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Human Rights and the Law: the  
Unbreachable Gap between the  
Ethics of Justice and the Efficacy of  
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## **Human Rights and the Law: the Unbreachable Gap between the Ethics of Justice and the Efficacy of Law**

*Abstract: This paper explores the structure of justice as the condition of ethical, inter-subjective responsibility. Taking a Levinasian perspective, this is a responsibility borne by the individual subject in a pre-foundational, proto-social proximity with the other human subject, which takes precedence over the interests of the self. From this specific post-humanist perspective, human rights are not the restrictive rights of individual self-will, as expressed in our contemporary legal human rights discourse. Rights do not amount to the prioritisation of the so-called politico-legal equality of the individual citizen-subject animated by the universality of the dignity of autonomous, reasoned intentionality. Rather, rights enlivened by proximity invert this discourse and signify, first and foremost, rights for the other, with the ethical burden of responsibility towards the other.*

*Keywords: human rights, identity and being, postmodernity, ethics, Levinas*

The discourse of modern human rights revolves around two fundamental fulcrums – the identity of self (the philosophical question of what it is ‘to be’ human) and the nature and extent of legal rights attached to such an identity. Too often, however, in the discourse of human rights there is an assumption regarding questions of the former in order to focus on issues surrounding the latter. This is unfortunate as it leads to a marginalisation of questions of being within the discourse of rights. But these questions are important for the degree to which we understand the former necessarily impacts upon the limits and content of the latter. In my work on ethics, postmodernity and rights I wish to return to a focus on questions of being and how the changing nature of our concept of being – particularly through the influences of contemporary postmodernity – impacts upon the efficacy of modern human rights law.

The assumed identity of being within modern human rights stems from the historical discourse of Western liberal humanism. It is a particular Anglo-French tradition – informed by (to name a few) thinkers such as Hobbes, Locke and Rousseau – with the important, influential augmentation from other German thinkers such as Fichte and Kant. In many cases, our contemporary human rights’ discourse is labelled Kantian or neo-Kantian, underscoring the

discourse's focus on the atomised individual of *moral potentia*.<sup>1</sup> This is the individual legitimised in the Enlightenment – an individual marked by the newly discovered essential/inherent traits of autonomous will and reasoned consciousness. Good conscience – what is right – stems from the exercise of such traits. This is the image of the self-determined, self-sovereign individual, exercising these essential traits for their own (reasoned and willed) ends. This is the image of the ego-I, for which such traits and markers of *moral potentia* and good conscience exist prior to the sociality of the collective – they exist within the limits of the capacity (the self-sovereign power) of the autonomous individual, first-and-foremost, free from community.

It is this (assumed) image of the individual which sits at the heart of modern human rights. The very founding document of contemporary rights – the 1948, United Nations' *Universal Declaration of Human Rights* – rests upon the notion of (the image of) the 'inherent and equal dignity' of all human beings 'endowed with reason and conscience.'<sup>2</sup> The universality (the equality) of such traits underscores the 'dignity' of humanity and ensures the universality of this identity of being, which in turn, ensures the universality (the equality) of rights attached to such an individual.<sup>3</sup> This universality and equality facilitates a 'sociality of the Same' – a homogeneity of/in the collective identity beyond 'distinctions of any kind, such as race, colour, sex, language, etc.'<sup>4</sup> In other words, our contemporary human rights' discourse begins with the self-interested individual and then expands this image of self into a sociality of coincidental others of equal traits and capacities (powers) of self-interest and, hence, rights – imagining a (potentially utopian) community of the Same individual character, possessing the same individual rights.

The relationship between this concept of the nature of being and the limits of our human rights is seen in the quality of such rights. This concept/focus of/upon 'I' leads to a particular subjective characteristic of rights within our modern human rights' discourse. Such rights are

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<sup>1</sup> For just a couple of examples of both a history of the idea of human rights and their neo-Kantian flavour, refer to: Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century*, 2000; Gary Herbert, *A Philosophical History of Rights*, 2002.

