural self:

> If the individual is saturated with socially acquired thoughts and feelings that whatever he wills for himself is the same as what his society wills for him, then he will retain his freedom at the same time he surrenders it to the general will.[69]

The general will is invoked and inspired by the legislator. It is the legislator's task to coalesce this unity between individual and general will. It is the legislator's task to

---

[65] Rousseau, *SC*, *ibid*, at 193.
[66] Rousseau *SC*, *ibid*, at 129.
[67] Rousseau, *SC*, *ibid*, at 76.
[68] Habermas, J. 'Legitimation Problems in the Modern State.' *The Habermas Reader.* (ed. W. Outhwaitte), Polity Press, Oxford, (2000), at 251.
[69] Rousseau, *SC*, *op cit*, at 13.

harness an organic unity of a shared common consciousness — a common sense — signified in a homogeneous lifestyle (a unity of ethnicity, patriotism, language and nationalism) in which the individual develops the same perspective as, and identifies with, the totality of the community:[70]

> [The legislator is] … capable of changing human nature, of transforming each individual, who is by himself a complete and solitary whole, into part of a greater whole from which he in a manner receives his life and being; of altering man's constitution for the purpose of strengthening it; and of substituting a partial and moral existence for the physical and independent existence nature has conferred on us all.[71]

Here, the *"I"* identities itself in the sameness of the *"we,"* which inspires a unity of one under the general will and the legislator.[72] This unity establishes a harmony between men living in a homogenous community. However, there is an exclusivity here: a circle of Same in which rights and benefits are limited to those who share in a homogenized, historical personality, rights as membership of/in the community.[73]

But also significant in the evolution of human rights, Rousseau is offering a dignity to the image of man, which was not in Hobbes's and Locke's meditations. Rousseau is offering a morality of wholeness through legitimate processes and rights of the socio-political.[74] The legislator expresses a uniting moral code between the individual and community.[75] A "civil man" — the citizen — is one with a new found sense of self (a new socio-political identity) within the group and, thus, a new sense of moral duty for/to the group:

> The passage from the state of nature to the civil state produces a very remarkable change in man, by substituting justice for instinct in his conduct, and giving his

---

[70] Rousseau, *SC*. *ibid*, at 15-16.
[71] Rousseau, *SC*. *ibid*, at 32.
[72] Herbert, above n 1, at 141; Rousseau, *SC*. *ibid*, at 32-35.
[73] Rousseau, *SC*, *ibid*, at 144-145. There is a notable narcissism of self here in Rousseau's writing, which is ironic as one of the grounds upon which Rousseau criticised Hobbes's thesis was the self-love found in Hobbes's self-interested, desiring subject. Rousseau himself distinguished between the natural, innocent self-love of *amour de soi* with the more degenerate love of *amour propre*. Refer to Rousseau. J. 'Discourse on the Origin of Inequality.' *The First and Second Discourses.* (ed. R. Masters), St. Martin's Press, New York, (1964), at 221-22.
[74] Hinchman, above n 6, at 12.
[75] Rousseau, *SC*, *op cit*, at 32-35.

> actions the morality they had formerly lacked. Then only, when the voice of duty takes the place of physical impulses and right of appetite, does man, who so far had considered only himself, find that he is forced to act on different principles, and to consult his reason before listening to his inclinations.[76]

For Rousseau, there is a higher calling for man found in the community of the socio-political. The socio-political, and duty to the legislator's law, replaces the natural and aggressive instincts in human behaviour. In the socio-political there is a freedom and right found in the parameters of the State, beyond natural liberty or self-interest:

> We might, over and above all this, add, to what man acquires in the civil state, moral liberty, which alone makes him truly master of himself; for the mere impulse of appetite is slavery, while obedience to the law which we prescribe to ourselves is liberty.[77]

Civil liberty and the rights of such, is the morality of political freedom limited within duties to the general will and the law. And with Rousseau it is this socio-political modality which becomes the new regulatory principle of man and rights.[78]

More than any other single philosopher, it is Kant (1724-1804) who leaves his moral and philosophical mark on our contemporary human rights' discourse. Writing during the late eighteenth century, Kant's philosophy of rights is the pinnacle of Enlightenment thought on the autonomous capabilities of man. Similar to Rousseau — and greatly influenced by him — Kant attempts to move man away from the barbarism of the Hobbesian rule of nature with a moral dignity in his own, independent faculties of being and the morality of rights. For Kant, though man possesses such Hobbesian inclinations, the true mark of human identity is his own capacity of voluntary willing (*Wille*). This capacity of will coupled with a self consciousness of the ability to achieve one's own aim/object is, what Kant terms, man's capacity of choice (*Willkür*).[79] It is the content of human will — self-will — (as opposed to natural will) which sets man apart from other

[76] Rousseau, *SC, ibid*, at 15-16.
[77] Rousseau, *SC, ibid*, at 16.
[78] Habermas, above n 68, at 251.
[79] Kant, I. *The Metaphysics of Morals.* (*MM*) (trans. M. Gregor), Cambridge University Press, London, (1991), at 42.

animals and nature. With such a capacity, man is "his own ends" — with the autonomous potentiality to fashion himself into his own intention and to determine his own self: "Now I say that man, and generally every rational being, *exists* as an end in himself, not merely as a means for the arbitrary use of this or that will …"[80]

Significantly for Kant, such capacity of willing is determined by reason: "… reason, be itself and independent of all experience, ordains what ought to be done."[81] As with Hobbes, Locke and Rousseau, and the general thought during the Enlightenment, for Kant reason is man's unique capacity endowed by nature to voluntarily move his individual will and, thus, distinguishes man from nature: "Reason is absolutely necessary for this sort of will."[82] It is man's power of reason which enables his unique freedom. This is the (human) freedom of the exercise of his will to choose a course of action independent and autonomous from other instinctual impulses. Reason is the grounding of the morality of man, the foundations of the "good will" of man which raises him above nature: "… nature's true intention must be to produce a *will*, which is not merely good as a means to something else but *good in itself*."[83]

Such capabilities of reasoned will and conscious intentionality enable man to commit to private rules — his own personal, subjective principles, or *maxims* — to guide his actions in order to achieve his own ends. This human will is "a power [of rational beings] to determine their causality by the conception … of rules."[84] It is this power of reasoned willed and conscious intentionality which marks human identity as uniquely moral. These personal maxims indicate internal, moral freedom and personal conscience: a moral personality unique to man: "A *person* is a subject whose actions can be *imputed* to him. *Moral* personality is therefore nothing other than the freedom of a rational being

---

[80] Kant, I. *The Philosophy of Kant.* (ed. C.F. Friedrich), The modern Library, New York, (1993), at 193-94. That man is his own end is one formulation of Kant's categorical imperative. He has two other formulations of the categorical imperative: to act according to that maxim which coincides with a universal law; to conduct oneself as living in a kingdom of ends, that is, to live in a community of rational beings who self-will the (universal) law.
[81] Kant, ed, Friedrich, *ibid*, at 171.
[82] Kant, ed, Friedrich, *ibid*, at 158.
[83] Kant, ed, Friedrich, *ibid*, at 158.
[84] Kant, I. *Kant's Critique of Practical Reason* (*CP*) (trans. T.K. Abbott), Longmans, Green & Co, London, (1967), at 120.

under moral laws …"[85] This reasoned morality is the very dignity of the human person: "… humanity so far as it is capable of morality, is the only thing which has dignity."[86] This reasoned morality signifies the responsibility "imputed" to man for his *own* actions invoked by his *own* choices and his *own* maxims.[87]

Here, within the ground work of Kant's conceptualisation of human identity, there are already the fundamental traits of "humanness" which mark our own contemporary human rights discourse: self consciousness (intentionality), reason and (self) will. That is, there is already the image of the individual as the autonomous potentiality of the self consciousness of its own capacity of reasoned, intentional self-will. It is this signification of human identity which invokes human conscience: the reasoned morality of good will. This is Kant's transcendental subject, and significantly, a transcendental subject of "self." Through its own capacity of reasoned intentionality the individual invigorates a motivational independence for itself, transcending beyond its natural/animal inclinations and variants.[88] This capacity of transcendence is the potential of human freedom still in today's human rights discourse. This is not a "total freedom." Rather, this is a "positive freedom" of self-determination and "reasoned independence" — freedom away from other impulses — which imbues the individual with the signification of human dignity.

For Kant, it is from these internal, personal maxims and reasoned, moral freedom that external laws and external freedom emerge and, through this, the possibility of rights. Where, through the exercise of practical reason, man's subjective maxims can be verified, they can become external, "objective" universal laws. These are laws which are right and reasonable for everyone. That is, these are maxims (laws) which stand the test of reason (Kant's practical reason) and "do not annul themselves through self-contradiction."[89] Thus, they are able to be universalised. Such maxims are able to become objective, moral laws imposing universal moral/ethical duties ("imposing how *he*

[85] Kant, *MM*, above n 80, at 50.
[86] Kant, I. *Groundwork of the Metaphysics of Morals*. (trans. H.J. Paton), Harper & Row, New York, (1956), at 102-03.
[87] Shestack, J. 'The Philosophical Foundations of Human Rights.' *Human Rights Quarterly*. (1998), Vol. 20, No. 2, 201-237, at 209.
[88] Allison, H. *Kant's Theory of Freedom.* Cambridge University Press, London, (1990), at 97.
[89] Herbert, above n 1, at 150.

ought to act" [my emphasis]) for all to follow:[90] "Act on a maxim that can also hold as a universal law. Any maxim that does not so qualify is contrary to morals."[91] It is through such practical reason that personal maxims become the grounding of external laws — "Law proceed from the will, maxims from choice"[92] — which reflect and enforce these moral duties.

In this way, Kant distinguishes two subjectivities and two types of human law and human freedom. Like Rousseau, Kant's subject is split between an internal and external, personal and public, personality. Firstly, there is the intimate (*autonomous*) subject "of his own end," with personal, reasoned and intentionally willed maxims and an internal, moral/ethical law and freedom. Secondly, there is the projected external (*social*) subject whose reasoned maxims are the precondition to his "external freedom" in the world, signified through objective universal laws and moral duties:

> In contrast to laws of nature, laws of freedom are called *moral* laws. As directed merely to external actions and their conformity to law they are called *judicial* laws; but if they require that they (the laws) themselves be the determining grounds of actions, they are *ethical* [moral] laws … The freedom to which the former laws refer can be only freedom in the *external* use of choice, but the freedom to which the latter refer is freedom in both external and the internal use of choice, insofar as it is determined by the laws of reason.[93]

Freedom here is within "law" — the law of reason, the moral law, the ethical law and the judicial law — all reflecting and reinforcing each other and conforming external actions to the underlining moral dignity of man, won through the individual capacity of reason: "*Moral* personality is therefore nothing other than the freedom of a rational being under moral laws."[94] And, thus, the universal laws of moral duty are man's laws of freedom.

---

[90] Kant, *MM*, above n 80, at 51. In fact, these universal laws are guided by their own universal law: the law of reason as the maxims which become universal law are generated by reasoned choices and then incur the "test of universalisation" of practical reason.
[91] Kant, *MM*, *ibid*, at 51.
[92] Kant, *MM*, *ibid*, at 52.
[93] Kant, *MM*, *ibid*, at 42.
[94] Kant, *MM*, *ibid*, at 50.

Like Rousseau's divided subject, Kant's split subject is also its own subjugator. That is, the laws of freedom are self-legislated. Hence, man obeys the moral laws and duties which he himself reasons, internally (through pure reason) and externally (through practical reason): "… the will remains free, though governed by rules, because the rules to which it commits itself are not superimposed from without; they are the will's own creation."[95] What sutures this ruptured subjectivity is the law of freedom itself, the law of reason inherent in individual identity. This is the pure reason of personal maxims coinciding with the practical reason of universal laws, exercised and attained through individual capacity. Human identity is emptied of everything else but the morality of reason. Hence, the transcendence (freedom) of the individual is through the ideality of reason and the dignity of man is invoked by the morality of reason.

Hence for Kant, rights emerge from such self-legislated moral laws (universal laws) grounded upon the internal maxims determined by individual capacities of reasoned consciousness and intentional will. These are distinctively individual rights, attached to man and his own intimate and autonomous attributes of reasoned freedom and moral dignity. Rights for Kant — or at least one aspect of rights — are the measure of the degree of an individual's external freedom in the world. That is, rights are the "free space" in which the capacity of the individual's intentional self-will and reasoned consciousness (to fashion his own end) exists externally. This is the freedom, the "human right" to be free, from interference from others — to be one's own reasoned, moral end as one self-wills.

But equally, a second aspect of Kantian rights is that this externality of the individual is filled with other people with their own self-willed and reasoned moral end, and, thus, the context of rights is significantly *social*. Here, amongst this sociality of many of the Same, equality for Kant is an equality which is, in the first instance, an equality outside the political. This is the equality within the Sameness of one's natural "will to will." That is the coincidence and the symmetry of the innate capacity of all autonomous human individuals to reasoned intentionality to meet one's end. This is equality grounded in the

[95] Herbert, above n 1, at 150.

universality of the autonomous individualistic capacities of reasoned consciousness and intentional self-will.

Thus importantly for Kant and our own contemporary human rights' discourse, the context of rights is one of mutual recognition. This mutual recognition requires the respect of/for others who are equal beings of naturally reasoned and autonomous consciousness and intentional self-will — others who are equal potential moral personalities:

> [External] Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity.[96]

This coexistence of mutual recognition is the logic, the practical reason, of the universal law of rights — within such sociality of autonomous freedom and rights, it is in an individual's interest to recognise and acknowledge another's right in order to have one's own human freedom and right recognised.[97] Thus, the grounding for Kant's individual rights — the precondition for our own contemporary human rights — is a sociability of recognition of equal autonomous beings for one's own self-interest. To gain the benefit of one's rights depends upon the co-existent freedom amongst equal and symmetrical individuals, all with their own capacity of intentional and reasoned self-will.

Hence, rights only exist in an act of reciprocal recognition and mutual respect in the service of individual benefit. This is a reflexive relationship within the sociality of equal and autonomously free individuals of intentional and willed choices:

> Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law.[98]

---

[96] Kant, *MM*, *op cit*, at 63.
[97] Kant, *MM*, *ibid*, at 77.
[98] Kant, *MM*, *ibid*, at 56.

These are rights which acknowledge the capacity of moral personality (human responsibility) in each individual within the sociality of a community of individuals. These are rights of/to the internal freedom of each human to make their own reasoned, intentional choices for their own self-determined ends, within an "external space" amongst other such individuals. Like Rousseau's moral code between the individual and the general will of community, there is a mirror effect here between the self and the other. In this reflecting feedback loop, the individual recognises the Sameness of himself in the other. The self and the other are transparent to the self and coincidental with each other — each as reasoned, intentional will and moral personality, with the powers of self-legislation and universal laws. Thus, the mutual recognition of co-existent freedom is a self-reflexive exercise. Hence, these are rights which respect the Sameness of the self in others in order to serve the rights of the self. In this way, like Rousseau, Kant's grounding of rights does not offer a space for the heterogeneity of others, but rather, an expansion of the homogeneity of the unity of the Same.

Thus, in the sociality of rights of equal free individuals under universal laws of reason, there is an obligation — a duty — to limit one's freedom to respect the Same in the other and to limit the other to respect one's freedom. Rights, for Kant, are "the capacity for putting others under obligation."[99] To have a right one must be able to oblige another to limit their freedom/their right of self-will so as not to encroach upon one's own freedom of self-will:

> Right is the limitation of every man's freedom so that it harmonises with the freedom of every other man in so far as harmonisation is possible according to a general [universal] law.[100]

And equally, one must recognise one's own obligation to recognise the other's equal self-will and, thus, acknowledge that one owes the same obligation to the other. It is in this act of duty and obligation, authorised in a right against the other, where Kant acknowledges the necessary coercion in obliging the other and in resisting the

[99] Kant, *MM*, *ibid*, at 64.
[100] Kant, ed. Friedrich, above n 87, at 152.

encroachment of the other: "[A] law of a reciprocal coercion is necessarily in accord with the freedom of everyone under the principle of universal freedom."[101] In this way for Kant, a community of mutual respect is also a community of reciprocal coercion. Rights and duties are different manifestations of the phenomena of self-will, and coercion is woven into the fabric of such rights and duties to protect such individualistic, autonomous will.

It is in this circle of the Same, in a community of mutual recognition and reciprocal coercion, that Kant's moral ideal of a reasoned freedom under universal laws is a service to "itself," rather than for the community of concrete distinctions and differences. In Kant's sociality of equal, autonomous capacities of "will to will," the universal laws of reason and the moral duties of the categorical *"ought to"* are abstract and empty. They are dedicated to the formulations of reasoned morality and good will, aiming towards the idealised dignity of (autonomously reasoned) man. Hence, within this community of reciprocal recognition, rights become a cut from each other and not a uniting communal bond. Rights are a focus on idealised rationalisations rather than a concern for content and consequences:

> [Individuals] coexist in a state of antagonism produced by their natural freedom, so that has an objective, practical reality, irrespective of the good or ill it may produce.[102]

Thus with Kant, rights are reduced to a vacuous service to themself, rights are an *homage* to individual potentiality/capacity of reasoned self-will, in a community of individuals of equal powers. In this way, Kantian rights become the expression of a mutual respect for the idealised individual power of "self-willed choice," rather than the concrete concern of/over people's "needs."[103] The human subject is reduced to the universality of the law, and the law — the universal law of the reasoned *"ought to"* — is the abstract moral imperative of One in a community of the Same. In this way, in the moral imperative of

---

[101] Kant, *MM, op cit,* at 58.
[102] Kant, I. *Kant's Political Writings* (ed. H. Reiss; trans. H.B. Nisbet), Cambridge University Press, Cambridge, (1970), at 86.
[103] Gaita, R. *Good and Evil: An Absolute Conception* Routledge Press, London, (1991), at 216.

the right of the "will to will," the actuality of the human subject and the substance of their divergent needs, and the consequences of one's own will upon others in this actuality, are covered over by reasoned formalities in a "consensus of one."

Society, for Kant, coalesces around a common will — a "transcendental consent" — *implied* in this mutual recognition of rights and duties. This is the implied common will of symmetrical individuals of reasoned self-will to unite under universal laws (under the universal law of reason itself). This is the implied common will to enter a contract — the "idea of the original contract" — to establish civil society and the State:

> In accordance with the original contract, everyone within a *people* gives up his external freedom in order to take it up again immediately as a member of a commonwealth, that is, of a people considered as a State. And one cannot say … man in a State has sacrificed a *part* of his innate outer freedom for the sake of an end, but rather, he has relinquished entirely his wild, lawless freedom in order to find his freedom as such undiminished, in a dependence upon laws, that is, in a rightful condition, since this dependence arises from his own lawgiving will.[104]

In this way, rights are the moral foundations of the State and the State is the product of moral reason. It is such a State which best promotes the conditions for the harmonious unfolding of the reasoned individual of moral freedom under universal laws, guaranteeing the legal freedom of the individual of self-will.[105] It is in such a State that the individual transforms from human-subject to citizen-subject and exchanges their natural freedoms for the security of their political liberty — a freedom under the law of reason, the emancipation of civil law and civil liberties.

For Kant it is only the political modality of constitutional republicanism — with its separate constitutive elements of legislature, executive and judiciary — which best serves this sociality of mutual recognition, freedoms and rights. It is a republic which best respects the individual's moral autonomy, its freedom, equality and independence

---

[104] Kant, *MM*, above n 80, at 127. The social contract is not a factual experience, but rather, the logical consequential idea of reason: man possesses the unique, natural quality of reason which allows him to abandon the state of nature and, thus, is on an inevitable, rational/natural path towards a civil society and the State. Refer to Kant, *MM*, above n 80, at 147-48.
[105] Shestack, above n 88, at 209.

amongst others, and which allows for the greatest space possible for the cultivation of a reasoned freedom under self-legislated, universal laws. Yet focused on the abstract individual of autonomous self-will, and a community of alter-egos of such an individual, Kant's common will has no organic unity — such as Rousseau's general will of national/cultural identity. Thus for Kant, a sovereign may possess the powers of compulsion usually reserved for a despot:

> Unconditional submission of the people's will … to a *sovereign* will (uniting all be means of one law) is a *fact* that can begin only by seizing supreme power and so first establishing public Right.[106]

This is the necessary force to inspire a concrete common will of rights and obligations within a community of individuals of moral freedoms. This is the force necessary to ensure the restrictions of mutual recognition, the respect of moral duties, and the tolerance of others under the universal law of reason and expressed in the civil law of the State.

With the works of Rousseau and Kant building on the previous insights of Hobbes and Locke (and others throughout this time), the natural rights of man is a thesis which both emphatically breaks with the past of the pre-modern ethical ideals of natural law, and cements the foundations of our own contemporary human rights' discourse. By the end of the Enlightenment of the eighteenth and nineteenth centuries, and entering into the twentieth century, the Western European understanding of human identity and human rights had indelibly altered: from honour earned through living a virtuous life-in-community, to the inherent, innate dignity of the autonomous capacities of self-willed, reasoned intentionality. So complete is the categorical shift from the pre-modern, natural law of the sociality of man invoked by the "balance of nature," to the modern thesis of natural rights invoked by the "nature of the individual," that the rights of man thesis colonised the language of natural law and is now also referred to as natural law itself.

[106] Kant, *MM*, *op cit*, at 36.

Yet even in its own time, there was concern over the abstract nature of such rights of reasoned self-will. Burke criticised the 1789 French Revolution and the "Rights of Man" as grossly rational and idealised and highlighted the contradiction of the abstract natural freedom of man under the restrictions of liberty in the civil State. For Burke such innate rights are repugnant to the idea of a State of restrictive civil rights.[107] Rights for Burke ought to be concrete and actual and he proposed the "rights of the free born Englishman" over the abstract metaphysics behind the concept of the natural rights of man. Bentham also attacked the anterior, natural quality of the rights of man thesis, arguing that it was the polity of the State and prescribed, governmental laws which were the grounding of people's rights. Natural rights were "a mischief:" "*Natural rights* is simple nonsense: natural and imprescriptible rights, rhetorical nonsense — nonsense upon stilts."[108] Hegel also criticised the natural rights of man thesis and particularly Kant (and another philosopher of rights in the Enlightenment, Johann Fichte) for the individualistic and autonomous nature of rights. For Hegel, such rights were "one-sided and false"[109] and so abstract that they signified an "empty and cold freedom of death."[110] Rather for Hegel, the State comes first and is not the consequence of an arbitrary consented convention. Rather, rights emerge in the context of the State and political community and are political and not natural in the sense that Kant and contemporary humanism outlined.

But more than most, Marx's analysis of the natural rights of man thesis reveals the inherent illusions, contradictions and dangers in the ideality of the universality of natural rights and the split subject of autonomous freedoms. Such insights and criticisms are significantly still relevant in our own contemporary human rights' discourse and have become an informative foundation for much postmodern commentary on this discourse, including the works of Lacan and Levinas, which I shall explore further in Part A & B of this dissertation. Marx's insights focus upon how such rights express a commodification of the subject and of rights themselves. For Marx, such rights become the means through

[107] Burke, E. *Reflections on the Revolution in France*. Dent Publishing, London, (1971), at 57.
[108] Bentham, J. *The Works of Jeremy Bentham* (ed. J Bowring), Simpkin, Marshall & Co, Edinburgh, (1843), Vol. 2, at 524.
[109] Hegel, G. *Philosophy of Right*. (trans. TM. Knox), Oxford University Press, Oxford, (1967), at 14, par. 1.
[110] Hegel, G. *The Phenomenology of Spirit*. (trans. A.V. Miller), Oxford University Press, Oxford, (1977), at 360.

which one objectifies oneself and invests in oneself to confirm oneself. It is perhaps unsurprising that the image of human identity and the notion of rights should be conceptualised as such, as they emerged at the culmination of the cult of objectivity and bourgeois idealism, from the expansion of economic and technological advancements that had begun at the end of the Middle Ages.[111] As such, such rights express a bourgeois and liberal conceptualisation of human identity, animated by the contemporary power/discourse matrix: the expansion of the democratic project throughout Europe; the politics of the Nation-State; and the power of empire and colonisation.[112]

Marx and the Critique from within

Marx's critique of the human rights discoursed of his day, the natural rights of man, is significant in a number of ways. Firstly, Marx details how such rights are not natural and real, but rather, contingent and dependent upon specific historical and social circumstances. In this way, such rights are not essential endowments of the identity of humanity, but rather, are imbued with their own discursive context — the bourgeois ideals of contemporary eighteenth and nineteenth century Europe. In addition, Marx highlights how the rights of man (human rights) are founded upon an ideologically inverted reality of human identity and its split subjectivity, which prioritises the monadic individual above the collective community. That is, there is an inversion in the divide between the autonomous individual (the private individual of civil society) and the social subject, (the public citizen of the political community). Together, these issues create a rights' discourse which is abstract, alienating and ineffective for the actual human individual in their concrete, communal existence.

Like Hegel, Marx sees the eighteenth century projects of the Nation-State and political democracy (political emancipation) as categorical breaks from the *ancien régime* and the feudal period which proceeded them. For both Hegel and Marx, the revolutionary and rights activities (particularly the French revolution) during this time split the old society

[111] Kunstler, B. 'Beyond the Illusion of Human Rights.' *Journal for Pedagogy, Pluralism and Practice* (Fall 1999), Vol. 1, Issue 4, (www.lesley.edu/journals/jppp/4/kunstler), accessed 20/10/2007, at 4.
[112] Gearty, C. *Are Human Rights Truly Universal?* (www.conorgearty.co.uk/pdfs/Chapter_29_UniversalityFINAL), accessed 12/7/10, at 2.

in two. Within feudalism the social and political realms of life were held together under the strict hierarchical structures of feudalism, the great chain of being and divine cosmos. Civil society and its communal life, with its differently grouped elements of classes and guilds, were tied to political society to the extent that: "They [the elements of civil society] determined, in this form, the relation of the individual to the *state as a whole*."[113] However, with the rupture of eighteenth century revolution and rights, civil and political society were torn a part: "The political revolution therefore *abolished* the *political character of the civil society*."[114] By the mid-eighteenth century the communal political realm became the space of the new Nation-State, while the social realm of civil society had its communality "dissolved into its most basic element"[115] — the private space of the individual who was newly freed from the old world structures. Thus, there is a significant historical correlation between the birth of the Nation-State and the newly liberated, autonomous man of rights, a correlation mediated by a re-invigorated legal system: "The *formation of the political state*, and the dissolution of civil society into independent *individuals* whose relations are regulated by *law* … are accomplished by *one and the same act*."[116] Man — free, atomised, autonomous and independent from social and communal bonds — is the foundation of the newly-formed Nation-State.

But significant to Marx particularly, this private space of the newly freed individual in civil society is also the new economic space created by the material and cultural elements of life unfettered with the collapse of the old society.[117] The result from the eighteenth century revolutionary spirit is a clear divide in the new world order. Firstly, there is one focus on the political society of the State and the community of citizen-subjects participating in the State. And secondly, there is another focus on the civil society of the

---

[113] Marx, K. 'On the Jewish Question.' *The Marx-Engels Reader* (ed. R. Tucker), Norton & Co, New York, (1978), at 44.
[114] Marx, *ibid*, at 45.
[115] Marx, *ibid*, at 45.
[116] Marx, *ibid*, at 45-46. There are a number of texts which trace the inter-dependent relationship between the new Nation-State born during the Enlightenment period and the supporting concepts of the autonomous individual and its socio-political *persona*, the citizen-subject. Refer to: Hoffman, J. & Brace, L. (ed.) *Reclaiming Sovereignty*. Pinter Press, London, (1997); Skinner, Q. & Strath, B. (ed.) *States and Citizens: History, Theory, Prospects.* Cambridge University Press, Cambridge, (2003); Vincent, A. *Theories of the State.* Blackwell, Oxford, (1994).
[117] Marx, *ibid*, at 45.

civil individual, independent from its social communality, in the contextual materialism of its every day existence. In this way, the emancipatory powers of the eighteenth century have a threefold effect. Firstly, they emancipate and focus the State into the political realm. Secondly, they emancipate and focus the autonomous and atomised individual, without its social bonds, into civil society. And finally, they emancipate and focus a capitalist economy into the civil society now monopolised by individual activity.[118] Thus, the emancipatory powers of the time present man — the freed, atomised individual — and the civil society in which he exists, almost empty of all political and communal content, with only its own self-concerned interests:

> The bonds which had restrained the egoist spirit of civil society were removed along with the political yoke. Political emancipation was at the same time an emancipation of civil society from politics and from even the semblance of a general [communal] content.[119]

Such a division in the new world order of the day abstracts communal political society from civil society and thereby de-politicises both the individual and his (private) interests and also the issues of economics.

In this historical contingency of such a categorical rupture between political and civil life, the newly emerged natural rights of man are not, as they appear, "natural." There is, instead, a peculiar paradox within the natural rights of man and the identity (the philosophy) of natural man upon which such rights rest. The natural rights of man present a universal being — the identity of the "rational, intentional, sovereign man" — as an abstract, transcendent and empty being. This is a pre-social and pre-political being, autonomous and self-determining within, of and for itself. Natural man is the monadic, atomised individual occupying civil society, and necessarily appears "passive and natural" contrasted against the "conscious socio-political" activity in relation to the State.[120] Yet at the same time, this natural man emerges from the limits of civil

[118] Douzinas, above n 1, at 159-60.
[119] Marx, *op cit*, at 45.
[120] Marx, *ibid*, at 46.

society — a sphere of society separated from the political and monopolised by the independent, autonomous individual in its contextual materialism. Hence, this universal, abstract, natural man is also particularised by the characteristics of the concrete interests of self-concerned, bourgeois ideals, traits, rights and liberties:

> None of the supposed rights of man, therefore, go beyond the egoistic man, man as he is, as a member of civil society; that is, an individual separated from the community, withdrawn into himself, wholly preoccupied with his private interest and acting in accordance with his private caprice. Man is far from being considered, in the rights of man, as a species-being; on the contrary, species-life itself – society – appears as a system which is external to the individual and as a limitation on his original independence. The only bond between men is the natural necessity, need and private interest, the preservation of their property and their egoist persons.[121]

The natural rights of Hobbes, Locke, Rousseau and Kant are, in fact, the bourgeois rights of contemporary eighteenth century Europe. These are rights to the private, self-interest liberties of/to ego and economics, property and proprietary, which alienate men from each. For Marx, these so-called natural rights do little more than liberate the "*frenzied* movement of cultural and material elements" which form man's private life within the contextual materialism of its civil life. Hence, man is "not liberated from property" through such rights, but rather, he is "liberated to own property."[122] Hence, it is not just "the individual" who is the foundation of the modern State (as quoted above) but more specifically, it is "the egoistic, bourgeois man who is the foundation of the new society" and "recognised as such in the rights of man."[123]

Hence, the rights of man are nothing more than social constructs of historical circumstances. Rights are an expression of the material reality of bourgeois interests now dominating a civil society freed from the sociality of community and separated from the political realm.[124] Such rights and such a presentation of "man" rely upon and reinforce the social inversion that presents and prioritises the nature of human identity as

---

[121] Marx, *ibid*, at 43.
[122] Marx, *ibid*, at 45.
[123] Marx, *ibid*, at 45.
[124] Roth, B. 'Retrieving Marx for the Human Rights Project.' *Leiden Journal of International Law*. (2004), Vol. 17, 31-66, at 38-39.

individualist and atomised. This is the presentation of human identity as separated and alienated from the concrete contextuality of the sociality of community in which the individual resides: "Man in his most intimate reality, in civil society, is a profane being. Here, where he appears both to himself and to others as a real individual he is an *illusory* phenomenon."[125] Such rights promote false reality claims of human identity: of a universal being — "sovereign man" — asserting a set of attributes and rights which stand outside and prior to both its social/communal and political activities:[126]

> Creation of fantasy, dreams … the sovereignty of man — but of man as an alien being distinguished from the real man — all these become, in democracy, the tangible and present reality, secular maxims.[127]

In this abstract inversion of (bourgeois) individualism over communal sociality — in the prioritisation of the universality of the (atomised) individual — the "real human subject" loses its concrete and social identity. Man (the individual) loses what/who it is in its particular, everyday communal life — its gender, class, economic and employment circumstances, etc.[128] The political emancipation of the eighteenth century revolutionary spirit freed political society and the individual from "under the yoke of the old systems" (and freed economic capitalism) but it failed to bring about the subject's actual freedom:

> The limits of political emancipation appear at once in the fact that the *state* can liberate itself from a constraint without man himself being *really* liberated; that a state may be a *free state* without man himself being a *free man*.[129]

Hence, through political emancipation alone, the subject is free, but only free to be limited to the parameters of isolating, exploitative and alienating civil society and bourgeois ideals.

For human identity, the impact of such a categorical split between political and civil society means that the individual's subjectivity is also split. The human subject has a

---

[125] Marx, *op cit*, at 34.
[126] Herbert, above n 1, at 274.
[127] Marx, *op cit*, at 39.
[128] Douzinas, above n 1, at 159.
[129] Marx, *op cit*, at 32.

split personality divided between the duality of the political and civil realm, and its activities, demands and interests reflect this:

> Where the political State has attained to its full development, man leads, not only in thought, in consciousness, but in *reality*, in *life*, a double existence – celestial and terrestrial. He lives in the *political community*, where he regards himself as a *communal being*, and in *civil society* where he acts simply as a *private individual*, treats other men as means, degrades himself to the role of a mere means, and becomes the plaything of alien powers.[130]

Man now takes on a double existence as both public political citizen within the community of the political State and private civilian within the individualisation of the civil society. And with each of these personalities man gains distinct roles and identities and acquires distinct rights — the public, political rights of the citizen and the private, civil rights of the civilian.[131]

Civil society and the "civilian personality" is *"man-in-life"* — the immediacy of terrestrial existence. But, as discussed above, civil society — and the civilian personality — is underpinned by the alienating (alienated) rights of man and the self-interestedness of dominant bourgeois individualism and ideals:

> Let us notice first of all that the so-called *rights of man*, as distinct from the *rights of the citizen*, are simply the rights of *a member of civil society*, that is, the egoistic man, of man separated from other men and from community.[132]

These are the rights which "take on the appearance" of natural as they are re-presented as outside and above the political and communal. These are the civil rights of liberty, equality and security. But this is bourgeois inspired liberty: liberty of the "private, isolated monad, withdrawn in himself" — liberty not found in inter-human relationships, but rather, "upon the separation of man from man," which leads men to view "other men not the *realisation*, but rather the limitation of his own liberty."[133] This is bourgeois

[130] Marx, *ibid*, at 34.
[131] Marx, *ibid*, at 41-42.
[132] Marx, *ibid*, at 42.
[133] Marx, *ibid*, at 42.

equality of each "self-sufficient monad" isolated from each other. And this is security of the bourgeois State. This is the only *"real right"* in modern, civil society: the "guarantee of the individual person; their right to property; the assurance of ego;" the (implied) consent to police and coercion;[134] even political coercion (*viz-a-viz* hegemonic coercion veiled by consent);[135] the "bond of self-preservation" and "border patrols" of private ownership and existence.[136] For Hobbes, Locke, Rousseau and Kant, this is the bond of fear uniting a civil society of bourgeois individuals, fear of the unreasoned, unsymmetrical other (Rousseau and Kant) or the sameness of the self (Hobbes and Locke).

Political society is the "celestial" opposition to civil society and (private, monadic) civil life. Political society encapsulates the "universal spirituality" of the public, political State under which atomised individuals are brought "in community," united into a modern, political collective vanquished from the civil realm.[137] Politics and the State are the new bonds amongst the disparate and autonomous individuals after the collapse of the old socio-political orders. Here, the political rights of the *"other-side-of-man"* are exercised and expressed. Where civil society is the realm of the egoistic, atomised civil personality, political society is the realm of the political personality, the moral citizen-subject.[138] Political society is the realm of the political cooperative serving the universal, common good of the political community at large (i.e. the State).[139]

But like civil society and the identity of the alienated human subject therein, there is also the paradox of delusion in the political personality. This paradox is found in the fact that the common good is served by the individual of civil society, the atomised egoist himself:

---

[134] Marx, *ibid*, at 43.
[135] As outlined in Gramsci's political and cultural hegemony meditations. Refer to Femia, J. *Gramsci's Political Thought: Hegemony, Consciousness, and the Revolutionary Process.* Claredon Press, Oxford, (1981).
[136] Marx, *op cit*, at 43.
[137] Marx, *ibid*, at 34.
[138] Marx, *ibid*, at 46.
[139] Douzinas, above n 1, at 158.

> In the state, on the contrary, where he is regarded as a species-being, man is the imaginary member of an imaginary sovereign, divested of his real, individual life, and infused with an unreal universality.[140]

In such a delusion of the "universality of the political sovereignty of the citizen-subject," the political rights of the citizen are just as empty and abstract as the personal rights of the individual, the rights of man. The political equality of each individual in communion with the State is an empty gesture. The State "abolishes all distinctions of birth, social rank, education, occupation" by relegating such things into the non-political private world of the civil society, thereby allowing such distinctions to "manifest their particular nature."[141] The delusional universality of the political State manifests itself, not in the eradication of such restrictive variants, but rather, in opposition to them.[142]

Behind such delusions the State is a "*devious* intermediary of human freedom," offering the emptiness of political emancipation.[143] The State, and political rights of the individual's emancipation, invert and de-prioritise the social sensibility of man and are served by and serve civil society — "the egoistic, bourgeois man" who is, after all, "the foundation of the new society."[144] It is the political realm, the citizen-subject and the political community itself, which is the means to preserve and promote the ends of the civil life of individual, bourgeois personality. Thus, in both the private realm of civil life and the public space of political society the split personality of human identity is (ideologically) sutured back together under the authenticity of the "true human subject:" the bourgeois.[145]

Hence for Marx, political emancipation alone does not work; indeed it does little more than bolster human alienation and individual "un-freedom." The division of political and civil society produces empty political rights and illusionary natural rights — neither assist the human subject in the *actuality* of existence. Marx rejects such notions of human

---

[140] Marx, *op cit*, at 34.
[141] Marx, *ibid*, at 33.
[142] Marx, *ibid*, at 33.
[143] Marx, *ibid*, at 32.
[144] Marx, *ibid*, at 45.
[145] Marx, *ibid*, at 43.

rights. Rather, the emancipation of humanity must be concretised in the actuality of the everyday sociality of the human subject: "*Every* emancipation is *restoration* of the human world and of *human relationships* [my emphasis] to *man himself*."[146] For Marx, the true human condition is the pursuit of a way of living collectively:[147] "We have an association, in which the free development of each is the condition for the free development of all."[148] Thus, rights should not impose the false and a-social freedoms of abstract ideals — such as the transcendent identity of the autonomous individual of reasoned *choice* and intentional *will* — which can be exploited by the dominant socio-political group. Rather, "rights" — or more precisely for Marx, the emancipation of man — need(s) to engage with and address the subject's particular *needs*:

> Further, one worker is married, another is not; one has more children than another, and so on and so forth … [hence] … one will be richer than another, and so on. To avoid all these defects, rights instead of being equal would have to be unequal … From each according to his ability, to each according to his needs![149]

Thus, the revolution must be social and emancipation must be practical. The revolution encapsulates the energy of a progress towards the perfect State, which is "by its nature, the *species-life* of man as opposed to his material life."[150]

Conclusion

The rise of a new conceptualisation of human identity (of a new philosophy of being) — from the fall of the *ancien régime* up to the period of the Enlightenment — sees the corollary transformation in the concept of human rights. The identity of the human subject alters from one within community which is structured socially, to a "free identity" of individuality, around which sociality coalesces.[151] This is this conceptualisation of the individual which was employed as the historical protagonist against the structures of

---

[146] Marx, *ibid*, at 46.
[147] Roth, above n 125, at 62.
[148] Marx, K. 'Manifesto of the Communist Part.' *The Marx-Engels Reader* (ed. R. Tucker), Norton & Co, New York, (1978), at 491.
[149] Marx, K. 'Critique of the Gotha Program.' *The Marx-Engels Reader* (ed. R. Tucker), Norton & Co, New York, (1978), at 531.
[150] Marx, above n 114, at 34-35.
[151] Kunstler, above n 112, at 5.

Monarchy and Church — against the restrictions of myth and religion — of the pre-modern world, to justify revolution and legitimise a new socio-political order, a new Nation-State, a new bourgeois power. Rights, justice, ethics and law are all involved in this categorical shift: from the notion of natural law and its teleological approach of social ethics concerned with a justice of rights in service of a common good; to the thesis of the natural rights of man focussed on self-will and the concern with the rights' bearers own capacity to exercise their innate liberties "to be" their own independently determined "self."

What is gained with such historical shifts in human identity and human rights is a "purported equality" of each individual under the State — the individual liberty of freedom of choice enjoyed by all and guaranteed under State civil and political law. What is lost is the concreteness of inter-connective community — a sociality, which was paramount in the pre-modern, natural law.[152] But in this shift in the conceptualisation of human identity there is priority of the alienating abstract, the universality of the atomised individual, with idealised (self) capacities of potentiality and rights. With this shift there is the promotion of the illusion of self-sovereignty under the domination of the new socio-polity. Marx highlights the problematic footing upon which such gains and such rights are made. Civil and political rights are grounded on the aspirations of an abstract, autonomous individual. And in this vacuum of alienation, civil and political rights become normative values re-calibrated to reflect and reinforce the egoist, self-interested work of the dominant socio-political group, bestowing politico-legal legitimacy to a bourgeois ideal.

The distinction between the conceptualisation of human identity and human rights focussed on this abstract ideality of humanity and such criticisms against the alienation of such ethereal rights, is the critical cleft between liberal and communitarian philosophy. This is the distinction between liberal individualism, liberal politics and liberal rights and communitarianism, with its perspective on rights which aims to prioritize the contextual communal reality of concrete existence and real-life rights which address the actuality of

[152] Kunstler, *ibid*, at 6.

the subject. For Marx, the conceptualisation of individual (atomised and alienating) rights is a dangerous inversion of the social reality of man and should be abandoned. Hence according to Marx, and for other critiques of human rights (including more contemporary post-humanism critiques such as those from Levinas and Derrida), the presentation of rights as the limits of individual civil and political protections *does not go far enough.*[153] Rights must do more than offer an equality of political protection. For such thinkers rights must also offer a concrete, social emancipation of the human subject (from the actuality of the plight of empirical existence) in its daily life.

Such criticisms against this ideality within such a tradition of rights have continued in the more contemporary critiques of postmodernism. Following on from Marx's critique, for contemporary postmodern identity theory our modern human rights' discourse is still animated by the presence of an abstract image of human identity. Within our contemporary human rights' discourse there is an assumed (subsumed) philosophical nature of being of the individual as self-knowing, self-aware and self-potent. In our modern rights the individual is presented as a one-dimensional potentiality of self fulfilment, transparent to itself through the capacity of autonomous reason and the possession of liberal rights.[154] Through the themes of liberal individualism within modern humanism, which emerged out of the Enlightenment in the eighteenth and nineteenth centuries, our contemporary human rights' discourse has been imbued with the split subject of Kantian moral *potentia.* Contemporary human rights have continued to be a celebration of abstract and alienating autonomous rights expressed/restricted through

[153] Roth, above n 125, at 40-41.
[154] Hall, above n 7, at 118.

civil and political liberties. Still today, the conceptualisation of human identity and human rights is the presentation of the human individual as autonomous, self-interested and appetitive; the individual of alienating natural attributes of self-will and conscious reason, used to fashion itself in the world as it sees fit.[155]

****

[155] Haber, H. *Beyond Postmodern Politics: Lyotard, Rorty, Foucault.* Routledge Press, New York, (1994), at 1.

Chapter Two

Modern Human Rights and Postmodern Agency

Introduction

From the founding fulcrums in the conceptions of human identity and human rights within the Enlightenment's thesis of the natural rights of man, the image of the autonomous individual with the self-realising capacities of reason and will, continued to dominate rights' (Western) theory into the twentieth and twenty first centuries. Through the emerging influence of this particular Anglo-French and Kantian perspective of liberal individualism and modern humanism over this time, our contemporary human rights have come to reflect the liberal rights of an autonomous individual, expressed through the civil and political liberties of the citizen. Even in the more communal sociality of rights found in Rousseau, there is still, nonetheless, a fixation on the individual of reasoned will, which (like Kant, who was greatly influenced by Rousseau) is then universalised into a community of the Same — a symmetrical sociality of the homogenous, organic unity of the One. The individual of human rights is presented as its own truth-maker, its own metaphysical, normative principle; it has maintained the image of a self-authenticating, agent of being.[1] From Hobbes through to Kant, and into our contemporary rights' talk, there remains the priority of the autonomous individual, a fixation on the natural and essential ontological qualities of the presence of being in human identity.

The emancipatory promise of the Enlightenment and its inspired projects of liberal humanism and human rights is that through these autonomous capacities of human individualism — and its symmetrical sociality of the Same — there is an inevitable progress towards a teleological end, an historical evolution towards an ideal both in the individual and of sociality at large.[2] Thus, there remains in our contemporary human rights' discourse the Kantian influence of autonomous (reasoned) moral agency — the

[1] Patterson, D. (ed.) *Postmodernism and Law*. Dartmouth Publishing, Aldershot, (1994), at 118; Taylor, C. 'The Politics of Recognition.' (ed. A. Gutman) *Multiculturalism: Examining the Politics of Recognition*. Princeton University Pres, Princeton, (1994), 25-73.

[2] Otto, D 'Everything is Dangerous: Some Post-structural Tools for Rethinking the Universal Knowledge Claims of Human Rights Law.' *Australian Journal of Human Rights* (1999), Vol. 5, 17-42, at 20.

ethical integrity of our human rights is won through the exercise of autonomous self-will and conscious reason.[3] Through the ongoing influence of liberal humanism, the Enlightenment's moral ideals invested in these capacities of the human subject have become the universal human rights of today.[4]

It is this identification of humanity's essential, self-contained attributes which contemporary postmodern philosophies reject. Such philosophies undermine the legitimacy of this abstract image of human identity with the contingency of every day life and the plurality of human experience and expression. And although liberal theory and practice is now more open than during the times of the early communitarians such as Burke, Hegel and Marx (and the utilitarian works Bentham), in law the conceptualisation of the intentional individual is still represented in the "reasonable person" and the "legal subject," underpinning mainstream legal jurisprudence, judicial processes and established human rights theory.[5] Thus, postmodern philosophies continue to challenge this concept of autonomous identity, and the notion of liberal rights invoked by such a concept, by putting the human subject back into its concrete contextuality.

In this chapter I wish to explore our contemporary human rights' discourse from the perspective of such postmodern philosophies. I begin this chapter with an outline of the postmodern concept of human identity and subjectivity. From this perspective, the human individual is never an autonomous, stable or whole transparent, self-centred totality. There is always an "affective other" impacting upon the human subject — whether it be the multiplicity of socio-historical discourses, unconscious desires, or linguistic significations — leaving an informative trace of open difference and alterity within the very fabric of human identity. In this postmodern era, identity has moved from the stability of the autonomous individual of reasoned consciousness and intentional

[3] Shestack, J. 'The Philosophical Foundations of Human Rights.' *Human Rights Quarterly*. (1998), Vol. 20, No. 2, 201-237, at 209.
[4] Gearty, C. *Are Human Rights Truly Universal?* (www.conorgearty.co.uk/pdfs/Chapter_29_UniversalityFINAL), accessed 12/7/10.
[5] Roth, B. 'Retrieving Marx for the Human Rights Project.' *Leiden Journal of International Law.* (2004), Vol. 17, 31-66, at 51-52; Douzinas, C. *The End of Human Rights*: *Critical Legal Thought at the Turn of the Century*. Hart Publishing, Oxford, (2000), at 3; Leiboff, M & Thomas, M. *Legal Theories in Principle*. Law Book Co, Sydney, (2004), at 336-337.

self-will, to an imagery of fragmentation and contingency. Next I examine our contemporary human rights' discourse from such perspectives through a review of the Universal Declaration of Human Rights (*UDHR*). This review highlights how today's human rights discourse is still dominated by the basic (Kantian) foundational principles of human identity — liberal humanism's image of the autonomous individual of reasoned self-will and the sociality of the Same. Through such an analysis I highlight the contradictions of this split subject of autonomous being and its socio-political liberties and review the ethical loss in such a structure of human identity and human rights. It is in an attempt to resolve these contradictions and this loss, in this postmodern age, that I next turn to Lacan and Levinas in Part A and Part B to follow — with their potential post-Enlightenment presentations of human identity, communal sociality and ethical inter-subjectivity.

The Postmodern Predisposition

Since the mid-twentieth century, postmodernism's philosophy of subject formation has undermined the stability and totality of the singular image of human identity presented in the liberal tradition of modern humanism and which has dominated our contemporary human rights' discourse.[6] Similar to Marx's critique of the concept of the individual of autonomous self-capacities, from a postmodern perspective the problem with the concept of the modern individual at the centre of our contemporary human rights is its split subjectivity. That is, the autonomous individual of reasoned rights is alienated, atomized and isolated, outside of its concrete contingency. In its pre-founded consciousness and self-sovereignty, in its autonomous and transcendental state of being, the modern individual of reasoned autonomy and rights is abstracted from its concrete contextual reality to the point that it is alienated from others (and itself). The individual is not

[6] Many of the concepts articulated in the postmodern discourse go back further than this. The philosophical heritage of postmodernism can be traced back to Nietzsche and Heidegger and then onto poststructuralism. Refer to Smith, G.B. *Nietzsche, Heidegger and the Transition to Postmodernity*. University of Chicago Press, Chicago, (1996). The term "postmodern" itself probably first gained currency in the English speaking world with publication of Lyotard, J.F. *The Post-Modern Condition: A Report on Knowledge*. (trans. G. Bennington & B. Massumi), Manchester University Press, Manchester, (1984).

perceived and understood in its empirical actuality, but rather, is an illusory and a-historical template of the "potentiality of human dignity, reason and conscience".[7]

For postmodernism, such a concept of identity, such a concept of human rights, is a grand-narrative of a totality of knowledge and "truth" — a meta-structure of meaning and understanding produced and legitimised by reference to itself as a value free and objective universal system of knowledge about itself.[8] This is this presentation of human identity as its own essence of "truth" — the meaning of identity beyond and without mediation from concrete externality, as the transcendental signifier and regulatory principle of truth and knowledge of and within itself and the world in which it moves.[9] This produces an essentialist, homogeneous understanding of identity and rights as it only gains currency through its own internalised criteria, its own innate reasoned autonomy, and, thus, does not build a profound, inclusive consensus.[10] Rather, it is built upon its own internalised "consensus of one," from an assumed hierarchy of signification and meaning,[11] prioritising one meaning above another, totalising one conceptualisation of identity and right (of "truth") over another. This is the manipulation of symbols, stories, spaces and ideas in order to establish an authenticity of self and presence in self.[12]

For postmodernism, this is a philosophy of being, a tradition of identity and rights, which focuses on the "presence of being," the *logocentrism* of the ontological signification of the individual. This image of identity is as the self-capacities of self-presentation. It is an identity which (in itself) is the "first and last" of its own existence and understanding, the stable whole and totality of its own knowledge, understanding and significance of its own presence of being.[13] Here, there is an assumption of an identity and ethic of

---

[7] Bauman, Z. *Postmodern Ethics*. Basil Blackwell, Oxford, (1993), at 26.
[8] Papastergiadis, N. 'The De-territorialization of Culture.' *Arena Journal*. (1988), Vol. 11, 145-175, at 146; Lyotard, above n 6, at xxv-xxvii.
[9] Sarup, M. *An Introduction to Post-Structuralism and Postmodernism*. Harvester Wheatsheaf, Hertfordshire, (1993), at 37-38.
[10] Sarup, *ibid*, at 132.
[11] Lyotard, above n 6, at xxv-xxvii.
[12] Clifford, J. 'Taking Identity Politics Seriously. The Contradictory, Stony, Ground …' *Without Guarantees: Essays in Honour of Stuart Hall*. (ed. P. Gilroy, L. Grossberg, & A. McRobbie). Verso, London, (2000), 94-112, at 95-96.
[13] Sarup, above n 9, at 35-36.

authenticity in the autonomous individual and human rights[14] — the assumed image of the human individual as self-regulating, self generating and self-constituting.[15] At its extremes, this is an egoist, narcissistic exercise of being, consumed with self-concern, self-worth and self-interest in its own presence of being.

Postmodernism counters this totalising, self-reflexive understanding of self individuality and reasoned autonomy with an unstable and shifting image of human identity. This is a 'relative' identity, which is contingent on various socio-historical discourses which shape society and one's experience within in it.[16] The meaning of human identity and the rights of such an identity do not emanate from the idealised, essential and transparent qualities and capacities of the transcendental, individual-self. There is no objective metaphysical position — not even the autonomy of reason — outside and beyond the socio-historical contingencies of human experience, upon which such a meta-narrative can reside and an absolute, objective and universal "truth" about any meaning and knowledge — including human identity and human rights — can be established.[17] All meaning and understanding is formulated within the discursive contingencies of historical context and linguistic signification.[18] Identity — the significations and contents of identity and rights — is arbitrary and empty, a flexible and fluid nodal point of unfolding inter-actions amongst cultural, socio-historical, linguistic and psychological contingencies. In this way, the signification of human identity is no longer imagined as self-sovereigned and autonomous, consciously complete within the self-capacities of presence of being. Rather, human identity is contingent upon affective and uncontrollable externalities — open and unending in a continual interaction with such *alterity*, such "otherness."[19] The *"human subject,"* as opposed to the traditions of the concept of the *"human individual,"* is the product of these forces beyond its control and is both subject to and subjugated by

[14] Taylor, *Politic of Recognition*, above n 1, at 28-29.
[15] Fitzpatrick, P. *Modernism and the Grounds of Law.* Cambridge University Press, Cambridge, (2001), at 69.
[16] Powell, J. 'The Multiple Self: Exploring Between and Beyond Modernity and Postmodernity.' *Minnesota Law Review.* (1997), No. 81, 1481-1491, at 1482.
[17] Haber, H. *Beyond Postmodern Politics: Lyotard, Rorty, Foucault.* Routledge Press, New York, (1994), at 4.
[18] Haber, *ibid*, at 1.
[19] Sarup, above n 9, at 2-6.

discursive processes.[20] And thus, such a subject is always already constituted by the alterity of its contextual contingencies, beyond its conscious containment and control.[21]

There are many constituting others in the alterity of otherness in postmodern philosophies, which are beyond the Sameness of the self and the *total* control of the human subject.[22] For example, Foucault analyses the impact of the manifolds of discursive powers on the formation of human identity. There is also Derrida's and Lyotard's analysis into the linguistic significations of *différance* and *differend* and their impact on the subject. Lacan offers the unconscious other of the Real as a constituting alterity of the subject. And finally, there is the other of Levinas's face of infinite alterity within inter-subjective proximity. Through the subjugation to these discursive interplays of otherness, the subject is constituted beyond itself and its capacities of reasoned consciousness and intentional self-will. As Barthes and Foucault suggest, in such a context of otherness, "Man is no longer its own author of its own life;" "this man" — the concept of the pre-figured, autonomous, self conscious individual — "is dead."[23] Through alterity and the multiplicity of contingent otherness, human identity is now conceived as unstable and fragmented, an ongoing and unfinished project of "*complexifaction.*"[24] Through the inter-relationships between/amongst such affective differences of alterity, the image of the transcendental individual is de-stabilised and decentred out of its ontological presence of *logocentric*, self-centred and self-sovereigned

[20] Fryer, D. *The Intervention of the Other: Ethical Subjectivity in Levinas & Lacan*. Other Press, New York, (2004), at 16.
[21] Haber, above n 17, at 1-8, 119. The distinction here between "the individual" and "the subject" is important, for the former signifies the identity of reasoned consciousness and intentional self-will, while the later is the signification of identity as contingency and instability. Hence in this dissertation I will use each term with such signification in mind.
[22] It is significant that postmodernism is understood as allowing for "some space" of personal control over itself and its externality. This, as I discuss in the following pages, is the concept of "subjective agency." In many respects, postmodernism/poststructuralism is a return to the notion of an active subject after the restrictions on human capacities within the anti-humanism of structuralism.
[23] Refer to Barthes, R. 'The Author is Dead.' *Image-Music-Text.* (trans. Stephen Heath), Hill and Way Publishers, New York, (1977); Foucault, M. *The Order of Things: An Archaeology of the Human Sciences.* (trans. Sheridon Smith), Tavistock Publishers, London, (1970), at 262. Even before poststructuralism and postmodernism, the "accomplices to this death" included Marx, Nietzsche and Freud, who all, in their own fashion, undermined the totality of the self-sovereigned, autonomous "man" with independent capacities of conscious reason and intentional self-will.
[24] Lyotard, above n 6, at 11.

meaning and understanding. Hence, rights are not the rights of autonomous capacities of being, but rather, a continuous inter-play of socio-historical and linguistic signification — a multiplicity of socio-political content and possibility.[25]

In this way, in opposition to the image of the abstract, self-contained "truth" of human identity, and its autonomous, reasoned rights, within the meta-narrative of our contemporary human rights' discourse, postmodernism places the subject back into its socio-historical context. It examines the local, micro-levels of society and the subject, language and interpretation, in which this inter-activity with this contextual alterity of otherness is experienced and expressed, offering a multiplicity of potentiality and possibility of meaning for identity and rights.[26] One postmodern technique employed is Foucault's discursive archaeology and socio-historical genealogy. Following on from Marx, such analytical techniques into subject formation and history, power and knowledge, reveal the concept of the autonomous individual and liberal human rights as an internal contradiction. Contrasted against the abstract qualities of reasoned and autonomous rights, at the particular local level of actuality of human experience, the regulatory principle of the universal individual-self has facilitated the empowerment of *a certain permutation of contingency*. With such analytical techniques one uncovers *a certain contrivance of critical power* of what conception of identity and which notion of right has what value and degree of equality:

> A freedom in which everyone, in which every individual is the equal of every other individual, this freedom-equality combination can, in reality, only be

[25] Herbert, G. *A Philosophical History of Rights* Transaction Publishers, New Brunswick, (2003), at 335.
[26] Hebdige, D. 'Postmodernism and the Other Side.' *Journal of Communication.* (1986), Vol. 10, No. 2, 78-97, at 90.

> something that has no force and no content … The weakness of this freedom is such that, precisely because it is abstract, fictive freedom with no real content, it will inevitably be defeated by the historical force of a freedom that functions as non-equality … The egalitarian law of nature [natural, innate rights and freedoms] is weaker than the non-egalitarian law of history.[27]

The ideality of the transcendental signifier of the so-called autonomous man, the meta-narrative of the universality of equal identity and rights, has *covered-over* the *non-egalitarian law* of contextual socio-political experiences. Underneath this abstract veil, at this micro-level of real life, the archaeology of the discourse of rights reveals the empirical reality (the concrete contradiction) of these rationalised human rights. In this reality, there is the reduction, marginalisation and exclusion/silence of distinction and difference (of alterity itself). There is the unequal otherness of gender, sexual orientation, ethnicity, race, etc, which have been denied the full status of "the universal, self-sovereigned man" and the full equality of the value of rights.

From the abstract equality of the reasoned autonomy of all, human rights' talk in reality has been (more often than not) the reserve of dominant socio-political groups within the State. In light of the actuality of the arbitrariness of the discursive contingency of human identity and human rights, how the concept of identity and the content of rights is "fixed" depends less on the innate, natural attributes of human identity, and more on the power/knowledge matrix enforcing particular grand-narratives of knowledge and "truth:" "So we have the triangle: power, right, truth … Truth [is] the limits of power's right."[28] In this light, rights are synonymous with power/sovereignty, not only in the traditional sense of "the conscious powers of and over the individual-self," but also, power to dominate the contingencies of signification:

> From the Middle ages onward, the central role of the theory of right has been to establish the legitimacy of power; the major or central problem around which the theory of right is organised is the problem of sovereignty. To say that the problem of sovereignty is the central problem of right in Western societies means that the essential function of the technique and discourses of right is to dissolve

[27] Foucault, M. *Society Must Be Defended: Lectures at the Collége De France.* (ed. M. Bertani and A. Fontana), Penguin Books, London, (2003), at 157.
[28] Foucault, *Society*, *ibid*, at 24.

> the element of domination in power and to replace that domination, which has to be reduced or masked, with two things: the legitimate rights of the sovereign on the one hand, and the legal obligation to obey on the other … right is an instrument of that domination … but also … right serves as a vehicle for and implements relations that are not relations of sovereignty, but relations of domination … [29]

In the liberal humanist tradition of our contemporary human rights' discourse, this dominance has been enjoyed by the white (European), middle-class (possessive), heterosexual male — the established image of autonomy, reasoned consciousness and intentional and possessive will. And thus, human rights have been the grand-narrative of the freedoms of this image of *"human"* and the presence (the significations) for *"his"* way of being.

Our human rights' discourse is one discursive technique of power. It is not a blunt, coercive power from the State, but rather, a Foucauldian *discursive power* working within/upon the contingencies of the manifolds of power imposed upon the human person, which has *reduced and masked* such domination. Such a discourse reflects and reinforces (with the legitimacy of a transcendental, objective grand-narrative) the interests and ideals of this particular group with socio-political sovereignty and domination.[30] In its presentation of the image of the sovereign individual of autonomous self-capacities, our discourse of human rights has facilitated the human person to be its own surveillance, *its own panopticon of self-disciplinary power of conformity*. In such a role, the human person cognitively accept, without interrogation or critique, the abstract ideal and the universal "truth" of autonomous freedoms (rights), experienced concretely as social political rights and dominated by only certain socio-political groups.[31] Thus, in such a fixed permutation of the contingency of identity and rights — of the discursive inter-play of the history, power, knowledge matrix of rights — we have accepted that some images of human identity (the white, bourgeois, heterosexual male image) can be

[29] Foucault, *Society*, *ibid*, at 26-27.
[30] In many ways, this outcome has been facilitated by modernism and the politics of identity from postmodern struggles of/for difference. I shall discuss this below in the Conclusion of this Chapter.
[31] Foucault, M. *Discipline and Punishment: The Birth of the Prison*. (trans. Alan Sheridan), Vintage/Random House, New York, (1979).

more human than others, some rights can be more right than others and, hence, some people can gain more State protection than others.

Postmodernism undermines such grand-narratives of power and domination by uncovering the traces of the "absent other" — the alterity of the external contingencies of signification — necessary to construct and fix the concepts and content of human identity and human rights.[32] This is done not only through the Foucauldian analysis of power and knowledge, but also through *Derridian deconstruction*. Here, the conceptualisation of identity and rights are placed under *erasure*. They are caught in constant inadequacy and inaccuracy — caught in constant detour, deferring and difference, in the discursive processes of *différance* — amongst endless contingent social, cultural, historical and linguistic chains of signification.[33] Such conceptualisations are revealed in hierarchies of significance and sets of binary oppositions, in which opposing elements work together as *accomplices* — one established presence of meaning relying on the other marginalised and excluded meaning,[34] undermining the unified totality and "truth" of the grand-narrative of our contemporary human rights. What postmodern critical techniques reveal — whether Derridian deconstruction, Foucauldian archaeology and genealogy, Lacanian subjectification or Levinasian proximity — is that there is always an-other which is structurally devalued (the accomplice, the *differend*). In all significations, in all presence of being, in the very logic and structure of traditional *logocentrism*, there is *always already the alterity of an-other*.

Here, in this alterity of otherness, there is (the potential of) an ethic in postmodernism. The postmodern project of justice is to bring these marginalised "others" into the light of consciousness, to highlight their signification — and their silence — in the process of meaning, understanding and knowledge. It is to liberate the *differend* and the de-prioritised *accomplice* subordinated to structural, historical, linguistic and cultural forces

[32] Norris, C. *Deconstruction: Theory and Practice*. Methuen Press, London, (1982), at 84.
[33] Derrida, J. *Of Grammatology*. John Hopkins University Press, Baltimore, (1976). Thus, the meaning and knowledge of the concept of human identity and human rights is just like any other linguistic sign or word, which gains meaning through the interplay between signifier, signified and other external signifiers; Lyotard, above n 6. Refer to Sarup, above n 9, at 35; Haber, above n 17, at 9-43.
[34] Foster, H. *Post-modern Culture*. Pluto Press, London, (1985), at 144.

of "knowledge, power and truth:" "Let us wage war on totality; let us be witness to the unrepresentable; let us activate the differences …"[35] There is always an excluded and silenced "other" animating the significance of concepts and meaning in the grand-narratives of "truth," even in the meaning and understanding of freedom and rights. The justice of postmodernism is to create a space to allow the voice of these others to be heard. It is an *effort towards the alterity of otherness*. The *paganism of postmodernism* is its *loss of faith* in the mono-dimensional significations of grand-narrative truth, knowledge and understanding of/in the individual subject and the world around it. It is to rupture the universality of the "truth" of knowledge and sense, reason and consciousness, with the presentation of the un-represented others and un-reducible difference of alterity.[36] The necessity for this type of justice is *not only* to allow difference to occur for the sake of difference. Equally important, the justice of postmodernism is to bring to consciousness the fact that the other is *not the antithesis of being*, but rather, *the fixed interiority of the actual signification of being*.[37] It is to invoke a communal open justice and ethics amongst people with the cognition that the differences amongst people are they very resonances invigorating the "truth," knowledge and being of identity and self.

Thus, there is no meaning or understanding of human identity and human rights beyond this inter-play of *différance.* Postmodernism counters the fixed concept and content of human identity and human rights by "liberating and re-presenting" the image of the human person as a "Derridian text" — its meaning and interpretation subject to local, external discursive forces of alterity.[38] In this way, identity becomes a "localised, narrative construction" (as opposed to a "universal, established grand-narrative") with limitless potentiality to be re-inscribed and re-described through the infinite inter-play of such discursive forces of *différance*. Thus, there is no inherent, stable "presence" and

---

[35] Lyotard, above n 6, at 82.
[36] Lyotard, *ibid*, at 15-27; Derrida, J. 'Violence and Metaphysics.' *Writing and Difference* (trans. A. Bass), Routledge Press, New York, (1978); Critchley, S. *Ethics of Deconstruction*: *Derrida and Levinas*. Edinburgh University Press, Edinburgh, (1999).
[37] Fitzpatrick, above n 15, at 63-65.
[38] Hall, D. *Subjectivity: The New Critical Idiom.* Routledge Press, New York, (2004), at 5. Although through globalisation, the internet, international communication technologies, etc, these "local forces" now also include locally accessed international forces, multiplying the fragmentation and plurality of subjective identification even more.

"sovereignty" in the signification of human identity and rights fixing meaning and understanding, as expressed in the grand-narrative of our contemporary human rights' discourse and its ontological focus on the presence of being. Rather, the concepts of identity and rights are *up for negotiation, hinging on the inter-relations* with other external significations.

Thus, where the Enlightenment and the tradition of liberal humanism's autonomous individual within the history of our contemporary human rights' discourse *"fear"* the spontaneous person — the person dislodged from idealised self-intentionality and autonomous, reasoned consciousness — postmodernism's *"textual subject"* opens the subject to the potential to escape from repressive notions of singular meaning, knowledge, identity and "truth," enforced through grand narratives of self-reflecting legitimacy.[39] This becomes the *democratic, emancipatory project of postmodern inclusion*[40] — to bring the subject and subjective powers out from the restrictions and limitations of grand-narratives of sovereign, transcendent "truth" and understanding:

> The conclusion would be that the political, ethical, social, philosophical problem of our days is not to try to liberate the individual from the State, and from the State's institutions, but to liberate us both from the State and from the type of individualisation linked to the State. We have to promote new forms of subjectivity through the refusal of this kind of individuality that has been imposed on us for several centuries.[41]

Postmodern identity theory becomes an *expression of personal aesthetics*,[42] a *collage* built up over the contingent inter-play of discursive significations. And hence, human rights are the expression of such personal subjectifications, rather than of individual sovereign powers:

---

[39] Hall, *ibid*, at 78 & 100.
[40] Hebdige, above n 26, at 90.
[41] Foucault, M. *Power: Essential Works of Foucault, 1954-1983 Vol. 3* (ed. D. Faubion, trans. R. Hurley, *et al*), The New Press, New York, (2000), at 336.
[42] "From the idea that the self is not given to us, I think that there is only one practical consequence: we have to learn to create ourselves as a work of art." Foucault, M. 'On the Genealogy of Ethics: An Overview of Works in Progress.' *The Foucault Reader*. (ed. P. Rabinow), Pantheon Press, New York, (1984), at 351.

> … it is not towards the ancient right of sovereignty that one should turn, but towards the possibility of a new form of right, one which must indeed be anti-disciplinarian, but at the same time liberated from the principle of sovereignty.[43]

In this way, in the postmodern era of human rights, human identity — one's set of traits and belief, one's personality — *ineradicably coincides with human subjectivity* — one's degree of thought and one's agency.[44] In the postmodern age, identity is now synonymous with subjectivity and the understanding, exercises and activisms of human rights (in the West, at least) have become a discourse in which we understand and express the capacities of our human subjectivity *over* our human identity.

But there is a paradox here in postmodern philosophy. For postmodernism both narrows the autonomy of the abstract individual across a broad range of contextual contingencies, but also, expands human subjectivity into the interplay of this inter-relational discursive otherness. This is the distinction between "individual autonomy" — the illusion of the totality of autonomous, transcendent self-sovereignty, as expressed in the tradition of our contemporary human rights' discourse — and a return to a notion of "subjective agency" — the reduced but "real" capacities of the subject to engage within its local level, contextual contingencies to gain personal signification. In postmodern presentations of human identity there is no longer the abstract ideal of individual automatism, but there are still varying degrees of identificatory choices within the terms of subjectivity across the multiplicity of contextual contingencies:[45]

---

[43] Foucault, M. *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*. Pantheon Press, New York, (1980), at 108.
[44] Hall, above n 38, at 3.
[45] Butler, J. *The Psychic Life of Power: Theories of Identity*. Routledge, London, (1997), at 15-17. In this respect, postmodernism is not *anti*-humanism, it does not defeat the subject of humanism, but rather, offers a potentially transformative *post*-humanist perspective on human identity and subjectivity, liberated from the repression of idealised and abstract "truth" (and the intellectual restrictions of the preceding discourse of structuralism). Generally, there is some confusion surrounding postmodernism and whether or not it is a distinct break from modernism. But postmodernism is not so much *post*-modern — that is, a chronological "coming after" and break from modernism —as it is post-*modern* — that is, an artefact of modernism. In this way, postmodernism can be read as the consequential, later state of modernism. It is post-*modern* as it reflects upon and examines the themes, practices and consequential outcomes of the project of modernism. Refer to Bauman, above n 7, at 1-15; also refer to Best, S. & Kellner, D. *Postmodern Theory: Critical Interrogations*. Guilford Press, London, (1991). In this respect, postmodernism is not the cause of the

> Paradoxically, the re-conceptualisation of identity as an effect, that is, as produced or generated, opens up possibilities of "agency" that are insidiously foreclosed by positions that take identity categories as foundational and fixed. For identity to be an effective means that it is neither fatally determined nor fully artificial and arbitrary … Construction is not opposed to agency; it is the necessary sense of agency, the very terms in which agency is articulated and becomes culturally intelligible.[46]

It is in these spaces of signification, in the liminal spaces on the threshold of signification and presence of being, where postmodernism grounds political activism and potential emancipation. Here, postmodern identity politics exploits the possibility of resistance within the discursive networks of constituting subjectivity. It is this notion of subjective agency of one's selfhood which is the "illusive goal" for/in postmodern thinking and activism, even when such agency is understood as thoroughly compromised by its contextual contingency.[47] By uncovering the experience of social reality as being intimately tied to its linguistic and discursive contextuality which invokes its signification, postmodernism uncovers the gaps, contradictions and limits of such significations and the terrain upon which new, diverse and other significations can take root.[48] This is politics based upon shifting affinities, in which there is a conscious effort to dissolve the traditional image of the Western individual-self into the interests of the

---

West's "ills" (the ethical crisis) of late twentieth and early twenty first century, which are often attributed to postmodernism, but rather, a testament to modernism and the centrality of "self" in individualist, liberal humanism. The reformulation of dominant social practices in Western ethics and rights over the last sixty years, to the point where such practices are expressions of superficial, personal subjectivity, is the consequence of the centrality of such a concept of self. Postmodernisms did not invent the centrality of the individual and the multiple subject. As outlined in the previous chapter, the sovereignty of self and the split subject of private and public demands and rights were instigated by the tradition of individualism which has fed into our contemporary human rights' discourse. The fragmented subject in postmodernism is actually the radicalised split subject of modernism (refer to Bauman, above n 7, at 16-21). This is the "emancipation" of postmodernism: modernism marginalised and excluded other voices of differences in order to portray an image, a grand-narrative, of stability and certainty. But those voices of otherness were always there, silenced but, nonetheless, always there.

[46] Butler, J. *Gender, Trouble: Feminism and the Subversion of Identity*. Routledge, New York, (1999), at 147-49.

[47] Hall, above n 38, at 77. I shall further outline this postmodern politics of "identity and inclusion" in Chapter Five: *'The Mediation of Ethical Desire through Identity and Human Rights,'* in which I discuss the debate between Butler and Žižek on the subject of the potential of Lacan's ethics of desire.

[48] Cornell, D. *Transformations: Recollective Imagination and Sexual Difference*. Routledge Press, New York, at 143.

subject.[49] In this light, a re-conceptualised understanding of human rights becomes a *praxis* of agency, a performative expression of subjectivity amongst the concrete contingencies of otherness.[50]

The Power of Right in Contemporary Human Rights

From such postmodern deliberations upon the formation of the conceptualisation of human identity and the notion of rights invoked by such an identity, I wish to review more closely the signification of human identity and human rights in our contemporary human rights' discourse. My aim here is, from the postmodern perspective outlined above, to deconstruct the central founding fulcrums of our contemporary human rights' discourse and highlight their fundamental weaknesses. From this deconstruction I wish then to argue for the need of a more current postmodern perspective on human identity and rights, as presented by Lacan and Levinas in Part A and Part B of this dissertation.

The most significant international expression and articulation of our contemporary understanding of human rights is found within the United Nations' (*UN*) Universal Declaration of Human Rights (*UDHR*), proclaimed in December 1948.[51] There are two broad inter-relating sections within the *UDHR*: the introductory Preamble which expresses the signification of certain assumed qualities of human identity; and the

[49] Laclau, E & Mouffe, C. *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics*. Verso, London, (1985), at 157.
[50] Butler, 1997, above 45, at 15-17.
[51] As a Proclamation, the *UDHR* has no legal force (until ratified by the Parliament of a Nation-State). At the time of its proclamation 48 States voted for its adoption while eight States abstained, including: Saudi Arabia; South Africa; and six members of the Eastern Europe and the former U.S.S.R block. Saudi Arabia abstained on cultural relativist grounds; South Africa was still under minority European (white) rule *viz-a-viz Apartheid*; and the six Eastern European countries reflected the contemporary geo-political/cold war discourse. The U.S.S.R also objected to the fact that the *UDHR* did not cite Nazism and fascism as human rights' violations. Refer to Leary, V.A. 'The Effects of Western Perspectives on International Human Rights.' (ed. A. An-Naim and F.M. Deng), *Human Rights in Africa: Cross Cultural Perspectives*. The Brookings Institution, Washington DC, (1990), at 24. These six Eastern European countries did eventually accept the *UDHR* in 1975, in the Final Act of the Conference on Security & Cooperation in Europe (Helsinki 1975). It should be noted that since its adoption in 1948, many commentators have argued that the *UDHR* now forms part of International Customary Law. Refer to Sohn, L. 'The New International Law: Protection of the Rights of Individuals rather than States.' *American University Law Review.* (1982), Vol. 32, 1-16; Kaladharan Nayar, M.G. 'Introduction: Human Rights: The United Nations and the United States Foreign Policy.' *Harvard International Law Journal.* (1978), Vol. 19, 813-7; 'Montreal Statement of the Assembly for Human Rights,' 22-27 March, 1968, Journal of the International Commission of Jurists, (1968), Vol. 94.

proceeding list of some 30 Articles (*Art.*), which encapsulate primarily civil and political rights of the citizen-subject in relation the State. The influence of Western philosophy and history upon such rights (from the English *Magna Carta*, 1225; the English Bill of Rights, 1689; the American Declaration of Independence, 1776; and the French Revolution's Declaration of the Rights of Man and of the Citizen, 1789;) is obvious in the types of rights enumerated, the prioritisation of civil and political rights in the individual's relationship with the State, and the language expressing both these rights themselves and the aspirations of such rights.[52]

The conceptualisation of human identity within the *UDHR* is expressed within the Preamble and *Art.* 1:[53]

> … the *inherent dignity* and … the *equal and inalienable rights* of all members of the human family [to be] the *foundation of freedom, justice and peace* in the world [my emphasis];
>
> Whereas the peoples of the United Nations have in the Charter reaffirmed their *faith* in fundamental human rights, in the *dignity and worth of the human person* and in the *equal rights* of men and women [my emphasis];
>
> ***Art 1:*** All human beings are *born free and equal in dignity and rights*. They are *endowed with reason and conscience* and should act towards one another in a spirit of brotherhood [my emphasis];

Expressed here are the basic qualities of human identity which invoke the very quality and worth of human dignity, and which give us equal access to the inalienable human rights listed in the Articles of rights that follow. These are the (universal) natural endowments of humanity which justify and legitimise both of our rights' claims and also the contemporary conception of rights which we are claiming.[54] Here is the expression of the symmetrical sociality of the Same – the homogenous collective of alter-egos endowed with the same natural and universal traits, within the brotherhood of humanity.

---

[52] For example, *Arts.* 3, 6, 7, 9, 10, 11, 12, 13, 14 and 15 of the *UDHR* all encapsulate themes and language of the four documents mentioned above.
[53] *Art.* 29 is also of great significance, to which I shall refer further in the following pages.
[54] Taylor, C. 'Condition of an Unforced Consensus on Human Rights.' *The East Asia Challenge for Human Rights.* Cambridge University Press, Cambridge, (1999), 124-144, at 125.

And hence, this is a brotherhood in service of the sameness of the self, rather than the alterity of the other.

Within this imagery of human identity captured here are the basic characteristics of the human being and the sociality of the same as presented by the liberal projects of humanism and modernism emerging out of the Enlightenment, in which each individual possesses their own (equal) autonomous attributes of reasoned freedom and moral conscience. This is the image of "reason" as the exercise of calculation for self-interest, "freedom" as the exercise of "self-will," and "moral conscience" — the "dignity and worth" of human identity — as the outcome of these exercises of reasoned self consciousness and intentional self-will. This identity is filled with the signification of the individual with autonomy to its own moral conscience and its own moral end, the autonomy of its reasoned rights. This is the signification of a political liberty, as expressed in the history of the Enlightenment and the traditions of liberal humanism and liberal rights, free from external interference, to make the effort towards one's own moral potentiality without obstacle.

It is in this way that our contemporary human rights' discourse contains a philosophy of right which coincides with the particular philosophy of being expressed in the Enlightenment and railed against by postmodernism (and previous communitarians such as Marx). Human rights are the consolidation of a certain concept of the autonomy of humanity and its nature of being.[55] Here, in the *UDHR* is the expression of a philosophy of liberal individualism and the ethic towards the autonomous bearer of rights and their exercises of being. Here is the signification of the isolated (alienated) and abstracted individual, outside its contingent contextuality of concrete existence and its affective impact on human identity. The brotherhood of the human family within the *UDHR* is a community of equal avatars, with the same abstract and alienating traits. The aim of the *UDHR* is to preserve the ethical integrity of these self-sovereigned powers of each

[55] Fitzpatrick, above n 15, at 189.

individual in community with the other, flowing from the equal capacities of autonomous, reasoned consciousness and self-will.[56] As Lefort suggest:

> The rights of man appear as those of individuals, individuals appear as so many little independent sovereigns, each reigning over his private world, like so many micro-entities, separated off from the social whole. But this representation destroys another: that of a totality which transcends its parts. It discloses a transversal dimension of social relations, relations of which individuals are only the terms, but which confer on those individuals their identity, just as much as they are produced by them.[57]

In this image of the self-sovereigned capacities of autonomous being, there is the self-reflexivity inherited from the Enlightenment's image of the natural rights of man. There is a transparent circle of the Same as expressed in Kantian reasoned morality, which extends from self to other but returns to self — the individual as the *logocentrism* of its own self-determination and self-realisation for its own ontological presence of being. Thus, like Kant's moral reason, the individual of our contemporary human rights' discourse is its own a moral agent, an existent of/in moral isolation within a community (a brotherhood) of the Same.[58] The (moral) dignity of this individual, the very "worth of the human person" expressed in the *UDHR*, is found in this self-determination and autonomous effort of being.[59]

The character of rights invoked by this concept of human identity also reflects the nature of this autonomous, self-centred individualism. These are subjective, possessive rights belonging to the subject individually, like property itself — ontological rights invoked by the individual's essential attributes, unmediated by contingent circumstances.[60] Such rights are a signification of the individual's autonomous capacity to control, possess and

---

[56] Shestack, above n 3, at 9.
[57] Lefort, C. *Political Form of Modern Society, Bureaucracy, Democracy, Totalitarianism* (ed. J.B. Thompson), Polity Press, Cambridge, (1986), at 257.
[58] Bauman, above n 7, at 81-85.
[59] Taylor, *Politics*, above n 1, at 24.
[60] Gordon, J. 'The Concept of Human Rights: The History and Meaning of its Politicization.' *Brooke Journal of International Law*. (1997-1998), Vol. 23, No. 3, 691-791, at 721-28. Note, some commentators such as Roth, refer to such rights as *de-ontological*. But here they are referring to rights as attached to the "abstract and metaphysical" traits of human identity already described above. Refer to Roth, above n 5, at 44-45.

propel itself, to have rights of and over its own potency and powers.[61] Such a conception of human rights is the very signification of the potentiality and potency of self-actualisation, immune from external affectivity.[62] These are personal rights marking personal boundaries of who we are, as self-determined presence of being, the coincidence of personal identity and right, philosophy and law, and law of right. To this extent, such personal rights lead to a law of rights which are 'ends orientated' — whose aim is to ensure the social space for the moral potential in each autonomous individual, the right to justify ethical considerations from the point of view of each autonomously reasoned and willed individual.[63]

It is with such innate and natural qualities of autonomous reason and intentional self-will, such markers of the 'true essence' of human identity shared amongst all individuals, that the *UDHR*, that our contemporary human rights' discourse, speaks as the grand-narrative of human identity and human rights. Hence, there is the universality regarding this image of human individuality and its rights within such a discourse. As Douzinas suggests:

> … there is a universal essence of man and this essence is the attribute of each individual who is the real subject. As species existence, man appears without differentiation or distinction in his nakedness and simplicity, united with all others in an empty nature deprived of substantive characteristics except for his free will, reason and soul — the universal elements of human essence.[64]

Through the characteristics of autonomous reason and intentional will, this image of individualism and personal rights is presented as value free and objective.[65] This image of the individual resides in a neutral place of being, and presents as the "true" marker of human identity and human rights. It is abstracted beyond the empirical experiences of

[61] Taylor, *Conditions*, above n 54, at 2.
[62] Kunstler, B. 'Beyond the Illusion of Human Rights.' *Journal for Pedagogy, Pluralism and Practice.* (Fall 1999), Issue 4, Vol. 1, (www.lesley.edu/journals/jppp/4/kunstler), accessed 20/10/2007, at 7.
[63] Roth, above n 5, at 52-53.
[64] Douzinas, C. 'The End(s) of Human Rights.' *Melbourne University Law Review*. (2002), Vol. 26, No. 2, at 451.
[65] Papastergiadis, above n 8, at 146.

the material world and the contingencies of otherness, with the moral potentiality of unmediated and universal meaning, understanding and knowledge.[66]

This is most clearly reflected in *Art. 2* of the *UDHR*, which excludes all natural qualities, empirical distinctions and actual markers of concrete human beings and human life:

> ***Art 2:*** Everyone is *entitled to all the rights and freedoms* set forth in this Declaration, *without distinction of any kind*, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status [my emphasis].

In this way, this meta-narrative of human identity and human rights excludes all particularism and becomes somewhat vacuous and negative — not tied to a clear concrete content or substance, but rather, only the ideal potentiality of the reasoned and willed effort of being.[67] Here is the illusory quality of such a grand-narrative of rights, for, as Marx highlighted, such abstract autonomy leaves the ethical ends of moral conscience vacant of any empirical substance. Hence the ends of this grand-narrative of "objective truth" lose their moral integrity and become totalised by their own *means* and self-interest — the exercises of autonomous individualism, the function of individual reasoned rights.[68] Caught up in its own self-reflexive legitimacy, the *UDHR* becomes impotent, for these ethereal "egalitarian laws of innate rights and freedoms are weaker than the non-egalitarian law of history."[69] Such human rights are not the empirical protection of the concrete individual, but rather, as understood by Burke, Bentham and

---

[66] Davies, M. *Asking the Law Question: the Dissolution of Legal Theory.* The Lawbook Co, Sydney, 2002, at 318-19. It is important to remember that this individual was generally not considered by modernist philosophy as an "actual being." Rather, this individual was the Enlightenment's utopian promise — the potential and promise in each human person who, if they engaged their free will and exercised their reason, *could* guide themselves (and through this, the human community) to the ideal of liberal, democratic existence. Thus, this individual was the "idealism of the essence of man." Refer to Douzinas, 2002, *op cit*, at 465.

[67] Fitzpatrick, above n 15, at 209.

[68] Bauman, above n 7, at 223-25. Generally speaking, this focus on "means" is another key characteristic of modernism. Modern societies tend to focus on the "means" of something and the measurement of these means — efficiency, utility, technological advancement, etc, — for the purpose of increasing man's "capacity of doing," and, hence, lose sight of the "ends." In this respect, modernism is the opposite of the Classical and pre-modern world — in modernism, there is a common theme of the "means justifying the end," whereas in the Classical and pre-modern worlds the "ends" justified the "means." Refer to Bauman, above n 7, at Ch. 7.

[69] Foucault, *Society*, above n 27, at 157.

Marx, the expression of an abstract moral aim and the justification for a certain identity and a certain right.

Here most clearly is the mark of the split subject within the *UDHR*[70] — the cleft between the universal and the practical, the abstract and the empirical, the singular and the community, autonomy and contingency, internalised sameness and externalised otherness. This identity of human individuality encapsulates the potency of signification from the position of the transcendental signifier — an autonomous totality of self, a "consensus of one" — beyond contextual history and subjective inclinations. It is this totality of self-reflexivity within the *UDHR* which attempts to conceal its own arbitrariness, its own power/knowledge matrix and the domination and sovereignty over certain permutations of socio-historical discursive contingencies of meaning and significations. It is in this presented stability of totality that the signification of human identity and human rights conceals its own internalised processes of *différance* of cultural, socio-historical and linguistic otherness working as *hidden accomplice* to the concept of identity and the meaning of rights. Here the "real human subject" of contingent, concrete human experience is the marginalised otherness, through which the concepts of the autonomous human identity and its abstract rights gain further legitimacy and prioritisation within the *UDHR* and our contemporary human rights' discourse.

At this level, with the prioritisation of this image of the autonomous individual within the introductory Preamble of the *UDHR*, this self-willed identity and these rights of autonomous reason are presented as pre-social and enter community (the brotherhood of the human family) pre-founded. It possesses an essence which precedes community and, through which, it can attain an objective truth about itself, beyond its concrete communal and empirical existence and experiences.[71] Both the individual and its rights are neutral avatars of reasoned consciousness, intentional self-will and autonomous moral potentiality. Yet this is a community of alter-egos, a community of the Same — of other monadic individuals of equal abstract capacities of self-sovereigned and self-determined

[70] Fryer, above n 20, at 11.
[71] Otto, above n 2, at 5.

potentiality.[72] The (Kantian) fallacy of our contemporary human rights' discourse is that somehow such atomised and individualistic autonomous beings exercise their equal capacities of moral potentiality in a similar fashion, to reach a similar moral and ethical truth regarding good and bad, right and wrong. This is the utopian aspiration offered within our contemporary human rights' discourse and expressed in the *UDHR*. That is, that through these individualistic exercises of right, through this universality of autonomous reason and intentional self-will, there is a teleological end of harmonious unity, a brotherhood of the human family in freedom, justice and peace (Preamble, paragraph 1; *Art.* 1; *UDHR).* This is the very 'act of faith' referred to in the *UDHR's* Preamble (paragraph 5) — that with such abstract exercises of reasoned consciousness and intentional will such a moral *potentia* of human existence may arise.

It is, in fact, this moral potentiality which is the common defence of our contemporary human rights, against the criticisms from communitarianism and postmodern philosophies. Such rights are defended as statements of aspiration; that the *UDHR* is an expression of an ideal goal — a future vision aspiring humanity to what humanity *"ought to be."* This goal is won for and through the self-centred individual of autonomous self-determining capacity, and by this, moves humanity away from the barbarism of concrete existence (invoked in paragraph 2, Preamble, *UDHR*) and towards the utopian 'brotherhood of freedom, justice and peace within the human family.' It is in this gap between the ideal and the empirical, in this split between the transcendental individual and "its-other-self" of concrete being, where it is hoped that human rights develop and moral conscience "does its work."[73] This is the gap where "law" takes the place of ethics in the hope of mediating between an ideal thought of self and the empirical experience of self. Yet in a very real and unfortunate sense, this gap within our discourse of rights is the terrain of no man's land in which any and all human subjects are always potentially caught and lost in the cross fire of the struggle between present and future, reality and aspiration. And it is in this gap where the realities of human subjects are either left in or

[72] Fryer, above n 20, at 11.
[73] Douzinas, 2000, above n 5, at 95-100; Bauman, above n 7, at 28.

left out of the symbolisations and gesticulations of human rights' talks and human rights' claims.

