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HUMANITY OF RIGHTS

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ABSTRACT
Claudio Corradetti's Human rights and critical theory is an argument for the idea of pluralistic universalism. The purpose of the volume is to demonstrate that human rights are something epochal and revolutionary, something that was realized at a specific historical moment, modernity, through a process of self-reflection. Subjects attain an idea of themselves as subjects and at the same time as subjects of law. In the following pages, while accepting Corradetti's thesis on the revolutionary character of human rights, I will argue the anthropological foundation of such rights, under penalty of the artificiality of the law itself. I will show that the subject of these rights cannot be considered one-dimensional nor can the law be fully resolved only in its legal formulation. The revolution of law is possible above all because the way of thinking of the subject's self-reflection in the world is revolutionary: not only as a legal actor, but as ontologically endowed with dignity and values whose rights are a legal and political expression. What is meant by "human being"? And what is the human being subject to law? What makes it possible to attribute the rights to an individual? Why, precisely in modernity, do you feel the need to organize rights legally and to formulate human rights, while maintaining that they are the prerequisite for being part of civil society? Through a brief reconstruction of some salient moments in the history of law up to modernity, I will propose some reflections on the underlying conception of human beings. This conception remains problematic, however, it is important to ask the question about the sense of "human being" and the fact that this question remains "open" both in the formulation of the idea of law and in the values on which we believe it is based. The idea is that the revolution brought about by modern law is so well beyond its logical and legal forms - which however remain essential - and is of consequence not only to a new vision of the world order but also of human beings.

KEYWORDS
Human rights, human being, revolution

INTRODUCTION

Claudio Corradetti's *Human rights and critical theory* is an argument for the idea of pluralistic universalism. It collects essays on the theme of language and rights, already published in English over a decade and is intended for use by students, but also for the more expert readers. The Author elaborates them in a monograph, and thus faces the challenge of a more organic and systematic reflection. This reworking keeps intact the intellectual biography of the Author, from its beginning in the philosophy of language (such as Davidson, Putnam, Wittgenstein, Lakoff) and its

move to political philosophy (Habermas's communicative action, Rawls's liberalism, Nagel's objectivism, only to name a few). Moving from theories of discourse to the formal interconnection of moral and cognitive faculties, Corradetti introduces moral values into the international legal order. Language, its various communicative applications together with the self-reflexivity of communicative consciousness are the tools that, in within the historical contingency, allow us to interpret freedom and well-being as 'human rights'. The argumentative rigor will then guarantee their expression and regulation in the legal system (including its international dimension).

The work's title traces the complexity of this process: the polarization of human rights and critical theory suggests that the former must always be subjected to the scrutiny of the latter. In doing so, rights realize pluralist universalism, that is, a form of 'concrete universal' rooted in the mutual presupposition between the (inevitable) historical contradiction of man and the meta-historical plan of self-reflection on the conditions of sensibility. Pluralist universalism thus fulfills the dual role of purpose of the work and narrative horizon in which the author carries out his reflections on human rights.

The thesis of this broad and complex line of argument is very simple: in the words of the Author himself: "I will support the idea that human rights express an epochal and revolutionary character for modernity. That is, they constitute elements of self-reflection in an attempt to define human beings as subjects worthy of equal respect".[1] The purpose of the volume is therefore to demonstrate that human rights are something epochal and revolutionary, something that was realized at a specific historical moment, modernity, through a process of self-reflection. Subjects attain an idea of themselves as subjects and at the same time as subjects of law. Which subject? Which right? Why exactly in modernity?

Corradetti's argument takes place on a theoretical level in which language, from an analysis of its functions in the public sphere, is transformed into argumentative capacity and, finally, into legal and value categories. Language - which in its various forms of communication makes both experience and communication possible - is the rational and reasonable logos that shapes the world and the subject who lives there.

In a symposium published in 2016 and dedicated to the constitutionalism of the international juridical order, the author deals with the cosmopolitan turn of classical constitutionalism and with it the necessity of the creation of a new paradigm for legitimizing national institutions identified in the overcoming of "an instrumental-

[1] C. Corradetti, *Relativism and Human Rights. A Theory of Pluralistic Universalism*, Springer, Dordrecht, 2022 (2nd ed.), p.211. I thank Prof. Teresa Pasquino and Prof. David Foster for the interesting discussions on the text and the useful suggestions.

technocratic form into a value-based approach of legal reasoning".[2] The West,[3] in triggering a process of formation of truly universal rights, and no longer able to count on its own cultural hegemony, encounters its the most serious difficulty in the "plurality of constitutional legal sources at the transnational level"[4] from which flows the increasingly important mediatoral role of international courts for promoting global constitutionalism.[5]