<sup>2</sup> Refer to The United Nations' *Universal Declaration of Human Rights*, (1948), Preamble & Article One.

<sup>3</sup> Charles Taylor. 'Condition of an Unforced Consensus on Human Rights.' *The East Asia Challenge for Human Rights*, 1999, 124-144, 124; See Douzinas, (note 1), 319; Zygmunt Bauman, *Postmodern Ethics*, 1993, 26.

<sup>4</sup> Refer to The United Nations' *Universal Declaration of Human Rights*, (1948), Article Two.

possessive, individualistic and subjective right, which are owned (like personal property) and exercised by the individual (all individual's equally) personally.<sup>5</sup> They are ontological rights – signifying the individual's autonomous capacity to control, possess and propel itself, to have rights of and over its own potency and powers, its own means to being.<sup>6</sup> These are rights which reflect the innate dignity in each of us to justify ethical considerations (good conscience) from the point of view of each autonomously reasoned and willed individual.<sup>7</sup> Such a conception of human rights is the very signification of the potentiality and potency of selfhood – of self-actualisation, immune from external affectivity.<sup>8</sup> To this extent, such personal rights lead to a law of rights which aim to ensure the social space for the moral potential in/of each autonomous individual, free from interference and intrusion from the State and the collective which the State represents. Human rights law becomes, first-and-foremost, the protection of self-directed individuals against the State/collective; it takes on a hue which prioritises individual political and civil rights (aimed against the State) above other aims and notions of rights (social, economic, etc).

This image of human identity and this characteristic of modern human rights is not a reflection of a 'universal truth' of the nature of being and its rights. Rather, it is the consequence of a certain historical contingency in Western Europe which facilitated the West's evolution from the *ancien régimes* organised around King and Church (the Ancient Empires and Medieval Europe) and towards the modern (enlightened) democratic State.<sup>9</sup> In this evolution in the West, human rights law – with its focus on the civil and political rights of the individual – comes to mediate between the new, modern State and this newly conceptualised image of the individual. The task of this law, first-and-foremost, is to draw a protective line around the individual over which the State/collective cannot step in the name of personal freedom and individual (socio-political) liberty. In this way, such an image of human rights has been of central importance to the significant advances in modern society.

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<sup>5</sup> B. Roth, 'Retrieving Marx for the Human Rights Project.' *Leiden Journal of International Law*, 2004, 51-52; J. Gordon, 'The Concept of Human Rights: The History and Meaning of its Politicization.' *Brooke Journal of International Law*, 1997-1998, 721-28.

<sup>6</sup> See Taylor, (note 3) 2.

<sup>7</sup> See Roth, (note 5) 52-53.

<sup>8</sup> B. Kunstler, 'Beyond the Illusion of Human Rights.' *Journal for Pedagogy, Pluralism and Practice*, Fall 1999, ([www.lesley.edu/journals/jppp/4/kunstler](http://www.lesley.edu/journals/jppp/4/kunstler)), accessed 20/10/2007, 7.

<sup>9</sup> Refer to both Douzinas' and Herbert's account on the history of human rights, (note 1).

And yet, such a focus on the individual and its subjective rights has led to tension between the individual and the collective of other individuals. This is seen in a number of ways. For example, when one individual's exercise of their rights clashes against another individual (or the collective) of the same equal rights (for example, when one freedom of speech clashes against another's freedom of speech). Or – on a global level – when one Nation-State claims its sovereignty as a defence for its actions within its own borders against the well-intentioned intervention from the global collective of other Nation-States. At these moments human rights law becomes uncomfortably ambiguous and confusingly opaque. At these moments the efficacy of human rights law is awkwardly compromised by a clash of 'right versus right' of sovereign individuality.