And by de-prioritising the concreteness of human existence, the *UDHR's* aspirations ignore its own contextual realities. The *UDHR* itself was born out of the outrage of conscience (the moral outrage) provoked by the barbarous acts of World War II *(*Preamble, paragraph 2). That we need laws to regulate and restrict individual behaviour in an attempt to restrict such barbarism contradicts the very notion of our individual reasoned capacities and moral *potentia.* The morality of our capacities of reasoned consciousness and intentional self-will is further undermined by the fact that despite the decades of reasoned rights, human barbarism continues:

> Our era has witnessed more violations of their [human rights'] principles than any of the previous and less "enlightened" epochs. The twentieth century was the centre of massacre, genocide, ethnic cleansing — the age of the Holocaust. At no point in human history has there been a greater gap between rich and poor … never before, in absolute terms, have so many men, women and children been subjugated, starved or exterminated.[74]

There seems little historical evidence that the individual protagonist of human rights and autonomous moral *potentia* in actuality exists. Rather, all too often, reason is employed to rationalise and justify the barbaric.

But it is *this* individual — this pre-founded, self-transcendent, Kantian image — who is sutured into community with the unifying (universal) strands of rational common sense, expressed in the laws, the codes and the Articles of human rights. It is in the penultimate

[74] Douzinas, 2002, above n 64, at 446.

Article, *Art.* 29(1), where the *UDHR* begins (and ends) to talk about the individual in community and its capacities and rights in relation to community:

> (1) Everyone has duties to the community in which alone the free and full development of his personality is possible.
> (2) In the exercise of his rights and freedom, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect of the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Here is the Kantian notion of rights being the limitations of the monadic individual's freedom in mutual recognition of others; a Kantian imagery of co-existent freedom amongst equal capacities of "will to will." In this narrowed sense, the abstract rights of the autonomous being gain the content (are fixed in conceptualisation) of an individual rights bearer's State sanctioned inter-subjective relations, in which free and equal individuals (autonomous and atomised citizen-subjects) are drawn together through mutual recognition under a protective and regulatory politico-legal system.[75] The image of the abstract, autonomous individual transforms into the community of citizen-subjects, with the equal liberties of civil and political rights. This is the signification of the democratic public square within our contemporary human rights' discourse, in which all commune as equal citizen-subjects and bear equal citizen liberties limited by the law, for all, in the inter-subjectivity of all.[76]

It is in this exercise of suturing the split subject — of re-joining the abstract individual back into the sociality of political community under the State — where the second broad section within the *UDHR* comes into play. This is the list of Articles of civil and political rights which proceed from the first section, the introductory Preamble and its expression of abstract human identity. Here, the sociality of community offered to the atomised and

---

[75] Habermas, J. 'Struggles for Recognition in the Democratic Constitutional State.' *Multiculturalism: Examining the Politics of Recognition* (ed. A. Gutyman) Princeton University Press, Princeton, (1994), 107-148, at 121.

[76] Habermas, *ibid*, at 128-129. Also note here how this responsibility for-the-other is also limited to a "duty:" that is, a politico-legal obligation, and not given the "full weight" of an ethical, moral responsibility. I discuss this further in the following pages of this chapter and further in Chapter Seven, when discussing how such rights limit ethics to politics and law.

autonomous possessor of individualistic identity and rights is a political sociality. This is a community — a commonality — of liberal citizen-subject identities of equal rights under the State, for only the State can offer the context of sociality in which the autonomous capacity of individual moral potential can flourish.[77] Here the split subject of our contemporary human rights' discourse runs along the Kantian fault lines of personal, internalised, autonomous life and rights, and external, political communal life and rights. In this balance between the split subject — the image of individual, abstract, moral potential, and the subject in concrete, communal/political existence — the laws of human rights, the Articles of the *UDHR*, reflect the qualities of prohibitive rights: rights against the State not to interfere with the liberties of the citizen and the expression of the abstract *potentia* of the individual.[78]

This primacy of civil and political rights is not only evinced within the *UDHR*, but also, runs throughout our contemporary human rights' discourse generally, as seen in the hierarchical structure of the generations of rights.[79] There are four other main International Conventions proclaiming "other" human rights:

---

[77] Here, as within Kant's meditations on rights, and as highlighted by Marx, human rights become the moral foundation of the political State as it is only the State which can promote the conditions necessary for the harmonious unfolding of the reasoned individual. Refer to Shestack, above n 3, at 209.

[78] Roth, above n 5, at 44-45.

[79] The term "generation of rights" in relation to our contemporary international human rights' discourse seems to have been first used by Manuel, G. & Polsins. J. *The Fourth World: An Indian Reality*. Collier-Macmillan, Ontario, Canada, (1974). However, the genealogy of the term dates back to the late 1940s and early 1950s and the works of T H Marshall on the development of (and relationship between) citizenship, rights and social class. Marshall argues that citizenship develops from civil to political and then social rights (a development of citizenship which runs parallel to the development of the idea of rights from the eighteenth, to the nineteenth and then into the twentieth centuries, respectively). He argues that a citizen is only a full citizen when in possession of all three categories of rights. Refer to Marshall, T.H. and Bottomore, T. *Citizenship and Social Class*. Pluto Press, New York, (1992). Marshall argues the case for the early twentieth century welfare State (a State which, over the later years of the twentieth century and early years of the twenty-first century, has been undermined by the resurgence of political neo-conservatism, local liberal consumerism and global capitalism). For Marshall (as with other welfare State supporters), the State plays a key role in the protection and promotion of the economic and social well-being of its citizens — based upon the principles of equality of opportunity, equitable distribution of wealth and public responsibility for marginalised members in the community. I would argue that these key aims of the welfare State are what Levinas's ethics of alterity and responsibility for-the-other encapsulates in the socio-political (politico-legal) invocation of critical democracy in service of an ethical-justice of open deliberation, dialogue and distribution. I shall discuss this further in the last two sections of Chapter Eight: 'The Good State: Deliberative Democracy, Critical Justice and Ethical Alterity;' and 'Deconstruction in the Decision: the Provocation of Rights in the Judgement of Law and Delivery of Justice.'

(i) The *International Covenant on Civil and Political Rights* (*ICCPR*) adopted by the General Assembly (*GA*) in Res 2200A (XXI) on the 16th December 1966, entered into forced on the 23rd March 1976 – the 'first generation of rights"' along with the UDHR;

(ii) The *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*), adopted by the *GA* in Res 22200A (XXI) on the 16th December 1966, entered into force on 3rd January 1976 — the 'second generation of rights;'

(iii) The *Declaration on the Right to Development* (*DRD*), adopted by the *GA* in Res 41/128 on the 4th December 1986, with 148 votes in favour, eight abstentions and one vote against (the USA) — the 'third generation of rights;'

(iv) The *Declaration on the Rights of Indigenous People* (*DRIP*), adopted by the *GA* in Res 61/295 on the 13th September 2007 — the 'fourth generation of rights.'

The hierarchical structure of these generations of rights represents a de-prioritisation of rights — from first generation to fourth generation. These generations of rights are an obvious signification of *différance*, the inter-play of marginalised otherness, in which civil and political rights gain further legitimacy of their prioritised presence, through the de-prioritisation of the other of human rights. This *différance* is also evinced in the recent (2009-2010) Australian debate over the introduction of a Federal *Human Rights Act* (*HRA*). In both the Advisory Report's recommendation and public defences of the *HRA* there is an automatic (assumed and unquestioning) inter-change of human rights language with the lexicon of civil and political rights.[80] Significantly, the Report recommends that the only enforceable human rights for the proposed *HRA* be civil and political rights. Other so-called "rights," (the "other" generations of rights, the *differend* and *accomplice* of the signification of human rights as civil and political rights) such as

[80] The National Human Rights Consultation, led by Professor Frank Brennan (the Brennan Report), received over 35,000 public submissions on this question and recommended to the Australian Federal Parliament a model of national human rights legislation, the *Human Rights Act* (*HRA*). The aim of the legislation is to review decisions made by Federal government authorities (Federal Ministers and departments) and other pieces of Commonwealth Parliamentary legislation, to ensure that they do not breach the human rights listed within the *HRA*. The Report recommends the model established in the United Kingdom and New Zealand: firstly, to create a *HRA*, with a pre-set list of human rights to be protected; secondly, to establish appropriate Court powers to hear human rights' complaints regarding reviewable decisions and legislation under the *HRA*; thirdly, on hearing the complaint the Court would make recommendations to the government or Parliament regarding the decision or piece of legislation in question for the government's/Parliament's consideration. Refer to The Brennan Report, (http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report), accessed 20/07/10, and Kirby, M. 'Human Rights Protection in Australia: Why Not?' *Murdoch University, Annual Human Rights Forum*, inaugural lecture. (www.murdooch.edu.au/document./PDF-Document/SPEECH_MURDOCH_MDK_HUMAN_RIGHTS_FORUM_21_10_09), accessed 20/7/10.

economic and social rights, are expressly excluded as human rights, "left to the discretion of the State," leaving the otherness of more concrete rights on the margins.

But such a postmodern reading of the *UDHR* and our contemporary human rights' discourse also reveals how these hierarchies of signification of identity and rights, of abstraction and contingencies, present rights as negative socio-political duties. These are rights of restriction against interference with the ideal of autonomous moral conscience which marks the identity of the individual-self.[81] To this extent, our contemporary human rights' discourse expresses the legal minimum of rights shared amongst equal citizen-subjects — the lowest common denominator of State duty to concrete human beings in their divergent daily lives. Human rights have become the bare minimum of tolerance and responsibility, of State to citizen and citizen to citizen — the least burdensome of legal duties and rights to allow the maximum space in the social square for the autonomous individual to exercise their reasoned, moral conscience.[82] The other is accepted to the point of "least intrusivity," which makes the other not really "the other," but rather, an other measured within the limits of self. My duty, within our contemporary human rights' discourse is to not intrude on the other, is to "not get too close" to the other, only in as much as such a posture protects me from the intrusion of the other.[83]

In this way, such rights are passionless and indifferent. That is, the rights and duties within the community of mutual recognition under State regulated laws are passive rights and duties, remaining (in the first instance) passive to the empirical existence of the subject and the contingencies of their experiences.[84] Positive rights and positive duties against the State — the rights and duties to oblige the State to take positive steps towards the actuality of the circumstances of people — become a secondary afterthought within our contemporary human rights' claims. And the self-sovereigned individual's consideration for others is left to the exercise of reasoned autonomy and personal moral

[81] Roth, above n 5, at 46.
[82] Gaita, R. *Good and Evil: An Absolute Conception* Routledge Press, London, (1991), at 46.
[83] Žižek, S. 'Against Human Rights.' *New Left Review*. (July-Aug 2005), Vol. 34, 115-131, at 120.
[84] Roth, above n 5, at 46.

conscience and choice. Responsibility for others is a 'personal liberty' of the citizen, to exercise or not as they see fit, guided by their autonomous moral conscience. Illustrations are infinite:

- Freedom of speech (*Art.* 19, *UDHR*) may be an equal right amongst equal citizen-subjects, but in reality there is nothing equal about my right to hold an opinion and have a voice contrasted against the power and influence of Rupert Murdoch;

- Equality before the law (*Art.* 7, *UDHR*) may encourage a blind justice to subjective distinctions, but it fails to acknowledge the advantage that money buys in expensive court proceedings;

- The State may breach my human rights by denying me ownership of property (Art. 17, *UDHR*) or denying me the right to vote for representative government (Art. 21, *UDHR*), but no one's human rights are violated when a child dies from lack of medication or a teenage is illiterate and will never find gainful employment.

Paradoxically, the right to concrete human existence — the right of an individual to the necessities of food, shelter and income, the right against the State to take positive steps in empirical human actuality (rights encapsulated within the generation of economic and social rights) — are de-prioritised against the primacy of the civil and political rights of the liberal individual, and become luxurious secondary items to the political freedoms of the human identity of autonomous moral potentiality, expressed through the citizen's liberties.[85] The paradox here is that political and civil rights are abstract to life but essential rights, and economic and social rights are actualities to life but non-essential rights.[86]

In deconstructing our contemporary human rights' discourse in this way, what is revealed in the image of rights invoked by the split subject of liberal humanism is a loss of ethical integrity in both the human subject and our human rights. What is lost within the abstract, autonomous individual is the concern for the value and affectivity of such rights in the contingencies of each person's life.[87] Dominated by the Enlightenment's liberal

[85] Gearty, above n 4, at 3.
[86] Gordon, above n 60, at 762.
[87] Roth, above n 5, at 56.

philosophy of being, our contemporary conceptualisation of human rights are "de-ethicized"[88] and lack a "philosophy of ethics" which speaks to the actuality of social existence, beyond the minimum standards of political duties and legal tolerance outlined above. It is here where our contemporary human rights' discourse loses its socio-ethical integrity, where justice and ethics are reduced to rational calculations of the politico-legal.

With this fixation on the autonomous individual-self, human rights have facilitated an alienating cut of inter-connective bonds amongst community, which once were so paramount in pre-modern, natural law and sociality.[89] Our contemporary conceptualisation of human rights does not encourage a "virtuous life" amongst others in community. Rather, our modern rights' discourse emboldens the dignity of the individual's autonomous effort in the power and control over self. In this way, these are rights more concerned with the "choices" of individuals, rather than the "needs" of daily existence. A sense of human responsibility towards each other and the needs of each other in the contingencies of existence are only marginal within our contemporary human rights' discourse. Rather, such rights emphasize the capacity of an individual to be responsible for itself, of a citizen to be concerned with its own liberties from the State — to employ its own reasoned and willed moral conscience in its own efforts of being.[90]

Conclusion

From the historical shifts from the pre-modern to the modern and then onto our contemporary postmodern age, one thing which links the rights meditations from Hobbes through to Kant and into our contemporary human rights' discourse is *fear*. This is a fear of the unreasoned human experience, fear of natural man or the sociability of man without the discipline of self-conscious reason and intentional will. It is this fear which drives the natural rights thesis and our contemporary human rights to a fixation on the ontology of self, but a certain, transparent, self-reflexive self beyond the contingency of

[88] Douzinas, C. Goodrich, P. Hachamovitch, Y. *Politics, Postmodernity and Critical Legal Studies: The Legality of the Contingent.* Routledge, London, (1994), at 18-20.
[89] Kunstler, above n 62, at 6.
[90] Bauman, above n 7, at 53-61.

externality. This presents an identity of humanity at the centre of itself — the *logocentrism* of the autonomous self-sovereigned individual — which our contemporary human rights' discourse has inherited through the tradition of liberal humanism, from the age of the Enlightenment. For Kant, it is the universality of this capacity of power of and over self which is the "reasoned morality" of the "story of man" — and which has become the "universal dignity of humanity" in today's human rights.

Hence, human rights are an extension of a certain conception of human identity which extends from Hobbes and Locke, and invokes a notion of rights expressed in (limited by) the civil and political liberties of the citizen subject.[91] As previous communitarians have argued, and as current postmodern identity theory highlights, founded in this tradition, our contemporary human rights inherit an image of identity which is split between abstract and actuality. It is in crossing this threshold that form meets content, and autonomous rights take on the signification of negative and prohibitive civil and political liberties in the guise of the citizen-subject against the State. In this context, rights take on the form of prescriptive laws, codes and Articles (as enumerated in the *UDHR*) in order to be immune from political interference in the exercise the reasoned, moral conscience towards the ideal of a 'brotherhood of the human family of freedom, justice, and peace' (as per the *UDHR*) for oneself and for the world.[92]

But crossing this threshold has proven difficult for a discourse of human rights still fixated on an image of autonomous individuality. And in the distance across this threshold, our contemporary human rights' discourse too easily loses sight of a justice and ethics focussed on the service of real life experiences and need, and the value and affective impact of rights on the daily lives of concrete human communities. Fixated on this image of individuality, and remaining too often on the side of the universal and abstract, justice from this human rights' discourse too often is a cause for self-legitimacy, restricted to, and employed to justify, reasoned law, State processes, and the intimacy of

[91] Herbert, above n 25, at 294.
[92] Herbert, *ibid*, at 294.

an empty self.[93] As Douzinas suggests, it is upon this threshold that our contemporary human rights become the terrain of barristers and bureaucrats[94] and the "rationalisations of bloodless bureaucratic violence," against the actuality of people in their daily lives, in the struggle of their empirical plight.[95]

Postmodern identity theory is an attempt to bring the human subject back into its contextual contingency, to liberate personal subjectivity from the alienating universality of the empty homogeneity of the image of the autonomous being. It is an attempt to return to an ethics and justice which is not limited within the self-reflexivity of prescriptive legal norms and abstract ideals, but rather, relevant to the experience of the human condition in community with others. The particularism of the alterity of the human experience — gender, race, ethnicity, etc, the manifolds of the multifarious human condition under the multiplicity of socio-political, historical and linguistic discursive inter-play — have radicalised the *modern split-subject* of rights into the *postmodern fragmented-subject* of aesthetic experiences and expressions. Late twentieth and early twenty first centuries' postmodern identity politics is a contestation over human identity itself, which offers the possibility of moving towards and respecting the other in the alterity of their distinctive otherness, in a unison of difference rather than community of the Same.[96] Since the 1960s, different localised groups, new social movements such as feminism, ethnic and racial rights movements, gay activism, etc, have agitated for the same emancipatory rights once limited to an identity of abstract individualism and restricted for the dominant socio-political group.[97]

But there is a good and bad to this postmodern ethic of subjective agency. Since the mid-twentieth century, in the struggles inspired by the identity politics of difference, different groups and different identities have moved towards equal rights and have animated new forms of human rights. In the West at least, as technology and science expand the

[93] Douzinas, 2000, above n 5, at 194-195.
[94] Douzinas, 2000, *ibid*, at 115-8.
[95] Cornell, D. *The Philosophy of the Limit.* Routledge, New York, (1992), at 157.
[96] Cornell, *ibid*, at 160-170.
[97] Refer to Laclau and Mouffe for an analysis of the new social movements of the postmodern age, and the possible uniting strategy of an organic, expansive, hegemony: Laclau, & Mouffe, above n 49.

boundaries of lifestyle choices and personal desire, rights have expanded as well: rights to IVF treatment; to access stem cell research; to biogenetic technology; to recreation and sport;[98] to euthanasia; etc. What is problematic in this expansion of rights is that the ethics of postmodern difference has too easily formulated human rights into a politics of personal aesthetics and self-love, lacking in a higher (moral) 'ought to' of human behaviour.[99] The fate of human rights fixated upon the modern individual of autonomous capacities, is now confused by and subsumed within a chorus of postmodern private demands.[100] What is at issue in such a chorus of demands is that in this personalisation of rights, in this losing sight of the value of rights across the threshold of ideal and practice, there are some perverse outcomes. For example, the rich North claims for the 'right to die with dignity,' while the poor South still struggles for enough food, water and shelter for the 'right to live with dignity.' The emancipatory promise of postmodernism moves us from stability to diversity, unity to fragmentation, presence to absence, and certainty to ambiguity.[101] It has stressed rights' claims and rights content to new, diverse peoples and ideas. Yet the paradox is that it stresses such plurality while still focusing on localised, subjective agency, causing the current moral crisis of self-interested indifference, ethical ambivalence and personal relativism.[102]

In many ways, this particular strain of postmodern identity politics of inclusivity is a neo-conservatism of subjective superficiality and personal consumption. And in this way it has continued the rights of the Same for the interest in self-promotion of both the individual of/involved in single issue, identity causes.[103] In this respect, such a personal postmodern perspective has *not* led to the transformation of human rights as one might

---

[98] Refer to the International Olympic Committee's (the *IOC's*) *Olympic Charter* and the paragraph entitled 'Fundamental Principles of Olympism', Article 4, where it states playing sport is a human right.
[99] Sarup, above n 9, at 24; Bauman, above n 7, at 237-240; Haber, above n 17, at 89-100.
[100] Douzinas, 2000, above n 5, at 1. Of course, reading post-*modernism* as a consequential conclusion of modernism and its fixation on the individual, this "post-modern fate" has its roots in the historical and ideological shifts introduced by the Enlightenment and humanism which we have discussed before. In this respect, this postmodern state of affairs of ethics and human rights outlined by Douzinas re-affirms and reinforces the structural flaws and problems within modern ethics and our contemporary human rights: namely, the focus on the "possessive/consumptive individual" and the role of the Nation-State to meet and mediate the needs, demands and desires of this individual through the limited capacity of the politico-legal discourse.
[101] Sarup, above n 9, at 41.
[102] Sarup. *ibid*, at 24, 107; Bauman, above n 7, at 16-21.
[103] Sarup, *ibid*, at 154-155.

have hoped. Rather, it has, to some extent, underscored the reality that Marx had uncovered — that those groups with the greatest socio-political sovereignty (like those of us in the liberal West and wealthy North) have the greatest human rights. A postmodernism which has imbued human rights with an expansion of lifestyle choices has only re-cemented the notion that those with the greatest socio-political capacities and skills to organise, promote and voice themselves in the civil and political discourse with the State, have the greatest *largess* of rights — regardless of gender, sexual orientation, ethnicity, race, etc. In this way, these postmodern struggles of political identity can, unfortunately, go to affirm and replicate the hierarchies of signification and power, with the participation in 'equal practices/protections' under the law, reducing the distinction of difference to the established, "One" regulatory principle.[104]

Too often, the outcome of this postmodern politics of identity has been a superficial tension of tolerance of difference, rather than a profound openness towards and engagement with the alterity of difference. This is expressed most clearly in our contemporary human rights' discourse within the cultural relativism debate — in which we see the postmodern discomfort about finding the ethical and moral ground to make judgement upon different human behaviour. Consequently, we still struggle with questions of difference: from the personal — such as child matrimony under the name of "indigenous culture" — to the political — such as the imposition of restrictive government procedures under the name of "Asian values"[105] or "Muslim practices." The postmodern politics of identity and subjective agency have resulted in the (positive) spread of difference and the promotion of the voice of otherness but (negatively) has failed to coalesce an inter-connectivity of difference. Rather, such politics of postmodernism has facilitated an agreement — sometimes a struggle, such as in cultural relativism — amongst differences to the same concept of their "individual and local right," to the same power of their own distinct "autonomous presence of being."

---

[104] Cornell, *Transformations,* above n 48, at 99-100.

[105] Refer Mahathiria, M. *The Malay Dilemma*. Marshall Cavendish Publishers, Malaysia, (2003). Dr Mahathiria was Prime Minister of Malaysia from 1981-2003, during which time he advocated for a human rights sensitive to "Asian values." Specifically for Malaysia, he cited three distinct characteristics which "universal" (Western) human rights should take into account: feudalism; Islam; and *adat* (Malay traditional custom).

What is still missing too often in our contemporary human rights' discourse and our contemporary human rights' practices is the *inter-sociality within and between communities, and subjects and communities*. With the extension of difference (and of rights across difference) facilitated by the struggles of postmodern identity politics, it is difficult now, unwanted now, to go back to the ideality of the ontology of rights — the modern image of the autonomous powers of the presence of being.[106] But in a more radical way, what is missing is a pre-modern ethic of rights and a sensibility toward their value and impact within community, amongst other people. What is too often lacking (or, at the very least, de-prioritised) is a rights' practice with a perspective of and responsibility toward communal affectivity, which re-focuses the idealised individual capacity and interest. This re-turn to a pre-modern sensibility is a reflexive return in postmodern, post-humanist, ethical discourse — one sensitive to the limits (and violence) of pre-modern sociality, but also, aware of the inter-subjective, ethical possibilities. This is the potential of a postmodern ethic of alterity and otherness. This is the possibility of a post-humanism which supports the subject, but with a focus on the liberated, postmodern "other" and not the "self" — a priority of "responsibility" and not "right." This is the ethical challenge of postmodernism (and of alterity) to a tradition of equal rights. A tradition which prioritises symmetry against asymmetry and of all as "the Same" measured against the ideal (but empty) transcendental signifier of human identity. This is the challenge of alterity with a focus upon the concrete affectivity of 'rights of equivalence' (a opposed to 'equal rights'), paying regard to the distinction of empirical experience.[107] This is the possibility of re-imagining human identity as a *subject-in-community*[108] and the potential of placing questions of ethics and justice for-all back into human rights.

To this extent, I wish to explore two possibilities of this ethics of alterity inspired by the postmodern concept of contingency of human identity within its contextual communality. Firstly, I explore Lacan's thesis on human identity and the psychological contingency of

[106] Herbert, above n 25, at 340.
[107] Cornell, *Transformations*, above n 48, at 128-29.
[108] Haber, above n 17, at Ch 4.

the split subject. Lacan's thesis of the split subject highlights the potential dangers in the ideality of the image of human identity and re-focuses such abstraction onto the "other" of the "true human condition" — the *subject-of-lack*. From this analysis of the split subject, Lacan presents an *ethics of desire* — an ethic of impossible return to the ideal, and an acceptance of the contingency of lack. I then go on to explore Levinas's human identity of ethical alterity — the contingency of the proximity of the other in the pre-founding formulation of subject identity. This anterior ethical marking within human identity expresses an asymmetrical, unequal relationship between the subject and other, and inspires the potential of a justice — a human right — in which the self is secondary to the other, and responsibility for-the-other is prior to rights for-the-self.

****

Part A: Lacan's Subject-of-Lack

Chapter Three

The Subject Divided and the Subject of Loss

Introduction

One of the more informative post-discursive interrogations on the contingency of self and the otherness of human identity comes from the meditations of the French psychoanalysis theorist, Jacques Lacan. Lacan's work, more than most in the postmodern discourse,[1] consciously focuses on the issue of subjectivity and the structuration of human identity. Lacan begins his thesis on human identity and subjectivity with Freud's key discover — the unconscious. For Lacan, what makes such a discovery a "Copernican revolution" is its signification as the "uncontrollable other" of human identity, beyond reasoned consciousness and independent intentionality, and yet invoking an affective impact upon the conscious self.[2] But for Lacan, this unconscious other and the psychoanalytic techniques of uncovering its content are not simply the means of pathologising and normalising human behaviour. More than offering a cure of the subject, Lacan sought to explore the unconscious and its content so as to understand the structuration of human identity and the processes in the formation of the subject. From his exploration into this unconscious other, Lacan concludes that it is impossible to have self-sovereignty, that is, conscious control *over* one's own subjectivity[3] — the ideal expressed in the image of human identity presented within the liberal (modernist) tradition of our contemporary human rights' discourse. Rather, Lacan conceptualises the subject and the structure of human identity as an ongoing and shifting 'process of identification,' in which the subject never has total and stable control over itself and its signification.

Here, Lacan's radical contribution to the contingency of subjectivity is to offer a locus of the subject and subjectivity which is neither ontologically essentialist nor metaphysical, but rather, exists as the effects of a lacking — a pre-ontological, unconscious other,

[1] Noting the issues surrounding Lacan's "threshold position" between post-*structuralism* and *post*-structuralism as outlined in the Introduction Chapter of this dissertation.
[2] Lacan, J. *Ecrits: A Selection.* (trans. and ed. A. Sheridan), W.W. Norton, New York, (1977), at 164-175.
[3] Hall, D. *Subjectivity: the New Critical Idiom.* Routledge Press, New York, (2004), at 78.

which is beyond conscious comprehension and calculability.[4] For Lacan, this contingent otherness is expressed as the "subject-of-lack" (the "lack-in-being") in the split subject of unconscious trauma and desires, and conscious experience. It is this Lacanian split subject which counters the split subject presented in the philosophical tradition of our contemporary human rights' discourse. In such a tradition the split is between the ideality of human identity and the concrete existence of human experience, in which the ideality is the potential of moral autonomy, attainable through the self-determined, conscious capacities of independent reason and intentional will. But for Lacan, the ideality of human individuality is the very *effect* of the split subject already residing in the conscious articulations of human identity. The self-sovereigned conscious potential is already compromised by the unconscious other. The self is not autonomous in its conscious capacities, but rather, always already a consequential fantasy (Marx's illusion of self) of the possible resolution of the already split subject's loss, trauma, anxiety and desire.

In this chapter I review Lacan's notion of the split subject and his explication of the unconscious otherness of human identity. I review how this split subject — and contingent human identity — emerges from the three inter-relational realms of psychic human development: the Real, the Imaginary and the Symbolic. Within/through these three inter-connecting realms there are two inter-related splits or cuts in human identity, two inter-connected psychic events in the development of human identity, which compound and reinforce each other in the structuration of the subject.[5] Firstly, there is a split of the Real by the Imaginary. For Lacan this split is the very rupture of self consciousness, with the intrusion of the imaginary other of human ideality, the *imago* — the ideal image of the subject. It is towards this ideal that the human ego develops. This intrusion also invokes desire within the subject to return to that which it senses it has

[4] Fryer, D. *The Intervention of the Other: Ethical Subjectivity in Levinas & Lacan.* New Other Press, New York, (2004), at 189.

[5] Some writers tend to focus on one split or the other, the split from the Real or the cut of the Symbolic. However, these two aspects of subject formation are part of the ongoing structuration of human identity — the latter relying upon and echoing the former — and both continue to have an enduring affective impact on conscious activity and individual subjectivity. Refer to Fryer, *ibid*.

lost — a "prior" sense of totality and harmony experienced within the Real. However, this return is impossible because it is a fantasy invoked by the intrusion of the *imago* itself and is even further alienated with the second cut of the Symbolic. Through the Oedipal complex, the subject-ego is barred from the fantasy of return and is propelled into the social dialectic of the Symbolic realm of linguistic representations and transforms into the "subject-proper." The subject cannot escape the discourse of language of this Symbolic realm of word symbols and signifiers, within which the subject — its meaning, understanding and knowledge, its very reality — is constituted. Yet the subject is never satisfied in this Symbolic reality either — for reality bears its own lack, the emptiness of ungrounded signifiers and word symbols.

For Lacan, this split of the Imaginary and the cut of the Symbolic are traumatic and alienating and compound each other. This split and the consequential (sense of) loss, trauma and alienation are repressed in the unconscious from which they impact upon the conscious experience and behaviour of the subject. It is this loss, and its traumatic impact, which constitutes the subject as a negative, marking human identity and individual subjectivity as a "lack-in-being," unable to traverse the Symbolic and, thus, always separated from its Real, desired sense of self harmony and unity.[6]

[6] Lacan's interrogation of desire and the desire for recognition from the other is a response to Hegel's thesis of subjective desire, which Lacan was introduced to by Kojeve. In this way, Lacan's interrogation of human identity is a unique alignment of the influences of psychoanalysis (Freud), linguistic structuralism (Saussure), and the philosophy of desire and subjectivity (Hegel). Lacan himself was a student of Kojeve's, attending his classes on Hegel between 1934-1937. Hegel argues a prior sociability in individual will, grounded by the subject's desire for recognition which brings the subject into a state of inter-subjectivity within the social dialectic. It is this inter-subjective mutual recognition upon which identity of the subject is dependent. In Kojeve's interpretation of Hegel's thesis, the human subject emerges *prior to* the faculty of reason — that is, before the Cartesian *cogito* — through the advent of human desire. This desire leads to aggression as each subject wants to subjugate the other (all others) in a struggle for recognition from the other. Kojeve also supplements Hegel's notions surrounding desire and recognition with the faculty of human speech. For Kojeve, speech is necessary and essential to the formation of the subject as it is through speech that the human subject expresses its desire. For Lacan, self consciousness is engendered through a social dialectic between the specular *imago* and the child. Lacan's original contribution to the Hegelian dialectic is in this notion of "self-recognition," of "intra-subjectivity." Lacan argues that this pre-*cogito* self consciousness of the subject begins not with a social dialectic between two human subjects, but rather, with the self recognition of the subject in its *own image.* In this way, it is the intra-subjective dialectic of self-recognition which becomes the (pre) ontological grounding for Hegel's aggressive social struggle for prestige and recognition within the inter-social dialectic. For a review of the connections between Hegel, Kojeve and Lacan refer to Butler, J. *Subject of Desire: Hegelian Reflection in Twentieth Century France*. Columbia University Press, New York, (1999). Note, one of the similarities between Lacan and Levinas is that they both were at one time students of Kojeve. Levinas's extension of

The Topography of Self: the Borromean Knot of the Real, the Imaginary and the Symbolic

For Lacan, there are three significant realms of psychological development, which inform the formation of human identity and which reside beyond the conscious capacities of the individual: the Real; the Imaginary; and the Symbolic.[7] In their broadest meanings, the Real is the sense of harmonious wholeness and stability within the individual subject which is missing from the Symbolic reality of our lives, due to the rupture of self consciousness. The Symbolic, on the other hand, is our reality constituted in the meanings and understandings generated by language and its linguistic symbols and discursive processes. And the Imaginary is the grounds of self consciousness itself, and the instigation of the ego which "plays-out" between the other two realms of the Real and the Symbolic. These three realms do not work independently, but rather, form a dynamic inter-connective topography upon which human consciousness unfolds and the signification of human identity is invigorated. In this inter-connectivity the intrusion of the Imaginary invokes ego desire for the lost sense of the Real, which is always already cut from the linguistic processes of signification within the Symbolic, in which desire operates. The Symbolic is the "big *'O'ther"* of the Real and the Real is understood as the *"absolute other"* to the Symbolic, the unrealised (unrealisable) left-over which the Symbolic is not.[8] Intersecting each other, these three realms are the "Borromean Knot"

---

the Hegelian inter-subjective dialectic of desire is in his interpretation that such a prior-sociability of inter-subjective desire bears a pre-conscious, asymmetrical ethical implication of responsibility *for-the-other* (as opposed to a symmetrical sociality of a *right-of-self*) between the self and the other. Refer to Chapter Six of this dissertation, footnote number thirty four.

[7] Over time, different names have been used to signify these three realms, for example: registers, orders, stages. For consistency, I shall refer to them as "realms" in this dissertation and for clarity I shall use capital lettering when referring to them.

[8] With Lacan's meditation on the contingency of human identity there are a number of "others" contrasting against and inter-connecting with each other. There is the unconscious in relation to the conscious; absence/loss in relation to presence; other human subjects in relation to the subject self; the "ideal, specular image" of the self in relation to the corporal self; culture (the Symbolic) in relation to the Imaginary and the Real; the Real in relation to the Symbolic; signifier in relation to signified. Because of these numerous "others" in Lacan's work, for clarity I will use the capital "O" Other to designate the Symbolic (as Lacan does) and add descriptive detail to the additional "others" to signify their meaning. It is important to understand here, that the notion of the Real as being the "absolute other" of the (Symbolic) Other is in regard to the Real's "unsymbolic" (un-representable) quality. In *Ecrits*, above n 2, at 311, where Lacan argues that "there is no Other of the Other" he is not referring to the Real, but rather, arguing that there is no other Symbolic realm in which language can function or which the subject can use in order to gain direct access to the signified.

of human identity, in which each independent and external realm is inextricably linked with and internalised by the other, working together in the structuring processes of human identity.[9] In this way, the individual subject could be understood as the "effective symptom" of the confluence of the Real, the Imaginary and the Symbolic, as it only exists within the nexus of the inter-connectiveness of these realms.[10]

Within this inter-connective conceptualisation of identity structuration, there is already the signification of the Lacanian "contingent other" of human identity: "that which is excluded from sense-making is that which makes sense hang together … Everything that exits *ex-sists* — has its being in relation to that which lies outside it … "[11] This characteristic of "ex-sistence" — that is, something outside and beyond but impacting within — intimates the Lacanian structural lack of human identity. This lack is the negative "lack-of-absence" in human identity, in which each element of psychological structuration is constituted only through the interaction with something outside and beyond (and yet internalised and affective) itself. In this way, there is an internal-external dialectic at the centre of the formation of human identity. There is an intra-psychic, intra-subjectivity of internalised externality, prior and beyond (and opaque to) the conscious individual, in which the subject loses any essential and positive characteristics of "individual-self" and becomes, rather, constituted by what it is not.

At this stage it is very important to understand that these three realms of psychic development are not independent steps in a chronological history of human development.[12] Lacan's analysis into the structure of human identity is complex and

---

[9] Significantly for Lacan, this structure of the knot is not the "meta-language" of psychoanalysis. The knot is neither the means to "cure" the subject nor the expression of the essential absolute "beingness" of humanity, as, at the heart of the subject, this knot is the contingent of an omniscient "lack" of being, the dialectic between the internalised-externality of the other. Thus, the *Borromean knot* is something to which one can only refer, but it can never actually be retrieved. Refer to Nobus, D. (ed.). *Key Concepts of Lacanian Psychoanalysis.* Rebus Press, London, (1998), at 139-163.

[10] "Symptom" (*sinthome*) is, in fact, the fourth realm of the *Borromean knot*, which is the focal point of the other three realms. *Symptom* constitutes each subject as a subject-of-desire. Refer to Ragland, E. 'Lacan and the Subject of Law: Sexuation and Discourse in the Mapping of Subject Positions that give the Ur-Form of Law.' *Washington and Lee Law Review*. (Summer 1997), Vol. 54, No. 3, at 1091-1118.

[11] Bowie, M. *Lacan*. Harvard University Press, Harvard, (1991), at 194.

[12] Due to the complexities and confusions surrounding Lacan's writings, it is convenient to both write and read these three realms as the chronological development of the human subject. And they do generally

necessitates a certain "theoretical abstraction" and "logical ordering" of the subject.[13] Though, for convenience sake, I shall outline Lacan's processes of subjective formation starting with the Real, it is, in fact, not the case that the Real is the "actual precursor" to the Symbolic. In actuality the Real never existed in the past of the subject. The subject is always already in the Symbolic realm of language and discourse, always already in the reality constituted through meaning, understanding and knowledge of linguistic signification. It is the Symbolic which is the primary first of subjective experience, from which the subject cannot escape and through which it experiences all other sensations and significations.

Hence, the Real exists as *an effect* of the Symbolic. It is constituted as that which the Symbolic is not. It is as the experience of the left-over of the Symbolic — that which the significations of reality in the Symbolic cannot represent and include: "[the Real] is neither being, nor non-being, but the unrealised."[14] What the Real does *represent* — a sense of harmonious oneness of self — is an ideal aspiration invoked by the failure of the Symbolic to *present* everything and resolve the subject's desires, anxieties and ambiguities. The Imaginary comes into play "between" these two realms because it is the Imaginary — the animation of the ego and genesis of self consciousness — which instigates such anxieties and desires. It is the ideal of the Real (the object of these desires) which haunts the subject from the chasms of its unconscious, playing a determinative but un-transparent role in the formation of human identity and conscious human behaviour, in the reality of Symbolic representations.

---

correspond with the development of human need (in which the child is less than six months old), desire (when the child is between six months and eighteen months old), and demand (when the child is eighteen months and old), and with Freud's model of *id*, *ego* and *superego*, respectively. However, despite this chronological alignment, Lacan rejects the notion of a linear development of the subject, which in fact, reflects more the Freudian model of human development (the *id, ego and superego*). Lacan's own writings on these three orders of human subjectivity could, themselves, be read chronologically. In his earlier works — pre-1950s — Lacan focused on the formation of the ego in the Imaginary order. But after *Book XI* in the mid-1950s Lacan focused more and more on the Symbolic order and the thesis that the subject was a linguistic phenomenon. By the mid-1960s, however, Lacan had re-focused once again, this time on the concept of the Real. Refer to Verhaeghe, P. 'Causation and Destitution of a Pre-ontological Non-entity: On the Lacanian Subject.' *Key Concepts of Lacanian Psychoanalysis* (ed. D. Nobus). Rebus Press, London, (1998), at 164.

[13] Bowie, *op cit*, at 91; Stavrakakis, Y. *Lacan and the Political: Thinking the Political*. Routledge Press, London, (1999), at 19.

[14] Lacan, J. *The Seminar of Jacques Lacan Book XI: The Four Fundamentals Concepts of Psychoanalysis, 1964.* (trans. and ed. A. Sheridan), W.W. Norton, New York, (1981), at 28.

Thus, this "history" of subject structuration is never left in the past, but rather, these three realms of subject experience share a synchronic space of subjectification in the processes of human identity. The event of the "past" (the Real) always already exists now (in the Symbolic present) in the conflicts of desire (the Imaginary), energizing a constant process of identification within the Symbolic:[15]

> What is realised in my history [through the benefit of psychoanalysis] is not the past definite of what was, since it is no more, or even the present perfect of what has been in what I am, but the future anterior of what I shall have been for what I am in the process of becoming.[16]

Hence, the Real only exists through the intervention of the Imaginary and the foreclosure of the Symbolic. It only arises *retroactively*, from the subject's sense of alienation, anxiety and ambiguity in the reality of its existence within the Symbolic, which cannot meet the subject's desires and which, thus, affects the subject to act "as if" this Real once existed in the past and is lost, and hence, towards which we desire to return:[17]

> Everything radiates out from and is organised around this signifier [the Symbolic], similar to these little lines of force that an upholstery button forms on the surface of the material. It's the point of convergence that enables everything that happens in this discourse to be situated retroactively and retrospectively.[18]

Thus, the Real is the fantasy of the Symbolic, the fiction of the unconscious. It is the mirage of the missing within the failings of reality at the agitation of the ego and self consciousness, which is *retroactively* invoked by the subject's continuing sensations of alienation, anxiety and desire, which are never resolved in the reality of our lives constrained within the meaning of reality constructed by language.[19]

---

[15] Fryer, above n 4, at 221.
[16] Lacan, *Ecrits*, above n 2, at 86.
[17] Fryer, above n 4, at 188.
[18] Lacan, J. *The Seminar of Jacques Lacan Book III: The Psychoses 1955-56.* (ed. J.A. Miller, trans. R. Grigg), Routledge Press, London, (1993), at 268.
[19] Žižek, S. *Tarrying with the Negative: Kant, Hegel and the Critique of Ideology.* Duke University Press, Durham, (1993), at 36.

The Intervention of the Imaginary: the Rupture of Consciousness, the Other Side of Self and the Lost Real

The significance of Lacan's split subject (*spaltung*) is that self consciousness, and consciousness generally, is not a self-determined (self-determinative) autonomous capacity of reasoned and intentional will. Lacan's mapping of the formation of human identity reveals that (self) conscious individual identity is always already a split subject, inherent with trauma and desires repressed within the unconscious. The self-sovereigned individual is always already the residence of an-other — the unconscious and its content of loss, trauma and desire, which infect the capacities of consciousness. This is the mark of the conscious self and the identity of the conscious individual — that always already the very genesis of the self conscious capacities is a traumatic rupture within the experience of self, leaving the subject with an unconscious sense of loss, alienation and anxiety "from self," and a fantasy of desire to regain this loss and resolve its trauma.

Self consciousness emerges with the intervention of the Imaginary realm. Lacan terms this intrusion the "Imaginary" as it is an experience in the psychical process of the subject which is dominated by images — conscious and unconscious, perceived and imagined, illusionary and real.[20] Such images are instigated by what Lacan terms the "the mirror stage" — the moment which inspires self consciousness (and upon this, all consciousness), through a process of self recognition. Prior to this moment, the existent is not a subject *per se*, but rather, is an undeveloped, pre-conscious living organism (*(l'avenement du vivant*) and has no conscious and cognitive capacity to make a distinction between itself, the world and others around it. The existent (considered an infant in this state) is driven by needs only (such as hunger), prior to any desires or demands generated by the Imaginary and Symbolic agitated by ego or reality. At the moment of self consciousness, for the first time, the existent looks into the mirror and recognises that the image it sees (the *specular*) is "itself" — its own, distinct image, which Lacan terms "the small other" (*le petite autre*). For the first time the subject recognises that it is something separate and distinct from others around it (significantly,

[20] Lacan, *Ecrits*, above n 2, at ix.

this other is considered to be the primal care giving (m)other).[21] This is the moment of initiation of the ego-self and the genesis of self consciousness, which becomes the nucleus of the subject-proper and the fulcrum of the formation of human identity.[22]

Thus, this intrusion of *le petite autre*, is the necessary rupture of self consciousness (of the birth of the self conscious ego) in the formation of human identity. But this rupture is not tranquil, but rather, traumatic upon the ego-subject and instils alienation and anxiety. For in order for the subject to gain this initial sense of self, there is also a sense of a loss with the intrusion of the Imaginary. That is, a split in the "original subject" and a loss of something "before" the distinction of self. There is a sense of something on the *other-side-of-self* (on the other-side-of-the-mirror), some sense of a primal, (pre) original unity with the (m)other — the sense of loss of the *Thing*, the *das Ding*, of the primal (m)other. This primal sense of oneness between the (m)other and the child, of self harmony and unity, engenders a sense of *jouissance*: a joy which signifies the sense of pleasure from this idea of (pre) original harmony and wholeness.[23] It is this scene of "prior oneness,"

---

[21] There is some debate as to whether or not the "mirror" is a metaphor — that is, whether there needs to be an actual mirror during this time of self conscious awakening or can the mirror be replaced by the image of an other or even the "word" (such as the name of the child). Sarup suggests that the mirror and the child's self recognition in the mirror is a "metaphor" used by Lacan to explain the emergence of self consciousness. Refer to Sarup, M. *An introductory Guide to Post-structuralism and Postmodernism*. Harvester Wheatsheaf Press, New York, (1993), at 8 & 12. Fryer, on the other hand, tends to side with those who argue that the mirror (that is, the self image) is essential in subject formation and cannot be replaced by the image of an other, such as its mother. Refer to Fryer, above n 4, at 50. Significantly, Nobus reminds us that Lacan's earlier work (pre-1950s) was with the mirror-stage (focussing on the Imaginary and ego formation) and that his later work (after *Book XI* in the mid-1950s) focussed on the Symbolic order and the conceptualisation of human identity as a linguistic phenomenon. This is important because, as we shall see later in this Chapter when discussing the subject in the Symbolic realm, Lacan did not dismiss the mirror-stage, but rather, came to suggest that the mirror stage itself was mediated by the Symbolic. That is that ego desire is always already expressed in the symbols of linguistic signification. Hence, there is a compounding integration between the Imaginary and Symbolic to the extent that even without the actuality of a mirror and the "self image/ego," the child still develops an identification through ego/other *via* the Symbolic as it would then see itself through the "words" of the others. Refer to Nobus, D. 'Life and Death in the Glass: a new Look at the Mirror Stage.' in Nobus, above n 9, at 101-138 at 119-120.

[22] Lacan, *Ecrits*, above n 2, at 2.

[23] The concept of *jouissance* is complex and ambiguous with an additional problem of translating it from French to English. Evans remarks how in French its meaning has a number of shades, including "enjoyment" as deriving pleasure from something, and "enjoyment" as in the legal sense of exercising property rights over something. He notes that it also has a sexual connotation in French, referring to orgasm. Thus, *jouissance* is more than simple joy or pleasure. Rather, *jouissance* refers to the strange satisfaction found in pursuing an eternally unsatisfied (libidinal) desire. As there is a split in the subject which produces a gap/lack, *jouissance* is the unfulfillable joy which desire strives to reach. Refer to Evans, D. 'From Kantian Ethics to Mystical Experience: An Exploration of Jouissance.' in Nobus, above n 9, at 1-3.

this *jouissance*, which is psychically experienced by the subject as the "past loss" of self, due to the intrusion of the Imaginary and the rupture of the self consciousness of the ego-subject.

It is this "sensation" of a "lost prior" (m)other of harmonious and total oneness which is the signification of the Real.[24] For Lacan, the significance of the Real in the formation of human identity is that it is not experienced by the subject in any positive, substantive way, but rather, as the fantasised loss or lack of the ideal totality and oneness of human identity. It is experienced not in any actuality, but rather, as a split-in-subjectivity invoked by the intrusion of the Imaginary realm, experienced as a "prior to," other-side-of-self, before the instigation of the self conscious ego. Thus, this "sensation" of the Real is (consciously) unknowable, as it is beyond the reality in which the subject lives (reality constituted by the Symbolic of language), on the other side of the intrusion of the Imaginary and the other side of self-consciousness. In this way, the Real has no material substance of its own, but rather, acquires meaning in opposition to what these other realms signify:

> In this opposition, the real is placed firmly on the side of the unknowable and unassimilable, while "reality" denotes subjective representations which are a product of symbolic and imaginary articulations.[25]

Experienced in this way, sensed in this manner by the subject, the Real is the limit of Symbolic reality and Imaginary images and yet continues a phantasmic haunting of the subject from its unconscious abode. It is the pre-conscious fantasy of harmonious oneness — beyond the determinism of the automaton of social constructivism produced by the Symbolic and prior to the Imaginary intrusion.

---

[24] Here, there is a sense that the Real has a feminine quality — it is the maternal object upon which the child depends and with which it senses itself to be complete and whole. Thus, the Real becomes in Lacan's topology the feminine other to the reality constituted on the "masculine" Symbolic realm. This is significant for the nexus between identity and rights, gender and sexuality. For example, the feminine is placed in the barred position of the Real (something which is "not all" encompassed by the Symbolic), signified by outward "rights of care" (towards others). On the other hand, the male is placed in the position of the Symbolic, dominating our contemporary human rights' discourse's self-interested rights of self. Refer to Butler J. *Bodies that Matter: On the Discursive Limits of 'Sex.'* Routledge, London, (1993), at 187-222.

[25] Evans, above n 23, at 161.

The insatiable desire of the ego to (re)claim a sense of stable, harmonious oneness, is indicative of this loss. This is the desire to return to the "prior" sensibility of subjective-unity:

> Where do we meet this for Real? For what we have in the discovery of psychoanalysis [the discovery of the unconscious], is an essential encounter — an appointment to which we are always *called back* [my emphasis] with a Real that eludes us … The Real is beyond the *automaton*, the return, the coming-back, the insistence of the signs by which we see ourselves governed …[26]

The (loss of the) Real — the sensation of the primary, prior self-unity — is the cause of subjective desire. This is desire which engenders an insistent effort-of-return to a completeness that never was in the conscious self and which only exists as the fantasy of the intrusion of the Imaginary and the left-over, unresolved sensations of conscious human experience in the reality of the Symbolic:

> … what analytic experience enables us to declare is rather the limited function of desire. Desire, more than any other point in the range of human possibility, meets its limit somewhere.[27]

The limit of this desire is the measure of the difference between the fantastic Real and the Symbolic reality of the subject. It is this difference which animates the work of an unfulfillable (unconscious) desire as it attempts to regain that which never existed and can never be signified in the (conscious) reality of the Symbolic.[28]

Thus the Real is not, in itself, of any "actual substance" (though from the unconscious it has substantive effect upon the conscious individual), but rather, is animated as a fantasy by the rupture of self consciousness. It is this rupture which *retroactively* instigates a "primary narcissistic wound:" "There is something originally, inaugurally, profoundly

[26] Lacan, *Book XI*, above n 14, at 53-54.
[27] Lacan, *Book XI*, *ibid*, at 31.
[28] Fryer, above n 4, at 189-90.

wounded in the human relation to the world … "[29] This is the primary split in human subjectivity which marks the conscious individual as the split subject of pre-ontological genesis. This is the primary split between fantasy and actuality, between a split of the (m)other and child. This is the split from the experience with the harmonious totality of the Real (the oneness with *das Ding*) and from the lost *jouissance* from the subject's primal sense of completeness.[30] In this way, the Real sense of self is sacrificed in order to engender self consciousness and to develop the subject-proper of individual personality. And thus, with this loss, the Real is the "constitutive lack" — of the primal sense of one's "self" — in subject formation. This loss of the Real — the trauma it causes and the desire-to-return which it generates — is the psychological foundation of the lack-in-being of the human condition, which always already resides in the unconscious from where it has an ongoing affective impact on human identity and conscious activity.

Thus, though this pre-conscious experience of the Real may be a phantasmagorical fiction, is not "no thing" for Lacan.[31] It is experienced and sensed as a traumatic and alienating split and loss at the centre of the structuration of human identity and, thus, has a determinative impact on the desires of human behaviour. It continues to haunt the subject in the reality of its Symbolic existence so long as its alienation (and human desire) continue to remain unfulfilled. This lack is the locus of the Lacanian subject and is the constitutive feature of human identity:

---

[29] Lacan, J. *The Seminar of Jacques Lacan Book II: The Ego in Freud's Theory and in the Technique of Psychoanalysis, 1954-55*. (trans. S. Tomaselli). W.W. Norton, New York, (1991), at 199.

[30] Cornell, D. 'Rethinking the Beyond of the Real.' *Cardozo Law Review.* (Jan 1995) Vol. 16, No. 3-4, 729-792, at 738. This moment of self consciousness is originally brought on by the weaning complex. At around six months, the mother induces this complex by withdrawing the breast. Here, the child begins to sense the distinction between its interiority (*Innenwelt*) and the external objects of the surrounding environment (*Umwelt).* As the infant of six months and less has no physical capacity to meet its needs itself the infant comes up against the trauma of the failure of its needs being met and, hence, the trauma of the weaning complex. Importantly, therefore, this trauma has another, anterior concept — that the human organism is born prematurely, without the capacity to control or command its own physical body, and, therefore, in its initial development, lacks the capacity of self sufficiency. Refer to Nobus, above n 9, at 107-110. The concept of humans having a premature birth is derived from the Dutch anatomist, Lodewijk Bolk's work in the 1920s. Refer to Nobus, above n 9, at 107-108.

[31] Although, limited to the beyond of the conscious significations of the Symbolic, the Real bears a nothingness of "Real" substance in itself.

> … this Thing [the Real] will always be represented by emptiness, precisely because it cannot be represented by anything else — or, more exactly, because it can only be represented by something else. But in every form of sublimation, emptiness is determinative.[32]

In this sense, the Real is the "maternal thing," the *das Ding* of the feminine (m)other, which is lost, repressed and barred from the subject. Experienced in this way, the Real is the "stranger within" the unconscious which lies at the heart of the subject,[33] the *ex-sistent,* negative absence of the human condition which challenges the notions of the potential of positive sovereignty of conscious beingness.

This negative lack of human identity is the "true" (Lacanian) human condition: "the truth of the subject, even when he is in a position of master, does not reside in himself, but, as analysis shows, in an object that is, of its nature, concealed."[34] Whatever may be the conscious experience and expression of human identity, it is always already infected with and contingent upon the unconscious loss of the Real. It is always already the signification of a lack-in-being and the animated desire to suture this lack and regain the "prior to" Real sense of self-unity:[35]

> The fact is that this subjectivity [the subject of lack] in whatever domain it appears — in mathematics, in politics, in religion, or even in advertising [or even in law and human rights law] — continues to animate the whole movement of humanity.[36]

The Lacanian truth about human identity is that *"I [am] another . . . ."*[37] The *"I"* of human identity is always already split in itself, even before entering the social discourse with others and the material world. "I" am always already marked by this unconscious split, causing trauma, anxiety, and desire, motivating my engagement and communication

---

[32] Lacan, J. *The Seminar of Jacques Lacan Book VII: The Ethics of Psychoanalysis 1959-1960.* (ed. J. A. Miller; trans. D. Porter). W.W. Norton, New York, (1992), at 129-130.
[33] Lacan, *Book VII, ibid*, at 71.
[34] Lacan, *Book XI*, above n 14, at 15.
[35] Žižek, *Tarrying with the Negative*, above n 19, at 36.
[36] Lacan *Ecrits*, above n 2, at 71
[37] Lacan, *Book II*, above n 29, at 7.

with others in an ongoing attempt to (re)gain this loss and heal this intra-subjective split.[38]

Hence, with this intra-subjective split subject, the unconscious is of primary importance in the formation of human identity, and, thus, psychoanalysis becomes necessary in order to understand the content of the unconscious and the structuration of subjectivity. The split in the subject, the loss of the Real and the consequential trauma, anxiety and alienation, and the corollary desire invoked to regain the Real, are all repressed and manifested in the unconscious as "traces." Such things are not transparent to the conscious subject in the reality of the Symbolic, but they all inform the subject from the unconscious. Thus, the unconscious is the other of the conscious. The gap of conscious determination, through which such traces bear an affective impact upon the subject, imposes its constitutive forces upon the subject, and yet is always already beyond the subject: "… the gap of the unconscious may be said to be pre-ontological … what truly belongs to the unconscious … is neither being, nor non-being, but the unrealised."[39]

Arising from this gap of the unconscious, it is this split in subjectivity and this loss of the Real which motivate the subject's desire to do the impossible in its conscious existence — to suture the split and regain the retroactively instigated fantasy of the *jouissance* of oneness with the Real. This is Lacan's psychoanalytical aim and task, to reveal such content of the unconscious in order to understand the psychic structures which always already underpin the conscious capacities and experiences of human identity:

> What we teach the subject to recognise as his unconscious is his history — that is to say, we help him to perfect the present historicisation of the facts that have already determined a certain number of the historical "turning-points" of his existence.[40]

[38] Žižek, S. *Tarrying with the Negative,* above n 19, at 31.
[39] Lacan, *Book XI*, above n 14, at 30.
[40] Lacan, *Ecrits*, above n 2, at 52.

In this sense, as Douzinas suggests, the (lost past) Real becomes the subject's *telos* — the destined imperative to which the subject strives but to which it can never return.[41] This lack-in-being of unconscious content is the grounding of subject structuration and the framing of human identity.

The Imaginary Other: the Ideal Imago and the Duality of Self

In this initial moment of subject genesis through the intruding specular, it is not the "subject-proper" *(l'avenement du sujet)* which emerges from the Imaginary, but rather, the "subject-ego," the necessary provocation of self consciousness.[42] But the Imaginary realm does more than split the subject and constitute a fantasy of a prior, primal sense of self. In addition, during the mirror stage there is an *intra-subjective dialectal process* between the subject (the ego) and its specular image (*le petite autre*), in which the specular is internalised by the ego and a contradictory duality in the ego's structure emerges. In the moment of genesis of self consciousness, in the "moment of the mirror" and of gaining an ego, the subject also gains a sense of loss, a sense of a split from a greater sense of Real oneness and wholeness. With this sense of loss the subject looks to the specular for compensation, to fill the gap now created. What the ego sees is the *imago*[43] — the unified image of self, which the subject internalises. This *imago* is the *Ideal-I*[1],[44] and becomes the ego's substitute object to fill the sense of loss from the (m)other, in an attempt to suture this loss and relieve the trauma, alienation and anxiety generated from this loss:

> The child is split from the very beginning in such a way that not only does the other define what the child thinks it should be, but the other [the image of itself] takes up the space of that which the child in fact is.[45]

---

[41] Douzinas, C. 'Law's Birth and Antigone's Death: on Ontological and Psychoanalytical Ethics.' *Cardozo Law Review*. (Jan 1995) Vol. 16, No. 3-4, 1325-1362, at 1326 & 1330.
[42] Lacan, *The Four Fundamentals Concepts of Psychoanalysis*, above n 14, at 205.
[43] Lacan gives two terms to this reflected specular image: the *Gestalt* — the wholly isolated, unitary and exterior qualities of the image — and the *imago* — the ideal status that this exterior, unified image gains in the eyes of the subject, and which is internalised. Refer to Lacan, *Ecrits*, above n 2, at 18-19.
[44] Lacan, *Ecrits*, above n 2, at 20. The superscripted *"1"* which Lacan uses here reminds us that there is a second *"I,"* a second split, that will further be developed. That is, the socialised (gendered) *"I"* which emerges in the Symbolic realm with the child's assumption of language and law. This second split — the cut of the Symbolic — will be further discussed below in this Chapter.
[45] Fryer, above n 4, at 56.

With this internalised image the initial sensations of human identity are constituted by a reflected image, rather than a "true presentation" of self, through which the ego develops *via* a virtual reality of self — a *simulacra* of an *internalised-external other*.

Thus, the birth of self consciousness is not only marked by a sense of loss (of the fantastic Real) but also by the duality of this internalised-externality of the idealised image of self. In this duality-of-self there is an underlining contradiction: an asymmetrical relationship between the ideal other and the actual corporal reality of the child still sunk in motor incapacity and nursing dependency:

> What I have called the mirror stage is interesting in that it manifests the affective dynamism by which the subject originally identifies himself with the visual *Gestalt* of his own body: in relation to the still very profound lack of co-ordination of his own motility, it represents an ideal unity, a salutary *imago*; it is invested with all the original distress resulting from the child's intra-organic and relational discordance during the first six months, when he bears the signs, neurological and humoral, of a physiological natal pre-maturation.[46]

The ideal unity of the *imago* scars the ego forever: "the sight alone of the whole form of the human body gives the subject an imaginary mastery over his whole body … which entirely structures his fantasy life."[47] In the anxiety over its actual corporal inadequacies, the ego will forever anticipate and desire to be, to become, to have this idealised other, in order to regain its lost sense of primal *jouissance*.

In this contradictory duality of the internalised-external ideal image of self, there is further alienation and anxiety, and even narcissism, marking the emergence of the ego, and which, through the unconscious, continually shadow the ego's relationships with other external objects and subjects:

> There is a sort of structural crossroads here to which we must accommodate our thinking if we are to understand the nature of aggressivity in man and its relation

[46] Lacan, *Ecrits*, above n 2, at 18-19.
[47] Lacan, *Book II*, above n 29, at 79.

> with the formalism of his ego and his objects. It is in this erotic relation, [that is, in the narcissistic relationship between itself and its image in the mirror] in which the human individual fixes upon himself an image that alienates him from himself, that are to be found the energy and the form on which this organisation of the passions that he will call his ego is based.[48]

Thus, through the intrusion of the Imaginary, the genesis of the formation of human identity assumes a tension and potential aggressivity within an intra-dialectic between ideal and actual, imaginary and real, totality and loss, unity and fragmentation, which haunts the ego (from the unconscious) and the future subject-proper in its inter-human social relations. It is these characteristics of loss and duality which form the kernel of the ego and it is this ego structure which forms the nucleus of human identity, the subject-proper in its social relations with others.

Yet paradoxically, in this *ex-sistent* duality of ego structuration, the sense of loss of the primal sense of self within the experience of the Real is "self-inflicted." Through the intrusion of the *imago*, the ego comes into being through the "*gaze"* of an external other, which is the gaze of the image of the reflection in the mirror, *the subject's own gaze* reflected back at it. It is the ego's own gaze which instils in the subject a permanent (sense of) split from the Real, which permanently establishes a contradictory duality in human identity, and which instigates alienation, trauma and anxiety.[49] Through this narcissistic self-gaze the ego sustains itself, producing its own desire for its own ideal self-image, to be that image, to be recognised as the self-in-the-mirror, to fulfil the lost sense of oneness. Thus, it is *the gaze* which is prioritised in the process of *coming-into-being*, in the process of self-identification of human identity. The gaze becomes the *objet a*: the privileged object of the ego's desire which causes both the subject's primal sense of separation (from the *jouissance* of the Real), and emerges as the contradictory, compensatory substitute for this loss of the Real.[50]

---

[48] Lacan, *Ecrits*, above n 2, at 19.
[49] Lacan, *The Four Fundamentals Concepts of Psychoanalysis*, above n 14, at 82-83. The "gaze of the other," of *le petite a*, is the "little reality" of the ego-subject. Refer to Lacan, *Ecrits*, *ibid*, at 2.
[50] Lacan, *The Four Fundamentals Concepts of Psychoanalysis*, *ibid*, at 82-83. The "*a"* in the "*objet a"* refers to "*autre"* (other) and is written in lower case (small "*a"*) to distinguish it from the *gran Autre* (the capitalised/big Other) which is found in the realm of the Symbolic. Refer to translator's notes, Lacan,

Thus, through this Imaginary realm, the subject emerges as a desiring subject: it is the Imaginary intrusion itself which causes a lacking and anticipating ego, and which causes self consciousness to emerge as self-interested. In this genesis of human identity, the ego forms the desire (informs self consciousness from the chasm of unconsciousness) to be something other than itself — the complete, unitary, other *imago* — in order to fulfil something it is lacking — the sense of *jouissance* from the "lost past" of harmonious totality with the Real. The ego is mobilised by an experience of *lack-in-being* and the desire to restore what is lost, through the sublimated internalised-externality of the ideal image of self, the *imago*. In these attempts, in this desire, to become the idealised image of the *imago* — the ego's aim is to consume and annihilate the other in order to take the place of the other, to restore the primal *jouissance* of self through the other:

> Aggressivity is the correlative tendency of a mode of identification that we call narcissistic, and which determines the formal structure of man's ego and of the register of entities characteristic of his world.[51]

In this way, the other is not only the desired object, but also, becomes the rival of the ego.

This hostility will transfer from the intra-subject ego/image duality to the inter-human self/other duality in the Symbolic, when human identity formulates into the subject-proper, inscribing human identity with a *paranoiac alienation* within the social collective. With the sense of loss of the Real — and the substitution of the internalised-external *imago* to replace it — desire and aggression of the ego is directed outward in a social dialectal towards other persons (other gazes) and objects in the real world.[52] Just as the *imago* is the substitute of the Real, just as the gaze of *le petite autre* becomes of the *objet a* of the ego, so too in the social relations with others, such others and their gazes will be internalised and will sublimate for the *imago*:

Ecrit, above n 2, at xi. Thus, the small other is, for Lacan, the gaze of the image of self — that is, the *gestalt* and its idealised position of *imago*.

[51] Lacan, *Ecrits*, *ibid*, at 16.

[52] Milovanovic, D. 'The Posmodernist Turn: Lacan, Psychoanalytic Semiotics and the Construction of Subjectivity in Law.' *Emory International Law Review*. (1994), No. 67, 67-98 at 75-76.

> Thus, the self is captured by its image which is also seen in the image of other person's — fellow men — creating a dislocation leading to anxiety in the self, this is the image of the other to whom/in which the self attempts mastery; these functions of mastery are established on the basis of a libidinal alienation, from which develops the paranoiac principles of human knowledge.[53]

Thus, the discord, tensions ands rivalry in the intra-subject duality between the ego and its image are transposed to other human subjects in the inter-subjective social reality of the subject-proper, so that the subject is driven to become the other subject, to have and be that which the other has and is:

> This form [the relation with the *imago*] will crystallize in the subject's internal conflictual tensions, which determines the awakening of his desire for the object of the other's desire: here the primordial coming together (*concours*) is precipitated into aggressive competitiveness (*concurrence*), from which develops the triad of others, the ego and the object …[54]

The image of the specular — the internalised *imago* — is constantly (re)presented within our fellow human subjects and establishes a permanent conflict of "you or I," in which the death drive emerges in order to, not only annihilate the other in order to be the other, but also, the self in order to become the other: "… it might be said that at every moment he [man] constitutes his world by his own suicide."[55] Thus, human identity is founded upon and marked by the aggressivity of the contradictory duality of the processes of ego formation and the emergence of (self) consciousness.

But there is an illusion in this psychological inter-play of loss and desire, internal and external, self and other, which becomes another central nodal point in the structure of

---

[53] Lacan, *Ecrits*, above n 2, at 137-139

[54] Lacan, *Ecrits*, *ibid*, at 4, 19 & 139. Significantly, Lacan comments that in modern, Western societies such aggression gets translated as a "strength of normal moral practice." Lacan, *Ecrits*, *ibid*, at 25.

[55] Lacan, *Ecrits*, *ibid*, at 28; Lacan, *The Four Fundamental Concepts of Psychoanalysis*, above n 14, at 84-85. The death drive refers to a fixation on some "*Thing"* (the re-turn to the Real) which de-rails our life circuit (the instinct and intuition for survival). It is closely related to the pleasure principle which masks the death drive as the subject goes through life. Refer to Žižek, *Tarrying with the Negative*, above n 19, at 96. I shall detail these two principles and their relationship in Chapter Four. Note also, the death drive also signifies the "terror of the Real" for to be able to re-join the fantasy of the Real and return to a sense of total oneness and wholeness would mean to destroy one's present self in order to become something other, the primal self of oneness and wholeness with the *das Ding* of the Real.

human identity. For within the duality of the internalised-externality of the ideal self-image of the *imago*, the ego takes on the illusion of "completeness" of an external other — the specular image — in its compensatory attempts to suture the split from the Real, in an effort to relieve the trauma and anxiety from this split. The ideal to which desire aims is radically exterior, strictly inaccessible and visually asymmetrical to the actual, organic subject in this moment of instigation of the self conscious ego.[56] Through the Imaginary, the object of ego desire is an external reflection beyond the ego and an unrealisable ideal illusion-of-self, instigated by the sense of a split-in-subjectivity and a loss of a primary *jouissance*. Thus, illusion of the ideal Imaginary sublimates the fantasy of oneness and totality with the Real. Even if the ego could become this ideal other, the desire of the ego is always unsatisfied — for in internalising the *imago*, the desire of the ego is always satisfying the other: "… even if the subject achieved his most perfect likeness in that image it would be the *jouissance* of the other that he would cause to be recognised in it."[57]

It is this unfulfilablilty of the subject's own ideal image-of-self which instils a crux of infinite failure within the subject, which produces ongoing oscillations of anxiety, anticipation and aggression, and which invigorates an insatiable desire directed towards the return to a fantasy of a primary sense of self oneness and harmony. And it is this subliminal duality-of-self which creates the *poles of signification* for the split subject, between idealised stability and totality, and actualised fragmentation. This duality takes root upon the fantasy of the Real and destablises any notion of a singular, stable and whole autonomous self.[58] It is within these oscillations between ideal totality and actual fragmentation that division and disharmony become constitutive of the human condition. It is (the oscillations between) these poles of signification in the structuration of human identity which ground human behaviour in its social relations and political expressions

[56] Nobus, above n 9, at 116.
[57] Lacan, *Ecrits*, above n 2, at 42.
[58] Hall, D. *Subjectivity: the New Critical Idiom*. Routledge, Press, New York, (2004), at 83. For Lacan, this tension within the subject between control/chaos, totality/unity and fragmentation/dispersion is expressed in the subject's dreams, which Lacan suggests look like the paintings of Hieronymus Bosch. Refer to Lacan, *Ecrits*, *ibid*, at 4-5 & 97.

and agitate human experience "between universalism and particularism in achieving a sense of social unity."[59]

To the extent that the ideal-ego is illusory, this identification of self is a mis-recognition (*meconnaissance*) of the other for the self:

> [The mirror-stage] teaches us not to regard the ego as centred on the perception-consciousness system, or as organised by the "reality principle" — a principle that is the expression of a scientific prejudice most hostile to the dialectic of knowledge. Our experience shows that we should start instead from the function of *meconnaissance* that characterises the ego in all its structures …"[60]

In this sense, the nucleus of human identity — the primal subject-ego of self consciousness — is not based on the actuality of the "beingness" of the subject, or the "essence" of individuality, but rather, on a *mirage* captured in the intra-personal dialectic of the internalised-externality of subject formation; in the illusion within the contradictory duality of the unrealisable external ideal other incorporated in the internalised image of ego-self.

Thus, within the duality of ego formation, human identity is not stable, but rather, is contingent upon the oscillations of the internalised-external *ex-sistence*. Within these oscillations of ego formation, the subject is unable to fulfil the identity it desires to become (the idealised *imago* and the return to the *jouissance* of the Real).[61] Thus, subject identity is never totally secured by any essential traits of its own, and desire is never totally satisfied. Rather, the subject is always already thrown externally of itself and assimilates characteristics from the external other, which acts as a model for and transforms the subject to be "other of itself:"

[59] Lacan, *Ecrits*, *ibid*, at 137.
[60] Lacan, *Ecrits*, *ibid*, at 6.
[61] Identity is also unable to be fulfilled because of the second gap within the Symbolic realm and the failure of the signifier, as we shall see later in this Chapter.

> We have only to understand the mirror stage *as an identification*, in the full sense that analysis gives the term: namely, the transformation that takes place in the subject when he assumes an image …[62]

In this sense, subject identity is caught in an open and infinite *"process of identification(s)"* and does not fulfil a presence of being, but rather, equivocates in an endless effort of *coming-into-becoming*. In these oscillations of *ex-sistence* in this process of identification, the ego (human identity) becomes its own object, permanently unstable within the negotiations between poles of distinctions, never simple nor definitely made or achieved, but rather, insistently (re) constituted and (re) contested.[63]

This oscillating identificatory process remains with the subject for all time and constantly repeats and reinforces itself in the subject's relations with the external world of people and things in the Symbolic realm.[64] It is this intra-psychic dialectic of the internalised-external duality emerging in ego formation which leads Lacan to declare:

> *"I"* is an other — don't let this impress you. Don't start spreading it around that "*I*" is an other — it won't impress anyone, believe me! And what is more, it doesn't mean anything. Because, to begin with, you have to know what an other means. The other — don't use this term as mouthwash.[65]

This negative lack — the sense of lost Real and the *ex-sistence* of the internalised-externality of the *imago* — infects ego formation and subject development like a disease: "The ego is structured exactly like a symptom. At the heart of the subject, it is only a privileged symptom, the human symptom *par excellence*, the mental illness of man."[66]

---

[62] Lacan, *Ecrits*, *op cit*, at 2.
[63] Butler, J 'The Lesbian Phallus and the Morphological Imaginary.' *The Butler Reader*. (ed. S. Salih), Blackwell Publishing, Malden, (2004), at 159. Although Butler employs Lacan's psychic formation of human identity and the notion of identity as a process of "repetitive becoming," she critiques Lacan on two fronts. Firstly, the ego is formed on the morphological schema of the male body. And secondly, this gender (and heterosexual) bias is compounded in the concept of the phallus, which idealises the male body part, installing it as the privileged signifier. I shall detail this point further in the pages below when discussing the Symbolic realm and the significance of the phallus in the Oedipus complex.
[64] Bowie, above n 11, at 92.
[65] Lacan, *Book II*, above n 29, at 7.
[66] Lacan, *Book I*, cited in Evans, above n 23, at 19.

The Symbolic Realm and the Subject in Language

But the formation of the ego through the intrusion of the Imaginary is only the original animation of human identity, the foundational moment of the ego-I kernel of subjectivity. To become the subject of full human personality, the ego must transform from *l'avenement du vivant* to *l'avenement du sujet* — the subject-proper, one which accedes to the speaking subject within the *inter-subjective sociality of the Symbolic realm*. With the intrusion of the Imaginary, the ego of the subject is instigated in a sense of loss of original *jouissance* and an unresolvable desire caught in the oscillations of the duality of an internalised-externality of the ideal self-image of the *imago*. Hence, with its desire, alienation and anxiety still unresolved, with its sense of lack of the Real still not sutured, the subject turns towards other compensatory objects for possible fulfilment. The ego turns towards the social world of the inter-human engagement of language in an attempt to escape the tension of the *imago*, in an attempt to satisfy its desire through others and acquire stable and whole identity.[67]

Just as the Imaginary is dominated by images and illusions, this Symbolic realm of human experience is dominated by language: where symbols represent other significations and metaphors represent and refer to other meanings beyond themselves. This is the realm of the work of the linguistic signifier, the play of differences between distinct signifiers (word symbols) which give signification — meaning and understanding — to the subject and its reality:

> Day and night, man and woman, peace and war — I could enumerate more oppositions that don't emerge out of the real worlds but give its framework, its axes, its structure, that organise … that there is in effect a reality for man … The notion of reality that we bring to bear in analysis presupposes this web. This mesh of signifiers.[68]

The Symbolic — the play of difference between signifiers — inscribes the signification of the subject's identity and the subject's reality. Through such processes of language the meaning, understanding and knowledge of the subject (its identity) and the material

[67] Stavrakakis, above n 13, at 31.
[68] Lacan, *Book III*, above n 18, at 199.

world (its reality) in which it lives come into being. But this Symbolic realm of linguistic signification (*le grand Autre*) also represents inter-activity amongst human-others, the plurality of all others and their desires, as opposed to the intra-subjective singularity of *le petite autre* of the (gaze of the) self-image of the *imago.* Language is necessarily the sociality of communication: it is dialogue and discourse in order to communicate desire from subject to subject.

But for the oscillations of the endless processes of identification and *coming-into-being* to continue in this reality represented through language, there must be something missing in the Symbolic. For human identity to remain unresolved and unstable in the duality of the poles between the internalised-externality of ego formation something in the reality of the subject must fail the subject: fail to address the desire of the subject, fail to "fix" its desire, meet its ideal and articulate a sense complete identity. Just as there is a lack in the subject, so too there must be a lack in the Symbolic reality in which human identity unfolds which, rather than assuring the subject, compounds the ambiguity and instability of the structuration of subject formation and the processes of human identity. It is at this point where Lacan introduces to psychoanalysis the importance of language and Saussure's linguistic structuralism in the formation of human identity, where he superimposes the structure of language onto the (psychic) structure of subjectivity.[69] And most significantly, where he focuses on the important role of the signifier in the structure of the representation of reality and its effect on the subject: the continual interplay of difference within a "mesh" of word signs with no substance of their own, but rather, constituting reality in an endless exchange within a web of distinct signifiers.

For Lacan, the importance of language — and the play of linguistic signifiers — in the structuration of human identity is critical. The subject cannot escape language: "there is

[69] Lacan argued that his contemporary psychoanalysts had forgotten, misunderstood and misused Freud's work. Lacan's introduction of linguistic structuralism into the Freudian paradigm was one of his attempts to "return to Freud," to bring psychoanalysis back to the "truth" that Freud had discovered about human subjectivity. This "truth" was that the unconscious was structured like language and, hence, psychoanalysis must understand language and Saussure. Thus, Lacan suggests to his peers to "read Saussure." Refer to Lacan, *Ecrits*, above n 2, at 114-147.

no other to the Other [the Symbolic realm]"[70] as there is no other medium of existence beyond language. It is only with and through language that knowledge of ourselves and the existing world is given to us. The subject is born into language and has always, is always, in language and can only use language to express its desires. Thus, it is the symbols of language — the signifier — which constitutes the subject and its identity: "… the subject is the subject of the signifier — determined by it."[71] Through the Symbolic "language is superimposed upon the subject" — reality/identity is inscribed in and marks us through the Symbolic processes of linguistic signification.[72]

Hence for Lacan, through language the subject is forced to enter a *secondary identification*, a "second degree of otherness, in an attempt to resolve the loss, trauma and desire instigated with the primal intrusion of ideal *imago*."[73] The dialectical (failed) processes of language both mediate and continue to reiterate the primal desire of the subject and the *lack-in-being* of human identity:

> While the image equally plays a capital role in our domain [the mirror-stage] this role is completely taken up and caught up within, remoulded and reanimated by the symbolic order. The image is always more or less integrated into this order [that is, the symbolic order].[74]

Thus, the processes of structuration of human identity — from the Imaginary and the ego to the Symbolic and language — is a process whereby the former establishes the

---

[70] *Ecrtis*, *ibid*, at 311.
[71] Lacan, *The Four Concepts of Psychoanalysis*, above n 14, at 67. Lacan also argues the importance of language because it is only through language that the analyst and patient engage; it is only through language that the unconscious and its content of repressed loss, trauma, anxiety and desire can be read; and that the unconscious itself is the very structure of language. Refer Lacan, *Ecrits*, *ibid*, at 147-178; and Lacan, *The Four Fundamentals Concepts of Psychoanalysis*, above n 14, at 20-21. Lacan also refers to *symptom* as metaphor (as it stands for something other — the trauma of cut/lack in the subject) and desire as metonymy (as desire works like metonymy, always sliding and moving through a chain of objects/signifiers). Refer to Lacan, *Ecrits*, *ibid*, at 175.
[72] Lacan, *Book III*, above n 18, at 96. Hence, not only is the "I" the other of the unconscious loss and desire and the ideal *imago* as described above, but also, is an other of itself in the constitution of self through language. "The expression of identity, for example, 'I'm a doctor, I'm a citizen of the French Republic' works the same as 'I am man' which specifically means no more than 'I'm like he whom I recognise to be a man, and so recognise myself as being such.'" In the last resort, these various formulas [these expressions of identity] are to be understood only in reference to the truth of 'I is an other' … ." Lacan, *Ecrits*, *ibid*, at 23.
[73] Lacan, *Ecrits*, *ibid*, at, 22, 172.
[74] Stavrakakis, above n 13, at 19.

conditions of knowing (*viz-a-viz*, human identity as a lack and focussed on ego-desire for an ideal) and the latter establishes the conditions for signification of such knowing:[75]

> The psychoanalytical experience has rediscovered in man the imperative of the Word as the law that has formed him in his image. It manipulates the poetic function of language to give to his desire its *symbolic mediation* [my emphasis].[76]

In this formation of human identity, language of the Symbolic (the signifier) provides the linguistic form of being for the desire of the Imaginary (the ego).

The Symbolic Preview: The Entrance of Oedipus, the Biases of Law and the Objet Petite a

The entrance into this second ontological moment within the formation of human identity is instigated in the Oedipus Complex. The Oedipus Complex is important in the formation of human identity not only because it instigates the speaking subject-proper, but also for Lacan, it explains how subjectivity — human identity — is always already sexed and social identity, that is, always already a gendered position.[77] Even more, it explains the (patriarchal) structure of law and society. From the Imaginary, the instigation of ego is marked with a sense of loss and desire, unresolved in the *ex-sistence* of the duality between ideal-ego and actual self. Hence, the ego turns towards other compensatory objects for possible fulfilment. Here, the ego turns from the unsatisfying self-image of the *imago* to the closet other around it, the (m)other, to invest in it the ego's desire for unity and totality, in an attempt to resolve its own sense of loss:[78] The subject turns to the phallic mother — the symbolic representation of the ego's sense of loss and

---

[75] Butler, 'The Lesbian Phallus and the Morphological Imaginary.' *The Butler Reader*, above n 63, at 161.
[76] Lacan, *Ecrits*, above n 2, at 106.
[77] Fryer, above n 4, at 89. The arguments surrounding the issue as to whether or not Lacan's interpretation of the Oedipus complex is *phallogocentric* or non-gendered are not central to this dissertation. There is much debate as to whether of not Lacan's Oedipus is purely symbolic or ultimately biological. However, although Lacan suggests that the phallus is not the penis there is nothing, ultimately, which places the father in the position of the phallus except for the penis and, therefore, even in Lacan's interpretation the phallus cannot be totally separated from its representation by the penis. Ultimately, in this interpretation of Lacan's work it, at the very least, implicitly leaves the relationship between the phallus and the penis intact and, thus, introduces a contradiction in his own writings. Refer to Cornell, above n 30, at 729-92.; Butler, J. *Gender Trouble: Feminism and the Subversion of Identity*. Routledge, New York, (1999); Butler, 'The Lesbian Phallus and the Morphological Imaginary.' *The Butler Reader*, above n 63, at 138-80.
[78] Stavrakakis, above n 13, at 19.

the ego's desire to regain this loss.[79] The subject objectifies itself and takes on the gaze of the mother and seeks to become that which the mother desires: "If the desire of the mother *is* the phallus, the child wishes to be the phallus in order to satisfy that desire."[80]

Yet this objectification of self signifies that the child-subject aspires to take the place of the father, as it is toward him that the mother's desires are directed. Here there is transference from the (phallic) mother to the (phallic) father; there is substitution in the psyche of the child-subject from the feminine to the masculine. It is in this transference where the gender positions between the sexes and the structures of patriarchal society and culture are established on the symbolic hierarchy of gender power between the phallic mother and the phallic father.[81] The feminine holds the position of *being* the phallus — to be the passive object of the desire of the masculine, to be a site of elaboration for masculine desire which confirms the identity of the masculine phallus.[82] The phallic father is in a position of *having* the phallus, the position of authority to the possession of active power and right to/over the phallic mother.[83] Human identity is positioned around this hierarchy of gender: the male child identifies *directly* with the father and, thus, attempts to take the father's place; the female child identifies with the father and the phallus *indirectly* (as she identifies with the mother's lack) and, hence, transfers her desire of the mother for the desire of the father.[84]

---

[79] Lacan, *Ecrits*, above n 2, at 282.
[80] Lacan, *Ecrits*, *ibid*, at 289.
[81] Lacan, *Ecrits*, *ibid*, at 22; Butler, *Gender Trouble*, above n 77, at 93.
[82] Butler, *Gender Trouble*, *ibid*, at 56.
[83] Butler, *Gender Trouble*, *ibid*, at 59. Butler argues that both these positions (the feminine and masculine) are positions of failure. For the feminine, "to be" the phallus is not to have any signification of self (desire), but rather, to be the site of the (masculine) others' desire. And for the masculine, to have the phallus means one can never "be" what one has because, in this position, one is only in possession of a signification of desire.
[84] This difference in the sexed positions *viz-a-viz* the phallus is expressed by Lacan in his well known "train story" — in which a boy and a girl seated in different positions, opposite each other, look out the window of a train towards the same object (the public lavatory) but see different things: the boy sees "Ladies," while the little girl sees "Gentlemen." It is these sexed, identity positions which are inflexibly structured in human identity at the instigation of the Symbolic through the Oedipus scene, which forever marks the human subject as gendered and desire as sexual. Refer to Lacan, *Ecrits*, above n 2, at 152. This train story also indicates Lacan's attitude toward symbolic/linguistic signification — that all signification and meaning stems from the signifier and bears no relation with the signified (the concept) or the referent (the objective world).

The father intervenes in the child-subject's redirected desire towards the maternal other object. This is the Symbolic *name-of-the-father*[85] — with the power of command and prohibition, the power of language to say *"no:"*

> The Oedipal complex means that the imaginary, in itself an incestuous and conflictual relation, is doomed to conflict and ruin. In order for a human being to be able to establish the most natural of relations, that between male and female, a third party has to intervene, one that is the model of something successful, the model of some harmony. This does not go far enough — there has to be a law, a chain, a symbolic order, the intervention of the order of speech, that is, of the father [the name-of-the-father].[86]

This is the symbolic castration of the child — the word, the command and law — which forever cuts and denies the subject from its attempts of attaining the *jouissance* derived from its oneness with the (m)other, which it senses it has lost from the intrusion of the Imaginary.[87] The name-of-the-father is the primary external force managing desire, releasing the super-ego against the self-centred ego,[88] and introducing "the kingdom of culture [the social/cultural normative rules and regulations]" upon the subject to regulate its desires and domesticate its aggressivity.[89] With this injunction of the *name*-of-the-father the subject is directed away from the (m)other's desire and is forced to compensate its loss by investing its desire in alternative substitutional others and their desires, within the realm of the Symbolic and the reality of the inter-human activities of sociality.[90] In this way, the paternal function of the Oedipus is to introduce to the subject the order and institutionalisation of human society and the community of meaning.[91] It is only by the subject's submission to such paternal authority that the subject turns away from the

---

[85] Here, there is symbol upon symbol in Lacan's Oedipus scene. The name-of-the-father symbolises the phallus which, in turn, symbolises the mother's absence — what the mother is lacking and desires — which in turn symbolises what the child desires in order to regain its primary sense of *jouissance* and oneness, which is, in the end, symbolised by the phallic mother — a complete and unified mother/child dyad. Refer to Ragland, above n 10, at 1096, 1102.
[86] Lacan, *Book III*, above n 18, at 96.
[87] Ragland, *op cit*, at 1096. The father's prohibition of the mother — the father's castration of the child from the Real of the (m)other and its *jouissance* — is not only with the word "No!" but also, in the very name of the father: a word and language which he has "stamped" onto the mother, marking the mother as his own object of desire.
[88] Douzinas, above n 41, at 1333.
[89] Ragland, *op cit*, at 1091; Lacan, *Ecrits*, above n 2, at 66-67.
[90] Verhaeghe, above n 12, at 166-68.
[91] Stavrakakis, above n 13, at 301-31.

maternal object of desire and gains its own identity through (symbolic/linguistic) representation in the larger sociality of the world of words.[92]

Here, Lacan places the masculine phallus in a uniquely privileged position in the processes of the formation of human identity and the structuralisation of society. The paternal law is fixed in the place of the transcendental signifier — the inescapable and unattainable ideal object which instigates the Symbolic and introduces the subject to its appropriate linguistic and sexed position.[93] It is the masculine position of *possessing* the phallus which warrants it to claim the mother as belonging to him, marking the feminine against the claims of the child (and other subjects).[94] It is the masculine which has the authority to cut the child-subject, castrate it from its sense of primal *jouissance* with the Real and leave it scarred and lacking. In possessing the phallus, the masculine name-of-the-father holds the potent position of guarantor of human identity and social reality:[95]

> … in order for there to be reality, adequate access to reality, in order for the sense of reality to be a reliable guide, in order for reality not to be what it is in psychosis, the Oedipus complex [the word of the name-of-the-father] has to have been lived through.[96]

This is the *phallogocentrism* of the Lacanian structured subject, the privileged masculine which is autonomous and self-grounding, speaking the law and language, but beyond the law and language. From this privileged position over the identity of others and their reality — over the Symbolic — the masculine is the regulatory principle of truth and knowledge. [97] In this gendered structural hierarchy, the feminine is the de-valued other, signifying incompleteness, the passivity in her position of *being* the phallus, while the masculine name-of-the-father becomes the Symbolic signification of the ideal *imago*, the activism of *having* the right of power over itself and others.

---

[92] Stavrakakis, *ibid*, at 20.
[93] Cornell, above n 30, at 765-768. Here the phallus becomes the "transcendental signifier" as it takes on a critical role in the formation of the (sexed) subject proper: "The phallus is the privileged signifier of that mark in which the role of the logos is joined with the advent of desire." Refer to Lacan, *Ecrits*, above n 2, at 286. I shall discuss in detail this privileging of the phallus below in this Chapter.
[94] Cornell, *ibid*, at 740.
[95] Butler, J. 'Bodily Inscriptions, Performative Subversions.' *The Butler Reader*, above n 63, at 92.
[96] Lacan, *Book III*, above n 18, at 198.
[97] Sarup, above n 21, at 37-38.