The general impression is that, despite its argumentative rigor and the legitimacy of the level of investigation, a one-sided perspective risks placing the question of rights on an exclusively formal logical level, delimiting the horizon of reasoning to ideal and unchanging categories. This one-sided perspective is due, in part, to the context in which the logic of law developed.[6]

In the following pages, while accepting Corradetti's thesis on the revolutionary character of human rights, I want to pay attention to their anthropological foundation of such rights, under penalty of the artificiality of the law itself. If, from a juridical point of view, the law is the reference from a social and political point of view of relations, however, this is only because there is already a human dimension in which these relations exist, where the question of their regulation may arise without being able to displace it. The subject of these rights cannot be considered one-dimensional nor can the law be fully resolved only in its legal formulation.[7] If

[2] C. Corradetti, "'Introduction', *Symposium: Cosmopolitan Law and the Courts*", *Transnational Legal Theory*,7(1), 2016a, p.1.

[3] "'West' is used here as a cultural term, characterised by strong diachronicity", cf. H. J. Berman, *Diritto e rivoluzione. Le origini della tradizione giuridica occidentale*, Il Mulino, Bologna 1998, pp. 16-18.

[4] C.Corradetti, 2016a, p.2.

[5] C. Corradetti, "Judicial Cosmopolitan Authority", *Symposium: Cosmopolitan Law and the Courts*, Transnational Legal Theory,7(1), 2016b, pp.29-56, analyses some sentences of international law in this regard.

[6] "'The general legal doctrine of the twentieth century' (but it could also be said: of the twenty-first) has brought the speculative premises of Sophistics to its final fulfillment. *Nomos-lex*, torn from a cosmic, religious and divine whole, is now closed in on itself; and modern science and philosophy reduce nature, which claims to rise above and against the declarative human will, to the one and the same measure. Nothing can come out of the circle of earthly powers. [...] Nature, resolving itself in the questions posed by human beings, assumes a shape according to the observer's technical methods. This 'humanization' and 'technicizing' deprives nature of the status of *phusis* which generates order, and refuses a claim to pass judgement on *names* assigned by citizens", M. Cacciari - N. Irti, *Elogio del diritto. Con un saggio di Werner Jaeger*, La Nave di Teseo, Milano 2019, p. 122-123. In fact, for Kelsen, 'man' is a juridical element: "law does not include man in his totality with all his spiritual and corporal functions, but qualifies only well-defined human acts as obligations or authorizations", H. Kelsen, *Pure Theory of Law*, Translation from the Second German Edition by Max Knight. Berkeley: University of California Press, 1967. The legal system is therefore not an expression of the harmony of the cosmos and its order, but a hierarchical organization based on a fundamental norm. Cf. also G. Zagrebelsky, *Diritti per forza*, Einaudi, Torino 2017.

[7] Instead, as Kelsen would like, for which the basis of law is not 'moral or religious conviction but a fundamental, presupposed norm that gives juridical validity to the Constitution, cf H. Kelsen,

this happened, in reality, there would be a risk of an exclusively formal elaboration both of the law and of the subject of rights, while human being requires to be considered in its complexity - that is, in the interdependence of relationships between the parts of one's existence - and in what exceeds the legal dimension. The revolution of law is possible above all because the way of thinking of the subject's self-reflection in the world is revolutionary: not only as a legal actor, but as ontologically endowed with dignity and values whose rights are a legal and political expression.

However, this leads to another type of reflection, namely that only with modernity has man become the bearer of rights. But what is meant by 'human being'? And what is the human being subject to law? What makes it possible to attribute the rights to an individual? Why, precisely in modernity, do you feel the need to organize rights legally and to formulate human rights, while maintaining that they are the prerequisite for being part of civil society?

Starting from Corradetti's thesis and point of view, in the following pages I will consider the aspects that go beyond a solely rational vision of law and of human being. In fact, the complexity of human rights requires the coordination of a plurality of disciplinary areas, of points of view and of dynamics of interdependence before they can be effectively translated - even legally - into a specific context. Through a brief reconstruction of some salient moments in the history of law up to modernity, I will propose some reflections on the underlying conception of human being. This conception remains necessarily problematic, since any attempt at a political-juridical definition of 'humanity' is circumscribed by some characteristics, while excluding others and, consequently, a section of that human being. Not only that: the emphasis on such a flexible concept as that of humanity could undermine the certainty of the rule and force a 'case by case' response. However, it is important to ask the question about the sense of 'human being' and the fact that this question remains 'open' both in the formulation of the idea of law and in the values on which we believe it is based. The idea is that the revolution brought about by modern law is such well beyond its logical and legal forms - which however remain essential - and is of consequence not only to a new vision of the world order but also of human being.