This focus on the selfhood of the individual, and the subsequent tension between it and the collective, has been critiqued on many fronts. Historical figures such as Burke, Bentham and Marx have raised concerns over such a focus.<sup>10</sup> Contemporary cultural relativists also question such a tradition and its focus on individual selfhood as does the debate/tension between the 'generation of rights' within our contemporary human rights' discourse. And there is even critique of such a focus on selfhood from Hegel and neo-Hegelians such as Adorno.<sup>11</sup> My interests lie in the late twenty and early twenty first century discourse of postmodernism and its re-imagining of human identity. Whereas the above tradition in the concept of the self within modern human rights commences with and focuses upon an image of being anchored within the realm of the ego-I, postmodern philosophy deliberately commences with the notion of the 'other.' This is the marginalised other de-prioritised in established and dominant meta-narratives of socio-political, ideological and cultural discourses. Postmodernity necessarily begins with an acceptance (and a prioritisation) of this other – that which defies the intimacy of the self, undermines its certainty and intrudes upon the sovereignty of individual conscious capacity and intentional/reasoned will. The alterity of otherness – the very quality of otherness – is that which is always already beyond the circle of the Same in the exercise (the effort) of existence of the self. The other defies the reduction of all into one, homogenous, symmetrical sociality.

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<sup>10</sup> E. Burke, *Reflections on the Revolution in France*, 1791; J. Bentham, *The Works of Jeremy*, 1843.

<sup>11</sup> G. Hegel, *Philosophy of Right*, 1967; G. Hegel, *The Phenomenology of Spirit*, 1977; M Horkheimer & T. Adorno, *Dialectic of the Enlightenment*, 1969.

My interest here is in how such a shift in the image of identity must necessarily lead to a re-imagining of human rights, which are dependent upon notions of human identity. For postmodernism there are many others which are potentially threatened by marginalisation and reduction: the gendered other; the sexual orientation of the other; the ethnic other; the unconscious other; the linguistic and symbolic other. The socio-political postmodern projects of identity politics have led to the important expansion of the equality of rights – the established individual rights as outlined above – to such differing social groups. That is, such ‘other individuals’ and individual groups gain (through socio-political agitation) an equal protection of the law against the (arbitrary) intrusion of the State. Yet at the same time postmodernity can too easily lead to a (often criticised) superficiality of the self. Postmodern subjective agency supplants modernism’s individual sovereignty and rights too easily become an exercise in subjective aesthetics, what Foucault refers to as ‘the creation of ourselves as a work of art.’<sup>12</sup> In this context, we have reached the potential postmodern plight of human rights<sup>13</sup> – in which human rights are confused with subjective demands in the potentially infinite processes of the objectification and commodification of self. Rights become the vehicle/the mechanism to express/signify ‘my-self’ as ‘I’ choose, free from State/collective interference. Rights (particular in the West) become subsumed within our contemporary moral crisis of self-interested indifference, ethical ambivalence and personal relativism.<sup>14</sup> The contemporary (postmodern) confusion here in our rights’ discourse is that with the (modern) focus on the autonomous individual, there is a blurring of the line between the private individual/subject and the public citizen. The public square aimed at the collective good has become the arena for private agendas engaged in individual interests. This postmodern outcome, of course, only goes to exacerbate the problematic tension between individual and collective.

For postmodernism’s important contributions to our understanding of human identity to be taken seriously (particularly in the human rights discourse) it must offer more than the identity politics aimed at the politico-legal equality of the relativism of the multiplicity of subjective self

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<sup>12</sup> Michel Foucault, ‘On the Genealogy of Ethics: An Overview of Works in Progress.’ *The Foucault Reader*, 1984, 351.

<sup>13</sup> See Douzinas (note 1), 1.