Significantly for our understanding of law, Lacan's analysis of Oedipus uncovers how this intrusion of the name-of-the-father — from its position of possessing the phallus — becomes the very foundation and structure of law:

> It is in the name-of-the-father that we must recognise the support of the Symbolic function which, from the dawn of history, has identified this person in the figure of the law.[98]

This is the mark of the gender bias of law and the socio-political institutionalisation of law. Here, Lacan is explicit that the structure of law and the structure of language (that is, the structure of our social and cultural significations of meaning, understanding and knowledge) are specifically masculine.[99] It is the masculine phallus which is the symbolic expression of the power and logic of traditional politico-legal institutions.[100] Law is founded upon, and structured within, the generation of ego-desire and the forbidding of such desire in this "ritual symbolic gesture," in which the juridical model exercises and consolidates its own powers.[101] Thus, the name-of-the-father is the expression of the legal determination of personal desire towards an ideal image. From this position of possessing the phallus, paternal law announces the prohibitive "no" — the first "law of desire," the original advent of the law. From this position, the phallus marks the boundaries between in and out, right and wrong, inclusion and exclusion — it is the (politico-legal) means through which the ideal of personal desire is managed.[102]

Thus, the law is not a means to attain the ideal of personal wholeness and human identity. It does not offer the primary original object of desired ideality, the maternal *das Ding* of the Real. Rather, the law is the necessary intervention which forever forecloses the

---

[98] Lacan, *Ecrits*, above n 2, at 67.
[99] Ragland, above n 10, at 1102; Schroeder, J. L. & Carlson, D.G. 'The Appearance of Right and the Essence of Wrong: Metaphor and Metonymy in Law.' *Cardozo Law Review* (2003), Vol. 24, No. 6, 2481-2516, at 297.
[100] Douzinas, C. *The End(s) of Human Rights: Critical Legal Thought at the Turn of the Century*. Hart Publishing, Oxford, (2000), at 297.
[101] Butler, *Gender Trouble*, above n 77, at 96.
[102] Douzinas, *op cit*, at 297.

object of desire from the ego, for the sake of self-legitimacy.[103] But also, this intervention is necessary in order that the subject-proper may strive forward into the Symbolic within its own processes of identification, its own expression of human identity, and not be consumed in the terror of Real:

> Thus the Oedipal identification is that by which the subject transcends [through the law] the [ego] aggressivity that is constitutive of the primary subjective individuation.[104]

The function of the law is to bar the subject from its ideal maternal object and total self-oneness and domesticate it aggressivity. It prevents the subject from becoming parasitic upon an-other, which would only prevent its own appropriate development of identity.[105] The law (the masculine phallus) is the "shield of the subject," barring the ideal object of human identity and preventing the subject from being "swallowed by the chasm of the Real" and consumed by the totality of an-other's oneness.[106] In this way, the law prevents the self-annihilation of the subject, but also, creates a trauma (compounds the trauma of the original intervention of the Imaginary and sensed split from the Real) as it leaves desire wanting. Seeking an alternative substitutional object for the barred original *das Ding* of desire, law (the name-of-the-father) directs the child-subject into the Symbolic representation of the sociality of others and their desire. It is the law which orders the subject into the community of meaning.

Here, there is an obvious criticism regarding Lacan's gender bias in his analysis of the normalisation of gender positions and the structuration of patriarchal societies. In his insights into Oedipus, what Lacan fails to elaborate upon and problematise is how this structure of law also instigates violence upon the other — it also excludes the (feminine) other. Lacan casts the phallic father into the position of having the phallus, he places the

---

[103] This is a critical point for Lacan in his criticism of traditional ethics and their offerings of potential utopian ideals, the possibility to re-turn to the Real. In such ethical schemes, the phallus has been confused for the guarantor of these possible ideals rather than the necessary cut from (the ideality of) the Real. I shall discuss this in detail in Chapter Four: '*Human Rights through the Lacanian Specular.*'

[104] Ragland, above n 10, at 1091; Lacan, *Ecrits*, above n 2, at 66-67.

[105] Another obvious function of the paternal law is to prevent the patricide of the father by the subject-child over the desire (maternal) object.

[106] Douzinas, above n 100, at 307.

male signifier beyond the ambiguous and unstable processes of signification between different signifiers and fixes the male to the privileged position of the transcendental signifier. But it is from this position that this paternal law challenges, confronts and sublimates itself for the omni-potence of the desired object of the (m)other — the paternal law takes the place of the phallic mother with its own law of words, its prohibitive "no."[107] Hence, this signification of law (of the logical structuration of the tradition of politico-legal institutions) only survives by denying the other, and the power of the law is structured on exclusion. Here the female other is rendered invisible by Lacan, only to be filled out by the male subject.[108] Hence the maternal Thing is denied in the law of language and the signification of reality in favour of the expression of paternal power.

But there is a veiled illusion in this paternal power of law and in this masculine position of the possession of the phallus. The "self-grounding," transcendental positioning of the paternal law is an attempt to veil over and conceal this exclusion of the feminine other.[109] The masculine transcendental position of/to power can only be gained by appearing to originate meaning and signification, language and law, by representing itself as the guarantee of the linguistic significations of reality and human identity. But the phallic father is constituted by the feminine other — its position of power depends on the denial and exclusion of the feminine other. The grand-narrative of social law is grounded upon the repression of the other, the barred feminine *das Ding* of the Real. This illusion is compounded by the fact that this authoritative position of paternal law only gains its status through confirmation by the feminine other. For paternal law to present itself in

[107] Douzinas, *ibid*, at 304.
[108] Žižek, *Tarrying with the Negative*, above n 19, at 58-59. Žižek also attempts to "rescue Lacan" from the gender biases in his work by arguing that the "invisible feminine" is a "positive position of excess" beyond masculine law and signification (Žižek, *Tarrying with the Negative*, above n 19, at 186-88). Butler, however, is less forgiving in her interpretation of Lacan on this issue, and comments (rather cynically) on Žižek's defence of Lacan's positive position for women as a "neologistic accomplishment before which [she] is in awe." Refer to Butler, 'Competing Universalities.' *The Butler Reader*, above n 63, at 265.
[109] Butler, *Gender Troubles*, above n 77, at 58. Also refer to Cornell, above n 30, at 729-792. The failure of Lacan here is that he fails to radicalise the Real and acknowledge that in this position of being the phallus, the feminine is in proximity to the Real which gives the feminine significant and unique power. The traditional silencing and exclusion of women places women in a phantasmagorical position of power expressed in terms such as "seers, mystics, psychics, woman's intuition; etc," — power beyond the (masculine) Symbolic representations of reality — all of which breed suspicion, fear and repression of women by men. Refer to Ragland, above n 10, at 1107.

the position of *having* the phallus, the feminine position must remain suppressed into *being* the phallus, the reflection of and site for the expression for masculine desire.[110] The maternal object is used simply to sure-up the position and power of the paternal law rather than explored within itself. Thus, law functions on repression and its primary ideological task is self-legitimation through exclusion and the veiling of such exclusion — whether enforced corporally or hegemonically.

The significance here in the formation of human identity (beyond the obvious gender issues) is that it is this law of prohibition, this cut of the subject in its attempts to return to the sense of Real oneness, which founds the subject-proper as it moves from ego-Ideal to full human personality. The Oedipus scene is both the grounding of the subject-proper and the instigation of law *via* language (masculine authority/power) through which human identity is constituted in a prohibition.[111] Proper human identity, thus, becomes the equivocations of ego desire from the Imaginary, constituted (symbolised in linguistic signifiers) as a negative effect of law and language in the Symbolic realm of inter-human activity. Thus, from the foundational moment within the Imaginary and the genesis of the self conscious ego, to the emergence of the speaking subject-proper, human identity is always constituted by an-other(s): the other of the *imago*; the other of the master signifier; or even the other of the Real.

But as the sense of loss of the Real is merely a fantasy invoked by the emergence of ego, and the ideal-I is merely an illusion of self, not even the paternal law's Symbolic representations of reality can resolve the subject's desire. Within the Symbolic, this desire is directed to alternative substitutional objects (away from the (m)other). These compensatory objects are the *objet(s) petit a* in substitute for the loss upon entry into the Symbolic realm of sociality and community. They are the equivalence within the Symbolic of the *objet a* in the Imaginary (the gaze of *le petite autre* — the asymmetrical,

[110] Butler, *Gender Trouble*, *ibid*, at 58. Butler argues it is in the uncovering of this suppressed power "to be" where one discovers not only the site of grounding the phallic paternal law, but also, the very site for undermining patriarchal structures. There is plasticity and transferability about the phallus in the dialectic of desire between the maternal and paternal — and, thus, the position/power of having the phallus is contestable.
[111] Butler, *Gender Trouble*, *ibid*, at 93.

ideal *imago*).[112] Every representation of reality, every social, cultural and ideological fantasy-of-reality, is articulated around the offerings of these *objets petite a*, in an attempt to bring consistency between subjective desire and the representation, the fantasy-illusion, of reality. As the subject-ego traverses the Oedipus scene and enters the Symbolic realm of reality representation, the status of the *objet a* is transferred to other human subjects (and their desire, their objects of desire, their gaze). This transference oscillates from intimate familial subjects to other human subjects in the broader social community of representation and meaning. Hence, the *objets petite a* sustain the illusory Symbolic representations of reality, sustain the power and exclusion (whether corporal or hegemonic) of the paternal law over the field of the Symbolic.

But such *objet petite a* are more than just the actual objects of desire sought and attained in the social field of Symbolic representation. The *objet petite a* can only function as an *absent* object: the desire of the subject to gain such an object is only agitated when the object is "absent and missing" from the subject. In this sense, the *object petite a* is not only the *potentiality* of the fulfilment of human desire, it is also (by the effect of its absence) the *cause* of human desire. The *objet petite a* (and the many *objets petite a* represented in the Symbolic) both attempt to cover-up the lack in the Symbolic and fulfil human desire, but also, marks the impossibility of these efforts and this task. Hence, the *objet petite a* also represent *the object-cause of desire* — objects which never fully satisfy the desire of the subject and, thus, which agitate the continuation of unfulfilled desire for something "other," beyond the limitations of the Symbolic. That is, the other of the

[112] Salecl, R. 'Rights in Psychoanalytic and Feminist Perspective.' *Cardozo Law Review* (Jan 1995), Vol. 16, No. 3-4, 1121-1137, at 113-1135. Here, there is a theoretical shift in Lacan's thesis. Prior to the notion of the *objet a*, Lacan referred to the phallus as the signifier of desire, but here it is the *objet a* which refers to the impossible desire for the Real. Thus, the object-cause of desire takes the place of the signifier of desire. Both the concept of the phallus and the *objet a* support desire by promising (the possibility of) an encounter with the lost Real, within the realm of the Symbolic. In this respect these two concepts are the same. However, they are different in respect to the angle from which they engage with desire: the *objet a* (or *objet petite a* in the Symbolic) refers to desire from the angle of objects (the *objet a* represents the imaginary fullness of the object of the Real that is lost and lacking); while the phallus represents the symbolism of possible fulfilment of desire. Refer to Stavrakakis, above n 13, at 49-51. In addition, in the realm of the Symbolic and the function of symbolisation, the phallus represents the position of power from which "true" *objet petite a* are offered to the subject. Hence, all other *objet petite a* offered from other, non-phallus positions are something "other" than "truthful/genuine." Rather, they are/represent artefacts and articulations of political propaganda, ideological specificity, or (most common in our contemporary human rights discourse) cultural relativism. Hence, the social, political and cultural discursive struggles for power are struggles for the position of the phallus in order to gain a claim to something genuine.

sensed lost oneness with the Real and ideal imagery. The *objet(s) petite a* mark(s) the limits of Symbolic signification, the limits of unconscious desire and illusory fantasies of realising this desire. Hence, the significance of the *objet petite a* as: "the object which can never be attained, which is really the cause of desire rather than that towards which desire tends."[113]

In this way the *objet petite a* sustains the illusion of the possibility of satisfying desire and the (re)gaining of the Real; it assists the paternal law's presentation of a fantasy of possible fulfilment in the reality of Symbolic representation. Always barred from its sensed past lost wholeness — by the intervention of the *imago* and the prohibitive "no" of the law, and then reinforced by the ambiguity of the signifier — the lack-in-being of subject structuration maintains an ongoing, inter-human dialectical effort to resolve its loss and relieve its trauma within the limits of the Symbolic and the significations of reality.[114] Thus, the offer of the *objet petite a* is never fulfilled, the fantasy remains, desire is left unfulfilled and the consumption of other sublimating object (other *objets petite a*) continues.

The Speaking subject: the Signification of Language and the Failing Signifier

But beyond the failing of subjective desire due to the fantasy of the Real and the illusion of the ideal *imago*, the subject's desire is left wanting by the very nature of the structure of its linguistically refined contextual reality. Here, within the Symbolic representations of human identity and reality, the speaking subject-proper still fails to fulfil its desires because the Symbolic (the paternal law) limits the subject to the structures of language and the role of the signifier in the processes of signification. The submission to the name-of-the-father (the acquiescence to *his* powers) is submission to the law of language in order to become a speaking subject and exist as a full human personality with an

[113] Evans, above n 23, at 125. Lacan also refers to the *objet petite a* as being "wedged anamorphically" between the *Borromean knot* of the Real, the Imaginary and the Symbolic and, due to its impossibility, it indicates the limit of language, the moment of silence. Refer to Thurston, L. 'Ineluctable Nodalities: On the Borromean Knot.' *Key Concepts of Lacanian Psychoanalysis.* (ed. D. Nobus), Rebus Press, London, (1998), at 147-148. Žižek refers to the *objet petite a* as "the empty frame that provides a space for the articulation of desire." Refer to Žižek, S. 'Superego by Default'. *Cardozo Law Review*. (Jan 1995), Vol. 16, No. 3-4, 925-942, at 939.

[114] Evans, *ibid*, at 99.

articulated human identity, enunciating one's desire within the community of meaning amongst other human subjects. This paternal law of Oedipus is the structure of language as Saussure outlines, with the interactive equivocations between distinct signifier symbols. The law of the subject's Symbolic existence is fundamentally a linguistic entity — it is the law of the signifier: "This law, then, is revealed clearly enough as identical with an order of language."[115]

Language for Lacan — the law of language — takes on the structure of Saussure's linguistic structuralism, in that meaning is made through the inter-play between different signifiers/word symbols. In language, meaning does not emanate from any essence in the object itself (the referent), or from the concept of the object (the signified) capturing this essence, but rather, through the inter-play of different signifiers — the word signs of the different objects.[116] Meaning is not created through a direct and inherent reference of the signifier to the signified and referent. Rather, it is through an arbitrary mesh of relationships of different and absent signifiers that a word gains meaning and that language bestows understanding, expression and representation of the subject and its reality:

> Through the word — already a presence made in absence — absence itself gives itself a name … and from this pair of … presence and absence … there is born the world of meaning of a particular language in which the world of things will come to be arranged … It is the world of words that creates the world of things.[117]

The signifier is a "sign of an absence" of another arbitrary inter-active signifier.[118] Hence, it is the signifier which makes meaning and constitutes the significance of the subject's identity and reality through what it is not.

Thus the signification of human identity and its contextual reality is constituted by the unstable sliding between distinct and arbitrary signifiers, both present and absent in each

---

[115] Lacan, *Ecrits*, above n 2, at 66; Evans, D. *An Introductory Dictionary of Lacanian Psychoanalysis*. Routledge Press, New York, (1996), at 98.
[116] Lacan, *Ecrits*, above n 2, at 84, 120-126.
[117] Lacan, *Ecrits*, *ibid*, at 65.
[118] Lacan, *Book III*, above n 18, at 167.

other. Every signifier refers to another signifier, which refers to another signifier, and so on. This incessant movement between different signifiers in order to make meaning is produced by what Lacan calls "signifying chains." These are "rings of a necklace that is a ring in another necklace made of rings" from which "meaning 'insists' but that none of its elements [signifiers] 'consists' in the signification of which it is at the moment capable."[119] The lack of "consistence" indicates that meaning does not positively exist, but rather, is constituted negatively by what it is not (that is, other referenced signifiers in the signifying chains). The lack of consistence indicates that meaning, reality and identity, do not positively and inherently exist. Signifiers are empty and hollow and constitute meaning negatively, through an arbitrary and unstable process of what is absent:

> Our starting point, the point we keep coming back to, since we shall always be at the starting point, is that every real signifier is, as such, a signifier that signifies nothing.[120]

Thus, there is always something missing in the Symbolic realm of reality representation and identity formation: the signified; the "Real" of the symbolised reality; the "other" to the everything which the signifier and the Symbolic can be and is. In this way, reality — the mediation of reality through Symbolic signification — is radically superficial. The Real of what is being spoken is caught but lost under the sliding chains of signifiers: "… the supposed realism of describing the Real by details is only conceivable in the register of an organised signifier …"[121]

Thus, not only is the subject split by the intrusion of the Imaginary, but also, reality — the Symbolic realm — is also split by the workings of unstable and arbitrary signifiers.

---

[119] Lacan, *Ecrits*, above n 2, at 153. This is reminiscent of Derrida's thesis on the dynamism of *différance* working through the linguistic chains of signification, causing constant detour and deferring of meaning across a web of difference amongst inter-connecting signifiers. It also echoes Lyotard's notion of the *differend*, the de-prioritised absent other signifier which works with other signifiers to make meaning. Refer to Chapter Two: *'The postmodern Predisposition.'* For an analysis of the connection between Lacan and Derrida refer to Hurst, A. *Derrida Viz-a-Viz Lacan: Interweaving Deconstruction and Psychoanalysis*. Fordham University Press, New York, (2008).
[120] Lacan, *Book III, op cit*, at 185.
[121] Lacan, *Book III, ibid*, at 229.

There is no totality or stable wholeness in the signification of reality. Reality has its own gap and can never satisfy the desire for harmonious wholeness of the subject, even with the "guarantee of the paternal law of the masculine phallus."[122] In this sense, both the subject and the social are constituted by division, disharmony, impossibility and the Lacanian lack.[123] The Real is never attained in the unstable reality of sliding inter-play (*glissement*) of Symbolic signification.[124] Thus, it is the Symbolic itself — the linguistic representation of reality and human identity — which denies the Real, prevents the subject from attaining wholeness and that cements the split subject in an ongoing cycle of unfulfilled desire, alienation, anticipation, and identification failure.

Thus, paradoxically, the subject is undermined in the very place (the Symbolic) where it seeks the assurance of itself and its identity, after the intrusion of the Imaginary, where it seeks resolution to its maladies:

> The paradox of the Word is therefore that its emergence resolves the tension of the pre-symbolic antagonism, but at a price: the Word … involves an irretrievable externalisation-alienation.[125]

The split, alienation, anxiety and desire from the intrusion of the *imago* are not relieved in the Symbolic, but rather, superimposed by the gap of the Symbolic and its own compounding anxiety, alienation and trauma:

> One lack is superimposed upon the other. The dialectic of the objects of desire, in so far as it is a link between the desire of the subject and the desire of the

[122] Douzinas, above n 100, at 305.
[123] Stavrakakis, above n 13, at 41 and 136. Here Lacan is reminiscent of Althusser's thesis of *interpellation*, in which the subject is hailed ideologically into its social place and position (through the Ideological State Apparatuses, the *ISA*). Refer to Althusser, L. *Lenin and Philosophy and Other Essays*. Monthly Review Press, New York, (1971). Similarly for Lacan, we are always already hailed in/by language into our social (Symbolic) identification. However, Žižek distinguishes Lacan and Althusser, suggesting that Lacan "reverses" Althusser. For Althusser, ideology interpellates the subject into a certain subject (socio-political/ideological) position. But for Lacan, language (the Symbolic of the politic-legal) hails the subject into "no position." That is, the subject is interpellated into the locus of *"x:"* the empty signifier, rather than into something specific. Refer to Žižek, *Tarrying with the Negative*, above n 19, at 73-74.
[124] Lacan, *Ecrits*, above n 2, at 154. In this sense the signified disappears, not as a structural point in language, but rather, as a real point of reference of/in signification. Refer, to Stavrakakis, *ibid*, at 27.
[125] Žižek, cited in Stavrakakis, *ibid*, at 34.

> Other — I have been telling you for along time now that it is one in the same — this dialectic now passes through the fact that the desire is not replied to directly.[126]

Limited in the processes of linguistic representation, human identity never succeeds. The law of signification bears a constitutive impossibility upon the subject which denies the subject and the attainment of its desire.[127]

In the end, only ever existing in the linguistic significations of reality, it is an empty signifier which becomes the locus of a human identity which is structurally split and symbolically hollow. Thus, human identity is not self-reflexive, transparent to consciously self-posited and autonomously willed consciousness. Rather, it is constituted by the Symbolic and inscribed by the criss-cross of linguistic inter-play and discursive processes of language:[128]

> In short, by means of the Word, the subject finally *finds* itself, comes to itself … in the Word, the subject directly attains itself, posits itself as such. The price for it, however, is the irretrievable loss of the subject's self-identity: the verbal sign that stands for the subject, that is, in which the subject posits itself as self-identical, bears the mark of an irreducible dissonance; it never "fits" the subject.[129]

There is no meaning, understanding or knowledge beyond this structure of language. The subject always already inhabits language which always already inhabits it. In this way, human identity is "enslaved" in language — it is contingent upon the arbitrary and unstable play of the linguistic signifier as it gains its meaning and value from the significations beyond its conscious control:

> Thus the subject, too, if he can appear to be the slave to language is all the more so of a discourse in the universal movement in which his place is already inscribed at birth, if only by virtue of his proper name.[130]

---

[126] Lacan, *Four Fundamentals Concepts of Psychoanalysis,* above n 14, at 215.
[127] Stavrakakis, above n 13, at 28-29.
[128] Stavrakakis, *ibid,* at 28.
[129] Žižek, cited in Stavrakakis, *ibid,* at 29.
[130] Lacan, *Ecrits,* above n 2, at 148.

In this sense, the Symbolic marks the subject with that which it is to become, already present in the law of language. As Cornell suggests, the Symbolic is the only locus through which "we only are as we have already been spoken for."[131] The Symbolic order is the constitutive "well-of-meaning" in the construction of human identity. It is the material from which subjectivity is formed and, thus, is the repository from which the subject's reality is constituted.[132]

This hollowness of the subject at the locus of the empty signifier marks the (Symbolic) death of the subject. For Lacan, the mere act of naming is murder as it denies the subject what it "really" is, what it really desires beyond the limits of Symbolic signification — "the symbol manifests itself first of all as the murder of the thing:"[133]

> There is, in effect, something radically unassimilable to the signifier. It's quite simply the subject's singular existence. Why is he here? Where has he come from? What is here doing? Why is he going to disappear? The signifier is incapable of providing him with an answer, for the good reason that it places him beyond death. The signifier already considers him dead, by nature it immortalises him.[134]

Thus, the subject "is nothing but the impossibility of its own signifying representation."[135] Language, the signifier, can only bestow the subject a *simulacrum* of reality and identity. This is a compounding simulacrum superimposed onto the simulacrum constituted through the gaze of the image of the ideal-*imago*, the instigation of the self conscious ego through the gaze of the other, ideal-I.

Conclusion

There is a very real sense in Lacan's interrogation into the formation of subjectivity and the processes of human identity that it is framed in negativity and failure. The subject is, first and foremost, a subject marked by a sense of loss. From the rupture of self

---

[131] Cornell, above n 30, at 737. "… man speaks, then, but it is because the symbol has made him man." (Lacan, *Ecrits*, above n 2, at 65).
[132] Fryer, above n 4, at 138.
[133] Lacan, *Ecrits*, *op cit*, at 104. The paradox is that it is only through language that the existent's desire is animated.
[134] Lacan, *Book III*, above n 18, at 179-80.
[135] Žižek, quoted in Verhaeghe, above n 12, at 164.

consciousness in the intrusion of a contradictory duality between illusory ideals and actual limitations, the subject is left with "an empty feeling" that it has lost something "beforehand," some *jouissance* from a previous sense of harmonious and stable oneness. For the rest of its existence and experiences, in all its expressions and articulations, the subject is always marked by — always animated from the unconscious traces of — this loss and the trauma, anxiety, alienation and desire it generates:

> There is something originally, inaugurally, profoundly wounded in the human relation with the world … this framework introduces an indefinable, a *no exit*, marking all relations …[136]

And as the subject can only exist in the reality of linguistic symbols, it is destined to fail to (re)gain its sense of lost *jouissance*, as it negotiates an endless play of empty signifiers with no substantive Real material (no signified) to fill its desire. In this way, the Symbolic becomes a consolidation of a lack-in-being of a split subject, split by phantasmic fictions and images and also by linguistic equivocations, all leading to the permanent impossibility of the realisation of subject identity. This is the negativity which imbues Lacan's interrogation into the human subject: the subject of lack as a negative identity of loss; the social Symbolic as a negative presence of absence; unconscious trauma and desire as the negative other beyond conscious comprehension and calculability.[137] In this experience of subjectivity we are left with a process of human identity (identification) in which the subject is (unconsciously) forced to substitute fantasy for illusion, illusion for reality, and reality for unsatisfactory representations. As Butler suggests this is an almost romanticising of subject failure and a religiosity of identity impossibility.[138]

This focus on otherness is what brings Lacan's interrogation of human identity and subjectivity within the "threshold" of the post-discourses. In many ways, Lacan is the

[136] Lacan, *Book II*, above n 29, at 199.
[137] Stavrakakis, above n 13, at 14-15.
[138] Butler, *Gender Trouble*, above n 77, at 72.

psychoanalytical supplement to Derrida,[139] for much of Lacan's interrogation of human identity follows the methodology of deconstruction and is a type of deconstruction of the unconscious and human identity. For Lacan, the subject is the text and his work involves the re-prioritisation of the elements of human identity in the discursive processes of human signification: consciousness and unconsciousness; signified and signifier. Within these relationships of accomplices to signification he prioritises "the other" over the established present but then places the other under permanent erasure (the subject Symbolised as $\not{S}$ to signify the subject-of-lack) to signify the incessant ambiguity and instability held within the locus of lack of unconscious human desire and the equivocations of empty signifiers. Lacan's deconstruction of human identity, like Derrida's own projects, resists the "temptation to fix a position" in human identity in an attempt to signify the "event of the impossible" in the structure of subjectivity.[140]

It is in this way that Lacan focuses our attention on the contingent other in the structure of human identity. Subjectivity is a condition of being which is bound to otherness. From the foundational moment of the confrontation of the ideal *imago* to the reality of Symbolic representation, there is always another constituting element beyond the conscious capacities of the subject — the mirrored image; the ideal-I; the lost Real; the phallic parent; the master signifier; the hollowed animations of empty signifiers — the subject is always already plagued by the constitutive forces of others in its attempts to gain a sense of self-realised and self conscious human identity. In the end, Lacan's subject is left with very little terrain upon which to "determine itself," within the limits of a fantasy of the Real instigating unfulfillable desire, an illusion of an ideal-I infusing anxiety, and smaller unsatisfactory objects of desire (the *objet petite a*) in a reality built

[139] Pound, M. 'The Assumption of Desire: Kierkegaard, Lacan, and the Trauma of the Eucharist.' *Journal of Cultural and Religious Theory*. (Winter 2008), Vol. 9, No. 1, 67-78, at 68.
[140] Derrida, J. 'For the Love of Lacan.' *Cardozo Law Review*. (1994-1995), 669-728, at 701-713. Derrida talks of his "love for Lacan" in that Lacan used "most brilliantly all the motifs that were deconstructable, in the process of deconstruction." However, ultimately, Derrida, cannot "be with" Lacan, as Lacan remains within the limits of many of those motifs (for example, the *phallogocentrism* of the phallus). Hence, Lacan remains on the "threshold" of the post-discourses rather then centrally within such discourses. Derrida's intervention into Lacan (and Levinas) is detailed and complex and not of central significance to this dissertation. For a compact analysis of Derrida's engagement with both Lacan and Levinas refer to Cornell, D. *The Philosophy of the Limit*. Routledge press, New York, (1992), at 85-90.

on empty Symbols of linguistic signification. All which retains the subject within a circulation of failure: a failure of self; a failure of desire; a failure of identity.

It is from this circulation of failure that I wish to explore the image of human identity and the structure of human rights presented in our contemporary human rights' discourse in the next chapter of this dissertation. From this Lacanian perspective, the structural integrity of this human rights' discourse is grounded upon dual illusions of possibility — two interweaving mirages aimed at veiling such failures with a fantasy-of-reality of the potential ideal of human identity coupled with the potential ideal of a stable sociality. These are the illusions of the potential of the individual of conscious capacities, the image of the *cogito*-like ideal, and the potential of the signification of human rights, through which such an image may be realised. These illusions sustain the fantasy that the subject's loss may be resolved through the totality of the symbols of rights — the *objet petite a* of human desire. These illusions are the "structural pillars" of our contemporary human rights' discourse, guaranteed by the State — the phallus of contemporary human rights — reconciling the human subject with the sociality of community.

****

Part A Chapter Four

Human Rights through the Lacanian Specular

Introduction

The outcome of Lacan's interrogation into the formation of human identity is a detailed analysis regarding the nature of the split in human subjectivity, a detailed understanding of the logical structure of human identity. This is a split subject which fractures at the very inception of self consciousness, with the intrusion of the idealised self image of the *imago*. The intra-psychic contradiction between these "two selves" — this ideal external other self and the limitations of the intimate self — leaves the subject (the ego) with anxiety, alienation and desire, a sense that it has lost "something of itself" which it wishes to regain. This is the lack-in-being locus of human subjectivity — the lost *Thing* (the *das Ding*) of the Real — which always agitates the subject from the realms of the unconscious, beyond conscious control. "I am always already myself split" and, thus, the other is the other place of my splitting. The truth of myself is the unconscious split of my conscious self. It is this pre-conscious intra-subjective split which is the invocation of human desire, which motivates inter-subjective human engagement/communication with others in the Symbolic, to fulfil my lack and address my desire — to gain the truth about myself.[1]

Hence, this subject is always already split, before and within, any conscious capacities of reason and intentionality, and turns towards the inter-subjective sociality of the Symbolic field of representation, through which reality is mediated, to gain resolution of such lack and fulfilment of such desire. However, in this realm there is also something missing. Representation is constituted by the discursive inter-play of linguistic signifiers and never articulates any substance of signification. There is nothing Real in the Symbolic, no actuality of the lost *Thing* within the significations of reality, no signified to completely fill the symbols of representation and cease the sliding of Symbolic signification. What is missing in the human subject, what constitutes the negative "gap" at the foundations of

[1] Žižek, S. *Tarrying with the Negative: Kant, Hegel and the Critique of Ideology.* Duke University Press, Durham, (1993), at 31.

the structure of human identity, coincides with (is compounded by) the very *Thing* missing in the representation of reality in which the subject exists and is limited within. This missing-*Thing* is the unattainable left-over which continues to invoke the subject's sense of loss and unfulfillable desire. Lacan reconciles the relationship between the self and society (the individual and the universal) with a split through both, leaving neither with the experience or the signification of totality and wholeness, but rather, constituted by the contradictions, paradoxes and antagonisms of the traumatic rupture of the other.[2]

This un-attainable left-over of the signification of subject desire, in the signification of human identity, presents a distinct difference between the Lacanian split subject of desire and the image of human identity presented in the tradition of our contemporary human rights' discourse. For Lacan, the split subject enters society always already pre-consciously split. However, the image of human identity within the human rights' discourse is potentially wholly (consciously) self-determined and is, thus, first and foremost split and independent (alienated and autonomous) from the society in which it enters. Whereas for Lacan the split subject seeks assurance within the contingencies of its inter-human social reality, the individual of the liberal tradition of our human rights seeks *self*-assurance through its own autonomous capacities of reasoned consciousness and intentional self-will, independent of its social context.[3] These distinctions alter the very ethical direction of the human subject in society and the ethical focus in these two projects of human identity. For Lacan, the subject-of-lack is directed towards its desire in an ethics of desire, whereas for our contemporary human rights' discourse, the individual is directed towards the exercise of its autonomous will (its conscious intentionality), in an ethics denying (de-prioritising) human desire and focussed on the ideality of the Real.

In this chapter I wish to explore the structure of our contemporary human rights' discourse from the Lacanian perspective of human identity, the split subject-of-lack. Firstly, I outline Lacan's critique of the ethics of the Real, which is the inspirational underpinnings of the liberal tradition within our contemporary human rights and gives

[2] Žižek, *ibid*, at 30.
[3] Zupancic, A. *Ethics of the Real: Kant, Lacan*. Verso Press, London, (2000), at 2.

integrity to the imagery of moral ideal *potentia* which it animates. For Lacan, the identity of the split subject in such a tradition (in such an ethic) represents a confusion in the nature of human desire and the limitations of linguistic significations. Such a confusion places the Real on the side of the Symbolic of human identity, places unconscious desire within the realm of conscious capacities, and exchanges the void of unfulfillable desire with the presence of exercises of self-will. This confusion in the designation of the Real produces the *dual illusions of possibility* which sustain a structural fantasy-of-reality within our contemporary human rights' discourse. Firstly, there is the illusion of self-harmony and wholeness (the *cogito*-like individual), reflecting the psychological desire towards the ideal image of the *imago*. Secondly, there is the compounding illusion of a unity and harmony within the greater social, Symbolic realm. Here the State holds the position of the phallus offering the law, the human rights law of civil and political rights — offering the Articles of Rights within the *UDHR* — as the *objet petite a*, through which the subject's ideal is potentially attained and its desires resolved.

Laying the Foundations with Ethics of the Real: Illusions; Fantasies; and Human Rights of Ideality

Both Lacan and the image of human identity within our contemporary human rights commence with a split subject of lack, both share an empty subject with no substantial internal content in themselves.[4] Both the transcendental subject of moral potentiality and Lacan's subject of the unconscious other are vacant of any positive substance. The (Kantian) identity of liberal individualism within contemporary human rights is split between the transcendental "I of thinking" and the phenomena of the pathological "I that is."[5] This is the split between the (empty) ideal potential of individual moral capacity and the concrete actuality of human existence. This duality of self consciousness reflects

[4] Zupancic, *ibid*, at 1-3. The similarity of the empty subject is what leads Jardine to refer to Lacan as "one of the last Cartesian orphans." Refer to Jardine, A. *Gynesis: Configurations of Woman and Modernity* Cornell University Press, Ithaca, (1985). However, the distinction between Lacan and Descartes is significant. For Lacan, the *cogito* is not a thinking subject (as per Descartes), but rather, an empty form of self-reflection. Refer to Salecl, R. 'Rights in Psychoanalytic and Feminist Perspective.' *Cardozo Law Review*. (Jan 1995), Vol. 16, No. 3-4, 1121-1137.

[5] Žižek, above n 1, at 68. Žižek refers to the *cogito* of self consciousness as emerging from another split in human history: the first crack in the ontological consistent universe, expressed in historical projects such as the great chain of being and the Divine Cosmos. Refer to Žižek, above n 1, at 12, 42.

Lacan's "subject of two-halves:" the duality of ego desire and ideal *imago* which invokes the self awareness of the intra-subjective mediation of an-other "I," which de-centres the subject outside of itself, objectifying the subject to (the gaze of) itself.[6] The transcendental "I" of idealised autonomous reason within the tradition of our contemporary human rights' discourse is the mirror of potential wholeness and oneness in individual capacity, the substitute for the sense of lost oneness and wholeness invoked by the intrusion of the *imago*-other. In this respect, both Lacan's interrogation of the Real and the tradition of liberal humanism within our contemporary human rights commence as discourses of the impossible: the former of the unconscious other beyond conscious capacities, and the latter of the impossibility of transcendence beyond the concrete individual.[7]

The distinction, however, in these split subjects of empty content is in their structural form — in the location of the fault line of the subject and the potential articulation of bridging such a divide in the animations of human subjectivity. For Lacan, the subject is split at the inception of self consciousness, at the genesis of the ego and ego desire and forms the kernel of human identity. It is this pre-foundational, pre-ontological, split which marks the very nature of human identity. The subject commences with its own internalised intra-psychic split, which it necessarily seeks to resolve within the social spaces of the Symbolic community of meaning in which it always already exists. Thus, human identity is always already marked by this irretrievable lack-in-being which is retroactively constituted by what the subject is not, already marked by unconscious anxiety, ambiguity and desire which the limitations of the signifier cannot fulfil and consciousness cannot attain. In this formulation of the split subject, Lacan's aim — his ethical aim for psychoanalysis — is to reconcile the subject with its symbolically mediated social existence through what each is lacking — an understanding and integration of the split of the ideal Real of self oneness and harmony reconciled with the sliding of meaning in the signifier.[8]

---

[6] Žižek, *ibid*, at 69.
[7] Zupancic, above n 3, at 3.
[8] Žižek, *op cit*, at 30.

However, for the tradition of our contemporary human rights' discourse self consciousness remains intact. The split in this subject leaves the autonomous capacities of conscious reason and intentionality "fenced-off" from the limitations of the inter-subjective social dialectic of the Symbolic.[9] The autonomous individual enters and exists in its sociality always already (potentially) whole and stable within itself. The individual exists for itself, by its independent conscious capacities. This places the Real on the side of consciousness. Here the Real is imagined as a potential "to be" attained through the exercise of the individual's conscious capacities, through the Symbolic expressions of its own existence, to relieve the subject of anxiety and desire through its own effort of being. Whereas Lacan's split subject cannot be sutured, as it is the very split which invokes the signification of the presence of the subject, the tradition of liberal humanism and Kantian *potentia* within our contemporary human rights merge the signification of the *I am* with the transcendent *I think,*[10] reconciling the potential of the ideal Real with the presence of individual will.[11] Whereas Lacan's unconscious void of the subject-of-lack can not be healed, the tradition of our contemporary human rights fills the content of transcendent subjectivity with the potential of the individual's conscious capacities, marking the exercise of reasoned will as the ethical act of re-healing the subject from its unconscious anxieties and ambiguities.[12] In this way, self-will becomes the imperative of desire and the mark of human identity.[13] Will is the necessary resolution of the subject, which is superimposed upon desire in an attempt to realise the Real to which desire aims and, hence, relieve subject anxiety.

Hence, the aspiration and inspiration of our contemporary human rights' discourse is the potential attainment of the Real. The very foundations of the discursive structure of our contemporary human rights is this ethic of the Real — the underlining utopian offering to "cure the subject," to resolve its desire and realise its sense of lost "prior oneness" with

[9] Douzinas, C. *The End of Human Rights*: *Critical Legal Thought at the Turn of the Century*. Hart Publishing, Oxford, (2000), at 326.
[10] Žižek, *op cit*, at 15-16.
[11] Zupancic, above n 3, at 13, 97-104.
[12] Zupancic, *ibid*, at 13, 97-104.
[13] Žižek, in Zupancic, *ibid*, at x.

the Real, before the intrusion of the Imaginary.[14] The sovereign good of such an ethic (the supreme good) is this ideal of re-harmonising the subject,[15] tendering the potentiality of the subject's sensed prior loss, the signification of the fullness of human identity, through the conscious capacities of intentional will. In other words, good, as expressed within such ethics of the Real, is not a moral good in itself, but rather, a signification for something other, lying behind and beyond:

> The Real is beyond the *automaton* … The real is that which always lies behind the automation … Moral action is, in effect, grafted on to the Real.[16]

Thus, such an ethic focuses upon the possible attainment of the ideal Real (the possible containment of anxiety and desire) within the processes of Symbolic representation and identity signification.

It is in this sense that there is a teleological goal towards which such ethics of the Real strive. This *telos* is the resolution of the split subject, released from the burden of oscillating desire and equivocating signification, through the exercise of self-will securing stable and certain identity within the totality of its Symbolic reality. The effort of such an ethic is to invigorate an expression, a re-presentation within the Symbolic, of the potential fulfilment of the ideality of the Real. This is the liberty of such ethical projects — the self-autonomy of "I" away from the anxiety and ambiguity, instability and uncertainty, of oscillating desire and equivocating Symbolic sociality. This is the liberty of the "I" fulfilling the fantasy of fullness, the imagery of the *imago*. This is the "ontological secondary supplementary attempt" to re-establish a "primary" sense of lost balance; the endeavour to re-construct self and society as harmonious, organic, non-

---

[14] Stavrakakis, Y. *Lacan and the Political: Thinking the Political*. Routledge Press, London, (1999), at 128.
[15] Lacan, J. *The Seminar of Jacques Lacan Book VII: The Ethics of Psychoanalysis 1959-1960.* (ed. J.A. Miller; trans. D. Porter), W.W. Norton, New York, (1992), at 70.
[16] Lacan, J. *The Seminar of Jacques Lacan Book XI: The Four Fundamentals Concepts of Psychoanalysis, 1964.* (trans. And ed. A. Sheridan), W.W. Norton, New York, (1981), at 53-54; Lacan, *Book VII, ibid*, at 21.

antagonistic articulations; the fulfilment of the presence of self, "from *becoming* to *being*."[17]

Such ethics of the Real inspire *projects of harmony*. Such projects aimed at suturing the split in human identity through the harmonisation "of and between" the subject and the social. Inspired by the unconscious lack of human identity, such projects of harmony attempt to "fill the void" of that lack with a Symbolic articulation of some *Thing* to capture and replace the sense of lost Real and, thus, to avert the ambiguity, anxiety and desire felt by such a loss:[18]

> The clear aim of all these attempts [traditional ethical projects] is to reinstate the big Other, the symbolic system, the field of social construction, as a harmonious unified whole by referring it to a single positive principle; the same applies to the subject … which, according to traditional ethics, can be harmonised by being subjected to the ethical law.[19]

Such traditional ethical projects are (conscious) attempts at Symbolic articulations of a totality of the re-presentation of the (unconscious) lost *Thing* of human desire, the signification of the possibility of stable human fulfilment grounded within the limits of the Symbolic.[20] It is in this way that such projects are attempts to *negate the negative* of lack, and *deny the denied* (the unfulfillable) desire of human experience. This subject/Symbolic conciliation offers harmony to both subject and social (individual and universal) — within each and between each — by re-instating a potential of a stable sociality of Symbolic representation, which addresses the totality of subject desire and leads the subject to their secure and stable sense of self fulfilment.[21]

In this harmonisation process the subject is subjected to a code, a law, a moral articulation, through which the subject's desire is re-directed towards and reconciled with

---

[17] Žižek, above n 1, at 97.
[18] Stavrakakis, above n 14, at 123.
[19] Stavrakakis, *ibid*, at 128-29.
[20] Stavrakakis, Y. 'Ambiguous Democracy and the Ethics of Psychoanalysis.' *Philosophy and Social Criticism*. (1997), Vol. 23, No. 2, 79-96, at 89.
[21] Stavrakakis, *ibid*, at 85.

the Symbolic representations of fulfilment.[22] It is here where such ethics of the Real produce an ego psychology, to subjugate the subject to an ethical law for "its own good," in order to normalise the subject *into* community.[23] Whether expressed in the pre-modern cosmos and great chain of being, or in the discourses of the *rights of man* from Hobbes and Locke, or in the moral law of Kant, or even in the socio-political hegemony of contemporary human rights, such ethical projects of the Real attempt to reconcile the potentiality of the subject of one "in and with" the Symbolic sociality of all.[24] It is here where such ethics of the Real reduce and deny unconscious desire, where the moral law and the ethical good act as the structural superego imposed upon ego development against desire:

> We must see right away how crude it is to accept the idea that, in the ethical order itself, everything can be reduced to social constraint, as is so often the case in the theoretical writings of certain analysts … [25]

Thus, the role of moral conscience is that of the superego, to transform ego desire into "remorse, guilt, punishment and repression." It is the *"ought to"* of desire domestication: "Traditional morality concerned itself with what one was *supposed to do* [my emphasis]."[26]

In this way, such ethics aim to re-direct desire toward/within the harmony of the social Symbolic in order to liberate the subject from an unstable desire:[27]

> The "Freudian blow" to philosophical ethics can be summarised as follows: what philosophy calls the moral law — and, more precisely, what Kant calls the categorical imperative — is in fact nothing other than the superego.[28]

---

[22] Stavrakakis, *ibid*, at 85-86.
[23] Fryer, D. *The Intervention of the Other: Ethical Subjectivity in Levinas & Lacan.* Other Press, New York, (2004), at 204.
[24] Zupancic, above n 3, at 1; Stavrakakis, above n 14, at 123.
[25] Lacan, *Book VII*, above n 15, at 225.
[26] Lacan, *Book VII*, *ibid*, at 315.
[27] Kristeva, J. 'Psychoanalysis and Freedom.' *Canadian Journal of Psychoanalysis.* (1998), Vol. 7, No. 1, at 4.
[28] Zupancic, above n 3, at 1.

The superego (the moral law of traditional ethics of the Real) commands the subject away from the impossibility of desire, and into the mediation of the Symbolic, but only in so far as to offer to resolve desire with the ideal potentiality of human identity within the totality of Symbolic signification.

From its very foundations our contemporary human rights' discourse is ingrained with such moral ideals of this ethics of the Real. In this discourse is the idealised potential to relieve the subject from its anxiety and desire by offering the possibility of the subject's sense of lost oneness within the Symbolic signification of human identity, the possibility of the former within the limits of the latter.[29] In its presentation of the image of human identity as the self-sovereigned, self-realisable autonomous individual, our human rights' discourse locates the moral potential of conscious reason and intentional self-will at the very locus of the Real[30] — the re-presented image of potential ideal oneness to address anxiety and desire. The ethical act in the moral potential offered within the liberal tradition informing contemporary human rights, is the exercise of such conscious capacities through certain socio-political (liberal democratic) discursive processes of articulations (our civil and political rights and freedoms). Through such potential powers-of-self and such social (political) significations of the Symbolic, the subject and society — both within themselves and between each other — are reconciled against the ambiguity of loss and the oscillations of desire. In this way, the Real becomes the *point de caption* (the quilting point)[31] upon which the discourse of liberal rights and moral freedom is secured. Founded upon such ethics of the Real, the human rights discourse offers the ideal potential of a "reinstated harmonious, unified whole of subject and social, referring to the single, positive principle" of the Real, to regulate and justify its emancipatory project of liberal humanism and subjective rights.[32]

---

[29] Stavrakakis, above n 14, at 123.
[30] Lacan, *Book VII*, above n 15, at 21.
[31] Lacan, J. *The Seminar of Jacques Lacan Book III: The Psychoses 1955-56.* (ed. J.A. Miller; trans. R. Grigg), Routledge Press, London, (1993), at 93-94. The *point de capton* are also empty signifiers but have (ideologically) been promoted to *primary or proto signifiers* — important signifiers around which a whole chain of signification, a whole ideological discourse, such as rights and emancipation, is constituted in order to give the necessary illusion of coherent, consistent and stable meaning.
[32] Stavrakakis, above n 14, at 128-29.

For Lacan, any ethical project proclaiming such potentiality of ideal harmony and stability is a "flight of fantasy."[33] Such an ethic is "one of philosophers' pretty little dreams" — it attempts to deny and negate the always already unconscious lack-of-being of the split subject (the negation of the negation), which is the very mark of human identity:[34]

> Freud's discovery was to show how the centre of the human being was not in the place assigned to it by a whole humanist tradition [but rather the space of the unconscious].[35]

Such traditions of the ethics of the Real are idealist projects of harmony and mastery, order and unity, of and between the subject and its Symbolic contextual reality. Such an ideal good "… has been the eternal object of the philosopher's quest in the sphere of ethics, the philosopher's stone of all the moralities."[36]

The possibility of bridging the gap of the Imaginary, the gap between the pre-conscious Real and the conscious Symbolic, and relieving ego desire, is impossible and are claims from impostors: "And when the Legislator (he who claims to lay down the Law) presents himself to fill the gap [the subject/object lack] he does so as an imposter [*sic*]".[37] Such claims ignore the Copernican discovery of Freud — how the unconscious reveals how the centre of human identity is "not in the place at which it is assigned by the humanist tradition" (that is, it is not at the conscious self).[38] From the discovery of the unconscious, the ideality of potential harmony and oneness does not exist:

> … the question of the Sovereign Good is one that man has asked himself since time immemorial, but the analyst knows that that is a question that is closed. Not only doesn't he have that Sovereign Good that is asked of him, but he also knows there isn't any.[39]

---

[33] Lacan, J. *Ecrits: A Selection.* (trans. & ed. A. Sheridan), W.W. Norton, New York, (1997), at 6.
[34] Lacan, J. *The Seminar of Jacques Lacan Book XX: Encore, on Feminine Sexuality, the Limits of Love and Knowledge, 1972-73*. (ed. J.A. Miller; trans. R. Grigg), Routledge Press, London, (1998), at 86.
[35] Lacan, *Ecrits*, *op cit*, at 88.
[36] Lacan, *Book VII*, above n 15, at 96.
[37] Lacan, *Ecrits*, *op cit*, at 311.
[38] Lacan, *Ecrits*, *ibid*, at 115.
[39] Lacan, *Book XI*, above n 16, at 300.

The unconscious reveals how the truth of human identity is not in the potentiality of conscious capacities and autonomous will, but rather, "the truth of the subject, even when he is positioned as master, does not reside in himself, but, as the analysis shows, in an object that is, of its nature concealed [i.e. the unconscious]."[40]

For Lacan, such grand narratives of the ideal good of human (subject and social) harmonious oneness and wholeness are not motivated by the "ethical good" in itself, but rather, by the psychic drives of the pleasure principle. The denial of impossible desire within the Symbolic is the "logic of avoidance" of the pleasure principle — the avoidance of displeasure from the trauma, anxiety and ambiguity from the subject's unconscious sense of loss.[41] The re-presentation of the potential ideal of harmony and stability speaks to our incessant anxieties and ceaseless desires, and offers assurance in place of the ambiguity of the lack-in-being and the sliding signifiers of significations. Ethics (and our human rights informed by such ethics of the Real) become the strategies of compensatory substitutes to fill our loss and meet desire, within the equivocations of the subject's Symbolic reality:

> I have emphasised this since the beginning of the year: from the origin of moral philosophy, from the moment when the term ethics acquired the meaning of man's reflection on his condition and calculation of the proper paths to follow, all mediation on man's good has taken place as a function of the index of pleasure. And I mean all, since Plato, certainly since Aristotle, and down through the Stoics, the Epicureans, and even through Christian thought itself in St Thomas Aquinas. As far as the determination of different goods is concerned, Things have clearly developed along the paths of an essentially hedonist problematic … And in order to resolve them, all the philosophers have been led to discern not true pleasures from false, for such a distinction is impossible to make, but the true and false goods that pleasure points to.[42]

What "pleasure points to" in such a tradition in the ethics of the Real, what is ethically good, is the silencing/veiling of unconscious desire by superimposing a conscious will. It

[40] Lacan, *Book XI*, *ibid*, at 15.
[41] De Kesel, M. 'There is no Ethics of the Real: about a Common Misreading of Lacan's Seminar on 'The Ethics of Psychoanalysis.' (www.rpe.ugent.be/de_Kesel_paper.doc) accessed 12/11/09, at 5.
[42] Lacan, *Book VII*, above n 15, at 211.

is the logic of avoidance through the repression and denial of the trauma of loss and ambiguity of unconscious desire. Hence, within such ethical projects there is always the offer, the promise, the potential, to fill the void of human identity (to suture the split of subjectivity) with the possibility of individual harmony in a sociality of Symbolic certainty.[43]

To this extent of "filling the void" such ethics are acts of delusory fantasy. These are acts animating Imaginary (the ideality of the ego-I) and Symbolic (the *objet petite a* underscoring illusions of possibility) substitutional objects in place of the unrealisable, unrepresentable sense of "left-over" which marks our experience with the Real:

> At the level of sublimation the object is inseparable from the imaginary and especially cultural elaborations (the Symbolic). It is not just that the collectivity recognises in them useful objects; it finds rather a space of relaxation where it may in a way delude itself on the subject of *das Ding*, colonising the field of *das Ding* with imaginary schemes.[44]

Such acts are delusional because (as discussed in Chapter Three, *'The Topography of Self: the Borromean Knot of the Real, the Imaginary & the Symbolic'*) the Real "is not real." Rather, the Real is the *retroactively* constituted "left-over" sense of loss from the intrusion of the duality of identity (the illusory ideal-I and the corporal inferior self) invoked at the emergence of self consciousness, and then enforced by the nature of the ambiguous signifier in the processes of representation. The sense of prior lost oneness which such ethics offer to resolve is a secondary effect/collateral consequence of the rupture of consciousness itself and of the foreclosure of the subject's Symbolic existence.[45] The (unconscious sensation of the) Real is the effective-result of what is beyond this foreclosure of the Symbolic and the limitations of the signifier in mediating desire. From the confines of the Symbolic, the Real is not the ideal, but rather, the impossible and desire is not reconcilable, but rather, insatiable. From the Symbolic there is no "going-back" to a "prior" sense of self as there was no prior self (prior to the

[43] Stavrakakis, above n 14, at 123.
[44] Lacan, *Book VII*, above n 15, at 98.
[45] Žižek, above n 1, at 37.

Symbolic) to begin with: **"**Thus, man is born from an aggressive induction and there is no natural, pre-established harmony to free us from this [no utopia, no Eden to which to return]."[46]

This is the "miracle" and "fraudulent" offer made by such ethics of the Real, made by the "impostors of the Law" (the impostors of the phallus).[47] This is the ideality that the Symbolic may re-present the unrepresentable, that a certain articulation of Symbolic moral code may potentially realise the unrealisable of the Real and resolve human (unconscious) desire:

> [The] aspiration to happiness will always imply a place where miracles happen, a promise, a mirage of original genius or an opening up of freedom, or if we caricature it, the possession of all women for a man and of an ideal man for a woman. To make oneself the guarantor of the possibility that a subject will in some way be able to find happiness even in analysis is a form of fraud.[48]

It is this placement of moral sensibility onto the locus of the Real, of exchanging the latter with the former, which is the unconscious motivation which inspires the utopian ideality of such ethics. It invokes the utopian vision of the potential of a 'universal brotherhood of the human family of freedom, justice and peace' (as expressed in the Preamble and *Art*. 1 of the *UDHR*) within our contemporary human rights' discourse. It inspires the potential of the fulfilment of human identity as the autonomous capacities of conscious self-realisation (the illusionary ideal-I object of desire), reconciled through the positive articulations and arrangements of Symbolic human rights within socio-political community (the certainty of stable signification).

It is this (unconscious) delusional goal of such ethics of the Real which stimulates the illusions of possibility animating the fantasies-of-reality within the Symbolic realm: "The fictitious [the fantasy] is not, in effect, in its essence that which deceives, but is precisely what I call the symbolic."[49] For Lacan, reality is always already framed by fantasy, an

[46] Lacan, *Ecrits*, above n 33, at 24.
[47] Lacan, *Ecrits*, *ibid*, at 311.
[48] Lacan, *Book VII*, above n 15, at 303.
[49] Lacan, *Book VII*, *ibid*, at 12-13.

expression of an ideal of illusory desire within the Symbolic: "Everything we are allowed to approach by way of reality remains rooted in fantasy."[50] Fantasy is the mirage of satisfied desire and a fixed signifier around the object of desire. It is the promise of fulfilled *jouissance* within/through Symbolic mediation. Reality is the substitute for the void of human identity, the fantastic potential of some-*Thing* Real to be expected and experienced in reality.[51] Reality (the Symbolic representation of reality), *is* a fantasy, inspired by delusional, unconscious goals. And the goal of such ethics of the Real is aimed towards colonising (to "cover-up" and "take-the-place-of") the space of the Real. The goal (the offer) of such ethics is to satisfy the pleasure principle and disarm the threat of the ambiguity, anxiety and alienation generated from the sensed loss of some *Thing* (*das Ding*) Real. Reality, the fantasy-of-reality, is constituted within a background of this excluded loss and oscillating desire and is an attempt to negate the trauma of the inherently impossible other of human identity with a potentiality of a certain (stable) whole of subjective signification.[52] Reality is the constructed fantasy of the Real. It is the attempted veil over the gap of the Real and the linguistic and discursive illusions which sustain our belief in a substantive certainty of self and society:[53]

> Once the separation of the fictitious and the real has been effected, Things are no longer situated where one might expect. In Freud the characteristic of pleasure, as that dimension which binds man, is to be found on the side of the fictitious. The fictitious is not, in effect, in its essence that which deceives, but is precisely what I call the symbolic.[54]

However, the paradox of this fantasy-of-reality is that the price for this reality is the repression of the desire which animates the fantasy in the first place.[55] Desire is never resolved within the Symbolic realm, which fails to signify the lost Real. And thus, pleasure is never satisfied and continues to work to veil the Real which is lost and to deny the desire which is unending: "Let us conclude that the reality system, however far it is

---

[50] Lacan, *Book XX*, above n 34, at 95.
[51] Žižek, above n 1, at 43.
[52] Žižek, *ibid*, at 117.
[53] Stavrakakis, above n 14, at 27.
[54] Lacan, *Book VII*, above n 15, at 12-13.
[55] Žižek, above n 1, at 117-118.

developed, leaves an essential part of what belongs to the real a prisoner in the toils of the pleasure principle."[56]

In any ethics of the Real there are illusions of possibility transforming the reality of lack in human identity into a fantasy-of-reality of human signification, veiling unconscious desire with the "pleasurable ideal" of the potentiality of conscious self-will.[57] This is the misrecognition (a Lacanian *meconnaissance*) of the ontological status of the Real. It is the mis-understanding of the Real's *pre*-ontological, *pre*-conscious signification, for the potentiality of the conscious ontological capacities of presence. With the interweaving illusions of possibility regarding the subject and sociality, a mirage takes effect within the fantasy:

> Let me simply say that this is what leads me to object to any reference to totality in the individual, since it is the subject [subjected to desire] who introduces division into the individual, as well as into the collectivity that is his equivalent. Psychoanalysis is properly that which reveals both the one and the other to be no more than mirages.[58]

The ideological task of any ethics of the Real generally, and the discourse of our contemporary human rights specifically , is to legitimise this fantasy within the Symbolic, by presenting human rights as the transcendent — universal — potential of the realisation of the illusions of possibility which sustain the fantasy.[59] How this is done is through the law, the law of the word, grounded upon the power of the phallus, and the presentation of rights as the object of desire within the Symbolic. Rights are the *objet petite a* which we are guided towards in order to re-claim the lost Real, to fulfil desire and resolve our sense of loss.

This mirage within the fantasy-of-reality is the failure of such ethics and the reason why such ethics fail. It is the ideality offered in such moral good and such moral law attempting to signify some missing *Thing* (that is, the Real) always already "beyond and

[56] Lacan, *The Four Fundamental Concepts of Psychoanalysis*, above n 16, at 55.
[57] Zupancic, above n 3, at 13, 97-104.
[58] Lacan, *Ecrits*, above n 33, at 80.
[59] Žižek, above n 1, at 117.

behind" the Symbolic, and which is a retroactive after-effect of self conscious genesis and Symbolic foreclosure.[60] The mistake in such traditional ethical projects is the unconditional attachment to the pursuit of an unconscious ideal of human identity, which is unreal and unrealisable within the Symbolic realm of representation in which the subject (can only) consciously exists:[61]

> Indeed, this is the essential flaw in philosophical idealism which, in any case, cannot be sustained and has never radically been sustained. There is no subject without, somewhere, *aphanisis* [difference/displacement, re: binary opposition between corporal self and the *imago*] of the subject, and it is in this alienation [of self by/within the self], in this fundamental division, that the dialectic of the subject is established.[62]

In the back-to-front direction of such ethics, the moral code (the law of signification, the phallus of the Symbolic) stands as "guarantor" for this potential ideality of self within the Symbolic, rather than as the cut from the ideal Real which the Oedipus scene explains.[63] It is with such guarantors that such ethics offer a convincing and coherent illusory potential of mastering the structural impossibility of the Real. Such ethics bizarrely begin with the possibility of the Real which does not exist in the presence (present) of the subject and then attempt to manage the reality of the Symbol to attain this Real, rather than commencing from the Symbolic in which the subject always already exists and through which the articulation of the void of the Real must always already be excluded. The failure of successive historical ethical projects ("from Plato and Aristotle") and of the illusory ideality within the liberal tradition in our contemporary human rights (from Hobbes, Lock, Kant, and even our contemporary human rights' discourse) is indicative of the impossibility of the Real to be signified within the Symbolic, and symptomatic of the failure of desire to ever be addressed and resolved in the discursive processes of Symbolic representation.[64]

---

[60] Lacan, *Book VII*, above n 15, at 313.
[61] Fryer, above n 23, at 203.
[62] Lacan, *Ecrits*, above n 33, at 221.
[63] Stavrakakis, above n 14, at 128.
[64] Stavrakakis, above n 20, at 86.

The Dual Illusions of Possibility: the Ideal-I of the Cogito and the Signification of Rights

It is in such confusion between the impossibility of the Real and the limitations of the Symbolic that such ethics of the Real produces a Lacanian fantasy-of-reality within the discursive structure of our contemporary human rights' discourse. This fantasy is informed by the dual illusions of possibility of a harmonised self in a certainty of the social. These are the complementary illusions of the idealised-I of the *imago* being realised within the totality of the socio-political community. This is fantasy of the reconciliation of the self and the universal through the potentiality of the particularism of the subject's anxieties and desires being resolved by the universality of significations within the Symbolic. Firstly, there is the illusion of the *imago* — the fictional image of the potential individual of conscious capacities, expressed in the *UDHR's* Preamble and Article One. Secondly, there is the illusion of the potency of human rights. These are the symbols of signification through which the subject may potentially attain the fulfilment of human identity expressed in the *cogito*-like image. These are the (*objet petite a*) Articles of civil and political rights within the *UDHR*. The State is the "Legislator" of such symbols. From the position of the phallus, it is the State which assumes the power to guarantee the fullness of human identity within/through the significations of the symbols of human rights. Animated by the inspiration (the misrecognition) of the ideality of the ethics of the Real, together these dual illusions of possibility form the discursive *structural pillars*, upon which the fantasy (the fantasy-of-reality) of our contemporary human rights is founded.

The first illusion of possibility within our contemporary human rights' discourse is expressed within the Kantian image of the individual of autonomous moral potential. It is this *cogito*-like image of the individual which possesses an "equal dignity and worth" through its own "autonomous capacities of intentioned free-will, reasoned consciousness and moral conscience" (*UDHR*, Preamble and Article One).[65] In this image of human identity it is the capacity of self consciousness which renders the individual

[65] However, there is a clear distinction between Descartes' *cogito* and the Kantian split subject inherited by our contemporary human rights discourse. For Descartes, the individual is split between "the thinking" and

self-present — the apperceptive capacity of self-awareness through conscious self-reflection. This is the transcendental "I" of autonomous (reasoned) will within the tradition of our contemporary human rights' discourse, which mirrors the potential wholeness and oneness of the idealised *imago* of individual capacity. This is the substitutional idealised image for the sense of lost oneness and wholeness invoked by the intrusion of the specular other. It is this image of human identity, this Symbolic signification of human identity, which is (re)-presented within the discourse of human rights as the (potential) resolution of subjective anxiety, ambiguity and desire. The ethics of the Real inspires our contemporary human rights' discourse to present such an idealised image of self in an attempt to resolve this anxiety, ambiguity and desire, which is first animated from the intra-subjective dialectic between the internalised-externality of ego-ideal and the intimate self. Through this image, there is the potential to reach behind the mirror, before the intrusion of self-awareness, and re-claim that sensed "prior" *jouissance* of the Real.

From the first page of Lacan's writing on the structuration of the unconscious and human desire, he attacks human identity as presented in this *cogito*-like image:

> However, I think it worthwhile to bring it [the mirror-stage and the Imaginary order] again to your attention … [as] … It is an experience that leads us to oppose any philosophy directly issuing from the *cogito*.[66]

For Lacan, there are two fundamental limitations on the conscious capacities of reasoned will, which make this image of human identity an illusory "flight of fancy."[67] Firstly such conscious capacities misidentify the Lacanian "true nature" of the lack-in-being of the split subject — the unconscious forces shadowing the subject's conscious capacities.

---

the "person thinking," and yet this split is immediately united in the internalized "thinking:" *"I think therefore I am."* Kant separates this process of thinking to an external position, transcendent from the individual and installs reasoned will (moral potential) as the mediator between the two. Descartes, on the other hand, still reserves an external place for god in the divine morality upon the individual. Refer to Žižek, above n 1, at 13-15. Nonetheless, what each shares in the tradition of liberal humanism within our contemporary human rights' discourse is the (autonomous) conscious capacity to render the individual self-present (self-determined).

[66] Lacan, *Ecrits*, above n 33, at 1.

[67] Lacan, *Ecrits*, *ibid*, at 6.

Secondly, this image of self-realisation ignores the Symbolic limitations under the discursive processes of ambiguous signifiers in the community of meaning in which the subject exists.

For Lacan, the essential nature of the human subject is one of negativity. The primary mark of human identity is one of loss — of what it is not and where it is not, in the shadows of the unconscious and the content within:

> … the truth of the subject, even when he is in the position of the master, does not reside in him, but, as analysis shows, in the object that is, of its nature, concealed.[68]

It is the unconscious traces of the pre-ontological split in human identity — the intrusion of the Imaginary and the genesis of ego desire — which undermine the very notion of self-realisation through autonomous conscious capacities.[69] These are the traces of the rupture of self consciousness. From the limits of consciousness, there can be no "going-back" to a prior, pre-ontological state of harmonious human oneness, as it is the intrusion of the Imaginary itself which marks the commencement of the ontological capacities of self consciousness:

> We would allow the sharpness of our experience to become blunted if we deluded ourselves … into believing in some kind of pre-established harmony that would be free of all aggressive induction in the subject …[70]

The subject of unconscious desires and the image of harmonious oneness towards which it aims, exists in absence, beyond the limits of conscious voluntarism and determination. The truth of human identity is not realised in the subject's conscious capacities and

---

[68] Lacan, J. *The Four Fundamentals Concepts of Psychoanalysis* (ed. J A. Miller, trans. A, Sheridan). The Hogarth Press, London, (1977), at 5.
[69] Ragland, E. 'Lacan and the Subject of Law: Sexuation and Discourse in the Mapping of Subject Positions that give the Ur-Form of Law.' *Washington and Lee Law Review*. (Summer, 1997), Vol. 54, No. 3, 1091-1118, at 1096.
[70] Lacan, *Ecrits*, above n 33, at 24-25.

intentional self-will, but rather, it is the structure of the unconscious which is the source of truth in the formation of human identity.[71]

Thus, the nature of the subject-of-lack cannot be re-presented in an image of self conscious determination and realisation. Rather, the subject is always already haunted by the trauma of the rupture of consciousness, always already subjugated to the forces of anxiety, alienation and desire emanating from the unconscious. The image of the ideal *cogito* presented within our contemporary human rights' discourse is an illusion. It attempts to signify the potentiality of individual identity as an object of its conscious self. But for Lacan, we are always already an object of our "other self" — of the pre-ontological forces of unconscious desire, oscillating under the equivocations of Symbolic signification. The image of the *cogito* individual exists without any grounding inherent in its (conscious) self. Rather, it emerges as a reflection of a response to the unconscious trauma of its own birth. It is an answer to the anxiety and desire invoked through the duality of the image of an ideal *imago* and the inferior-self. The *cogito*-like image towards which our contemporary human rights' discourse directs us is a re-presented substitute — a Symbolic simulacrum — attempting to resolve a primary experience of loss and desire beyond its own control:

> It is nonetheless true that the philosophical *cogito* is at the centre of the mirage that renders modern man so sure of being himself even in his uncertainties about himself … [72]

The conscious capacities of reason and self-will are limited in the face of this unconscious other of human identity. It is impossible to "know thy self" as the subject can never re-claim the unconscious beyond itself, but rather, only "bare witness to it."[73] From the locus of the unconscious, it is illusory for the subject to claim "I think therefore

[71] Sarup, M. *An introductory Guide to Post-structuralism and Postmodernism*. Harvester Wheatsheaf Press, New York, (1993), at 43-44.
[72] Lacan, *Ecrits, op cit,* at 165.
[73] Lacan, *Ecrits, ibid*, at 174.

I am." Rather, desire leads us to understand that, "I think of what I am where I do not think to think."[74]

The "dishonesty" within this illusory image of the *cogito* of human identity within our contemporary human rights' discourse is that it attempts to mask the incessant nature of human desire. It attempts to repress the very intra-subjective dialectic within the duality of the *imago* and ego, which animates the illusion of the *cogito* in the first place:

> [The ego is] the radical heteronomy that Freud's discovery [of the unconscious] allows gaping within man [which] can never again be covered over without whatever is used to hide it being profoundly dishonest.[75]

To avoid such desire, the image of human identity is presented as (potentially) substantively pre-determined, a potential ideal of self-fulfilment within its own conscious capacities, the identity of oneness "prior to" and beyond anxiety, alienation and desire. Hence, such an image of human identity turns upside-down the relationship between the pre-ontological unconscious and the ontological conscious. It presents the (potential of) the individual framing the non-being of desire, rather than desire framing the presence of the individual. However, without desire there is no subject-proper, as desire marks the intrusion of the other which instigates consciousness, as desire is the energy which motivates conscious articulation and subject signification within the Symbolic. With human identity presented in the image of the *cogito*-like ideal, the very animation of subjectivity is suppressed. Hence, this image of ideal human identity is presented in an abstract form, empty of particular content and empty of its content of desire. And thus, this re-presentation of the image of human potential has no substance of life: "I will now dare to define the Cartesian *I think* as participating, in its striving towards certainty, in a sort of abortion."[76]

---

[74] Lacan, *Ecrits*, *ibid*, at 166.
[75] Lacan, *Ecrits*, *ibid*, at 172.
[76] Lacan, *Book XI*, above n 16, at 141.

The second illusion of possibility expressed within our contemporary human rights' discourse corresponds with the second limitation on the *cogito*-like individual. This is the illusion of the totality of the Symbolic. That is, that within the discursive inter-play of Symbolic signification, this ideal image of *cogito* human identity may be realised. In this illusion of possibility there is the fantasy that the subject's reality (the fantasy-of-reality) bears the totality of substantive materials of signification to "fix" the subject — to both cease its desire and heal its lack. In our contemporary human rights' discourse this substantive material is reflected in the second part of the *UDHR*, the Articles of human rights. This is the illusion which offers the potential of reconciling and harmonising the particularity of individual identity within the universality of its social reality. Through these Symbolic human rights, the subject is given the best potential grounding to transcend to the identity of the image of the *cogito*. The task for this illusion is to produce a convincing consistency of and between the subject and its contextual reality symbolised in the field of the Symbolic.

However, from a Lacanian perspective, the reality of the subject is nothing but the Symbolic, the linguistic representations of the inter-human community of meaning. It is the discursive processes of signification which offers "the gift of language" which "envelops the life of the subject in a network of signification," producing the "contextual reality of the subject:"[77]

> How is one to return, if not on the basis of a peculiar discourse, to a pre-discursive reality? That is the dream — the dream behind every conception of knowledge. But it is also what must be considered mythical. There is no such Thing as a pre-discursive reality. Every reality is founded and defined by discourse.[78]

The discourse of language is the second degree of otherness in the structure of human identity. It is the only place in which the subject's unconscious sense of lack and ego-desire can take expression and be recognised:[79] "[The Symbolic] is the field of that living being in which the subject has to appear. And I said that it was on the side of this living

[77] Lacan, *Ecrits*, *op cit*, at 68, 168.
[78] Lacan, *Book XX*, above n 34, at 32-33.
[79] Lacan, *Ecrits*, *op cit*, at 172.

being, called to subjectivity, that the drive [desire] is essentially manifested."[80] Hence, the image of the autonomous capacities of the *cogito*-like individual is further undermined. Firstly it is framed within its unconscious other which shadows the individual with ego-desire and images. And then secondly, the individual's capacity of self realisation (of Symbolic signification) is limited by the very nature of the linguistic expression of such unconscious ideals and desires. Human identity is not measured by the pre-social, autonomous capacities of self consciousness. Rather, the subject is *dependent* on language and its discursive processes of signification. It is *dependent* upon the "well of meaning" through which it can express its identity and experiences of desire, joy (*jouissance*) and anxiety, within the circulation of the inter-human sociality of the Symbolic.[81]

Yet in this dependence upon the signification of linguistic discursive processes there is also something missing. As discussed in the Chapter Three, *'The Speaking subject: the Signification of Language and the Failing Signifier,'* this gift of language through which my identity of lack and desire is expressed also suffers its own lack. Language itself is limited by the law of the sliding inter-play between distinct signifiers within the animations of signifying chains, in which there is no substantive signified to "hold down" and "complete" meaning, signification and identity. Thus, caught within such discursive processes of linguistic meaning, the ontological significance of the subject — the very signification of its identity and identity of (its) desire — is a product of the linguistic law of the signifier:[82]

> In any case, man cannot aim at being whole (the "total personality" is another of the deviant premises of modern psychotherapy), while ever the play of displacement and condensation to which he is doomed in the exercise of his functions marks his relation as a subject to the signifier.[83]

Hence, the Symbolic representation of reality does not offer the substantive materials to give stability and certainty to human identity. It does not hold any form that can

[80] Lacan, *Book XI*, above n 16, at 203.
[81] Fryer, above n 23, at 138.
[82] Fryer, *ibid*, at 85.
[83] Lacan, *Ecrits*, above n 33, at 287.

articulate the fullness of the *cogito*-like subject in order to fill the lost sense of oneness and resolve ego desire. Rather, under the law of the signifier, the subject loses its very identity in the processes of meaning in which it attempts to resolve itself in the first place: "I identify myself in language, but only by losing myself in it like an object."[84] In this *in-dependence*[85] of subject and Symbolic, of the unconscious and the conscious, of the presence and absence between signifiers, the image of the autonomous individual of conscious capacities loses its transcendental and universal currency.

But in addition, the limitations of the law of the signifier not only undermine the potential of subjective conscious capacities, but also, challenge the integrity of rights themselves as the potent signifying force articulating the expression of the moral *potentia* of human identity. Subjected to the law of the signifier, to the ambiguous equivocations of Symbolic signification and discursive processes, the significations of human rights do not, can not, express the fulfilment of human desire. Subjective desire is always already dependent upon the ceaseless equivocations of the Symbolic, and the Symbolic — the arrangement of the symbols of rights in which identity is articulated — always already lacks the substance of the signified and the articulation of the Real. In this way, the significations of the symbols of human rights do not express the potential fulfilment of human identity, as presented in our contemporary human rights' discourse. Rather, they signify the limits of human identity:

> This dialectic [of the *cogito*] is convergent and attains the conjuncture defined as absolute knowledge. As such it is deduced, it can only be the conjunction of the symbolic with a real of which there is nothing more to be expected [nothing more beyond this symbolisation]. What is this real, if not a subject fulfilled in his identity to himself? From which, one can conclude that this subject is already perfect in this regard, and is the fundamental hypothesis of this whole process. He is named, in effect, as being the substratum of this process; he is called the

[84] Lacan, *Ecrits*, *ibid*, at 86. More positively, one may argue (as Butler does) that one does not lose identity in these processes of meaning and linguistic signification, but rather, such processes are the potentiality of the limits of subjective signification. I shall discuss this potentiality further in Chapter Five, '*The Mediation of Ethical Desire through Identity and Human Rights.*'

[85] This term "in-dependence" is a term I have borrowed from Levinas to refer to the subject's independence founded upon the inter-dependence with the other, in order to be dependent in itself. Refer to Chapter Six, *'Levinas and the Violence of the Self,'* at page 217.

> *Selbstbewusstein*, the being conscious of self, the fully conscious self. I would to heaven if it were so …[86]

It is this interweaving of these two illusions of possibility — the potentiality of the signification of the fullness of conscious identity within the articulations of the potency of the symbols of human rights — which serves as both the inspiration and aspiration of the ethical goal (the ethics of the Real) of our contemporary human rights' discourse. From these dual illusions of possibility our contemporary human rights' discourse weaves its fantasy-of-reality of the significance of human rights. This fantasy is the utopian vision within the *UDHR* of what humanity "ought to be." This is (the offer of) the potential healing of the (unconscious) split of human identity, harmonised with the totality of a 'universal brotherhood of the human family of freedom, justice and peace,' attained through and expressed within the *UDHR* and the significations of the Articles of human rights therein.

The Power of Right: the Law as Phallus and Rights as Objet Petite a

If there is a Lacanian misrecognition in the ethics of the Real regarding the nature (the ontological status) of the Real within the tradition of liberal idealism informing our contemporary human rights' discourse, then there is also a Lacanian misrecognition in the nature and function of the phallus. With an ethic of the Real, the status of the Real is imagined (potentially) on the side of the Symbolic. From a Lacanian perspective, the ethics of the Real, our contemporary human rights, works backwards. It begins with the possibility of the Real and then focuses on the potential to intentionally will (to consciously re-present) the Symbolic in order to attain the Real. In other words, the ethics of idealism commences with the illusion of harmony (subjective and social) and then consciously manipulates the social in an attempt to attain the ideal. The consequence of this is that will is superimposed over desire as the possible resolution of desire.

In this inverted, back-to-front ethical movement of idealism, in this utopian fantasy-of-reality, the position of the phallus is taken as the site which negates the oscillations of

[86] Lacan, *Ecrits, op cit,* at 296.

desire, the site from which the fantasy is enforced. The phallus's task is to sustain certainty, stability and un-ambiguity. It is the phallus which is the master signifier and guarantor of the Symbolic (the fantasy-of-reality animated within the Symbolic). It is the phallus which "speaks" to the subject in response to its desires and which offers the potential resolution of the lack within the subject. The phallus is charged with the ideological task to legitimise some genuine substantive material, some Symbolic signification, which will potentially (allegedly) address the forces of the unconscious other, through the articulations of human identity within the community of meaning of the Symbolic. In this way, the position of the phallus becomes the bridge between the Real and the Symbolic, the potential transformation of the fantasy-of-reality into the "reality-of-the-Real."

As discussed in Chapter Three, *'The Symbolic Preview: The Entrance of Oedipus, the Biases of Law and the Objet Petite a,'* this position of the phallus is the position of the transcendental signifier. It is the position of a self-justifying, normative (regulative) principle around which a grand-narrative of certainty (of "truth") in meaning, understanding and knowledge (in the Symbolic signification of the fantasy-of-reality) coalesces. It is a position which purports to stand outside of the ambiguous and unstable processes of signification, upon its own, transcendental grounds of justification. For the articulation of human identity and the signification of human rights this position has been occupied by different sources over time: God; nature; the King; and in modern human rights, the State. It is the State — with excessive socio-political power gained through its role in the United Nations and by its promotion within the *UDHR*[87] — which is the

[87] Refer to the *UDHR* Preamble, para. 4 and 5 in which it mentions the word *"essential"* for the only time, referring to the essential safeguards of the well-being of the State in "international friendly relations" and free from "internal revolutionary action" — as opposed to the "essential safeguard" of the human subject and community. Note, as the *UN* only functions by the "grace" of the involvement of Nation-States and the *UDHR* only gains any substantial currency through a Nation-State's ratification of human rights' law within its own political discourse, it is *not* the *UN* which stands in the position as the phallus and guarantor of rights, but rather, the Nation-State. In this way, paradoxically, the *UN* has placed the task of guaranteeing the promotion and protection of rights in the hands of the very governmental institutional and structural bureaucracies which caused such brutalities (World War II) which agitated the need for a modern human rights' discourse in the first place. Hence, one other reason why modern human rights fails the individual subject, is the norm of any State to service itself (the maintenance of self-presence and power) through a politics of the Same — whether this is through the blunt dictatorial powers of coercive repression or the (Western) hegemonic powers of assimilation and the adequation of alterity.

legitimate guarantor of international human rights law. In our contemporary human rights, it is the modern State which is the legitimate (transcendental) signifier guaranteeing the signification of human identity through the politico-legal symbols of human rights within the social Symbolic.

Here, the State reflects the status of the name-of-the-father.[88] It is the (paternal) "L"aw of/behind the law, the "L"egislator which announces the law and guarantees the subjective identification in Symbolic signification.[89] It is from the position of the phallus that the State marks the boundaries between in and out, inclusion and exclusion, within the fantasy-of-reality tendered to address subjective desire. It is the State (the socio-political institutions and discursive processes of law and power, including the Foucauldian panopticon power of self-regulation) through which the ideal of personal desire is managed.[90] In this way, human rights become the expression of the social (socio-political) determination of subject desire,[91] framed within the signification of human identity.

However, from a Lacanian perspective, the claim of "L"aw to bridge the Imaginary, to sustain the Real and to address the animations of ego desire within the Symbolic, is a hollow claim from an impostor:[92]

> [The] aspiration to happiness will always imply a place where miracles happen, a promise, a mirage of original genius or an opening up of freedom, or if we caricature it, the possession of all women for a man and an ideal man for a woman. To make oneself the guarantor of the possibility that a subject will in some way be able to find happiness even in analysis is a form of fraud.
>
> There is absolutely no reason why we should make ourselves the guarantors of the bourgeois dream [liberal self-interest].[93]

---

[88] Noting the gender biases regarding the paternal phallus and the name-of-the-father outlined in Chapter Three, *'The Symbolic Preview: The Entrance of Oedipus, the Biases of Law and the Objet Petite a.'*
[89] Douzinas, above n 9, at 309-311.
[90] Douzinas, *ibid*, at 297. Refer to Chapter Two, *'Modern Human Rights and Postmodern Agency,'* at page 59-62 regarding the panopticon powers of self-regulation.
[91] Douzinas, *ibid*, at 29.
[92] Lacan, *Ecrits*, above n 33, at 311.
[93] Lacan, *Book VII*, above n 15, at 303.

Such fraudulent claims are in the service, not of the Real, but rather, of the fantasy of the Real on the side of the Symbolic. These claims of/to the power of the phallus to articulate the potentiality of the Real within the Symbolic have fundamentally confused and mistaken the significance of the phallus.[94] From a Lacanian perspective, the principle of the phallus does not point to nor guarantee an ideal harmony of the signification of human identity within the social. Rather, the phallus signifies the split of the subject and the gap in the Symbolic order.[95] The phallus is the marker of that which is missing, that which has been cut from and forbidden to the subject.

In this position of the phallus, the State, the discursive law of human rights, is tasked *not* to legitimise the illusions of possibility of subject and social within the fantasies-of-reality signified in the Symbolic. Rather, the phallus functions as the cut of subjectivity which necessarily moves the subject away from the catastrophe of the ideal of oneness (the fatalism of the death drive in the reunion with the Real) and introduces the subject to its own animation of identity in the signification of the inter-human Symbolic. The subject of the lack-in-being, the subject of the pre-ontological split and of unconscious desire, needs the Symbolic. Desire and *jouissance* circulate within the limits of the Symbolic between differing desiring subjects amongst the inter-play of unstable signifiers. The Symbolic forces the subject to abandon the destructive oneness-with-self and gain its own expression of subjectivity amongst the significations of the desires of others.[96] It is not the task of law, of human rights, to articulate the liberal idealism of the *potentia* of the "bourgeois dream" of self-interested, self-determined oneness, but rather, it necessarily obliges an open (lacking) human identity into the sociality of community. The currency of human rights law is not to signify the possibility of utopian fantasies-of-reality of conscious capacities of autonomous self-will, but rather, is in its the indicative signification towards the social bonds of unconscious desire. The phallus is the Symbolic directive towards the impossibility of autonomous harmony of human identity and, thus, the necessity of sociality.

[94] Stavrakakis, above n 14, at 128.
[95] Stavrakakis, *ibid*, at 128.
[96] Douzinas, above n 9, at 326.

To claim the certainty of the ideal of the Real within the Symbolic is to repress human desire and deny the impossible ideal of its own (unrealisable) signification. For Lacan, this repression of desire is one of the potential dangers within the ethic of the Real within the liberal tradition of our contemporary human rights' discourse. That is, that the power of the phallus is in the fact that it must necessarily substitute its signification of the lost ideal for the omni-potence of the unrealisable loss in human identity.[97] The phallus necessarily denies and excludes the value and worth of the Real as something "other than" its own signification within the Symbolic, by reducing it to the representations of "the word of the father:"

> For such a task, we place no trust in altruistic feeling, we who lay bare the aggressivity that underlies the activity of the philanthropist, the idealist, the pedagogue, and even the reformer.[98]

Here the ethic of idealised good becomes a service to self — the necessary suppression of the other in order to legitimise itself in substitute of the other:

> My egoism is quite content with a certain altruism … What I want is the good of others in the image of my own. That doesn't cost me much. What I want is the good of others provided that it remains in the image of my own.[99]

In this light, the ideological function of the phallus — the socio-political task of law and our contemporary human rights — is to veil such repression by the totality of its word. It does this through the universality of its own signification of the potential ideal of human identity and social harmony, which it re-presents in the fantasy within the Symbolic. In such a task of totality there is no space for the (threat of) the alterity of the other, bar that which is already assimilated into (hegemonised by) the Sameness of the self of the phallus.

This exchange of the "word" for the "Real" (of the signifier for the un-signifiable and of the masculine paternal for the feminine maternal) occurs through the offerings of the

---

[97] Douzinas, *ibid*, at 304.
[98] Lacan, *Ecrits*, above n 33, at 7.
[99] Lacan, *Book VII*, above n 15, at 185.

objet petite a — the little others of the absolute other of the Real. These *objet petitie a* are offered in an attempt to sustain the fantasies-of-reality of potentially resolved loss and fulfilled desire within the realm of the Symbolic (of reality). From its position of the phallus, the State offers civil and political rights as the compensatory *object petite a* for (unconscious) ego desire, through which the subject signifies its lost sense of *jouissance* of "re-turned" oneness with the Real within the Symbolic expression of its human identity. As the Symbolic re-presentation of "desire's object," such civil and political rights are held out as offering "the best chance" to fulfil the signification of desire within the social, and fulfilling the image of the *cogito*-like ideal of human identity.

In this way, these symbols of civil and political human rights become the "rights object" towards which "desire is willed" in the fantasy of fulfilling the lack in the structuration of human identity. These *objet petite a* of human rights become the compensatory objects in substitution for the missing, lost sense of ideal human oneness with the Real of human identity. Human rights are the expression, the Symbolic signification, through which the re-presentation of some *Thing* Real of human identity is potentially realised within the signification(s) of the Symbolic and the sociality of the community of meaning. As the *objet petite a* of human identity, these symbols of human rights sustain the fantasy-of-reality of the (paternal) law and the socio-political workings of the State, by articulating both "the object that is lacking in the subject (*das Ding* of the Real) and the object that fills the lack in the subject (rights of the presence of self)."[100] Through these socio-political symbols (through these rights) offered by the State, the subject is presented with the potentiality of "equality and dignity" of the Symbolic articulations of its identity, and the possibility of the realisation of the ideal *cogito*-like *imago* image of self. Through these symbols of human rights the subject (potentially) attains a sense of (re)cognition and (re)affirmation of the fullness of human identity. The subject (potentially) attains the articulation and signification (the subjectivisation) of being "human" within the socio-political field of the Symbolic.

[100] Soler, C. 'The Subject and the Other, Parts I and II,' at 267, in, Stavrakakis, above n 14, at 51.

In this way, the task of the symbols of human rights is to animate a credible consistency between human desire (the particularity of human animation) and the fantasy of the socio-political reality of the phallic State. Our contemporary human rights' discourse does this by promoting itself (by being promoted by the phallic State) as the response to the other of the lack-in-being of human identity (by fulfilling unconscious desire and addressing the unconscious loss of the Real). In this response, such human rights offer the resolution of, and thus deny, such lack from the re-presented fantasies-of-reality, and thus, disarm the uncontainable ambiguity of the unconscious other of ego desire. In this way, human rights help cover-over the illusory quality of the fantasy-of-reality — covering over the impossibility of signifying the unrepresentable, pre-ontological status of the lack-of-being of human identity.

It is through this paradox of both responding to, but also, denying the impossibility of desire that our contemporary human rights' discourse both creates and exhausts its own limitations and legitimacy.[101] At one and the same time, these symbols of human rights are tasked to signify the potential of human identity and yet also signify their Symbolic limitations in articulating desire within the ambiguities of Symbolic representations. Hence like all *objet petite a*, the symbols of human rights are not only the objects tendered to meet human desire, but also, are the *object-cause of desire*. They encapsulate the very lack of desire's object, they refer to the left-over of total fulfilment of unconscious desire in conscious articulation and effort, and thus, they are the Symbolic agitation of continued desire. The symbols of human rights do not exist in their full presence of signification, but rather *ex-sist* by "insistence" of some *Thing* beyond their own signification (the *das Ding* of the Real towards which desire aims).[102] In this way,

[101] Douzinas, above n 9, at 95.
[102] Salecl, R. 'Rights in Psychoanalytic and Feminist Perspective.' *Cardozo Law Review.* (Jan 1995), Vol. 16, No. 3-4, 1121-1137, at 1134. As we saw with Butler in Chapter Three, '*The Symbolic Preview: The Entrance of Oedipus, the Biases of Law and the Objet Petite a,'* Selecl also outlines the different forms of rights between the masculine and feminine gendered positions in Lacan's split subject, as they emerge out of the Oedipus scene. As the masculine is in the position of *possessing* of the phallus ("to have" the phallus) "masculine rights" are expressed Symbolically as "subjective, possessive rights" — as they are expressed within our contemporary human rights' discourse. The feminine position is *"to be"* the phallus and from this position rights commence not in the possessive action (the bourgeois inclination) of "having rights," but rather, from the point of view that everyone is "with rights," that is, that no one is without human rights. Refer to Selecl at 1335-36. Hence, an argument is made that such "feminine rights" do not

human rights are never totally signified and can never be totally realised in Symbolic mediation.