1 MODERN LAW: FROM READING THE WORLD TO INTERPRETING IT *EX NOVO*

The term 'right' - in ancient Greek δίκαιον, *rectum* for the Latins - derives from the medieval Latin *directum* which indicates precisely the direction and quality of

Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre voi Rechtssatz, Tübingen 1923, exp. pp. 348-354.

being *direct*.[8] This is connected to the Italian 'diritto' and French 'droit'. In a study that has become classic, Berman[9] reconstructs the origin of Western legal tradition by analyzing the interaction of three different traditions: Roman law, Germanic law and biblical law. Their interaction is characterized by independent phases: on the one hand, the collections of ecclesiastical documents, many of which drew directly from biblical law, contribute to winning unity and juridical independence for the Church and allow for the birth of canon law. On the other, the growing complexity of the public dimension requires the emergence of specific forms of law (feudal, commercial, civil, state).

Briefly, as regards ecclesiastical law, the first collection dates back to the third and fourth centuries, *Canones et constitutiones apostolorum*,[10] which will later be included in more organic collections, such as: the *Liber Extra* in 5 books (1234) by Gregory IX , the *Sextus*[11] of Boniface VIII (1298), the *Clementines* of Clement V (1314) and the *Extravagantes* of John XXII (1317). In 1500 these collections were published in the form of the *Corpus Iuris Canonici*[12] composed of the *jus canonicum*, including the earliest texts and canons, and the *jus novum*, formed by contemporary legislation and decisions: in this way the ancient sources were kept alongside the new. The pontifical decretals that nourished canon law from the twelfth century. On the other hand, they were simply decisions on controversies taken by the pontifical court, without any claim to order and consistency. The *Corpus* was therefore consulted as a sort of archive, to be drawn on to resolve the current controversy from one time to another, by analogy.[13] Due to this

[8] Cf. W. Cesarini-Sforza, *«Ius» e «directum». Note sull'origine storica dell'idea di diritto*, Bologna, 1930.

[9] H. Berman, 1998.

[10] For a presentation of the sources of Canon Law, cfr. A. Stickler, *Historia Iuris Canonici Latini. I. Historia fontium*, Torino 1950; F. Calasso, *Medioevo nel diritto*, pp. 171-174. According to the Etymologies of Isidore, κανών is the 'linear measure', which by extension means 'rule'. This term underwent further specifications depending on whether its source was the Pope or the Councils. In addition to the Pope and the Councils, there was another source of law, the law of nature. However, it does not create *constitutio*, but expresses itself in the *instinctus naturae* that God has imprinted on human nature. Law is therefore compound from *ius divinum naturale* and *traditio apostolica*, that is, the *ius divinum positivum*. Cfr. Isidoro, *Etymologiarum sive Originum Libri XX*, Oxford 1911 (1989), Tomo I, Libro V, II.

[11] The name *Liber Sextus* meant that it was the continuation of the five books of the Decretals of Gregory IX. In fact, the work, commissioned by Boniface VIII, was also divided into five books and contained the pontifical decretals of the years 1239-1298, canons I and II of the Council of Lyons (of 1245 and 1274) and 88 *regulae iuris*. As for the work of Gregory IX, it was not absorbed in this one, as desired by Boniface VIII, in as much as was to be considered repealed.

[12] Cfr. A. Stickler, *Historia Iuris Canonici Latini. I. Historia fontium*, p. 273.

[13] P. Grossi, *L'ordine giuridico medievale*, Laterza, Roma-Bari 1995, p. 120. For a general introduction to the history of Canon Law, cfr. G. Le Bras, *Histoire du Droit et des Institutions de l'église en Occident*, Paris 1955; of particular interest and rich in its innovative spirit is the work of P. Fedele, *Lo spirito del diritto canonico*, Padova 1962.

characteristic, the *Corpus* needed numerous revisions and, published in 1582, it remained valid also in the lay courts - limited to spiritual questions[14] - until 1865.