It is this impossibility of the *object petite a* of rights, this limitation by conscious self-will against unconscious desire, which is one motivation behind the competitive consumption of rights within our contemporary human rights' discourse. As the Symbolic re-presentations of desire, human rights act as any other signification under the law of the signifier. They are the substitute-objects in service of desire. But in the discursive processes under the sliding inter-play amongst the chains of significance, they never hold the substantive totality of the original. Rather, they gain their signification only by deferring and delaying the signification (of the Real) which they attempt to symbolise.[103] In this way, the symbols of human rights fail in the very task in which they gain legitimacy. They never fully satisfy the desire they address, and hence, desire continues to demand more significations (more human rights) in an attempt to meet the promised potential of ideal imagery within our contemporary human rights' discourse.

At this point, the fantasy-of-reality of our contemporary human rights' discourse erodes and the dual illusions of possibility are revealed. The *cogito*-like autonomous capacities of reasoned self-will and the potency of the Symbolic re-presentation of human signification fall short of the task of imposing order upon unconscious desire. Desire is never fully fulfilled within the limits of the conscious capacity to arrange the Symbolic significations of human identity. It is never fully met by the symbols of rights which the phallic State *re*-present as the "best possible chance" of the articulation of human subjectivity. "Will" cannot contain desire because desire is the prevenient to will:

---

focus upon the self-interested actions of individual ego-rights in an alienating struggle "to be." In addition, from this gender perspective, one can argue that such feminine rights (which begin with everyone "with rights") is the primary imagining of rights which underpins the secondary imagining of "possessive rights," animated by the masculine (that "*I* possesses" the rights with which I exist). This gender critique of rights is seen in our contemporary human rights' discourse and the *UDHR* which, first and foremost, acknowledge that all are born "with rights" and then go on to propose that all "possess" their rights "individually."

[103] Douzinas, *op cit*, at 317.

> The notion of the birth of ego in which resides a narcissistic structure and the correlative tension of aggressivity in the 'coming-into-being' (*devenir*) of the subject motivates man's desire to 'impress his image in reality' which becomes the 'obscure basis of the rational mediations of the will.'[104]

Conscious self-will imposed upon unconscious desire only satisfies pleasure (the pleasure principle) to avert impossible and unending desire. And hence, in this failure of human rights, more rights are demanded to continue to avoid the impossibility of desire and the anxiety of loss. As technology and science, living conditions and lifestyles, expand individual potential and personal growth across the Western world (expanding the 'self"s interests' and, thus, the domain of self-will), the postmodern fate of further and further private demands being claimed as public rights unfolds. In an ongoing attempt to address the incessant desire of the unconscious other of human identity, the symbols of human rights fail the subject. And yet through this failure, such rights facilitate the subject to claim more and more rights, in an attempt to resolve its personal desire for subjective certitude and conscious coherency.

Conclusion

In using Lacan's interrogation of human identity and uncovering the Ethic of the Real and the inter-weaving dual illusions of possibility within the discursive structure of our contemporary human rights' discourse, we see human rights as primarily an expression of symbolic subjective identification, rather than a transcendent principle of normative (regulative) human value and identity. It is the entitlement of rights and the possession of these *object petite a* of rights which is the expression of "the human" in "human right." Following Lacan's structuration of subject formation and human identity, the subject necessarily turns from the anxiety, alienation and lack generated through the Imaginary and the ideal-*imago,* and engages with the inter-human sociality of the Symbolic — already always split — in order to (re)gain a lost sense of stable self identity. To be granted the rights held within our contemporary human rights' discourse — to hold possession of such symbols of human signification — is one mechanism of

[104] Lacan, *Ecrits,* above n 33, at 22.

(re)affirmation and (re)cognition of one's signification as human within our Symbolic mediation of reality.

In this way, though the *UDHR* claims an 'inherent human dignity, worth and equal rights in all human beings' (as per the Preamble and *Art* 1), it is only through gaining the rights outlined within the *UDHR* that one is recognised as the "sign of being human." It is only in attaining such human rights that one gains the recognition of the dignity, worth and equality of these human rights. Thus, only by grasping these Symbols of rights — the masculine, bourgeois act of *possessing* these symbols — does one gain the signification of human identity which invokes the protection of such rights. The more one's signification of identity is accepted as human, the more rights one has. The more rights one has, the more one's identity is accepted as human. This distinction between the inherent nature of rights and the contrivance of rights constituted by language, is the distinction between the *constative powers* of linguistic description and the *performative act* of language and the Symbolic — the power of signification in/of rights and identity.[105] The difference between these two effects of language highlights the ambiguity of Symbolic signification within our rights' talks and underscores the duality of identity in the (Kantian) split subject of human rights. The ascension to human dignity and worth *through* these human rights' symbols is the (attempted) suture of the split subject of transcendence and actuality, of the atomised individual and the social community. This transformation in identity is the reconciliation of the gap between the *Preamble* and the Articles of Rights within the *UDHR* and is the action of the effort of rights in progressing reality to ideality.

The "Lacanian secret" in all of this signification is that it is illusory (as was Marx's point). For it is always of the greatest importance to supplement our understanding of such processes of signification with the correction that such significations of worth, value and dignity of human identity is a re-presentation of a particular image of human identity already symbolised within the discourse. This is the socio-political identity of the

[105] Refer to Derrida's critique of America's *"Declaration of Independence,"* in Derrida, J. 'Declarations of Independence.' *New Political Science* (1986), Vol. 7, Issue 1, 7-15.

modern image of the subject articulated within (Western) liberal humanism. Uncovering this secret of the symbolisation of human identity, rather than losing oneself in the transcendent qualities of a metaphysical universal identity, allows us to understand one reason (for there are many) why different lives have different value and different rights have different prioritisation. For example, why the lives of the approximately 3,000 victims in the event of 9/11 in New York City are of greater (symbolic) currency than the lives of the approximately 800,000 Tutsi victims massacred in under 100 days in Rwanda in 1994. In actuality — ontologically — they may be equal, but symbolically, they are not. For in the former such lives represent the "fullness" of the image of the human. They are lives in full possession of their civil and political symbols of "being human," of having the human qualities of the image of human identity within our contemporary human rights' discourse. They are lives gaining signification within the socio-political relationship of citizen and State within the discourse of liberal democracy, which (potentially) bestows all the necessary Symbols to be (potentially) the fully articulated identity of "being human." It shocks us that the "devalue and degradation" shown in an event like 9/11 should happen to humans such as these.[106] The Tutsi life is more (symbolically) ambiguous. Their socio-political discourse is more opaque. The collection of symbols of signification they possess is less amiable to "fit" within the signification processes within our contemporary human rights. We consciously accept this disparity between the value of life (the value of the signification of life). We cognitively reinforce this disparity in the different levels of shock we express over the two events and in the differences in the remembrance we pay to each experience through Symbolic ritual. Even within our contemporary human rights' discourse the value of life of each human is *not* equal when the symbols used to signify the identity of being human always already carry the inherent traces of bias towards one particular discursive expression of identity, one particular collection of Symbols of subjectivity.

[106] This distinction in the value of the symbol "human" is also reflected in the language we use to describe such an event. For example, not only do we use the language of a "breach of human rights," but also, we talk about such an attack being an "attack on democracy." True, violent attacks on the open and consensus building traits of modern, social democracy shock us by their paradoxical brutality. However, the linking of the symbols of ontological human identity with the symbols of ideological liberal democracy (the link within our contemporary human rights' discourse) in such an event signifies that the value of the victims of these events are of greater currency because they are symbolically re-presented within the socio-political (ideological) discursive processes of signification of liberal democracies.

Such a Lacanian secret of signification helps us understand how the duality of the split subject expressed within the spaces of the *UDHR* also reflects the confusion in the ethics of the Real, between the impossibility of the Real and the limits of the Symbolic. Of most concern to Lacan is that in this confusion, the price of the fantasy of the potential ideal of the Real is the denial of desire. The paradox of the fantasies-of-reality inspired by the illusions of possibility is that such reality represses the desire which animates the fantasies in the first place.[107] That is, that such human rights deny the very identity (human loss and desire) which they are supposedly established to serve. This, for Lacan, is a loss of freedom. The ethics of ideals which inform our contemporary human rights place freedom in the realm of the empty abstract (the fantasy), independent of the actuality of the subject animated by psychic forces of the unconscious other and linguistic equivocations. This distinction in human identity is the divide between the subject's *pathos* and its moral potential. The act of moral freedom within our contemporary human rights' discourse — the ethical act of rights — is to traverse the terrain between these two poles, the conscious capacities of reasoned self-will aimed towards the (ethical) Real.[108] This is an alienating freedom, in which freedom is beyond the subject, a movement away from the subject, a freedom experienced as a "stranger in the house of the subject."[109] In this freedom there is the imposition of *will over desire*, of the ontological presence of being over the pre-ontological absence of non-being which marks human identity.

This imposition of will over desire reflects a fear of desire, a fear of the mark (of loss) of human identity and of the human subject itself. This is a fear which has been reflected in the historical projects of the ethics of the Real such as Hobbes and Locke, Rousseau and Kant, and in the hegemonic projects of emancipation within our own contemporary human rights' discourse. It is this fear which justifies the State in its position of the phallus, to domesticate desire in the limits of the socio-political discourse, under civil and political symbols, the *objet petite a*, of human rights. It is this fear which, ultimately,

[107] Žižek, above n 1, at 117-118.
[108] Zupancic, above n 3, at 9, 21.
[109] Zupancic, *ibid*, at 23.

calls upon the Kantian split subject within the liberal tradition of our contemporary human rights' discourse to justify State power, rather than obliging the State to support the human subject in all its affective equivocations.

For Lacan, the fundamental failure of such ethics of the Real is their failure to recognise the inability to meet desire. This is the failure of such ethics to recognise the inaccessible nature of the Real, the phantasmic imagery of the ideal, and the unstable nature of the Symbolic mediation of the reality in which we live. It is such failures which lead such an ethic towards the discursive practices of positive potentiality and ideal good, the energy of an ideological and intellectual fantasy working to veil the contradiction of the negative lack of Real of both subjective identity and the social order.[110] The task of the fantasy of the ideal (of the will to will) is to bring comfort to the corporal self, through the assurance of the potential totality of self. Yet for Lacan and his *dis-fantasy of lack*, comfort is grounded in the assurance of loss, in the incompleteness of self.

From a Lacanian perspective, such failures lead to a number of potential consequential dangers which are always present in any project of the Real, which I wish to explore in the following chapter. Repressing the nature of the split subject of lack and the incessant oscillations of desire is usually motived by the pleasure principle — the drive to avoid the trauma of ambiguity and uncertainty — which only goes to mask the danger (the terror) of the Real, towards which, paradoxically, an ethics of the Real is directed. The drive of such pleasure, for stability and certainty, can lead to an ideology of ethics and a politics of right with the aim of restoring in the human experience that which is lost — enforcing onto the subject one Symbolic re-presentation in the altruistic name of "good."

In opposition to such ethics of the Real, Lacan commences his interrogation of ethics not from the Real, but rather, from the limits of the Symbolic, with what can be termed an *ethics of desire*. His task, his ethical task, in the explorations of subjective psychic formation is not to offer hope of ideal fantasies of illusions, but rather, to understand the effects of unconscious desire within the bounds of Symbolic representation. Rather than

[110] Žižek, above n 1, at 57-59.

commence with an image of an ideal good, Lacan commences with the impossibility of desire in the structuration of human identity. Rather than enforce an autonomy of will upon desire, Lacan marks the distance between the split subject of pathology and transcendence as the terrain of desire and the potentiality for an agency of unfixed identity.[111]

****

[111] Žižek, *ibid*, at 37.

Part A Chapter Five

The Ethical Interrogations of Impossible Desire

Introduction

Informed by a Lacanian perspective on the formation of human identity and the structuration of subjectivity, rights are seen as inextricably entangled with desire and, through this, with psychology. From this perspective, human rights are firstly about a psychological space and experience of the human subject and only secondly about a political experience, expression or exercise of power.[1] This is a certain power attached to the specific concept of the subject (the "individual") and also to the socio-political (legal) dialectic of the Symbolic (the State). It is in this psychological space where the self meets society, where the self is negotiated and regulated to fit, conform and harmonise with society. In this sense, rights' talks/claims expressed through the paradigms of politics, culture, economics, community, etc, are not the sites of rights *per se*, but rather, the consequences of the psychological drives to express/experience self (identity) within one's contextual social realities. This expression of self is what bestows upon the human subject a sense of worth, value and dignity. It is this psychological space of self which sets the compass points and parameters of the topography of human identity and, through this, the symbols of rights to express this identity.

For Lacan, within these psychological spaces of self, the unconscious other of human identity subjugates the subject to trauma, loss and desire. The Lacanian subject is always already (pre-ontologically) split — a *lack-in-being* prior to, and because of, the rupture of self consciousness. The inability of Symbolic signification, under the law of the signifier, to fully articulate such an identity of loss and desire further compounds the subject's sense of anxiety, ambiguity and uncertainty. This is the "double splitting" — the compounding alienation — of the human subject which traditional ethics of the Real have failed to reconcile in their attempts to contain unconscious desire with the conscious efforts of reasoned will within the limits of socio-political discursive significations. The

[1] Kunstler, B. 'Beyond the Illusion of Human Rights.' *Journal of Pedagogy, Pluralism & Practice*. (Fall 1999), Vol. 1, Issue 4, 1-12, at 1, 5.

fantasies-of-reality which such ethics of the Real weave veil these gaps in subject structuration, repressing the animation of identity under idyllic illusions regarding the possibilities of autonomous moral *potentia*, and thereby emptying the psychological space of rights of the subject of desire.

In this chapter I wish to explore some of the implications of such ethics of the Real and this repression of desire, and, in addition, explore Lacan's alternative, an *ethics of desire*. For Lacan, one of the primary concerns regarding an ethics of the Real is how it is driven by pleasure — the pleasure principle — which covers-over the latent ego aggression of identification and the terror of the Real towards which the death drive strives to return. In such ethics of the Real the moral conscience (the moral law) of the potential of human identity has confused the Real as attainable within the Symbolic (rather than signifying the retrospective left-over of the un-symbolised), and mistaken the phallus as the guarantor of the possibility of the Real (rather than the necessary Symbolic cut from the Real). Such confusion is motivated by the pleasure principle to regain a sense of stability and avert the ambiguity of the other of subject structuration and subjugation. It is this motivation, this confusion, which encourages repression of desire, invokes narcissistic aggression and potential psychic ailments such as psychosis, and inspires the illusions of possibility in the fantasies-of-reality aspired to in the ethics of the Real.

As an alternative to the ethics of the Real, Lacan offers his own ethical exposition from his psychoanalytic interrogations of the subject, *an ethics of desire*. In such an ethics, Lacan does not offer the comfort of illusions of ideals and the potentiality of suturing the split subject within/through Symbolic signification. Rather, Lacan brings human subjectivity back to the impossibility of the signification of the Real and the fulfilment of desire. It is the status of loss — in the subject and the Symbolic — to which desire leads us, which potentially marks the energy of personal agency, personal choice and personal responsibility. In such choices, in such responsibility, there is the understanding of desire as the social bond of community and, by confronting desire — by not giving ground to an unfulfilled desire — there is the possibility to engage with others in an open way, beyond

the objectification of the other to our desire, but rather, as something other, within themselves.

Finally, I explore two socio-political expressions of this Lacanian ethics of desire and how they may influence a discourse of human rights. Judith Butler and Slavoj Žižek are two leading (post) Lacanian philosophers and both use Lacan to focus on the processes of subjectivisation and the potential of the open *performative gesturing* involved in liberal democracy. Butler's work on personal/political agency falls within the paradigm of postmodern identity politics. Her work exploits Lacan's insights on ambiguous identity under the sliding processes of signification within the Symbolic realm, and aims at a radical inclusivity of expanding the identification of "human" within the socio-political articulations of liberal democracy. Žižek's project of ideological dislocation focuses on the radicalness of the Real and the repudiation of certain fantasies of the ideals of good. The performing potential of liberal democracy is in its *ethico-political capacity* to centralise the space of emptiness which marks the inevitable, unplanned intrusion of the impossibility of the Real. The aim in such a Lacanian project of socio-political interrogation is not to unseat the discursive processes of liberal democracy. Rather, the radical nature of the Lacanian lack is a point of focus to shift the *architectural aspect* of liberal democracy — to ensure that the very structures of the discourse is orientating around the ambiguity of the unknown other rather than enclosed around a consensus of the Same.

However, despite both these efforts and extensions of Lacan's work, an ethics of desire is still limited in that it prioritises the structural signification of the ethical potentiality of impossibility. In this way, Lacan's ethics of desire suffers from its own "lack." In focussing on the structural others of intra-subjective human identity — the unconscious, desire, loss, the Symbolic and the signifier — the ethics of desire leaves underdeveloped the inter-subjectivity between the self and the other human person. It is at this point where Levinas's prioritisation of the other human subject, and a primary responsibility for-the-other, engages with Lacan's interrogation of intra-subjective psychic

structuration, and supplements (extends) the desire of self with an *a priori* affinity for-the-other human subject.

The Threat to Human Subjectivity from Human Pleasure: Ailments, Ideologies and the Terror of the Real

The question of ethics, for Lacan, is a question associated with the Real. Whether in traditional ethics of the Real as outlined in Chapter Four, *'Laying the Foundations with Ethics of the Real: Illusions, Fantasies and Human Rights of Ideality,'* or in his own ethics of desire, ethics is a question of "orientation" with the Real:[2]

> As odd as it may seem to that superficial opinion which assures any inquiry into ethics must concern the field of the ideal, if not of the unreal, I, on the contrary, will proceed instead from the other direction by going deeply into the notion of the real. The question of ethics is to be articulated from the point of view of the location of man in relation to the real.[3]

For Lacan, the flaw of the ethics of the Real is in the tendency to orientate the ethical goal not *around* or *towards* the Real, but rather, at the very *locus* of the Real. That is, the moral sensibility of the projects of such ethics — the moral law and ethical act — stands in the place where exists (in place of) the Real.[4] This "grafting of the moral law *onto* the Real" places the unrealisable Real on the side of the Symbolic — the re-presented (Symbolically signified) ideal potential of subject fulfilment and social stability.[5] It is the Real, the lost sense of a "prior" harmonious and whole self-oneness, which is the

---

[2] Note there is some confusion regarding the naming of Lacan's ethics, as some refer to it as an "ethics of the Real" as it too (like the traditional ethics of the Real) is an ethics "in relation to the real." Refer to Žižek, S. *They Know Not What They Do.* Verso Press, London, (1991). Importantly though, Lacan's ethics does not take on the same relationship with the Real as the more traditional ethical projects which Lacan criticises. It is this distinction that I wish to mark clearly and, hence, I use the term "ethics of desire" when discussing Lacan's ethical interrogations.

[3] Lacan, J. *The Seminar of Jacques Lacan Book VII: The Ethics of Psychoanalysis 1959-1960.* (ed. J.A. Miller, trans. D. Porter), W.W. Norton, New York, (1992), at 11. Lacan gives credit to Freud for the discovery of the significance of the Real to ethics: "In so far as Freud's position on ethics constitutes progress here, the question of ethics is to be articulated from the point of view of the *location of man in relation to the real* [my emphasis]." Refer to Lacan, *Book VII*, at 21.

[4] Fryer, D. *The Intervention of the Other: Ethical Subjectivity in Levinas & Lacan.* Other Press, New York, (2004), at 227.

[5] Lacan, *Book VII*, *op cit*, at 21.

"Supreme, Sovereign good" of which all other "goods" unconsciously (attempt to) "return."[6]

The goal of such ethical projects becomes an expression, a *re*-presentation within the Symbolic, of the potential fulfilment of the ideality of the Real. This is seen, for example, in the image of human identity as the potentiality of the ideal-self, presented as self-defined oneness within our contemporary human rights' discourse. This is the potential liberty offered by such ethical projects. The human subject is (re)presented as potentially gaining the fullness of human identity within the significations of the socio-political discourses of the Symbolic. The liberty won through the sociality of the Symbolic structures is the potential resolution of the desire which agitates human existence:

> [Ethics] begins at the moment when the subject poses the question of that good he had unconsciously sought in the social structures. And it is at that moment, too, that he is led to discover the deep relationship as a result of which that which presents itself as a law is closely tied to the very structure of desire.[7]

Such traditional ethics of the Real are harmonising projects, reconciling the subject with the social in the totality of the signification of the Symbolic. They are inspired by the unconscious lack of human identity and the oscillations of unending desire. Their aim is to attempt to fill the void of human loss through the Symbolic articulation of some *Thing* which presents the potential totality of desire, replacing the sense of lost Real, and thus, resolving the subject's anxiety, alienation and desire.[8]

The primary failure of such ethics of the Real — "from Plato and Aristotle"[9] — is how they fail to see that the ideal Real of the subject's "prior sense" of lost oneness is, first and foremost, a *mirage* invoked by the distance between the idealised *imago* and the actuality of subjective ego at the rupture of self consciousness, and is sustained by the

---

[6] Lacan, *Book VII*, *ibid*, at 70.
[7] Lacan, *Book VII*, *ibid*, at 76.
[8] Stavrakakis, Y. *Lacan and the Political: Thinking the Political*. Routledge Press, London, (1999), at 123-28.
[9] Lacan, *Book VII*, *op cit*, at 211.

limitations of the Symbolic under the law of the signifier. It is not a loss of ontological significance which conscious capacities can resolve, but rather, a pre-ontological loss which motivates the entirety of conscious activities and energies:

> The fact is that this subjectivity [the subject of lack] in whatever domain it appears — in mathematics, in politics, in religion, or even in advertising — continues to animate the whole movement of humanity.[10]

The Real — the ideal oneness of self — does not exist in the consciousness of the individual within its Symbolic realm. Rather, it is instituted *retroactively* as that which is lost at the genesis of consciousness itself, by the intrusion of the Imaginary, and the emergence of self-awareness to the distinction between the ideal and the ego. It is this distance of distinction which agitates a sense of "prior loss" and animates the anxiety, ambiguity and desire which marks human identity. It is this illusory sense of loss which is compounded and sustained by the ambiguity of the Symbolic realm of signification and the equivocations of the signifier. It is this failure to understand the significance (the non-significance) of this pre-ontological loss which encourages the tradition of such ethics of the Real to impose superego structures of moral law and ethical good. This failure of understanding facilitates an ethic which aims to colonise the terrain of this distance of distinction which animates unconscious desire with conscious self-will, in order to deny (impossible) desire and secure the ideal of stable and certain human identity.

The paradox of such delusional ethical fantasies is that the moral law employed to repress desire is rooted in the desire (the unfulfillable desire) which it represses. The aim of the ethics of the Real is "to be" that which it is denying, to take the place of, colonise and cover-up the locus of the Real and, hence, fulfil human desire once and for all with its own significations.[11] Rather than assist the subject to deal with their impossible desire, such ethical projects, paradoxically, fuel such desire even more with re-presentations of the possibility of fulfilment and the potentiality of reconciled alienation, anxiety and

---

[10] Lacan, J. *Ecrits: A Selection.* (trans. & ed. A. Sheridan). W.W. Norton, New York, (1997), at 71.
[11] Kristeva, J. 'Psychoanalysis and Freedom.' *Canadian Journal of Psychoanalysis* (1998), Vol. 7, No. 1, 1-21, at 4.

ambiguity. Yet such re-presentations can never totality be the ideality of the Real as such *re*-presentations always suffer from the ambiguity of the signifier and the imagery of the Ideal, and can never be the presentation of the unrepresentable sense of loss invoked by the foreclosure of its own processes of Symbolic signification:

> Traditional morality concerned itself with what one was supposed to do "insofar as it is possible," as we say, and as we are forced to say. What needs to be unmasked here is the point on which that morality turns. And that is nothing less than the impossibility in which we recognise the topography of our desire.[12]

Desire is left wanting from the failure of such ideals of fulfilment, and, thus, such ideals of fulfilment sustain desire and desire continues to drive the ideals of fulfilment. Hence, desire is the animation and energy which engenders its own censorship[13] and ethical integrity and moral law has no support (no justification) within itself, but for the continued exclusion of the insatiable desire and lack-in-being upon which it rests.

Therefore, in the search for the ideality of the fulfilment of human identity through a moral code of Symbolic re-presentation, "the good" (unconsciously) comes up against and clashes with the expression of unfulfillable desire mediated by such significations.[14] In such confrontation the impossibility of the Real, the unfulfilability of desire and the anxiety which it generates may rupture the illusory fantasy of potential ideality: "like a tile falling on a passer by, or a knock on the door during a dream."[15] At this moment we are reminded that the human experience is a dialectic of impossibility, in which our reality is framed by fantasy and such fantasies-of-reality can never fulfil our desire.[16] Desire, thus, threatens the potential harmony of/between subject and social and, thus, is barred by the good. Desire is denied by the moral law of the fantasies-of-reality and the illusions of possibility, in order for such law and fantasies to maintain their coherency and integrity: "… the sphere of good erects a strong wall across the path of our desire …

---

[12] Lacan, *Book VII*, above n 3, at 315.
[13] Kristeva, *op cit*, at 4.
[14] Fryer, above n 4, at 202.
[15] Lacan, J. *The Four Fundamentals Concepts of Psychoanalysis* (ed. J.A. Miller, trans. A. Sheridan), The Hogarth Press, London, (1977), at 60.
[16] Stavrakakis, above n 8, at 53.

the first barrier that we have to deal with."[17] In the name of liberty, in the name of the good away from (freed from) the instability of impossible desire, unconscious desire is denied. This "ethical good" is the "wall upon which we bang our heads."[18] This exclusion of unfulfillable desire and the impossible Real is the *wounding of the wound* by the ethics of the Real, the wounding of the absent other always already within the (unconscious) structuration of human identity.

For Lacan, there are a number of consequences from such an ethics of the Real, focussed on the potentiality of the signification of the impossible Real. Firstly, with such efforts of repressing desire, in the unconscious clashes between desire and good, in the name of "the good" of liberating the subject from desire, such good can cause the human subject psychic maladies and ailments such as psychosis and neurosis, making " … man both a victim and outlaw, and … condemns modern man to a social hell."[19] It is also in the (unconscious) fixation on the ideality of the Real that the pathogenic nature of civilised morality is revealed.[20] Such efforts towards the ideality of good are animated by the very concerns of ego desire itself, in its intra-psychic duality of ideal totality and corporal inadequacy:[21]

> Nevertheless, one cannot stress too strongly the irreducible character of the narcissistic structure, and the ambiguity of a notion that tends to ignore the constancy of aggressive tension in all moral life that involves subjection to this structure.[22]

The ethics of the Real always bear the potentiality of the paranoiac anxiety and narcissistic aggression instigated at ego formation and, hence, even the ideal altruism within our contemporary human rights cannot be trusted.[23]

---

[17] Lacan, *Book VII*, above n 3, at 230.
[18] Lacan, *Book VII*, *ibid*, at 70.
[19] Fryer above n 4, at 207-08; Lacan, J. *The Seminar of Jacques Lacan Book III: The Psychoses 1955-56.* (ed. J.A. Miller, trans. R. Grigg), Routledge Press, London, (1993), at 145; Lacan, *Ecrits*, above n 10, at 29.
[20] Fryer, *ibid*, at 203.
[21] Fryer, *ibid*, at 203.
[22] Lacan, *Ecrits*, above n 10, at 24.
[23] "For such a task, we place no trust in altruistic feeling, we who lay bare the aggressivity that underlies the activity of the philanthropist, the idealist, the pedagogue, and even the reformer." Lacan, *Ecrits*, *ibid*, at 7.

There is also the potential of such ethics of the Real to extend their superego structures of ego domestication into the *praxis* of an ideology(s) of ethics and the politics of right, in which one Symbolic representation is enforced onto the human subject in the altruistic name of "good:"

> Every political promise is supported by a reference to a lost state of harmony, unity and fullness, a reference to a pre-symbolic real which most political projects aspire to bring back.[24]

In the confusion of the impossibility of the Real with the limits of the Symbolic, the ethics of the Real confuses the ideological with the ethical and the two are nowadays joined as one: "A sensitive subject such as ethics is *not* nowadays separable from what is called ideology."[25] The danger which shadows such ethics of ideals is that in the "effort of good," "good can become evil," and the ideals of "utopia can become dystopia."[26]

But perhaps the most concerning issue to arise from such ethics of the Real is that, in denying desire, such ideality indulges human pleasure and masks the danger of the death drive which fuels desire. For Lacan, the superego of the morality of ideals is *not* the agent of prohibition, but rather, an invocation to enjoyment and pleasure:

> That the unconscious is structured as a function of the symbolic, that it is the return of a sign that the pleasure principle makes man seek out, that the pleasurable element which directs man in his behaviour without his knowledge … that that which one seeks and finds again is the trace [of the unconscious fantasy of Real] rather than the trail — one has to appreciate all of this in Freud's thought, if one is to understand the function of reality.[27]

Pleasure "works on the side of the fictitious," motivates and supports the "fantasies-of-reality which binds man."[28] In denying the impossibility of fulfilling desire — in masking over the fictional nature of the ideal Real — the fantasies of ideals liberate a

---

[24] Stavrakakis, above n 8, at 128.
[25] Lacan, *Book VII*, above n 3, at 182.
[26] Stavrakakis, *op cit*, at 128.
[27] Lacan, *Book VII*, *op cit*, at 12-13.
[28] Lacan, *Book VII*, *ibid*, at 12.

desire with no limits, with no phallus to signify the cut from the Real and to bar the subject from the lost object.[29] Rather than represent the "check on the narcissistic quality of self-love" motivated to return to an ideal sense-of-self,[30] such ethics presents a moral law as guarantor of the potentiality of the Real. Such ethical projects become the signposts to human certainty, stability and security, which reinforce the imagery of the ego ideal-I and the potential totalisation of self-fulfilment of human identity. The bar on impossible desire (as opposed to the bar on the subject from the impossible Real) is the logic-of-avoidance of the pleasure principle — the avoidance of displeasure from the trauma, anxiety and ambiguity from the subject's unconscious sense of loss.[31]

Serving the possibility of pleasure rather than the impossibility of desire, there is a point of no return, a point of "being lost in the fantasy" and of a perversion in which "the moral good commands the subject to take pleasure to the point of destruction."[32] This is the point where *Kant meets Sade* in the ethical paradigm of the moral law of self potential.[33] Sade is the truth of Kant. The Sadian subject is one who acts without any doubt or ambiguity, with the (moral) certainty of knowing exactly what they are doing (the certainty of fulfilling their desire) and what the other wants (desires) from them.[34] The sadomasochist fully and consciously enjoys (the illusions of) desire's ultimate object, freed from any impossible lack, any possible restriction, ambiguity and doubt.[35] In the signification of desire in this social engagement, each subject stands in the place of the other's desired object.[36] The sadist transfers the totality of their denied lack of desire onto the body of the masochist, and the masochist becomes the complete instrument-

---

[29] Kristeva, above n 11, at 8.
[30] Douzinas, C. 'Law's Birth and Antigone's Death: on Ontological and Psychoanalytical Ethics.' *Cardozo Law Review*. (Jan 1995), Vol. 16, No. 3-4: 1325-1362, at 1333.
[31] De Kesel, M. 'There is no Ethics of the Real: about a Common Misreading of Lacan's Seminar on 'The Ethics of Psychoanalysis.' (www.rpe.ugent.be/de_Kesel_paper.doc) accessed 12/11/09, at 5.
[32] Kristeva, above n 11, at 4, 6-8. Would this not be the point of human atrocity, in which all different others are destroyed to enforce the ideal of a potential fantasy-of-reality and gain the pleasure of the assurance of such fantasy away from any intruding "otherness"?
[33] Lacan, 'Kant avec Sade.' *Ecrits*, above n 10, at 765-90.
[34] Žižek, S. *Tarrying with the Negative: Kant, Hegel and the Critique of Ideology*. Duke University Press, Durham, (1993), at 70-72.
[35] DeKesel, above n 31, at 13.
[36] DeKesel, *ibid*, at 6.

object of the sadist, the complete instrument of the other's will to enjoy — each confirming the totality of the fantasy of the other.[37]

But as the impossibility of unconscious loss and desire continuous to oscillate under the veil of the illusion, desire is never full and pleasure seeks more gratification to stave off the anxiety of the impossible. The repression of impossible desire fails the subject and the subject seeks more:

> In daring to formulate a satisfaction that isn't rewarded with a repression … it is precisely to the extent that demand always … insists on something else; that in every satisfaction of a need, it insists on something else … a something that demand means beyond whatever it is able to formulate [the beyondness of impossible desire].[38]

Hence, the subject is caught in the act of repetition, the insistence of further pleasurable satisfaction. The act of repetition shows the denial — the impossibility — of articulating desire's ultimate object through the Symbolic, "… the insistence of the signs by which we see ourselves governed by the pleasure principle:"[39]

> Where do we meet this for real? For what we have in the discovery of psychoanalysis is an encounter, an essential encounter — an appointment to which we are always called back with a real that eludes us.[40]

Such pleasure may fix our fantasy momentarily and fill our desire instantly, but desire is always already on the other side, "beyond and behind" such Symbolic significations. And thus desire is always already unfulfillable. In repetition, pleasure is unending and the perversion becomes as excessive as the impossibility of desire[41] — more and more extreme in the attempt to resolve desire in the (illusory) totality of the signification of desire. It is not desire which instigates cruelty in the world, against which human rights attempts to struggle, but rather, it is the denial of the impossibility of desire, the

---

[37] Žižek, above n 34, at 70-72.
[38] Lacan, *Book VII*, above n 3, at 294.
[39] Lacan, J. *The Seminar of Jacques Lacan Book XI: The Four Fundamentals Concepts of Psychoanalysis, 1964.* (trans. and ed. A. Sheridan), W.W. Norton, New York, (1981), at 54.
[40] Lacan, *Book XI*, *ibid*, at 53.
[41] De Kesel, above n 31, at 9-10.

enforcement of a totalising fantasy of ideal self-satisfaction, which leads to inhumane cruelty.

Thus, the gratification of pleasure by the fantasies-of-reality goes only so far as to delay and defer desire. Desire, thus, continues its destructive aim towards the lost object, the forbidden maternal *Thing* of the impossible, fictitious Real. It is this continued energy of destruction which links desire — and pleasure — with the death drive, the drive of desire to return to the Real: "… the realisation of desire is necessarily formulated from the point of view of a Last Judgement."[42] In this sense, the pleasure principle and the death drive are different sides of the same coin. For as failed pleasure continues to provoke desire (and impossible desire continuous to provoke pleasure) pleasure's energy aimed at fantasies of Symbolic gratification colonising the locus of the Real, coinciding with desire's energy aimed at the lost object of the Real. This continuous energy of return masked by pleasure is the drive to "go-back" which is catastrophic for the subject. For in this drive to return is the crisis of resolving the intrusion of the Imaginary, of being "swallowed within the chasm" of the undifferentiated universality of the sameness of the "One," the loss of self within the other.[43] It is for this reason that the Real is the forbidden object from which the phallus (the law) bars the subject:

> Well now, the step taken by Freud at the level of the pleasure principle is to show us that there is no Sovereign Good — that the Sovereign good, which is *das Ding*, which is the mother, is also the object of incest, is a forbidden good, and there is no other good. Such is the foundation of the moral law as turned on its head by Freud.[44]

This is the very "terror of the Real" within the potential union of oneness with the ideal image of human identity. Such a return to the Real would be (if it were possible) self-defeating, destroying the ego-I and replacing it with something "other," a pre-conscious, pre-human, non-differentiated object-other.[45] Hence, the narcissistic fixation of re-gaining a sense of ideal oneness of self fulfilment within such ethics of the Real, urges

[42] Lacan, *Book VII*, above n 3, at 294.
[43] Lacan, *Ecrits*, above n 10, at 296.
[44] Lacan, *Book VII*, *op cit*, at 70.
[45] Fryer, above n 4, at 203.

(Sadian-like) self-degeneration and destruction to become that *Thing* which is missing Such a self challenges and consumes everything in existence, until self becomes the fullness of desire and desire becomes the self. In this way, the Symbolic realm of representation does not protect the subject from the death drive, but rather, the death drive is mediated unknowingly (unconsciously) through the Symbolic representations of the subject's desire, veiled over by pleasure.[46]

This is the very function of the law, of the phallus. It functions not to guarantee the fantasies-of-reality and illusions of potential realisation of the lost object of sense of self, but rather, to bar the subject from the Real and thereby shield the subject from the catastrophe of self-love and return. From this Lacanian, psychoanalytic perspective, the function of law, of functional moral law and genuine ethics, is to keep the subject separate from the Real, to shield the subject from being "swallowed up by the Real,"[47] rather than to guarantee the return to the Real through the fantasies of the Symbolic.

It is in this context of fantasy, pleasure, desire and death that our contemporary human rights' discourse operates. As discussed in Chapter Four, '*The Power of Right: the Law as Phallus and Rights as Objet Petite a,'* human rights are the *objet petite a* on the side of fantasy, sustaining fantasy and agitating desire by the "non-totalising totality" of the signification of human identity and unconscious desire. The harmonising project of conscious self-will and socio-political discourse within our contemporary human rights offers the narcissistic self-indulgence of potential ascension to the ideal-I image of the *cogito*-like *imago*. In so doing, our contemporary human rights bar the unconscious, impossible desire with the conscious possibilities of autonomous self-will, and agitate personal pleasure above the social bonds of open desire. If nothing else, the priority of our contemporary human rights' discourse is to stands for personal pleasure. They are rights against the State to ensure (to stand as the phallus and as guarantor for) the "best socio-political Symbolic conditions" for the subject to exercise its will in attempting to

[46] De Kesel, above n 31, at 5.
[47] Douzinas, above n 30, at 1305-07.

gain "personal freedom" against the oscillations of unending desire and the impossibility of human loss.

The Constitutive Lack in an Impossible Desire

In attempting to avoid some of the potential dangerous and perverse consequences associated with the traditional ethical projects of the Real, Lacan orientates his ethics of desire not at the *locus* of the Real, but rather, *around* the constitutive lack of the Real. In this way Lacan is attempting to steer a third path through the tradition of superego enforcement and repression against desire, and the perversion of stimulating pleasure. What is good and right for the subject in such an ethics of desire is found within the *trajectory* and *movement* of unconscious desire, rather than in a "moral good's guarantee" and colonisation of the potentiality of human fulfilment:

> And it is because we know better than those who went before how to recognise the nature of desire, which is at the heart of this experience [the experience of human existence and action], that a reconsideration of ethics is possible, that a form of ethical judgement is possible … Have you acted in conformity with the desire that is in you? … Opposed to this pole of desire is traditional ethics.[48]

It is the *aiming* towards and *encircling* of the Real by an impossible (unfulfillable) desire which is so critical for Lacan. This is the event/the act of failing to arrive, and the resistance of *fixing* a position with the process *of position-taking*.[49] It is this "transgressive" quality of desire which offers the potential of ethical openness found in unconscious desire.[50] The character of desire — the condition of the ethical subjectivity — is in the "longing-for" the lack of the Real, rather than in the potential attainment of the lacking ideal and the fulfilment of impossible desire. The lack of subjectivity is experienced as an anticipation of a "wanting-to-be," the "wanting-of-being" which an ethics of desire aims at encapsulating, not with the security of presence-

[48] Lacan, *Book VII*, above n 3, at 314.
[49] Derrida, J. 'For the Love of Lacan.' *Cardozo Law Review*. (1995), Vol. 16, No. 3-4, 699-728, at 700-704.
[50] De Kesel, above n 31, at 9-10.

of-being, but rather, in the *performative gestures* of aiming-to-be, in the "event of the failure of arrival."[51]

Lacan's ethics is concerned, first and foremost, with what is good for the subject (as opposed to sociality at large) and, thus, such ethics necessarily commences within the intra-psychic structuration of the unconscious other of human identity. The unconscious reveals the gap between the Symbolic and the Real, between sociality and ideality, and explains (in the revelation of desire) the subject's continued animation mediated through the social Symbolic, even after the constraint on desire and the gaining of pleasure and satisfaction. Thus, the unconscious and its force of desire are not to be (cannot be) repressed or healed. Rather unconscious desire is the very seat of human subjectivity, the very home of human identity: "I am saying that Freud addresses the subject in order to say to him the following, which is new — 'Here, in this field of the dream [of the unconscious] you are at home.'"[52] In re-orientating the subject around its own unconscious (impossible) desire, Lacan attempts to make space in the Symbolic articulations of subjectivity for the "non-essentialist other" of human identity.[53] As desire is the energy which agitates our existence — as it is the primary cause/force of motivation for the human subject and its conscious activities/actions — it cannot (should not) be repressed. Such ignorance of one's desire, such repression, is the wrong of our traditional ethics. With such repression the subject fails to realise the nature of desire and, thus, the nature of itself.

Conversely, against such repression the ethics of desire, first and foremost, is concerned with projecting the subject against the truth of its own structural contingency, the truth of the formation of it own human identity — its own lack-in-being to which impossible desire points.[54] The goal of psychoanalysis is not to "cure" the subject or facilitate its sense of complete and harmonious conscious well-being and presence. Unlike traditional

[51] Tie, W. 'Beyond the Dislocation(s) of Human Rights.' *Social and Legal Studies*. (2009), Vol. 18, No. 1, 71-91, at 72-75; Derrida, *op cit*, at 700.
[52] Lacan, *Book XI*, above n 39, at 44.
[53] De Kesel, above n 31, at 17.
[54] De Kesel, *ibid*, at 9.

ethics, the goal is not to re-impose the Symbolic onto the subject in order to manage desire:

> One might be paradoxical or trenchant and designate our desire [as analysts] as a non-desire to cure … against the common approaches to the good that offer themselves with a seeming naturalness, against the benevolent fraud of wanting-to-do-one's-best-for-the-subject.[55]

Rather, the task of an ethics of desire is to bring the subject to the realisation that *it* is a subject of desire rather than continuing the comfortable illusions than the subject's desire is subjected to it:[56]

> [The subject] … seeks … to be in agreement with himself, to identify with or be in some conformity with some norm. [However] we find … the subject reveals himself to the never entirely resolved mystery of the nature of desire.[57]

The task is to reveal the affective impact of irretrievable loss in the formation of human identity and the impossibility of desire in the articulations of subjectivity, rather than help the subject "colonise its lack with a fantasy of self-mastery, other people's happiness or a social good."[58]

> …the role of psychoanalyses is to teach the subject to recognise his unconscious as his history … help him to perfect the present by understanding the past which has already determined a certain number of historical "turning-points" in his existence which organise his subjectivity.[59]

Thus, Lacan helps us understand the truth of the human condition — the absolute disarray of un-ending and equivocating desire: *"I am in so far as I doubt."*[60] And from this experience we may confront our own fantasies of reality in our Symbolic

---

[55] Lacan, *Book VII*, above n 3, at 10.
[56] De Kesel, *op cit*, at 15.
[57] Lacan, *Book VII*, *op cit*, at 237.
[58] Caudill, D. 'Lacanian Ethics and the Desire for Law.' *Cardozo Law Review*. (1995), Vol. 16, 793-803, at 798.
[59] Lacan, *Ecrits*, above n 10, at 53.
[60] Žižek, above n 34, at 69; Caudill, *op cit*, at 799.

articulations and demands, through our own unfixed and incomplete, uncertain and absent, desire.

Hence, such an ethics commences with the constitutive lack of human identity and the impossibility of desire and does not hold out ideals of subjective certainty and stability and social harmony and totality. Lacan inverts such traditional ethical aspirations (and inspirations). He does not commence with an ideal good (potential) of human subjectivity, but rather, with the very desire traditional ethics attempts to deny:

> Now we analysts are able to recognise that place as the place occupied by desire. Our experience gives rise to a reversal that locates in the centre an incommensurable measure, an infinite measure, that is called desire.[61]

His aim is to first "clear a pathway from fantasy to the workings of unconscious desire" and then attain the potential of virtue, rather than commence with a moral ideal (in the illusions of fantasy) which strikes at desire.[62] Thus, such an ethics of desire demands "… a radical repudiation of a certain ideal of good."[63] Such "good" is "every moment and always, the first barrier [against desire] that we have to deal with."[64] The "end point of the commencement" of an ethics of desire is an intra-subjective confrontation, in which "… the true termination of an analysis … [should be to] confront the one who undergoes it with the reality of the [true] human condition [of lack]".[65]

Hence, the ethics of psychoanalysis does not commence with the freedom of repression of desire by the fantasy of reality, or the indulgence in pleasure to avoid (unconscious) discomfort. Rather, it commences at "lifting the veil" on the unconscious, un-masking the fictitiousness of the Real and the impossibility of desire, in order to liberate the subject from the delusions of ideality and perversions of pleasure. The ethics of desire is a dislocation of the concept of such ideality and fantasies employed to defeat the lack-in-

[61] Lacan, *Book VII*, above n 3, at 215-16.
[62] Caudill, above n 58, at 798.
[63] Lacan, *Book VII*, *op cit*, at 230.
[64] Lacan, *Book VII*, *ibid*, at 230 & 225.
[65] Lacan, *Book VII*, *ibid*, at 303 & 314.

being of human identity. The ethics of desire is an ethic of *traversing the fantasy* in order to confront the impossibility of the Real:

> Killing the fantasy means to show the subject that the Other is inconsistent and thus so too is the subject in the field of the Other, thus the subject starts to identify with the lost object.[66]

Thus, the ethical goal of a "liberated subject" is not aimed at an image of a self-sovereigned individual of conscious, self-determined capacities. Rather, it is grounded in the impossibility of unconscious desire in order to release the subject from the anxiety of the fantasies of certainty and the images of ideality.[67] This is the (ethical) strategy of *encircling the Real.*[68] Starting from the impossibility of desire, Lacan's ethics does not wish to colonise the locus of the Real — as per traditional ethical projects — but rather, maintain a *proximity in distance and doubt* within the anticipation of the longing-for, in a vigilant posture gesturing towards the Real, but without arrival at the (fictitious) place of the Real.

In this way, Lacan attempts to make unconscious desire the inescapable "ought to" of ethical subjectivity, as opposed to the conscious will (moral good) of traditional ethics.[69] Hence, Lacan's refrain — one should never lose sight of one's desire, one should always "act in conformity with desire:" "the only thing one can be culpable of is giving ground relative to one's desire."[70] This is not the desire of hedonistic pleasure — the pleasure, as discussed above, agitated to stave off the trauma of loss and impossibility. Rather, this is the desire that ruptures the subject's illusions with the impossibility of the Real, and forces the subject to make choices and act:

> This is when ethics comes into play, in the question forced upon us by an encounter with the Real: will I act in conformity to what threw me "out of joint," will I be ready to reformulate what has hitherto been the foundation of my

---

[66] Verharghe, P. 'Causation and Destitution of a Pre-ontological Non-entity: on the Lacanian Subject.' *Key Concepts of Lacanian Psychoanalysis*. (ed. D. Nobus), London, (1998), at 182.
[67] Fryer, above n 4, at 188.
[68] Stavrakakis, above n 8, at 130-132.
[69] Fryer, *op cit*, at 210-11.
[70] Lacan, *Book VII*, above n 3, at 321.

> existence? … For Lacan, the accent is to be placed first, on desire … for it is desire that aims at the impossibility, the Real.[71]

This is uncomfortable desire and uncomfortable ethics. This is the peculiar starting point of the ethics of desire. In the intra-subjective relationship with desire, which Lacan frees from the repression of the moral law and rehabilitates from perversion, the subject faces its own (unconscious and unending) desire. The subject enters a relationship with its own impossible desire, "to be" the "other of self" — the subject of (impossible) desire and unbreachable loss.

There are a number of ethical implications both for the subject and other subjects from such a starting point in this ethics of desire. To free desire from the repression of traditional ethics allows the subject to understand, know, acknowledge and embrace the unbreachable loss of ideal self-oneness, which drives towards destruction and perversion. It is this drive of desire Lacan asks us "not to give ground to," not to "give way to." Rather we are asked to "stand firm" in the face of such desire — to go to the depths of it and recognise the "death of it" and the "uncomfortableness of it."[72] The ethical act begins first in the subject facing this desire and taking responsibility for it, making choices regarding the animations of such desire and taking action with this desire in mind.[73] Once desire is uncovered, it cannot be re-covered. We can no longer act without regard for our desire — the principle cause of our motivations and actions in the first place.[74] Desire becomes the invocation of the ethical choice — to live in the delusional fantasies-of-reality which defer the subject away from its desire and encourage the perversion of pleasure, or to bear the responsibility of the desire which animates such fantasies in the first place.[75] By Lacan forcing us to focus on desire we assume the weight of desire.[76] Responsibility and ethics do not commence in a pre-given (conscious) ideal of certitude to be attain. Rather it is, first and foremost, desire which animates our

---

[71] Zupancic, A. *Ethics of the Real: Kant, Lacan*. Verso Press, London, (2000), at 235.
[72] Kristeva, above n 11, at 7.
[73] Kristeva, *ibid*, at 6-8.
[74] Fryer, above n 4, at 212.
[75] Pound, M. 'The Assumption of Desire: Kierkegaard, Lacan, and the Trauma of the Eucharist.' *Journal of Cultural and Religious Theory*. (Winter 2008), Vol. 9, No. 1, 67-78, at 68-69.
[76] Neill, C. 'The Locus of Judgement in Lacan's Ethics.' *The Journal for Lacanian Studies.* Vol. 3; No. 1; 85-100, at 90-93.

existence within the Symbolic. Desire is always already unfixed and ambiguous and motivates the articulations of self within the Symbolic re-presentations of our existence.[77] In not giving ground to such desire we "recognise it as *our* desire" and take responsibility for it.[78]

For society, this freedom from fantasies and illusions by the ethics of desire animates the potential of a flourishing of diversity in the relational bonds amongst people.[79] The subject of desire is always already amongst a community of meaning within the sociality of the Symbolic, as the Symbolic is the discursive mediation of desire. The responsibility inspired through the "facing-of-desire"[80] is not one measured against the ideal of self-sufficiency and independent moral *potentia*, but rather, a responsibility through desire always already expressed in the social field of the Symbolic.[81] Freed from images of ego-ideals and fantasies of Symbolic reality (though always only partially freed as unconscious desire and the play of the signifier are always already beyond the subject), the subject is now in a position, has the capacity, to face desire and to encounter others as others, rather than as simple objects of desire.[82] Facing desire places the subject in a position to make ethical choices and take responsibility as to how they engage in the inter-subjectivity with the other. In engaging in one's desire one can act to ameliorate the transference of ego desire, to check the perversion of indulging pleasure, and to keep surveillance on the destruction of the death drive, all inscribed onto the other within the sociality of the Symbolic and the inter-human community of meaning.[83]

---

[77] Neill, *ibid*, at 97.
[78] Neill, *ibid*, at 90.
[79] Kristeva, above n 11, at 11.
[80] This *face-to-face relationship* with desire is the *ap-proximation* of Lacan *with* Levinas, for with both, ethics begins in a relationship of *face-to-face* with an-other before and beyond the (conscious) self. However, where Lacan's ethical relationship is the *intra*-subjective face-to-face relationship with human desire (loss), Levinas's face-to-face relationship is with the *inter*-subjectivity with the other human subject. I shall discuss this ap-proximate relationship of face-to-face ethics which Lacan and Levinas share (though, from their individual and unique institutional positions) in the Conclusion Chapter, '*The Trouble with Neighbours: Lacan with Levinas, the Unconscious and Ethics.*'
[81] Neill, above n 76, at 98.
[82] Kristeva, above n 11, at 11.
[83] Kristiva, *ibid*, at 11-12.

This does not mean desire is erased, that the subject can stop the force of unconscious desire in its conscious articulations and Symbolic mediations. This would mean the "cure" of desire. Rather, desire and the loss to which desire aims is always already the first and last cause within the structure of human identity.[84] Unfulfillable desire is always oscillating within the unconscious of the subject. But with Lacan's ethics of desire we are given the opportunity to attempt to *let go* of our fantasies and of the ailments and perversions of repressed desire.[85] In facing desire, rather than engaging in the perversion which repressing desire stimulates, Lacan offers the *ethical strategy of sublimation* to deal with the ambiguity of desire and the truth of the structure of human identity:

> Sublimation is that which provides the *trieb* (drive) with a satisfaction different from its aim — an aim still defined as its natural aim … [it] has a relationship to *das Ding* as such, to the Thing, insofar as it is different from the object.[86]

Sublimation is a redirection of the drive of the subject (desire's death drive striving to return to the maternal *Thing* of the Real) so that the drive/desire is satisfied without the need to repress desire. It is not only a change in the object, but more significantly, a change in the position of the object "in the structure of fantasy:"[87]

> Sublimation is satisfaction without repression … achieved … by not changing a new object or a previous object, but the change of object in itself.[88]

Structurally, sublimation raises an object up to the dignity of the lost object, but not to exchange the object for the lost object. This is the dignity of the "loss found within" the

---

[84] Fryer, above n 4, at 207.
[85] Fryer, *ibid*, at 208.
[86] Lacan, *Book VII*, above n 3, at 111. There is also the ethical strategy of "identifying with one's symptom," which I shall outline, pages 198-200.
[87] Evans, D. *An Introductory Dictionary of Lacanian Psychoanalysis*. Routledge Press, New York, (1996), at 198; Fryer, *op cit*, at 209.
[88] Lacan, *Book VII, op cit*, at 293. Lacan offers the example of mediaeval "courtly love" as the sublimated object of love (the Real): "Courtly love is, for man ... the only way to elegantly pull off the absence of the sexual relationship [the relationship with the Real]." Refer to *The Seminar of Jacques Lacan Book XX: Encore, on Feminine Sexuality, the Limits of Love and Knowledge, 1972-73*. (ed. J.A. Miller, trans. R. Grigg), Routledge Press, London, (1998), at 69. In this idealised mythology of love, the love object (the Lady) is the impossible object, an unattainable ideal whole around which the Knight can only "swoon" without ever obtaining. Notice there is (the ethical requirement of) sacrifice here, the necessary sacrifice of the unity with the object (the Real), the necessary sacrifice of self-love, denying oneself of one's imagined ideal of desire.

object — not to colonize the space of the Real, but rather, to acknowledge the impossibility of the Real:

> Now if you consider the vase from the point of view I first proposed, as an object made to represent the existence of the emptiness at the centre of the Real that is called the Thing, this emptiness is represented and the representation presents itself as a nihil, as nothing. And that is why the potter, just like you to whom I am speaking, creates the vase with his hands around the emptiness.[89]

Sublimation is the energy of this encircling: of the "taking-position" around the emptiness of loss, rather than taking over the locus of loss.

The Mediation of Ethical Desire through Identity and Human Rights

The bridge between such an ethics of desire and the signification of human rights is through the *performative gesture(s)* of human identity which is essential in Lacan's interrogation of the structuration of subject formation. Our contemporary human rights' discourse expresses a certain signification of human identity, the Symbolic re-presentation of the socio-political legalisation of desire in the image of (consciously reasoned) self-will and personal (socio-political) liberty. With a Lacanian re-imaging of the subject as a subject-of-lack and human identity marked by the impossibility of desire, an ethics of desire potentially re-invigorates human rights as an agent of unfixed signification. Lacan finds a certain liberty within the oscillations of impossible desire and the ambiguity of an unstable Symbolic. It is, significantly, a liberty under failure: the failure of the Real to gain signification; the failure of desire to be resolved; the failure of the Symbolic to fix identity. In the decentralisation of Lacan's pre-ontological split in human identity — within the very logic of the structuration of self consciousness around the void/failure of indeterminate loss and ambiguous symbolisation — there is produced a potentiality of a power of unrepresentable, open desire sustained by an agency of ambiguous signification.[90] Within such animations of self and signifier there is the

[89] Lacan, *Book VII*, *ibid*, at 121.
[90] Žižek, above n 34, at 40-42.

possibility of the gesture of subjectivisation and performance of identification,[91] never "fixed" in the singularity of being, but always a shifting process of coming-into-being. Human rights become the Symbolic significations of the subject's articulations of unfixed and fluid identity of agency and self, of infinite intra-subjective desire mediated through the sociality of the Symbolic.

It is at this juncture of performative gesturing where Butler's work into *resignification* and reiteration takes meaning. Through a combination of Lacan, Foucault and Hegel, Butler focuses on the equivocating energy within the Symbolic realm — power at the level of the cultural, social and political discursive mediations of human desire. At this level, signification, the articulations of human identity, is never stable and certain, but rather, (as Lacan informs us) limited under the law of the ambiguous signifier and the inter-play of difference amongst diverse symbols:

> All human beings share in the universe of symbols … It is a function of the symbols … that those variations are produced in which the subject is open to taking on the variable, broken, fragmented, sometimes even unconstituted and regressive, images of himself.[92]

Under this play of symbolisation is the potential for personal agency and the social energy of group identity politics. The subject is not destroyed under the contingencies of such Symbolic significations. Rather, such contingency is the energy of agency — within the limits of the Symbolic are "varying degrees of identificatory choices within the terms of subjectivity across the multiplicity of contextual contingencies."[93]

---

[91] Butler, J. *Gender Trouble: Feminism and the Subversion of Identity*. Routledge Press, New York, (1999), at 163-190. The process of subjectivisation can be defined as the way in which the subject is initiated into "being" and concurrently regulated by cultural, linguistic and ideological norms (the discursive inter-play of subjective contingency). Refer to Pirskanen, J. 'The Other and the Real. How Does Judith Butler's Theorising of the Subject and Contingency Differ from the New Lacanian Thought?' *QueerScope Articles*. (Jan, 2008), 1-14, at 1. (www.helsinki/jarj/sqs1_08/sqs12008pirskanen.pdf) accessed 14/01/10.

[92] Lacan, *Book I*, at 157-58, cited in Hall, D. *Subjectivity: the New Critical Idiom.* Routledge Press, New York, (2004), at 81.

[93] Butler, J. *The Psychic Life of Power: Theories of Identity*. Routledge Press, London, (1997), at 15-17.

In the continuous play of desire, in the repetitive performance of shifting identification, within Lacan's linguistic processes of signification and discursive practices of representation, meaning is not stable and identity is not fixed.[94] Here, there is the possibility of contestation in the very Symbolic split of subjectivity, in the failure of identity and the gap of Symbolic representations of reality.[95] This is not the agency of the pre-discursive, self-reflexive "I" of conscious capacities of self-determination. This is not the equivalence of the voluntarism in the traditional image of self-sovereigned determination, held within our contemporary human rights' discourse. Rather, this is the possibility of agency found within the dissonance in the identificatory processes between reality and Real, signifier and signified, identification and identity.[96] In these spaces of instability, identity gains a plasticity which can be exploited in the strategies of a postmodern identity politics of openness. This is the potential to extend the very "category of human identity" within the discourse of human rights, so that subjects who do not conform to traditional re-presentations of the significations of human identity are not necessarily excluded.[97]

Opposing the "pre-fabric" image of identity as the presence of the ontological self-willed individual within our contemporary human rights, Butler sees identity as an "incomplete fabrication" through signs and discourse. Identity is one of Lacan's fantasies-of-reality, attempting to "fix" human desire and human signification. The female gender, for example, is the signification of a certain fantasy of sexual desire, sexuality, and the symbolic arrangements of signs to re-present and fulfil such desire.[98] But within this signification there is another critical element to give such symbols integrity — that is, the performance of the signification. Identity needs the reinforcement of repetition in performance to gain legitimacy. It is in this contingency of performance where there is the possibility of failure and, thus, *resignification*.[99]

---

[94] Butler, above n 91.
[95] Butler, *ibid*, at 99.
[96] Butler, *ibid*, at 181-83.
[97] Salih, S. (ed.) *The Butler Reader*. Blackwell Publishing, Malden, (2004), Editor's Notes, at 3.
[98] Butler, *op cit*, at 173-75.
[99] Butler, *ibid*, at 178-179.

> As a process, signification harbours within itself what the epistemological discourse refers to as "agency." … [However] the subject is not *determined* by the rules through which it is generated because signification is *not a founding act, but rather a regulated process of repetition* …[100]

Identity only maintains its credibility in the circle — the performative cyclical repetitive inter-play — of signification and discursive processes. The agency of *resignification*, the personal liberty of subjectivity *over* identity aspired to within our in human rights, is in the possibility of intruding, disrupting, varying and subverting the elements within this circulation of Symbolic repetition.

This is the ethico-political aim of Butler's Symbolic agitation through the (Lacanian) subject-of-lack within the discursive powers of the Symbolic. This is a democratic project, extending to all articulations of human identity in a gesture of radical inclusively; a principle of (hegemonic) expansion of the political field for the inclusion of all equivocations (the agency) of human identity. This presents an impossible task, as identity is always already unfixed in the signification of the signifier, but nonetheless, a principle of inclusivity which "ought to" govern the socio-political field.[101] This is a political project aimed at an *ethics of openness* towards the oscillations of impossible desire and unstable identifications, animating a polity of inclusivity of the ceaseless equivocations in the significations of human identity. Thus, this is not a human rights fixed on the pre-given conscious being of autonomous capacities. Rather, this is a human rights for the human identity of contingency, of impossibility and loss, ambiguity and uncertainty, under the sliding inter-play of the law of language. It is in this very impossibility, because of this impossibility, that such a task, such a human rights, is necessary. Subjectivisation is the challenge of *resignification* against the established socio-political order, a challenge which human rights must ensure gains inclusion rather than repression:

---

[100] Butler, *ibid*, at 185.
[101] Butler, J. *Bodies that matter: on the Discursive Limits of Sex*. Routledge Press, London, (1993), at 16, 193.

> What challenge does that excluded and abjected realm produce to a symbolic hegemony that might force a radical re-articulation of what qualifies as bodies that matter, ways of living that count as "life," lives worth protecting, lives worth saving, lives worth grieving?[102]

There is a certain ideal pragmatism in Butler's work, a future-looking possibility (though always impossible) of expansive democratic inclusivity.[103] Like many postmodern projects orientated around identity, this is a politics of expansive hegemony, which aims, not so much to challenge the *form* of our contemporary human rights,' but rather, primarily aims at expanding the *content* of human rights and the inclusivity of others within such rights.

But in this sense, Butler is stricter than Lacan. She employs Lacan's subject of Symbolic articulation but limits it within Foucauldian discursive inter-play, in order to posit the subject as a cultural construct — something subversive in the processes of *resignification* and reiteration, but nonetheless, something which ultimately seeks inclusion within the established socio-political discourse. Butler does not offer social change through the structural necessity of accommodating the radical impossibility of the Real, but rather, articulates political possibilities through the network of pre-existing social practices.[104] There is also a central problem with such politics of reiteration in the struggle to expand the category of human identity under the assurances of human rights. Like most postmodern projects of identity politics, it eludes subjectivity beyond the bounds of personal aesthetics of the Western bourgeois. Subjectivisation through *resignification* is, in Butler's own words, "styles for the flesh."[105] However, on a daily basis in the West, we are bombarded by other performative gestures — the "performance of human atrocities" against human identities other to our own.[106] Images of other identities' degradation repeatedly intrude in the circularity of the signification of human identity within the socio-political of the West. And yet such gesturing agitates little in the form of a human rights response, a personal response, an ethical response, or even a socio-

[102] Butler, *ibid*, at 16.
[103] Pirskanen, above n 91, at 12.
[104] Pirskanen, *ibid*, at 11.
[105] Butler, above n 91, at 177.
[106] Tie, above n 51, at 83-84.

political response. The performance of atrocity falls short of the ethico-political response to which Butler aims, and *resignification* fails the other human subject who is not already articulated through a socio-political signification that is recognised as human.

For Žižek, Butler's employment of Lacan "is not radical enough" — it is "not political enough," even though she politicising everything by "bringing everything into the political."[107] For in this politicisation of everything she reduces the unsymbolisability of the Real and, thus, the radical ethico-political potential of the alterity of the Real. Lacan's subject is more profoundly marked by the void of loss, even prior to the performative gestures of identification through socio-political Symbolic significations.[108] Whereas Butler focuses on the inter-subjective discursive inter-play of social (Symbolic) subjectivisation, for Žižek, the Real — lost and impossible — is the structural necessity of otherness upon which such significations then unfolds: "It isn't the lack of this or that, but lack of being whereby the being exists."[109]

From this perspective, the ethico-political possibilities of the Lacanian subject-of-lack are not articulated on the horizon of the socio-political. Rather, the subject of loss and desire signifies a greater socio-political/ideological possibility — the radical, potential challenge against the very structural integrity of the socio-political:

> One should distinguish between two levels: the hegemonic struggle for which a particular content will hegemonise the empty universal notion; and the more fundamental impossibility that renders the Universal empty, and thus a terrain for hegemonic struggle.[110]

---

[107] Žižek, S. 'Da capo senza Fine.' *Contingency, Hegemony, Universality. Contemporary Dialogues on the Left.* (ed J. Butler, E. Laclau & S. Žižek), Verso Press, London, (2000), 213-262, at 261.
[108] Žižek, S. 'Class Struggle or Postmodernism? Yes, Please!' *Contingency, Hegemony, Universality. Contemporary Dialogues on the Left*, *ibid*, at 90-135, 104, 115. The debate between Butler and Žižek is not of primary significance to this paper. Briefly, both authors employ Lacan's meditations regarding subject and social formation. Their disagreement seems to centre upon their interpretation and employment of Lacan's notion of the Real. For Butler, she dedicates some time to it, but reads it more as a "site of repression" from the masculine phallus, and focuses more on the question of identity agency within the field of the Symbolic. Žižek, on the other hand, sees the unrepresentable Real as the locus of political and ideological signification. For a concise analysis of the debate between Butler and Žižek refer to: Pirskanen, above n 91; Swiffen, A. 'Politics of Law and the Lacanian Real.' *Law Critique*. (2010), Vol. 21, 39-51.
[109] Lacan, J. *The Seminar of Jacques Lacan Book II: The Ego in Freud's Theory and in the Technique of Psychoanalysis, 1954-55*. (trans. S. Tomaselli), W.W. Norton, New York, (1991), at 223.
[110] Žižek, *op cit*, at 111.

The radicalness of the Real and Lacan's subject of impossible desire and irretrievable loss is in its emptiness at the centre of (the very emptiness which de-centres) human identity. The Symbolic can never master the Real and the socio-political can never articulate the impossibility of desire and loss. Politics, ideology and human rights are fantasies-of-reality like any other fantasy. The Real, the ethico-political consideration of the Real, is that which has always already said "no" to such fantasies within the Symbolic; it always already threatens to rupture the logic of the Symbolic delusions of ideological significations.[111]

An ethico-political action of desire, a human rights inspired by the impossibility of the Real, is informed by the refrain: "not to give way to one's desire." This does not express a "hegemonic compromise" of desire into a wider network of liberal humanism inclusiveness. Rather, the rupture of the Real, the desire for which we must stand, is animated by the nature of its unsymbolisability — in its necessarily structural resistance against the logic of the prevailing socio-political discourses and fantasies of signification.[112] The performative force of the ethico-political is grounded in the irreducible difference between illusions and symbols (the Imaginary and the Symbolic), and the Real.[113] Rights of the Real are the register of the always already potential of the rupturing otherness. Rights of the Real cannot articulate the agitations of a "signification of Symbolic style," as the loss of the Real which inspires such agitations lacks all substance of symbolisability. Hence, the Real can never be contrived and planned for in political strategies, but rather, must always be accommodated when it is experienced at the moment of rupture itself.[114] The performative gesture of the Real and of a human rights of the Real is in the force of refusal and rupture of the reality (of the fantasies) in which we live.

[111] Pirskanen, above n 91, at 8.
[112] Pirskanen, *ibid*, at 8
[113] Tie, above n 51, at 75.
[114] Tie, *ibid*, at 84.

In this sense, the ethical act, the act of human rights, is found in the rupture of the Real. It is found in the dislocation between fantasy and impossibility (of fantasy — the fantasies-of-reality — *by* impossibility — the impossibility of the Real). This is "the event," the encounter with the Real which signifies the moment of ethical provocation, when some*Thing* "other" is forced upon me beyond my contrivance and conscious understanding.[115] This dislocating rupture is, for Lacan, "the act"[116] in which the Symbolic fails — when fantasy and law fail in the excess of the alterity of the Real — and the subject (and the Symbolic social) faces impossible desire.[117] This is the moment of responsibility and politisation, the exercise of an ethico-political reformulation to account (one way or another) for the alterity of the dislocating other. This is the moment of terror, not the terror of the Real (of the self-destruction in the return to the Real), but rather, the trauma of the rupture and the terror of the choice of the impossible.[118] Beyond my contrivance, it is the unpredictable rupture of the impossibility of the Real which forces me to choose, and from choice comes the possibility for change; rather than the choice of a political ideal which then forces change.[119]

In this sense, the ethico-political of the Real, the rights of the Real, are not "forward looking," offering the symbols of idealised future potentiality of hegemonised subject and society. Rather, rights of the Real are conceived in the very structure of the ideological fantasy-of-reality itself, orientating this fantasy around a hollowness of lack. This orientation around the lack is the space for vigilance towards the rupture of the Real and the illogic of its otherness beyond Symbolic significations:

> These contradictory ideas, people and symbols are portrayed as the alien and disturbing intruder, are stigmatised and eliminated, rather than understood as the point of eruption of the hidden truth of the "always already other of the Real" that belies the fantasy of the promise from Symbolic reality of a harmonious completeness, of totality and unity.[120]

---

[115] Refer to Badiou, A. *Being and Event*. (trans. O. Feltham), Continuum Press, London, (2006).
[116] Lacan, *Book XI*, above n 39, in Tie, *op cit*, at 86.
[117] Tie, *ibid*, at 86.
[118] Zupancic, above n 71, at 235.
[119] Zupancic, *ibid*, at 236. Of course, the ethics of the Real masks the ideological choice first made before the enforcement of fantasy by the illusion of objectivity and universal good.
[120] Žižek, S. *Looking, Awry*. MIT Press, Cambridge, (1991), at 40.

It is in this way that the Real seems not to be revolutionary (revolutionary as Marx was, for example), but rather, the ethical act is signified (has the best chance to be signified) within the discursive structure of social democracy. The rupture of the Real provokes a re-orientation in the *form* of this social democratic structure. It stimulates a *re-focussing in the architectural aspect* in which the discursive processes orientate around the empty space of the unrealisable other, rather than encapsulating these spaces in hegemonies of homogeneity.

This accommodation of the space of impossibility is the ethical act of "embracing the symptom." This is an identification with that which introduces disharmony. An identification no longer orientated around interpellations of significations from the Symbolic, but rather, identification in the response to the impossible alterity of the Real.[121] In many ways, human rights of the Real are a discourse of the sublimation of the symptom, a discourse which always already attempts to raise the "excluded truth" of our fantasies of socio-political significations — when such truths, such intruders, arise — into the position of the universal.[122] The impossible task here for human rights is to always already leave a space open for such inevitable dislocations, strangers and intruders which rupture the fantasies and ideologies under which we live. By identifying with the symptom we embrace the illogic of the otherness of the other against our own articulations, rather than persecuting the other or repressing the other into a certain narrative style of signification. "We are all Jews, we are all Chernobyl, we are all boat people"[123] is not an articulation that we understand the illogic of the other, but rather, that we acknowledge that such otherness, first and foremost, is a symptom of the ordered structure. A reminder that the disharmony of the rupture is not produced by the symptom, but rather, is constitutive of the subject and the social — its own foreclosure, invoking its own lack, its own loss and its own anxiety and desire … its own symptom.[124]

---

[121] Verhaeghe, P. 'Causation and Destitution of a Pre-ontological Non-entity: On the Lacanian Subject.' *Key Concepts of Lacanian Psychoanalysis* (ed. D. Nobus). Rebus Press, London, (1998), at 182.
[122] Stavrakaksi, above n 8, at 133.
[123] Žižek, above n 120, at 140.
[124] Stavrakakis, *op cit*, at 134.

For Stavrakakis, such an ethics of desire and impossibility of the Real are best explored in the *praxis* of liberal democracy, not in the "substance of Symbolic style" of liberal democracy, but rather, in its very *structural ambiguity*. It is served by continued critical awareness (from examples, from intellectuals and artists), and institutional processes of vigilant self-review.[125] The ethics of desire is not an ethic of inclusive harmony, but rather, an *ethics of disharmony* always inspiring the sociality of ambiguous contestation.[126] In such a socio-political signification, the task of human rights is to work towards ensuring a politics of the lack — remaining vigilant to the centrality of ambiguity, in which the locus of power is the empty place of the constitutive tensions of the lack of the other.[127] As Žižek suggests:

> All we have to do is mark the trauma, as such, in its very impossibility, in its non-integrated horror, by means of some "empty symbolic gesture."[128]

For Žižek, such an empty gesture of socio-political structuring was captured in the 1989 over-through of Ceausescu's rule in Romania. After this historical event, the red star of the flag of the old Communist order was cut out, leaving only a hole, representing a brief "threshold moment" between political orders, open to all possibilities and closed to none. It is the lack of the Real which should stand as the organising principle of the fantasies-of-reality and socio-political ideologies, rather than the energies exerted in the projects to colonise the space/terrain of such lack.

Conclusion

With his psychoanalytical deconstruction of the human unconscious, Lacan brings to light the very structures of subjectivity and forces in the formation of human identity, which take root prior to and beyond the capacities of self consciousness and intentional self-will. The subject is subjected to the *ex-sistence* inter-play between the Symbolic, the Imaginary and the Real and is, in itself, the consequential symptom of an intra-psychic dialectic between two selves (the ego-Ideal and the corporal self), which invokes the

[125] Stavrakakis, *ibid*, at 135-136.
[126] Stavrakakis, *ibid*, at 126.
[127] Stavrakakis, *ibid*, at 123-125.
[128] Žižek, above n 2, at 272.

animations of its subjective significations within the sociality of language and discourse. Lacan's split-subject is, first and foremost, always already, marked by loss — of a sense of a prior harmonious oneness and the loss of/in language — and all the uncertainty and instability, trauma and anxiety, alienation and desire, which such loss invokes and sustains. The desire to suture the loss of an ideal-self is an unconscious fantasy which, nonetheless, compels our conscious energies, dictates the way we engage in a communality amongst others and determines how we attach ourselves to the discursive institutions of the social.

The liberal tradition of our contemporary human rights' discourse also commences with a split subject which, equivalent to Lacan, is also characterised with a lack. However, where these two images may be similar in their (empty) content, they are distinctly different in their form. The liberal individual is always already self-contained and enters the sociality of community always already in (potentially) full conscious capacity of its own independently reasoned self-will. This is an empty image, but nonetheless, like a blank canvas, an image primed "for its own making." For Lacan, the split-subject endures a pre-ontological intrusion which stimulates its necessary *sojourn* into the sociality, in order to attempt to resolve its unresolvable desire and to re-gain its impossible loss through the engagement with others. The conscious individual is neither autonomous nor self-contained, but rather, always subjugated to the contingencies of its own unconscious other within the very structural fabric of human identity.

It is this distinction in the formulation of the split subject which alters the "ethical orientation" of these two images of subjectivity and human identity. From a Lacanian perspective, the liberal tradition within our contemporary human rights is an "ethics of the erotic."[129] This is an ethic which encourages the repression of desire by the imposition of will and the freedoms to self-interested pleasure, in the efforts towards the (potential ideal) image of self in the presence of being. For Lacan, the mistake with such projects of the ethics of the Real is that they place the potentiality of the sovereign good

[129] Douzinas, C. *The End of Human Rights: Critical Legal Thought at the Turn of the Century.* Hart Publishing, Oxford, (2000), at 342.

of the Real within the Symbolic reach of the significations of the signifier, within the conscious contrivances of subjective articulations. The phallus, the transcendental signifier of the law, the *author*-ity of human rights, expresses the guarantee of the possibility of ascending to the ideal of desire, through the totality of the significations of the Symbolic. Supported by such guarantees, our contemporary human rights' discourse weaves a Lacanian fantasy-of-reality from the dual illusions of possibility. This is the fantasy of the potentiality of the image of the ideal-I of the *cogito*-like *imago*, accessed through the totality of a stable and certain sociality, offering the *objet petite a* of human rights to meet the desire of the subject and ensure the fullness of its identity.

It is this erotic aspect of our human rights which underpins much of the agitation from postmodern identity politics. Pleasure defers desire and masks the terror of the Real, but desire is never fulfilled and pleasure demands more. Hence there is a proliferation of rights to articulate the private demands of the individual in its effort to secure the fullness of self-realisation, a "right" guaranteed by human rights. This process of subjectivisation gains integrity through the exploitation of agency energised under the sliding signifier and discursive processes. It exploits the potency to arrange the elements of identity signification in order to ensure the *resignifications* of self within the socio-political articulations. This invokes the economy of rights — the market of rights — of the twenty first century. This has facilitated the expansion of political and legal symbols which sustain private demands within the radicalised inter-subjectivity of the postmodern processes of identifications — the "new maladies of the soul."[130]

But an ethics of desire informed by the irreducibility of loss is both more radical and complicated than this. Foundationally, fundamentally, the Real is a fantasy *retroactively* constituted by the genesis of ego and the foreclosure of the Symbolic. With this in mind, Lacan's psychoanalytic project attempts to find a path between both the tradition of the grand narratives of ideal truths and the postmodern discourse of the ethics of

[130] Refer to Kristeva, J. *The New Maladies of the Soul*. (trans. R. Guderman), Columbia University Press, New York, (1995). The new maladies include the perversion of "unappeased, endless indulgence," exemplified by postmodern hyper-consumerism, lacking any sense of limit or value and without the father (the law of the phallus).

subjectivisation.[131] Both fail in their reading of the Real and in their dealing with desire. Postmodern politics may be more pragmatic than the traditional illusions of ideals, postmodern politics may have moved away from the superego ideologies of good and politics of right, but nonetheless, both mis-read the radical unsymbolisability of the Real and potential ethico-political implications. From a Lacanian perspective, both traditional idealism and pragmatic postmodernism potentially exhibit the same flaws: limiting the irreducible Real to the socio-political Symbolic; unhealthy in repressing the impossibility of desire; dangerous in masking the aggression of narcissistic ego; and perverse in agitating the pleasure of One.

What is lost in both ethical projects, what is needed to be re-instated in both projects, is the "Law" — not the "impostor of Symbolic miracles and frauds"[132] (the performative gestures on the terrain of Symbolic self-will), but rather, the "law of impossible desire" and the significance of irretrievable loss. In many ways, Lacan's ethical aim is to strengthen the position of the phallus.[133] An ethics of desire reiterates the "mutual bond" between desire and law: "The dialectical relationship between desire and the Law causes our desire to flare up only in relation to the Law."[134] This is the law which directs the subject away from the terror of the (self) destruction within the Real and into the sociality of the Symbolic. This is a law which does not colonise the impossibility of the Real, but rather, signifies the loss in ego subjectivity and the lack in the social Symbolic. This is the ethical sacrifice which is missing in both traditional ideals and personal postmodern politics: "There is no other good than that which may serve to pay the price for access to desire."[135]

Thus, a human rights invoked by such an ethics of desire is neither the articulation of potential fulfilment of human identity, as signified within our contemporary human rights' discourse, nor the signification of the endless expansion of the socio-political, as agitated by postmodern politics. Human rights should not function to sustain the fantasy

[131] Zupancic, above n 71, at 5.
[132] Lacan, *Book VII*, above n 3, at 303.
[133] Douzinas, above n 129, at 327.
[134] Levinas, *Book VII*, *op cit*, at 83-84.
[135] Lacan, *Book VII*, *ibid*, at 321.

of possibility, nor the signification of the political of either the subject or society.[136] Rather, a human rights' discourse inspired by an ethics of desire is a Symbolic reconciliation of the loss in subjectivity with the lack in the social. The performative gesture of desire is the "long-for" induced by the failure of signification to ever attain what is Real, the anticipation of encircling with the failure to arrive. Such human rights bear the responsibility and obligation to what is excluded by both the sociality of the political and the self-concern of the subject. The task of such human rights is to attempt to maintain a space within the social bonds of ego desire for the intruding rupture of the illogic of the impossible — the incalculable otherness of the alterity of the Real. The effort of such human rights is in the vigilant posturing to ensure the *provocation to* liberal democracy, whenever it ruptures, rather than in articulating the *politics of* liberal democracy.

Yet perhaps the very strength of Lacan's structure of impossible desire is also its own ethical limitation. The radical retrospectivity of the Real limits the subject to the structure of the Symbolic, always experiencing the Real through the Symbolic from which the subject looks backwards to inscribe meaning and signification to the loss of the Real.[137] It is the negativity of Lacan which fails the subject. By its very retrospective nature, the ethics of desire is a backward looking ethic of no hope,[138] in response to a future vision of a polity of ideals; it is loss and desire against possibility and potential. It is at this moment where Lacan is most limited by his own structuralism, in the duality of his *post*-structuralism and post-*structuralism* interrogation in human identity.[139] The ethics of desire is an ethics of self, for the subject only gains meaning within the structuration of self — the unconscious other of self; the Symbolic significations of self. The Real — loss and lack, subjective and social — only has meaning as an unknown other to self. The "liberating aim" of psychoanalysis may release the subject from its own ailments of repression, fantasies-of-reality and perversions of pleasure, but the

[136] Douzinas, above n 129, at 337.
[137] Cornell, D. 'Rethinking the Beyond of the Real.' *Cardozo Law Review.* (Jan 1995), Vol. 16, No. 3-4, 729-792, at 763.
[138] Here, Stavrakakis argues the opposite: that Lacan's impossible desire is an ethics of hope without ideals, which is indicative of a "hope without the horrors of the good." Refer to Stavrakakis, above n 8, at 97-100.
[139] Refer to the Introduction Chapter, '*Rights' Claims and Counter-Claims: A Clash of Discourses*,' page 7-9, where I discuss how Lacan sits on the threshold of such discourses.

benefits of such an ethics, first and foremost, prioritises the well-being of the subject in the formation of its own subjectivity.

What identity lacks within Lacan's own structuration of (intra-subjective) ethical desire is the lack of the signification — *the significance* — of the *human other*. Lacan's structural loss within subjectivity has little room for the significance *of* humanity (the other subject) beyond the loss *in* humanity and, thus, is marked by its own alienating inhumanity:

> For truth proves to be complex in essence, humble to its office and *alien to reality* [my emphasis], stubborn to the choice of sex, akin to death and, all in all, *rather inhuman* [my emphasis].[140]

Without the humanness of the inter-sociality with the other human subject, there is little articulation in Lacan's interrogation of human identity of the notion of justice — the equitable inter-play between the self and other — which is crucial in any discourse of ethics, rights, law or politics. Lacan wants to limit the repression of desire by the ideals of good, and with this, ameliorate the pathogenic possibilities of psychic ailments, narcissistic aggression and perverse pleasures. But in "releasing desire" he leaves no ground upon which to stand-for-good, save the void of the loss of a Real that "never was" (the limitation of the *retrospective* constitution of the Real), which always shadows the present. In the void of this loss Lacan is not enough.

It is in this void where Levinas's *face-of-the-other* sublimates Lacan's symptom of loss. It is this point which stands as the threshold between Lacan with Levinas and from which we traverse across anti-humanism structuralisation and towards post-humanism subjectivity. What Levinas offers to the Lacanian subject of unconscious contingency is the potential of a "good without an ideal."[141] Without dismissing the unconscious other of human structuration, Levinas supplements Lacan's pre-ontological moment of split subjectivity with the significations of an anterior, prevenient ethical proximity towards an-other human subject. At this junction of subjective-otherness Levinas and Lacan

[140] Lacan, *Ecrits*, above n 10, at 145.
[141] Fryer, above n 4, at 234.

share in the undecidability of deferring and doubt. At this moment of *human* otherness, the longing-for of Lacan's impossible desire is not only directed towards the impossible alterity of the unrealisable Real, but also, is drawn across the distance of proximity with the alterity of the *real human other*. In this way, "taking-position" towards the locus of the Real, where the void of loss resides, Levinas encircles such loss not with the desire of self, but rather, with a *responsibility-for-the-other*. The Law of Levinas's proximity, the authority of the phallus, is taken up and held by the other subject — not the signification of ontological knowing, but rather, of infinite alterity (of the other) and absolute responsibility (*for-the-other*).

****

Part B: Levinas's Subject for-the-Other

Chapter Six

The Self, the Face, Alterity and Ethics

Introduction

As outlined in the Introduction Chapter, my interest in this paper is to explore two inter-connected issues: to examine the philosophical conception of human identity within our contemporary human rights' discourse, and how such a conception impacts upon the ethical efficacy — the inter-human inter-relatedness — of human rights. My focus is to interrogate these issues through the post-discourses' philosophy of otherness and its corollary ethics of alterity. In *Part A* of this dissertation, we have seen how the thoughts of Lacan on the subject and its unconscious other can assist us in reviewing both the concept of modern human rights and the concept of individual identity which lay behind them. Coming from the perspective of psychoanalytic structuralism,[1] Lacan's alterity emphasizes the terrain of the unconscious other and how this impacts on human identity and subjectivity. This perspective and emphasis leads Lacan to problematise the image of the autonomous individual of conscious capacities and reasoned self-will, as presented within the liberal tradition of our contemporary human rights' discourse. Countering this image, Lacan presents a pre-ontological split subject — the subject of lack and desire prior to its conscious presence of being. It is this always already split subject which enters the sociality of the Symbolic, already haunted by the traces of the intrusion of the alterity of the unconscious other. It is the alterity of this pre-ontological split subject which marks Lacan's work as both *post*-structuralist and *anti*-humanist;[2] a subject who stands against the more traditional humanist individual of the conscious ego, central to the concept of modern human rights.

---

[1] Noting the debate over whether or not Lacan is more *post*-structuralist or post-*structuralist* as outlined in the Introduction Chapter, pages 7-9.

[2] Refer to Fryer, R. *The Intervention of the Other: Ethical Subjectivity in Levinas & Lacan.* Other Press, New York, (2004), at 1-31; Stavrakakis, Y. *Lacan and the Political: Thinking the Political*. Routledge Press, London, (1999), at 1-71.

The corollary of this Lacanian perspective is his ethics of desire. Lacan wants us to understand the powers of the unconscious desires to "return" to a more idealised, complete and harmonious sense of self (the Real), and how such desires to, and impossibility of, return within the Symbolic effects the human condition. Lacan wants us to understand how the attempts to fulfil and satisfy this return in the reality of our own ontological existence (the Symbolic mediation of reality) are what lead to individual maladies, psychosis and perversions. But in this respect, Lacan's ethical thesis is a narrow meditation of *intra*-subjectivity, on an internal relationship of self-with-self. Lacan's thesis leaves us at the threshold of the individual subject and its own mirror image: its own internal split; its own lack; its own anxieties; its own unconscious desires to "return" to its own sense of harmony and completeness; its own other self, the Real.

In this way, Lacan's split subject of intra-subjective otherness remains caught at the nexus of old and new: of post-*structuralism* and *post*-structuralism; of *anti*-humanism and *post*-humanism. Though his subject of lack undermines the tradition of human identity as intentional, conscious being, his alterity nonetheless remains within the internal structuration and topography of this being. The split of subjectivity may be lost from the intentionality of the subject, but nonetheless, it is still wholly and completely a part of the subject itself. Thus Lacanian ethics, and any ethico-political implications for human rights from Lacan, still remain an affective outcome of the internalised, self-reflecting, human subject. This is the negative limitation of Lacan's meditations — that the subject can never escape the trauma and anxieties of its desires because it can never escape it-self. Through Lacan we uncover that that the "escape route" of the Symbolic is not an escape, but rather, an unfulfillable fantasy built upon an unfulfillable desire.

It is in this negativity where we must turn to Levinas for another, more communal perspective — and, thus, more hopeful and optimistic — on human identity and its potentially broader inter-human ethical implications. More than most in the post-discourses, Levinas's focus is on the ethical other of human identity and the potential transformative affectivity of an ethics of alterity, inspiring the imagining of a post-

humanist human rights for a postmodern world.[3] Like Lacan, Levinas commences his interrogation into human identity with a pre-ontological, split subject, a pre-foundational intrusion into the conscious presence of being. But unlike Lacan, Levinas focuses his ethical thesis *primarily* on the intrusion of the "human other," on the alterity of the other subject — the very quality of otherness — beyond the Sameness of the self, rather than fixed on/in the duality of self. Where Lacan is caught in a pre-conscious *intra-subjective dialectic* of self, Levinas draws our attention towards a pre-original, asymmetrical *inter-subjective proximity* between the self and the alterity of the other human subject. Where Lacan leads us to, and leaves us with, the gap of the loss of the unconscious other-self, Levinas's ethics of alterity is orientated around the gap of proximity between the self and the other human subject. With this, Levinas's focus moves from the limits of being within the circle of self to explore the transcendental potential of an *otherwise-than-being* of human identity.[4]

---

[3] There is some debate on how to categorise Levinas's writing: whether or not it is humanism, anti-humanism or post-humanism. However, I take the position that his thesis is a post-humanist extension of humanism. Levinas himself claims that he is "no longer frightened by the word humanism." Refer to Levinas, E. *Humanism of the Other*. (trans. N. Poller), University of Illinois Press, Urbana, (2006), at 3.

[4] Because Levinas's thesis of an ethics of alterity is a meditation on transcendence *through otherness* and not the traditional metaphysics through the ontology of self, Levinas himself acknowledges the limitations of traditional philosophical language to fully articulate the "holiness" of the beyond essence in his ethics of alterity. Refer to Levinas, E. 'Transcendence and Intelligibility.' *Basic Philosophical Writings* (ed. A. Peperzak, *et al*), Indiana University Press, Bloomington, (1996), at 149-159. One reason why Levinas's language is so difficult is because he attempts an axiology of ethics and philosophy: the metaphysical (theological) infinite alterity with the phenomenological level of human experience. These two poles of Levinas's thinking reflect both a Western and Jewish (Greek and Hebrew) influence, through which Levinas seeks to invoke a "new Jerusalem" of Western reason (the love of wisdom) inspired by Hebrew ethics (the wisdom of love). These two polarities are also seen in the different focus (and language) in Levinas's two main texts: *Totality and Infinity* (trans. A. Lingis), Duquesne University Press, Pittsburgh, (1996) (a phenomenological investigation of the other); and *Otherwise Than Being or Beyond Essence*. (trans. A. Lingis), Duquesne University Press, Pittsburgh, (1998) (a more theological/metaphysical exploration of the other in the self). Refer to Burggraeve, R. *The Wisdom of Love in the Service of Love: Emmanuel Levinas on Justice, Peace and Human Rights*. Marquette University Press, Milwaukee, 2002, Chapter 1 and Chapter 5. This combination of Jewish theology and Western humanism is also encapsulated in Levinas's call for a "Jewish humanism" which centres upon a "humanism of the right of the other," rather than the concept of the individual, human self. Refer to Levinas, E. 'For a Jewish Humanism.' *Difficult Freedom: Essays on Judaism.* (trans. S. Hands), John Hopkins University Press, Baltimore, (1990), 273-76. I would also liken Levinas's post-humanism with the notion of "critical humanism," which is also expressed and explored in some strains of postmodern thinking and, like Levinas, begins the ontology of self, first and foremost, with the prevenience of the (alterity of the) subjugated other. For a good introduction into the notion of critical humanism and its implications in a "postmodern politics of difference," refer to Noonan, J. *Critical Humanism and the Politics of Difference*. McGill-Queen's University Press, Montreal, (2003).

It is this prevenient, asymmetrical inter-subjective proximity with the alterity of the other which brings Levinas back into an ethics-in-community (the self-in-community). This focuses Levinas (more than Lacan) on the issue of how we engage with other people — with the alterity of others — in a just and equitable way, without the reduction or exclusion of their otherness. It is with this ethical otherness of alterity within the fabric of human identity which I wish to challenge the ontological focus of human identity within our contemporary human rights' discourse. In contra-distinction from the tradition of liberal humanism, which orientates ethical integrity of our contemporary discourse of rights around the ideality of the autonomous capacities of individual moral *potentia*, Levinas's human identity of alterity grounds the ethical integrity of the subject and rights on the well-being of the pre-original other. Thus, rather than enforce a philosophical tradition which focuses on the self and invokes an egalitarian *socio-polity* in service to the self, Levinas's post-humanist ethics of alterity expresses the possibility of grounding an *ethico-polity* upon an infinite responsibility *for-the-other*, through a *human rights of otherness, prior to* the adequation of all into law and sociality of egalitarian symmetry.

In this chapter I wish to outline Levinas's philosophy of the ethics of alterity of the other. I wish to lay the foundations of the ethic of alterity before further exploring its human rights significations and ethico-political potential. Levinas's philosophy of the other is complex and detailed and, thus, I will explore his thoughts in four separate sections. Firstly, I explore Levinas's understanding of the self without the intervention of the other. This is the self in the tradition of the self-centred, ego-I — the self with the propensity to the violent reduction of the other into its own self-interested agenda of being. The second section of this chapter reviews Levinas's pre-occupation with the "life incarnate" — with his dedication to the face-to-face ethical encounter of human inter-subjectivity occurring within daily life. Finally, in the third and fourth sections, I explore Levinas's conceptualisation of the other as the face and the radical, infinite alterity carried with the face, within the corporal inter-subjective ethical experience of *proximity*. For Levinas, this proximity is an asymmetrical inter-human relationship between self and the alterity of the other which precedes the consciousness of being and, thus, is the ethical grounding of human subjectivity and sociality. Thus, the mark of this ethics of alterity is not in the

subject's autonomous conscious capacities, but rather, resides in the other self of the split subject — a pre-conscious ethical self in proximity with this anterior alterity of the other. In this non-ontological mark of human otherness, Levinas presents an anti-foundational foundation of human identity and inter-subjective ethics — a pre-ontological other self beyond the very essence of being, which, nonetheless, is the very inspiration and grounding of being.[5] For Levinas, ethics is "first philosophy" because this asymmetrical inter-subjective proximity is the primary foregrounding of subjective existence and social inter-action.[6] This proximity speaks to the *otherwise-than-being* of the primordial ethical instinct of inter-subjective openness upon which the conscious individual is grounded.

Levinas and the Violence of the Self

Levinas, like Lacan, begins his ethical meditations critical of the traditional, Western ontological conceptualisation and philosophy of the self, which he sees centred upon the self-absorbed ego, focussed upon intentionality, free will and reasoned consciousness.[7] This concept of human identity is, for Levinas, a concept of the economy of return, of the self reflecting and returning back on itself. Being is the *logos* of this tradition. The

[5] Fryer, above n 1, at 179. Like Lacan, Levinas has many "others." For example, there is the other of the immediate, single other — the face; the other of the many (the "third party"); the other of the subject itself (the otherwise-than-being, ethical creature of the ethical-I); and the absolute other — the divine alterity of god. Like Lacan, Levinas attempts to distinguish these different "others" with the use of the capital "O"ther and the lower case "o"ther. However despite this, there is still confusion surrounding these terms when translated from French to English. In my writings I shall add some detail descriptors when using the term "other" so the reader may know which "other" I am invoking. However, generally speaking, I shall use the following guidelines: the single "other" shall be the individual, the face; the plural "others" shall be the "third party," the multitude of human subjects; the otherwise-than-being shall be the interior, anterior ethical other of the subject itself; and the "O"ther shall be left for god. One feminist critique of Levinas is that he portrays the "feminine other" as something other to the privileged masculine, rational subject. In particular, they refer to Levinas's references to women and domesticity and gentleness (for example, refer to Levinas, *TI*, *op cit*, at 155) and his praise for fecundity and the "birth of the son" (refer to Levinas, *TI*, *op cit*, at 278-281). Good summaries of the feminist position on Levinas are: Irigaray, L. 'What Other Are We Talking About?' *Yale French Studies*. (2004), No. 104: 67-81; Chanter, T. 'Feminism and the Other,' *The Provocation of Levinas*. (ed. R. Beransconi and D. Wood), Routledge Press, New York, 1988.

[6] Levinas, *TI*, *ibid*, at 304.

[7] It is this focus of being, this freedom of being, which Levinas sees as the obsession of Western philosophy "from Parmenides to Heidegger." Levinas, *TI, ibid*, at 43, 69; Critchley, *The Ethics of Deconstruction: Derrida and Levinas*. Edinburgh University Press, Edinburgh, (1999), at 5, 158. Similar to Lacan's critique of the *cogito-I* outlined in Chapter Three, Levinas's critique of the individual echoes Marx's original critique against the nineteenth century discourse of human rights, as I outlined in Chapter One above. In Marx, Lacan and Levinas, rights are viewed as concepts of alienation and ideology (fantasy), which separate and cover-up another true human condition with a focus on power and being. However, all are different in conceptualising what this 'other true human condition' is (social class, the unconscious, the ethical subject, respectively).

presence of being is assumed as the starting point through which all knowledge, understanding and truth is exposed:

> The [Western] philosophical tradition has understood truth as self-manifestation of being to consciousness, as representational or gathering disclosure of being for which human subjectivity is only a means. Within the horizon of the conception, meaning can be found only in the dis-covering or un-veiling of being in its synchronic presence to the mind … The conception of subjectivity of the subject held by the Western tradition assumes that the manifestation of being is the starting point of all sense.[8]

As Derrida suggests, this focus on ontological presence and being (this *logocentism*) reflects Western philosophy's desire to attain, and preoccupation with, a unitary closure: a desire to "command one's own frontiers and territory (to possess and control one's self and self identity); a desire for totality and closure of self."[9]

The aim of this individual (the self) is self identification. In this process, the self identifies with the presence of it-self as the fulfilment of it-self in its desire "to be" (it-self):[10]

> Thus the process of the present unfolds through consciousness like a "held note" held in its *always*, in its identity of being the same, in the simultaneity of its moments. The process of the subjective does not come from the outside; the presence of the present involves consciousness. … that is, the emphasis of presence, being's remaining-the-same in the simultaneity of its presence, in its always, in its immanence.[11]

This is a focus on the nature of the ego-I of the subject, the knowing subject of the *now* of self-consciousness,[12] in which the consciousness of the individual is filled with itself — filled with its own being — and, thus, in which the subject's own self-interest to exist

---

[8] Levinas, 'Truth of Disclosure and Truth of Testimony,' *BPW*, above n 4, at 97 & 100.
[9] Derrida, *Margins of Philosophy*, at *x*, in Critchley, above n 7, at 74. Derrida and Levinas inspired each other and, at Levinas's funeral, Derrida gave the eulogy. It is commonly suggested that Levinas's second great intellectual work, *Otherwise than Being*, is a revision of *Totality and Infinity* in response to Derrida's reading of Levinas's earlier work, in Derrida, J. 'Violence and Metaphysics.' *Writing and Difference* (trans. A. Bass), Routledge Press, New York, (1978).
[10] Burggraeve, above n 4, at 46.
[11] Levinas, 'God & Philosophy', *BPW*, above n 4, at 134.
[12] Critchley, above n 7, at 3.

("to be") is prioritised above the interest of the other (of all others). This is a focus on the self folding back onto itself in the economy of return and the circle of the Same, as the process of subjectivity does not come from the outside, but rather, from the presence of the present of self:

> The fact that being unveils itself, that it shines forth, that its being consists in being true, implies that the contours of being fit into the human scale and the measures of thought. Truth is the original adequation that all adequation presupposes. Indeed, the "I" of knowledge is at once the Same par excellence, the very event of identification and the melting pot where every Other is transmuted into the Same.[13]

As Levinas suggests, this individual is "intimate with its own immanence:" "remaining-the-same in the simultaneity of its own presence." Thus, this individual is self-reflective: "... it is not just that one *is*, one is *oneself."*[14]

Similar to Lacan's subject-ego and desire for the *imago*, in this focus on the presence of being there is an ideality of the self "in fullness" and self-sovereignty of its being. This is the ideality of the self having the capacity of self-possession of its being and its efforts/powers of being:

> Consciousness is therefore always the grasping of a being through an ideality [of self possession]. Even an empirical, individual being appears through the ideality of the *logos*. Subjectivity as consciousness is thus interpreted as an ontological event, namely the rediscovery of being on the basis of an ideal principle or *arche* in its thematic exposition.[15]

The ideality of human existence, of human identity, is the experience of self-certainty, "sovereignty, self-possession and a guarantee of being."[16] This is achieved through the exercise (the grasping) of the self's *own* intentional/conscious powers of being (the powers of will/intentionality and reason), through which the individual "claims" itself.

---

[13] Levinas, 'Transcendence and Height,' *BPW*, above n 4, at 13.
[14] Levinas, *EE* at 38, in Burggraeve, above n 4, at 48.
[15] Levinas, 'Substitution,' *BPW, op cit*, at 80.
[16] Levinas, 'Substitution,' *BPW, ibid*, at 80.

It is in this focus on the presence of being where Levinas, like many authors — from both the postmodern discourses and the Frankfurt School — sees the (potential) violence of this autonomous, self-sovereigned human individual, and the potential violence in a philosophy focussed on this ontological presence of being. Through this focus on the self-interest of being, there is always the potential for the violence of the reduction of the other to the circle of the Same, to the folding back to the self:

> Phenomena, apparition in the full light, the relationship with being, ensure immanence as a totality and philosophy as atheism. … Being excludes all alterity [all difference]. It can leave nothing outside and cannot remain outside, cannot let itself be ignored. The being of beings is the light in which all things are in relationship. Its very night is a mute and concerted hammering out of all thing, the obscure labour of the totality, an uninterrupted thrust of generation, growth, and corruption [of being/of the self].[17]

This is an existence and a philosophy which is a practice of reductionism. It eradicates the alterity of difference in order to make different things similar and, thus, comprehendible and useful to the self and its presence/effort of being. This philosophy of self is an:

> … attempt at universal synthesis, a reduction of all experience, of all that is reasonable, to a totality wherein consciousness embraces the world, leaves nothing outside itself, and this becomes absolute thought. The consciousness of the self is at the same time the consciousness of the whole. There have been few protestations in the history of philosophy against this totalisation.[18]

Such an ontological understanding (and prioritisation) of human identity grounds the collective upon a symmetrical sociality of equal self-coinciding beings, which reduces the alterity of human existence and inter-subjective sociality to the circle of the Same. Whether by assimilation, hegemonisation or exclusion (marginalisation and annihilation), whether by coincidental reciprocity of identical wills of being (such as in Kantian philosophy), there is always a potential reduction of the other to the Same of self. In this ontological (*logocentric*) focus of being, there is always a degree of deafness and

[17] Levinas, 'Enigma and Phenomenon,' *BPW*, *ibid*, at 74.
[18] Levinas, E. *Ethics and Infinity: Conversations with Philippe Nemo*. (trans. R..A. Cohen), Duquesne University Press, Pittsburgh, (1985), at 75.

blindness to the alterity of the other, in the collective effort to create "a kingdom of the Same."[19]

For Levinas, this potential violence of reducing the other to the Same is the "moral evil" of the human subject, it is the origin of all potential violence:

> Origin of all violence, varying with the various modes of being: the life of the living, the existence of human beings, the reality of things. The life of the living in the struggle for life; the natural history of human beings in the blood and tears and wars between individuals, nations, and classes; the matter of things, hard matter; solidity; the closed-in-upon-self, all the way down to the level of the subatomic particles of which physicists speak.[20]

This conceptualisation of human identity creates a community of autonomous individuals who have the right to both engage with others as means, resources and possessions in their own autonomous effort to be, and to defend such self-interest against the threat of competing co-incidentals — *alter-ego* others who are equally egocentric subjects with equally self-interested, ontologically focussed rights and freedoms.[21]

Levinas does not deny this ego-I and its focus on its own self-interest and self-concern. In fact, Levinas sees the natural necessity of the ego-I, the being which is concerned with its own perseverance against its own finitude, in the struggle against not-being.[22] This is the effort of being against the pre-original *il y a*, a concept Levinas gains from Heidegger.[23] For Levinas, the *il y a* is both the indeterminate mythical void of a pre-

---

[19] Purcell, M. *Levinas and Theology*. Cambridge University Press, Cambridge, (2006), at 104.
[20] Levinas, E. *Levinas, Entre Nous: Thinking of the Other*, (trans. M.B. Smith and B. Harshav), Continuum Press, London, (1998), at viii.
[21] This defence also includes the free and reasoned consent/will of entering into a social contract or contract of will, as per Rousseau, Kant and Hegel, in order to gain benefits for one's own rights against an equal other. This is still the service of self — rather than a Levinasian service of the other — in the reciprocal benefit one receives in entering such a contract. These rights and freedoms of the effort "to be" and the defence of being are the very rights and freedoms which our contemporary human rights' discourse promulgates. I shall explore this link between being and human rights — from a Levinasian perspective — in Chapter Seven, *'Levinas's Critique: Human Rights and the Ego-I.'*
[22] Burggraeve, R. 'The Good and Its Shadow: The View of Levinas on Human Rights as the Surpassing of Political Rationality.' *Human Rights Review*. (June 2005), Vol. 6, No. 2, 80-101, at 97.
[23] One of the most significant influences on Levinas's ethical meditations is the philosophy of phenomenology explored by both Husserl and Heidegger. Levinas himself stated that his work was phenomenological, even if he did not follow all of Husserl's methodology (refer to Purcell, above n 19, at

worldly existence, from which the self escapes and emerges, and also, the always present background rumbling to human existence. Like Lacan's "terror of the Real," it is the undetermined, anonymous menace of "not being" (the *there is* behind being) which has always been and is always there against the subject's presence and against which the subject must always be vigilant.[24] Thus, consciousness and intentionality, self-consciousness and ego, is the struggle to be awake to the here and now against the anonymity of the *il y a*. It is the continuous "effort and anxiety of existence" consumed with self-interest and self-preservation: "The belongingness to being is in fact not a rest in a harbour of peace …"[25] Yet this is also the paradox of being. This constant struggle reveals how the subject consumed with self does not possess enough resources for the certainty of itself. In this way, the subject is not self-sovereigned, but rather, caught in its owe limitations, trapped in its own being: "This impossibility of the ego not to be a self constitutes the underlying tragic element in the ego, the fact that it is riveted to its own being."[26]

---

29). Indeed, Levinas's first book was written as a response to Husserl's phenomenological ideas (Levinas's doctoral thesis: *The Theory of Intuition in Husserl's Phenomenology*) and he described Heidegger's *Being and Time* as "one of the greatest books in the history of philosophy" (refer to Levinas, *Ethics and Infinity*, above n 18, at 37). It is from the works of these two philosophers that Levinas develops his own meditations on the philosophical concepts of "being," the *il y a* and *Dasein*. For a detailed outline on the influence of Husserl and Heidegger on Levinas's work refer to Eskin, M. 'A Survivor's Ethics: Levinas's Challenge to Philosophy.' *Dialectical Anthropology.* (1999), No. 24, 407-50. Also, for a detailed explanation of Levinas's use of Husserl and Heidegger refer to Levinas's two main texts: *TI* and *OTB*, above n 4. Another significant philosophical influence on Levinas in relation to the philosophy of phenomenology was Jean Wahl, to whom Levinas dedicated *TI*.

[24] Levinas, *OTB*, above n 4, at 162-164. There is some debate as to whether or not, during the evolution of his work, Levinas actually altered his conceptualisation of the *il y a*, or rather, merely expanded the notion. Refer to Fagenblat, M. 'Encountering the Other: The Artwork and the Problems of Difference in Blanchot and Levinas.' *Text Theory Critique.* (2005), No. 10, 298-313, who argues that there is a distinction in Levinas's conceptualisation of *il y a* between his early and later works (between the writing of *TI* and *OTB*). However, also refer to Hutchens, B. *Levinas: A Guide for the Perplexed*. Continuum Press, New York, (2004), at 36-46, who seems to suggest that Levinas's earlier and later uses of the term *il y a* expand upon each other and form part of the same concept. From my own research I have taken the view that Levinas expanded the concept during the evolution of his works rather than changed it.

[25] Levinas, *OTB*, *ibid*, at 176; Levinas, 'God and Philosophy,' *BPW*, above n 4, at 133. This means that in its struggle for being against the anonymity of not being of the *il y a*, the ego individual never gains its ideality of stability and certainty in self-actualisation and self-determination. The struggle, paranoia and anxiety of this in some people are what draw the individual into Lacan's thesis of maladies and psychosis. Note, to move into this intentionality of consciousness — into the state of existence — the self begins in the state of *hypostasis* and with the effort of *dasein*, the effort of *being there* (of being present, the effort of the realisation of self existence), against the "there is" of the *il y a*. Refer to Levinas, *OTB*, *ibid*, at 176.

[26] Levinas, *EE*, in Burggraeve, above n 4, at 88.

Thus, the subject must extend outwards for other resources and powers to sure-up and strengthen its self-survival. The subject exists in a paradoxical state of *in-dependence:* in order to achieve autonomy and *independence* it is *dependent* on the objective world of materials.[27] In both thought (through noetic knowledge) and deed, the subject *sojourns* into the world and "grasps" objects and "returns home" to its own self-interest of self-promotion. Here is the potential violence against the other from the subject focused on the presence of self, for we are always already born in the sociality amongst others and, hence, the other human subject is always already present with the ego-I and present in its struggle of being.[28] Thus, the objective world, including other human subjects, become caught in the circle-of-self and used economically in the subject's struggle for existence. The world and others in it are always threatened to be thematised into the interests of the ego and absorbed into the "melting pot of the ego-I where every Other is transmuted into the Same:"[29]

> By relating to beings in the openness of being, understanding finds a meaning for them in terms of being. In this sense, understanding does not invoke them, but only names them [thematises and categorises them]. And thus … understanding carries out an act of violence and of negation. A partial negation, which is violence. And this partial negation can be described by the fact that, without disappearing, beings are in my power: they are mine. Possession is the mode by which being … is partially denied.[30]

If not totally absorbed into the economy of self, the other is only accepted "as other" in a collective of "the same" to the extent of a self-coinciding image of the alter-ego of the

---

[27] Refer to Levinas *DEHH* at 187, in Burggraeve, above n 4, at 49.
[28] Burggraeve refers to Levinas outlining four main potential acts of violence of self directed at the other: use and consumption; tyranny; murder and hate; and racism. Refer to Burggraeve, R. 'Violence and the Vulnerable Face: The Vision of Emmanuel Levinas on Moral Evil and Our Responsibility.' *Journal of Social Philosophy*. (Spring 1999), Vol. 30, No. 1, 29-45.
[29] Levinas, 'Transcendence and Height,' *BPW*, above n 4, at 13. Here, Levinas's concern for the violence against the other in the economy of self contrasts against the philosophers of our contemporary human rights, as discussed in Chapter One above. From Hobbes through to Kant, their concern is focussed on the reduction of the individual (individual will/freedom) in the sociality of many and, thus, they meditate upon social, legal and political resolutions to mitigate such danger to the self (i.e. restrictive rights against others to interfere with the moral *potentia* of the individual). It is through the salvation of the self (the barricading of the being) that these thinkers see the salvation of the other and of society more generally.
[30] Levinas, *EN*, above n 20, at 8. It is in this way that possession (property rights) becomes central to the rights of the individual of being. For in the subject's *sojourns* the subject is entitled to (has a right to) "grasp" and "take home" (return to itself) materials, resources, objects and even others into its own self-interest agenda of "being." Refer to Levinas, *TI*, above n 4, at 35-40.

self. In Hobbsian predictability, ego meets ego and act as "wolves to one another" in their struggle for (self) survival, "two freedoms violently clashing … at war with one another … War is the chronicle or the drama of the essence's interestedness [in itself]…"[31] In the struggle to be, the alterity of the other is reduced to the presence of self, (re)presenting the other as understandable generic types and concepts against the measure of self.[32]

Because of this potential violence which emerges with human identity focussed on the individual ego-I, focussed on the ontological signification of the presence of being, the self needs to take an additional "creative step" in development. Like Lacan's additional

[31] Levinas, 'Essence and Disinterestedness,' *BPW*, above n 4, at 111; Burggraeve, above n 4, at 66; Levinas, *EFP*, at 118, in Burggraeve, above n 4, at 65; Levinas, 'Essence and Disinterestedness,' *BPW*, above n 4, at 111.

[32] Burggraeve, 'Violence and the Vulnerable Face,' above n 28, at 35-37. This reduction does not have to be done with overt violence. For example, there is violence in language and discourse. One example in Australia is with the reduction of the category of "boat arriving asylum seekers" (usually referred to as "illegal asylum seekers"/"boat arrivals") entering Australia. This group of people is united under one homogenous representation and understanding — "illegal boat arrivals" — reducing their alterity (from each other and from the Australian community) to a single concept imposed upon them from the Sameness of the self (of Australia). Here, the conceptualisation of the categorisation of "illegal arrival" in the ongoing Australian debate about "border protection" highlights how such reduction is motivated by the perceived "threat" of the other against self-preservation and self-security (in this case, Australia) — hence, the language of "opening flood gates" and "being over run," which surrounds this debate in Australia. This debate also reflects how the "truth" of this other (the "threat" of these "illegal arrivals") is constructed through self-referencing rather than based on "objective, statistical information." For example, in the financial year of 2008-09 23 boats were intercepted in Australian waters, carrying a total of 1,003 people (including crew). This increased in the financial year of 2009-10 to 118 boats and a total of 5,609 people (an abnormally high figure and, in fact, the highest number of boat arrivals in the last twenty years). By contrast, in most years there is a higher number of asylum seekers arriving into Australia by air rather than by boat. For example, in the calendar year of 2009 2,849 asylum seekers arrived in Australia by air (one-third of the total asylum seeking figure for that year). Noting the abnormally higher boat arrivals in 2009-10, this is the first year in the last twenty years that such numbers are higher than air arrivals. Statistics also evince that those entering Australia via boat are usually more likely to be assessed as genuine refugees contrasted against those entering via air. For example, between July 2009 and January 2010 approximately 95% of boat arrivals were found to be genuine refugees contrasted against 20% arriving by air. Australia also takes-in a low number of asylum seekers world-wide: approximately only 2% of worldwide asylum seekers in 2009. Yet in Australia the debate over asylum seekers — and the language of the debate — seems to always focus on those entering Australia via boat and the "crisis" of being "swamped" by such people. Refer to (www.news.com.au/national/asylum-seekers-arrive-by-plane-not-boat), accessed 20/7/10; Federal Parliamentary Library Statistics at (www.aph.gov.au/library/pubs), accessed 20/7/10; Phillips, J. and Spinks, H. *Background Notes: Boat Arrivals in Australia since 1976*. Parliament of Australia, Parliamentary Library, (2010), (www.aph.gov.au/library/pubs/bn/sp/BoatArrivals.htm), accessed 20/7/10. For a good summation of the asylum seeker issue in Australia (including a detailed analysis of the number of asylum seekers and their reasons for seeking asylum, of Australian government policy and responses, and of the debate surrounding these issues) refer to Koser, K. *Responding to Boat Arrivals in Australia: Time for a Reality Check*. Lowy Institute for International Policy. (Dec 2010), (www.lowyinstitute.org), accessed 10/12/10.

step to become the subject-proper, Levinas also sees the need for the ego-subject to move beyond the self-interest of the presence of being. Human identity is not solely the "autonomous" and individual effort and struggle of being, but also, is something "other," away from the all absorbing state of the ego-I. This further conceptualisation of human identity is the movement from (self) consciousness and freedom of the self to (moral) conscience — the movement from being (self) to beyond being.[33] And for Levinas, this movement is facilitated by the provocation of the other human subject within the inter-subjectivity of corporal reality.[34] It is the incarnate situatedness of inter-human sociality which provokes the self to be complete in human identity.

The Incarnate: the Provocation of the Other in the Everyday

With the potential violence of the reduction of the other to the Sameness of the self inherent in the conceptualisation of the ego-I, Levinas's ethical exposition is an exploration of the possibility of an alternative "beyond being/beyond essence" approach to human identity:

> It is not without importance to know if the egalitarian and just State in which man is fulfilled … proceeds from a war of all against all, or from the irreducible responsibility of the one for all, and if it can do without friendship and faces.[35]

That is, for Levinas (moving away from the traditional philosophical — ontological — focus on being) the question is not 'why is there being and how does it understand and express itself,' but rather, 'how does being justify itself'? Through his ethical meditations, Levinas argues that the justification — the very foundation — of the self

---

[33] Purcell, above n 19, at 95; Levinas, *TI*, above n 4, at 84.

[34] Hegel was the first to philosophise an inter-subjectivity of self. Though importantly, unlike Hegel, Levinas does not have the subject developing in stages from solitude to solicitude. Rather, in the face-to-face encounter in proximity, the self, the other and the sociality of all others (Levinas's "third party", which I shall discuss in detail in Chapter Eight, '*A Neighbourhood of Three and Justice for the Many*'), are in immediate, anterior and asymmetrical responsibility and justice amongst and for each other. That is, Levinas's contribution to the Hegelian inter-subjective dialectic of desire is its ethical inter-relational, asymmetrical social implications of responsibility. Thus, radically, Levinas suggests that not only the other, but all others, sociality itself — and thus this ethics of alterity — are prior to consciousness and knowledge. Like Lacan, Levinas's thesis on being is greatly influence by Hegel through the teachings of Kojeve, under whom both Levinas and Lacan studied. Refer to Chapter Three above, page 91, footnote number 6.

[35] Levinas, *OTB*, above n 4, at 159-60.

begins in its *response* to the other human subject, a response which the other has already provoked in the self, prior to any autonomous, self conscious capacities. Hence, Levinas begins with a prior (a priority of) alterity of otherness which invokes the subject into existence. Levinas begins with a calling from (of) the other which awakens the subject to its conscious presence of being.

Levinas's aim here is not to undermine and defeat the subject, but rather, strengthen human identity with an ethical grounding and integrity. Levinas does not "give up on humanism," but rather, attempts to contest the notion of human identity with a beyond essence "of the positing of the I," to include "the source of humanity, the other."[36] Levinas's ethical exposition on the structure of human subjectivity is a *re-newal* of the human subject. It is a *re-introduction* of the ego-self with the anterior ethical-self, the re-coupling of the ego-I with the ethical-I within human nature. It is this ethical human identity which Levinas wishes to uncover through a kind of "subject archaeology" or "archaeology of the self,"[37] in order to go beyond the limitations (and potential violence) of traditional (Western ontological) conceptualisations of human identity: "Our question is whether, beyond being, a meaning might not show itself whose priority, translated into ontological language, will be called prior to being."[38]

Levinas commences his ethical justification of human identity with the recognition of the existence of the inter-subjectivity of the self and the other within the incarnate world. Levinas takes seriously the self as living incarnate, in-the-real-world peopled by others. It is in this inter-relatedness situated in the day-to-day reality of self and other where the self is exposed to the beyond of consciousness and the other-in-me:

> The other to whom the petition is addressed does not belong to the intelligible sphere to be exposed … Subjectivity is structured as the other in the same, but in

[36] Levinas, 'Essence and Disinterestedness,' *BPW*, above n 4, at 122; 'Transcendence and Height,' *BPW*, above n 4, at 14.
[37] The means of this archaeology of self is Levinas's radical use of Husserl's phenomenological methodology. Refer to Burggraeve, R. 'Thinking between Jerusalem & Athens.' *Journal of Social Philosophy*. (Spring 1997), Vol. 28, No. 1, 110-126, at 119.
[38] Levinas, *DD,* at 96-97, in Fryer, above n 1, at 160.

> a way different from that of consciousness … [as] a perception of a presence "in flesh and bone" … [39]

The subject exists in the world already engaged in the everyday *praxis* of time and place with other people.[40] Life, Levinas tells us, is "terribly profane and secular;" we live "incarnate and en-fleshed." But here, in this contextual everydayness of human existence, there is "salvation."[41] The life-world gives itself to us and nourishes our existence:

> However much the entirety of preoccupation that fill our days and tear us away from solitude to throw us into contact with our peers are called "fall," "everyday life", animality", "degradation," of "base materialism", these preoccupations are in no way frivolous.[42]

For Levinas, the events of the everyday of the living-in-the-world have significance and the mundane needs to be taken seriously.

The significance and sincerity of the everyday is in the fact that it is in the everyday where the self encounters and engages with the provocation of the other (of other human subjects). Hence, it is in the everyday where the self encounters the interrogations of ethics, rather than in abstract ideals and autonomous self-interested exercises of conscious capacities. Concrete life, by its very nature, implies an "otherness" — we always already exist in the presence of others, and, thus, by our very nature of existence we are always already open to and provoked by the (intervention) of others. Thus, it is in the inter-subjectivity of the everyday where the ethical self emerges. It is in this contextual everydayness where ethical choices and actions take place — that is, where choices and actions regarding how we engage with the alterity of others (whether justly, equitable, or otherwise) in community with others unfold. It is in the sociality of the

---

[39] Levinas, *OTB*, above n 4, at 25.
[40] Levinas's position of the importance of the everyday world stems from his reading of Heidegger. However, unlike Heidegger, who saw the everyday as only having meaning through its utility to some larger *dasein* and who saw the incarnate as inauthentic and the fall of self, Levinas sees the everyday as the escape of the self from itself and its totalising effort of being (the ethical salvation of the self through the every day, inter-subjective existence with others). Refer to Levinas, *TI*, above n 4, at 110.
[41] Levinas, *EE*, at 41, in Purcell, above n 19, at 81; Levinas, *TI*, *ibid*, at 110.
[42] Levinas, *TO*, at 59, in Purcell, *ibid*, at 83.

incarnate world where friends shake hands; where one opens the door for another and says *"after you;"*[43] where one crosses the street to avoid or give to a beggar; where one stretches out a hand when another falls; where one senses disgust at injustice; where one weeps at human horror. It is in this everyday encounter with the other where the ethical reality and ethical questions (small and large) exists.

But this everyday inter-subjectivity between human subjects — and the expression/experience of ethics therein — has already inspired previous ethical meditations. For example, from the communitarian perspective from intellectuals such as Bentham and Burke. And from Hegel and his understanding of the inter-subjective, political dialectic. And also, as outlined in Chapter One, from Marx and his perspective on labour and class. Inter-subjectivity itself is not new nor, for Levinas's ethics, is it enough. But what is new in Levinas is the *ethical significance* of such inter-subjectivity. In this always already inter-subjective relationship between self and other, Levinas focuses upon the prevenience of the other human subject. This is the other who must always already be prior to and precede the self (that is, prior to self-conscious identity and subjectivity), the other who must always already be in a position of provoking the self into being:

> To say that the person begins in freedom, that freedom is the first causality and that the first cause is nobody, is to close one's eyes to that secret of the ego, to that relation with the past which amounts neither to placing oneself at the beginning to accept this past consciously nor to being a mere result of the past.[44]

It is in this world of flesh where the prevenient other *awakens* the subject into being. The self is always already in sociality in the world. In this inter-subjectivity the origin of the subject does not derive from its own autonomous and potentially self-fulfilling conscious capacities. This is the atomised existence of what Levinas terms the pagan ego-I.[45] This is the ontologically focussed state of being within the liberal tradition of the philosophy of our contemporary human rights, in which human identity is limited to the autonomous

[43] Levinas, *OTB*, above n 4, at 117.
[44] Levinas *NineTR*, at 49, in Purcell, *op cit*, at 43.
[45] Levinas, *CPP*, at 52, in Purcell, *ibid*, at 127.

capacities of consciousness and self-will — a philosophy (and a rights) reducing the other into the economy of the Same, into symmetrical equals in a sociality of coincidence. But ironically, even this relationship of violence reflects the priority of the other in inter-subjectivity. In such a relationship the self is reaching out towards a prior other beyond itself, even if to only exploit and annihilate the other:

> War and commerce presuppose the face [the other] and the transcendence of the being appearing in the face … War like peace presupposes beings structured otherwise than as parts of a totality … War presupposes the transcendence of the antagonist … [46]

Even before there is the total war of ego against ego, even before this sociality of equals (equal automatons of wills and reasons), there must first be an-other beyond the limits of the presence of being and the ontological significations of being. There is always the alterity of otherness which cannot be reduced into the efforts of being.

What is new here in Levinas is that, in this inter-subjective *proximity* between the self and the other, prior to any conscious contrivance of an equitable/ethical sociality for all, the subject is placed *under* this anterior otherness beyond itself, which calls being into existence. The other, alterity, is superior to me, because it resides before me, above me, beyond me and my ontological struggle "to be" in my individual, conscious efforts of being. Here, an ethics based upon such alterity is the movement of desire "to be," to concretise one's presence of being[47] — but it is a movement invoked by the superior alterity of the prevenient other *before* a choice of being is made. This is the pre-original movement of desire of being, prior to the conscious choice and will "to be." The subject only arises in and as a response, a respons-*ability*, to the other's call, to the infinite otherness of its alterity, beyond the essence of its own being and beyond the reduction to

[46] Levinas, *TI*, above n 4, at 222. A point explicated by Hegel's dialectical thesis on inter-subjectivity.
[47] This desire is first aroused in the subject by the other of "death." For Levinas, death is the impossibility of the subject, that which breaks through the subject's solitary "I" and yet is always beyond the control of the subject. Death is the first other to subjectify the subject to an-other beyond the subject. With the intrusion of death the subject is provoked to transcend itself with a desire to heal death's rupture and return to the self a sense of harmony and control. Refer to Fryer, above n 1, at 36-38.

its needs, demands and limits of being.[48] Thus, countering the liberal image of human identity and ethics, which presents a symmetrical sociality founded upon an equality of individuals of autonomous capacities of reasoned consciousness and moral potential (of human dignity), Levinas presents a pre-ontological, inter-subjective proximity of asymmetrical proportions, focussed upon the radical alterity of the other. A "prior sociality" of an immanent intimacy in which the self is always already — beyond conscious choice and intentional self-will — in ethical debt and obligation to (an ethical openness towards) the other, who hails the subject and towards whom the subject extends and, thus, comes into being.[49] Thus, moving beyond the ideality of abstract moral equivalence and symmetrical sociality ingrained within our contemporary human rights, rather than reducing the other into a relationship of One, into an equality of the Same with the self, human identity is, first and foremost, marked with a responsiveness towards the other, a responsibility *for-the-other*, who is always already more than "I."

Thus, like Lacan, Levinas challenges the traditional image of human identity as equal conscious capacities of autonomous ontological signification with *a prevenient ethical epoch*, which splits the subject of conscious being prior to the emergence of (the ego-I's) self-interest and the sociality of equal avatars of being. The very fabric of subjectivity, the very mark of human identity, is invoked by a pre-ontological foreign exteriority of alterity, which internally moulds the subject as ethical — human identity signified by an obligation beyond the choice "to be" *for-the-other* and not for one's *self-interest.* It is the radical excess and infinite nature of alterity, of the otherness of the other (contrasted against the Sameness of the self's Same), which provokes in the self the desire to transcend the limitations in itself in its struggle "to be."

But like Lacan, such desire is unfulfillable, as it the alterity of the other which agitates desire, alterity which "… hollows out a desire that could not be filled … a desire without

[48] Critchley, S. *Ethics, Politics, Subjectivity: Essays on Derrida, Levinas and Contemporary French Thought.* Verso Press, London, (1999), at 64-65.
[49] Derrida, J. *The Gift of Death*. (trans. D. Will), University of Chicago Press, Chicago, (1995), at 54-56.

end, from beyond Being."[50] Desire's end is beyond itself as the struggle "to be" is beyond the ontological limits of the presence and efforts of being. Alterity of the other is "infinite" and Absolute in its difference from the ontological limits of the presence of being and, thus, sustains an "unending desire in the self."[51]

The Face and Infinite Alterity

This otherness beyond the subject, this infinite and absolute alterity, is met by the subject in "the face" (*la visage*) of the other human subject in the everydayness of inter-subjectivity. But this face of the other should not be read literally. When Levinas refers to "the face" he is not referring to the countenance or presence of the face: "the other is invisible" and, thus, has no phenomenological sense or (re)presentation.[52] The face does not coincide with the appearance of being or of the plasticity of presence:

> The way in which the Other presents himself exceeding *the idea of the Other in me*, we here name the face. This mode does not consist in figuring as a theme under my gaze, in spreading itself forth as a set of qualities forming an image. The face of the other at each moment destroys and overflows the plastic image it leaves me, the idea existing to my own measure and to the measure of its *ideatem* — the adequate idea.[53]

---

[50] Levinas, *DD* 111/*OG* at 67, in Fryer, above n 1, at 167. Thus, like Lacan, Levinas argues that desire comes from else where, beyond self consciousness and intentionality. But the distinction between Lacan and Levinas on this point of desire is that Lacan remains focused upon and prioritises the desire from within the self (from the *intra*-subjective unconscious) and its consequential affective impact in the subject. Levinas, on the other hand, works through this desire of the self to focus on its external target: the alterity of the other subject beyond the limits of being (that is, on desire's *inter*-subjective, ethical consequences upon the other human subject).

[51] Levinas, *TI*, above n 4, at 62-63. Importantly, this other of infinite alterity is not the opposite from the self. To think in terms of some opposition between the self and the other would provide a definition of one in relation to the other — a negative to a positive, a comparison and a hierarchy. This would still be a reduction of the other to the self. Refer to Levinas, *TI*, *ibid*, at 194-95. However, Levinas does see the need for comparison and hierarchy in a system of justice extended to all subjects. Justice, for Levinas, arrives with the intervention of the many others, the third party, and with this multitude of people there must be a system of prioritising and distributing care for all. I shall discuss this further in Chapter Eight, *'Ethics and Beyond: Human Rights, Law and Justice of the Many.'*

[52] Levinas, *TI*, *ibid*, at 6. To highlight the point that ethics is inspired through the alterity of the face of the other human, beyond its plasticity and presence, Levinas argues that non-human animals do not invoke an ethic in the human subject. Rather, the face of other animals is "merely biological." Refer to *TI*, *ibid*, at 80.

[53] Levinas, *TI*, *ibid*, at 50-51.

This is the very point of Levinas's ethics of beyond being and beyond essence — that there is an overflow,[54] a beyondness of alterity lost to the ontological presence of being and its phenomenological signification. It is this beyondness of alterity captured within the face which can never be reduced to the Sameness of the self: "The presence of being not entering into, but overflowing, the sphere of the same determines its [the face's] 'status' as infinite."[55]

Thus, there is heterogeneity with the face.[56] The other human subject is always already something beyond being, in transcendence and encapsulating something beyond both its own being and the self's being. This "beyond being" is the very quality of the alterity of otherness "carried with the face of the other:"

> The face is present in its refusal to be contained. In this sense it cannot be comprehended, that is, encompassed. It is neither seen nor touched — for the visual or tactile sensation the identity of the I envelops the alterity of the object, which becomes precisely a content.[57]

This alterity escapes the subject, it cannot be reduced to the presence of Sameness. The subject cannot bind and contain this alterity of the other to a (re)presentation, to an image of identification or to a categorisation and thematisation of a fixed narrative.

---

[54] This overflow of infinite alterity is similar to Lacan's notion of the overflow of the Real — the notion that there is always something ungraspable (from the point of view of being or the Symbolic in which being exists) in alterity and in desire. But where Lacan stays trapped in subjectivity — focused on the desire of the subject to return to the Real within — Levinas sees desire as inferring something more important, (the potential freedom of) the ethics of the alterity of the inter-human, social other.

[55] Levinas, *TI*, *op cit*, at 195. For Levinas this overflow is not only the alterity of the other against the Sameness of the self, but also, the radical, infinite alterity of the transcendence of god carried with the face. God is the authority behind the face of the other (Fagenblat, above n 24, at 299). For Levinas, the other is "indispensable for our relation with god." Ethics, thus, are "spiritual optics" and there is "no knowledge of god separated from the relationship with men." (Levinas, *TI*, *ibid*, at 78). This is the prophetic significance of Levinas and his ethic of otherness, and what makes the ethics of alterity not only *first philosophy*, but also, *"first theology"* — "a religion of the other" (Levinas, *TI*, *op cit*, at 78; Purcell, above n 19, at 35). For Levinas, god is the other of the other, the otherwise of all others. God is the first "O"ther, the absolute Other par excellence, the rupture beyond and of all phenomenological experience (Levinas, 'God and Philosophy,' *BPW*, above n 4, at 141). This is Kierkegaard's god revealing itself only in the "humility of persecution and as hunted;" god as an "unrecognizable truth not determined by phenomenon" (Levinas, 'Enigma and Phenomenon,' *BPW*, above n 4, at 71). In his way, Levinas, like Lacan, ties a borromean knot of ethical inter-subjectivity, with three intertwining elements: in the *praxis* of self with other (the two corporal elements) ethics reveals a third element of the divine: "… the I approaches the Infinite [God] by going generously toward the You …" (Levinas, 'Enigma and Phenomenon,' *BPW*, above n 4, at 76).

[56] Levinas, *TI*, *ibid*, at 36.

[57] Levinas, *TI*, *ibid*, at 194.

It is in this absolute, unrepresentable (un-repressible) alterity of otherness where the ethical significance of the inter-subjective relationship between self and other arises. In contrast to traditional conceptualisations of subjectivity, for Levinas there is an unbreachable asymmetrical dimension to the inter-relationship between self and other. This is not the traditional hierarchy of the self over the other, nor a collective founded upon the equality and unity of subjects standing side-by-side, as equals in the capacities of moral *potentia* or solidarity of wills (re: Kant). Rather, in the infinite alterity of the other there is always already a hierarchy in which the other is of greater significance/signification than the self. Thus, on an ethical measure, the other and the self do not stand as equals, side-by-side, but rather, the other is before the subject, face-to-face and eye-to-eye.[58] There is no equivalence or reciprocity in this inter-subjectivity: the eye-to-eye contact is not on the same level between self and the other. Rather, the other, with its infinity and radical alterity, is always already superior to the self and always already infinitely above and prior to the limits of the Sameness of the self. This is the "curvature of the inter-subjective space" — the expression of the asymmetrical height between human beings:

> The truth of being … allows exteriority to state itself, entirely command and authority: entirely superiority. This curvature of the intersubjective space inflects distance into elevation; it does not falsify being, but makes its truth first possible.[59]

Thus, unlike traditional ontological meditations on ethics, the ethics of alterity commences in an asymmetrical relationship between the self and the face, the subject and alterity, which is disproportional and unequal.

With this alterity carried with the face, the other is both being and beyond being, a signification of both presence and "non-presence," within the subject's knowing and not knowing. Thus, the "fullness" of the other comes to the subject as a *withdrawal:* the

[58] Levinas, *TI*, *ibid*, at 39.
[59] In keeping with his theological theme, Levinas also suggests that it is in this space where god appears: "This "curvature of space" is, perhaps, the very presence of God." Levinas, *TI*, *ibid*, at 291.

"slipping away" of something "always another, always inaccessible, and always still to come."[60] Beyond the limits of noetic reduction and phenomenological representation, beyond the effort of ontological significations of the presence of being, the face is not meant to be understood by the subject, but rather, simply allowed to be in the alterity of itself, experienced in the equivocation of its alterity. Hence, the other is experienced as a "trace," the past present of the withdrawn alterity of otherness: "The trace is the presence of whoever, strictly speaking, has never been there *(é té lá*); of someone who is already past."[61] Just as with Lacan's experience with the Real, for Levinas, alterity carried with the face, the very characteristic of the other itself, is beyond being and beyond essence. Alterity is an "enigma" to the self, experienced only as a sense of something "not there:"

> Phenomena, apparition in the full light, the relationship with being, ensures immanence as a totality and philosophy as atheism. The enigma, the intervention of a meaning which disturbs phenomena but is quite ready to withdraw like an undesirable stranger, unless one harkens to those footsteps that depart, is transcendence itself, the proximity of the Other as Other.[62]

Alterity is an evocation. It is a rupture, the intervention and disturbance of a stranger to the presence of self, disturbing the limits of the circle of Same and intruding into the

---

[60] Levinas, *TA* at 82-83/*TO* at 89, in Fryer, above n 1, at 76. Here, there is a sense of negativity in Levinas's thesis — of the presence of the "non-presence" of alterity. This negativity could be termed Levinas's *anthropologica negativa* or theological negative. This is a major criticism against Levinas, that his ethic is an empty ethics of infinity between the self and the other. Levinas sought to address this critique (stemming from Derrida's 'The Force of Law') with his second major work, *Otherwise than Being*, which focuses on the third party and a social justice for all inspired by the infinite alterity of the other. I shall discuss this further in Chapter Eight, *'Ethics and Beyond: Human Rights, Law and Justice of the Many.'*

[61] Levinas, 'Enigma and Phenomenon,' *BPW*, above n 4, at 65. In this language of "the trace," Levinas's articulation of the face appears to align with Lacan's notion of the Real. However, there is some debate whether or not such an alignment is accurate. Refer to Fryer, above n 1, at 215-237; Critchley, *Ethics, Politics, Subjectivity*, above n 48, at 198-217. I shall outline this debate below in the Conclusion Chapter, *'The Trouble with Neighbours: Lacan with Levinas, the Unconscious and Ethics,'* where I draw Lacan and Levinas together. In addition, in this language of "the trace" one sees the alignment between Levinasian ethics and Derrida's textual methodology of deconstruction. This is particularly clear in Levinas's thesis of language which includes the presence of the "said" and the un-present of the "saying" held as traces within the "said." Refer to Critchley, *The Ethics of Deconstruction*, above n 7. I explain "the saying" and "the said" in further detail in footnote 66 below. This parallel in Derrida's and Levinas's work also comes together in the imaging of social justice: Levinasian justice through alterity; and Derrida's justice through deconstruction. I shall discuss this further in Chapter Eight below.

[62] Levinas, 'Enigma and Phenomenon,' *BPW*, above n 4, at 74.

effort and experience of being.[63] This is the *epiphany* of the face, the radical beyondness evoked in the face, *"there!"* says the subject, *"I sense some-thing else!"*

To the extent of this paradox of the "presence of non-presence," there is no total grasping of the other, there is no complete nailing down of the other as this image or that representation. Rather, there is only an aiming for the other, a longing and anticipation for the other; a movement (a Lacanian encircling) of self to other and/or other to self, across a divide. This distance of difference between the Sameness of the self and the alterity of the other is the *proximity* between the other to the self: the unbreachable (ethical) space between the self and the other marked by infinite alterity. As Davies summarises, this longing, this proximity, suggests:

> The Other is a "reality without reality," with which I may form a "relation without a relation" of an "unrelating relation" [with] the distance separating me from the Other [as] "untraversable and at the same time traversable."[64]

The face (alterity carried with the face) is an experience or "sensation" (though not limited to a phenomenological sensation) of this longing and anticipation of the some-thing other, of "this untraversable distance of proximity" between the self and the alterity of the other.[65] Ethics of alterity is the (non) event of the "taking position but not arriving" in relation to the intruding other.

It is across this terrain of proximity where alterity agitates the desire "to be" and the other hails and calls the subject to come into being. Beyond ontological signification and phenomenological sensation, the encounter with the face "is an encounter hinted at in linguistic discourse."[66] Proximity signifies the discursive inter-subjectivity between

---

[63] Levinas, 'Enigma and Phenomenon,' *BPW*, *ibid*, at 72.
[64] Davis, C. *Levinas: An Introduction.* University of Notre Dame Press, Notre Dame, (1996), at 56.
[65] This sensation is expressed by Levinas's use of the term *caressing*. Caressing is different from touching as it "transcends the sensible" and "seizes nothing." Rather, caressing is a "search and movement into the invisible" as it "aims beyond an existent" while "knocking at the gate of being." Refer to Levinas, *TI*, above n 4, at 257-58. In on sense, one could say that this longing is, in fact, the sensation of desire — the unfulfillable desire provoked by the object of desire itself — the other (alterity).
[66] The expression of alterity with the face is also in its *gaze*: "The eyes break through the mask — the language of the eyes, impossible to dissemble." Refer to Levinas, *TI*, above n 4, at 64-66. In language Levinas makes a distinction between *what is said* and *the saying.* More than the simple non-said, the

subject and other, in which the subject comes into being through the other's interpellation:

> The invoked is not what I comprehend: *he is not under a category*. He is the one to whom I speak — he has only a reference to himself; he has no quiddity … The interpellated one is called upon to speak; his speech consists in "coming to the assistance" of his word — in being *present*.[67]

In language the other calls the subject and the subject extends beyond itself in its response, its responsiveness and respons-*ability*, towards the alterity of otherness. Thus for Levinas, the ethical subject (ethics itself) is bound in language.

Here, the provocation of coming into being, the interpellation of the subject across the terrain of proximity, is the rupture of consciousness by the overflow of infinite alterity carried with the face of the other. It is the trauma of this rupture which is the ethical event in an ethics of alterity — the imposition and interrogation of the other upon the subject to engage with and respond to the some-thing beyond itself.[68] Hence, ethics is *an-archic*, not chaotic, but uncontrollable and uncontainable to the conscious capacities in its insistence upon the presence of being. Ethics, for Levinas is experienced as anxiety

---

saying is something which exceeds and precedes the signification of the said but which is a part of the discursive process and language. The said is *the what*, the naming noun of linguistic designation which fixes meaning and reduces alterity/difference to an understanding of the same. The saying is the *who* — the subjective element and verb activity of speaking (*who is behind the said/who is speaking?*) and is the realm of the other/of alterity. The *who*, the saying, is the metaphysical (transcendent) dimension of discourse which exceeds the question of *what* and precedes the said. For there to be language, for there to be the said, first there needs to be the saying (the one who speaks, who is in the open posture to speak) in proximity with an-other. Refer to Levinas, *OTB*, above n 4, at 21-57.

[67] Levinas, *TI*, *ibid*, at 69. As discussed in Chapter Three above, page 126, footnote 123, there is also interpellation in Lacan's meditations on human identity and how the Symbolic "works on" the subject. Here again there is similarity between Lacan and Levinas in that it is in language where the subject emerges and where the subject is bound. However, Levinas's interpellation of the subject is different in that Levinas's other which hails the self into subjectivity is the alterity of the other human subject. It is the enigmatic otherness beyond and before all and any ontological and phenomenological presence and processes. And Levinas's interpellation is a call to ethical duty — to respond ethically to the interpellation from the other.

[68] This rupture of the ethical event — to experience the intrusion of alterity — is again something which Levinas and Lacan share. Refer to Chapter Five, '*The Constitutive Lack in an Impossible Desire.*' Also Refer to Badiou, A. *Being and Event*. (trans O. Feltham), Continuum Press, London, (2006) for a detailed examination into the event of the intrusion of alterity.

and effort, as an external imposition upon the self.[69] Similar to Lacan, this externality of alterity is internalised within the identity of being and the signification of subjectivity. Like Lacan, Levinas presents a pre-ontological split subject — the conscious subject always already intruded upon by the anterior, ulterior, presence of radical alterity. At this point "being fails it-self" — identity is denied to consciousness and is structured upon the asymmetrical quality of an anterior inter-subjective proximity, with the infinite beyond being of alterity already experienced in the intimacy of being.[70] Identity (the fullness of identity) is always lacking and missed from the conscious coincidences of self, from the ontological significations of identity. Provoked into being by the beyond being of the alterity of the prevenient other, the subject is left open and unending towards-the-other within-itself. The conscious subject is (ethically) wounded, human identity is heterogenous to/in it-self. For Levinas, in this (ethical) space of proximity, on this topography of irreducible otherness, there is (the opportunity of) transformation in which the self "escapes" from its efforts of the self-interest "to be" and into the efforts (what Levinas will call "freedom") of "responsibility *for-the-other*."

Proximity and Alterity: Otherness and Ethics

This irreducible ethical distance of difference of proximity is *not* a geometric measurement of a spatial void between the self and other. Rather, this distance signifies a "moral movement" and aiming towards each other. It is a "moral proximity" expressing an ethical relationship with the other, regardless of distance and time:[71]

---

[69] This ethical anxiety, effort and struggle aroused by the other is in contrast to the subject's own self-interested anxiety, effort and struggle to exist — the effort "to be" against the "not being" of the *il y a*. For Levinas, there is *no* restful state of peace for the subject. The subject is always in effort — either (unethically) for itself or (ethically) for the other.

[70] Critchely, *Ethics, Politics, Subjectivity*, above n 48, at 65.

[71] Levinas, *TI*, above n 4, at 190; Douzinas, C. *The End of Human Rights: Critical Legal Thought at the Turn of the Century*. Hart Publishing, Oxford, (2000), at 354. As I will outline in Chapter Eight, '*A Neighbourhood of Three and Justice for the Many*,' it is because proximity is a "moral distance" and not a geometric one, that the third party (Levinas's term for the multitude of all humanity) is (can be) introduced into proximity to signify that the self has an ethical responsibility to all others, near and far, immediate and distant, and even past, present and future.

> Proximity is by *itself* a signification. The subject has gone into the openness of the intentionality and the vision. The orientation of the subject upon the object has become a proximity, the intentionality has become *ethical* …[72]

In this space of proximity Levinas uncovers a prevenient ethical foundation of human identity and subjectivity which is asymmetrical and singular, between the subject personally and the other singularly. Across this space of proximity the transcendence of alterity draws the self and other together as "neighbours," in which the self and the other are both near and far, strangers but acquaintances, separate but together:

> … proximity is a relationship with a singularity, without the mediation of any principle or ideality. In the concrete it describes my relationship with the neighbour, a relationship whose signifyingness is prior to the celebrated "sense bestowing."[73]

At one and the same time, proximity tries to explain both the unassailable distance between the self and the other (the distance of difference/alterity) and also, the "us" who are together in the neighbourhood of alterity, of shared proximity.

Thus, unlike the liberal tradition within our contemporary human rights discourse, Levinas pulls away from the aim of uncovering and enforcing homogenous social bonds, around which a unity of an egalitarian sociality can unfold, a coming together under the commonality of the Same universal values or inherent qualities. This, for Levinas, infers the processes of potential violence of reducing the alterity of others to the Oneness of the Same, of absorbing otherness into the "melting pot of the ego-I:"

> An exit [for the self] in the idea of the infinite … toward a thinking which thinks more than it [the self] thinks — or which does *better* than think. It goes toward the Good. This is a dis-inter-ested Affectivity — or Desire — [of the self] in which plurality as social proximity does not need to be gathered under the unity of the One, which no longer signifies a simple lack of coincidence, a pure and simple absence of unity … In sociality — which is no longer a simple aim but

[72] Levinas, *CPP*, in Purcell, above n 19, at 116.
[73] Levinas, 'Substitution,' *BPW*, above n 4, at 81.

> responsibility for the neighbour … that sociality is an irreducible excellence through its very plurality … [74]

Rather, in the shared neighbourhood of proximity Levinas aims for a heterogenous bond of a unicity amongst difference, a plurality — "of self" and between self and other human subject — without the solidification of "all into One."

Levinas attempts to explain this prevenient ethical posturing of proximity in the concept of "diachronic time." This is the pre-cursory time of (ethical) human identity, prior to conscious being and all ontological knowledge of/from being. Opposed to the synchronic time of self-interest (of ontological being and ego-I self consciousness), this diachronic modality of inter-subjectivity grounds subjectivity — human identity — as ethical: as for-the-other, even before (self) conscious intentionality and will.[75] This diachronic time of the moment of the prior to and pre-original ethical awakening of human identity, is the subject's: "… *non-intentional* participation in the history of humanity, in the past of others."[76] It is significance of an always already ethical obligation within the inter-subjectivity of proximity:

> An ethical meaning of the relational to the other, answering, in the form of responsibility before the face, to the *invisible that requires me*; answering to a demand that puts me in question and comes to me from *I know not where*, nor when, nor why.[77]

This is ethics based on the forgotten — a pre-conscious split in subject conscious calculation and self-reflectivity, which shadows and doubles the conscious subject. It is an ethics, and an other upon which this ethics emerges, which is the anterior structure of the self and human identity — a deep past which ghostly haunts the subject.[78]

---

[74] Levinas, 'Transcendence and Height,' *BPW*, above n 4, at 158-159.
[75] Fryer, above n 1, at 179-80.
[76] Levinas, *EN*, above n 20, at 177 & 171, in Fryer, *ibid*, at 180.
[77] Levinas, *Outside the Subject*, at 92, in Veling, T. 'In the Name of Who? Levinas and the Other Side of Theology.' *Pacifica*. (October 1999), No. 12, 275-92, at 283.
[78] Critchley, *The Ethics of Deconstruction*, above n 7, at 160.

Thus, in this pre-original event of subjective originality there is no exercise of conscious choice. In this pre-originality of self there is no individual of free will, no "contract of (social) engagement" or contrived agenda of "self-interest." Rather, there is the other (ethical) subject, the open and unending subject already postured in proximity towards the calling of alterity, always already hollowing the ontological character of consciousness:

> Being then would not be the construction of a cognitive subject, contrary to what idealism claims [traditional, Western ethic and philosophy]. The subject opening to the thought and truth of being, as it incontestably does, opens upon a way quite different from that which lets the subject be seen as an ontology or an understanding of being. Being would not derive from cognition. … Being and cognition together signify in the proximity of the other and in a certain modality of my responsibility, this response preceding any question, this saying before the said.[79]

Here, open to the other but before conscious capacities, the subject is always already in "passive hostage" to the exteriority of the other with whom it is in proximity. The self is persecuted, obliged, ordered, interpellated and respons-*able* beyond the essence of its (conscious) being and intentional will: "The condition of being hostage is not chosen; if there had been a choice, the subject would have kept his as-for-me."[80] In this subjectivity of otherness the subject *must* respond. The subject has no choice but to respond, it has no conscious capacity to choose otherwise. Thus, this irreducible, inter-human structure of proximity is the structure upon which all other structures depend. Ethics, for Levinas, is the *foundation* of the human subject and all knowledge and understanding and *not* the superstructure, erected *after* and upon consciousness, knowledge and understanding.[81]

Yet there is a paradox in the radical strength of infinite alterity which persecutes, obliges, orders and holds hostage the self. For in proximity with the self, there is both a "hardness and softness" within the face-of-alterity. The face both denies/confronts the subject (in its presence of being), but also, is at the (ethical) mercy of the subject:

---

[79] Levinas, *OTB*, above n 4, at 26.
[80] Levinas, *OTB*, *ibid*, at 136.
[81] Levinas, *TI*, in Eskin, above n 23, at 412 & 415-16.

> The Other who can sovereignly say "*no*" to me is exposed to the point of the sword or the revolver's bullet, and the whole unshakable firmness of his "for itself" with that intransigent *no* he opposes is obliterated because the sword or the bullet has touched the ventricles or auricles of his heart.[82]

The face, and its alterity, is hard and strong because it is uncompromising — it is infinite, immeasurable and irreducible to the Sameness of the self. It is in this strength of alterity that the face is always accusing and commanding the self: *"I am not you, do not reduce me to you!"* The face "faces" the subject, eye-to-eye. With its infinite (superior) alterity of otherness, the face breaks through the subject's being (ruptures the split in subjectivity) and, thus, causes confusion, chaos and anxiety. The subject cannot ignore the call of the other and can never be free from the interrogation and confrontation from the other, who stands prior to, beyond and before the self: "It is impossible to evade the appeal of the neighbour, to move away."[83] In this way, the subject is always already in the position of subjection to the other — the other (the hard, radical alterity of the other) *imposes* itself upon the self.

However, this beyondness of the other is what also makes the other so "destitute and vulnerable" in the presence of the self. Levinas comments: "the strangeness that is freedom [freedom of alterity/freedom from being] is also strangeness-destitution."[84] As the face of the other throws the self into confusion and anarchy, the self can too easily (attempt to) reduce the beyond essence of the other to appearance and plasticity. The self can too easily reduce the other into its conscious efforts of being, into the Sameness of the self through noetic knowledge, thematisation and categorisation of self consciousness. Thus, the radical infinity of alterity is, paradoxically, expressed "in total nudity" and "defenceless eyes," and "absolute openness of the Transcendent" — it is dominance of the self by the weak, "the widow and the orphan."[85] Within the distance of difference of proximity, the other faces the subject and "pleads:" *"I am other to you, I am different and not you, do not kill me, do not absorb me into the sameness of you."*

---

[82] Levinas, *TI*, above n 4, at 199.
[83] Levinas, *OTB*, above n 4, at 128. Refer to Levinas, *TI*, *ibid*, at 197.
[84] Levinas, *TI*, *ibid*, at 47.
[85] Levinas, *TI*, *ibid*, at 199; Levinas, *TI*, *ibid*, at 215.

It is in this vulnerability where the ethical event — the ethical question — is grounded. This vulnerability in the alterity of the other is a temptation to murder, to reduce the other to the (re)presentation, image or countenance and presence of the self:

> The primordial signifyingness of the existence, its presentation in person or its expression, its way of incessantly upsurging outside of its plastic image, is produced concretely as a temptation to total negation, and as the infinite resistance to murder, in the other qua other, in the hard resistance of these eyes without protection — what is softest and most uncovered.[86]

The other brings doubt and equivocation to the centeredness of the self, to which the self can (consciously) respond with violent reductionism and totalitarianism or ethical openness.

It is from this vulnerability of the alterity of the other where Levinas establishes two of the most important ethical concepts. Firstly, from an ethics inspired by alterity, Levinas draws his own ethical categorical imperative (an ethical "law" and obligation): "thou shall not kill" ("you shall not commit murder.")[87] Ethics, is both the vulnerable face, pleading against the natural exertion of (the ego-I's) self-interest in its struggle "to be," and also, the strength of a command, for: "in his [the other's] gentleness dawns his strength and his right."[88] This command (this "gentle/soft command") is to the self to go beyond the self's own interest and to be for-the-other (the other's interest of/in alterity). Goodness (what is good and right) is to not "reduce and murder" this alterity of the other to the limitations of the self: "To be for the Other is to be good."[89] Ethics is a movement

---

[86] Levinas, *TI*, *ibid*, at 262.
[87] Levinas, *TI*, *ibid*, at 199. Some authors, such as Critchley, wish to denote Levinas's radical ethical turn from traditional Western (Kantian) ethics and, thus, do not use the language of the categorical imperative to describe Levinas's ethical demands. Rather, such authors suggest that Levinas's ethical demands on the subject are unconditional — an "unconditional responsibility" to the other born from the inter-subjective proximity of self with other. Refer to Critchley, *The Ethics of Deconstruction*, above n 7, at 225-26.
[88] Levinas, *TI*, *ibid*, at 261. Levinas's categorical imperative is different from Kant's in two ways, though both may be read as principles of moral law. Firstly, Levinas's moral law is an ethical command based on difference, imposed by the alterity of the prevenient other, whereas Kant's categorical imperative is a moral law arrived at first through the universality of symmetrical pure reason. Secondly, Levinas's imperative is a gentle command (re: the soft-hard paradox of the alterity with the face). Kant's categorical imperative is only strong — with the logic of pure reason supporting it, it becomes a universal maxim.
[89] Levinas, *TI*, *ibid*, at 261.

beyond being, goodness is an equivocation in being. Goodness is the transcendence of the self to go beyond being *of* selfhood and towards being *for* the (alterity of) the other. Ethics is found in the response — the response-*ability* — to this "soft command" from the other.

Secondly, within this vulnerability of the face, Levinas also sees freedom. Here, of course, is the freedom of the other away from the potential threat and violence of the self. But more significantly, here in this soft-command of prohibition of self, Levinas also grounds freedom for the individual subject. Alterity is an interrogation of and challenge to my freedom: "The idea of perfection [the ideality of "I"] is not an idea but Desire; it is welcoming of the Other, the commencement of moral consciousness, which calls in question my freedom."[90] This is freedom for the self away from the limitation of its own presence of being, its own violent self-interestedness:

> Thus in expression the being that imposes itself does not limit but promotes my freedom, by arousing my goodness … It is thus the irremissible weight of being that gives rise to my freedom. The ineluctable has no longer the inhumanity of the fateful [the destruction from the ego-I] but the severe seriousness of goodness.[91]

This is an ethical freedom away from the traditional conceptualisation of individual identity as the "imperialist-ego exercising its rational free will to promote self existence and self-interest."[92] This is a freedom, and an ethics, of the dis-interested self, "dis-interested" in its very own ego-I self-interest and presence of being.

But this ethical version of freedom from violence does not deny the subject's self-interested intentions altogether. Within the paradox of the hard-soft face, the ethical soft-command is not a natural necessity or a compulsion of/for the self. It is not a "must"

---

[90] Levinas, *TI*, *ibid*, at 84.
[91] Levinas, *TI*, *ibid*, at 200. This contrasts against the tradition of freedom in our contemporary human rights' discourse. Traditional liberal ethical thought on human identity focuses on the freedom of the individual self and its presence of being. Even in the inter-sociality of Marx and Hegel, the freedom offered is a socio-political freedom of self, the freedom of the presence of being through political or economic solidarity and freedom. Levinas's freedom of the subject is a freedom through the ethical exteriority of otherness of the self, a freedom *from* the self limited to its own (violent) presence of being.
[92] Levinas, *TI*, *ibid*, at 42.

ordered to the self.[93] This is impossible because the face is too vulnerable and destitute (too "soft") to demand anything from the self. The face is "unarmed" and has no means to enforce a law of prohibition against the self.[94] Thus, in this soft-hard command from alterity, at the level of conscious capacity beyond the proximity of the ethical-I, there is still free will to choose. Ethics can only exist when directed at free beings, where free choice is made through conscious calculation to act as/for good or bad, for-the-other or for-the-self, without intimidation or enticement.[95] It is in this sense that the ethical event for the subject — the ethical appeal from the other — is *transformative* for the subject. It is one which offers the transformation and escape from *free will* to *good will:*

> The irreversibility of the relation [between self and other] can be produced only if the relation is effected by one of the terms as the very movement of transcendence, as the *traversing* of this distance [the distance of difference of proximity], and not as a recording of, or the psychological invention of this movement … Alterity is possible only starting from *me.*[96]

In recognising the ethical relation of proximity, it is the subject — the conscious subject — who is called upon to step beyond itself and, thus, transcend and transform from self-interest to care for the other.

So to become ethical, "to be" ethical in the daily *praxis* of the incarnate, we must act ethically, we must *choose ethics.* It is true, for Levinas, there always already exists and primary "yes" to the other in our primary openness towards the other. This is the pre-original, asymmetrical, inter-subjective, ethical pre-disposition of proximity, the split subject of the anterior ethical-I, which is beyond our (self) conscious choosing and in

---

[93] Burggraeve distinguishes between the force of the command of the face (*thou shall not kill)* and the lack of strength to compel the subject to follow this command. Refer to Burggraeve, *Wisdom of Love,* above n 4, at 98. Another way of thinking about this is that the face bears with it a (categorical) imperative (*thou shall not kill*) but no means to compel the subject to follow this imperative.

[94] Any law, as Derrida suggests, cannot stand without the power of enforcement. Refer to Derrida, J. 'Force of Law: the Mystical Foundation of Authority.' *Deconstruction and the Possibility of Justice.* (ed. D. Cornell, M. Rosenfeld, and D. Carlson), Routledge Press, New York, (1992), at 22-23.

[95] Burggraeve, *Wisdom of Love, op cit,* at 98. It is in this exercise of free choice where shame resides. Always already in ethical proximity, the other becomes the measure of the self, to act in consideration of the other is (ethical) goodness, to choose for-the-self breeds the sense of shame — the unintended acknowledgement of the violence (and non-ethics) of self-interest. Refer to Levinas, *TI*, above n 4, at 84.

[96] Levinas, *TI, ibid,* at 39-40.

which the self is a passive recipient/hostage:[97] "[To] hear a voice speaking to you is *ipso facto* to accept obligation toward the one speaking … In question here is a *yes* older than that of naïve spontaneity …"[98] But in addition to this, "to be" ethical we must also exercise our (self) consciousness and free-willed intentionality into moral conscience. We must acknowledge and echo this primary ethical inter-subjectivity, to move beyond being and become being- for-the-other. Thus, though the prevenient ethical alterity of human identity forces the ethical-I to choose, how to choose is mediated by the ego-I: "*How* I answer depends on my freedom; *that* I answer does not."[99]

In this sense, human identity marked by the prevenient alterity of the other expresses ethics as a *possibility*: the moment of (conscious) choice upon every subject in the ('un-choosable') encounter (the intrusion) with the other.

> [The trace of alterity with the face] enters in so subtle a way that unless we retain it, it has already withdrawn. It insinuates itself, withdraws before entering. *It remains only for him who would like to take it up* (my emphasis). Otherwise, it has already restored the order it troubled …[100]

This rupture of ethics (the ethical interrogation and decision) is momentary but, nonetheless, it is continuous and consistent, endless and incessant as we face "the face," the many faces, of the other in the world incarnate. The subject is persecuted by this/these moments and must choose, for there is always already a split in consciousness and always already the anterior, pre-original non-choice of proximity with the alterity

---

[97] Levinas, *TI*, *ibid*, at 51.
[98] Levinas, *NineTR*, at 48-49, in Purcell, above n 19, at 42.
[99] Burggraeve, *Wisdom of Love*, above n 4, at 102. In this way, it is important to understand that ethics, for Levinas, is not a faith or a belief (like a faith or belief in god). Despite Levinas's references to the divinity of god in the ethics of alterity, ethics for Levinas is in the doing, in the choice made and effort/agency used in the "*I do!*" and the "*yes*" of ethical action of everyday life. Refer to Purcell, *ibid*, at 52-53. Note, even a non-response is an ethical response (it is the silent "*no*" to the ethical interrogatory from the other). The non-response is the refusal of one's responsibility. Levinas is clear that such as position is still, nonetheless, evil. This is the evil of the silent witness, captured in the Burke's statement: "The only thing necessary for the triumph of evil is for good men to do nothing." Refer to Burke, E. *Thoughts on the Cause of the Present Discontents.* (6th ed.) J. Dodsley, London, (1785), at 106. It is also the evil of absent-mindedness — the attempt to escape responsibility by withdrawing into pleasure, drink, drugs, etc, in order to forget or distance/alienate oneself from one's responsibility. Refer to Burggraeve, *Wisdom of Love*, above n 4, at 102.
[100] Levinas, 'Enigma and Phenomenon,' *BPW*, above n 4, at 70.

carried with the face. Ethics, in this light is the "perhaps of the yet to come,"[101] it is the sense of the diachronic time of ethical proximity rupturing the synchronic ego-I of "the now."

In this ethical freedom of the subject, found in the anterior space of proximity, there is the "responsibility for-the-other" which marks human identity. The other (the face): "does not limit the freedom of the same; [it] calls [the subject] to responsibility, it founds it and justifies it."[102] Thus, there is the taking up of the responsibility for-the-other in the debt of (ethical) existence, in the response to the interpellating other. This is the responsibility for the "not killing" of the other, the "not reducing" of the alterity of its otherness. And as this alterity is infinite and the self is always already open to this alterity in the prevenient posture of proximity, this responsibility is also infinite and open: "The more I answer the more I am responsible; the more I approach the neighbour with which I am uncharged the further I am away."[103]

It is this responsibility for-the-other, this response-*ability* of subjectivity provoked by the alterity of the other, which signifies the true (ethical) human subject:

> The ethical relation [proximity], opposed to first philosophy which identifies freedom and power, is not contrary to truth; it goes unto being in its absolute exteriority, and accomplishes the very intention that animates the movement unto truth.[104]

Countering the liberal tradition of ethics, with its focus on the rights of the subject "to be" (on the autonomous conscious capacities exercised in the ontological interest of being), Levinas sees the mark of human kind elsewhere. For Levinas, human identity is found in a split subject whose anterior-self is inspired by the alterity of the other, expressed as/through responsibility for-the-other, prior to conscious determination and choice:

---

[101] Derrida, above n 94, at 24.
[102] Levinas, *TI*, above n 4, at 214.
[103] Levinas. *OTB*, above n 4, at 3.
[104] Levinas, *TI*, *op cit*, at 47.

> It is in a responsibility which does not justify itself by any prior engagement — in the responsibility for the other — in an ethical situation — that the meta-ontological and meta-local structure of [ethics] … emerges … of *a responsibility anterior to engagement* [my emphasis].[105]

The truth of the subject and human identity is its very ethical structuration formed around the asymmetrical inter-human proximity with the other, beyond its conscious capacities of reason and self-will. The truth of the subject and human identity is its *in*-dependence on the infinite alterity of the other. The subject is signified and exhibited in the responsibility for-the-other, always already borne by the subject in the "prior to" intrusion of alterity and split of proximity.[106] First there is responsibility for-the-other (first there is proximity and otherness, first there is ethics) and then there is freedom (of the conscious self, of the right to/of the power to be/of being); first the other and then the subject; first ethics and then the law, society and justice.

This responsibility for-the-other is expressed in the response of "*here I am.*" *Here I am* is the acknowledgment of *my* (pre-foundational) personal responsibility for the other:[107]

> A marvellous accusative [of other upon self]: here I am under your gaze, obliged to you, your servant … It is the "here I am," said to the neighbour to whom I am given over, and in which announces peace, that is, my responsibility for the other.[108]

This *here I am* of responsibility for-the-other is Levinas's (ethical) call for ultimate suffering and sacrifice of the self for the other:

> I approach the infinite insofar as I forget myself for my neighbour who looks at me; I forget myself only in breaking the undephasable simultaneity of representation, in existing beyond my death. I approach the infinite by sacrificing myself. Sacrifice is the norm and the criterion of the approach.[109]

---

[105] Levinas, *Autrement*, at 162-63, in Eskin, above n 23, at 409.
[106] Levinas, 'Substitution,' *BPW*, above n 4, at 90.
[107] Levinas, *CPP* at 141, in Purcell, above n 19, at 106.
[108] Levinas, *DD*, at 123/*OG*, at 75, in Fryer, above n 1, at 171.
[109] Levinas, 'Enigma and Phenomenon,' *BPW*, above n 4, at 76.

This is the radical *substitution* of the self in the ethics of alterity. Caught in the non-choice passivity of the open and obligatory proximity with the other, the self has no "self-interest," but rather, *is* the other.[110] The subject is always already in the position "to be" for-the-other. This *Here I am* response from the self to the other is the self effacing it-self in an act of radical and extravagant "generosity and hospitality," the act of "dis-interestedness" of being: "To give, to-be-for-another, despite oneself, but in interrupting the for-oneself, is to take the bread out of one's mouth, to nourish the hunger of another with one's own fasting."[111] This sacrifice is not the death of the subject, but rather, its potential transformation. It is the "breaking-through-being" of the "greater ethical self" over the conscious ego self, the two halves of split subjectivity reconciled in ethical alterity and responsibility.[112]

It is in this ethical response-*ability* of *here I am* where the uniqueness of the self takes shape, where the identity and subjectivity of the human being unfolds. In the self-centredness of the ego-I, in the self-absorbed struggle of being, the self is a bland, expansive terrain of Sameness. But in the ethical responsibility of inter-subjective proximity, the self becomes a species of its own making, a species of its own response and responsibility. In this posture of proximity the self has been individually "elected" and is privileged by the calling of the other to "personally respond"[113] (regardless of "how" it chooses to respond). Thus, the subject is not unique through any ontological essence or trait of being, not unique through any spontaneous exertion of intentionality and will in the interest-of-self. Rather, the subject is unique because it personally has

---

[110] Levinas, *OTB*, above n 4, at 118.
[111] Levinas, *OTB ibid*, at 56; Levinas, 'Enigma and Phenomenon,' *BPW*, *op cit*, at 76. Significantly, in this responsibility for-the-other, the good-will of such hospitality is *not* based on the reciprocal interest the self. Nothing of this ethical encounter benefits the subject's self-interestedness. Reciprocity is the signification of the return to self. Rather, in Levinas's ethical thesis, there is only gift giving without exchange, responsibility without receipt, generosity without gratitude. Refer to Levinas, *OTB*, *ibid*, at 111-112; and Derrida, above n 94, at 22.
[112] Levinas, 'Enigma and Phenomenon,' *BPW*, above n 4, at 76. As I will outline below in Chapter Eight, *'A Neighbourhood of Three and Justice for the Many,'* Levinas balances this sacrifice of self with the introduction of the third party (the many other human subjects of our corporal existence) into the face-to-face encounter in proximity. In this justice of the many, the subject's responsibility for-the-other is calculated with the care and responsibility that the third party also bears to the self.
[113] Levinas, *TI*, above n 4, at 245.

been singled-out by the calling of alterity, here and now, and must personally — subjectively — respond to this call:[114]

> Here [in proximity] the unicity of the ego first acquires a meaning — where it is no longer a question of the ego but of *me* … Here the identity of the subject comes from the impossibility of escaping responsibility, from the taking charge of the other.[115]

Because of this personal and unique responsibility for-the-other, I cannot transfer this responsibility to another party. This responsibility for otherness is singularly *my* responsibility to the particularism of the face of the other in the specific inter-subjective neighbourhood of proximity with the other. The weight of this responsibility is borne only on *my* shoulders; the alterity carried with the face in the face-to-face event in proximity calls only *me*.

It is in this ethical sacrifice of the self in responsibility for-the-other that the self transcends the limitations and brutalities of its own self-interested presence of being. In this movement of transcendence there are two distinct characteristics: *trans-ascendance* and *trans-descendence*.[116] The former is the upward and outward movement beyond the presence of being towards the other; the latter infers the subject's descent into itself and its own "other within itself," to the paradoxical *intimacy of transcendence*. This is the ethical-I of the diachronic alterity of proximity, the "other half" of the split subject, prior to conscious awakening — the "ethical creature" of prevenient proximity over which "the self is not the author."[117]

---

[114] Burggraeve, *Wisdom of Love*, above n 4, at 101.
[115] Levinas, 'Essence and Disinterestedness,' *BPW*, above n 4, at 120.
[116] Levinas's conceptualisation of this intimate transcendence, of the double movement of transcendence, owes a lot to the work of his mentor, Jean Wahl, to whom Levinas dedicated *Totality and Infinity*. Refer to Burggraeve, R. *Affected by the Face of the Other: The Levinasian Movement from the Exteriority to the Interiority of the Infinite.* (www.mondodomani.org/dialegestai/rbu01), accessed 7/1/10. Purcell also refers to the concept of trans-ascendance as the human relation of "liturgy" for/with the neighbour. Refer to Purcell, above n 19, at 135-140.
[117] Levinas, *TI*, above n 4, at 12 & 41; 269 & 293; Levinas, 'Substitution', *BPW*, above n 4, at 89-95; Purcell, *ibid*, at 35.

This trans-decendence is the signification of an internalised "scruple of the subject," which the alterity of the face agitates in the real world of daily existence.[118] This is the very (ethical) "soul of the subject," the other within the self:

> *The soul is the other within me*, a sickness of identity, its being out of phase, its diachrony, gasping, shuddering … The psychism of the soul is alterity within identity, animation, inspiration … A signifyingness of meaning more ancient than manifestation of being, the one-for-the-other, "possession" of the same by the other in responsibility.[119]

The scruple is the opening to the "hither side" of the self — not conscious or unconscious, but rather, on the *otherwise-than-being* side of the subject:

> The ego is in itself not like matter is in itself, which, perfectly wedded to its form, is what it is … The ego is an irritability, a susceptibility, or an exposure to wounding and outrage, delineating a passivity more passive still than any passivity relating to an effect. This *hither side* of identity is not reducible to the *for-itself*, where a being recognises itself in its difference beyond its immediate identity. Here we are obliged to speak of the irremissibility and the anguish … of this *in itself* of the Oneself … Unable to take a distance from itself, it is hunted down in itself, on the hither side of resting in itself and of self-coincidence.[120]

With this hither side the subject is reconciled within/through itself: the knotting and unknotting in the split subject; in essence and in essence's other; to the pre-original otherwise-than-being in human identity.[121] The face calls the subject "back" in trans-decendence to its hither side, to its own otherwise-than-being, ethical creature of pre-original responsibility.[122] This "other-within-self" is the pre-original ethical-I of human

---

[118] Burggraeve refers to the discomfort for the subject of this ethical scruple being like a "pebble in one's shoe," which, he suggests, the word "agitation" encapsulates. Refer to Bruggraeve, *Affected by the Face of the Other*, *op cit*, at 18-19.
[119] Levinas, 'Truth of Disclosure and Truth of Testimony,' *BPW*, above n 4, at 102.
[120] Levinas, 'Substitution,' *BPW*, *ibid*, at 86.
[121] Levinas, *OTB*, above n 4, at 92; Levinas, 'Essence and Disinterestedness,' *BPW*, *ibid*, at 116. One could equate this knotting and unknotting of essence with Lacan's Borromean knot of subjectivity, noting my comments on Levinas's own Borromean know of "the self, the other and god" at page 226, footnote 55 above.
[122] Levinas, *OTB*, *ibid*, at 92.

identity. This other half of self "cramps the subject in its own skin" and signifies the "unicity" of the heterogeneity of self.[123]

Conclusion

The often cited criticism levelled against Levinas is that his philosophy of ethics is romantic and naïve: the giving all of oneself for the other. However, from a Levinasian perspective, it is the very nature of the traditional self-sustaining, intentionally-willed and conscious ego-I which is simplistic and naïve.[124] "To be" in a world which reduces alterity into the economy of the Same is to be blind to the secret of the ego, to the anterior truth of the split subject and ethical subjectivity. "To be" in the presence of self, in the interestedness of being, is to be in the struggle and violence of the ego-I. It is in this ontological traditional conceptualisation of human identity which is the very reason why, for Levinas, an ethics of alterity is required and justified. Levinas's ethics is a conscious construct against this tradition of being; it is not the naivety of ideality, but rather, the "madness of the ethical" — a counter-intuitive unreasonableness — "to do right" *for-the-other* above "possessing a right" of self-interest.[125]

The face of the other human subject — in the concrete reality of co-existence — is the trigger for this re-newal of ethics and human subjectivity. Carried with the face is the radical and infinite quality of "otherness," alterity. This is the asymmetrical quality of otherness which overflows being and resists reduction into the limits of the circle of the Same and the efforts of being. With this alterity, the face provokes the self to move beyond self-interest and the potential of human violence. In this way, ethics, for Levinas, is an interruption. Ethics is the intervention of being by infinite alterity, it is the critique of being which splits being into two, prior to and beyond conscious capacities and ontological signification.[126] Hence in this split in subjectivity, similar to Lacan's thesis of the unconscious loss and unending desire, ethics and existence, the otherwise-than-

[123] Levinas, 'Substitution,' *BPW*, above n 4, at 86.
[124] Burggraeve, 'Violence and the Vulnerable Face,' above n 28, at 34.
[125] Derrida, above n 94, at 25.
[126] Levinas, *TI*, above n 4, at 43.

being of existence, precede the existent and subjectivity precedes consciousness and intentionality.

In this anterior ethical engagement of proximity the self first bears a pre-original responsibility to the other — a duty towards the other before conscious choice and intentional will, which brings the subject into being. That is, 'to be" dis-interested in self and "to be" for-the-other. This ethical response is the *here I am* dis-interestedness in self and it is as infinite as the infinity of alterity itself. Thus, there is a personal burden on the subject, a singular responsibility of the self for-the-other to sacrifice and substitute self-interest for care and concern for the other. This is the "law" of the ethics of alterity, the prohibition "not to kill the other." This ethical-I is the very scruple of human subjectivity. It is the anterior obligation animated on the hither side of conscious subjectivity, provoked by the other's interpellation and born in proximity with alterity.

It is this pre-original, beyond being experience of/with alterity which is the most radical positive force of Levinas's ethics of alterity. It is this ethical creature of the otherwise-than-being of/in self which is the re-newed (conceptualisation of) "human identity" — Levinas's *post-humanist subject* of otherness beyond the limits of the conscious self and the tradition of ontological being. Ethics is the original condition of subjectivity, prior to any consciousness and intentionality. Ethics, not self consciousness, autonomous self-will, or moral *potentia*, is the mark of human identity. Within this pre-ontological split subject, the affectivity of this "prior to being" ethical-I is not the death of the subject. Rather, it is the possibility of transformation in transcendence, the potential for the subject to move beyond its (conscious) self and toward a freedom beyond being and beyond the propensities to human violence. This transcendence is the "adventure of

self," the adventure of movement across the threshold of self and towards the other. This "ethical movement in (self) being" is not the Ulyssian adventure of return (to the Same), but rather, the adventure into the wilderness (into the radical other) of Abraham.[127]

****

[127] Levinas, 'God and Philosophy,' & 'Meaning and Sense,' *BPW*, above n 4, at 148 & 48.

Part B Chapter Seven

Alterity, Human Rights and Responsibility for the Other

Introduction

Levinas's presentation of human identity is one which is marked with an ethical responsibility towards the other, invoked prior to the autonomous capacities of consciousness and intentional self-will. Levinas presents ethics as "first philosophy" because the other always already precedes the self, hailing being into existence and, thus, it is the self which is always already open and obliged to the alterity of the other. Ethics is first philosophy because our ontological presence — the philosophy of being, law, justice and rights securing the sociality of the presence of being — are the affective consequences of this prevenient proximity with the infinite alterity of the other. Hence, ethics does not occur at the self-reflective level of human experience, but rather, at the level of the sentient subject.[1] Thus, like Lacan, Levinas is presenting us with a pre-conscious split subject — the ontological signification and conscious capacities of the ego-self, which arise in and as a response to the otherwise-than-being, ulterior creature of the ethical self. This is the shared (shared also between Lacan and Levinas) internalised-exteriority of the alterity of the prevenient other to me, which resides within me — the traumatic rupture of self conscious, ontological being by the pre-original alterity of otherness. In this way, like Lacan (and like Kant) Levinas is presenting a split subject empty of content (missing within itself). Yet like Lacan, Levinas's formulation of the split subject is radically different from Kant. For where Kant imagines moral freedom as an escape from the contamination of *heteros*, Levinas sees human identity bound to an infinite, ulterior otherness in which *heteros* is the mark of the ethical subject.[2]

It is in this prevenient proximity where Levinas inverts the liberal humanist tradition of our contemporary human rights' discourse. The ethical integrity of the inter-subjective sociality of human community is *not* achieved through the primacy of the individual's

[1] Critchley, S. *Ethics, Politics and Subjectivity: Essays on Derrida, Levinas and Contemporary French Thought*. Verso Press, London, (1999), at 63-66.
[2] Cornell, D. *The Philosophy of the Limit*. Routledge Press, New York, (1992), at 99-100.

autonomous capacities of being, exercised within a symmetrical co-existence of egalitarian community. Human dignity is not found within the realms of the alienated automaton of moral potential within the atomised "I." Rather, ethical engagement between self and other commences prior to the autonomous ego-I, in the irreducible distance of difference between self and other, in the asymmetrical inter-subjective alterity with the other. For Levinas, ethics, and the dignity of an ethical/virtuous life, is simply and radically established upon the interrogation of the ontological Sameness of self and the efforts of being by the alterity of the other, prior to our conscious capacity to answer. From this Levinasian perspective, ethics is the taking into account of "my personal responsibility" for the particularity of the irreducible, prevenient alterity of the other to which I am already hostage.[3]

In this chapter I wish to explore the signification of human rights through the image of human identity marked by this Levinasian ethical subject of alterity. I wish to explore how the formal orientation of our human rights' discourse alters when inspired by this re-imagined postmodern (post-humanist) image of human identity. In this chapter I wish to contrast how different conceptualisations of human identity — from the traditional ego-I to the Levinasian ethical-I — shifts the ethical direction and integrity of human rights. Similar to my Lacanian analysis of human rights in Chapter Four above, in the first section of this chapter I use Levinas's understanding of ethical subjectivity and infinite responsibility to critique the characteristics of our contemporary human rights. Levinas's ethical subjectivity directs our attention to the *formal orientation* of rights around the exercise of the effort of being. Similar to Foucault, Levinas is critical of our conceptualisation of rights formulated around the sovereignty of the ego-I and the ontological right to power and freedom, which inspire a responsibility to the service of self *before* a responsibility to others.[4] From a Levinasian perspective, our contemporary human rights' discourse fails the subject because it fails to speak to the ethical-I of prevenient proximity and fails to engage with the split subject of the otherwise-than-

[3] Critchley, *op cit*, at 62, 64.
[4] Refer to Foucault, M. *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (ed. C. Gordon), Pantheon Books, New York, (1980); and Foucault, M. *Society Must be Defended: Lectures at the College of France, 1975-1976.* (trans. D. Macey), Penguin Books, London, (2003).

being of human identity. Rather, our rights discourse reduces the ethical integrity of both the individual and community within the conscious contrivances of socio-political significations, and the limitations of, the presence of being — the egalitarian community of One — reducing the alterity of human otherness to the adequation of the citizen-subject, and ethics to abstract principles of legal rights and duties.