For a long time, canonists merely reconciled the decrees which were in contradiction with each other, but did not get as far as codifying the law as a coherent whole. Around the twelfth century, profound social, economic and political changes made the principle of non-contradiction insufficient and required an organizational rationality previously unthinkable. Gratian's introduction of a hierarchy of sources, together with the effort to integrate Roman law and separate canonical law from theology, favored the process of rationalization of the law.[15]

The criterion of hierarchy of sources available to Gratian consisted in distinguishing the eternal and unmodifiable (not even by the *Pontifex*) from those determined by contingent needs, giving greater importance to the former. Gratian, in addition to reworking the law by integrating Roman law in a coherent way, separated canon law from theology.[16] Quaglioni summarizes the ongoing process as follows:

> Theology of the 12th century moves onto the firm basis of an ethical-juridical order, based on the coordinates of a tight dialectic between fas and jus, between divine law, which translates into the natural order, and human law which is embodied in custom and in its changing specification [...] The refusal to reduce the legal order to the single dimension of a compulsory regulatory order goes. In this sense, the twelfth century is the century of the foundation of common law, the century of medieval juridical construction as an interpretation of an underlying order.[17]

A further imbalance in favor of biblical sources was implemented by the Protestants during the Reformation, in order to limit papal power.

Social transformations,[18] the deepening of legal science, the birth of the natural sciences, all this contributed to changing the criteria through which law exercised its binding force. An increasingly complex society required an order that could not be guaranteed by legal particularism and that, indeed, required the creation of new areas of competence for the law itself. Reality had thus become unintelligible and law developed the formal schemes needed, capable of interpreting reality to make

[14] Canon law has never intended to regulate human conduct alone, but only those aspects of action that are part of the religious life, conscience and faith, leaving the competence for human transactions to civil law: *kanòn* has always been contrasted with *nomos*, the rule of the civil community. This distinction of competences, however, could not be clear-cut, because the motivations of human behavior cannot be rigidly distinguished from each other. Civil law and ecclesiastical law have therefore remained united due to the impossibility of clearly distinguishing their respective areas of competence. Cfr. F. Calasso, *Medioevo nel diritto*; P. Grossi (1995).

[15] Cf A. Stickler, *Historia Iuris Canonici Latini. I. Historia fontium*, p. 273.

[16] Gratiano, *Decretum magisteri Gratiani*, cit., c. I-VIII, D. I, p. 1.

[17] D. Quaglioni, *Introduzione. La rinnovazione del diritto*, in G. Constable-G. Cracco-H. Keller-D. Quaglioni, *Il secolo XII: la "renovatio" dell'Europa cristiana*, (Annali dell'Istituto storico italo-germanico in Trento. Quaderni, 62), Bologna, Il Mulino, 2003, pp. 20-21.

[18] Cfr. J. Heers *L'Occident aux XIV et XV siècles. Aspects économiques et sociaux*, Paris 1963.

it more orderly. In this way the law ceased being something immediate and became something 'thought out'.[19] The binomials, and the law-regulatory system, express a new conception of reality and a new positioning of the human being within it. Nature could no longer be interpreted only as a work of God; it became a place that could be studied and whose mysteries could be revealed. In turn, the law was no longer an interpretation and mirror image of reality and of an immutable status quo; it became an artificial way of organizing the human world and its relationships. Consequently, even politics gradually could no longer be the expression of a given natural and cosmic order. Inevitably, human beings - who no longer coincide with specific social functions and less and less with a specific class - occupy defined positions in the world; they need to organize the way they find themselves in the world.

As a result of these changes, it was no longer possible to use legal collections as tools of consultation to settle similar cases and the establishment of legal systems was necessary. In this phase, the rationality of law was the instrument that allowed for the establishment a new social and political order in a world in turmoil.[20]

The consequence of this change consists in the fact that those who govern no longer claim to be the interpreters of a natural and static order, but are aware of having to organize a complex reality which would be unintelligible in itself, thus promoting a process of social mobility, previously inconceivable. Seen from a medieval perspective, in modern age the political scene becomes 'artificial': between cosmic order and political order there is no longer any analogy and the latter essentially becomes 'conventional'. On the other hand, even religion, which until then had guaranteed the order of the world and of the cosmos, becomes a source of conflict and the idea that the natural order is reflected in the historical one is lost. On the contrary, from a modern perspective, medieval law, with its claim of adherence to reality, constituted an impediment to social, political and economic evolution.

Rationality becomes the principal foundation of law: the origin of law is no longer experience but abstract theorizing. *Jurisdictio* becomes 'jurisdiction', that is, 'creation of rights': from the sixteenth century onwards the sovereign was not limited to making natural laws explicit; the sovereign became the creator of law. The latter is no longer, however coercive, the key to an understanding of reality, but an *instrumentum regni,* subordinate to the political realm and separate from the social.

[19] In this era of transition between the fourteenth and seventeenth centuries, scientific reflection and artistic production (literary and figurative) also emphasize the role of the senses and the imagination. The basic idea is that reality has suddenly become unknowable in an immediate way and that contingency is characterized by something elusive that only rationality is able to grasp and use. For an analysis of the political Renaissance cfr. G. Marramao, *Potere e secolarizzazione*, Bollati-Boringhieri, Torino, 1989, pp. 69-73.