In the second section of this chapter I explore the possible significations of a human rights orientated around the pre-original, ethical creature of alterity, a *human rights of otherness* which, first and foremost, is directed towards the other. Before an interrogation of the possible socio-political implications of such a rights of otherness (something I take up in the next chapter), in this section I explore how Levinas's identity of ethical alterity offers the potential of another expression of rights beyond the traditional signification of symmetrical sociality or political equivalence, expressed in both liberal humanism and postmodern identity politics. This is an imagining of a human rights of otherness which commences in the pre-original one-on-one, asymmetrical, ethical relationship of proximity between the self and the face of the other. From this ethical grounding, the human rights of otherness commences in the subject's sacrifice of self-interested rights for a responsibility for-the-other, and a freedom which protects the alterity of the other from the reduction to the ontological significations of being. These are human rights which aim across the distance of difference of proximity and toward the other, but which does not grasp and limit alterity to the presence of being. Such personal human rights of responsibility for-the-other are expressed in the *small goods* of inter-subjectivity between the subject and the other, in the extravagant hospitality towards the other in every day life.

Levinas's Critique: Human Rights and the Ego-I

Levinas's criticism of rights and the ethical ideality of rights does not commence from a negative, anti-rights position — a position, perhaps, more reflective of Lacan's anti—humanist negativity against an ethics of Good. Levinas, in fact, does see the need for rights and the good of rights "because we don't have justice."[5] Levinas, like our

[5] Cornell, above n 2, at 167.

contemporary human rights' discourse, does have a utopian vision for the transformative potential of ethical subjectivity and human dignity, a vision in which "… men who, before all loans, have debts, owe their fellowman, are responsible — chosen and unique — and in this responsibility want peace, justice, reason. Utopia!"[6] Levinasian ethics is a positive ethics of human identity, human dignity and inter-subjective response-*ability*. His interrogation on ethics is *post*-humanist, not *anti*-humanist.[7] Yet significantly, Levinas's humanism does not commence in the ideality of the autonomous self, but rather, is a humanism of the *other* human subject.[8] For Levinas, the ethical integrity of human identity (the dignity of the human subject) is essential in the sociality amongst people, not their individuation and, hence, for Levinas, "humanism — traditional, liberal humanism — is not sufficiently human."[9] Thus, the issue for Levinas is not whether or not rights are intrinsically of value (perhaps a more pessimistic Lacanian position), but rather, how (one could say, upon whom) such rights are *justified*.[10]

Thus, what is at odds between the liberal tradition of our contemporary human rights' discourse and Levinas's ethics of proximity is the *formal orientation* of such rights, the architectural foundations of human identity and ethical direction from which the discursive structure of modern rights commences. The central criticism against these contemporary liberal rights is that such rights (such a presentation of human dignity) are grounded upon a universal image of human identity — a symmetrical sociality of inter-subjectivity of *equal individual beings* of autonomous conscious capacities and moral *potentia*.[11] Such rights focus on the *logocentrism* of being and the power "to be," the

---

[6] Levinas, E. *Levinas, Entre Nous: Thinking of the Other*. (trans. M.B. Smith and B. Harshav), Continuum Press, London, (1998), at 200.
[7] I liken Levinas's *post-humanism* with the notion of *critical humanism* which is also expressed and explored in some strains of postmodernism. Refer to Chapter Six above, '*The Self, the Face, Alterity and Ethics,*' page 209, footnote 4.
[8] Critchely, above n 1, at 67.
[9] Levinas, E. *Otherwise Than Being or Beyond Essence*. (trans. A. Lingis), Duquesne University Press, Pittsburgh, (1998), at 127-28.
[10] Joldersma, C. 'Human Rights and Democracy: Reading Giroux Otherwise with Levinas.' *Philosophy of Education*. (2006), 315-17, at 315.
[11] In this respect Levinas's critique against rights is similar to Marx's critique, as outline in Chapter One, '*Marx and the Critique from within*.' Like Marx, Levinas's ethical project of a responsibility for-the-other (against a right-of-the-self) aims to recover the subject and rights from the abstract ideality of human

ontological presence of the individual-self. It is in this symmetrical sociality of conscious automatation and ontological signification where the violence of the reduction of the alterity of the other to the self potentially unfolds:

> By virtue of what, and in what way, could the free or autonomous will claimed by the right of man impose itself on another free will without this imposition implying an effect, a violence suffered by that will?[12]

Levinas's primary aim in ethics and alterity is to avoid such violence. Thus, for Levinas, rights and what they represent — the ethical dignity of a sociality of a justice for all — do not commence in symmetrical inter-subjectivity of individual, universal egalitarianism, but rather, in the asymmetrical proximity of distinction between self and other and the infinite responsibility owed to the alterity of the other.[13] The inspiration and aspiration of rights are not invoked by an ontology of a "universality of all" to meet the consciously accepted "unfortunate empirical fact that we are not alone," but rather, based upon the irreducible alterity of the pre-conscious, prior-communal other, marking human identity with a prevenient sensibility (an ethical dignity) of responsibility for-the-other.[14]

As outlined in Chapters One and Two above, our contemporary human rights' discourse is imbued with the liberal tradition of the individual of autonomous capacities of self-determination. Our modern human rights are replete with the image of human identity in the form of the ego-I (Lacan's *cogito*-like image of the *imago*), possessing an "equal dignity and worth" through its own "autonomous capacities of intentioned free-will, reasoned consciousness and moral conscience" upon which rests:

---

freedom (the autonomy of reason) ingrained in modern liberalism. Refer to Diamantides, M. (ed.) *Levinas, Law, Politics*. Routledge-Cavendish, Oxon, (2007), at 3. For Levinas, Marx is useful because "Marx did take the other seriously," and was "sincere in relation to the problem of hunger." Levinas seems to hold qualified admiration for Marx in the fact that he (like Levinas) aimed at recovering the contingency of life from the ideality of liberalism. The difference, Levinas suggests, is that Marxism demands (the use of will) while alterity/ethics obliges the use of the pre-foundational, ulterior duty of responsibility. Refer to Levinas, *EN*, above n 6, at 103; Levinas, E. *Existence and Existents*, 1978, at 45, in Diamantides, M. (ed.) *Levinas, Law, Politics*. Routledge-Cavendish, Oxon, (2007), at 182; Terreblanche, S. 'Todorov, Levinas and Anti-Totalitarian Humanism: A Perspective on Contemporary Utopian Though.' *HTS*. (2007), Vol. 63, No. 1, 301-25, at 311 & 313-14.

[12] Levinas, *EN*, above n 6, at 134.

[13] Critchely, above n 1, at 99.

[14] Cornell, above n 1, at 105.

> … the foundation of freedom, justice and peace in the world … All human beings are born free and equal in dignity and rights … endowed with reason and conscience and should act towards one another in a spirit of brotherhood.[15]

These are the subjective, possessive rights of the individual — ontological rights invoked by the individual's essential attributes and autonomous capacities, unmediated by contingent circumstances, such as "race, colour, sex, language, religions, etc, the split subject alienated from its contextual otherness."[16] Such rights are a signification of the individual's independent capacity to control, possess and propel itself, to have rights of and over its own potency and powers "to be."[17] Even prior to any sociality, it is these inherent, individual traits which are promoted as the essence of all humanity's freedom, dignity and equality, which are presented as the *a priori* of humanity's symmetrical inter-subjective equality. It is with such mutually shared autonomous capacity of rational reflection that these liberal rights offer the potential of peace through a "common sense compromise of international agreements, Instruments and Conventions," from which the aim of a universal brotherhood of a human family of equality, freedom, justice and peace is won.[18]

From a Levinasian perspective, such rights of liberal humanism, focussed upon a sociality of autonomous, individual self-capacity, present a number of problems. Firstly, as such rights start from the position of the ego-I, such rights are, in the first instance, the rights of *being* in the struggle "to be:"

> The right of man, which must be recognised, is the right of an "I." Man is conceived of as an "I" or as a citizen — but never in the irreducible originality of his alterity, which one cannot have access through reciprocity and symmetry

---

[15] *UDHR*, Preamble and Article One.
[16] Gordon, J. 'The Concept of Human Rights: The History and Meaning of its Politicization.' *Brooke Journal of International Law.* (1997-1998), Vol. 23, No. 3, 691-791, at 721-28; *UDHR*, Article Two.
[17] Taylor, C. 'Condition of an Unforced Consensus on Human Rights.' *The East Asia Challenge for Human Rights.* Cambridge University Press, Cambridge, (1999), 124-44, at 125.
[18] *UDHR*, Preamble; Burggraeve, R. *The Wisdom of Love in the Service of Love: Emmanuel Levinas on Justice, Peace and Human Rights*. (trans. J. Bloechl), Marquette University Press, Milwaukee, (2002), at 77-80. This common sense compromise is, of course, a peace won through a Kantian calculation and mutual recognition of rights of freedom through international Instruments, Charters and Conventions.

> [through Sameness]. Universality and egalitarian law results from the conflicts in which one primitive egoism opposes another.[19]

These are rights for the individual to exercise its own autonomous intentional will and reasoned consciousness — its own efforts, powers and actions in self-assertion — in order to, first and foremost, concretize itself and protect itself as being in the real world of things.[20] These are rights "I" have to impose upon others in my effort "to be," rights to enforce the ontological signification of my personal presence of being. These are proprietary rights the subject has over the material world (and itself), rights to *sojourn* into the world, to "grasp and take home" materials, resources, objects and even others into its own self-interested agenda of being.[21]

It is with this focus on the individual's presence of being within such a tradition of liberal rights that the radical alterity — of the ethical creature of the self and the otherness of the other subject — is reduced and de-prioritised. Within the equality of such autonomous rights, human identity and subjectivity is limited to the Same of the self, within a collective of symmetrical egalitarianism, as all become One, side-by-side in synchronic unity under the Same theme of ontological signification of individual, autonomous conscious capacities: "man is conceived of as an "I" or as a citizen — but never in the irreducible originality of his alterity … alterity with regard to the knowing being vanishes."[22] In reducing the alterity of human identity, these rights of being take on the significance of the (Kantian) empty split subject, in which human identity is reduced to a "neutral theme/concept" of the universality of the Same:

> The discovery of those rights that, under the name rights of man, are associated with the very condition of being a man, independently of qualities by which men differ from one another … The formal essence of the rights of man seen in terms

---

[19] Levinas, 'Transcendence and Height.' Levinas, E. *Basic Philosophical Writings.* (ed. A Peperzak, *et al*), Indiana University Press, Bloomington, (1996), at 14.
[20] Burggraeve, above n 18, at 47.
[21] Levinas, E. *Totality and Infinity* (trans. A. Lingis), Duquesne University Press, Pittsburgh, (1996), at 35-40; Burggraeve, *ibid*, at 51-52. This is also true in Marx's critique on human rights, in which individual bourgeois (property) possession and accumulation is prioritised above the sociality of a common, universal bond (such as labour).
[22] Critchely, above n 1, at 99; Levinas, 'Transcendence and Height,' *BPW*, above n 19, at 14; Levinas, *TI*, *ibid*, at 42.

> of the exceptional place of man in the determinism of the real, opening up the right to a free will, thus receives a concrete characteristic and a content.[23]

Such rights present and enforce the subject of moral potential and autonomous consciousness abandoned from its alterity and the alterity of the other, alterity which (for Levinas) is the agitation which enlivens the personal uniqueness found in the respons-*ability* extended towards the other.

It is in this way that such rights of being present the autonomous individual of self-determination with, paradoxically, no distinction, with no spontaneous marks of self (individual) identity. This is seen, for example, where human distinctiveness (the marks of human alterity) is ignored in the *UDHR* — where there is "no distinction of any kind, such as race, colour, sex, language, religion, political or other opinion …" (Article Two). Here, in the empty abstract of the Kantian split in subjectivity, human *heteros* is erased, neutering all alterity through neutral categorisation and collectivity of the ontology of the individual self, and reducing the human subject to a nullity.[24] These ontological rights of the autonomous capacities of mastery, power and sovereignty of the subject are a (Lacanian) *illusion*, with no unique and distinctive mark of spontaneous subjectivity and individual human identity. Rather, such rights only speak to the universality of the empty symmetrical sociality of an egalitarian and alienated abstract "I."

In such rights of being, the dignity of man and moral *potentia* of the individual (*UDHR*, Preamble and Article One) are founded upon the exercise of the autonomous capacities of reasoned consciousness and intentional self-will, in the continual effort of autonomous self-realisation. Hence, such rights give dignity to the anxiety, struggle and power (to the desire) of self-presence and self-existence. In this way, such rights only go to "assure the ontological dignity of man, as though essence [the ontological essence of being] sufficed

---

[23] Levinas, E. 'The Rights of Man and Good Will,' *EN*, above n 6, at 133-134.
[24] Hutchens, B. *Levinas: A Guide for the Perplexed*. Continuum Press, New York, (2004), at 36-40. This is the false freedom upon which postmodernism and poststructuralism focus. This is the tension within choice — exercising one's will to create oneself but having this will narrowed by registers beyond one's own control. Refer to Hall, D. *Subjectivity: the New Critical Idiom* Routledge, Press, New York, (2004), at 1-16.

for dignity."[25] This is a dignity of being in which: "…Western thought, which, catching sight of the *abstract* man in men, proclaimed the absolute values [dignity] of the person … "[26] But such universality of the dignity of the ego-I, such egalitarianism of symmetrical inter-subjectivity in the sociality of ontological signification, only assists in veiling the potential violence of Hobbes's war of ego against ego in the individual's struggle "to be:" "Universality and egalitarian law results from the conflicts in which one primitive egoism opposes another."[27] This is the violence of each individual's effort of being clashing with another equal individual's effort of being, the violence of reducing the alterity of otherness into the economy of the Same and the coincidence of self for the service of self.

A corollary issue which stems from these rights of being is how freedom is conceptualised. Freedom here is the freedom "to be," freedom orientated around the *logocentrism* of the ontological presence and powers of being. This is freedom found in the exercise of effort in the struggle for individual self-realisation and self-determination:

> The subject is "for itself" — it represents itself and knows itself as long as it is. But in knowing or representing itself it possesses itself, dominates itself, extends its identity to what of itself comes to refute this identity. This imperialism of the Same is the whole of essence of freedom.[28]

This is the freedom of alienated and autonomous individual power. This is a freedom of self power (self propulsion and preservation) in the name of the self. It is this focus on being, this freedom of being, which Levinas sees as the obsession of Western ontological philosophy "from Parmenides to Heidegger."[29] As Critchley suggests:

---

[25] Levinas, 'Essence and Disinterestedness,' *BPW*, above n 19, at 125.
[26] Levinas, 'Meaning and Sense,' *BPW*, *ibid*, at 58.
[27] Levinas, 'Transcendence and Height,' *BPW*, *ibid*, at 14.
[28] Levinas, *TI*, above n 21, at 87.
[29] Critchley, S. *The Ethics of Deconstruction: Derrida and Levinas*. Edinburgh University Press, Edinburgh, (1999), at 5, 158. This idea that such rights are focussed on self power and the right to have power is also shared by Foucault. Refer to Foucault, *Power/Knowledge*, above n 4, and Foucault, *Society Must be Defended*, above n 4.

> Liberty [in this tradition] is simply the assurance that no otherness will hinder or prevent the Same and that each *sortie* into alterity will return to self bearing the prize of comprehension … [in which] nothing is hidden.[30]

With such powers "to be," with such freedoms "to be" and the right to such powers and freedoms, the individual is portrayed as isolated and self-dependent — alienated and autonomous from other human subjects.

But such a freedom is not really a freedom, but rather, confuses the effort and struggle "to be" with the freedom of being.[31] It grounds freedom in the individual's continuous struggle for power and independence in order to possess enough freedom to secure self-existence, against the subject's inevitable *in*-dependence in the corporal world:

> As a "means" and "possibility" exercised in thinking and doing [in noetic knowledge and grasping], freedom necessarily manifests itself as a form of power over the other than oneself. … Yet at the same time, freedom is an infinite desire for the ever-greater power, fuelled by the secret hope for complete independence and mastery over all. … Freedom is always experienced as an insatiable drive for growth and lust for expansion, a continuous effort to broaden one's own capacity and power.[32]

The paradox is, as discussed above in the Chapter Six, '*Levinas and the Violence of the Self,*' that the subject fixated on its own presence of being, *is not free*, but rather, is trapped within the limits of its own ontological signification of being: "… the *I* always has one foot caught in its own existence … man is conceived of as an "I" or as a citizen — but never in the irreducible originality of his alterity … "[33] Like Lacan, for Levinas, the desire which the alterity of the other agitates to move "beyond the failure of being" is unending.[34] Thus, the individual can never have enough freedom in its struggle "to be." The human subject can never have enough rights and freedoms to aid its always

---

[30] Critchley, *Ethics of Deconstructions*, above n 29, at 6.
[31] Cornell, above n 2, at 179.
[32] Burggraeve, above n 18, at 55.
[33] Levinas, 'Transcendence and Height,' *BPW*, above n 19, at 14. This reflects the paradox of being in its struggle against not being, in which the ego-I of self consciousness cannot escape its own self-referentiality. Refer to Chapter Six above, '*Levinas and the Violence of the Self*.'
[34] Purcell, M. *Levinas and Theology*. Cambridge University Press, Cambridge, (2006), at 107.

and ongoing effort of being.[35] Hence, just as Lacan's unfulfillable unconscious and libidinal desire motivates a continual demand for the *objet petite a* of rights, so too for Levinas the individual subject can never escape its own (failed) presence of being and, hence, claims more and more of these rights in its struggle "to be."

Thus, in these ontological rights focussed on the endless effort "to be," there is only freedom by degrees, a degree of personal agency of individual identification and subjective heterogeneity — rights of/over the *dominion of personal identity.* This is the space of the processes of individual subjectification and Butler's *resignification,* in which the subject takes personal action over itself in claiming its rights and freedoms of being, claiming the symbols of rights for the ontological signification of being. This is the terrain of (subjective) resistance against totalisation from the other, which our contemporary human rights defend.[36] However, this is freedom limited to the capacity of self in the struggle for self. This is freedom of the individual agency exemplified in postmodern identify politics — the politics of equal recognition for the (socio-political) significations of others in the ontology of the Same, within the socio-political symmetrical collective of autonomous being:

> The "I" is not a being which always remains the same, but is the being whose existing consists in identifying itself, in recovering its identity throughout all that happens to it. It is the primal identity, the primordial work of identification. The "I" is identical in its very alterations. … The universal identity in which the heterogenous can be embraced has the ossature of a subject, of the first person.[37]

In this way, these rights have already reduced the heterogeneity of the infinity of alterity and the ethics of otherness to the *genus* of Sameness and the signification of being. This freedom, enchained to being and the ontology of the individual-self, does not enable the subject to resist neutralization — nor does it embolden an inter-subjective ethic towards others. Rather, this freedom merely reinforces the subject-of-self under the broad maxim

---

[35] Levinas, *DHDA* at 179-182, in Burggraeve, above n 18, at 57.
[36] This is the terrain of conscious choice, limited within the preceding bounds of the "unchosen" ethical posture towards proximity expressed within the pre-original ethical-I of the otherwise-than-being of subjectivity. Refer Levinas, *TI*, above n 21, at 218-19.
[37] Levinas, *TI*, *ibid*, at 36.

that being free is an aspect of being "an individual being amongst other autonomous beings."[38]

It is in this reduction of the alterity of otherness in human identity to the ontological signification of being, that such liberal rights lose there radical transformative potential. They are *evolutionary rights* in that they evolve, expand and hegemonise the emancipatory project of liberal humanism, in that they spread socio-political signification of the *genus* of the autonomous individual of conscious capacities. The globalisation of liberal democracy's civil and political rights evinces such expansion. They represent a continuation of a distributive justice, an equal distribution of proportional shares in an already established system of the ontological aspiration of individual autonomy and, thus, they maintain the privilege of the established *logocentrism* of the presence of being and the power "to be" of individual self-sovereignty.[39] In this way such rights defer the *transformative potential* of alterity by limiting the infinity of alterity and the non-calculability of otherness to an equal access to the symbolic significations of autonomous, individual being.[40] Such symbolic *restylisation* affirms the hierarchies of signification and the powers of being, with the participation of difference limited within the sociality of the Same socio-political practices and protections, under the singular regulatory principle of the ontological re-presentation of the individual's struggle of being.[41]

It is through this focus upon the ontological signification of the autonomous individual that, paradoxically, the sociality (the human family) of universal freedom, justice and peace is sought (*UDHR*, Preamble). But orientated around (limited by) the adequation to individual, autonomous presence of being, the justice and peace invoked by such rights is a utilitarian justice and peace. This is a pragmatic, *reasonable* justice and peace, which establishes mutual recognition and coercive co-existence from rights and duties shared equally amongst individuals of the Same, in the service of self. As Burggraeve suggests:

---

[38] Hutchens, above n 24, at 40.
[39] Cornell, above n 2, at 138.
[40] Cornell, *ibid*, at 138.
[41] Cornell, D. *Transformation: Recollective Imagination and Sexual Difference*. Routledge Press, New York, (1993), at 99-100.

> … it is clear how, "reasonable" peace, as a socio-political extension of the rational form of an animal insistence on one's own effort *"to be"* — now bent on one's own rights and freedoms — is only a very unstable peace, susceptible to great swings of power and shifting concentrations of interests. It is thus in fact an "armed peace" or even a "peaceful violence."[42]

Such rights inspire a sociality of a warring-peace, a peace of cold-war anxiety, which veils the shadow of potential violence against alterity in the ontological focus on the struggle of autonomous being. This is a politico-legal peace-of-convenience, in which peace and war are different sides of the same coin, a peace of a coinciding community of socio-political negotiations of legal rights and duties, in the service to self and benefit for self.[43] Thus, the social outcome of such a formulation of rights is a "respectful tolerance" for the legal equality of the other — citizen to citizen and Nation-State to Nation-State — kept "at a safe distance from each other," within a co-existence of reciprocal self-interest of autonomous existence.[44]

True, this peace of compromised deferred hostility between equal parties of ontological signification is better than outright war and open violence. The socio-political discourse of civil and political rights within the liberal tradition of our contemporary human rights is important for the protection against the aggression of totalisation. But from a Levinasian perspective, such a contractual peace reduces the aim of rights to the rationalisation of politico-legal negotiations and agreements.[45] In these negotiations there is always the energy of the ego-I to employ the autonomous capacities of consciousness in order to promote "my right/my interest" above the other. In such negotiations there is always the inequality in the political *cache* of power, prestige and position, which allows one side to organise, promote and voice themselves above the cries of others, which sees such rights facilitating established hierarchies of power, prestige and presence amongst the so-called egalitarianism of autonomous individuals and equal rights. Thus, from this fixation on the autonomous capacities of being in such liberal rights, there is established

---

[42] Levinas, *MT*, at 367, in Burggraeve, above n 18, at 79.
[43] Hanley, C. 'Levinas on Peace and War.' *Athena.* (2006), No. 2, 70-79, at 72.
[44] Burggraeve, *op cit*, at 75-79.
[45] Burggraeve, *ibid*, at 75.

(there is a justification for) a collective of law, a system of justice and politics without the primacy of a responsibility for-the-other, but rather, which incorporate and maintain the primacy of self *before* community, a politics of the Same in the serve to the self.

It is such service to self which de-prioritises (the ethical) responsibility for-the-other in favour for (the ontological) responsibility for the self. This is a responsibility to protect one's own individual freedom(s) in our autonomous effort "to be," within the symmetrical community of equal ontological signification.[46] Rights are the protection of the exercise of autonomous, reasoned and conscious self-will in the ontological effort of self-existence within the sociality of the Same and then, only secondly, are such rights exercised for-the-other:

> Consciousness is total freedom, or is ultimately that; and it is total equality, equality of self with self, but also equality to the extent that, for consciousness, responsibility is always strictly measured in terms of freedom [of self] and thus always limited [to the self].[47]

This is responsibility, these are rights, which are, first and foremost, a guarantor (like Lacan's guarantor of the ideal Real) of the self as it intentions itself "to be." Then, and only as a secondary afterthought of convenience and legal agreement — in mutual recognition and self benefit, in order to mitigate the threat of the equivalent other — do these rights become a responsibility (a protection of care and consideration) for the other.[48]

In this way, such rights inspired by the ontological philosophy of autonomous, individual being, limit the ethical capacity within the liberal tradition of rights. Without Levinas's hither side, otherwise-than-being ethical creature of human identity, our contemporary

---

[46] There is a responsibility for-the-other of sorts in the liberal tradition o f human rights, but it is a responsibility of atomised and autonomous equal individuals of moral *potentia* (as per Kant). Thus, the responsibility in this sociality is still one of service to the self, the responsibility provoked by the benefit to the self in the protection of one's own rights and freedoms through co-existence with another's equal rights.
[47] Levinas, 'Substitution,' *BPW*, above n 19, at 82.
[48] Burggraeve, above n 18, at 40-45.

human rights' discourse only expresses and encapsulates the "half truth of being" (that is, the conscious, autonomous ego-I):[49]

> The order of politics … that inaugurates the social contract is neither the sufficient condition nor the necessary outcome of ethics. In its ethical position, the *I* is distinct both from the citizen of the City [the State], and from the individual who precedes all order in his natural egotism, but from whom political philosophy, since Hobbes, has tried to derive … the social or political order of the City.[50]

As discussed above in Chapter Two, '*The Power of Right in Contemporary Human Rights,'* this reduction (this loss) of the ethical is most notably experienced in the silence of the *UDHR*, within the gap between the ideality expressed in its Preamble and the Articles of civil and political rights thereafter. This is the no man's land of rights, the distance between ideality (the Real) and reality (the Symbolic), Kant's domain of reasoned self-will and Lacan's terrain of oscillating desire. For Levinas, this is the gap of forgetfulness, in which the alterity of the prevenient, pre-conscious other of infinite responsibility is lost for the sake of the ego-I: "In this forgetfulness, consciousness is pure egoism."[51]

> The interhuman perspective [the ethical inter-subjectivity of proximity] can subsist, but can also be lost, in the political order of the City where the Law establishes mutual obligations between citizens.[52]

It is in the traversing of this gap between aspirational autonomy and realistic sociality that the ethical potential of human rights and responsibility for-the-other are de-prioritised and covered-over by the narrowed civil and political rights and duties of a State's citizen

---

[49] Burggraeve, *ibid*, at 91. This reduction to and fixation upon civil and political right as the totalising theme and narrative of human right was reflected at the inception of our contemporary human rights discourse, at the 1948 launch of the *UDHR* itself, which saw a division between Western nations (promoting civil and political rights), Eastern block/former U.S.S.R nations (promoting social and economic rights) and Arabic nations (promoting cultural and community rights). This division continues today in the hierarchical division of rights: civil and political rights are the "first generation of rights," signifying their "primacy" in the rights discourse. Refer to Chapter Two above, '*The Power of Right in Contemporary Human Rights.'*

[50] Levinas, *EN*, above n 6, at 86.

[51] Levinas, 'Substitution,' *BPW*, above n 19, at 95.

[52] Levinas, *EN*, *op cit*, at 86.

in service to itself within a symmetrical community of the Same. In this gap these become rights which limit the ethical to the negotiations between autonomous parties identified in an agreement (politico-legal Instruments and Conventions) — negotiations between Member-States, and between the citizen and its Member State (its Nation-State). This is the mutual obligation of conscious calculation: of reasoned, legal rights and duties; rights of reciprocity in service to the self — the "exchange of legal duties inscribed in impersonal laws" — in the "*I qua I* reciprocal benefiting relationship of equals."[53]

Thus, in moving from the ethic of an asymmetrical infinite alterity to an egalitarianism of socio-political signification of the (potential) autonomous presence of self, responsibility is exchanged for civil and political rights — restrictive rights against interference for the protection of the potential of the autonomous capacities of being. But for Levinas, there is danger in politics when it is uncoupled from the ethics of alterity:

> But politics left to itself [without the ethical subject] bears a tyranny within itself; it deforms the "I" and the other who have given rise to it, for it judges them according to universal rules [the "L"aw], and this as in *absentia*.[54]

Without the alterity of the ethical creature of the otherwise-than-being, without the asymmetrical inter-subjective proximity with alterity, our contemporary human rights' discourse is always already limited in its success to establish and maintain freedom, peace and justice for the other. Rights already fail the alterity of the other by the very nature of their founding orientation: by the very conceptualisation of autonomous individual identity within the liberal tradition of such rights; by the *logocentrism* of the socio-political signification of self in the service-to-self in its autonomous ontological struggle "to be."[55]

---

[53] Levinas, *EN*, *ibid*, at 86.
[54] Levinas, *TI*, above n 21, at 300.
[55] An additional concern here is that this power and politics in our contemporary human rights limit the entitlement and enjoyment in these rights to those individuals/groups with the greatest *cache* of the structural and discursive powers of/over governmentality, identity and knowledge — the powers of the socio-political. If rights are won through the political negotiations between the "parties of agreement" (citizens and States) then those with the greatest political skill and *presence* gain the greatest of their rights. In this way, as Marx argued, these are rights and freedoms of the inequalities of ontological and discursive

It is this service to self which directs such liberal rights of the struggle "to be" towards abstract universal laws of being, rather than into the contingencies of human sociality. Under the universality and egalitarianism of the symmetrical sociality of potential autonomous being, all humans are equal in the Sameness of the self and, thus, entitled to the Same (universal) politico-legal rights protecting the same potential of autonomous (self) conscious capacities of being. Hence, a set of universal politico-legal maxims is concretised into all the multifarious realities of the human subject. The risk here is that this universality of pre-given rights is experienced as the totality of rights, reducing ethical obligation to pre-conditioned regulatory rules, the blueprint of *potentia* of autonomous being.[56] This is the risk of our rights' discourse petrifying in its own totality, alienating the spontaneity of individual experience and the ethical alterity of otherness.

From a Levinasian point of view, such universal rules and rights limit the infinity of rights (the right of the other) which emerge from an ethics of alterity, through the infinite responsibility of self to other. As Manderson suggests:

> … [Levinasian] ethics insist on the necessity of our response to others, and the unique predicament of each such response, rather than attempting to reduce such responses to standard instances and norms of general application to whole

---

power. More generally, Foucault's argument on power and knowledge shows how these are rights and freedoms of the hierarchy of the ontology of power. (Refer to Foucault, *Power/Knowledge*, above n 4). Significantly, this reinforces the politics of the Same encapsulated within our contemporary human rights' discourse, as the State is the mirror of the self. The State is the *re*-presentation of the self on the grander, social and geo-political scale. Hence, the negotiation with the State for our human rights is also an agreement with our deepest, ideal self. Thus, we are back at potential violence, back at the potential reduction of an economy of return — the reduction of alterity into the circle of the Same.

[56] Refer to Terreblanche, above n 11, at 302 & 311. This is the inferred danger of totalitarian aspirations — even in the name of social ideals and the good. Many post WWII anti-humanists and post-humanists (such as those in post-structuralism, postmodernism and Levinas himself) contribute the horrors of WWII to such a doctrine of totalitarian idealism found in humanism. Even neo-humanists — the second and third generations of the Frankfurt School, such as Adorno and Habermas — recognise such inferred dangers in humanism and have moved away from such tendencies. Refer to Horkheimer, M. Adorno, T. *Dialectic of the Enlightenment*. (trans J. Cumming), Continuum Publishers, New York, (1969). However, unlike the post discourses, they still maintain a prioritisation and concentration of conscious presence. On the other hand, post-discourses focus on the other beyond the intent and will of the subject, placing the subject either under permanent erasure (post-structuralism), or under pre-foundational registers, such as Levinas's own ethics of alterity, or Lacan's unconscious desire.

> communities and capable of being largely settled in advanced. … We cannot *derive* ethics from universal first principles. Ethics *is* that first principle.[57]

For Levinas, like Marx, there are no ethical universal maxims (no Kantian universal Law or Lacanian ideal good/Real) for all in (and in all circumstances of) infinite alterity.[58] Such a focus only goes to defer ethical responsibility — *my* (personal) ethical response — to abstract principles, rather than opening *my* response to the unique alterity of the other in the shared neighbourhood of proximity. As Douzinas suggests:

> Reason reveals the structure of reality and subsumes individual cases and moral dilemmas to the imperative of universality which necessarily reduces the singularity [of responsibility] of the individual person.[59]

With this universalisation of human rights into pre-given, legal prescripts, consciousness is drawn away from the face-to-face ethical encounter with the other, and away from ethical responsibility for-the-other, and focused towards abstract principles serving the universal symmetry of self.

Such a focus on abstract egalitarianism aimed at the symmetrical sociality of all inspires a limited responsibility to pre-given principles (of rights) and pre-figured abstract ideals (of the presence of being), rather than to the unending contingencies of the corporal plight of others. One example of this human rights' logic of symmetrical universalisation is expressed by *The Guardian's* Jonathan Steele. His suggestion that peace talks between "professional Afghan" women and the Taliban are a "backward step" in which, "unfortunately, security is more important than human rights," signifies the gap between

---

[57] Manderson, D. *Proximity: Ethics and the Soul of Law*. McGill-Queens University Press, Quebec, (2006), at 8.
[58] Manderson, *ibid*, at 6-7. As discussed in the preceding Chapter Six, '*Proximity and Alterity: Otherness and Ethics,'* there is in Levinasian ethics a kind of categorical imperative — the law of alterity. Thus, Levinas is not against law and the lego-political *per se*. However, the point here is that, for Levinas, the State and laws must be grounded on the openness and ambiguity of alterity, and not concretise (nor prioritise in themselves) effort and power in the service of the Same and the ontology of being. I shall discuss further in Chapter Eight to follow.
[59] Douzinas, C. *The End of Human Rights*: *Critical Legal Thought at the Turn of the Century*. Hart Publishing, Oxford, (2000), at 347.

the aspiration of autonomous ideals and the empiricism of human alterity.[60] It is such human rights' reasoning which sees the West agitate for and hasten democratic elections in such places as Iraq and Afghanistan under the banner of "the peoples" human rights. In such cases the *principles* of human rights — expressed in the limits of socio-political significations of being — are trumpeted and fought for *before* the safety and security of the peoples' freedom, justice and peace are won, as if these principles were somehow separate from and more important than the corporal plight of the very people such rights are meant to protect. In our contemporary human rights' discourse, it has become this struggle for the security of these human rights *principles* which is the priority, rather than the ethical well-being of the people, through a responsibility for the contingency of the alterity of the other.[61]

No doubt, such rights in the service of abstract principles and ideals of autonomous being can be positively employed in the struggle against violence and reduction. For example, such principles are employed for the human rights of women under the Taliban. This is the type of struggle echoed in the above comments from Jonathan Steele. But paradoxically these same human rights — this same language of rights and freedom of being — are employed in Europe, in places such as France, in the debates around the public wearing of the *Burqa*.[62] In both cases, it is not the "rights of the other" which is

---

[60] Jonathan Steele, Australian Broadcasting Commission "Radio National" (frequency, 810AM Australia), *Late Line with Philip Adams*, aired 11/05/10. Steele's radio comments echo his article: *Afghanism: is it Time to Talk to the Taliban?* in which he states such talks are a "desperate desire for peace … over human rights." Refer to *The Guardian*: (www.guardian.co.uk/world/2010/may/04/afghanistan-taliban). Accessed 14/05/10.

[61] The defence of such ideal principles of rights is the hope that, through meeting the legal duties of our contemporary human rights' discourse and through the fulfilment of such human rights principles, the other is served. However, this reasoning sees the ethical duty and responsibility for the other become a wishful collateral consequence of the service to (Kantian) universal maxims, rather than a primary concern and focus in itself. As I shall outline in Chapter Eight, *'A Neighbourhood of Three and Justice for the Many,'* with the introduction of the third party — Levinas's term for the multitude of humanity — an ethics of alterity leads to a human rights of otherness in which the service of self is de-prioritised for the service of the other(s).

[62] Refer to France's Justice Minister's, Michèle Alliot-Marie, speech in defence of the laws in France, where she states "Living in the Republic with an uncovered face, is a question of *dignity and equality* [my emphasis]. It's a question of respecting our Republican principles." According to the bill, women wearing a *burqa* or *niqab* in France will face a €150 fine and will be forced to take "citizenship classes" — an obvious attempt by the State to hegemonise distinction to the circle of the Same. Anyone deemed guilty of forcing a woman to wear a full-face veil will face a €30,000 fine and one year in jail. (Refer to: *Bill Prohibiting Concealment of the Face — Speech by Michèle Alliot-Marie, Ministre d'Etat, Keeper of the*

being respected, it is not the corporal existence of women which is being engaged. Rather, in such debates it is the freedom and right of the universal ideality of the signification of "being woman," and the universal pre-given principles of rights attached to such a conceptual ideality, which is being respected, fought for and protected. In both cases woman are being repressed by laws; in both cases woman are being reduced to a conceptual ideality of a *genus* of what women "should" (ontologically) be and, hence, what rights they "should" (symbolically) have in order to express "who they are" as women. In both cases there is the exercise of the politics of the Same. A politics which does not engage with the alterity of women as other, but rather, which engages with its own self-reflectivity of a universal ideality of what it is to "freely *be*" female, projected onto the alterity of women.[63]

Ultimately, this uncoupling of the socio-political rights of the autonomous individual's interest "to be" from ethical responses to the daily struggles of real human beings, encourages a service to structure (the politics of the Same) above a (Levinasian) service-for-the-other. Such reduction of alterity potentially leads to an unquestioning and uncritical service to the conceptual and administrative establishment of certain systems and procedures (policies and laws) which aim to enforce certain universal pre-formed principles and ideality.[64] But in these systems of (potential) ideality there is the Lacanian

---

Seals, Minister of Justice and Freedom, at the Senate. (www.ambafrance-uk-otg/ Michèle-Alliot-Marie-s-speech-to.html), accesses 12/10/10.

[63] Levinasian ethics, on the other hand, would focus the ethical question, at least in the first instance, back on oneself. That is, rather than focus on styles in dress of the other, there is a preliminary question to ask myself (the ethical critique of one's own actions): *"am I repressing (murdering!) this other?"* The question of the *Burqa* (the covering of the face) is, however, a particularly Levinasian ethical dilemma. I would argue that, from a Levinasian perspective, both sides of the argument (to cover or not to cover the face) miss the point of (Levinasian) human subjectivity. Both are still limited within their own arguments, and limit the other to the face, to the ontological presence of being (the plasticity of the face). Both arguments are still obsessed with being (as opposed to being obsessed with the alterity of being). Both arguments offer freedom through an ontological action and signification (covering the face is a freedom of modesty, uncovering the face is a freedom to sexual/gender identity). Both establish and enforce a coercive law (though to different degrees) to fulfil this freedom *through* the ontology of the face. However, an ethics of alterity speaks to such reductions of ontological being and presence of self. "Levinasian freedom" is precisely the opposite of such freedom "of being." It is freedom of the subject *from* the limitations of being (from the limitation of the "plasticity of the face") through the invocation of the otherwise-than-being of human identity.

[64] As discusses in Chapter Two, *'The Power of Right in Contemporary Human Rights,'* this service to structure is seen in the recent (2009-2010) Australian debate regarding the possibility of a Federal Human Rights Legislation. Here human rights are only those rights already established and structural and

fantasy-of-reality of the ideal good and the possibility of the perversion of evil in the ethical good: of good-will becoming lost; of good intentions becoming engulfed and petrified[65] within anonymous and alienating systems, structures and procedures of rights and wrongs.[66]

It is in this service to self and the structures of self where the blind dangers of traditional philanthropy and altruism take root. Focussed on the potentiality of an autonomous presence of being and a symmetrical socio-polity of the effort "to be," liberal rights present principles and ideals of a service to self.[67] This is a service to self in which our pre-established principles of rights, as expressed within the *UDHR*, and the international structures and procedures of rights are those imbued by the singularity of a (Western, ontological, *logocentric*) conceptualisation of individual human identity and human freedom and, thus, offer the Same rights and freedoms — the Same response and responsibility — to the infinite alterity of otherness and unending contingencies of corporality. These are rights which *return-back-to us*, out of which *we* get something,

---

procedurally (administratively) entrenched: the civil and political rights of the citizen subject; the rights of ontological signification of being and the political symbolisation of the individual. Other so-called rights — for example, social and economic rights which speak directly to the corporal contingency of the human subject — are not considered "human enough" or "right enough" to be included. Refer to The Brennan Report, (http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report), accessed 20/07/10; and Kirby, M. 'Human Rights Protection in Australia: Why Not?' *Murdoch University, Annual Human Rights Forum*, inaugural lecture. (www.murdooch.edu.au/document./PDF-Document/SPEECH_MURDOCH_MDK_HUMAN_RIGHTS_FORUM_21_10_09) accessed 20/7/10.

[65] The State acting in this means of petrifaction is what Levinas terms the pagan State, inferring the pagan state of self-interest existence, similar to the pagan subject discussed in Chapter Six, '*Proximity and Alterity: Otherness and Ethic.*' As I shall outline in Chapter Eight, '*The Good State: Deliberative Democracy, Critical Justice and Ethical Alterity,*' Levinas counters the self-serving and stale pagan State with the good and ethical State of permanent revolution. This so called permanent revolution in the State is one way Levinas attempts to address the potential of law and politics (even when invoked by alterity) coalescing around themselves (serving themselves) in the administration of justice.

[66] Burggraeve, R. 'The Good and its Shadow: The View of Levinas on Human Rights as the Surpassing of Political Rationality.' *Human Rights Review*. (June 2005), Vol. 6, No. 2, 80-101, at 83-86. Levinas refers to Stalin's reign of terror as an example — an extreme — of violence emanating from the service of structure, the blind dogma of the ideologue. He also refers to Hitler as an example — an extreme— of the other violence, that of racism and hatred, the ego thematising and exercising mastery (noetic mastery) over the other. Thus, in one sense, Levinas's exposition into violence against the other uncovers two broad potential acts of violence: systemic and thematisation/categorisation, in the service of self. For Levinas, both Stalin and Hitler are not abnormal since the violence they exhibit against the other is a normal, human potentiality: we are all potentially racist; we all potentially service principles and structures and enact evil in the aim of good. However, it is the extent/extreme of Stalin's and Hitler's violence which was unusual and abnormal.

[67] Critchley, *Ethics of Deconstruction*, above n 29, at 110.

which makes *us* (Western Nations) feel good when engaged in such altruist activities, when we act upon the moral conscience of One and ask ourselves "*how do/would I feel?*"[68]

For Levinas, such a symmetrical approach in the universal egalitarianism of the ontological presence (right) of being is contradictory and unworkable. A community of freedom, equality, peace and justice cannot be won through the reduction of alterity in the struggle for individual, autonomous being and then negotiated *up* into a sociality of a mutual respect of coercive reciprocity, mediated through law and politics. Such politico-legal agreements do not avoid the inherent violence within the politics of the Same and the service to self, but rather, facilitate the reduction of alterity to a *potentia* of autonomous powers of being, through an ontological fixation of/on being:

> As one free man alongside another, the ego is still the "prince." And even if the ego shares that sovereignty equally with others, he nonetheless remains in power: there remains the possibility of stoning other free people, of criminal enmity towards individuals, of violence exercised one upon the other, and suffered one at the hands of the other.[69]

In this way, despite the altruism and ideal good, our contemporary human rights' discourse still promulgates an understanding of human identity in which only the privileged and powerful (the ones with the greatest *cache* of the conscious contrivances of the ontological signification of presence and power) — in commerce and knowledge, in wealth and position — gain the most agency (gain the most rights) for their own self-interest in their own struggle "to be."[70] Dignity, although it may be inherent in the abstract human identity and, thus universal, is not something experienced in the lives of the poor, the down trodden and exploited as, despite their rights to autonomous being and

---

[68] In the arguments for the "rights of others" (and for rights generally), rights' advocates are quite open about the "self-serving rewards" of human rights, that a human rights' system makes "us feel good about ourselves and presents us as more civilised/civil." Refer to Honour Justice Kirby in his advocacy for an Australian Commonwealth Human Rights Bill, in which he suggests that the "first" of a number of reasons why "we need" a Commonwealth Bill of Human Rights (narrowed to civil and political rights of the individual citizen) is because "it makes us feel good about ourselves and who we are." Refer to (www.abc.net.au/rn/bigideas/stories/2010/2953615.htm), audio accessed 20/7/2010.
[69] Levinas, *MB*, at 71, in Burggraeve, above n 18, at 80.
[70] Burggraeve, *ibid*, at 80.

universal symmetrical equality, they do not have the actual means (the actual power of presence) to win their right(s) and enjoy their dignity. Ultimately, for Levinas, despite the positive compromise of the "total war of ego against ego" which our contemporary human rights have achieved, liberal rights still presents an imagining of the subject, and of rights and laws, which hints at only a limited 'universal brotherhood of the human family of freedom, justice and peace' (as per the *UDHR*): a "humanism [and human rights] [only] of the proud."[71]

A Human Rights of Otherness: Rights Grounded in the Responsibility for-the-Other

For Levinas, the aim of human rights — the potential of an ethical sociality of freedom, peace and justice between people (as expressed in the *UDHR*) — must commence beyond the tradition of liberal humanism, which places the ontological self-interest of autonomous efforts of being above the responsibility for radical alterity in others. Rights founded upon the formal structures of individual, autonomous conscious capacities inherit the potential reduction of the other to the Same, even in an unifying collective, when such collectivity is inspired by a symmetrical inter-subjectivity of autonomous, rational capacities of being. Such an ego-I orientated ontology of rights directs the potency of rights away from the service to alterity and towards the service to self, in a politics of the Same — the administrative and bureaucratic structures of liberal rights hegemonising alterity into an inclusivity of One, the *genus* of ontological focus of individual, autonomous being.

In a human rights inspired by an ethics of alterity, the energy of being exercised in the service to self, is re-directed into the primary responsibility for-the-other. What this looks like and how this operates in law, justice and society is something Levinas attempts to address with his notion of the *third party* and the introduction of the many into the inter-subjective ethical proximity between the self and the face, which I explore in the next chapter below. But in this section, I wish to examine the ethical compass points of a *human rights of otherness*, animated by the prevenient responsibility owed to radical alterity. This is a human rights structurally (foundationally) recast by the animation of

[71] Levinas, *JG*, at 22, Burggraeve, *ibid*, at 80.

the one-on-one unique relationship of inter-subjective proximity between the subject and the face of the other. This is a re-imaging of human rights, before the adequation of all into a law and society of egalitarian symmetry. A human rights of otherness expresses the always already ethical mark of human identity, the pre-original openness to a superior other. This requires a reprioritisation in the split subject — a re-focussing on the otherwise-than-being of the ethical creature of pre-original (pre-ontological), asymmetrical inter-subjective proximity above the conscious capacities of the ego-I. Such a human rights of otherness extends beyond the politics of the Same, beyond the limits of the socio-political significations of the ontological presence of being, to always aim for the alterity of others and always challenge the reductive service to self.

To commence human rights from the inspiration of the Levinasian split subject of ethical alterity at first appears uncomfortable and illogical — it challenges the *centripetal direction* of our conscious reflectivity as such rights commence in service towards a responsibility for-the-other prior to a right of being in the effort for self. It is to recognise ethics as "first philosophy," ethics as the primary/primordial condition of human identity, upon which is founded the conscious subject of presence and self-will.[72] This is to imagine the genesis of human rights within the an-archic realm of the ethical creature of the otherwise-than-being of human identity, within the hither side of conscious intentionality:

> The unlimited responsibility in which I find myself comes from the *hither side* of my freedom, from the "anterior to every memory," an "ulterior to every accomplishment," from the non-present par excellence, the non-original, the anarchical, prior to or beyond essence. The responsibility for the other is the *locus* in which is situated the non-place of subjectivity.[73]

Such a possibility of a human rights of otherness begins in the "height" of the other over me, in the *curvature of the inter-subjective space* — the expression of the asymmetrical elevation between human beings.[74] It commences before conscious thematisation and

[72] Levinas, *TI*, above n 21, at 304.
[73] Levinas, 'Essence and Disinterestedness,' *BPW*, above n 19, at 117.
[74] Levinas, *TI*, *op cit*, at 291.

calculation of the other, in the distance of difference within the shared neighbourhood of inter-subjective proximity. Such human rights of otherness begin in the face of the other, in the always already personal respons-*ability* towards the alterity of otherness carried with the face and the primordial obligation owed to the other for awaking me into being. This begins rights counter-intuitively, it commences the freedom of the subject in the freedom of the co-existing neighbour of proximity, beyond subjective presence of being:

> Thought begins with the possibility of conceiving a freedom exterior to my own. To think a freedom exterior to my own is the first thought. It marks my very presence in the world.[75]

This is the anxiety and trauma of such an ethics of alterity and human rights of otherness: it challenges the ego-I of ontological signification to go beyond itself, the potential *trans-descendents* toward the ethical-I of human identity and the *unreasonable* demands of alterity caught between ego and ethic, self and other.[76]

Yet this ethics of alterity and the possible expression of a human rights of otherness is not the signification of the poststructuralist death of the subject. The (post) humanism of Levinas's "humanism of the other human subject"[77] is not aimed at destroying the freedom of the subject. Rather, it aims at transforming the conditions of such freedom: shifting the contingency of subjectivity from the "religiosity of self" to the affectivity of the inter-subjective other human subject who already stands before me and already invokes me into being. With the unmasking of self to the otherwise-than-being of human identity, there is a revelation of the inter-related face of the other behind and before the image of self:

> Is not that what the self emptying itself of itself would mean … When it is affected the ego is in the end affected only by itself … This transfer, other than interested, "otherwise than essence," is subjectivity itself … It is being divesting itself, emptying itself of its being, turning itself inside out, and if it can be put thus, the fact of "otherwise than being" … The self is through and through a

[75] Levinas, *EN*, above n 6, at 14.
[76] Derrida, J. 'Force of Law: the Mystical Foundation of Authority.' *Deconstruction and the Possibility of Justice.* (ed. D. Cornell, M. Rosenfield & D. Carlson), Routledge Press, New York, (1992), at 21-23.
[77] Critchely, *Ethics, Politics, Subjectivity*, above n 29, at 67; Levinas, *OTB*, above n 9, at 127-28.

> hostage, older than the ego, prior to principles. What is at stake for the self, in its being, is not to be. Beyond egoism and altruism it is the religiosity of the self. It is through the condition of being hostage that there can be in the world pity, compassion, pardon and proximity — even the little there is, even the simple "After you", sir … [78]

For Levinas, ethics, alterity and a human rights inspired by such themes, is the recognition that "Man, par excellence — the source of humanity — *is* the Other," that "The self, a hostage … [is] already substituted for the other."[79] It is through this recognition, through such an initial orientation of rights for-the-other before the freedom of self, that there is the potential of a sociality of freedom, justice and peace for all. A post-humanist ethic of alterity and postmodern rights of otherness do not aim at "annihilating the I," but rather, "bind[ing] it to the Other in an incomparable and unique way. … as if the entire fate of the Other was in its hands."[80]

Thus, the ethics of alterity and a human rights of otherness are not revolutionary acts aimed at denying the subject, society, law and governmentality. For Levinas, politics is necessary, the State is necessary, the protection of the individual in law is necessary. But an ethics of alterity tasks human rights as the energising infra-structure upon which society, law and governmentality rest, it enlivens rights with the pre-foundational inspirational and aspirational originality of law, justice and politics:[81]

> The goal of my communication was to insist on the irreplaceable function of the I in a world of peace, but it did not mean to dispute the role of the State and hierarchy … [however] … In order for things to work and in order for things to develop an equilibrium, it is absolutely necessary to affirm the infinite responsibility of each, for each, before each … Consequently, subjectivity is

---

[78] Levinas, *OTB*, *ibid*, at 111 & 117.
[79] Levinas, 'Transcendence and Height,' *BPW*, above n 19, at 14; Levinas, *OTB*, *ibid*, at 118.
[80] Levinas, 'Transcendence and Height,' *BPW*, *ibid*, at 17-18.
[81] Burggraeve, above n 18, at 151. Levinas's social revolution is always predicated by an inspiration of an ethics for the other. This inspiration is, thus, only the starting point for a potentially more open society, acting with care and consideration for each other. In this light, the revolution which Levinas seeks is not a violent over-throw of the State, but rather, an internal vigilance within the State for the other and an ethical treatment of the other. This is the mark of the good, open State in "permanent revolution." I shall discuss this in detail in Chapter Eight, '*The Good State: Deliberative Democracy, Critical Justice and Ethical Alterity.*'

> indispensable for assuring this very non-violence that the State searches for in equal measure … [82]

Alterity is the starting point. The human rights of alterity is the expression of the intrusion of the (pre-ontological) other into the presence of (ontological) being, the reminding invocation in the exercise of effort of the presence of being to the possibility of being for-the-other. Through the agitation of a human rights of otherness, responsibility is established as the beginning of society, in the unique singularity of the inter-subjective proximity of self and other, not the end point of autonomous self-reflection. Proximity and alterity, ethics and responsibility, are not the *supplementation* of a consciously contrived sociality of legal rights and duties, but rather, the *prefixation* upon which such sociality is established.

As such, the concept of rights within a human rights of otherness formally orientated around an ethics of alterity is radically different from our contemporary, liberal understanding of rights. Opposed to the contemporary notion of rights of mutual benefit of adequated, autonomous self-interest and powers "to be," a human rights of otherness commences with the (ethical) right of the other *over me*, in the infinite responsibility the self has towards the other, invoked in the prevenient proximity between self and other:

> For, in this extreme straightforwardness of the face and its expression, assignation and demand that concern the ego, that concern *me*. In this extreme straightforwardness — its right over me. … The right of the human is here, in this straightforwardness of exposition, of commandment and of assignment, a right more ancient than all conferment of dignity and every merit. The proximity of the neighbour — the peace of proximity — is the responsibility of the ego for the other.[83]

This alterity inspired human right of the other is inalienable not because it is animated by an inherent traits of being, but rather, because it emerges in the pre-original fabric of human identity.[84] This is human dignity not assumed in the ontology of self, but rather, evinced in the resistance of the overflow of alterity against the presence of being. This is

[82] Levinas, 'Transcendence and Height,' *BPW*, above n 19, at 23-24.
[83] Levinas, 'Peace and Proximity,' *BPW*, *ibid*, at 167.
[84] Burggraeve, above n, 18, at 104.

dignity in the merit of *my* personal effort exercised towards the right of the other and my unique respons-*ability* to the other:

> This charge is a supreme dignity of the unique. I am I in the sole measure that I am responsible, a non-interchangeable I, I can substitute myself for everyone, but no one can substitute himself for me.[85]

Hence, rights inspired by an ethics of alterity are rights, first and foremost, which express the infinite responsibility (and the uniqueness of human dignity) toward the pre-original alterity of the face who precedes me in the inter-subjective proximity with me, rather than a right of the autonomous powers of independent self-realisation.

It is through this inter-human rights action of responsibility for-the-other that the subject's freedoms and rights are found. An alterity orientated human right of otherness is first the right of the other through which, in inter-subjective proximity, there is the freedom and right of the self:

> My freedom and my rights, before manifesting themselves in my opposition to the freedom and rights of the other person, will manifest themselves in the form of responsibility, in human fraternity.[86]

This is the freedom and right of the self from being — a freedom of self to transcend from its own auto-affirmation, from its own limitations of potential violence in its efforts of being.[87] "Peace" is also found in this freedom and right. For Levinas, peace, freedom and human rights are synonyms for his central concept of responsibility for-the-other in service of the right of the other over me:[88]

> Thus this responsibility would be the very rationality of reason or its universality, a rationality of peace.

---

[85] Levinas, 'Ethics and Infinity,' *BPW*, above n 19, at 100-101.
[86] Levinas, 'Rights of Man and the Rights of the Other,' at 124-25, cited in Douzinas, above n 59, at 355.
[87] Levinas, 'Right of Man and the Right s of the Other,' at 124-125, cited in Douzinas, *ibid*, at 355.
[88] Burggraeve, above n 18, at 41.

> Peace as love of the neighbour, where it is not a matter of peace as pure rest that confirms one's identity but of always placing in question this very identity, its limitless freedom and its power.[89]

This is not "peace" of the "restful place of individual presence," peace as imagined as the idyllic outcome of self certitude and stability won in the struggle "to be." This is peace in the presence of the (ethical) effort towards the other. This is peace grounded in the pre-original neighbourhood of proximity between the inter-relating self and other, peace prior to conscious contrivance, legal enforcement and political powers: "peace independent then of belonging to a system, irreducible to a totality;" "peace as awakeness to the precariousness of the other."[90] This is not peace in the effort in self — the subject is never at rest, it is always called by the infinite responsibility for-the-other, in the other's right over me. The effort of responsibility is infinite in the face of Absolute alterity. The subject, prior to any conscious choice, is in constant openness towards and obligation under the prevenient other, without any balance of reciprocity or return.[91] Hence, this is peace in agitation, peace found in the oppressive effort of continual vigilance not to reduce the other into the circle of the Same.

It is in this inter-relatedness of proximity between me and the face that justice emerges. Justice begins, first and foremost, in personal, ethical, asymmetrical respons-*ability* towards the other, in the recognition of the infinite alterity of the other and the absolute obligation owed to the other:[92]

> The one for the other is not a deforming abstraction. In it justice is shown from the first; it is thus born from the signifyingness of signification, the one-for-the-other of signification … Justice is impossible without the one that renders it finding himself in proximity.[93]

---

[89] Levinas, *OTB*, above n 9, at 160; Levinas, 'Peace and Proximity,' *BPW*, above n 19, at 167.
[90] Levinas, 'Peace and Proximity,' *BPW*, *ibid*, at 165 & 167.
[91] Levinas, 'Peace and Proximity,' *BPW*, *ibid*, at 165-168. For Levinas, the subject is never at peace — even in its own effort of being there is no peace, as the struggle against not-being is continuous and unending. Hence, in one sense, the ethical choice for Levinas is one of determining how to exercise one's effort: in the ego-I, self-interested struggle for self; or in the ethical-I, responsibility for-the-other.
[92] Critchely, *Ethics, Politics, Subjectivity*, above n 29, at 99-100.
[93] Levinas, *OTB*, above n 9, at 159. As I shall outline in Chapter Eight, *'A Neighbourhood of Three and Justice for the Many,'* justice for Levinas requires the intervention of the third party — the multitude of all humanity. Justice is the distribution to all others of this ethical responsibility found between the subject

The systems and procedures which extend justice to all, the politics and law of equality between citizens and equity for all, gain foundational integrity and formulation within the inequality and dis-proportionality of the pre-original ethical relationship of proximity.[94] The system of justice, the decisions of justice enforced by law, gains its ethical integrity through the recognition of alterity. Responsibility for alterity, rights for-the-other, guide justice toward the service of the other.

Commencing in this freedom, peace and justice found in the disproportional responsibility aimed towards the proximity of radical alterity, the first right of a human rights of otherness is "*thou shall not kill*" — the prohibitive law "*thou shall not reduce the other to the presence of being*."[95] This is the "categorical imperative" of an ethics of alterity and rights for the other, the primary right for the radical otherness not to be reduced into the circle of the Same and the presence of being:

> A categorical imperative: without regard — so to speak — for any freely taken decision that would "justify" the responsibility; without regard for any *alibi*. An immemorial past, signified without ever having been present, signified on the basis of responsibility "for the other," in which obedience is the mode proper for listening to the commandment.[96]

This is the law inspired by a covenant *to* rather than a contract *with* the other, grounded within the inter-relational neighbourhood of prevenient proximity.[97] But significantly, this is not a coercive law. Despite the prevenient openness towards alterity prior to autonomous consciousness, consciousness still has the power of rational choice. As discussed in Chapter Six above, '*Proximity and Alterity: Otherness and Ethics,'* alterity holds a paradoxical vulnerable power — the hard-soft character of the face: strong in its prevenient provocation prior to all consciousness; but weak in its vulnerability before the

---

and the particular face-of-the-other. However, the point here is that, for Levinas, justice is always already, first and foremost, inspired by and rests upon the ethical responsibility invoked at this pre-original level of proximity between the subject and the other.

[94] Critchley, *Ethics of Deconstruction*, above n 29, at 233.

[95] Levinas, *TI*, above n 21, at 199.

[96] Levinas, *EN*, above n 6, at 148-49.

[97] Manderson, above n 57, at 13.

power of the presence of being. The prevenient strength of ethics means the subject is always burdened with the ethical responsibility toward the other, but ethics' weakness before the presence of being means that what the subject chooses is still its free choice: "The will is free to assume this [ethical] responsibility in whatever sense it likes; it is not free to refuse this responsibility itself; it is not free to ignore the meaningful world into which the face of the Other has introduced it."[98]

Beyond this imperative of alterity and this primary right of the other, a human rights of alterity resists the constriction of prescriptive legislation. Law and politics limit the beyondness of radical alterity and the overflow of ethical, infinite responsibility. As Critchley suggests:

> Ethics is not an obligation towards the other mediated through the formal and procedural universalisation of maxims … rather … ethics is lived as a corporal obligation to the other, an obligation whose form is sensibility … Ethics is a relation of sentient singularity prior to universalisation and rationality.[99]

Alterity is infinite, responsibility is unending, the multifarious nature of the other approaching and calling me across the threshold of proximity is unyielding. Ethics, justice and rights of the other serve the alterity of the other in the particularity of the face of the other and not in the universality of abstract human identity. To limit one's responsibility for-the-other to prescriptive rules and regulations is to deny the very nature of alterity. It is to limit the ethical debt owed to the other and reject the personal responsibility owed to such otherness.

---

[98] Levinas, *TI*, above n 21, at 218-19. As Derrida suggests: "Without the possibility of radical evil, of perjury, and of absolute crime, the is no responsibility, no freedom, no decision. Refer to Derrida, J. *Politics and Friendship.* (trans. G. Collins), Verso Press, London, (1997), at 219.

[99] Critchley, *Ethics of Deconstruction*, above n 29, at 180-82. Refer also to pages 255-59 above and the discussion on the "ethical capacity of rights." Levinas is not denying the necessity of law and, in fact, argues that laws are sourced from the ethical pre-original responsibility to order such responsibility into social arrangements. There are laws in an ethics of alterity, but laws are only valid to the degree that they are in the service of and remain open to alterity (to the other). I shall discuss this further in Chapter Eight, *'Deconstruction in the Decision: the Provocation of Rights in the Judgement of Law and Delivery of Justice.'*

Hence, an ethics of alterity and a right of otherness are not expressed in the enumerated lists of positive rights. Rather, ethics and rights in service of the other are signified in the openness for the expression of alterity, in the aiming towards, longing for and encircling of the other, without the adequation of alterity into the presence of being. The human rights of otherness challenge the presence (the effort) of being with the ethical *adjournment* in the grasping *sojourn(s)* of being.[100] Hence, the rights of the other are not signified in lists of rules, but rather, are expressed in the "forestalling and perpetual postponing" of conscious decisions and autonomous actions, animating a moment of hesitation in critical reflection for-the-other.[101] Such rights of the other in the service of alterity energise the effort of being into a vigilance towards the other, to protect the expression of alterity from the limitations, poverty, torture, violence, cruelty, exploitation and enslavement to being.[102]

Commencing in the personal obligation invoked by the asymmetrical inter-subjective proximity, a human rights of otherness, first and foremost, inspires a signification of "small goods" between the inter-human actions of everyday life. The ethics of alterity is expressed in the performance (the performative gestures) of good conscience toward my neighbour in proximity to me; the exercise of effort into concrete goodness (the effort of transition from free-will to good-will) of consideration, compassion and care for-the-other above the interest of self:[103]

> … worrying about the other, a spending without counting … A generosity without recompense, a love unconcerned with reciprocity, duty performed without the "salary" of a good-conscience-for-duty-preformed …"[104]

Such rights express themselves in the inter-personal moments such as *"after you sir;"* the stretching out of a hand when another falls; one's action in the face of injustice; weeping

[100] Hutchens, above n 24, at 41.
[101] Levinas, *TI*, above n 21, at 35.
[102] Levinas, *EN*, at 156, cited in Joldersma, above n 10, at 315.
[103] Burggraeve, above n 18, at 110.
[104] Levinas, *Outside the Subject*, at 87, cited in Veling, T. 'In the Name of Who? Levinas and the Other Side of Theology.' *Pacifica*. (October 1999), No. 12, 275-92, at 286-8.

at human horror.[105] These are the inter-human, ethical moments of the ethical-I exerting its ethical orientations towards the other, before and beyond any conscious contrivances and limitations of laws and politics, systems, regimes and structures. These are the *small miracles* testifying to something other and outside of human rationality and reason, which agitate the self-interested presence of being:

> Unbeaten, it undergoes the violence of evil, which, as small goodness, it can neither vanquish nor drive out. A little kindness going only from man to man, not crossing distances to the places where events and forces unfold! A remarkable utopia of the good or the secret of the beyond.[106]

The challenge from an ethic of alterity, the interrogation from a human rights of otherness, is to *me* in my personal life. Alterity and responsibility agitate my conscious to understand that in my decisions there is a choice between self and other, a choice which unavoidably burdens me. Beyond all political, legal and social obligations and minimum requirements of legal tolerance, there is always already an ethical choice. In my existence I take up food, water, space and resources, and in so doing take from the other.[107] The benefits of modernity — science, technology, globalisation and international trade — can be employed for self-promotion or in the service for others. Choices must be constantly made between my self-interest and the other's well-being.[108]

These small goods are the every day miracles signifying the radical generosity and hospitality inspired by alterity and invoked by a rights of otherness. Nothing of this ethical encounter and this human rights of otherness benefits the subject. My service to the right of the other, my gift-giving for-the-other, is without reciprocity, without exchange, receipt, mutual benefit or gratitude.[109] Such ethics of alterity, such rights of the other, are simply ingrained in the very nature of my human identity animated by a prevenient proximity and a pre-original (pre-ontological) responsibility. From such

---

[105] Levinas, *OTB*, above n 9, at 111 & 117.
[106] "Small goods" seems to be a term Levinas gains from Vassily Grossman's work. Refer to Levinas, *EN*, above n 6, at 199.
[107] Fryer, D. *The Intervention of the Other: Ethical Subjectivity in Levinas & Lacan.* Other Press, New York, (2004), at 178.
[108] Burggraeve, above n 18, at 109.
[109] Levinas, *OTB*, above n 9, at 111-112; and Derrida, *The Force of Law*, above n 76, at 23.

ethical gestures an inter-human, *in*-dependent fraternity takes shape — not a collectivity of a "brotherhood" reduced to the sociality of the Same,[110] but rather, a community of the prevenient heterogeneity of human identity of self and between self and other:

> … plurality as social proximity does not need to be gathered under the unity of the One, which no longer signifies a simple lack of coincidence, a pure and simple absence of unity … In sociality — which is no longer a simple aim but responsibility for the neighbour… that sociality is an irreducible excellence through its very plurality …[111]

This is not the traditional symmetrical sociality of egalitarian conscious equality. Rather, this is a sociality formulated around the pre-conscious ethical orientation towards the "prior to" ethical principle of inter-subjective proximity:

> The proximity of a neighbour is my responsibility for him; to approach is to be one's brother's keeper; to be one's brother's keeper is to be hostage. Immediacy is this. Responsibility does not come from fraternity, but fraternity denotes responsibility for the other, antecedent to my freedom.[112]

For Levinas, ethics is first philosophy because always already ethics come first, alterity precedes the self and a human rights of otherness challenge the ontological significations of self-interest with a pre-cursory responsibility for-the-other.

Conclusion

Both Levinas and Lacan challenge the liberal image of human identity within our contemporary human rights' discourse — the individual of autonomous conscious capacities directed towards independent self-assertion and presence of being. Both challenge such an image of identity with a pre-conscious split in subjectivity — a subject whose ontological limits and conscious capacities are always already scarred, wounded and left opened, by the intrusion of an-other beyond its conscious containment and

---

[110] This unity of the Same, unity of shared values and qualities, is the very foundation upon which our contemporary human rights' discourse rests, as expressed in the 'universal brotherhood of a human family of freedom, peace and justice' of the *UDHR*. This is the equality and equity of citizens of the Same inherent traits of being, with the Same entitlements, to the Same rights.
[111] Levinas, 'Transcendence and Height', *BPW*, above n 19, at 158-159.
[112] Levinas, 'God and Philosophy,' *BPW*, *ibid*, at 143.

control. But where Lacan leaves us in the hollowness of the lost Real, Levinas re-directs our attention towards the particularism of the face of the other human subject, with whom we share our everyday existence. Levinas's (post) humanism is a critical humanism for/of the other and inspires a human rights of otherness. With this, the ethics of alterity challenges the tradition of liberal humanism and our contemporary liberal rights, with a hospitality and generosity aimed towards the other, already before the conscious individual commences its calculations of autonomous self-assertion in the sociality of many. Commencing in the prevenience of proximity, Levinas's ethical demand is for *my* individual commitment to and effort towards an infinite responsibility for the particularism of the alterity of otherness standing before me in the face of the other, rather than settle for the minimum standard of mutual recognition advocated by political agreement and abstract legal rights.

From the pre-original ethical foundation of proximity and an infinite *responsibility for-the-other*, the disparities between a Levinasian human rights of otherness and our contemporary human rights' discourse are clear. Both begin with the same inspiration and aspirational goals — a sociality of freedom, justice and peace. However, both begin at opposite points of human subjectivity. Whereas our contemporary human rights begin with the self-conscious and autonomous "I," and the coincident collectivity of this autonomous individual, Levinas begins with (the face of) the other and in the *heteros* of inter-subjective alterity. Whereas liberal rights begin in the strength of autonomous freedoms and powers of self-determination, Levinas begins in the vulnerability (the openness) of a pre-original debt of responsibility for-the-other. And whereas liberal rights grounds freedom and rights in the conscious contrivances of law and politics, procedures and State, Levinas's rights of the other commence in the personal mark of ethical subjectivity, pre-conscious and pre-foundational. From these divergent starting points, Levinas inverts the formal orientation and direction of human rights, from which the shared goal of a sociality of all is experienced through the encircling of the ethical *heteros* of human identity and personal inter-subjectivity, prior to and in placement of a universality of egalitarian capacities of individual consciousness and will.

Yet beyond this asymmetrical, personal inter-subjectivity, there is concern over the social efficacy and politico-legal implications of such ethics. The pre-foundational ethics of alterity may inspire law and politics of social, intersubjective cohesion, but it is *through* the structures of law and politics that an ethical society takes shape. Hence, how this intimate and infinite responsibility towards the other translates into the structural sociality of politics, law and justice amongst a community of many is a critical challenge to the potential *praxis* of an ethic of alterity. Yet ethics of infinite responsibility for-the-other upon which Levinas commences his renewal of human identity and sociality is extreme in its personal generosity and sacrifice towards the other. The ethical subject's burden of infinite responsibility is a "superhuman task," limited to the "exemplary existence of saints and martyrs."[113] The ethical subject, the moral being, is the marvel of creation and the miracle of humanity, impossible to fully attain.[114] Thus, the potential weakness of Levinasian ethics — that such an Absolute alterity of ethical subjectivity presents an empty subject —(a subject always beyond itself) which, thus, potentially remains transfixed in its own empty abstractions of personal, radical generosity in the one-on-one asymmetrical inter-subjectivity between self and other. Paradoxically, Levinas's ethical subject (as with Lacan's) exhibits the same potential weakness as reflected in the Kantian split subject of autonomous consciousness. In this way, the daily *praxis* of an ethic of alterity, and a human rights of otherness, potentially offers little to the politico-legal regimes of sociality beyond the "small goods" of personal generosity and a charity of one.

It is in response to this critique that Levinas introduces the notion of the third party, which I explore in the next chapter. Also grounded in proximity, the third party represents the multiplicity of many human others, which propels ethics beyond a prevenient infinite responsibility towards the single other and into the potentiality of a

---

[113] Levinas, E. 'The Trace of the Other.' *Deconstruction in Context*. (ed. M. Taylor), University of Chicago Press, Chicago, (1986), at 351-53, in Veling, above n 104, at 288-89.

[114] Levinas, *TI*, above n 21, at 89. In one sense both Lacan and Levinas present a failed subject. That is, both present the impossibility of the subject affected by an intrusion/split beyond its conscious capacities and control. However, for both thinkers, such a failure is positive in that, it is in the failure that the other is not reduced into the circle of the Same. Hence, such ethics of such an alterity beyond being could be called *ethics of failure*.

social justice and an ethico-political signification accounting for all. It is the third party which confronts the subject to extend (to manage) its infinite responsibility beyond the face of the other, and towards all others. In this way, with the introduction of the third party, infinite responsibility in the pre-original relationship of proximity to the other becomes a distributive and calculating justice for all. It is through the third party that there is the possibility of transforming the small goodness between human subjects into a conscious effort towards a sociality of justice, law and politics, which is open to difference and responsive to all. In this way, the ethics of alterity between the self and the face is just the *starting point*. It represents not only of a new conceptualisation of the human subject — a post-humanism for a re-imagined human rights of otherness — but also, a re-newed social perspective always aiming towards an aspirational responsibility and socio-political duty to all others.

****

Part B Chapter Eight

Ethics and Beyond: Human Rights, Law and Justice of the Many

Introduction

As outlined in Chapter Seven, with the uncovering of the anterior ethical-I of human identity, Levinas focuses his exploration of ethics from a radically different position than the traditional subjectivity found in our contemporary human rights' discourse. Levinas's ethics (like Lacan's) is an ethics of a non-identity — the (pre-conscious) split subject missing a certain presence in the conscious experience of being (in the limits of ontological signification), but nonetheless, always experienced in the present as a rupture, shock and challenge from an enigmatic disturbance of being. This is an ethics of alterity which potentially reinvigorates human rights with a unyielding effort of personal engagement in ethical consideration for the particularity of the other human subject, beyond the accepted minimum legal requirements of egalitarian co-existence expressed within our contemporary human rights' discourse.

But for Levinas, the ethics of alterity is the potential inspiration for not only the transformation of the individual subject, but also, in the sociality of community at large. The anterior, ethical face-to-face encounter in proximity is the pre-cursory foundations upon which a potentially greater socio-political collectivity takes root: "it is through the condition of being a hostage that there can be pity, compassion, pardon, and proximity in the world."[1] It is in this way that the non-identity of the ethical split subject may have an affective impact on the systems of law, justice and politics in the structuration of human sociality. This is the (utopian) vision of an ethical justice for all — an *ethico-political* collectivity orientated around the openness of responsibility for-the-other, above the narrowed politico-legal rights of self.[2]

---

[1] Levinas, 'Substitution,' (1968 edition), in Critchley, S. *Ethics, Politics, Subjectivity: Essays on Derrida, Levinas and Contemporary French Thought.* Verso Press, London, (1999), at 183.

[2] Similar to our contemporary human rights, Levinas's post-humanism for the other human subject explores the possibility of a utopian ideality for all: "… men who, before all loans, have debts, owe their fellowman, are responsible — chosen and unique — and in this responsibility want peace, justice, reason. Utopia! This way of understanding the meaning of a human — the very dis-inter-estedness of their being …" Refer to Levinas, E. *Levinas, Entre Nous: Thinking of the Other*, (trans. M.B. Smith and B. Harshav), Continuum

However this movement from subject to community, between the ethical to the political, is a point of tension not only amongst the subject, the other and the greater community, but also, for Levinas himself: "… how do you expect me to move from the absolute splendours of *hesed*, of charity, to an analysis of the state procedures at work in our democracies?"[3] As discussed in Chapter Seven, "*A Human Rights of Otherness: Rights Grounded in the Responsibility for-the-Other,"* for Levinas, ethics is a personal, infinite responsibility inspired by the face, an ethic signified in hesitation. It is an ethics of the rupture and, in this shock, an ethic of equivocation and indecision. Such ethics is the moment of adjournment between the power of self and the interest of self by the intrusion of the other. It is expressed (at least in its initiation) in the "small goods" of personal responsibility for the particularity of the unique other. However, Derrida, like many, questions the possibility of generalising/socialising this particularity of face-to-face responsibility and open hospitality.[4] Justice and a just politics in the social realm of community *must* act among many, and decisions must be *made* in contemplation of a multitude.[5]

Press, London, (1998), at 200. Some commentators, such as Burggraeve, suggest that this shift from the singularity of the relationship between the subject and the face, to the multiplicity of all, is Levinas's attempt at building of a *new Athens:* the bridging of Western ontology and Jewish transcendence, in which ontological reason is built upon the foundations of Judaic metaphysics. Refer to Burggraeve, R. *The Wisdom of Love in the Service of Love: Emmanuel Levinas on Justice, Peace and Human Rights*. (trans. J. Bloechl), Marquette University Press, Milwaukee, (2002), at 123.

[3] Levinas, E. 'In the Name of the Other.' *Is it Righteous to Be? Interviews with Emmanuel Levinas.* (ed. J. Robbins), Stanford University Press, Stanford, (2001), at 195.

[4] There are a number of texts in which Derrida interrogates Levinas, including: Derrida, J. 'Violence and Metaphysics.' *Writing and Difference* (trans. A. Bass), Routledge Press, New York, (1978); Derrida, J. *Adieu to Emmanuel Levinas* (trans. P.A. Brault and M. Nass), Stanford University Press, Stanford, (1989); Derrida, J. 'Force of Law: the Mystical Foundation of Authority.' *Deconstruction and the Possibility of Justice.* (ed. D. Cornell, M. Rosenfield and D. Carlson), Routledge Press, New York, (1992), 3-67. For Derrida, whilst acknowledging the integrity of an ethics of alterity, such an ethic still requires a phenomenological symmetry — a respect of the being of the other, recognition of the other as ego — or else, like Lacan's Real, alterity always already remains excluded and, thus, perpetuates violence against the other. Such critiques are noticeably directed toward Levinas's first major work, *Totality and Infinity* (trans. A. Lingis), Duquesne University Press, Pittsburgh, (1996). It was such criticism which Levinas sought to address with his second major work, *Otherwise Than Being or Beyond Essence*. (trans. A. Lingis), Duquesne University Press, Pittsburgh, (1998), which seeks to reconcile the infinite responsibility of the pre-conscious alterity of proximity between the self and the face, with a distributive justice within the sociality and socio-political systemisation of the collective (Levinas's *third party*). For a detailed account of the intervention of Derrida into both Lacan and Levinas's work refer to Cornell, D. *The Philosophy of the Limit*. Routledge Press, New York, (1992).

[5] Loumansky, A. 'Levinas and the Possibility of Justice.' *Liverpool Law Review*. (2006), No. 27, 147-171, at 170. For a detailed analysis on some of the difficulties and ways of attempting to bring Levinas into

But for Levinas, the trauma of alterity is a "good trauma,"[6] for it is the intrusion of *heteros* which is the invocation of the subject into being. It is the animation of an ethical proximity of openness toward the other human subject and it is the potential challenge to the violence of the reduction of the other into the ontological signification of the self. This, in fact, is the signification of the ethical split subject — the self/other inter-subjectivity of proximity and ethical alterity, upon which is grounded the conscious contrivances and ontological significations of sociality. Hence, it is through this intrusion of alterity that Levinas attempts an ethico-political double act. (A just) polity is only valid through its orientation around the (personal) ethical responsibility of the subject amongst others:

> There are, if you will, tears that a State functionary … does not see, and can not see: the tears of the Other. In order for business to function well and run smoothly, it is absolutely necessary to affirm the infinite responsibility of everyone, for everyone, and to everyone. In such a situation (of socio-political order), there is need of individual consciences, for only they can see violence, the violence flowing from the effective functioning of Reason itself … Consequently, subjectivity (of the responsibility established ego) is indispensable for the achievement of this non-violence which the State (and every socio-political order) seeks … [7]

Despite some liberal interpretations of Levinas's ethics as an ethics of personal charitableness,[8] Levinas maintains the connection between the ethical and the political, the subject and the social. It is the ethics of alterity which is the spirit and justification of the State and a non-violent, non-totalitarian polity. It is the un-reasoned, mad mercies of our own dis-interestedness, which go beyond the administration of State power and the

---

politics and law refer to Manderson, D. *Proximity: Ethics and the Soul of Law.* McGill-Queens University Press, Quebec, (2006).

[6] Critchely, *Ethics, Politics, Subjectivity*, above n 1, at 195.

[7] Levinas, E. *EFP*, at 98, cited in Burggraeve, above n 2, at 176-77.

[8] Terreblanche, S. 'Todorov, Levinas and Anti-Totalitarian Humanism: A Perspective on Contemporary Utopian Though.' *HTS.* (2007), Vol. 63, No. 1, 301-25, at 310-11. This is the critique (or sometimes even the celebration) of Levinas by some liberals — that his ethics is merely a reinforcement of the political status quo, of liberal democracy and a private ethics exercised by private individuals which does not interfere or challenge the mechanicians of the State. Also refer to Batnitzky, L. 'Encountering the Modern Subject in Levinas.' *Yale French Studies*. (2004), No. 104, 6-21.

institutionalisation of politics, which sits as the (ethical) grounding upon which to continually critique, challenge and improve the State and its power.[9]

In this chapter I explore these greater social and political possibilities which emerge from Levinas's ethics of alterity and human rights of otherness. There are three sections in this chapter. The first section examines Levinas's notion of the "third party" — the collectivity of the multiplicity of the many which bridges the gap between ethics and politics. The third party is introduced into the relationship of proximity with the self and the other by the other itself. In the eyes of this third party "I am also the Other's Other and that I know that I am."[10] Hence, arbitration and measurement between parties is a necessity. This is justice — the distribution of the anterior, infinite responsibility amongst the sociality of community and which, thus, invokes law and politics to help mediate such ethically inspired justice within the collective. It is here where Levinas's ethical responsibility moves into the politico-legal, which is explored in the second and third sections of this chapter. Polity, founded on the pre-original ethics of alterity and provoked by the human rights of otherness, invigorates the possibility of the "good State" — the systemisation of the open justice of alterity through legal and political structures. Animated by the spirit of alterity, the good State is and remains self-critical and flexible to ensure that the other is always served by an ethic which is always already first philosophy, to ensure that the radical non-presence of the alterity of otherness is not reduced or alienated by the presence of being within the sociality of the many. This places the State in a condition of "permanent revolution," in which the State and its political and legislative structures, administrations and procedures, are always renewed (in renewal) with and revitalised by an open and unending justice.

A Neighbourhood of Three and Justice for the Many

For Levinas, justice and politics are inherent in the character of the ethics of alterity and the inter-subjective relationship of proximity between the self and other. This is because

[9] Burggraeve, above n 2, at, 166-175.
[10] Levinas, cited in Loumansky, above n 5, at 154.

the face-to-face (ethical) event of the self and the other takes place in the corporal reality of human existence, in which there are many other human subjects:

> Everything that takes place here "between us" concerns everyone, the face that looks at it places itself in the full light of the public order, even if I draw back from it to seek with the interlocutor the complicity of a private relation and a clandestinity.[11]

These many others between the self and the face are what Levinas terms "*le tiers":* the "third party." It is because of this third party that the larger social questions and goals of justice and politics arise within the ethics of alterity. This third party is introduced into the ethical relationship between the self and the other by the face of the other itself:

> … The epiphany of the face qua face opens up humanity. … The poor one, the stranger, presents himself as an equal. His equality within this essential poverty consists in referring to the *third party*, thus present at the encounter, … The presence of the face, the infinity of the Other, is a destituteness, a presence of the third party (that is, of the whole of humanity which looks at us).[12]

The face of the other, by its very nature, infers to "being other," to the otherness of the infinite multiplicity of others which is not the Same of the self and, hence, responsibility (and the rights of otherness) is always already invoked within preceding social relations with "other others." [13]

---

[11] Levinas, *TI*, above n 4, at 212.
[12] Levinas, *TI, ibid*, at 213.
[13] Note, as discussed in Chapter Six, '*The Face and Infinite Alterity,*' there is a heterogeneity with the face as it carries with it both the plasticity of being, but also, the enigma of the beyond being (the beyondness of ontological presence) of alterity. Likewise, there is a further heterogeneity of the face here, where the face carries both its own plasticity and alterity, *and also*, the alterity of all others: the *third party*. This preceding sociality of the human socio-political collective reflects Rousseau's (and Hegel's) thesis of the sociality (the inter-subjectivity) of humanity and, more significantly, of rights as well. That is, rights cannot be the rights of the autonomous individual as expressed within the liberal tradition of our contemporary human rights' discourse as the individual is always already within the sociality of community. However, as discussed in Chapter Seven, '*Levinas's Critique: Human Rights and the Ego-I,*' the distinction between Rousseau, Hegel and Levinas, is that Rousseau and Hegel refer to a *political* totality of *symmetrical sociality* — the "we" of unified commonality. On the other hand, Levinas — even at the conscious level of sociality, law and rights — maintains the *ethical* significance of the *asymmetrical quality* of inter-subjectivity (the prevenient other *over* me in proximity *with* me) and, hence, of the nature of rights also.

Hence, the third party does not represent a chronological movement between the infinite responsibility between the self and other and the sociality of the third party. The self does not develop in stages and sociality does not come after the encounter with the face and the intrusion of alterity.[14] Rather, in proximity with the face the self is always already in the multiplicity of its contextual social arrangements,[15] as the face is always already referring to the third party and a prior/coinciding sociality. Hence, with the third party, proximity is necessarily an *open* inter-subjectivity of the many and ethics is a *non-private* event. Infinite responsibility provoked by the other is immediately called into questioned by the third party. Hence, (personal) responsibility and (social) justice are simultaneous. The third party is parasitic upon the intrusion of the other. Justice and responsibility are different sides of the same coin — (social) justice is the reverse side of (inter-subjective) proximity.[16]

Thus, the neighbourhood of proximity — and the effort of ethics — is *not* limited to the immediate, most coincidental and most intimate others. True, the ethical posture of proximity is "a relationship with a singularity … it describes my relationship with the neighbour."[17] But this relationship of self and other is alienating and isolating and reveals how the wisdom of love of the ethics of alterity is a blind love[18] — a love (a responsibility and ethics) only going one way, a love monopolised by a particular, imminent neighbour. However, with the third party also animated in proximity the inter-humanness of self, other and the "other other" are all drawn together into the neighbourhood of all: "... the third party is other than the neighbour [the face], but also another neighbour [of the Self], and also a neighbour of the other, and not simply his

[14] Hutchens, B. *Levinas: A Guide for the Perplexed*. Continuum Press, New York, (2004), at 99-103.
[15] Hutchens, *ibid*, at 100. In fact, Hutchens suggests (against general readings of Levinas) that Levinas's justice precedes responsibility. Notwithstanding such an interpretation, the significance of the responsibility/justice duality in proximity is that it inverts traditional notions of justice attached to the essentialist human identity, that justice is the demand for individualist and self-interested rights. Refer to Hutchens, *ibid*, at 99-111.
[16] Ricoeur, P. & Escobar, M. 'A Reading of Emmanuel Levinas's Otherwise than Being or Beyond Being.' *Yale French Studies* (2004), No. 104, 82-99 at 94; Purcell, M. *Levinas and Theology*. Cambridge University Press, Cambridge, (2006), at 166.
[17] Levinas, E. 'Substitution.' *Basic Philosophical Writings* (ed. A. Peperzak, *et al*), Indiana University Press, Bloomington, (1996), at 81.
[18] Though this is not a selfish love, as the love/the giving from self and other is infinite.

equal [in its own alterity to the other]."[19] With the third party all are my neighbour and I am neighbour to all within the preceding (asymmetrical) social relations (self, other, third party, who are "not simply equal"), within the prevenience of proximity.

Proximity, therefore, and the responsibility for-the-other grounded in proximity, is not limited to a relationship measured by space or time, or a collectivity of similarity:

> It [proximity/responsibility] is the summoning of myself by the other, it is a responsibility toward those whom we do not even know. The relationship of proximity does not amount to any modality of distance or geometrical contiguity, nor the simple "representation" of the neighbour.[20]

Hence, with the third party introduced simultaneously into the neighbourhood of proximity, my personal responsibility extends from the singular to the universal. I am responsible for all: near and far, coinciding and radically distinct, past, present and future. I am in proximity to all, a social neighbour to all, and bear an ethical responsibility for all even before I exercise my conscious capacities of choice and will: "…every one of us is guilty before all (responsible for everyone else), for everyone and everything, and I more than others …"[21] I am answerable for all within the neighbourhood of proximity as the third party — humanity — haunts the relationship of the self and the other and, thus, challenges the responsibility therein.[22]

In this way, the pre-foundational infinite responsibility that the subject has for the other must disperse across all humanity and be exercised *for-all-others*. If not, if I focus solely on my immediate neighbour, I can cause potential unintended consequence upon the third:

> The third party, different from my fellowman, is also my fellowman. And he is also the fellowman of the fellowman … For me, it would be to fail my *first-*

[19] Levinas, *ND* at 57; in Burggraeve, above n 2, at 135.
[20] Levinas, 'Substitution,' *BPW*, above n 17, at 81.
[21] Levinas, quoting from Dostoyevsky, 'Truth of Disclosure and Truth of Testimony,' *BPW, ibid*, at 102. The alternative of "guilty" or "responsible for all" stems from the differences in translation from the Russian and into French and English respectively.
[22] Loumansky, above n 5, at 153.

> *personal responsibility* [my emphasis] — in my *pre-judicial responsibility* [my emphasis] with regard to the one and the other — fellowmen — were I to ignore the wrongs of the one toward the other because of this responsibility, prior to all judgement, of proximity.[23]

My responsibility to the third party in proximity to me is a *first-person* responsibility. It is a direct and immediate responsibility, which is the same responsibility as that which the self has towards the immediate other.[24] No matter how near or far, no matter how intimate or otherwise — in distance, time, space and coincidence — the other and the third are in the same, direct (ethical) social relationship with the self. Thus, responsibility aimed towards the third party is *not* a secondary after thought given to an "intruding extra" of the "left overs" of responsibility directed to the immediate other. With the third party "I am my brothers' keeper" and all are my brothers, "I am Samaritan to all," and my care and consideration (my responsibility) is synchronised for/to all.[25]

It is within this shared neighbourhood of proximity amongst the many of the third

---

[23] Levinas, *EN*, above n 2, at 167-68. One critique against Levinas is that, like other post-modern relativist meditations, it focuses too much on the acceptance of otherness so that it does not allow judgement of others and their actions. However, this critique misses the point about the third party, justice and law. With the third party in the space of proximity responsibility and judgement merge simultaneously and ethical judgement (inspired by responsibility) is the necessary shock to awaken consciousness and rationality. Levinas's ethics is an invocation to ethical judgement, not a relativist excuse not to judge.

[24] Burggraeve, above n 2, at 136. Note a number of things from this quote. Firstly, Levinas reminds us of the failures of blind love, of unidirectional, infinite responsibility monopolised between the self and the other (the face). Secondly, Levinas reminds us that the responsibility born from the ethical posture of proximity and now shared between all three parties of the self, the other and the third party is an anterior, pre-original responsibility prior to consciousness. Finally note, through the third party, there is the expansion of justice (of responsibility) to even the unintended consequences of our actions. Thus, I must consider the justice of my decisions and actions within the ethical reality of the neighbourhood of proximity in which I and all others exist, even those about whom I have no immediate consciousness. For example, my lifestyle decisions in Australia have an impact on those living in Africa; my decisions regarding my personal environmental waste and emissions, have an impact on those in the future.

[25] There is another *borromean knot* here, another holy trinity of ethical elements. Where Lacan overlaps the triad of *intra-subjective* development (the Real, the Imaginary and the Symbolic (refer to Chapter Three, '*The Topography of Self: the Borromean Knot of the Real, the Imaginary and the Symbolic'*), Levinas pulls together two knots of *inter-subjectivity.* The first borromean knot, as discussed in Chapter Six, page 226, footnote 55, is Levinas drawing together the self, the other, and god; and in this second knot there is the self, the other and the third party. But these two inter-subjective triads of ethical holiness are not distinct and separate, but rather, overlap and infer each other — for the space of proximity which opens up to the third party is also the space which opens unto the divinity and transcendence of god. Thus for Levinas, not only is ethics found in the proximity between the self and the other divine, but also, the justice engendered by the third party is godly. In this way, justice born out of the ethical responsibility for-the-other, and which is extended to the third party, is work which is "close to God" and work through which we move closer to god. Refer to Levinas, *TI*, above n 4, at 78.

party — of responsibility for the alterity of all — that judgement is grounded. This is a judgement not based upon self-interest — in proximity the self is always already open to the obligation of respons-*ability* for-the-other. Rather, this is judgement exercised in the service of alterity. In contra-distinction to the liberal tradition of our contemporary human rights' discourse, this is judgement orientated in regard to the wrongs-of-the-other (the reduction of alterity) and *not* the rights-of-self. This judgement is the outcome of the calculating, comparing and measuring in the distribution of my responsibility amongst the sociality of the many:

> [Judgement] doe not mean the taking account of possible wrongs I may have suffered at the hands of one or the other, and denying my dis-interestedness; it means not ignoring the suffering of the other, who falls to my responsibility.[26]

Judgement is my personal responsibility to the other, to come to their aid in the exercises and effort of my responsibility for them. Such judgement orientated around the pre-original responsibility for the other in pre-conscious proximity makes me part of the sociality of the third party, it is the invocation of social engagement. Before consciousness, judgement is already grounded in responsibility for the other and, in turn, grounds the aspirations of an egalitarian society — to judge and be judged by others in equal responsiveness to the alterity of each, asymmetrical other.[27]

Thus, a potential tension between the self and the other is caused by the third party as now my responsibility to the other must be exercised in consideration of the third party: "The Other and the third, my neighbours, contemporaries of one another, put distance between me and the other party."[28] The third party troubles responsibility, humanity is a disturbance to the singularity of the self/other relationship. Paradoxically, therefore, the third party is both an expansion of otherness but also a limit on my responsibility for otherness: "To be sure — but this is another theme — my responsibility for all can and has to manifest itself also in limiting itself."[29] With the third party, the other expands

[26] Levinas, *EN*, above n 2, at 168.
[27] Hutchens, above n 14, at 106.
[28] Levinas, *AE*, at 157, 200; in Burggraeve, above n 2, at 135
[29] Levinas, *OTB*, above n 4, at 128.

from the singularly unique face to the universality of all others. Yet, with this opening unto the third party, my infinite responsibility to the singularly unique other is potentially re-directed to all others within the neighbourhood of proximity. My judgement of consideration and care takes into account the sociality of all: "Only the hunger of the third limits the rights of the Other [the right of the immediate other to the infinite responsibility I have for-the-other]."[30]

This multiplication of responsibility for-the-other across the collection of all others is the mark of justice. This is a (pre) social justice which commences in the recognition of the (prevenient) infinite responsibility before the singularity of the other in community with the multiplicity of the third party:

> My relationship with the other as neighbour gives meaning to my relations with all others … In it justice is shown from the first, it is thus born from the signifyingness of signification, the-one-for-the-other, signification … [31]

Thus paradoxically, justice commences in the recognition of the uniqueness of the face and yet penetrates "behind the unique singularities of the other"[32] in order to fulfil one's (ethical) responsibility to all others. Each one of these others bears their own singularity and uniqueness — their own alterity. They are a collective, but a collective in/of alterity, without reduction to the Same, a collectivity of asymmetrical sociality.[33] In proximity to the alterity of all, I am obliged to exercise my judgement in consideration for all.

In this way, emerging from the imminence of an ethic of infinite responsibility for-the-other, the third party introduces the agitation for a universal justice for-all-others. In this sense, justice is the social signification, the modality of *praxis*, of the ethics of alterity — in service, not for self-interest and the presence of being, but rather, for the alterity of otherness:

---

[30] Levinas, *DL*, at xiv, 12; in Burggraeve, *op cit*, at 136.
[31] Levinas, *OTB*, *op cit*, at 158.
[32] Levinas, *EN*, above n 2, at 198.
[33] Wolcher, L. 'Ethics, Justice, and Suffering in the Thought of Levinas: the Problem of the Passage.' *Law and Critique*. (2003), No. 14, 93-116, at 107.

> It is in the name of that responsibility for the other, in the name of that mercy … that the entire discourse of justice is set in motion … in which, in an ethical dis-inter-estedness … the inter-ested effort of brute being persevering in being is suspended.[34]

With the third party, the prevenience of proximity and absolutism of alterity potentially transforms into a social justice for all, in which my pre-cursory ethical obligation becomes inspiration for a sociality of justice.[35] With the third party, the infinite responsibility toward the unique other emerges into a 'rational response' and a 'rationalised responsibility,' a balanced, calculated and deliberative justice for all:[36]

> Here, beginning the third person, is the proximity of a human plurality. Who, in this plurality, comes first? This is the time and place of the birth of the question: of a demand for justice! This is the obligation to compare unique and incomparable others; this is the moment of knowledge and, henceforth, of an objective beyond or on the hither side of the nakedness of the face; this is the moment of consciousness and intentionality.[37]

This accounting of the multiplicity of unique others is the *validation* of a just decision across the sociality of the many, which distributes one's infinite responsibility amongst the irreducible alterity of all others. This is the aim of justice— the attempted peaceful resolution of the potential conflicts amongst disparate people and interests to whom I bear responsibility, with whom I am in proximity.[38]

It is this calculating movement of justice and judgement which signifies the emergence of consciousness. The provocation to justice is the provocation to consciousness, for consciousness is the capacity of reason and rationalisation utilised in the mediation of justice and judgement:

> The fact that the other, my neighbour, is also a third party in respect to another, who is also a neighbour, is the birth of thought, consciousness, justice and philosophy … If proximity ordered to me only the other alone, there would have

[34] Levinas, *EN, op cit*, at 198-99.
[35] Levinas, *OTB*, above n 4, at 190.
[36] Burggraeve, above n 2, at 139-41.
[37] Levinas, *EN*, at 166-76, cited in Wolcher, above n 33, at 107.
[38] Hutchens, above n 14, at 99.

> not been any problem, in even the most general sense of the term. A question would not have been born nor conscious, nor self-consciousness.[39]

Thus, significantly, the prevenient proximity between the self and the other reside prior to consciousness (as explained in Chapter Seven above), but alone proximity does *not* inspire consciousness. Rather, it is the need for justice — the disturbance from the third party — which inspires reason and consciousness, in order to undertake the calculations and deliberations (in order to fulfil one's ethical duty to all) of the distribution of the responsibility animated by alterity.

It is in these calculations of "comparing the incomparable" that there is a potential for equity amongst the neighbourhood of alterity. This is *not* the equality of an egalitarian, coinciding sociality of One. Rather, this is an equity of justice which paradoxically emerges from the inequality of the self and other, a symmetry of sociality of collective justice founded upon the asymmetrical ethical obligation of responsibility.[40] The potential for the equitable consideration (responsibility) of social justice unfolds in the mediation of the pre-original infinite responsibility to all otherness:

> [Justice] calls for judgement and comparison, a compassion of what is in principle incomparable, for every being is unique, every other unique. In that necessity of being concerned with justice that idea of equity appears … The equality of all is borne by my inequality, the surplus of my duties over my rights. The forgetting of self moves justice.[41]

---

[39] Levinas, *OTB*, above n 4, at 128 & 157.

[40] This distinction from the equality of all as equal subjects means that, in service of an ethics of the other and responsibility for the other, sometimes in the particularity of the other, justice warrants an inequitable approach to the parties involved — but only in service of the ethical asymmetry in proximity and the ethical-justice of alterity. An example of this is seen in "positive discrimination." The key distinction of this ethical justice of alterity and proximity is *not* an equality of the ontological significance of and between *singular* (atomised) citizen-subjects (the reduction to the Same), but rather, an equitable *distribution* (of responsibility) between citizens which gives "care and consideration" to the *particularity* of the other. As Marx suggests, "From each according to his ability, to each according to his needs!" Refer to Marx, K. 'Critique of the Gotha Program.' *The Marx-Engels Reader*. (ed. R. Tucker), Norton & Co, New York, (1978), at 531. Also refer to Chapter One above, '*Marx and the Critique from within*,' at 42-50.

[41] Levinas, *OTB, op cit*, at 159; Levinas, *EN*, 1998, cited in Wolcher, above n 33, at 107. It is this equity of all to the same responsibility which invokes procedures of objectivity in the justice system — represented by the traditional blindfold worn by the Goddess of Justice. However, a Levinasian sense of justice would have justice un-blindfolded. As I shall discuss below in the section '*Deconstruction in the Decision: the Provocation of Rights in the Judgement of Law and Delivery of Justice,'* justice and judgement should not be a process whereby alterity and difference is covered over, but rather, a process in which the alterity of

This justice in service of an equity inspired by (an ethic of) infinite responsibility for alterity attempts to mediate the "correction of the asymmetry of proximity in which the face is looked at."[42] This is the equality of/to the dis-interestedness of being — the forgetting of self — extending through to all in proximity, near and far, immediate and distant. This is an equity animated within the significations of ethical, responsive judgement, the judging and being judged in equal responsiveness to the alterity of each other.

It is in this equality of a justice for all where Levinas addresses one of the main critiques against his ethics of alterity. That is, that the infinite responsibility that the self owes to the other is the masochistic extreme of self sacrifice for the other.[43] True, such sacrifice is reflective of the singularity of the face-to-face encounter in pre-foundational proximity. However, proximity is also, always already, filled with the sociality of the third party. In proximity, there is a synchronicity between the self, other and third party which is the "original locus of justice, a terrain common to me and the others where I am counted among them."[44] With this third party I become an-other alongside of the other. Thus, infinite responsibility for the other transforms into a rationalised justice for all, including *me:* "A third party is also approached; and the relationship between the neighbour and the third party cannot be indifferent to me when I approach:"[45]

> Is not the infinite which enigmatically commands me, commanding and not commanding [the soft-hard command of the face], from the other, also the turning

---

others — the marginalised, the poor, the weak — is taken into account in the deliberations/calculations of justice. Justice is personal and judging should take personal account of such alterity (refer to Levinas, *OTB*, *op cit*, at 159).

[42] Levinas, *OTB, ibid*, at 158.

[43] This concern over the totality of generosity and hospitality from the self echoes in the "*what about me"* (*my* subjectivity and *my* rights) argument from some liberals. Refer to Veling, T. 'In the Name of Who? Levinas and the Other Side of Theology.' *Pacifica.* (Oct 1999), No. 12, 275-92, at 280. This is also the cry from that strain of postmodern identity politics focussed upon equality of subjective agency and egalitarian inclusively. Refer to Chapter Two above, *'Modern Human Rights and Postmodern Agency,'* and my discussion on the characteristics of such postmodernism.

[44] Levinas, *OTB*, *op cit*, at 160.

[45] Levinas, *OTB, ibid*, at 16.

> of the "I" into "like the others," for which it is important to concern oneself and take care? My lot is important.[46]

With the introduction of the third party, the one way, infinite responsibility from self to other is provoked into a *social reciprocity of responsibility* and care between all subjects (including me), grounded, first and foremost, in the pre-conscious neighbourhood of ethical proximity and alterity: "Justice requires contemporaneousness of representation. It is thus that the neighbour becomes visible, and, looked at, presents himself, and there is also justice for me."[47]

Thus, the neighbourhood of proximity includes the third party — the sociality of the many. In this light, the collectivity of humanity commences in the (ethical) asymmetrical proportions of inter-subjective proximity, before any (conscious) conception of community equality and egalitarianism. Inverting the liberal tradition of our contemporary human rights, Levinas's neighbourhood of the third party is *not* orientated around a universal regulatory principle of collective coincidence and inter-subjective adequation. Rather, alterity, responsibility and the possibility of a sociality of justice for all, begin in the hybridity of difference in the singularity of each other's particular alterity. The sociality of the many commences in the heterogeneity of humanity and, thus, social justice is founded in an (ethical) openness towards ambiguous human *heteros* and *not* in the reduction of certitude:

> Justice is necessary, that is, comparison, coexistence, contemporaneity, assembling, ordering, thematisation, the *visibility* of faces and, thus intentionality and intellect … the intelligibility of a system, and thence also a co-presence on an equal footing as before a courts of justice.[48]

With the third party, all humanity comes together in the space (the ethical distance of difference) of proximity, all "live" with each other in ethical proximity with the particularity of its own alterity: "And the entry of a third party, treating me as an other

[46] Levinas, *OTB ibid*, at 128 & 161.
[47] Levinas, *OTB, ibid*, at 159.
[48] Levinas. *OTB, ibid*, at 157.

alongside of the other I faced, first institutes a kind of common terrain among us."[49] Thus the aspiration and signification of a symmetrical sociality of an equitable justice and democratic polity is *not* deduced from the coincidence of ontological signification or conscious capacities of individual *potentia*. Rather, it is formulated around the infinite, asymmetrical responsibility directed toward the irreducible alterity of all others in passive, pre-conscious proximity with *me*.

In this way, justice begins in uniqueness but proceeds to a necessary reduction of the other into a *genus* of thought and consciousness, a thematisation of visibility and co-presence and a comparing of the incomparable alterity. Paradoxically, the ethics of alterity leads to the very process which Levinas rails against in traditional ontological philosophy. But for Levinas, such rationality is only valid in the service of justice and through the inspiration of the prevention proximity of radical alterity. Consciousness and rationality, and the signification of the presence of being, follow the ethical awakening in proximity, they do not precede nor produce it:[50]

> There must be justice amongst incomparable ones. There must then be a comparison between incomparable and a synopsis, a togetherness and contemporaneousness; there must be thematisation, thought, history, and writing. But being must be understood on the basis of *being's other*. From the perspective of the signification of the approach, to be is to be *with* the other for or against the third, with the other and the third against oneself.[51]

Countering the foundations of our contemporary liberal rights, a social justice of alterity does not reflect a common nature in which all subjects are "chips of the same block," but rather, serves the prevenient responsibility to alterity: "This is a fraternity [humanity in alterity] which precedes the commonness of a *genus*."[52] Justice is inspired, not by the equal measure of rights amongst equal citizens of conscious capacities in the interest of self, but rather, is the very sensibility of the pre-original right to a responsibility the other has over the subject:

---

[49] Lingis, A. 'Translator's Introduction,' Levinas, *OTB*, *ibid*, at xli.
[50] Hutchens, above n 14, at 104.
[51] Levinas, 'Essence and Disinterestedness', *BPW*, above n 17, at 123-24.
[52] Levinas, *OTB*, above n 4, at 159.

> … justice is not a legality regulating human masses, from which a technique of social equilibrium is drawn, harmonising antagonistic forces. That would be a justification of the State delivered over to its own necessity.[53]

Justice — even in the necessity of social ordering and prioritisation — never abandons and never forgets the origin of the right of the uniqueness of the other, the ethics of alterity and the human right of otherness for-all-others:[54] "Here, the right of the unique, the original right of man, calls for judgement and, hence, objectivity, objectification, thematisation, synthesis."[55]

The Good State: Deliberative Democracy, Critical Justice and Ethical Alterity

Through the introduction of the third party, the personal responsibility of the self to the face opens up to a planned responsibility for all — a distributive justice amongst the many in which there is deliberation, prioritisation, calculation and consideration for-all-others. This requires "discussion, discourse, planning and agreement" amongst others in order to formulate a "balanced response, a balance in the responsibility, owed to all."[56] Thus, through the third party the asymmetrical personal effort of responsibility in proximity becomes the necessary grounding of the social structures of justice — the institutions and systems of law and politics which undertake the processes of judgement and deliberation in the sociality of justice amongst the collective. With the third party, *ethics becomes the foundations of the State* and alterity becomes the grounding of political and legal decision making, to ensure a just outcome for all, within the particularity of all:

> This analysis of the interpersonal relation which tended to show the original signifyingness of the right of the individual in the proximity and the uniqueness of the *other* man is in no way a repudiation of politics … this original right itself leads to the liberal State, to political justice, through the plurality of individuals

[53] Levinas, *OTB*, *ibid*, at 159.
[54] Levinas, *EN*, above n 2, at 168.
[55] Levinas, *EN*, *ibid*, at 168.
[56] Levinas *HAH* at 107 & 133, footnote 11, in Burggraeve, above n 2, at 137.

> belonging to the "extension" of the human *genus;* but also to say how the reference to the face of the other preserves the ethics of that State.[57]

Thus, though the ethics of alterity commences with the radical generosity of open hospitality at the (metaphysical) limit of beyond essence, it is, nonetheless, realised in the contingent concrete world of politics and law through the mediation of justice. Through this mediation of third party justice the *praxis* of the politico-legal structures and powers of the liberal State are potentially transformed into the *praxis* of ethico-political, inter-subjective, social responsibility:

> Metaphysics or the relation with the Other is achieved in service and hospitality. In the measure that the face of someone else truly brings us into relation with the third, the metaphysical relation from me to the Other takes the form of a We, and flows into a State, institutions and laws, which form the source of universality.[58]

Hence, the State — the political and legal structures, systems and institutions of the sociality of justice within a liberal State — is the *concrete realisation* of a justice for all, inspired by an ethic of alterity.

Here, Levinas's end point of his pre-foundational ethics of alterity coincides with the liberal (Kantian) tradition of our contemporary human rights' discourse. At this end we arrive at an empty ethics of personal responsibility publicly institutionalised; the harmony of the personal and the public through a symmetrical posture in proximity and an ethic of alterity; the sociality of laws enforcing the personal, pre-original "right to responsibility:"

> The goal of my communication was to insist in the irreplaceable function of the "I" in a world of peace, but it did not mean to dispute the role of the State and hierarchy as mush as it has appeared to have done.[59]

At this end point, despite the radical non-identity of the pre-original, pre-cursory ethical-I with which Levinas attacks the tradition of Western ontological philosophy and subjectivity, Levinas *goes soft* on the State — the very politico-legal processes which

---

[57] Levinas, *EN*, *op cit*, at 167.
[58] Levinas, *TI*, above n 4, at 300.
[59] Levinas, 'Transcendence and Height,' *BPW*, above n 17, at 24.

signify such ontological presence and power, reduction and violence. Paradoxically, despite the pre-social split in subjectivity, Levinas's ethical thesis culminates in a certain reiteration of the universality of the *genus* of "we," signified in the liberal State — the State which "holds justice as the absolutely desirable end and hence as a perfection ... [a State] closer to the morally ideal State."[60]

But any attempt of assimilate Levinas with traditional liberalism would ignore the radically different starting points of Levinas's ethical thesis of alterity and the tradition of liberal rights, as discussed in Chapter Seven above.[61] Such assimilation would be a mis-reading of the radically divergent affective impact on the sociality of rights from a State orientated around the alterity of others or informed by the preservation of personal existence. For Levinas's State, inspired by ethical alterity and personal responsibility, is *not* the State passively balancing the homogenous *we* of unlimited personal rights of and between equal autonomous individuals, within (but alienated from) a collectivity of the Same. It is *not* a State of negative, restrictive rights. It is *not* a State born from a calculating contract between co-existing equals of conscious capacities in the protection of their individual, autonomous rights of self-determination and assertion. Such a State is a "pagan State" in service of its own National-ego, in service of its own institutional pride and protection, which loses sight of the inspiration of alterity.[62] This is a "State of Caesar": "… the State in search of hegemony; the conquering, imperialist, totalitarian and oppressive State:"[63]

---

[60] Wright, T. Ainley, A. Hughes, P. 'The Paradox of Morality: An Interview with Emmanuel Levinas.' *The Provocation of Levinas: Rethinking the Other*. (ed. R. Bernasconi and D. Wood; trans. A. Benjamin and T. Wright), Routledge Press, London, (1988), at 177.

[61] Terreblanche, above n 8, at 310-11; Batnitzky, above n 8, at 6-21.

[62] Levinas, *EN*, above n 2, at 168. For Levinas, at the extremes this violent, pagan State takes on the shape of the planned State of *Stalinism*, in which the State stands as judge on every situation from the point of view of the State's own ideological/political and structural benefit (self-interest) and which centralises to the point of inertia and death (the lack of renewal within/of the State). This was evinced in the final collapse of the USSR in the 1980s. It is also seen in the (ethically) closed States of North Korea or Pol Pot's Khmer Rouge Cambodia, in which the State and the people are merged into the sameness of the State, through State apparatuses, reducing alterity and otherness to the singularity of the State and, thereby, the inertia of singularity.

[63] Levinas, *AV* at 216, in Burggraeve, above n 2, at 143.

> … forgetfulness of the source to which the quest for justice goes back [the ethics of alterity] risks transforming the sublime and difficult work of justice into a purely political calculation — to the point of totalitarian abuse.[64]

Whether in the extreme of dictatorship or in the "soft totalitarianism"[65] exhibited in the hegemonic processes of modern, liberal democracies, both political formulations exhibit (though in different degrees) the pagan primacy of self-interest and self-assertiveness, above an openness to and responsibility for others. Both political formations express the pagan tendency of foreclosing on themselves to present a totality within themselves — the impulse toward an identity, unity and synthesis of self-reflexive Sameness — which reduces, marginalises and excludes the singularity of difference and responsibility to otherness.

But Levinas's (post-humanist) aim, the aim of alterity, is to avoid such violence of reduction against difference in the processes of ontological signification — which has so often accompanied the hegemonisation of liberal humanism — even in the necessary systemisation and categorisation of the third party into a synthetic collective in the effort towards social, ethical-justice. Thus, with the third party and social justice animated from within prevenient proximity, the ethic of alterity grounds the State with the task to structure justice for all within society, *but without* institutionalising it to the point that alterity is smothered over and forgotten.[66] First and foremost, Levinas's liberalism is a "liberalism of otherness": the politics of the other inspired by a humanism of the other and aimed toward a liberty for the other:[67]

> But justice itself cannot make us forget the origin of the right of the uniqueness of the other, henceforth covered over by the particularity and generality of the human. It cannot abandon that uniqueness to political history, which is engaged

---

[64] Levinas, E. *Alterity and Transcendence*. (trans. M. Smith), Columbia University Press, New York, (1999), at 170, cited in Wolcher, above n 33, at 114.
[65] Critchley, S. *The Ethics of Deconstruction*: *Derrida and Levinas*. Edinburgh University Press, Edinburgh, (1999), at 223. This is the soft totalitarianism of Gramsci's superficial hegemony. That is, a State maintaining power through politico-legal systems and ideological discourses which work to "mask coercion with consent." Refer to Femia, J. *Gramsci's Political Thought: Hegemony, Consciousness and the Revolutionary Process.* Claredon Press, Oxford, (1981).
[66] Levinas, *AE,* at 163/127, in Burggraeve, above n 2, at 142.
[67] Levinas, *EN*, above n 2, at 167.

> in the determinism of powers, reasons of the State, totalitarian temptations and complacencies. It awaits the voices that will recall, to the judgement of the judges and statesmen, the human face dis-simulated beneath the identities of citizens. Perhaps these are the "prophetic voices."[68]

It is the openness to hear such "prophetic voices of otherness" under the necessary generality of humanness and equalisation of citizenship in the service of justice, which distinguishes Levinas's liberal State of otherness from the liberal tradition of our contemporary human rights.

Thus, Levinas's State is a liberalism of otherness which articulates a politics of the other. It is a State charged with administering the personal responsibility measured by a third party justice for all. A State positively undertaking the politico-legal decision making processes in service of an equitable justice amongst many, derived from an unequal, ethical responsibility for others:[69]

> Here, the right of the unique, the original right of man, calls for judgement and, hence, objectivity, objectification, thematisation, synthesis. It takes institutions to arbitrate and a political authority to support all this. Justice requires and establishes the State … But still its imperative motivation is inscribed in the very right of the other man, unique and incomparable.[70]

This is the transformative potential of an ethics of otherness. This is the potential for the State and its institutional structures and manifolds of legal and political power to become the modality of a justice animated by an ethic of alterity and a responsibility for-the-other:

> The first question in the inter-human is the question of justice. Henceforth it is necessary to know, to become consciousness. Comparison is superimposed onto my relation with the *unique* and the incomparable, and, in view of equity and equality, a weighing, a thinking, a calculation, the comparison of incomparables, and, consequently, the neutrality — presence or representation … the necessity of thinking together under a synthetic theme the multiplicity and the unity of the

[68] Levinas, *EN*, *ibid*, at 168.
[69] Hughes, C. 'The Primacy of Ethics: Hobbes and Levinas.' *Continental Philosophy Review*. (1998), No. 31, 79-94 at 89.
[70] Levinas, *EN*, *op cit*, at 168.

> world … and of the final signifyingness of being; and, through this, finally, the extreme importance in human multiplicity of the political structure of society, subject to laws and thereby to institutions where the *for-the-other* of subjectivity — or the ego — enters with the dignity of a citizen into the perfect reciprocity of political laws which are essentially egalitarian or held to become so.[71]

The realisation of an open State and the egalitarian dignity of the citizen in reciprocal political laws are not the consequences of the equality of autonomous conscious capacities. Rather, the State and the equity of the inter-subjective collectivity are, first and foremost, founded upon the asymmetrical ethical obligation animated within the pre-foundational, pre-conscious, ethical neighbourhood of proximity.

More specifically then, such a State directed towards alterity and responsibility for-the-other can be described as a social State of discursive and deliberative democracy, a *critical democracy* as opposed to the traditional liberal State of individual egalitarianism, focussed upon the *logocentrism* of self-centred synthesis.[72] It is this open, deliberative and critical democracy which gives the greatest potential to best attempt the reason and calculation, comparison and prioritisation, necessary in social, ethical-justice, but in a way which avoids the violent subsumption of alterity into its own self-serving politico-legal systems and structures. Thus, Levinas is not *against* the modern democratic State, but rather, at the end of his thesis *returns* to democracy by *passing through* the ethical foundations of alterity (just as he returns to the subject but detoured through alterity). The utility of Levinas's ethics of alterity, the benefit of justice invoked by proximity, is in how it provokes modern democracy *not* to rest on what has been achieved, but rather, to always strive to do better.[73] And, as I will outline in the following section,

---

[71] Levinas, 'Peace and Proximity,' *BPW*, above n 17, at 168.
[72] Levinas, *EN*, *op cit*, at 167*;* Critchely, *Ethics, Politics, Subjectivity*, above n 1, at 114-16.
[73] Loumansky, above n 5, at 156. In this way, one could say that the test of alterity is not against the brutalities of dictatorial regimes — these are too obviously immoral, unethical and illegitimate. Rather, Levinas's ethico-political thesis of alterity and proximity is best used as a (ethical) critique against the modern, democratic State. Refer to Loumansky, above n 5. Levinas's invocation of an open and critical State in service of the responsibility for-the-other, is somewhat complicated by Levinas's own stance on Israeli violence against the Palestinians, particularly his silence on the attacks on Sabra and Chatla (silence, perhaps, reminiscent of Heidegger's silence on the Nazis). For an outline on some of the positions regarding Levinas and the use of force refer to Hanley, C. 'Levinas on Peace and War.' *Athena.* (2006),

'Deconstruction in the Decision: the Provocation of Rights in the Judgement of Law and Delivery of Justice,' a human rights of otherness, expressing the ethical responsibility towards alterity within the proximity of the other, is one of the main *provocateurs* of the State. Such rights agitate the State to remain vigilant in its (ethical) effort to always "do better" in its responsibility for-the-other. Mediated through justice, provoked by such human rights, alterity is the measure of the modern State — the continuous questioning of whether or not democracy "achieves an authentic dignity for the human subject of otherness."[74]

It is such a critical State of discursive and deliberative justice which is the "good State:" an "ethical State of openness guided by the spirit of responsibility."[75] A State always already orientated towards the prevenient responsibility for-the-other:

> Justice, society, the State and its institutions, exchanges and work are comprehensible out of proximity. This means that nothing is outside of the control of the responsibility of the one for the other.[76]

In such a good State, justice (emerging with the third party from proximity) mediates the pre-original ethical into the *praxis* of the political, and through this mediation alterity remains both the inspirational impulse and aspirational measure of the machinations of the politico-legal processes. Through the mediation of justice, ethics and alterity stand both outside of (prior to and contemporaneously beyond) politics and law and also operate as the central animating force in the politico-legal deliberative distribution of responsibility and social justice.[77] This is the double role of an ethical-justice provoked by a human rights of otherness. At one and the same time, the ethical justice of alterity animated by the responsibility towards the other signified in a human rights of otherness,

---

No, 2, 70-79; Caygill, H. 'Levinas's Silence.' in Diamantides, M. (ed.) *Levinas, Law, Politics*. Routledge-Cavendish, Oxon, (2007), at 83-92.

[74] Critchley, *The Ethics of Deconstruction*, above n 65, at 222.

[75] Levinas, *OTB*, above n 4, at 160; Levinas, *EN*, above n 2, at 167.

[76] Levinas, *OTB, ibid*, at 159. Burggraeve suggests that with the extension of the ethics of alterity into the administration of justice and the politics of Statehood, Levinas goes on to imagine the possibilities of an internationalisation of a brotherhood of freedom, justice and peace founded upon alterity. This is an internationalisation of the reciprocity of responsibility between Nation-States and their political and administrative organs. Refer to Burggraeve, above n 2, at 142-45.

[77] Diamantides, above n 73, at 192.

expresses an inspiration of and aspiration towards a *heteros* sociality amongst and between the alterity of humanity, *and also* the centrality of the space necessarily left open within the politico-legal processes of sociality for such alterity. This space is necessary to ensure that such alterity is not subsumed in the self-serving Sameness of self-reflexivity.

It is in this role of mediation where justice holds its greatest social signification. Emerging from proximity and animated by alterity, justice, in the first instance, stands for the recognition of the call of the other,[78] the recognition of the uniqueness of the "prophetic voices" of particularity covered over by social generality. Justice is the ethical strategy against the reductivity of the ontological power of presence which allows things to speak to us *as they are*, to displace the impulse to impose *our* meaning and understanding onto others around us.[79] Similar to Lacan's *object petite a*, justice, charged with infinite alterity, expresses the overflow, beyond essence of the politico-legal and its ontological significations of presence and power. Justice internalises the exteriority of the presence of the non-present ethic of alterity, within these politico-legal processes of State power. Thus, through the mediation of justice, alterity is brought into the (pre) foundations of politics and law. Hence, through justice, politics and law are found to be *not* self-maintaining totalities, validating their own foreclosed positions with reference to self-reflexive norms already established.[80] There is an-other to the politico-legal, an-other to the legal *logocentrism* of modern society, which stands outside of politics and law, and yet, through justice, is central *in* politics and law. Justice, like alterity itself, is unending and irreducible before the machinations of the structures and systems of politics and law, and always already is the mark of alterity which reminds the socio-political of the other.[81]

Thus, this becomes the "critical task" of justice in a State of "critical democracy." It is this unending and irreducible justice of otherness, emerging from alterity but established

[78] Cornell, *Deconstruction and the Possibility of Justice*, above n 76, at 87.
[79] Cornell, *The Philosophy of the Limit*, above n 4, at 80.
[80] Cornell, *The Philosophy of the Limit*, *ibid*, at 120,-121.
[81] Cornell, *The Philosophy of the Limit*, *ibid*, at 120-121.

within politics and law, which challenges the power and processes of the State. Like alterity itself, the fullness of justice remains outside of the systemisation and institutionalisation of the State and interrogates, interrupts, critiques and challenges its structural and discursive powers. As the social modality of alterity, as the mediation of the internalised externality of ethical responsibility, justice is the critical foil against the State, confronting it with what it is not and demanding it does better. At the centre of the State, within the pre-foundations of its politico-legal processes, justice signifies a space for the non-presence of the other. This is the hole of the ethics of alterity, the space of prevenient proximity always already within the sociality of the third party. This gap is the empty (democratic) space of permanent contestation, contingency and difference within the politico-legal deliberative processes aimed towards a justice for all. This is the space already seen in modern democracy, which gives modern democracy its greatest, ethical potential. This is the spaces of review, critique and revision — the spaces of judicial appeals, administrative review and free political expression. If alterity is the soul of the subject, signifying the beyond being of the otherwise-than-being of the ethical-I,[82] then it is the ethical-justice of social responsibility, invoked from the proximity of the third party, which is the soul of the State, signifying the open spaces of unending vigilance within critical deliberations.

In this way, like Lacan's unending desire, for Levinas, justice is the expression of a longing and anticipation within the State. It is the encircling of the space of otherness in the necessary social systemisation of subjective responsibility. Justice is found in the movement toward a destination which is beyond the limits of ontological experience, a destination forever deferred, displaced and always yet to come.[83] The critical State is one which never attains justice, but rather, a State in service to a justice beyond itself. A State in service of the (pre) original right of man, the responsibility for-the-other. A State engaged in the constant (ethical) effort towards an unending, beyond the limits, sensibility of justice:

---

[82] Refer to Chapter Six, *'The Self, the Face, Alterity and Ethics,'* pages 243-244.
[83] Derrida, cited in Arrigo, B. and Williams, C. 'The (Im)possibility of Democratic Justice and the 'Gift' of the Majority: on Derrida, Deconstruction and the Search for Equality.' *Journal of Contemporary Criminal Justice*. (Aug 2000), Vol. 16, No. 3, 321-343, at 332.

> But a liberal State: always concerned about its delay in meeting the requirement of the face of the other. A liberal State — a constitutive category of the State — and not a contingent, empirical possibility; a State that recognises, beyond its institutions, the legitimacy — though it be a trans-political one — of the search for and defence of the rights of man. A State extending beyond the State. Beyond justice, an imperious reminder of all that must be added to its necessary harshness, and that springs from the human uniqueness in each of the citizens gathered in the nation.[84]

Marked by alterity, justice is disembodied from law and, thus, no State, community or territory is said to "embrace justice," but rather, "is moved *by* justice and aims *towards* justice in its ethical effort of reflection, review and critical contestation."[85] The good State is constantly contingent, always seeking to augment the necessary reductive calculations of the politico-legal processes and structures with the beyond-of-justice, the "resource of charity" found in the pre-original right of responsibility within proximity.

Around such an ethical space of otherness, fissured by the agitations of justice, the good State of critical democracy remains vigilant to the alterity of others in its political and legal deliberative processes. Such spaces of openness within the structures and systems of the politico-legal signify the risk and danger, the ambiguity and uncertainty, of modern, critical democracy.[86] They also signify the precarious nature of ethics and alterity — the asymmetrical currency of alterity necessarily operating within phenomenological symmetry and ontological structuration.[87] Hence, to be ethical is always to be at risk and to be in danger — for both the State and the alterity beyond the State. Democracy is the political signification of this very tension between the certitude of the presence of being and the struggle of alterity against the totalisation of being. Critical democracy represents the possibility of the non-exclusivity of this contingent heterogeneity — a system of collectivity with regard to, an openness towards, and a hospitality for the *heteros* of the intruding other. The provisional nature of democracy speaks to the continual possibilities and temporality of ethics, justice and politics, and of

[84] Levinas, *EN*, above n 2, at 174-75.
[85] Critchely, *Ethics, Politics, Subjectivity*, above n 1, at 101.
[86] Critchley, S. 'Five Problems in Levinas's View of Politics and a Sketch of a Solution to Them.' in Diamantides, M. (ed.) *Levinas, Law, Politics*. Routledge-Cavendish, Oxon, (2007),, at 97.
[87] Cornell, *Deconstruction and the Possibility of Justice*, above n 76, at 85.

the openness of a State in constant interrogation and critique from "those other prophetic voices." Critical democracy is the "politics of ethical difference, political wisdom at the service of ethical love; democracy is the politics of alterity."[88]

Guided by justice and open to alterity, such a good State of critical democracy is a State which is *ethically* dignified and justified:

> Consequently, it seemed to us important to recall peace and justice as their [the political processes and institutions] origin, justification and measure; to recall this justice, which can legitimate them ethically …

Through the work of justice, the good State counters the "rationality of the law and politics" with the "rationality of responsibility and justice."[89] With an openness towards alterity, the good State remains sensitive to the other under its own weight of being, which always potentially reduces the other into its rationalising processes of politics and law.

It is because of this unending and irreducible quality of justice that such a democracy is a 'State in permanent failure,' with a 'justice of permanent failure.' This is a State in which "there is never enough justice and never enough democracy in service of the beyond essence of alterity:"[90]

> The first reason is that it is ethics which is the foundation of justice. That is the liberal State. The second reason is that there is a violence in justice. When the verdict of justice is pronounced, there remains for the unique "I" that I am the possibility of finding something more to soften the verdict. There is a place for charity after justice. The truly democratic State finds that it is never democratic enough. It always wants to improve its institutions.[91]

Through an unending justice aimed towards the "prophetic voices of others" manifested in the left-open spaces of critical review and revision, the laws and politics, processes and

---

[88] Critchley, *The Ethics of Deconstruction*, above n 65, at 208 & 240.
[89] Levinas, *OTB*, above n 4, at 160.
[90] Levinas, *EFP* at 98, in Burggraeve, above n 2, at 183.
[91] Wright, Ainley, Hughes, above n 60, at 175.

structures, of the good State are in constant re-calculation — permanently open to the charity of responsibility to the uniqueness of the particular at work within justice:

> That is perhaps the very excellence of democracy, whose fundamental liberalism corresponds with the ceaseless deep remorse of justice: legislation always unfinished, always resumed, a legislation open to do better. It attests to an ethical excellence and its origin in kindness from which, however, it is distanced … by the necessary calculations imposed by a multiple sociality, calculations constantly starting over. Thus, in the empirical life of the good under the freedom of revisions, there would be a progress of reason.[92]

In such democratic States there are inherent spaces for review, critique and interrogation. These are centralised within the politico-legal processes of deliberation. Such critical spaces express a human rights of otherness (reflecting the ethical vigilance and effort of responsibility towards the other, which the other has *over* me), which, themselves, are centralised in the machinations of the good State:

> Let us imagine … a matter of judging a man and rendering sentence. In order to determine a sentence, one finds oneself again face to face with the other, and one must look only at the face. But once the sentence is pronounced, once it is made public, one must be able to discuss, contest, approve, or combat it. Public opinion — other citizens and the press — can intervene and state, for example, that this sentence ought to be reviewed …. One can debate decisions; there is no human decree that cannot be revised.[93]

When functioning at its best, throughout modern, critical democracy there are such spaces of contestation and revision. For example, in trial procedures with rights of the defence and pleas of mitigation; in appeal processes; in the abolishment of the death penalty; in administrative review forums such as judicial review and the establishment of Ombudsmen; in the public spaces for free press and freedom of expression.[94] This constant, critical revision is the reverberation of the beyondness of alterity expressed through justice. It is the State exercising its energy in the permanent effort of

---

[92] Levinas, *EN*, above n 2, at 199.
[93] Levinas, E. 'The Awakening of the I,' (interview by R. Pol-Droit). *Is it Righteous to Be? Interviews with Emmanuel Levinas.* (ed. J. Robbins), Stanford University Press, Stanford, (2001), at 183.
[94] Levinas, *EN*, at 145, 156, cited in Joldersma, C. 'Human Rights and Democracy: Reading Giroux Otherwise with Levinas.' *Philosophy of Education*. (2006), 315-17, at 315.

ceaselessness and renewal, with an agitation from human rights for constant improvement. These are the many (potential) spaces signifying the (ethical) effort within the institutionalisation of the good State, to minimise the violence of reduction against alterity in the deliberative processes of decision making.[95] Outside the self-validating totality of law and politics, the pre-originality of alterity secures ethics, first and foremost, as the inspiration to justice, and justice as the centrality of (moral) conscience in the making of the decision within the law.

Yet this invocation of the good State of critical and open democracy does not abrogate the first-person, personal responsibility which the subject owes the other. The ethical-I of human identity endures the intervention of the third party, endures the transformation from responsibility to justice, politics and law.[96] The ethics of alterity, the responsibility for-the-other and a justice for-all-others are not automatic consequences of institutions of power.[97] Rather, the subject still retains their personal responsibility to ensure that the State maintains the centrality of alterity and justice for-all-others in its political and legal deliberations:

> … responsibility of the "one for the other," which delineates the limit of the State and does not cease to speak to the vigilance of persons who would not be satisfied with the simple subsumption of cases under a general rule, of which a computer is capable.[98]

This is the double responsibility borne by the subject in the sociality of justice, law and politics. This is the responsibility upon the individual self to both remain vigilant against its own ego-I *and* to ensure that the State remains ethical and in service to alterity. This is the right of responsibility (the ethical burden) which each subject bears and which the State echoes and enforces in its own ceaseless agitations towards an unending justice.

---

[95] Cornell, *The Philosophy of the Limit*, above n 4, at 105.
[96] Wolcher, above n 33, at 114. This is another distinction between Levinas's ethics of otherness and more traditional notions of liberal individualism. For Levinas, notwithstanding the institutionalisation of justice and responsibility through law and politics, the individual subject still bears a burden of responsibility, first and foremost, for the other. However, in liberalism ethics is primarily exercised within the realm of individual freedom and private practices of moral conscience. Refer to Terreblanche, above n 8, a 310-11.
[97] Burggraeve, above n 2, at 147.
[98] Levinas, 'Peace and Proximity,' *BPW*, above n 17, at 169.

Thus, alterity demands more than the prioritisation of private liberty, which is protected within the traditional, liberal division of the private and public sphere. Justice, born from proximity, maintains and guarantees a personal responsibility to publicly engage with, critique and interrogate the State and its politico-legal systems and institutions.[99] Hence, the personal space won through civil and political rights are always important attributes in the ethical integrity of the good State. Expressed through a human rights of otherness, such rights allow the *personal responsibility* of the *ethical-I* (as opposed to the *private right* of the *ego-I*) to be mediated through the collectivity of third party sociality and justice.

Thus, the good State is marked with the *transformative potential* of a radical shift towards third party justice — a radical shift from the traditional State of modern justice to the good State and postmodern care.[100] The task of the good State is to facilitate this socio-political transformation of post-humanist responsibility through the structuration of a justice for all in service of the (ethical) alterity of all. Provoked by a human rights of otherness and mediated through the ethical-justice of alterity, the socio-political machinations of critical democracy are constantly challenged to always make the effort to strive to do better.[101] When working at its best, when vigilant to the spaces of otherness within the politico-legal, such a State is always in permanent revolution. This is a State sensitive to the centrality of alterity and unending in is efforts towards the precursory obligation of inter-subjective ethical responsibility.[102] It is this critical democracy of otherness which has the best chance to avoid the petrification and inertia of the pagan State, the best chance to avoid the suffocation of the other and the limitation of ethics under the weight of its own being. Such a State in permanent revolution is in constant vigilance and temporality, in constant effort of revision in the considerations and calculations of justice across the social order. In permanent revolution, the good State of critical democracy is best positioned to avoid both the alienation of impersonal and

[99] Critchely, *Ethics, Politics, Subjectivity*, above n 1, at 88-89. Levinas cites songwriters, artists and intellectuals as some examples of this personal/public responsibility. Refer to Levinas, *EN*, above n 2, at 168.
[100] Critchley, *The Ethics of Deconstruction,* above n 65, at 268.
[101] Critchley, *The Ethics of Deconstruction, ibid,* at 223.
[102] Levinas, cited in Burggraeve, above n 2, at 151-153.

anonymous institutions and procedures, and the violence of the reduction of otherness in such institutions and procedures.[103]

Deconstruction in the Decision: the Provocation of Rights in the Judgement of Law and Delivery of Justice

It is in this task of permanent revolution and constant vigilance in attendance for the other where human rights play their potential role in the name of justice. These are rights which do not signify an expression of autonomous equality of conscious capacities of self-presence, but rather, as the agitating presence of otherness against the State. One of the primary weaknesses of our contemporary human rights' discourse is that it has become divorced from the justice of charitable responsibility — orientated instead, around an impulse towards anonymous laws governing an ideal symmetrical sociality within an impersonal totality of the State.[104] Such human rights, focussed on prescriptive and normalising systems and structures, too easily petrify and coalesce the open State and unending justice in the service of itself — foreclosing around its own effort of law and politics aimed at abstract individuation, rather than an effort opened towards the contingency of the other:

> Justice is not a legality regulating human masses, from which a technique of social equilibrium is drawn, harmonising antagonistic forces. That would be a justification of the State delivered over to its own necessity. Justice is impossible without proximity.[105]

Such rights of political and legal prioritisation, first demand calculation and deliberation in the validation of its own procedures and ideals (its own Lacanian fantasy-of-reality) and then, secondly, may or may not, in the processes of such self validation, serve justice for all.[106] This institutionalisation of legal equality of individuals alone is not a sufficient

---

[103] Refer to Burggraeve in *ibid*, at 7-93; Burggraeve, R. 'The Good and Its Shadow: The View of Levinas on Human Rights as the Surpassing of Political Rationality.' *Human Rights Review*. (June 2005), Vol. 6, No. 2, 80-101, at 86.
[104] Levinas, *OTB*, above n 4, at 159.
[105] Levinas, *OTB*, *ibid*, at 159.
[106] Cornell, *The Philosophy of the Limit*, above n 4, at 135. In other words, as Marx proposed, such a presentation of the modern State inverts the reality of rights and places the power of the self-serving ego

condition of justice because there is the permanent exclusion of the other beyond the *logocentrism* of the ontological significations of individual power and presence in law and politics.[107] At this point, notwithstanding the ethical potential of such traditional, liberal democracy, "democracy alone is not enough" — democracy, in itself, is not justice, but only the potential (socio-political) condition and context of justice.[108] At this point, it is the agitation from a human rights of otherness which challenges democracy to extend (beyond) itself — to do more and be more than it is: "A State extending beyond the State … from resources [of responsibility] that cannot be deduced, nor reduced to the generalities of a legislation."[109]

As discussed in Chapter Seven above, "*A Human Rights of Otherness: Rights Grounded in the Responsibility for-the-Other,"* the human rights of otherness always already orientate around alterity and commence their social task from a radically different point from that of our contemporary human rights. The original right of man, the right of responsibility the other has *over* me, always already carries the "prophetic voices of the other," the "religiosity of the breath and prophetic spirit in man," silenced under the generality of humanness and adequation of collective citizenship. A human rights of otherness is always already replete with the "resources of charitable responsibility that has not disappeared beneath the political structure of institutions."[110] It is the right of the other within a human rights of otherness which provokes the critical revisiting and review demanded from justice in the sociality of the critical, democratic State:

> [Rights can be an achievement of the ethical relationship] … if it is completely moral. I was talking just now about the liberal State. Isn't it a permanent revisiting of the right itself, a critical reflection on political rights, which are only *de facto* laws?[111]

(bourgeois individualism) above the ethical responsibility within the sociality of the collective. Refer to Chapter One above, '*Marx and the Critique from within.'*

[107] Levinas, *EN*, above n 2, at 176.
[108] Hutchens, above n 14, at 103.
[109] Levinas, *EN*, *op cit*, at 174-75.
[110] Levinas, *EN*, *ibid*, at 174-75.
[111] Levinas, *EN*, *ibid*, at 176.

The first principle of sociality from a human rights of otherness, the first law of rights of responsibility for-the-other, is the categorical imperative not to reduce the other into the circle of the Same and the presence of being: "A categorical imperative … signified on the basis of responsibility "for the other," in which obedience is the mode proper for listening to the commandment."[112] In this way, the human rights of otherness and justice work together on the State and in the institutions of law and politics with the beyondness of what is not yet law and politics. Justice and human rights are different sides of the same coin, working on law and politics for the promotion of proximity and the safeguard of alterity.

It is in such a human rights in service of such an ethical justice where Levinas extends rights beyond the (self-serving) limits of politics and law, and the minimum level of legal tolerance inherent in our contemporary human rights' discourse, and into the ethical obligations borne by all in proximity with all. Human rights are the signification of the struggle to attempt to institute within the State internalised (political) commitment from (the ethical) outside the institution. Human rights are the provocation to the politico-legal institutions and procedures of the State to always aim towards an unending justice and to remain open to alterity, to always aim "to do better." Human rights of otherness provide the continual reminder to the deliberations of law and politics to process and prosecute a justice for-all-others, in defence of the original right — towards responsibility — of man. In this way, the human rights of otherness are the vigilante of ethics and responsibility, the aggravating *provocateur* reminding the State of the responsibility of the obligations borne within justice:

> This understanding is only possible by creating space for human rights, which take to heart in their pure, non-political formulations the rights of the unique other against all systems.[113]

[112] Levinas, *EN*, *ibid*, at 148-49.
[113] Levinas, *EFP* at 98, in Burggraeve, above n 2, at 91.

Human rights are the internalised ethical touchstone within the deliberative and distributive politico-legal processes of justice, provoking the State to ceaselessly strive towards an even better justice for an even greater openness towards alterity.[114]

Hence, this demand for justice for-the-other represents, in Levinas's work, a significant appeal to the function of law and, more specifically, for human rights law. Whereas for Lacan law is the mediation of desire within the Symbolic, for Levinas, law is the function of justice in the processes of the State:

> The hour of justice, of the comparison between incomparables who are grouped by human species and *genus*. And the hour of institutions empowered to judge, the states within which institutions are consolidated, of Universal Law which as always *dura lex*, and of citizens equal before the law …[115]

Law works on behalf of justice and in provocation of rights. Invoked by justice, law emerges from the prevenient face-to-face relationship and the social arrangements of the anonymous third party.[116] The ethical obligation of justice is that justice requires that the unique, face-to-face demands, needs and voices that arise in these contingent social situations be addressed *by law*. Hence, justice and law synchronize in determining Levinas's pluralistic vision of a *heteros* society. Justice amounts to an examination of the condition of interpretation and application of laws to this multiplicity of particular social circumstances and cases.

Thus, law for Levinas does not service general and abstract principles, but rather, provoked by human rights and in service to justice, law must first be orientated around responsibility towards the unique within the social collective. The justice in law — law functioning within the matrix of ethical justice and the responsibility of proximity — is the demand to go beyond the service of its own legal techniques regulating social

---

[114] Levinas, *I* at 131/243-244, in Burggraeve, *ibid*, at 148-154; Burggraeve, 'The Good and its Shadow,' above n 103, at 85.
[115] Levinas, *EN*, above n 2, at 198.
[116] Levinas, *EN*, *ibid*, at 23. Hence, alterity inverts the liberal tradition of the formation of the law. Law does not precede the charity of ethical responsibility because law itself derives from the charity of responsibility.

equilibrium and harmonising antagonistic forces of individual rights. Rather, justice demands that generic law and legal principles service the particular, in a responsibility for the particular. Levinas's laws are not inert prescripts, regulating society and human behaviour. Rather, Levinas's law is subordinated to these social arrangements and applied to the particular of such arrangements:

> The multiplicity of people, each of them indispensable, is necessary to produce all the dimensions of meaning [of the law]; the multiplicity of meaning is due to the multiplicity of people.[117]

The meaning of law, in the service of a justice animated by alterity, is not merely an application of normative principles to the particular case — the generality of the former taking precedent over the particularity of the latter. Rather, justice bestows a certain generosity (of the charity of responsibility) to the particular, allowing the law to be interpreted and applied with some liberality in the circumstances of the particular.[118] Hence, law becomes more than just law. Rather than shy away from the particular by retreating behind its own "objective" procedures, systems and structure, law — particularly human rights law — takes on the ethical (moral) characteristics animated beyond such machinations, and reveals an ethical effort towards alterity and responsibility within prevenient proximity. From the prevenient, pre-original foundations of proximity and alterity, a human rights of otherness, are rights (and rights enforced by law) which are "completely moral in their achievement of the ethical (asymmetrical, inter-subjective) relationship."[119]

This demands law to re-focus how it is interpreted and applied to the specific contingencies of human experience. This is a demand for a shift in the process of decision making in law in the face of the uniqueness of the particular, just as alterity demands democracy and rights to re-orientate around the alterity of the other:

---

[117] Levinas, *LR*, at 195, cited in Hutchens, above n 14, at 110.
[118] Hutchens, *ibid*, at 108.
[119] Levinas, *EN*, above n 2, at 176.

> My problem consists in inquiring [of law] into how to reconcile what I call the infinite ethical requirement of the face that meets me … and the appearance of the other … how to enter into this comparison of incomparables without alienating the face? For beings are not compared as faces, but already as citizens, as individuals, as a multiplicity in a *genus* and not as "uniqueness."[120]

The ideal of justice ameliorates the tendencies of totalisation and exclusion immanent within the necessary judicable processes of comparison within a synthesised *genus*. This ideal of (ethical) justice enhances the politico-legal systems and structures with mercy and charity of ethical responsibility:[121] "[Justice] is that special form of pity which goes out to the one who is experiencing the harshness of the law …"[122]

In the legal tradition of modern democracy, law reflects universal principles which compare individuals in the *genus* of the citizen — law legislated in generic terms from the political processes of Parliament, or applied as established principles of precedent in court proceedings. Under such principles, the tradition of contemporary legal positivism generates a process which examines and reasons how a particular case aligns with such pre-established, legal principles. Such a tradition takes law as self-maintaining. Law is presented as a closed system of self-validation which assumes the ontological fullness of the presence of the law, whereby the normativity of the law is established by *looking back*, with reference to legal norms already established.[123] This traditional approach of the law within modern democracy is tasked with fitting a case and circumstance into these pre-established general principles, to cover the particular facts under the universal law. But this is the violence done to the uniqueness of the human subject within the case, this is the subsumption of the particular case under the universal law.[124]

Distinct from this traditional approach within modern democracy, the necessity of legal principles in the service of justice and provoked by rights, is that such principles must always be left open to the particular, in a process of decision making characterised by its

---

[120] Levinas, *EN*, at 176.
[121] Slaughter, M. 'Levinas, mercy, and the Middle Ages.' in Diamantides, M. (ed.) *Levinas, Law, Politics*. Routledge-Cavendish, Oxon, (2007), at 50.
[122] Levinas, cited in Slaughter, footnote 7, *ibid* at 65.
[123] Cornell, *The Philosophy of the Limit*, above n 4, at 120-22.
[124] Hutchens, above n 14, at 106-109.

casuistry — with the flexibility and openness of interpretation and application to enable a certain "generosity to the particular case," the unique face:

> … the particular should be seen within the Law as the principle which is independent of the universality that every particular law reflects … [Justice] is concerned with the passage from the general principle embodied in the Law to its possible executions and its concrete effects. If this passage were simply deducible, the Law, in its particular form, would not have demanded a separate adherence. But the fact is that general principle and generous principles [the charity of justice] can be inverted in the course of their application … All generous thought is threatened by its own Stalinism. The greatest strength of … casuistry is that it is the special discipline which studies the particular case in order to identify the precise moment within it when the general principle is at risk of turning into its opposite; it surveys the general from the vantage point of the particular.[125]

This casuistry of justice examines the need of the particular case, in order to avoid law coalescing into generic themes of legal (grand) narratives, impervious to the particular and the voices of others. This is the threat of the reduction of law to the service of its own structures and principles expressed in the violence of *Stalinism*. This focus on the deliberative application of law to the particular is the counter balance to the threat of anonymous and normative generics, whose primary aim is to unify the *genus* of humanity under a totality of static, regulatory principles.[126] This is the compromise of justice for the sake of social convenience in the face of social complexity.

Within our contemporary common law system, this casuistry approach is already applied. But it is limited to the extent of enforcing the validity of past legal principles of individual rights and duties and the certitude of the current legal system of such principles against arbitrariness and instability. Yet in such a system, the ruptures of the novel beyond the law — for example, the Court of equity, the principle of torts, in Native

---

[125] Levinas, *LR*, at 220, cited in Hutchens, *ibid*, at 107-08. Some comment has been made regarding the connection between Levinas and Jewish legal tradition. Hebrew scripture talks of the *jus talionas*, in which the courts distribute a compensatory justice, taking into account all parties and circumstances, and the right of all parties to this accounting of justice. The principle of the universal applying to the particular stems from the Talmudic dialectic and the oral law of casuistry and, once again, highlights the inversion of Kant, who advocates reasoned universal maxims above the "small law" of the particular. Refer to Burggraeve, above n 2, at 156-64; Hutchens, *ibid*, at 110-111.

[126] Hutchens, *ibid*, at 109.

Title law[127] — reveal the contradiction of this legal approach. Contrary to the stable certitude expressed by legal positivism, law is already unstable, insecure and uncertain. Law already arbitrarily relies upon the coincidence of the right people, in the right court, at the right time, with the right attitude, to apply a novel interpretation and application of the law to the particular facts, in order to re-invent the law into an appropriate approximation of a just outcome under the particular circumstances. These are the too few moments when law steps beyond itself, serves more than itself and the established politico-legal structures of individual rights, and looks towards the uniqueness of the subjects involved, *shaping law to suit the circumstances*. These are the too few moments in which the court challenges itself and the law, with a duty (a justice) towards its respons-*ability* for the particular alterity involved.

It is this reinvention of the law — this already present instability, insecurity and uncertainty in the law — which a human rights of otherness provokes and which marks a service to justice and an effort of ethics. An ethic of alterity orientates the politico-legal deliberative processes of the law around this reinvention. Human rights provoke such processes, and the personnel involved, to recognise this ethical duty within such deliberations. Human rights provoke these deliberations to practice this justiciable responsibility in every deliberative moment of politics and law — and not just within the exceptional moments of legal revelation — subjecting the law to the particular rather than the particular to the law. In this way, law provoked by rights and in service to alterity and justice, inverts the considerations of legal principles. The processes of legal interpretation and application are tasked with fitting law into facts and legal rights into ethical responsibility, and not facts into law and responsibility into rights. It is this repetitive process of review and revision of the general law towards the particular facts — from the promulgation of law from Parliament, to the application of law in the courts, to the reporting of the law to the public — which marks the deliberative processes of law and justice as open and potentially transformative:

[127] Refer to the *Mabo v Queensland* (1992) 175 CLR 1 (the *Mabo Case*) in which the Australian High Court recognised Indigenous property rights over certain Crown land, under certain circumstances.

> In short, for a decision to be just and responsible, it must, in its proper moment if there is one, be both regulated and without regulations: it must conserve the law and also destroy it or suspend it enough to have to reinvent it in each case, rejustify it, at least reinvent it in the reaffirmation and the new and free confirmation of its principles.[128]

Every decision becomes a re-interpretation of the law to the uniqueness of every case and the animation of responsibility between the parties (including the decision-maker involved).[129] The demand of a justice in service of the ethics of alterity, the challenge of a human rights of otherness, is *not* that the beyondness of the law exemplified in these moments of rupture (of equity, torts and Native Title) should be limited to rare moments of (moral) conscience from one structural site (for example, the High Court) within the politico-legal system. Rather, the entire deliberative process of law should be continually and incessantly orientated around this task of ethical interrogation and reinvention, exercising this ethical duty in the deliberation and decision-making of justice in *response* to the particularity of the subjects involved and the relations of responsibility therein.

It is this repetitive practice of reinvention in the decision where Levinas's law coincides with Derrida's deconstruction within these gaps between law and justice.[130] For Derrida, the possibility of ethics and justice lies in its impossibility. If not, then the ethical would be reduced to the actual totality of what it is and justice would be limited to the phenomenological processes of law.[131] An ethics of alterity is impossible and frustrating in its ambiguity and uncertainty. Yet this is the very point — ethics is the silence (the voiceless prophetic voices) between the unconditional hospitality of proximity and the systemic processes of "making the undecidable decision," in order to ensure the latter is measured against the former.[132] This is the liminal space in which ethics operate, the

---

[128] Derrida, *The Force of Law*, above n 4, at 61.
[129] Cornell, *The Philosophy of the Limit*, above n 4, at 110, 115. For Levinas, this is in keeping with the spirit of the law (the "sentiment" of justice), as opposed to the letter of the law (the "thematisation" of justice by law). This is the same distinction as Levinas's *saying* and *said* in language: the spirit of the law is the unrepresentable sentiment of the saying; the letter of the law is the said attempting to express these sentiments within the themes. Refer to Chapter Six above, page 229, footnote 66. Also refer to Levinas, *OTB*, above n 4, Chapter 2.
[130] Cornell, *The Philosophy of Limits*, *ibid*, at 145.
[131] Cornell, *The Philosophy of Limits*, *ibid*, at 83.
[132] Cornel, *The Philosophy of Limits*, *ibid*, at 83; Critchley, *Five Problems in Levinas's View of Politics*, above n 86, at 98.

threshold between the unrepresentable and the Symbolic, in which a deconstructive "philosophy of the limit" can help justice to trace the otherness that resists assimilation and reduction.[133]

Hence, law, inspired by alterity and functioning for justice, is tasked with two functions: the application of generic principles; and also, the interrogation of those principles with the circumstances of the case. Law — or judges and governmental officers administering law — is required to engage in a double gesture of interpretation and application, the *deconstructive double reading* of the legal text. The first gesture is the gesture of the regulation of the rule, the signification of the law itself. The second, contemporaneous gesture of the law is the ethical gesture — the ethical measure of the application of law in the service of justice, with the law of rights of responsibility in mind. Without such a second reading, law is in service to itself and justice is reduced to the limits of the law and the processes of the State. Hence, to be just (for the law to be applied justly) it must not only work through its own judicial procedures of determination, but also, as part of these procedures, the law must determine itself: judges must critique themselves; the State must always provide space — public and private (for example in official appeals, administrative review, and free press) — for review and re-calculation of the law, its application and the outcome itself. The law must function in a way in which it interprets and acknowledges the status of its own interpretation and application.[134] In this conscious effort of deconstructive double reading, the law must recognise that it is tasked with justice, which is invoked in its interpretation and application of the generic to the particular, and *not* tasked with discovering the truth of the law and the certainty of (politico-legal) stability.

Thus, the significance of the decision maker, the judge (and the Parliamentarians and governmental administrators who promulgate and administer law), who applies law to the unique circumstances of the case. In service to justice, a judge's responsibility is *not* to

[133] Cornell, *The Philosophy of the Limit*, *ibid*, at 84-85.
[134] Cornell, *The Philosophy of the Limit*, *ibid*, at 114.

the law or to the courts, but rather, to justice.[135] Levinas talks of the personal role of judges — that they are not limited to the technicalities of judgement, but rather, stand *in* the particulars of the conflict before them, personally amidst the proximity of the subjects involved:[136]

> Justice is impossible without the one that renders it finding himself in proximity. His function is not limited to the subsuming of particular cases under a general rule. The judge is not outside the conflict but is in the midst of proximity. This means that nothing is outside the control of the responsibility of the one for the other.[137]

The personal, ethical burden (obligation) of the decision maker is the task of judgement orientated with regard to responsibility for-the-other amongst the parties involved: "[Judgement] means not ignoring the suffering of the other, who falls to my responsibility."[138] The judge is asked (by justice) to take an ethical position in the particular circumstances of the case, to respond to the particularity and bear the responsibility for such a decision. Judges — and all decision makers within the politico-legal deliberative processes — need to judge according to law, but most significantly, coincidentally, must also be open to the provocation of rights towards an unending justice for-the-other, in consideration of their response to the ethical demands of alterity from the particular parties and circumstances involved.

Under such conditions, the best a judge can do for certitude and stability is be sensitive to the competing perspectives within the particular, and conscious of their own perspectives and responsibilities, rather than assume a transcendental subjectivity enforcing established, esoteric legal principles:[139]

> To resume what I have said: It is in the name of that responsibility for the other, in the name of that mercy, that kindness to which the face of the other man appeals, that the entire discourse of justice is set in motion, whatever the limitations and

[135] Cornell, *The Philosophy of the Limit*, *ibid*, at 143, 166.
[136] Levinas, *OTB*, above n 4, at 159.
[137] Levinas, *OTB*, *ibid*, at 158.
[138] Levinas, *EN*, above n 2, at 168.
[139] Cornell, *The Philosophy of the Limit*, above n 4, at 103.

> rigors of the *dura lex* may bring to the infinite benevolence toward the other. Unforgettable infinity, rigors always to be mitigated. Justice always to be made more knowing in the name, the memory, of the original kindness of man toward his other … A justice always to be perfected against its own harshness.[140]

Within the decision making process, the judge is asked to undertake the judicial gesture of morally overstepping beyond the law. The decision maker is tasked to transgress the limits of law and traverse into the beyondness of justice, to those possibilities not yet contained in the system — the beyondness which animates justice, law and the State in the first place, the ethics of alterity.[141]

Hence, the institutionalisation of alterity and responsibility is in the politico-legal machinations of the decision. It is in the *process of deciding* where law and politics is accountable for determining a response to the singular demand, need and voice of the other.[142] This is the "madness of the decision," the neurotic uncertainty of the undecidable within the infinite alterity of human *heteros*, intruding upon the limits of procedural regulation and institutional stability:[143]

> A decision that didn't go through the ordeal of the undecidable would not be a free decision, it would only be the programmable application or unfolding of a calculable process. It might be legal; it would not be just.[144]

This undecidability is marked by the spaces within the deliberative processes for those prophetic voices of otherness, referred to in the preceding section, '*The Good State: Deliberative Democracy, Critical Justice and Ethical Alterity.*' This is the constant (deconstructive) delay and deferral of the decision. This is the continual ethical effort, the repetition of the moral gesture within the law, and throughout the entire politico-legal system of the law, of review and interrogation of the decision itself. Hence, though the

---

[140] Levinas, *EN*, *op cit*, at 198-99.
[141] Hutchens, above n 14, at 106.
[142] Critchley, *Five Problems in Levinas's View of Politics*, above n 86, at 97-98.
[143] Derrida, *The Force of Law*, above n 4, at 25.
[144] Derrida, *The Force of Law*, *ibid*, at 24. Interestingly, though there is a difficulty in creating law/rules which can capture the totality of the non-presence of alterity, Derrida enumerates eight duties for Europe to keep the "memory of Europe" preserved. The general theme in these eight duties is one of openness and continual self-critique. Refer to Derrida, J. *The Other Heading*. (trans. P. Brault and M. Naas), Indiana University Press, Indiana, (1992).

good of alterity can never be realised, though proximity cannot be codified and cannot be reduced to a full actualisation, there is still the (ethical) effort of institutionalisation of legal principles of critical openness to minimise the violence of reduction against alterity in the process of decision making.[145] In this way, the pre-originality of alterity secures ethics, first and foremost, as the inspiration to justice, and justice becomes the centrality of (moral) conscience in the making of the decision within the law.

Yet this space of ethical uncertainty does not signify arbitrariness in the decision, for this would allow the possibility of the incursion of sovereign will to determine the signification of the decision.[146] Nor does it signify the acceptance of all difference, for this is the danger of condoning well-established hierarchies of reduction and exclusion as sound in their own intimate relativity.[147] The Levinasian space of alterity within the necessary ontological processes of law is not the space of absence (perhaps a Lacanian perspective), but rather, the absence of reduction. It is the space of human *heteros* in the humanism of the other, free from reduction. It is not so much the focus on alterity for the sake of alterity alone which is Levinas's claim, but rather, alterity for the sake of defeating the violence of ontological significations of the presence of being. This regulation, this regulatory principle of critical democracy and of law and justice, is the non-subsumptive relation with the other.[148] The aim of justice, the function of law inspired by alterity and provoked by human rights, is to minimise violations against difference, rather than facilitate chaos or relativism.

Thus, the institutionalisation of justice seeks a regulatory principle which does not close in on itself in an act of certitude and of full determination. Justice is not tasked with promulgating more laws and extending the political power of the State. Rather, justice

[145] Cornell, *The Philosophy of the Limit*, above n 4, at 105.
[146] Derrida, *Adieu*, above n 4, at 202. But neither should alterity and deconstruction be confused with *tolerance* of difference. Such tolerance would infer an adequation of difference with the Sameness of self, a mutuality of equitable positive signification such as legal rights or political powers.
[147] Cornell, *The Philosophy of the Limit*, *op cit*, at 104.
[148] Critchely, *Ethics, Politics, Subjectivity*, above n 1, at 67, 99.

agitates for the need for another measure of rules when rules are applied and enforced, the criteria of the ethical under-current of alterity:[149]

> …ethics entails politics and law … But, on the other hand, the political or judicial *content* thus assigned remains indeterminate, to be determined beyond knowledge and any possible presentation, concept or intuition …[150]

In service to justice and provoked by human rights, law and the politico-legal can only be used as a descriptive guide to application, procedure and judgement, and not as a prescriptive determination in itself and for itself. Law and politics are only (ethically) valid when only indicative of an openness in determination towards some-*thing* beyond such determination.[151] It is in this sense that there is "no last word" in justice. Rather, in the double, deconstructive gesture of a decision (a decision in delay and deferral), there is only the interpretation of law in the situatedness of the particular, and the re-invention of law to the particularity of the subject.[152]

Conclusion

Levinas's ethics of alterity invokes a State of a community of and for refugees. Similar to Lacan, Levinas's social consequence of ethical alterity is the confronting fact that "We are all Jews, we are all Chernobyl, we are all boat people."[153] A justice for all in the ethical State of openness is a justice for the alien both from outside and from ourselves, our own otherwise-than-being.[154] It ends in the familiarity of the potential that democracy — critical, open democracy — offers. This is a State (when working at its best through the provocation of a human rights of otherness) always aiming to do better and always attempting to be open and available to the multiplicity of human experience and expression. Hence, in some ways, Levinas's work is not a meditation on political action. Levinas's ethics of alterity does not easily fit directly into politics; nor does it

---

[149] Cornell, *The Philosophy of the Limit*, *op cit*, at 104.
[150] Derrida, *Adieu*, above n 4, at 199.
[151] Cornell, *The Philosophy of the Limit*, *op cit*, at 106.
[152] Derrida, *The Force of Law*, above n 4, at 17.
[153] Žižek, S. *Looking Awry*. MIT Press, Cambridge, (1991), at 140. Refer to Chapter Five above, '*The Ethical Interrogations of Impossible Desire*,' at 193-95.
[154] Douzinas, C. *The End of Human Rights: Critical Legal Thought at the Turn of the Century*. Hart Publishing, Oxford, (2000), at 357 & 365.

easily fit directly into the order of the law — even though, for Levinas, both are invoked by and founded upon the ethics of alterity.[155] But nor do human rights easily fit into law, politics and the multifarious nature of community arrangements. And this is where Levinas's ethics of alterity can help in dealing with the left-over of human rights beyond law and politics, where a human rights of otherness extends the significance of rights beyond the limits of law and politics.

More significantly, beyond law and politics, Levinas's work is a focus on ethical integrity and, from this starting point, has potential political effect. From Levinas's anterior, ulterior, otherwise-than-being, from the ethical creature of the subject's own ethical-I, Levinas grounds human identity. Levinas does not aim to defeat the ego-I with this prevenient split subject of non-presence. Rather, he aims to augment it (*justify it*) with ethical integrity, upon which an ethics of openness — and not a politics of Same — can invigorate a just society. Through this augmentation of the ego with the ethical, Levinas directs alterity to enhance the politico-legal structures of democracy with an ethical (pre) foundation. The task here is not to demolish the institutions and procedures of democracy, but rather, to reinforce them with ethical responsibility. Alterity is the possibility to transform the sociality of the State and its underlying orientation from liberal democracy to a critical, open democracy; from emancipatory parochialism to critical pragmatism.[156]

With the third party sharing the face-to-face ethical encounter in proximity, ethics moves from intimate prevenience to a potential of a social justice for all. In this already given sociality of self, other and third party, ethical responsibility is already justice, justice is already imbued with responsibility for others, and law is already invigorated with an energy directed towards a just response to the particularity of *heteros* in the processes of interpretation and application. Through this ethical animation within pre-original proximity, alterity — the ethics of responsibility for others — is centralised in human sociality and in the structures and systems of justice serving this sociality. In this

[155] Manderson, above n 5, at 9-11.
[156] Critchely, *Ethics, Politics, Subjectivity*, above n 1, at 115-116.

multiplicity of unique otherness, the obligations of responsibility extend into obligations for all and, hence, into a justice for all to be a law responsive to all. This is the utopian vision which Levinas's critical democracy shares with the polity of liberal emancipation, though arriving at such a vision from distinctly different starting points orientated around divergent subjects: "Absolute interruption of ontology, but in the one-for-the-other of holiness, proximity, sociality, peace. A sociality that, although utopian, commands all the humanity in us …"[157]

It is this centrality of ethics inspired by the non-identity of alterity — this sensitivity of openness to others — which both makes democracy necessary and also in need of a human rights of otherness. The revolutionary power (the deconstructive, ethical effort) of a human rights of otherness is always needed to keep the State in permanent revaluation of the calibrations of justice, because the task of alterity, in the State sensitive to alterity, is infinite to fulfil and impossible to complete. Law enforces the space of alterity within our societies. But a human rights of otherness speaks to the outside remainder of alterity to which justice should always aim and law should always serve. This is the ongoing struggle, energy and effort which a human rights of otherness, vigilant to the other, attempts to project. The totality of the beyondness of alterity, responsibility, human rights and justice is not able to be prescribed and institutionalised within the limits of laws and politics. But with the provocation of rights, it is insinuated in the continuous ethical effort in law and the deliberative decision making processes of the law.

****

[157] Levinas, *EN*, above n 2, at 171.

Conclusion

The Self, the Other and Human Rights

From Self to Other: from Rights to Responsibility

Our contemporary human rights' discourse is expressed in a language of totality — a language of universality, natural endowment and inherent dignity, and political and legal certitude and stability. Yet, despite such language our understanding, knowledge and experience of rights necessarily derive from their own particular historical and philosophical (political and ethical) contingencies and influences, dominated by the shifts and transformations in the conceptualisation of human identity within Western history and thought. This nexus between human identity and human rights necessarily crosses over these divergent contingencies. Simultaneously human rights express a philosophy of being, the ethical ground rules of a just inter-human relation between self and others, and a politics of the State and the processes of law engaged to socially enforce such philosophical and ethical imaginings. Throughout history — from the pre-modern, to the modern, and extending into contemporary postmodernism — as the philosophical conceptualisation of human identity has changed in Western thought, so too has the ethical expectation of inter-human communality and the political and legal significations of this evolving philosophy of being and ethics of inter-subjective sociality.

My aim in this dissertation was to try and draw together these contingencies and our conceptualisation of human identity with the way we understand, engage with and talk of human rights, and its ethical goal of a universal brotherhood (a human family) of freedom, justice and peace, as expressed in the *UDHR*. Through the historical and conceptual shifts in the image of human identity I wished to highlight how our contemporary rights have become a discourse of self-interest, promoting the independence of the autonomous individual above the collectivity of community, and a self-serving politics of the Same restricting ethical inter-subjectivity within the limits of a hegemonic homogeneity of politico-legal symbols and significations. I also aimed to explore the possibility of a richer and more open postmodern ethical inter-subjectivity through the notion of *alterity* and, specifically, through the works on human identity and

ethics of Lacan and Levinas. Though not undermining the potentiality of the politico-legal significance of democratic rights and duties — the civil and politics rights we have come to know as our contemporary rights — each of these thinkers *re-orientate the architectonic aspect* of democracy on the necessity of something *beyond* such significations. In an effort to ameliorate the omniscient violence of reduction of difference which has accompanied the hegemonic progress of liberal humanism, Lacan and Levinas aim such progress towards an uncertain ethic and justice, which consciously considers the inter-subjectivity of otherness and distinction *over* the totality of the self and the Same.

Through the shifts in history and thought within the tradition of human rights, the image of human identity has moved from pre-modern collectivity to the modern individual of autonomous moral *potentia*, which has extended further into the contemporary postmodern subject of private demands and personal choices. Starting in the pre-modern world of natural justice (*ius naturale*) rights reflected a justice of communal ethics — a distributive system of rights and duties orientated around a teleological end of a balanced harmony of natural forces. Human identity was conceptualised within the totality of community and the individual was moulded into a distinct social strata and class of the collective, which (pre) ordained their rights and duties within the "natural" social hierarchy. Rights — and their social mediators of law and justice — reflected this social hierarchy of position and power, benefits and duties, animated by the general law of the divine cosmos, the great chain of being or the Feudal system's pyramid of power. Animated by such divine nature, the ethics of such rights of natural law was also something which stood outside of the particular law of humanity. The *ius naturale* of the harmonious balance of rights and duties was also the moral measure and marker of the ethical integrity of the individual, the State and the ruler, and the law.

Yet, by the seventeenth and eighteenth century, the conceptualisation of human identity and rights had radically changed. The individual was now prioritised and it was the collective which was designed to fit with the individual. The good, virtuous life was no longer considered in regards to an external ethical measure of the totality of a social

harmony, but rather, orientated around the internal moral potential of the independent individual, who possessed inherent and innate qualities of dignity, invoked by its autonomous capacities of self-will and reasoned intentionality. With such a shift in the imagining of human identity the ethical integrity of rights narrowed from the *ancien regime* and the notion of communal, ethical inter-dependence to the Enlightenment's natural rights of man and modern, liberal humanism's focus on the atomised individual of autonomous capacities and an egalitarian State of communal will. Through the influence of such thinkers as Hobbes, Locke, Rousseau and Kant, fundamentally, our contemporary human rights' discourse has come to express and signify that *space of personal subjectivity over human identity* — a focus on power and presence (the presence of power) of being and the philosophical *logocentrism* of the ontological signification of individualism. With such a philosophical foundation regarding the nature of human identity, human rights have evolved into our modern, liberal rights of self. Such rights aim, first and foremost, at the potential of the independence of the individual of autonomous conscious capacities of reason and self-will, through a prescriptive list of restrictive politico-legal rights and duties, against possible infringement into self-interested, self-assertive, individual powers of presence.

This is the ontological and individualistic focus of human identity within our contemporary human rights' discourse inherited from the natural rights of man thesis, emerging from the Enlightenment and liberal humanism. This is a focus on the *freedom of the individual* through its own essential, natural and innate qualities of being, its essential powers to control its own presence of being with its own conscious capacities. It is with these intimate and innate self conscious capacities of reason and will that the individual has the power to grasp the truth about itself and best fulfil its autonomous (free) moral *potentia*. It is with these capacities that this individual is the *logocentrism* of its own presence of being, the individual of self-determining agency. This is the individual marked with its own intimate and autonomous capacities of self-enforcement, self-reflexivity and self-assertiveness as it makes its way through the world. This is the presentation of the human individual as autonomous, self-interested and appetitive — the individual of independent natural attributes of self-will and conscious reason to fashion

itself and its own moral conscience.[1] This is a presentation of human identity as self-knowledge, self-awareness and self-potency, a one-dimensional potentiality of self fulfilment transparent to itself and (at least in the first instance) independent from the sociality of the other.[2]

By uncovering the ontological and philosophical contingencies in the conceptualisation of the image of human identity, we begin to understand how our contemporary human rights' discourse contains a particular ethic of right which coincides with a certain philosophy of being — a philosophy of liberal individualism which adequates ethics into the promotion and protection of the autonomous rights' bearer and their exercises of being.[3] This is the *morality of One* within the liberal tradition of our contemporary human rights' discourse. This is the re-presentation within human rights of the modern split subject. That is, the subject as fully conscious and independently (potentially) free, whole and complete within, of and for itself, before and beyond the inter-subjective sociality of community. This is the aspect of Kantian metaphysics still present within our contemporary human rights' discourse, in which the abstract individual of autonomously reasoned will is presented as pre-social. It possesses an intimate and alienating essence of being which precedes community and through which it potentially gains self-fulfilment, beyond the concrete and contingent collectivity of its empirical existence and experiences.[4]

Perhaps more than most, it is Marx who highlights the discursive (historical) contingencies of rights — as opposed to their "purported" natural, innate characteristics — and the vacuous duality in human identity presented in the modern split subject. The contingent backdrop of the foundations of modern rights is the bourgeois ideal of independent, individual proprietary and possession, after the collapse of the social hierarchies of the ancient and Feudal worlds. The new freedom of individual

---

[1] Haber, H. *Beyond Postmodern Politics: Lyotard, Rorty, Foucault.* Routledge Press, New York, (1994), at 1.
[2] Hall, D. *Subjectivity: the New Critical Idiom* Routledge Press, New York, (2004), at 118.
[3] Haarscher, G. 'Law, Reason and Ethics the Philosophy of Human Rights.' *Ethical Dimensions of Legal Theory.* (ed. S. Wojciech), Rosopi Press, Amsterdam, (1991), at 141-45.
[4] Otto, D. 'Everything is Dangerous: some Post-structural Tools for Rethinking the Universal Knowledge Claims of Human Rights Law.' *Australian Journal of Human Rights*. (1999), Vol. 5, 17-42, at 21.

independence promotes an abstract universality of sovereign being, possessing a set of attributes of self, signified through a political sociality of egalitarian citizen-subjects. This split becomes the foundation of modern rights (and the modern, democratic State), mediated through and expressed within the limits of civil (personal and private) and political (public and social) politico-legal rights. Yet the formulation of this duality of human identity empties human rights (and human identity) of any contingent concreteness. It *inverts* the reality of the sociality of the subject by promoting the autonomy of individualism, abstracted and alienated (in the firs instance) from sociality. It leaves the actuality of collective existence subsumed by idealised and alienating individual power and hostage to the passive rights of socio-political restrictions managed by the State, in order to create the "social space" for individual moral *potentia*, which fails to address the concrete plight of daily life.

This is the distinction between formal equality of freedom — all born with the same conscious capacities of autonomous reason and self-will — and actual equality and freedom. The weakness in such an egalitarian image of human identity within the tradition of our contemporary human rights is that it assumes that we are all, individually, of equal dignity and worth (all sharing the universal capacities of autonomous moral potential) while glossing over the *actuality* of the contingencies in which we are born, which mark us as unequal in personal freedom and socio-political liberty.[5] Formal equality and freedom becomes a distraction from actual freedom and equality — facilitating a focus on the protection of idealised individual freedom — on the individual's self-assertive power "to be" and "to become" — empty of the concrete actuality of everyday inequalities. Hence, such a tradition of liberal rights — as with all ontologically focussed discourses of rights from both the left and right wings of politics — leads to a promulgation of passive rights of restriction to enforce formal equality in the "space-of-the-self," without the pro-active rights of personal responsibility to resolve the contingent inequalities which establish and maintain the actuality of lack of equality in personal freedom and political liberty.

[5] Heller, A. 'Rights, Modernity, Democracy.' *Deconstruction and the Possibility of Justice*. (ed. D. Cornell, M. Rosenfeld, D. Carlson), Routledge Press, New York, (1992), at 352-53.

What is gained with this break from the *ancien regime* is a *formal* equality of human dignity expressed through (signified by) the "purported" egalitarianism of political liberty of all individuals under the one, democratic State — the same restrictive rights for all so that each individual can exercise their shared autonomous, moral *potentia* (their individual human dignity) equally. But what is lost, is a concrete inter-subjective communality and a social responsibility towards actual freedom, forgotten in the (private) struggles for purported equal political liberty for the equal expression of individualism. Such a re-orientation in the conceptualisation of human identity behind the signification of modern human rights produces a right of ideal, personal self-objectification and possession. This is an empty *ego rights'* discourse animated by an *ego philosophy* and supported by an *ego politics*. Hence, the so-called political egalitarianism of individual citizen rights does not actually deliver equality, but rather, an equality in the (ego) struggle of political signification. The so-called egalitarianism of political rights within modern democracy is inspired by an independent image of human identity, which only goes to emboldened those with the greatest *cache* in presence and power — in education, money, the media and position — to hold greater influence over and gain greater benefit from the discursive reality of political rights.