[20] Medieval society properly becomes a legal society «because it is fulfilled and saved in law» P. Grossi, 1995, p. 8.

If medieval law was considered an interpretation of an existing reality, modern law must be thought of as rational reflection, as an a priori, capable of questioning reality even before answering its questions. However, for both, the relationship with reality remains difficult and ambiguous. All these transformations have certainly changed the role of man in the world and his way of conceiving himself, becoming a bearer of rights.

This brief excursus was intended to recall the genesis of modern law, for all the resolved and problematic issues that come with it: the need to organize a plurality of sources of law, the need to replace religious and metaphysical criteria with an instrument that is able coherently to organize the relationships between the elements of law, a new positioning of the human being in a cosmos where nothing is already pre-ordained, the need for law to be able to respond to a complexity and changing nature of reality previously unimaginable, and in respect of which it cannot be exhaustive. In all this, even the concept of the subject of law has its own ambiguities, because it does not always coincide with the human being as such, indeed, as we will see, almost never. If in medieval society it was above all the social function and the class that determined whether and which rights could be enjoyed, new criteria are needed for the modern individual to be a matter of reflection in the law. On the one hand, the increasing preponderance of rationality allows for a new social and legal order, on the other hand, it gradually attributes a secondary role to other dimensions of human being.

2 WHAT KIND OF RIGHTS AND WHAT KIND OF HUMAN BEING

The birth of modern legal science attributes a new role to reason and places human life in a horizon of meaning different from a metaphysical one, in a constructed world with its own purposes and tools. Thanks to their creative touch, men and women can now intervene in the status quo and trigger previously unimaginable process of social mobility. Individuals become increasingly autonomous and in control of their own destiny. The process of emancipation triggered by this use of reason changes the way human being is thought.

Corradetti's work focuses on the role of law and rights, at the apex - so to speak - of this process of their rationalization. This process, started and nourished by the Christian tradition, ends with its emancipation from Christianity and from Christianity's metaphysical horizon. Historical pressures, however, require us to identify the basis of law elsewhere, as a horizon of meaning to which rights, including transnational rights, can be traced back. Accepting the challenge of recent international jurisprudence, the Author focuses on the role of constitutionalism:

> The thesis of a 'cosmopolitan turn' of classical constitutionalism has largely influenced the debate on the contemporary transformation of international law. It is a real Copernican revolution, which [...] has also led to the creation of a new paradigm

> for legitimizing national institutions. The cosmopolitan turnaround goes hand in hand with the constitutionalisation of international law. [...] Constitutionalization implies the transformation of bilateral or multilateral agreements into higher order principles, of a broader scope.[21]

For which he gives the following explanation:

> In order for this transformation to be possible, a shift in reasoning should precede, one moving away from an instrumental, technocratic form into a value-based approach of legal reasoning. This value inclusion within legal thinking is what the term 'constitutionalism' aims to capture.[22]

The birth of modern legal science has gone beyond the metaphysical horizon of classical jurisprudence and has given rationality a new role. Although dilated and complex, the space-time continuum dominated by national states has ensured a certain homogeneity to criteria of action, allowing rationality adequately to exercise its role. Now, however, the new global challenges show the limits to the role of reason, both in national contexts and even more in international ones, as well as revealing to the interaction between different conceptions of law. In Corradetti's argument, reason is not enough in itself: it can fulfill an instrumental role, but must be based on something else, specifically, on ethical values, that is, on principles of a higher order from which international law can be formulated. However, global constitutionalism cannot be compared with that of national states, neither for the socio-political characteristics of its origin, nor because of the absence of a written form and a precise definition of the constituent power, nor, finally, because of the plurality of legal sources on which this constitution should be based.[23] All this contributes to set up a tension between states and supranational institutions that has made increasingly important "the role of international courts in bringing about constitutionalism beyond the state".[24]

In the last part of his argument, Corradetti describes a new era in legal history, which, with the appropriate distinctions, is as revolutionary as the birth of modern law: the presence of a plurality of sources of law, the tensions to which they give rise, the radical change in the socio-political context, the novelty of the situations to be resolved and, with them the need to identify a new foundational element of law. The tension between national law and constitutional transnational law raises the question of the obligation also for States that are not signatories of an international

[21] C.Corradetti, 2016a, p.1.

[22] C.Corradetti, 2016a, p.1.

[23] C.Corradetti, 2016a, p.2. The author refers to what Doyle noted about the Charter of the United Nations. It cannot be considered a global constitution as it lacks two essential characteristics: (1) the all-embracing character and (2) that of a fundamental law. For Doyle, cfr: M. Doyle, "The UN Charter – a Global Constitution?" in J. Dunoff e J. Trachtman (ed.), *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge University Press, Cambridge 2009, p. 114.

[24] C.Corradetti, 2016a, p.3.

agreement, and therefore of the need to surpass pre-constitutional bilateral obligations. These questions could only be resolved by recognizing "the revolutionary character of the individual as the primary source of the legitimacy of international law".[25]

If rationality had permitted the birth of modern law and its gradual emancipation from a metaphysical horizon, now law is no longer able to play a self-foundational role, and reason, in as much as it is regulatory, needs something that founds and legitimates the assumptions of its arguments. For Corradetti, the introduction of the value element is decisive. It should provide thae system of common values, transversal to the sources of law, and function both as a common substrate and as a point of reference for the production of the law and the interpretation of its norms. In order to function, this system of higher principles should therefore give law a priority over politics, rather than letting it come in a second moment, and so place the individual at the basis of the law itself. Moreover, Corradetti highlights the multiplicity of functions that international courts perform besides that of reaching judgements, transforming 'particular cases' into occasions for the production of new laws and carrying out the constitutionalisation process.[26]

The aspect that in my opinion should be clarified to make this line of argument effective is the broadening of the issue - which is for Corradetti eminently juridical, although bound to remain aporetic - to the conception of the human being as presupposed by and beneficiary of the entire operation. The limits of rationality, in fact, do not emerge in relation to the contents of the law, whose coherence they guarantee, but in relation to the importance that rights assume as regards a certain conception of the human being and their contribution to defining it. Similarly, too, the principles of a higher order, that emerge during the constitutionalization of transnational law must in turn be founded on and express some conception of human being and not only of the individual as a subject of law. This is also intended to prevent formally established rights losing their force in the face of economic and political interests and attaching a secondary value to the human being for whom they are formulated.

In an attempt to guarantee human beings recognition and space for action, law can be configured as an attempt to say what 'humanity' is (with all the word's ambiguity of referring to both human beings as a set and their characteristics). However, this naturally exceeds the rational dimension of human being, which needs to be recognized and protected on the basis of higher principles. In summary, reason is more effective as an instrument (both expressive and regulatory) than as a foundation, since not everything that is recognized as an essential human value is always rationally describable. The current modernization of law discussed by Corradetti, which is addressed on the level of constitutional transnational law,

[25] C.Corradetti, 2016a, pp.4-5.
[26] C.Corradetti, 2016a.

cannot stop at identifying higher principles nor at a conceiving the individual as a subject of law: in order to function, it should take into account the human being in its pre-political relationships. Moreover, the proliferation of rights can be interpreted not only as putting an accent on human being, but both (1) as an attempt to bridge the silence of procedural systems as regards any particular idea of a human being and (2) as an attempt to place this within a controlled relational dynamic such as the juridical one. In both cases, the inability to express a conception of the human being- if not fully, but neither in a consensual way - also as a subject of law, emerges on the basis of which it is possible to elaborate the law and the principles of a higher order.

In the next paragraph I will reflect on this point, without being able to settle the questions. The aim is not to formulate a definition of the human being, but to highlight the fact that a system of values that aspires to fulfill the role of constitutional principles needs to take a position on the question about human being and in what sense the human being is a legal subject.

3 BEFORE THE LAW

"The 'human' part of human rights has always been unstable, variable in its scope and inclusiveness".[27] For over two centuries, the different declarations of human rights have indeed expressed different conceptions both of the human and of the universality attributed to the rights themselves. The use of words such as 'citizen' and 'person' have not offered greater clarity, nor again the portion of humanity assumed as a legal subject (women, immigrants, foreigners...) which is specified each time. In essence, all these denominations seem to have raised more problems than they have solved: "humanity is a category that expands or shrinks according to moral judgments: a sign and a value that human beings attribute to themselves, but which they can also deny to other human beings".[28]

Plato, for example, hesitated to attribute a particular idea to the human being (Parmenides 130 c), while Aristotle judged its value in relation to the bodies of the universe, which were the true bearers of excellence (*Nichomachean Ethics* 1141a 33-34). For the biblical tradition the *adam* - which is not an individual but the prototype of all humanity - is taken from *adama*, that is, from the dust of the soil and its relationship with ewa (life) is marked by sin and therefore driven out of Eden.

In the oscillation between the brute and the divinity of the human, Pico della Mirandola gives positive interpretation of the difficulty in defining human being. In

[27] J. Bourke, *What it means to be Human: Reflections from 1791 to the Present*, Counterpoint Berkeley (CA) 2011, p. 136.