From the abstract form of the alienated individual of autonomous capacities, the *content* of our contemporary human rights' is emptied of any substantive actuality, presenting instead an idealised possibility of a community of citizen-subjects of equal politico-legal rights, within which co-existing, independent individuals flourish under State regulation. In the collapse of the pre-modern social hierarchy enforced by the natural law, the divine royal or the Church, the modern, politico-legal State appropriates the morality of the equal dignity of this individual *potentia* as the "cement" of the modern social collective of autonomous citizen-subjects.[6] This morality of One becomes the "universal (democratic) dignity of all," and replaces pre-modern suspicion, myth and faith with modern, rational law to unite a community of "free men" under the same State legislated civil and political liberty amongst equal citizens. In the context of this abstract form of

[6] Bauman, Z. *Postmodern Ethics*. Basil Blackwell, Oxford, (1993), at 6.

human identity and this emptied content of civil and political rights, the communal duty borne by the individual citizen-subject and the regulating State are the minimal duties of legal tolerance towards others: the Articles of Rights within the *UDHR* reflect the negative duties to restrict interference of the idealised individual of moral *potentia*, rather than reinforce an (ethical) obligation towards actual care and consideration.[7]

The potential emancipation offered within our contemporary human rights' discourse (promised within the project of liberal humanism) is that through such a human individual, and the egalitarianism of the community of the citizen-subject, there is an inevitable progress towards a teleological end. That is, there is an historical evolution towards the fulfilment of an ideal in both the individual and of sociality at large — the attainment of the goal of the universal brotherhood (the human family) of freedom, peace and justice in the world (*UDHR*).[8] This idealism of modern liberalism is not naïve enough to believe in a *reality* of equal, autonomous moral choice, self-will and rationalised intentionality (except, perhaps, within some of the more extreme corners of contemporary neo-liberalism).[9] And yet, traditional liberal humanism is naïve enough to assume that such autonomous powers of rational choice and self-will, animated by self interest, justifies the powers of the modern State to enforce an "ethical code of individualism" through prescriptive laws, which can regulate and promulgate a sociality of 'freedom, peace and justice' for all.[10] The *modern faith* in the universal dignity (the moral *potentia*) of the individual is that the democratic State's laws of equal civil and political rights for the individual will enlighten the "empirical life of man," and, thus, transform the reality of inequality amongst individuals into an ideal egalitarian citizenry.[11] Thus, the moral agency, the ethical integrity, of both the individual, the sociality of the modern State, and our politico-legal concept of modern rights (our

---

[7] Roth, B. 'Retrieving Marx for the Human Rights Project.' *Leiden Journal of International Law.* (2004), Vol. 17, 31-66, at 46.
[8] Otto, above n 4, at 20.
[9] For a good summation of neo-liberalism and some of its extreme visions of social equality refer to Duggan, L. *The Twilight of Equality? Neo-liberalism, Cultural Politics, and the Attack on Democracy*. Beacon Press, Boston, (2003).
[10] Bauman, *op cit*, at 26-28.
[11] Bauman, *ibid*, at 26-27. Yet, as Bauman notes, this is the paradox of modernity — that it presents "man" as "free" but, nonetheless, still requiring the politic-legal regulations of the State to enforce the "right decision" from man in the exercise of his freedom.

contemporary civil and political rights) is invested within the exercises of autonomous self-will and conscious reason (that is, "rational, individual and free choice") in the individual's efforts of being, in the individual human struggle to secure a stable and certain presence-of-being.[12] Hence, the character of modern rights as subjective and possessive. These are rights which belong to the subject individually for the benefit of its autonomous capacity to control, possess and propel itself, (choose and dictate), its own potencies and powers in a co-existence of mutual respect for the other who is the Same.[13] Human rights guarantee the personal boundaries of *"who we are"* as self-determined presence-of-being within the political sociality of the many of the Same. Rights have become the power of border control: the guard at the limits of who we "choose to be" against the intrusion of others who, like ourselves, exercise their powers and rights (their autonomous capacities of freedom) to enforce their own presence-of-being.

It is through re-articulating and reinforcing these autonomous capacities of self that our contemporary human rights' discourse paradoxically promotes fear rather than friendship: fear of asymmetrical others and unreasoned actions; fear of alterity both of others and within self. From Hobbes to Kant and into our contemporary human rights' discourse, one theme which emerges is the desire for self-assertive certitude over the fear of the unknown alterity of others and the unreasoned human experience of self. This is a fear of the de-stabilising intrusion of external difference and internal instincts and desires without the discipline of self-conscious reason and intentional will (guided by the State and legal codes). It is this desire and this fear which continues to drive our contemporary human rights' discourse. Fear that without these conscious capacities the 'moral potential and ethical integrity of humanity are disregarded, resulting in barbarous acts which outrage the conscience of mankind' (*UDHR*, Preamble). It is this desire and this fear which motivates the split subject of modern rights: alienated, not only from the sociality of inter-subjectivity, but also, split from its own contingent, concrete existence and experience.

---

[12] Shestack, J. 'The Philosophical Foundations of Human Rights.' *Human Rights Quarterly*. (1998), Vol. 20, No. 2, 201-237, at 209.
[13] Taylor, C. 'Condition of an Unforced Consensus on Human Rights.' *The East Asia Challenge for Human Rights.* Cambridge University Press, Cambridge, (1999), 124-44, at 125.

This fear and alienation is the ideological (unconscious) blind spot of the ontological significations of liberal humanism and modern rights, which haunts the hegemony of Western progress with the shadow of the violence of reduction of difference. This split urges autonomous self-will, the conscious intent of our individual will to will, *over* our desires and the empirical particularities of others in an attempt to gain stability and certitude in our own presence-of-being. The paradoxical consequence of the history of liberal rights is that the modern split subject, inspired by this fear, emboldens the ego over the other, individual rights over social responsibility and homogeneity over alterity. It agitates the reduction of otherness to the circle of the Same and the validation of the modern State and its socio-political totality, in the name of abstract rights and political certainty. From the prioritisation of this One, individualistic presence-of-being, the community of contemporary rights reflects a symmetrical sociality — a collectivity of equal and coinciding individuals of an abstract, self-sustaining identity mediated through political and legal egalitarianism, void of concrete considerations towards the multifarious nature of human existence.

However, since the mid-twentieth century the post-discourses (such as poststructuralism, postmodernism and post-humanism) have deconstructed the vacuous nature and violent reduction entangled with the progress of liberal humanism, the modern State and contemporary rights. Similar to Marx, postmodernism highlights the disparity between the abstract ideal of the image of human identity and egalitarian sociality and the concrete reality of discrimination. The postmodern era has revealed that the avatar of the reasoned individual expresses a particular parochialism within its universal egalitarianism, which covers-over the unequal otherness of gender, ethnicity, sexual orientation, etc, who (until recently) have been denied the full status of the sovereign individual and the full value of rights. The traditional, modern split subject of our contemporary human rights' discourse has been orientated around the aspiration of ideals to the point that it has glossed-over the contingency of certain contrivances of critical power: the European (white), middle-class (possessive bourgeois), heterosexual male. For postmodernism, it is this contrivance of critical power which has hegemonised the universality of its own particular ideological

understanding and experience of human nature and knowledge of being, through the exclusion and subordination (marginalisation and silencing) of other, nonconforming differences and distinctions in human experience and expression.[14] It is these ontological markers of human identity which, until recently, more than most, have gained the greatest recognition, benefit and reward from a rights' discourse focussed on the presence of power, as it is this image of the individual which has the greatest ontological power over the socio-political symbols of signification.

Postmodern politics counters the abstract ideality of independent, human identity with the concreteness of everyday life. In this empiricism of the everyday, there is the arbitrariness and fluidity of the accumulation of cross-referencing discursive influences upon human existence, signification and meaning. This is the affective influence of *alterity* upon the human subject — the individual subjected to the external otherness of social, historical, psychological and linguistic contingencies, which leave *an open wound of otherness* within the intimate internality of the self. Thus, identity is not the totality of self — the consensus of One, self-reflexive automatism of conscious control — but rather, is contingent upon the interaction of otherness and always already open to such unending forces of alterity. Countering the "metaphysics of One" found in abstract individualism, postmodern identity politics focuses upon the local, micro-levels of reality and the particularism of human experience — such as, gender, race, sexual orientation, etc — in order to radicalise the modern split subject with postmodern relativity, fragmentation and multiplicity. In deconstructing the traditional image of human identity within our contemporary human rights' discourse in this way, postmodernism reveals a lack of ethical integrity within human rights. What is lost within the abstract, autonomous individual is the concern for the value and affectivity of such rights in the contingencies of each person's life.[15] Dominated by the Enlightenment's liberal philosophy of being (the idealised autonomous moral *potentia* of being), our contemporary conceptualisation of human rights lacks a philosophy of ethics which speaks to the actuality of social existence, beyond the minimum standards of political

[14] Noonan, J. *Critical Humanism and the Politics of Difference*. McGill-Queen's University Press, Montreal, (2003), at 4.
[15] Roth, above n 7, at 56.

duties and legal tolerance shared amongst those who *we* (the State) acknowledge as the Same as *us*.

The project of postmodern justice aims at bringing this actuality of human existence into the light of equality. It aims to liberate the marginalised otherness subsumed by abstract ideality. Where the tradition of liberal humanism is marked by a fear of *heteros* and otherness, postmodernism celebrates alterity, presenting identity as the *limitless exercise* of personal, subjective agency *within the limits* of human identity. The politics of this type of postmodernism is the emancipation of liberalism extending to the accommodation of the multifarious experiences, expressions and significations of human identity and human reality. The benefit of such postmodern politics of inclusivity is the spread of political rights and protections to otherwise marginalised groups and silenced voices. Yet, what is criticised about such postmodern discourses is the tendency to present human rights as a politics of personal choices and lifestyle liberties, the reiteration of a bourgeois aesthetics of self. Within this strand of postmodern politics, rights become the *performative expressions* for the private taste of personal objectification and commodification. This strand of politics becomes an extension of modern liberalism rather than a critical, categorical shift/foil. This variety of postmodern identity politics rarely challenges the hierarchies of signification and power. Rather, it aims at opening up such hierarchies to difference, which becomes hegemonised under the symmetrical collectivity of the so-called equal citizen-subject under the Same State laws and powers.

What is still missing in our contemporary rights' struggles and claims — even under postmodern identity politics — is an *inter-communal responsibility* beyond the excesses in personal self-interest of subjective choices and ontological politics of the Same. It is the radicalness of alterity, the irreducible quality of the otherness of alterity, which potentiality offers a way out of this circle of the Same of individual identity and social symmetry, which has dominated the tradition of our contemporary human rights. This is the potential of an *ethical postmodernism of otherness* beyond the superficiality of self-subjectiveness. Both Lacan and Levinas take up this challenge to radicalise the ethical potential of alterity against the tradition of liberal humanism and the ego psychology and

ontology dominating Western philosophy. Both undermine the traditional (Kantian) split subject with another image of a split subject. Rather than a duality of autonomous individual conscious capacities and the concreteness of symmetrical inter-subjective communality, both Lacan and Levinas present a split always already *within the autonomous conscious individual* — a pre-conscious split in human identity which marks the subject always already other. This is the internalised-exteriority of the alterity of the prevenient other to me — the unconscious or the face of the other — whose affective impact upon subjectivity resides within me, but who is always already beyond me (other to the ontological presence of me). This is the traumatic rupture of the self conscious, ontological being by the pre-original alterity of otherness. Like the traditional, Kantian split subject, this presents an *empty subject*, void of any substantive content. However, the significance of such a pre-original split is in how it *re-orientates the structural aspect of subjective formation*. Rather than focussed upon a totality of self-presence which invokes a reduction of otherness, Lacan's and Levinas's subject-of-alterity aims towards a structure of subjectivity which leaves open the ethical space for the irreducible intrusion of the always already other. In this way, both Lacan and Levinas *invert* the liberal humanist tradition of our contemporary human rights' discourse. The ethical integrity of the inter-subjective sociality of human community is *not* invoked by the primacy of the individual's independent moral *potentia*, exercised through the autonomous capacities of being. Rather, the ethical potential of humanness resides, first and foremost, in the pre-conscious inter-subjective mark of human identity, always already burdening the subject with a responsibility towards (an obligation of openness towards) the other which is beyond the (ego) interest of self.

The Trouble with Neighbours: Lacan with Levinas, the Unconscious and Ethics

To place Lacan with Levinas in this way, in an orientation around alterity and an ethic of otherness, is not without its difficulties as there are many differences in their work which forbid a simple closed reading of Lacan and Levinas as a unity of togetherness and oneness. Yet primarily, these differences revolve around their institutional differences and the scope of their tasks, rather than from unbreachable fundamental differences in the substance of their work. Lacan is a (post) structuralist psychoanalysis and his

investigations are limited within the realm of the human unconscious and its affective impact on the structure of human identity. Lacan is interested in the internal, psychological structuration of the subject and how it operates under the influence of the primordial unconscious. Levinas, on the other hand, is a theologically trained philosopher, exploring the phenomenology of the ethical subject. This background focuses his concern onto the ethical integrity of the subject — the nexus of ethics, being and inter-human engagement. It is not the *structure* of the self which Levinas is concerned with, but rather, the *justification* for ethical, inter-subjective actions. That is, actions which are conscious of and attempt to avoid the reduction of the other in the exercise of the power of the presence-of-self. It is this institutional difference which leads to the divergence between the ethical perspectives of Lacan and Levinas. Lacan remains within the structural margins of the *intra*-subjectivity of the self. Lacan's subject is unable to traverse the Symbolic and, thus, always fails in its aim towards the alterity of self — the unconscious desire to return to *das Ding* of the Real, which invokes the desire of the conscious self and the possibility of an ethic of openness for the other. Levinas's subject is also weighed down with failure. But this is the *inter*-subjective failure to bridge the distance of difference in the proximity between the self and the other human subject, which animates an inter-human ethical sociality. It is this (Levinasian) focus on inter-subjectivity which animates a universal ethics of otherness to be used in the everyday life of each human subject and their relations with others.[16]

Yet, despite this institutional difference, the coupling of Lacan and Levinas around the notions of human identity and ethical integrity is not as implausible as some may argue.[17]

---

[16] This difference in the scope of the tasks of Lacan and Levinas is clearly expressed by Lacan himself who suggests that psychoanalysis as neither a "*Welanschauung*, nor a philosophy that claims to provide the key to the universe." (Refer to: Lacan, J. *The Seminar of Jacques Lacan Book XI: the Four Fundamentals Concepts of Psychoanalysis, 1964.* (trans. and ed. A. Sheridan), New York, (1981), at 77. Levinas, on the other hand, presents an inter-subjective ethics of alterity which overtly attempts to address all humanity and offer a potential utopian vision of human existence: "… love from stranger to stranger, better than brotherhood in the bosom of brotherhood itself … Absolute interruption of ontology, but in the one-for-the-other of holiness, proximity, sociality, peace. A sociality that, although utopian, commands all the humanity in us … " Refer to Levinas, E. *Entre Nous: Thinking of the Other*, (trans. M.B. Smith and B. Harshav), Continuum Press, London, (1998), at 171.

[17] Refer to Morss, J. "Saving Human Rights from its Friends: A Critique of the Imaginary Justice of Costas Douzinas." *Melbourne University Law Review*, (2003), No. 34, (http://www.austlii.edu.au/au/journals/MULR/2003/34.htm), accessed 12/01/2009.

Surprisingly, though the two thinkers did not address each other's work while they were alive (the, so-called, missed encounter),[18] they can be read as complimentary alternatives for each other's work — placing one in proximity of the other within the neighbourhood of alterity with each other.[19] Their positioning is not one of simple conjoining or opposition. They are not similar enough to be read as the same *genus*, but neither are they different enough to be dis-joined completely. There is a disjunction between their work and yet it is precisely with respect to their differences that they can be placed within the horizon of each other — apposing (rather than opposing) each other in *face-to-face proximity* with one another.[20] Both are keenly interested in the formation and nature of subjectivity. And from this keenness, both formulate a different, but nonetheless ap-proximate, critique against traditional humanism. In Lacan's poststructuralist psychoanalysis of human identity his project remains in the realm of intra-subjective anti-humanism; whereas Levinas moves beyond this position, extending the intra-subjective structuration of human identity into a post-humanist, inter-subjective ethical posture.

This proximity between Lacan and Levinas is a necessary co-joining for each other's work. It is necessary because each ameliorates the extremities within their own works, each can be used to read the blind spot of the other.[21] For Lacan, without Levinas, is an ethics still too focused on the individual subject, caught up within its own insatiable and destructive desire and the maladies of unconscious trauma and anxiety. Levinas offers another alternative (another other) beyond intra-subjectivity — the other human subject who intrudes upon the subject folding back onto itself and into itself. And for Levinas, without Lacan, the subject is given over to the other in complete and infinite responsibility and sacrifice. This is a responsibility and a sacrifice beyond the subject to the point that it is unbearable, to the point of self effacement as the subject substitutes itself for the other. Here, Lacan reminds Levinas of the affectivity of the unconscious on the subject. Lacan reminds Levinas that the subject has its own internal demands upon

[18] Refer to Harasym, S. (ed.) *Levinas and Lacan: the Missed Encounter*. State University of New York Press, New York, (1998).
[19] Reinhard, K. 'Kant with Sade, Lacan with Levinas.' *Modern Language Notes — The John Hopkins University Press*. (Sept 1995), Vol. 110, No. 4, 785-808; Fryer, D. *The Intervention of the Other: Ethical Subjectivity in Levinas & Lacan*. Other Press, New York, (2004), at 21.
[20] Reinhard, *ibid*, at 788.
[21] Reinhard, *ibid*, at 785.

itself and not only the demands from the infinite other. Rather than sacrifice and substitution, Lacan offers Levinas sublimation — a re-direction in the energies of sacrifice and yet satisfying the demands of sacrifice.

Both thinkers can also be coupled together in their posture towards Western philosophy. Despite not engaging directly with each other, both are obviously influenced and informed by the works of Kant and Hegel (especially the dialectic of inter-subjective desire, both being introduced to Hegel through Kojeve), Husserl and Heidegger. And conversely, both also held in contempt traditional, Western ontological philosophy and the image of traditional, Western individualism. And in doing so, both also put into question the presentation of traditional Western ethics, founded upon the conceptualisation of the independent individual of autonomous capacities of moral *potentia*. Lacan challenges this with his priority of desire and *jouissance;* and Levinas with his priority of proximity and responsibility. In opposition to the traditional image of human identity and its ethical integrity of One, both writers focus on the affectivity upon the subject by some-*thing* beyond itself — some greater other outside of and beyond the conscious grasp and control of the individual and its self-reflexive ontological significations. And in this respect, both authors are concerned with the consequences of a certain otherwise than being — either the unconscious other or the ethical-I other of the self — upon the human subject.

In this sense, both authors are ruptures to the founding notions of liberal humanism and our contemporary human rights' discourse. For Lacan, the individual of conscious, autonomous capacities of self is a fiction and fantastic ideal, while for Levinas it is a naive and romantic image of human identity.[22] Levinas even sites psychoanalysis as one of the main instruments which has caused the demise of the individual of self-conscious intentionality:

[22] Burggraeve, R. 'Violence and the Vulnerable Face of the Other: the Vision of Emmanuel Levinas on Moral Evil and Our Responsibility.' *Journal of Social Philosophy*. (Spring 1999), Vol. 30, No. 1, 29-45 at 35.

> Psychoanalysis and history really culminate with the destruction of the "I", identifying itself from within. The reflection of the *cogito* can no longer arise to ensure the certainty of what I am; it barely guarantees the certainty of my existence itself. That existence … becomes purely phenomenal. Psychoanalysis casts a fundamental suspicion on the most unimpeachable testimony of self-consciousness.[23]

In substitution of this conceptualisation of human identity, both Lacan and Levinas turn towards the radical potential of alterity (the immeasurable and irreducible difference of the other) as the foundational touchstone of another image of the human subject — the human *sensibility* (as opposed to rationality) towards a pre-conscious event of otherness. It is this pre-original event of otherness which is the traumatic rupture of consciousness, from which emerges the conscious being. And though the two thinkers explored different others — Lacan and the Real, Levinas and the face — Lacan's beyond of the unconscious serves the same purpose as Levinas's beyond of the hither side of the ethical subject.[24]

---

[23] Levinas, *EN*, above n 16, at 20-21. Yet, always noting the institutional distance between Lacan and Levinas, Levinas clearly states later in the same text: "I am definitely not a Freudian." Refer to *EN*, above n 16, at 97. This reticence towards psychoanalysis is underscored by Levinas's reiteration that the hither side of the ethical-I creature of other-wise-than-being is *not* the unconscious (nor the conscious) but rather another "other" of subjectivity. For Levinas, with its focus on the unconscious, psychoanalysis remains within the binary opposition with consciousness and, hence, returns to the conscious ego-self (a criticism I agree with in this dissertation, refer to pages 347-350 below). Refer to Levinas, cited in Critchley, S. *Ethics, Politics, Subjectivity: Essays on Derrida, Levinas and Contemporary French Thought.* Verso Press, London, (1999), at 186-187. I shall expand on this notion of Lacan's ethical limitations of *return* in the pages below. However, there are conflicting views as to Levinas's position on psychoanalysis. Levinas had an anti-Freudian teacher (Charles Blondel) who taught a "sharply anti-Freudian psychology" (refer to Burggraeve, R. 'Emmanuel Levinas: Thinker between Jerusalem and Athens, A Philosophical Biography.' *Journal of Social Philosophy* (Spring 1997), Vol. 28 No. 1, 110-26, at 116), and Levinas disagreed with the idea that the unconscious was the "hidden other" from the conscious self. (Refer to *Fryer*, above n 19, at 1). However, although referring to Levinas's suspicions of psychoanalysis, Fryer nonetheless cites Levinas's enthusiastic comments on Freud and the libido in *Time and Other* (trans. R Cohen), Duquesne University Press, Pittsburgh, (1987), (refer to Fryer, above n 19, at 76). In addition, Gondek cites three occasions in which Levinas refers to psychoanalysis in his text, *Totality and Infinity* — all of which seem un-hostile towards Freud's theses of the unconscious. Refer to Gondek, Hans-Dieter. 'Cogito and Separation: Lacan and Levinas.' *European Journal of Psychoanalysis*. (Fall 1995-Winter 1996), No. 2, at 2-3, (http://www.psychomedia./it/jep/number2/gondek), accessed at 11/02/10.

[24] Here I am thinking of the debate between Fryer and Critchely in which Chritchley draws an equivalence between Levinas's face-of-the-other and Lacan's Real. In one way, both thinkers are correct. Fryer is correct in suggesting that the retro-active construction of the Real through the Symbolic distinguishes the Real from the "reality-of-the-face" (Žižek also suggests this distinction between Lacan and Levinas) — a theme I highlight in the pages below. For Levinas's face of the other is not a retro-active construction. The face exists in direct relation with the subject — in a different time and place (the an-archy of the diachronic time of the hither side) to move the subject beyond itself — but, nonetheless, the face has a direct and immediate (intimate) relation with the subject — calling/hailing the subject to its ethical responsibility "to be" for-the-other. However, Critchley is also correct in suggesting that, notwithstanding this formal distinction, the face and the Real have the same *affective impact* upon the subject, in that both are the

Here, is it clear that both thinkers perceive the human subject as a particular social subject, engaged in a prior-sociability with an internalised external other — a "pre-history" social subject, animated before the conscious capacities of self are formularised. Both authors begin their imagining of human identity with a presentation of self which commences some place *not* at the presence of self, but rather, within the affectivity of an-other, before the traumatic rupture of self. Hence, for both thinkers it is the other (the affect of the other) which creates and constitutes the subject, and, thus, both thinkers are ap-proximate with each other in their non-humanist posture.[25]

Yet significantly for both thinkers, in this sociality with the other, the self necessarily fails. The subject can never traverse the distance of difference of alterity expressed within the terrain of proximity between the self and the other. For Lacan, there is an unbreachable proximity between the Real (within the unconscious) and the individual subject caught within the conscious Symbolic realm of ontological signification. There is also, ultimately, the unbreachable distance of the incestuous object of desire — the (m)other, which the law (the phallus) necessarily divides and keeps apart from the subject. And so too for Levinas there is an unbreachable proximity between self and other, between the individual subject and the infinite alterity carried with the face of the other. These are social relationships which, for both thinkers, are intimate and foundational to the formation of human identity. Yet, at the same time for both thinkers, these are relationships in which the individual subject can never successfully nor completely traverse to the other side and fully comprehend and grasp.

---

internalised-externality of otherness in the formation of human identity and the enigmatic rupture of the circle of subjectivity. Refer to Critchley, *Ethics, Politics, Subjectivity,* above n 23, at 198-216, and Fryer, above n 19, at 215-238. Yet, in another way, both thinkers are also incorrect, for they both ignore the profound religiosity within Levinas's alterity: "The justice rendered to the Other, to my neighbour, gives me an unsurpassable proximity to God … One follows the Most High God, above all by drawing near to one's neighbour." (Levinas, *Difficult Freedom: Essays on Judaism*. Cited in Veling, T. 'In the Name of Who? Levinas and the Other Side of Theology.' *Pacifica*. (Oct 1999), No. 12, 275-92, at 292. For Levinas, always behind (within) the animation of alterity carried with the face of the other is the radical holiness of god. This religiosity-of-the-face in Levinas's work is something which is overtly missing in Lacan's writings regarding the Real.

[25] Fryer, *op cit,* at 31-32.

In this light, Lacan and Levinas are ap-proximate with each other in that they both offer, what may be termed, an *ethics of failure*. Yet it is this so-called "failure" of/in self which is the touchstone of a radical re-calibration of the ethical integrity in the structure of human identity. It is this necessary failure of human sociality founded upon alterity which leads both thinkers to orientate the structural integrity of ethics around the space of otherness, rather than the traditional place (and power) of self. For both, ethics is an expression of a longing across the distance of difference. For both, ethics is a "position-taking" in relation to the asymmetrical nature of the distinction of alterity, rather than a subsumption of the other in an (self-reflexive) effort of unified understanding of the other from (and within) the limits of the self. For both, ethics is the effort of constant rupture, displacement and deferral of/within the representational systems of ontological significations which attempt to "grasp and know" the other.[26]

But it is in this space of ethical otherness where, also, Lacan and Levinas are at their most distant. For Lacan, the Real as a *retroactively* constituted sense of some-*Thing* missing from our conscious selves. It is some-*Thing* Real, but some-*Thing* always already outside of the limits of reality, animated by the foreclosure of Symbolic significations. Here, Lacan's impossible desire to return to the Real — to pass "back" through the phallus and traverse the threshold of the Symbolic — leaves human identity marked by an emptiness, the *lack-in-being* of *intra*-human subjectivity. This is the negativity of human identity — the trauma of this cut from the desired object and the consequential alienation, anxiety and aggression which characterises human experience and expression. There is no cure of the conscious human ego against such maladies and negative experiences. One cannot "return" to the Real (or be returned by psychoanalysis) and one cannot become the supplemented ideal image of the *imago*. Rather, one is left haunted by the traces of the trauma of these (unconscious) experiences and this empty sense of self. Though this some-*Thing* (*das Ding*) of the Real which we most desire has an affective impact on conscious human experience, for the subject existing within the limits of the social and linguistic discourses of signification, the Real is, nonetheless, no-*Thing* as it always

[26] Shelly, R. 'The Philosophy of the Limit by Drucilla Cornell (Book Review).' *Sydney Law Review*, Vol. 17, 472-81, at 480. (http//www.austlii.edu.au/au/journals/SydLawRw/1995/29.pdf), accessed at 12/02/2010.

already remains excluded from these margins of Symbolic existence. It is the chasm of the internalised externality of both human consciousness and human inter-relatedness which can never be filled.

And hence the currency of Lacan's ethics of desire both within the self and the sociality of inter-humanness is also limited. The other to which Lacan directs his ethical motivation, which offers the potential of freedom and liberation to the individual subject from its own existence, paradoxically does not exist within this discursive terrain of the subject. No other can ever hail the subject beyond this existence. As a *nothingness*, the structural other of lack (the Real of the unconscious) cannot transcend the individual subject beyond the limits of its own existence because the experience of this (retroactively constituted) other is only through the subject's own existence signified within the Symbolic. Thus, in Lacan's thesis of individual subjectivity, the transcendence to this beyond and promise of freedom is structured as unfulfillable phantasms tormenting individual aspirations. Here for Lacan, liberation is limited. It is the freedom the individual subject attains from liberating itself from the false ideals and objects held out in the Symbolic as the fulfilment of its desires. In this respect, just as the pure, idealised totality of the subject is impossible, so too is a pure ethics impossible while the subject is restricted within the structural limitations of the Symbolic.[27]

Hence, Lacan's ethics is revealed in tragic pessimism and as a limited ethics of return:[28]

> It is in the tragic dimension that actions are inscribed and we are called to take our bearing with regard to values … That is where the experience of human action resides, and it is because we know better than those who have gone before how to recognise the nature of desire that is at the heart of this experience, that an ethical revision is possible …[29]

---

[27] Cornell, D. 'Rethinking the Beyond of the Real.' *Cardozo Law Review*. (Jan 1995), Vol. 16, No. 3-4, 729-792, at 755.
[28] Refer to Derrida, J. *The Post Card: From Socrates to Freud and Beyond.* (trans. A. Bass), University of Chicago Press, Chicago, (1982). The ethics of return is what Cornell refers to as the "law of destination." Refer to Cornell, *ibid*, at 735.
[29] Lacan, J. *The Seminar of Jacques Lacan Book VII: The Ethics of Psychoanalysis 1959-1960.* (ed. J.A. Miller, trans. D. Porter), W.W. Norton, New York, (1992), at 313-14.

Lacan's ethics is an ethics of a desire to return to a sense of harmony and wholeness, a return to the Real. But barred from this by the phallus —(the law of the name-of-the-father) and, thus, subjected and limited to the Symbolic, the self does not return to the Real, but rather, returns to another place — the return to the presence-of-self. And thus, ultimately, it is the phallus (the law and the separation it inflicts) to which Lacan (and Lacan's subject) always returns — the indivisible barrier and gap between subjective desire for the Real and the fantasy-of-reality of the Symbolic law of discursive signification.[30] The self always returns to the presence of the phallus and, in this way, must always return to the limits of the presence of itself. This returned self is, indeed, different from the conscious ego. It is cognisant of the alienation, anxiety and aggression of the ideality of the Real beyond the limits of itself and, thus, it can potentially behave differently — relieved (as opposed to cured) from the fantasy of the ideal good of an ideality of selfhood and the illusory harmony of sociality. But nonetheless, Lacan's process of ethical subjectivity is structured on an infinite boomerang of identification between the Symbolic, the phallus and the failed desires toward the Real.

It is with this sense of return that Lacan leaves us with an unfulfilled ethics of desire. Without this ethics, the individual subject is disillusioned and lost in the world of impostors, lost in illusions of possibility within our fantasies-of-reality. Our contemporary human rights' discourse is one such fantasy-of-reality, propped up by its dual illusions of possibility: the potentiality of the unified self within a totality of the Symbolic significations of the sociality of the State. It is this rights' talk which distracts the individual subject from understanding its desire and its necessary failure — from understanding *the law of loss* — with false and idealised promises of fulfilment and satisfaction. For Lacan, the freedom in such rights' talk limits the individual subject and denies it from gaining access to and understanding of the ethics of unfulfilled desire and impossible return.[31] In this way, Lacan has left us without an idealised potentiality of self and without a sociality with other human subjects. Typical of the post-structuralist

[30] Refer to Derrida, *op cit*. The theme and significance of "return" in Lacan's work is something which Lacan himself acknowledged. Refer to his seminar: 'Edgar Allan Poe: The Purloined Letter.' in *Ecrits: A Selection.* (trans. and ed. A. Sheridan), W.W. Norton, New York, (1997).
[31] Douzinas, C. *The End of Human Rights*: *Critical Legal Thought at the Turn of the Century*. Hart Publishing, Oxford, (2000), at 226-27.

(postmodern) discourses, beyond the structural principles of a fragmented individual subjectivity, Lacan leaves no grounding of the individual. There is no human sentimentality, no human other on which to build fraternity, brotherhood and community, no aspiration or inspiration for the subject or the social.

The Sociality of an Ethical-Justice in the Critical Gaps of Democracy

It is at this point where we can turn to Levinas and the possibility of a new, post-humanist version of *selfhood-in-community*. Perhaps amongst the many significant contributions Levinas offers in the approach to ethics and philosophy (in his approach to ethics as "first philosophy") is the potential to bridge the gap between the anti-humanism of Lacan's post-structural perception on human desire (and poststructuralism generally) and the liberal tradition of humanism. True, Levinas shares in the anxiety against humanism, in the "crisis of humanism,"

> The unburied dead of wars and extermination camps make one believe the idea of a death without morning after and render tragic-comic the concern for oneself and illusory the pretension of the rational animal to have a privileged place in the cosmos and the power to dominate and integrate the totality of being in self-consciousness … Henceforth the world founded on the cogito appears to be human, all to human … clear of all "ideology," without human traces.[32]

But in addition, Levinas also is suspicious of a closed postmodernism concerned only with subjective agency and signification: "Modern anti-humanism is perhaps not right in not finding in man, lost in history and in order, the trace of … a … pre-historical and an-archical [ethical] saying."[33] In his own way, Levinas's desire is for a return to humanism, but a significantly structurally altered humanism — *a humanism of alterity* (of the other subject) and its ethical implications upon the self. Here, where Lacan begins (and ends) with the structuralisation of the subjective self (*viz a viz* its relation with the other of its own lack), Levinas begins and ends with the (human) other. Where Lacan stops — at the threshold of the other but denies us this other through the structure of the law — Levinas

[32] Levinas, *Humanism and An-archy*, at 127, cited in Diamantides, M. 'Levinas and Critical Legal Thought: Imbroglio, Opera Buffa, Divine Comedy?' *Levinas, Law, Politics*. (ed. M. Diamantides), Routledge-Cavendish, Oxon, (2007), at 179.
[33] Levinas, *Humanism and An-archy*, at 139, cited in Diamantides, *ibid*, at 179.

begins. Where Lacan's psychological self is marked by the emptiness of the impossible Real and unfulfillable desire, Levinas fills this chasm of selfhood with the face of the other human subject, and implores an ethical inter-subjectivity from this trace of pre-original otherness, orientated around an (ethical) effort of being for-the other rather than of-the-self. Levinas's ethical responsibility is the *inter*-subjective limitation — or, viewed another way, the inter-subjective *expansion* — of Lacan's *intra*-subjective desire. It is this (Levinasian) inter-subjectivity which inspires the possibility of an ethical inter-humanness within the machinations of the (Lacanian) desire of the self in the Symbolic sociality of signification.[34]

Here it is clear that Levinas's ethical ambition is greater than Lacan's and, hence, of greater ethical potential to the integrity of a imagining of human rights and the functions of the politico-legal workings of the sociality of the State. Levinas's motivation for his ethics of alterity is to attempt to pre-configure a justification for the human subject to act against violence, that is, the violence of "being" against the alterity of the other. He aims to recover ethics and the contingency of life from the idealist concept of human freedom (the freedom of being), which modern liberalism has recast into the autonomous, individual of reasoned self-will.[35] As the previous quote above indicates, for Levinas, the horror of human evil is motivated by such autonomous self-assertion — both in the individual human subject and the human collective of the Same (the symmetrical sociality of the State). This reduction of the other is the vulgarity and debasement within the action of ego self-interest and energy held by the presence-of-being.[36] By insisting on ethics as first philosophy, by pre-founding ethics prior to consciousness (prior to the ego-self), law and politics, Levinas attempts to re-invigorate human identity with a primordial ethical inclination for the other human subject who is always already beyond and before me and, thus, superior to me. Ethics, thus, begins as/in an asymmetrical, inter-subjective relationship of obligatory responsiveness and responsibility. Ethics is primarily this primordial event of inter-subjectivity — it is the moment of *entre nous*. It is ethics which

[34] Hutchens, B. *Levinas: A Guide for the Perplexed*. Continuum Press, New York, (2004), at 100.
[35] Diamantides, M. 'Responsibility in the Wake of the Subject's Demise: the Appeal and Danger of Levinas's Ethical Anarchy,' in Diamantides, *op cit*, at 3.
[36] Levinas, E. 'Meaning and Sense.' *Basic Philosophical Writings* (ed. A. Peperzak, *et al*), Indiana University Press, Bloomington, (1996), at 51.

is the mediation of a prior sociability of subjective development and the community collective and not will, reason or politics. It is through the pre-original openness of proximity with the other human subject that the Absolute alterity of the other provokes an infinite responsibility for-the-other, and, thus, from which emerges an inclination — a possibility — of justice in the freedom/transcendence from the limitations and the violence of being, within the corporality of human sociality.

In this way, Levinas's renewed human identity lets go of its own self interest for the interests of others. In this dis-interestedness, the subject is no longer wrapped around itself, but rather, "circles itself"[37] — circling the space of alterity within itself, founded upon the prevenient inter-subjective proximity and responsibility with the face of the other:

> … an undoing of the substantial nucleus of the ego that is formed in the same … by this *assignation to respond,* which does not leave any place of refuge, any chance to slip away, and is this despite the ego, or, more exactly, despite me.[38]

The split of subjectivity is not found in the autonomy of the consciously rational self. Rather, it is found in how the internality of the Sameness of the self is structurally orientated around (pre-configured upon) the affectivity of the externality of the alterity of the other, always already in open proximity to the self. This potential transformation in the formation of being towards this otherwise-than-being of human subjectivity, requires an ethics of effort (an effort of ethics), in which the subject moves from passive openness towards the infinite responsibility for-the-other (the "non-choice" of ethical proximity), and into an active giving of hospitality and charity in the corporal world of the other (the "conscious decision" to be ethically just towards the other). This transformation is also the effort of transformation in the empirical socio-political world in which we live. Here, the conceptualisation of human identity is also transformed: [the] "idea of a person as an

[37] Critchley, *The Ethics of Deconstruction*: *Derrida and Levinas*. Edinburgh University Press, Edinburgh, (1999), at 108.
[38] Levinas, E. *Otherwise Than Being or Beyond Essence*. (trans. A. Lingis), Duquesne University Press, Pittsburgh, (1998), at 141.

end itself is abandoned — the other is the end, *"I"* am the hostage."[39] With this ethical effort Levinas attempts to "wrench philosophy and the *existent* from essence," to rid the sociality of humanity of the brutality and violence of the ego-I.[40]

In so doing, Levinas, more than Lacan, attempts to transform the sociality of liberal humanism and modern, liberal democracy. This is an attempted move from a purported egalitarianism of idealised individual rights borne by a symmetrical collective of ego-beings, and towards a responsibility for the prioritised particularity of the pre-original other. Upon the pre-foundational ethical subjectivity — with the simultaneous presence of the "third party" in proximity with the self and the face — justice emerges. And hence, consciousness, sociality, law and politics are established in order to inspire the nobility and dignity of an ethical-justice of human fraternity for-the-other and not of-self. Hence, justice is the expression of subjectivity beyond the law, the signification of the pre-original ethics of alterity prior to Symbolic animation. This justice of alterity, animated by this ethical responsibility, is mediated throughout the social by law — a law, hence, marked by the charity of responsibility. Thus, rights (the law of human rights) are re-newed with this ethical integrity of responsibility for-the-other:

> Disinterested as goodness: the other in his demand which is an order, the thing to do with me, the other as fellow man as always stranger — goodness as transcendence; and I, the one who is held to respond, the first one who happens to come along, a right of man. A right of the other man above all.[41]

Hence, Levinas presents justice as more than simply the limits of the system of law and the imposition of politico-legal power.[42] Rather, justice speaks of the calling of the other and of the already owed responsibility of compassion, mercy and pity, grounded upon the prevenient inter-subjective relationship of proximity, and *not* within the reciprocal responsibility of individual rights animated by the benefit of self. This open ethical-justice is concerned with the service of the other and the vigilance to the spaces of alterity in the necessary politico-legal processes of inter-human sociality. Unlike our

[39] Levinas, 'Substitution,' *BPW*, above n 36, at 94.
[40] Levinas, 'Essence and Disinterestedness,' *BPW*, *ibid*, at 114.
[41] Levinas, *EN*, above n 16, at 135.
[42] Slaughter, M. 'Levinas, Mercy and the Middle Ages,' in Diamantides, above n 32, at 51.

contemporary human rights' discourse, it is not consumed by a limited concept of legal-justice — the looking back to principles and precedents to enforce a stable and certain system of law and political structure, prioritising the *logocentrism* of presence and power.[43]

The proper politico-legal discourse of such an open justice works in the constant effort of exposing this pre-original, ethical encounter of alterity. Such a justice "is best served by the politics of democracy, since it is democracy which is potentially always open to review, revision and change."[44] Hence, just as Levinas returns the subject to humanism but a humanism with a re-newed ethical orientation, so too Levinas returns sociality and justice to democracy, but a democracy with a revitalised, critical architectural aspect. This re-orientation in the structural form of democracy is that it is founded within the critical gap of alterity, rather than upon the (traditional liberal) circle of the Same. This is the structural gap of contestation, critique and intervention essential to democracy, It is such gaps which oppose the foreclosure of the limits of the Same, which invigorate the politico-legal deliberative discourse with a posture of openness and respons-*iveness* to the particularity of otherness:

> … the *formal* injunction [transformation] of the deduction [of alterity] remains irrefusable … ethics entails politics and law … But, on the other hand, the political or judicial *content* thus assigned remains indeterminate, to be determined beyond knowledge and any possible presentation, concept or intuition, singularly in the speech and responsibility *taken* by everyone in each situation …[45]

At its interrogative and open best, democracy bears the sense of invention and spontaneity, which counters the potential violence of the reduction of alterity in the processes of stability and certainty. Hence, the democratic aspirations towards justice and an egalitarian sociality of the State commence from the infinite responsibility towards the irreducible alterity of the other, and *not* from the universality of all under the

---

[43] Slaughter, above n 42, at 51.
[44] Levinas, E. *Is it Righteous to Be? Interviews with Emmanuel Levinas.* (ed. J. Robbins), Stanford University Press, Stanford, (2001), at 134, 194.
[45] Derrida, J. *Adieu to Emmanuel Levinas*. (trans. P.A. Brault and M. Nass), Stanford University Press, Stanford, (1989), at 101.

Same ontological signification of (autonomous) being.[46] Divorced from this ethical integrity towards the other — separated from the service of ethical-justice — the necessary democratic structures of legal rationalism and political certitude leave the collectivity of human sociality under a Lacanian fantasy-of-reality, an illusion of a totality of stable and secure certainties. Without alterity and an open justice directed towards ethical responsibility, society risks the danger of closing in on itself, risking totalisation — even in the soft totality of modern, liberal hegemony — foreclosing on the possibilities gained from human distinction. As Derrida reminds us, "pure unity … is a synonym of death."[47]

In this (Levinasian) light, the aim of alterity is not to defeat democracy. Rather, it is to re-examine it through the prioritised ethical proximity of inter-subjectivity, in order to reorientate the effort of moral conscience away from the liberal tradition of self-interest and towards a responsibility for-the-other. The egalitarianism of modern, liberal democracy *is* a concept of justice and, moreover, democracy is necessary for the potentiality of ethical justice. But democracy alone is *not* a sufficient condition for justice, because there is always the exclusion of some other in the presence of being and the ontological significations of self and sociality.[48] Justice exists and is an expression of the liminal spaces between ethics and the politico-legal sociality of the democratic State, the liminal left-over of ethics beyond the processes of law and politics. Hence, justice is the empty spaces which burrow fissures in the presence of democracy, signified through the deliberative and discursive processes of law and politics. Justice remains the refuge of the voices of the other, beyond the Sameness within such processes of democratic sociality.

Open, critical democracy is scarred with such marks of openness, pitted with such wounds of otherness. It accepts the (ethical) necessity (the ethical risk) of the need for deliberative dialogue in these spaces and within these processes of politics and law, to

---

[46] Cornell, D. *The Philosophy of the Limit*. Routledge Press, New York, (1992), at 106.
[47] Derrida, J. 'The Villanova Roundtable.' *Deconstruction in a Nutshell: Conversations with Jacque Derrida*. (ed. J. Caputo), Fordham University Press, New York, (1997), at 13.
[48] Levinas, *EN*, above n 16, at 176.

engage with and account for the expansion of the other within the circle of the Same. This is not the closed dialogue invoked by an act of self-reflexivity in an attempt to institutionalise and hegemonise the self-interest of one voice under the veil of consensus (Gramsci's "superficial hegemony"). The mark of critical democracy functioning at its best is in the effort towards an ethical-justice and the openness of judicial processes in order to "hear the voice of the other" and, hence, account for difference within the dialectical deliberations of the sociality of the State.

Thus the need for human rights which take seriously the responsibility of inter-human proximity and the sociality of ethical-justice — as opposed to legal-justice. The task of human rights is the task of the *provocateur*. Human rights are external to the politico-legal processes of social deliberations and dialogue (as they signify the beyondness of Absolute alterity) and yet also human rights are central to the processes of democracy in order to constantly animate such processes with the justice of responsibility and ethical consideration for all. Human rights remind the animation of people and power in the actuality of collectivity to always do better, to always remain open to unfinished renewal and unending revision "in the face" of the multifarious particularity of human distinction.

Reorientated around this gap of alterity — constantly expressed through a human rights of otherness — ethics and justice presents politics and law with an impossible tasks. This is the critical task of constant vigilance for the limitless an-archy of otherness within the margins of the presence of power in self and State. Politics and law *must fail*, just as our ethical efforts in our responsibility for-the-other are never enough, an ethical responsibility which the "self does not succeed in shouldering."[49] This is the humility of ethical-justice and critical democracy, the acceptance of the irreducible lack-in-being of an otherwise-than-being, hither side of human identity, which must be accounted-for in the sociality of the significations of being. A human rights of otherness in the service of an ethical-justice for all agitates democracy not to give-up in the face of such ceaseless

[49] Levinas, *OTB*, above n 38, at 195.

ethical demands, or rest in political complacency for what has been achieved, but rather, to look forward to what *might be* in the constant interrogation of itself:[50]

> But for this reason, it [justice] may have *avenir*, a "to-come," which I rigorously distinguish from the future that can always reproduce the present … Perhaps it is for this reason that justice, insofar as it is not only a juridical or political concept, opens up for *l'avenir* the transformation, the recasting or refounding of law and politics. "Perhaps," one must always say perhaps for justice.[51]

Yet this is *not* a justice which allows the acceptance of any and everything in the name of alterity. It is *not* the ethical effort of the apologist for the right of relativism (or for the claims of cultural relativism in the discourse of human rights). Rather, the gap of alterity towards which human rights remain vigilant, and around which the form of critical democracy is re-orientated, is the ground upon which to constantly challenge the violence towards difference from the totality of the Same in a democracy of the many. It is an expression of re-calculation of subjective rights of the sovereign self in the consideration of the matrix of inter-subjective responsibility.

***

With the rupture of postmodern deconstruction in the mid-twentieth century it is no longer possible to return to the simplicity of idealised self-assertive certainty, the universal capacities of reasoned intentionality of self-will and a credible totality of a sociality of shared symmetry, without, at best, the naivety of political popularism or, at worst, the vulgarity of bigotry. Such liberalism of the sovereignty of self and State has been discredited — it "dupes us" into believing in the (rights of) dignity of presence and power with a so-called nobility of aspirational ideality, even when people are starving or repressed under historical atrocities.[52] What the radical alterity of postmodernism reveals is that the ontological *logocentrism* in the tradition of liberal humanism within Western philosophy, and its most cherished concept — human freedom — are rooted in the

---

[50] Cornell, *The Philosophy of the Limit*, above n 46, at 110.
[51] Derrida, J. 'Force of Law: the Mystical Foundation of Authority.' *Deconstruction and the Possibility of Justice*. (ed. D. Cornell, M. Rosenfield & D. Carlson), Rutledge Press, New York, (1992), at 27.
[52] Diamantes, M. 'Levinas and Critical Legal Thought: Imbroglio, Opera Buffa, Divine Comedy?' in Diamantides, above n 32, at 182.

conceit that they have tapped into the very core of the universal "essence of man," and that any such ontological essence of being is a *projection* of the ideal nature of the wielders of *power*, dependent upon the subordination of "the other" for its own self-serving coherency and stability.[53] Yet at the turn of the twenty-first century, in the hyper-reality and *complexification* of trans-economic capitalism and international globalisation,[54] the loss of such simplicity and ideality has not necessarily led to a more complicated local-sociality as often suggested, but rather, perhaps even the converse. Through technology like the world-wide-web the individual-subject has gained its greatest social space to exercise more than ever before its autonomous capacities of being, as promised within liberal emancipation; contemporary mainstream politics is more non-descript than in recent memory; and the social and cultural polemics are more banal than in the last hundred years. The progress of liberal democracy through the processes of globalisation has hastened the hegemony of localised and global differences. Apart from the growth of international cosmopolitanism (enjoyed mostly by the bourgeois elite of mainly the rich North of Western countries, which objectifies and commodifies local cultural artefacts, articulations and symbols into its own aesthetic of significations of being),[55] in language, culture, sociality, lifestyle, knowledge and wisdom, there has been a reduction of distinction into a homogenous totality of the Same, with a prioritisation on the sociality of capitalist consumerism and self-interested individuation. It is, indeed, a perverse paradox that the discourse of human rights, which aims at a sociality of freedom, justice and peace *for all*, should facilitate such hegemony of the *Oneness of the Same*, by investing its ethical integrity and moral dignity in the "universality" of the "independent automatism of the individual."

---

[53] Noonan, above n 14, at 3-4.

[54] On the issues of postmodern *hyper-reality*, *trans-economic capitalism*, and *comlexification*, refer to Baudrillard, J. *The Transparency of Evil: Essays in Extreme Phenomena*. (trans. J. Benedict), Verso Press, London, (1995); and Lyotard, J.F. *The Post-Modern Condition: A Report on Knowledge*. (trans. G. Bennington and B. Massumi), Manchester University Press, Manchester, (1984), respectively.

[55] Some commentators view the expansion of globalisation as a positive international movement, especially in the areas of global governance and international justice. For a recently published account of such a position refer to Brock, G. and Brighouse, H. (ed.) *The Political Philosophy of Cosmopolitanism*. Cambridge University Press, Cambridge, (2005).

This historical progress of liberal democracy has often included a retroactive self-justification. It has often begun with a limitation of the benefits of democratic egalitarianism to those with the greatest *cache* of power (the socio-historical contrivance of the power of the white, middle-class, heterosexual, male) and glossed-over its own self-serving imperialism of classism, racism and colonialism, sexism and homophobia,[56] until it has been provoked by the agitations *of others* to do better — *to be more democratic*. At which point, it claims such moments of justice and liberty as its own success. The success here in modern democracy is not in its critical openness and continued, ethical vigilance against its own pagan petrification and ego self-service, but rather, to have the fluidity to absorb and disarm such agitations into its own aspirations and ideals — hegemonising such distinctions of disagreement into its own expansion of the Same. At the beginning of the twenty-first century, the radicalness of modern, liberal democracy is *not*, unfortunately, found in its critical openness, but rather, in the audacity of how it still manages to justify and enforce political and legal inequality (for example, in the legal discriminations still found in Australian law towards homosexuals)[57] and celebrate social and economic disparities, while still claiming the moral authority of the lexicon of a sociality of a collective of egalitarian citizen-subjects. Rather than this fundamental contradiction defeating itself (the Kantian test of Universal Law), modern, liberal democracy seems to sustain itself with little effort, despite such paradoxes.

The continual growth of modern, liberal democracy speaks to its well meaning, important and *enticing* ideal of liberating the individual from oppressive sociality — something which most other forms of socio-political collectives (past and present) have not been as successful in doing. Yet one polemic in which there is still great tension in modern

---

[56] Critchley, *Ethics, Politics, Subjectivity*, above n 23, at 87-88.

[57] The extent of discrimination against homosexuality enforced within Australian legislation is reflected in the vast number of legislative changes which the, then, new Australian Labour government brought down in 2008-09. Some one hundred pieces of existing Australian Federal legislation were amended to relieve them of their discrimination towards homosexuality. Such amendments have still not made the "homosexual citizen-subject" equal with the "heterosexual citizen-subject" in Australia, reflected in the recent contemporary debate regarding same-sex marriage legislation. For a detailed analysis of discrimination in both State and Federal Australian law, refer to The Australian Institute of Criminology. *Trends and Issues in Crime and Criminal Justice*. (ed. M. Bull, S. Pinto, P. Wilson), (Jan 1991), No. 29, (http://www.aic.gov.au/documents/F/2/E/%7BF2ED9BD3-0314-4EAA-AD03-410635E620DE%7dti29.pdf), accessed, 17/09/2010.

democracy's success of emancipated individualism is that of the collective. The anxiety of the loss of community is felt in both the West — when we reminisce of times of considerate neighbourhoods, corner store shopkeepers, unlocked front doors and public courtesies to others — and in the non-West — expressed most vividly in the fundamentalism of terrorism enlisted to enforce a religiosity-of-community, foreclosed upon Western hegemonic influences. With the structural formation of our contemporary human rights' discourse orientated around the moral potential of individualism, this is an anxiety to which modern human rights fails to speak. Our contemporary human rights' discourse has either failed to navigate an agreeable course between the two necessary poles of liberal, consumptive individualism (the necessary power of being) and fundamental community mores (the reality of inter-human, inter-subjective existence), or has become stale and petrified in its own limits of self-reflexivity. Either way, at best it offers a tension of legal tolerance for those who are similar enough to us for us to expect the same in return. At worst, it is a human nightmare consumed by bureaucratic procedures and legal principles, which aim to "keep safe a past dream of a future potentiality in the ideality of man" and almost narcissistically torments the real-life struggles of human existence. Our contemporary human rights' discourse too often has been distracted by the ideal of the universality of human dignity (the equality of the individual's capacities of reasoned self-will and intentionality), resulting in the expression of abominably trivial and insignificant recipes of the universal human experience, or abstract models of free individualism — both largely irrelevant to the practical moral dilemmas and daily decision-making deliberations of the *subject-in-community* with others.[58]

If, since the mid-twentieth century, the impact of postmodernism has been to expand our understanding of the potential for violence in the social strategy of symmetrical security and the politics of the Same, then perhaps, with postmodernism, we have also begun to take seriously the notion that it is impossible to have an ethic of/through One, (as it is impossible to have a politics of One), and, hence, we must necessarily be open to alterity if we accept the necessity of attempting *to be* ethical in our daily actions and deeds. To

[58] Bauman, above n 6, at 30-31.

be ethical — open to the distinction of the alterity of the other — is still a choice of the conscious self — a difficult choice, an ethical-effort-of-being. Yet, being-in-community with the alterity of otherness requires such a necessity and such an effort. If we take seriously this necessity, and we take seriously the potential violence of social symmetry, then we must necessarily move beyond the modernism of autonomous individualism and the postmodernism of identity politics and inclusivity; we must traverse into the realm of radical alterity. To do this we bring together Lacan and Levinas, we *must read* Lacan *with* Levinas, we must take seriously (*intra*-subjective) desire and (*inter*-subjective) proximity. Rights, even in their more traditional civil and political form, function as little more than the reminder of the left-over beyond self — the possible threat of rupture and intrusion from something beyond the image of self. Rights, thus, must also necessarily be *read with* Lacan and Levinas.

The alterity of Lacan with Levinas reminds us that this threat of rupture is real. For this otherness is always already intimately internalised in the formation of human identity, the other is the necessary pre-foundational event of the proto-sociality animating human consciousness. A human rights of otherness is not a quest for self-effacement in the face of such a threat. But it is an urging to understand the necessity of otherness in the existence of self, and an agitation to be conscious to the fact that the threat from otherness is the threat imagined within the solitude of the intra-subjective self. In this way, human rights must be more than the reduction of human potential to the Symbolic significations of self, through the politico-legal sociality of the State. Such a limitation of human rights echoes with the anxiety of such a threat. Human rights must be, first and foremost, the expression of the ethical potential of self — the openness to an ethic of-the-other, expressing a responsibility for-the-other. This "pre-history of ethical subjectivity" is something which our contemporary human rights' discourse has lost and forgotten in its own prioritised struggle of being, in the "signification of history and order." Alterity,

and the rights-of-responsibility, remind each of us that, beyond the interests and significations of ourselves, we are burdened with the effort of ethical obligations and the vigilance of justice — not because we want to but because, in the asymmetrical inter-humanness of subject-in-community, we must.

****

BIBLIOGRAPHY

Alliot-Marie, M. *Bill Prohibiting Concealment of the Face — Speech by Michèle Alliot-Marie, Ministre d'Etat, Keeper of the Seals, Minister of Justice and Freedom, at the Senate.* (www.ambafrance-uk-otg/ Michèle-Alliot-Marie-s-speech-to.html), accessed 12/10/10.

Allison, H. *Kant's Theory of Freedom.* Cambridge University Press, London, (1990).

Althusser, L. *Lenin and Philosophy and Other Essays*. Monthly Review Press, New York, (1971).

Appiah, KA. *The Ethics of Identity*. Princeton University Press, Princeton, (2005).

Aristotle. *Nicomachean Ethics.* (trans. H. Rackham), Harvard University Press, Cambridge, (1962).

------ *The Art of Rhetoric*. (trans. H.C. Lawson-Tancred), Penguin Publishers, London, (1991).

Arrigo, B. & Williams, C. 'The (Im)possibility of Democratic Justice and the 'Gift' of the Majority: on Derrida, Deconstruction and the Search for Equality.' *Journal of Contemporary Criminal Justice*. (Aug 2000), Vol. 16, No. 3, 321-343.

Badiou, A. *Being and Event*. (trans. O. Feltham), Continuum Press, London, (2006).

Barrett, M. *The Politics of Truth: From Marx to Foucault*. Polity Press, Cambridge, (1991).

Barthes, R. 'The Author is Dead.' *Image-Music-Text.* (trans. Stephen Heath), Hill and Way Publishers, New York, (1977).

Batnitzky, L. 'Encountering the Modern Subject in Levinas.' *Yale French Studies*. (2004), No. 104, 6-21.

Baudrillard, J. *The Transparency of Evil: Essays in Extreme Phenomena*. (trans. J. Benedict), Verso Press, London, (1995).

Bauman, Z. *Postmodern Ethics.* Basil Blackwell, Oxford, (1993).

Bentham, J. *The Works of Jeremy Bentham* (ed. J. Bowring), Simpkin, Marshall & Co, Edinburgh, (1843).

Best, S. & Kellner, D. *Postomdern Theory: Critical Interrogations.* Macmillan Press, London, (1991).

Bowie, M. *Lacan*. Harvard University Press, Harvard, (1991).

The Brennan Report. (http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report), accessed 20/07/10.

Brock, G. & Brighouse, H. (ed.) *The Political Philosophy of Cosmopolitanism*. Cambridge University Press, Cambridge, (2005).

Bull, M. Pinto, S. & Wilson, P. (ed.) The Australian Institute of Criminology. *Trends and Issues in Crime and Criminal Justice*. (Jan 1991), No. 29, (http://www.aic.gov.au/documents/F/2/E/%7BF2ED9BD3-0314-4EAA-AD03-410635E620DE%7dti29.pdf), accessed, 17/09/2010.

Burggraeve, R. 'Emmanuel Levinas: Thinker between Jerusalem and Athens, A Philosophical Biography.' *Journal of Social Philosophy*. (Spring 1997), Vol. 28, No. 1, 110-26.

------ 'Violence and the Vulnerable Face: The Vision of Emmanuel Levinas on Moral Evil and Our Responsibility.' *Journal of Social Philosophy*. (Spring, 1999), Vol. 30, No. 1, 29-45.

------ *The Wisdom of Love in the Service of Love: Emmanuel Levinas on Justice, Peace and Human Rights*. (trans. J. Bloechl), Marquette University Press, Milwaukee, (2002).

------ 'The Good and its Shadow: The View of Levinas on Human Rights as the Surpassing of Political Rationality.' *Human Rights Review*. (June 2005), Vol. 6, No. 2, 80-101.

------ *Affected by the Face of the Other: The Levinasian Movement from the Exteriority to the Interiority of the Infinite.* (www.mondodomani.org/dialegestai/rbu01), accessed 7/1/10.

Burke, E. *Thoughts on the Cause of the Present Discontents*. (6th ed.), J. Dodsley, London, (1785).

------ *Reflections on the Revolution in France*. Dent Publishing, London, (1971).

Butler J. *Bodies that Matter: On the Discursive Limits of 'Sex.'* Routledge Press, London, (1993).

------ *The Psychic Life of Power: Theories of Identity*. Routledge Press, London, (1997).

------ *Gender Trouble: Feminism and the Subversion of Identity.* Routledge Press, New York, (1999).

------ *Subject of Desire: Hegelian Reflection in Twentieth Century France*. Columbia University Press, New York, (1999).

------ *The Butler Reader*. (ed. S. Salih), Blackwell Publishing, Malden, (2004).

Caputo, J. (ed.) *Deconstruction in a Nutshell: Conversations with Jacque Derrida*. Fordham University Press, New York, (1997).

Carroll, J. *Humanism: the Rebirth and Wreck of Western Culture*. Fontana Press, London, (1993).

Caudill, D. 'Lacanian Ethics and the Desire for Law.' *Cardozo Law Review*. (1995), Vol. 16, 793-803.

------ 'Identifying Law's Unconscious: Disciplinary and Rhetorical Contexts.' *Washington & Lee Review*. (Summer 2004), Vol. 54, No. 3, 1075-90.

Chanter, T. 'Feminism and the Other.' *The Provocation of Levinas*. (ed. R. Beransconi & D. Wood), Routledge Press, New York, (1988).

Clifford, J. 'Taking Identity Politics Seriously. The Contradictory, Stony, Ground …' *Without Guarantees: Essays in Honour of Stuart Hall*. (ed. P. Gilroy, L. Grossberg, & A. McRobbie), Verso Press, London, (2000), 94-112.

Cornell, D. *The Philosophy of the Limit*. Routledge Press, New York, (1992).

------ *Transformation: Recollective Imagination and Sexual Difference.* Routledge Press, New York, (1993).

------ 'Rethinking the Beyond of the Real.' *Cardozo Law Review*. (Jan 1995), Vol. 16, No. 3-4, 729-792.

Cornell, D. Rosenfeld, M. & Carlson, D. (ed.) *Deconstruction and the Possibility of Justice*. Routledge Press, New York, (1992).

Critchley, S. *Ethics, Politics, Subjectivity: Essays on Derrida, Levinas and Contemporary French Thought.* Verso Press, London, (1999).

------ *Ethics of Deconstruction*: *Derrida and Levinas*. Edinburgh University Press, Edinburgh, (1999).

------ 'Five Problems in Levinas's View of Politics and a Sketch of a Solution to Them.' *Levinas, Law and Politics*, (ed. M. Diamantides), Routledge Cavendish, Oxon, (2007).

Crowe, M. *The Changing Profile of the Natural law*. Martinus Nijhoff Press, The Hague, (1977).

Davis, C. *Levinas: An Introduction.* University of Notre Dame Press, Notre Dame, (1996).

Davies, M. *Asking the Law Question: the Dissolution of Legal Theory*. The Lawbook Company, Sydney, (2002).

Davies, S. *Renaissance Views of Man*. Manchester University Press, London, (1978).

De Kesel, M. 'There is no Ethics of the Real: about a Common Misreading of Lacan's Seminar on 'The Ethics of Psychoanalysis.' (www.rpe.ugent.be/de_Kesel_paper.doc) accessed 12/11/09.

Derrida, J. *Of Grammatology*. (trans G. Spivak), John Hopkins University Press, London, (1976).

------ *Writing and Difference* (trans. A. Bass), Routledge Press & Kegan Paul, New York, (1978).

------ *The Post Card: From Socrates to Freud and Beyond* (trans. A. Bass), University of Chicago Press, Chicago, (1982).

------ 'Declarations of Independence.' *New Political Science.* (1986), Vol. 7, Issue 1, 7-15.

------ *Adieu to Emmanuel Levinas*. (trans. P. Brault & M. Naas), Stanford University Press, Stanford, (1989).

------ 'Force of Law: the Mystical Foundation of Authority.' *Deconstruction and the Possibility of Justice.* (ed. D. Cornell, M. Rosenfield & D. Carlson), Routledge Press, New York, (1992).

------ *The Other Heading*. (trans. P. Brault & M. Naas), Indiana University Press, Indiana, (1992).

------ *The Gift of Death*. (trans. D. Will), University of Chicago Press, Chicago, (1995).

------ 'For the Love of Lacan.' *Cardozo Law Review.* (1995), Vol. 16 No. 3-4, 699-728.

------ *Politics and Friendship.* (trans. G. Collins), Verso Press, London, (1997).

Diamantides, M. (ed) *Levinas, Law, Politics.* Routledge-Cavendish, Oxon, (2007).

Douzinas, C. Goodrich, P. & Hachamovitch, Y. *Politics, Postmodernity and Critical Legal Studies: The Legality of the Contingent.* Routledge Press, London, (1994).

Douzinas, C. 'Law's Birth and Antigone's Death: on Ontological and Psychoanalytical Ethics.' *Cardozo Law Review*. (Jan 1995), Vol. 16, No. 3-4: 1325-1362.

------ *The End of Human Rights*: *Critical Legal Thought at the Turn of the Century*. Hart Publishing, Oxford, (2000).

------ "The End(s) of Human Rights." *Melbourne University Law Review*. (2002), Vol. 26, No. 2, 445.

Duggan, L. *The Twilight of Equality? Neo-liberalism, Cultural Politics, and the Attack on Democracy*. Beacon Press, Boston, (2003).

Eagleton, T. *Literary Theory: An Introduction*. Basil Blackwell, Oxford, (1983).

Edmundson, W. *An Introduction to Rights.* Cambridge University Press, Cambridge, (2004).

Eskin, M. 'A Survivor's Ethics: Levinas's Challenge to Philosophy.' *Dialectical Anthropology*. (1999), No. 24, 407-50.

Evans, D. *An Introductory Dictionary of Lacanian Psychoanalysis*. Routledge Press, New York, (1996).

------ 'From Kantian Ethics to Mystical Experience: An Exploration of Jouissance.' *Key Concepts of Lacanian Psychoanalysis.* (ed. D. Nobus), Rebus Press, London, (1998), 1-28.

Fagenblat, M. 'Encountering the Other: The Artwork and the Problems of Difference in Blanchot and Levinas.' *Text Theory Critique.* (2005), No. 10, 298-313.

Federal Parliamentary Library Statistics at (www.aph.gov.au/library/pubs), accessed 20/7/10.

Feldstein, R. Fink, B. & Jaanus, M. (ed.) *Reading Seminar XI: Lacan's Four Fundamental Concepts of Psychoanalysis.* State University of New York Press, New York, (1995).

Femia, J. *Gramsci's Political Thought: Hegemony, Consciousness and the Revolutionary Process.* Clarendon Press, Oxford, (1981).

Fink, B. 'The Master Signifier and the Four Discourse.' *Key Concepts of Lacanian Psychoanalysis*. (ed. D. Nobus), Rebus Press, London, (1998).

Finnis, J. *Natural law and Natural Rights*. Clarendon Press, Oxford, (1980).

Fitzpatrick, P. *Modernism and the Grounds of Law*. Cambridge University Press, Cambridge, (2001).

Foster, H. *Post-modern Culture*. Pluto Press, London, (1985).

Foucault, M. *The Order of Things: An Archaeology of the Human Sciences.* (trans. A.M. Sheridon Smith), Tavistock Publishers, London, (1970).

------ *Discipline and Punishment: The Birth of the Prison*. (trans. A. Sheridan), Vintage/Random House, New York, (1979).

------ *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977.* (ed. C. Gordon Brighton), Harvester Press, Brighton, (1980).

------ *The Foucault Reader*. (ed. P. Rabinow), Pantheon Press, New York, (1984).

------ *Power: Essential Works of Foucault, 1954-1983 Vol. 3* (ed. D. Faubion, trans R. Hurley, *et al*), The New Press, New York, (2000).

------ *Society Must be Defended: Lectures at the Collége of France, 1975-1976.* (trans. D. Macey), Penguin Books, London, (2003).

------ *The Archaeology of Knowledge and the Discipline of Language*. (trans. A.M. Sheridan-Smith), Pantheon Press, New York, (1972).

Freud, S. *The Ego and the Id: The Standard Edition of the Complete Psychological Works of Sigmund Freud*. (ed. & trans J. Strachey), W.W. Norton, New York, (1989).

Fryer, D. *The Intervention of the Other: Ethical Subjectivity in Levinas & Lacan*. Other Press, New York, (2004).

Gaita, R. *Good and Evil: An Absolute Conception.* Routledge Press, London, (1991).

Gearty, C. *Are Human Rights Truly Universal?* (www.conorgearty.co.uk/pdfs/Chapter_29_UniversalityFINAL), accessed 12/7/10.

Gordon, J. 'The Concept of Human Rights: The History and Meaning of its Politicization.' *Brooke Journal of International Law.* (1997-1998), Vol. 23, No. 3 691-791.

Gondek, Hans-Dieter. 'Cogito and Separation: Lacan and Levinas.' *European Journal of Psychoanalysis*. (Fall 1995-Winter 1996), No. 2, (http://www.psychomedia./it/jep/number2/gondek), accessed at 11/02/10.

Gramsci, A. *Selections from the Prison Notebooks of Antonio Gramsci*. (ed. &trans. Q. Hoare & G. Nowell-Smith), Lawrence & Wishart, London, (1971).

------ *Antonio Gramsci: Selections from Political Writings 1910-1920.* (selected & ed. Q. Hoare; trans. J. Mathews), Lawrence & Wishart, London, (1976).

Grene, D. & Lattimore, R. (ed.) *The Complete Greek Tragedies, Volume III, Sophocles I: Oedipus the King; Oedipus at Colonus; Antigone*. (trans. E Wyckoff), Modern Library, New York, (1954).

Grotius. *The Law of War and Peace*. (ed. J. B Scott), Clarendon Press, Oxford, (1925).

Haarscher, G. 'Law, Reason and Ethics the Philosophy of Human Rights.' *Ethical Dimensions of Legal Theory*. (ed. S. Wojciech), Rosopi Press, Amsterdam, (1991).

Haber, H. *Beyond Postmodern Politics: Lyotard, Rorty, Foucault.* Routledge Press, New York, (1994).

Habermas, J. 'Struggles for Recognition in the Democratic Constitutional State.' *Multiculturalism: Examining the Politics of Recognition* (ed. A. Gutyman), Princeton University Press, Princeton, (1994), 107-148.

------ *The Habermas Reader* (ed, W. Outhwaitte). Polity Press, Oxford, (2000).

Hall, D. *Subjectivity: the New Critical Idiom.* Routledge Press, New York, (2004).

Hanley, C. 'Levinas on Peace and War.' *Athena*. (2006), No. 2, 70-79.

Harasym, S. (ed.) *Levinas and Lacan: the Missed Encounter*. State University of New York Press, New York, (1998).

Hebdige, D. 'Postmodernism and 'The Other Side.' *Journal of Communication* (1986) Vol. 10, No. 2, 78-97.

Hegel, G. *Philosophy of Right*. (trans. T.M. Knox), Oxford University Press, Oxford, (1967).

------ *The Phenomenology of Spirit*. (trans. A.V. Miller), Oxford University Press, Oxford, (1977).

Heller, A. 'Rights, Modernity, Democracy.' *Deconstruction and the Possibility of Justice*. (ed. D. Cornell, M. Rosenfeld, & D. Carlson), Routledge Press, New York, (1992).

Herbert, G. *A Philosophical History of Rights.* Transaction Publishers, New Brunswick, (2002).

Hinchman, L. 'The Origins of Human Rights: A Hegelian Perspective.' *The Western Political Quarterly*. (Mar 1984), Vol. 37, No. 1, 7-31.

Hinkson, J. 'Marxism, Postmodernism and Politics Today'. *Arena Journal*. (1991), Vol. 94, 138-166.

Hobbes, T. *Leviathan*. (ed. R. Tucker), Cambridge University Press, Cambridge, (1996).

Hoffman, J. & Brace, L. (ed.) *Reclaiming Sovereignty*. Pinter Press, London, (1997).

Horkheimer, M. & Adorno T. *Dialectic of the Enlightenment*. (trans J. Cumming), Continuum Publishers, New York, (1969).

Howard, D. 'The Possibilities of a Post-Marxist Radicalism.' *Thesis Eleven.* (1987), Vol. 16, 69-84.

Hughes, C. 'The Primacy of Ethics: Hobbes and Levinas.' *Continental Philosophy Review*. (1998), No. 31, 79-94.

Hunt, A, & Wickham, G. *Foucault and the Law: Towards a Sociology of Law as Governance*. Pluto Press, London, (1994).

Hurst, A. *Derrida Viz-a-Viz Lacan: Interweaving Deconstruction and Psychoanalysis*. Fordham University Press, New York, (2008).

Hutchens, B. *Levinas: A Guide for the Perplexed*. Continuum Press, New York, (2004).

Irigaray, L. 'What Other Are We Talking About?' *Yale French Studies.* (2004), No. 104, 67-81.

Jameson, F. *Marxism and Form*. Princeton University Press, Princeton, (1971).

Jardine, A. *Gynesis: Configurations of Woman and Modernity*. Cornell University Press, Ithaca, (1985).

Joldersma, C. 'Human Rights and Democracy: Reading Giroux Otherwise with Levinas.' *Philosophy of Education*. 2006, 315-17.

Joseph, J. & Taylor, T. *Ideologies of Language*. Routledge Press, London, (1990).

Kaladharan Nayar, M.G. 'Introduction: Human Rights: The United Nations and the United States Foreign Policy.' *Harvard International Law Journal.* (1978), Vol. 19, 813-7.

Kant, I. *Groundwork of the Metaphysics of Morals*. (trans. H.J. Paton), Harper & Row, New York, (1956).

------ *Kant's Critique of Practical Reason* (trans. T.K. Abbott), Longmans, Green & Co, London, (1967).

------ *Kant's Political Writings* (ed. H. Reiss, trans. H.B. Nisbet), Cambridge University Press, Cambridge, (1970).

------ *The Metaphysics of Morals.* (trans. M. Gregor), Cambridge University Press, London, (1991).

------ *The Philosophy of Kant.* (ed. C.F. Friedrich), The modern Library, New York, (1993).

Koser, K. *Responding to Boat Arrivals in Australia: Time for a Reality Check.* Lowy Institute for International Policy. (Dec 2010), (www.lowyinstitute.org), accessed 10/12/10.

Kirby, M. 'Human Rights Protection in Australia: Why Not?' *Murdoch University, Annual Human Rights Forum: Inaugural Lecture.* (www.murdooch.edu.au/document./PDF-Document/SPEECH_MURDOCH_MDK_HUMAN_RIGHTS_FORUM_21_10_09), accessed 20/7/10.

------ 'In Conversation with Justice Kirby, an interview with Paul Barclay.' *ABC Radio National, Big Ideas Program, Library of Queensland Deep in the Conversation Series.* (www.abc.net.au/rn/bigideas/stories/2010/2953615.htm), audio accessed 20/7/2010.

Kristeva, J. *The New Maladies of the Soul*. (trans. R. Guderman), Columbia University Press, New York, (1995).

------ 'Psychoanalysis and Freedom.' *Canadian Journal of Psychoanalysis.* (1998), Vol. 7, No. 1, 1-21.

Kunstler, B. 'Beyond the Illusion of Human Rights.' *Journal for Pedagogy, Pluralism and Practice.* (Fall 1999), Vol. 1, Issue 4, (www.lesley.edu/journals/jppp/4/kunstler), accessed 20/10/2007.

Lacan, J. *The Four Fundamentals Concepts of Psychoanalysis* (ed. J.A. Miller, trans. A. Sheridan), The Hogarth Press, London, (1977).

------ *The Seminar of Jacques Lacan Book XI: The Four Fundamentals Concepts of Psychoanalysis, 1964.* (trans. & ed. A. Sheridan), W.W. Norton, New York, (1981).

------ *The Seminar of Jacques Lacan Book II: The Ego in Freud's Theory and in the Technique of Psychoanalysis, 1954-55*. (trans. S. Tomaselli), W.W. Norton, New York, (1991).

------ *The Seminar of Jacques Lacan Book VII: The Ethics of Psychoanalysis 1959-1960.* (ed. J.A. Miller, trans. D. Porter), W.W. Norton, New York, (1992).

------ *The Seminar of Jacques Lacan Book III: The Psychoses 1955-56.* (ed. J.A. Miller, trans. R. Grigg), Routledge Press, London, (1993).

------ *Ecrits: A Selection.* (trans. & ed. A. Sheridan), W.W. Norton, New York, (1997).

------ *The Seminar of Jacques Lacan Book XX: Encore, on Feminine Sexuality, the Limits of Love and Knowledge, 1972-73*. (ed. J.A. Miller, trans. R. Grigg), Routledge Press, London, (1998).

Laclau, E & Mouffe, C. *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics*. Verso Press, London, (1985).

Laurent, E. 'Alienation and Separation (II).' *Reading Seminar XI: Lacan's Four Fundamental Concepts of Psychoanalysis*. (ed. R. Feldstein, B. Fink, & M. Jaanus), State University of New York Press, New York, (1995).

Leary, V.A. 'The Effects of Western Perspectives on International Human Rights.' (ed. A. An-Naim & F.M Deng), *Human Rights in Africa: Cross Cultural Perspectives*. The Brookings Institution, Washington D.C. (1990).

Lefort, C. *Political Form of Modern Society, Bureaucracy, Democracy, Totalitarianism* (ed. J. Thompson), Polity Press, Cambridge, (1986).

Leiboff, M. & Thomas, M. *Legal Theories in Principle*. Law Book Co, Sydney, (2004).

Levinas, E. *Existence and Existents*. (ed. Alphonso Lingis), Martinus Nijhoff, The Hague, (1978).

------ *Ethics and Infinity: Conversations with Philippe Nemo.* (trans. R.A. Cohen), Duquesne University Press, Pittsburgh, (1985).

------ 'The Trace of the Other.' *Deconstruction in Context*. (ed. Mark Taylor), University of Chicago Press, Chicago, (1986).

------ *Collected Philosophical Papers.* (ed. Alphonso Lingis), Martinus Nijhoff, The Hague, (1987).

------ 'For a Jewish Humanism.' *Difficult Freedom: Essays on Judaism.* (trans. S. Hands), John Hopkins University Press, Baltimore, (1990),

------ *Basic Philosophical Writings* (ed. A Peperzak, *et al*), Indiana University Press, Bloomington, (1996).

------ *Totality and Infinity* (trans. A. Lingis), Duquesne University Press, Pittsburgh, (1996).

------ *Levinas, Entre Nous: Thinking of the Other*, (trans. M.B. Smith & B. Harshav), Continuum Press, London, (1998).

------ *Otherwise Than Being or Beyond Essence*. (trans. A. Lingis), Duquesne University Press, Pittsburgh, (1998).

------ *Alterity and Transcendence*. (trans. M. Smith), Columbia University Press, New York, (1999).

------ *Is it Righteous to Be? Interviews with Emmanuel Levinas.* (ed. J. Robbins), Stanford University Press, Stanford, (2001).

------ *Humanism of the Other*. (trans. N. Poller), University of Illinois Press, Urbana, (2006).

Locke, J. *An essay Concerning Human Understanding*. (ed P.H. Nidditch), Clarendon Press, Oxford, (1975).

------ *Second Treatise of Government*. (ed. P. Laslett), Cambridge University Press, Cambridge, (1988).

Loumansky, A. 'Levinas and the Possibility of Justice.' *Liverpool Law Review*. (2006), Vol. 27, 147-171.

Lyotard, J.F. *The Postmodern Condition: A Report on Knowledge.* (trans. G. Bennington & B. Massumi), University of Minnesota Press, Minnesota, (1984).

------ *The Differend: Phrases in Dispute.* University of Minnesota Press, Minneapolis, (1992).

Mahathiria, M. *The Malay Dilemma*. Marshall Cavendish Publishers, Malaysia, (2003).

Manderson, D. *Beyond the Provincial*. Melbourne University Press, (1996), Vol. 20, 1048-71.

------ *Proximity: Ethics and the Soul of Law*. McGill-Queens University Press, Quebec, (2006).

Manuel, G. & Polsins, J. *The Fourth World: An Indian Reality*. Collier-Macmillan, Ontario, Canada, (1974).

Marshall, T.H. & Bottomore, T. *Citizenship and Social Class*. Pluto Press, New York, (1992).

Marx, K. *The German Ideology*. (ed. C. J. Arthur), Lawrence & Wishart Publishing, London, (1970).

------ 'Critique of the Gotha Program.' *The Marx-Engels Reader*. (ed. R. Tucker), Norton & Co, New York, (1978).

------ 'Manifesto of the Communist Part.' *The Marx-Engels Reader*. (ed. R. Tucker), Norton & Co, New York, (1978).

------ 'On the Jewish Question.' *The Marx-Engels Reader* (ed. R. Tucker), Norton & Co, New York, (1978).

Milovanovic, D. 'The Posmodernist Turn: Lacan, Psychoanalytic Semiotics and the Construction of Subjectivity in Law.' *Emory International Law Review.* (1994), No. 67, 67-98.

Morss, J. "Saving Human Rights from its Friends: A Critique of the Imaginary Justice of Costas Douzinas." *Melbourne University Law Review*, (2003), No. 34, (http://www.austlii.edu.au/au/journals/MULR/2003/34.htm), accessed 12/01/2009.

Natoli, J. & Hutcheon, L. (ed.) *A Postmodern Reader*. State University of New York, Albany, (1993).

Neill, C. 'The Locus of Judgement in Lacan's Ethics.' *The Journal for Lacanian Studies.* Vol. 3, No. 1, 85-100.

NewsCom. (www.news.com.au/national/asylum-seekers-arrive-by-plane-not-boat), accessed 20/7/10.

Nobus, D. (ed.) *Key Concepts of Lacanian Psychoanalysis.* Rebus Press, London, (1998).

Noonan, J. *Critical Humanism and the Politics of Difference*. McGill-Queen's University Press, Montreal, (2003).

Norris, C. *Deconstruction: Theory and Practice*. Methuen Press, London, (1982).

Otto, D. 'Everything is Dangerous: some Post-structural Tools for Rethinking the Universal Knowledge Claims of Human Rights Law.' *Australian Journal of Human Rights*. (1999), Vol. 5, 17-42.

Papastergiadis, N. 'The Deterritorialization of Culture.' *Arena Journal*. (1998), Vol. 11, 145-175.

Patterson, D. (ed.) *Postmodernism and Law*. Dartmouth Publishing, Aldershot, (1994).

Phillips, J. & Spinks, H. *Background Notes: Boat Arrivals in Australia since 1976*. Parliament of Australia, Parliamentary Library, (2010), (www.aph.gov.au/library/pubs/bn/sp/BoatArrivals.htm), accessed 20/7/10.

Pirskanen, J. 'The Other and the Real. How Does Judith Butler's Theorizing of the Subject and Contingency Differ from the New Lacanian Thought?' *QueerScope Articles*. (Jan 2008), (www.helsinki/jarj/sqs1_08/sqs12008pirskanen.pdf) accessed 14/01/10.

Pound, M. 'The Assumption of Desire: Kierkegaard, Lacan, and the Trauma of the Eucharist.' *Journal of Cultural and Religious Theory.* (Winter 2008), Vol. 9, No. 1, 67-78.

Powell, J. 'The Multiple Self: Exploring Between and Beyond Modernity and Postmodernity.' *Minnesota Law Review.* (1997), No. 81, 1481-1491.

Purcell, M. *Levinas and Theology*. Cambridge University Press, Cambridge, (2006).

Ragland, E. 'Lacan and the Subject of Law: Sexuation and Discourse in the Mapping of Subject Positions that give the Ur-Form of Law.' *Washington and Lee Law Review*. (Summer, 1997), Vol. 54, No. 3, 1091-1118.

Raphael, D.D. *Political Theory and the Rights of Man.* Indiana University Press, Bloomington, (1967).

Regnault, F. 'The Name of the Father.' *Reading Seminar XI: Lacan's Four Fundamental Concepts of Psychoanalysis* (ed. R. Feldstein, B. Fink & M. Jaanus), State University of New York Press, New York, (1995).

Reinhard, K. 'Kant with Sade, Lacan with Levinas.' *Modern Language Notes — The John Hopkins University Press*. (Sept 1995), Vol. 110, No. 4, 785-808.

Ricoeur, P. & Escobar, M. 'A Reading of Emmanuel Levinas's Otherwise than Being or Beyond Being.' *Yale French Studies.* (2004), No. 104, 82-99

Roth, B. 'Retrieving Marx for the Human Rights Project.' *Leiden Journal of International Law*. (2004), Vol. 17, 31-66.

Rousseau. J. 'Discourse on the Origin of Inequality.' *The First and Second Discourses.* (ed. R. Masters), St. Martin's Press, New York, (1964).

------ *The Social Contract and Discourses.* (trans. G.D.H. Cole), J.M. Dent & Son, London, (1988).

Salecl, R. 'Rights in Psychoanalytic and Feminist Perspective.' *Cardozo Law Review*. (Jan 1995), Vol. 16, No. 3-4, 1121-1137.

Sarup, M. *An Introductory Guide to Post-Structuralism and Postmodernism*. Harvester Wheatsheaf, New York, (1988).

Schroeder, J.L. & Carlson, D.G. 'The Appearance of Right and the Essence of Wrong: Metaphor and Metonymy in Law.' *Cardozo Law Review.* (2003), Vol. 24, No. 6, 2481-2516.

Shelly, R. 'The Philosophy of the Limit by Drucilla Cornell (Book Review).' *Sydney Law Review*, Vol. 17, 472-81. (http//www.austlii.edu.au/au/journals/SydLawRw/1995/29.pdf), accessed at 12/02/2010.

Shestack, J. 'The Philosophical Foundations of Human Rights.' *Human Rights Quarterly*. (1998), Vol. 20, No. 2, 201-237.

Skinner, Q. & Strath, B. (ed.) *States and Citizens: History, Theory, Prospects.* Cambridge University Press, Cambridge, (2003).

Slaughter, M. 'Levinas, mercy, and the Middle Ages.' in *Levinas, Law and Politics*, (ed. M. Diamantides), Routledge Cavendish, Oxon, (2007).

Smart, C. *Feminism and the Power of the Law.* Routledge Press, London, (1989).

Smith, G.B. *Nietzsche, Heidegger and the Transition to Postmodernity*. University of Chicago Press, Chicago, 1996.

Sohn, L. 'The New International Law: Protection of the Rights of Individuals rather than States.' *American University Law Review*. (1982), Vol. 32, 1-16.

Stavrakakis, Y. 'Ambiguous Democracy and the Ethics of Psychoanalysis.' *Philosophy and Social Criticism*. (1997), Vol. 23, No. 2, 79-96.

------ *Lacan and the Political: Thinking the Political*. Routledge Press, London, (1999).

Steele, J. *Afghanism: is it Time to Talk to the Taliban?* (www.guardian.co.uk/world/2010/may/04/afghanistan-taliban). Accessed 14/05/10.

Stirner, M. *The Ego and its Own*. (trans. Steven Byington), Rebel Press, London, (1993).

Strauss, L. *Natural Rights and History.* University of Chicago Press, Chicago, (1971).

------ *What is Political Philosophy*. University of Chicago Press, Chicago, (1988).

Swiffen, A. 'Politics of Law and the Lacanian Real.' *Law Critique*. (2010), Vol. 21, 39-51.

Taylor, C. 'The Politics of Recognition.' (ed. A. Gutman) *Multiculturalism: Examining the Politics of Recognition*. Princeton University Pres, Princeton (1994), 25-73.

------ 'Condition of an Unforced Consensus on Human Rights.' *The East Asia Challenge for Human Rights.* Cambridge University Press, Cambridge, (1999), 124-44.

Terreblanche, S. 'Todorov, Levinas and Anti-Totalitarian Humanism: A Perspective on Contemporary Utopian Though.' *HTS.* (2007), Vol. 63, No. 1, 301-25.

Thurston, L. 'Ineluctable Nodalities: On the Borromean Knot.'(ed. D. Nobus), *Key Concepts of Lacanian Psychoanalysis.* Rebus Press, London, (1998).

Tie, W. 'Beyond the Dislocation(s) of Human Rights.' *Social and Legal Studies*. (2009), Vol. 18, No. 1, 71-91.

Tierney, B. *The Idea of Natural Rights*. Scholars Press, Atlanta, (1997).

Tuck, R. *Natural Rights Theories*. Cambridge University Press, Atlanta, (1979).

Tully J. *A Discourse on Property: John Locke and his Adversaries.* Cambridge University Press, London, (1980).

United States of America, State Department, *US State Department's 2010 Trafficking in Persons Report*, July 2010.

Veling, T. 'In the Name of Who? Levinas and the Other Side of Theology.' *Pacifica*. (Oct 1999), No. 12, 275-92.

Verhaeghe, P. 'Causation and Destitution of a Pre-ontological Non-entity: On the Lacanian Subject.' *Key Concepts of Lacanian Psychoanalysis* (ed. D. Nobus), Rebus Press, London, (1998).

Vincent, A. *Theories of the State*. Blackwell, Oxford, (1994).

William of Ockham. *Philosophical Writing*. (trans P. Boehner), Bobbs-Merrill Company (1964).

Wojciech, S. (ed.) *Ethical Dimensions of Legal Theory*. Rosopi Press, Amsterdam, (1991).

Wolcher L. 'Ethics, Justice, and Suffering in the Thought of Levinas: the Problem of the Passage.' *Law and Critique*. (2003), No. 14, 93-116.

Wright, T. Ainley, A. & Hughes, P. 'The Paradox of Morality: An Interview with Emmanuel Levinas.' *The Provocation of Levinas: Rethinking the Other*. (ed. R. Bernasconi & D Wood; trans. A. Benjamin & T. Wright), Routledge Press, London, 1988.

Young, I. 'Together in Difference: Transforming the Logic of Group Political Conflict.' *Principled Positions*. (ed. J. Squires), Lawrence & Wishart, London, (1993).

Žižek, S. *Looking, Awry*. MIT Press, Cambridge, (1991).

------ *They Know Not What They Do*. Verso Press, London, (1991).

------ *Tarrying with the Negative: Kant, Hegel and the Critique of Ideology*. Duke University Press, Durham, (1993).

------ 'Superego by Default.' *Cardozo Law Review*. (Jan 1995), Vol. 16, No. 3-4, 925-942.

------ *The Plague of Fantasies*. Verso Press, London, (1997).

------ 'Class Struggle or Postmodernism? Yes, Please!' *Contingency, Hegemony, Universality. Contemporary Dialogues on the Left*. (ed. J. Butler, E. Laclau & S. Žižek), Verso Press, London, (2000), 90-135.

------ 'Da capo senza Fine.' *Contingency, Hegemony, Universality. Contemporary Dialogues on the Left*. (ed. J. Butler, E. Laclau & S. Žižek), Verso Press, London, (2000), 213–262.

------ 'Against Human Rights.' *New Left Review*. (July-Aug 2005), Vol. 34, 115-131

Zupancic, A. *Ethics of the Real: Kant, Lacan*. Verso Press, London, (2000).

****