[28] F. Remotti, *L'umanità in mano all'umanità*, in *Parolechiave*, 57, 2017, pp. 145-160, p. 146.

the *Oratio de hominis dignitate* (1486)[29] Pico reflects on the universal of *humanitas* and imagines it as a dynamic place of convergence of plurality (and not as something static and given once and for all), a space of freedom, capable of containing all the facets of the human, and therefore difficult to wrap into a definition. Historically, Pico's optimistic vision has had no luck and the question about *humanitas* has been continually re-proposed every time we have had to deal with diversity in respect of a subject who looks and questions.

Just after the discovery of the new world, the ancient opposition of 'we-them' was also extended to the natives of the colonized lands, posing serious questions about their 'humanity' and, therefore, also about the legitimacy of the ferocity with which they were subjugated and exterminated. In fact, there is an 'us' who claims for itself the criterion of being human and arrogates its power to decide whether 'they' too are fully human. The totalitarian regimes and genocides of the 1900s have re-proposed the problem, giving new impetus to the language and declarations of human rights. However, the sensational failures of the numerous declarations proclaimed in recent centuries in the face of conflicts and massacres aimed at exterminating a portion of humanity demand reflection. The more they are proclaimed the more they are contradicted by conflicts and policies that deny what rights would like to recognize. Why make a declaration in order to deny it? Is the problem in the formulation of the law or in the need to change the perspective from which it is formulated?

Of course, someone might argue that once an idea is brought into the open, it is easier to notice when it is not working. However, the converse interpretation is also possible: an idea is proclaimed with greater force when one is aware of the fact that it is disregarded. Probably, in the case of rights, the truth lies in the middle: on the one hand, declarations are an expression of a new awareness, on the other, they are an attempt to avoid actions that harm the health and well-being (in the broadest sense of the term) of our fellow men and women. In all this, the law may seem an attempt to fill a void, not so much one left by metaphysics but, more generally, by whatever element can fulfill the role of underlying foundation of a system of rules which, however effective, proves to no longer to be able to rely on reason alone. In this sense, rights are an expression of a profound tension: on the one hand, they belong to a legal and political dimension; on the other, they must express something that makes the human being recognizable.

The constitutional transnational law referred to by Corradetti speaks about highlights the role played by particular cases in the formulation of a right and its

[29] G. Pico della Mirandola, *Oratio de hominis dignitate*, Bologna 1496 (trad. it. a cura di E. Garin, Pordenone 1994). The literature on the subject is endless, I just note: I. Kant, *Antropologia pragmatica*, Bari 1985 (ed. orig. *Anthropologie in pragmatischer Hinsicht* [1798] in I. Kant, *Werkasugabe*, VII, pp. 103-302) in which Kant clarifies the objectives, all earthly and "orientative" of the new discipline of anthropology; M. de Montaigne, *Saggi*, Milano 1986, chap. I (orig.ed. *Essais* (1595), Paris 1965, in which the philosopher highlights how elusive the concept of human is.

contribution to the identification of higher-order principles. At the same time, remaining on the juridical level, it does not grasp the pre-political dimension of the human being, its intrinsic plurality, at the risking of crystallizing it into an ordering principle (and a merely abstract subject of law).

The language of rights often highlights the fact that they are 'something that is due to us' and leaves implicit the fact that they are also something that "we owe to someone else".[30] That is to say that the dimension of reciprocity within the human community is neglected while other dimensions of law are accentuated (for example, the normative role of revenge, in the sense of space that cannot be surpassed). In fact, modern law and, in particular, human rights are a response to centuries of failure in recognizing essential factors in human life, and to the difficulty of defining what human being is and how inclusive any possible definition should be. In the absence of a definition of human being, human rights a guarantee of regulatory certainty that protects essential factors in human life.

In the nonviolent liberation struggles of the twentieth century, for example in India and South Africa, the greatest effort was needed to deal with the enemy from which they were trying to free themselves without excessive revenge and vendetta. There had to be a recognition that both sides belonged to the same human community, whatever it was and regardless of the political space in which it interacted, and this formed the basis for any subsequent socio-political evolution. To be truly inclusive, humanity must be a pre-political concept, regardless of political, national, religious, racial, economic, cultural, or any other connotations.

During the struggle that led to the independence of India, Gandhi translated his vision of the harmony of life into a program of social and political change in which individual and society are interdependent elements of the same dynamic process. Not only that: every individual and social right implies corresponding duties: "This is why Gandhi speaks of nonviolence in terms of recognition of the irreducible presence of others for the transformation of the self".[31] In this way, through the elaboration of social justice, based on reciprocity and aimed at overcoming the opposition between us and them, it underlined the relational dimension of the human.

Similarly, in South Africa the Truth and Reconciliation Commission (TRC) worked to create a single human community. By combining the values of transnational human rights and the Christian values of forgiveness and redemption, the TRC sought to achieve amnesty rather than punishment. To do this, it embarked on the path of the search for 'truth', which consisted not in the narration of already known facts, but in the construction of a collective memory, built on the experiences of the victims as well as that of the oppressors.[32] Putting everyone's life

[30] G. Zagrebelsky, 2019.

[31] R. Jahanbegloo, *Introduction to Nonviolence*, Palgrave Macmillan 2014, p.79.

[32] Truth and Reconciliation Commission, *Final Report*, 1998, p. 25.

at the center meant recognizing and respecting each person's dignity as a person, overcoming the role each had played in the history of the country: "for Mandela, the recognition of truth meant respect for each person's dignity, the abandoning the submission of justice to politics, morality to realism and the ultimate goal [...] was a simple but unknown vision, which had at its center a reflection on humanity elaborated in the long years spent on Robben Island".[33]

Even on the Catholic side, the current Pope proposes the question of the human being as a basis for rights. Without renouncing the vision of human being as an *imago Dei*, the Pope does not use it as an instrument to reassert the monopoly on the interpretation of natural law, but to recognize the greatness and value of each individual, urging an increasingly inclusive vision of human rights.

We understand then that the papal teaching prefers the term 'fraternity' to that of 'humanity':[34] the attempts to define the concept of 'humanity' bring with it the risk of producing a culturally connoted definition, of identifying with a politically and historically ambiguous tradition (even in the Christian and Catholic sphere), of recalling too directly a religious tradition, which in interpreting human being as an *imago Dei* stakes a claim of hegemony over the very concept of humanity and to the distinction drawn between nature and culture. 'Fraternity', on the other hand, expresses a deep bond of kinship, transversal to different cultures, religions and peoples, but also with nature (think of the encyclical *Laudato si'*), of which the human being is a part. "If we are all brothers - reads the Abu Dhabi document - then we are all citizens with equal rights and duties".[35] "Any idea of 'minority' disappears - comments Spadaro - which brings with it the seeds of tribalism and hostility, which sees the face of the other in the face of the enemy".[36] The use of the word brotherhood preserves and exceeds the political vision of a global citizenship and places the question of humanity on a relational and reciprocal, pre-political and foundational level, postponing any further legal and political specifications to a later date, preventing that contingent differences (nationality, race, religion, class, culture, etc.) from becoming impediments to the recognition of rights. Whatever is meant by 'humanity' cannot therefore be exhausted in a juridical and political expression or in rights. And the latter should be at least a partial expression of that. Furthermore, rights should not be elaborated and affirmed without taking into

[33] M. Flores, *L'umanità arcobaleno del Sudafrica di Mandela*, in *Parolechiae*, 57, 2019, Carocci, Roma, p. 170.

[34] The term was already pronounced by the Pope in his greeting to the city of Rome after his papal election. The term, which has a long theological tradition behind it, is used by the Pope with a political slant, cf. the document on human brotherhood agreed together with the Imam in Abu Dhabi. http://www.vatican.va/content/francesco/it/travels/2019/outside/documents/papa-francesco_20190204_documento-fratellanza-umana.html. Cf also 4/2018 2020 of *La Civiltà Cattolica*, dedicated to the theme of brotherhood. As I write, the new encyclical *Brothers all* is about to be published.

[35] http://www.vatican.va/content/francesco/it/travels/2019/outside/documents/papa-francesco_20190204_documento-fratellanza-umana.html

[36] A. Spadaro, *La ribellione di Papa Francesco alla retorica dell'apocalisse*, in *Repubblica*, 30 dicembre 2020, p. 16.

account the corresponding duties, that is, without reciprocity and co-responsibility in their implementation.

Corradetti's reflections on human rights and critical theory raise numerous questions both in terms of content and perspective. His reconstructive proposal - from language to constitutional transnational law - not only offers a very personal vision of the Author on the challenges to which contemporary law is called to take a position, but evokes latent and equally important questions, such as those of the foundation of law and human (protagonist and recipient of rights at the same time) within a real world that is far more complex than its own legal parable and its philosophical traditions. Beyond the need to address issues from a specific disciplinary perspective, the question remains open about the effectiveness of a response entirely internal to the legal dimension, given the complexity of the issues on which rights are called to express themselves and their origin in areas different from human experience.