<sup>14</sup> M. Sarup, *An Introduction to Post-Structuralism and Postmodernism*, 1993, 24 & 107; see also Bauman, (note 2), 16-21. This, of course, is not a consequence of postmodernism itself. Too often the critiques of postmodernism fail to realise that postmodernism itself is the consequential conclusion of modernism. Postmodern equivocations of/in the multiplicity (the relativism) of subjective positioning are the corollary of liberal humanism’s focus on autonomous individual sovereignty over itself as its own end.

identity. For postmodernism to contribute to the easing of tension between individual and collective it must speak to an ethical sociality beyond a simple equality of politico-legal rights for ‘other subjective, individual selves’. If now through the work of postmodernism there is a discourse of the primacy of the other within the philosophy of being, then within the human rights discourse we must re-prioritise talk about a ‘responsibility-towards-the-other’ above the ‘rights-of-self.’ This shift in the nature of human rights is not new within the discourse of our contemporary rights. Since the formal establishment of modern rights post WWII, there has been an ongoing debate regarding the individual’s responsibilities (above their rights) to the collective. For example, this debate arises from the point-of-view of cultural relativism (for example the arguments surrounding Asian and Muslim values) and from the point-of-view of the second and third generations of rights,<sup>15</sup> which focus on social and economic rights of the collective. There is also the 1950s work of T.H. Marshall and his argument that the individual citizen of the new democratic State is only complete when it includes characteristics of both individual rights/protections which are also mediated with more expansive social responsibilities.<sup>16</sup> For me, my interests lie in the ethical implications of the nature of rights when viewed through the notion of postmodern otherness. And in this task I turn to the philosophy of Emmanuel Levinas and his understanding of an ethical primacy between the subject and the other above the interests of the self and the politico-legal discourse of protected self-interest.

Levinas is radical *not* for his insistence on there being a prior inter-subjectivity between the self and the other – between one individual and another individual – which comes before the autonomous self. Thinkers such as Rousseau, Marx and Hegel already referred to such an inter-subjectivity. Rather, Levinas’ radicalness stems from his insistence that such an inter-subjectivity is, first-and-foremost, an asymmetrical ethical responsibility for the difference (the alterity) between self/other, rather than an equality of politico-legal rights amongst individuals who are the same. For Levinas, ethics is ‘first philosophy’ because it is this inter-subjective (inter-human) ethical responsibility which animates all other human activities.<sup>17</sup> It is this ethic of a responsibility-for-the-other (for each other) which is the foundation, the measure and the aim of the sociality, the politics, the law and the rights of humanity. This is what turns our contemporary

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<sup>15</sup> Refer to The United Nations’ generations of rights: The *International Covenant on Economic, Social and Cultural Rights* and the *Declaration on the Right to Development* respectively.

<sup>16</sup> Refer to T.H. Marshall, & T. Bottomore, *Citizenship and Social Class*, 1992.

<sup>17</sup> Emmanuel Levinas, *Totality & Infinity: An Essay on Exteriority*, 1996, 304.



human rights law on its head – for it pulls the focus of rights away from the autonomous (rational) powers of individual sovereignty/agency and towards a ‘right of responsibility’ each individual bears towards the inter-human collectivity of distinct others.

Levinas finds this primary ethical inter-humanness in the anterior neighbourhood of what he terms the ‘proximity with the face’ of the other.<sup>18</sup> This is the ethical foundations of human identity upon which social justice arises and towards which the law – the politico-legal discourses and machinations and specifically human rights law – are motivated to serve. This relationship between the self and other occurs pre-ontological, there is a pre-conscious split in the subject,<sup>19</sup> in which the other always already is before and above me and in which the self is always already opening and aiming towards the calling of the other. Hence, for Levinas, there is a prevenient openness of (ethical) responsibility in the very fabric of human identity; an asymmetrical debt of consideration the self inherently owes towards the other. This is because the self is always already in community: always already incarnate with others; always already in dialogue and discourse with the faces of others. For Levinas, it is the ethical quality of this inter-human engagement with alterity (with the otherness of the other) which marks us – which interpellates the subject – as ‘human’ and not some other experience of being.

For the critics of Levinas, it is perhaps too easy to dismiss such ethics as too personal and too subjective, something from which Levinas never resiles. Yet, such criticisms ignore the intervention of another – of the readings of Derrida – in the works of Levinas, which draw out in Levinas a sociality of *ethico*-political justice from the singularly infinite nature of personal, ethical responsibility found within the proximity with the face.<sup>20</sup> This is done through Levinas’s insistence of the ‘third party’ – the sociality of all others/all humanity – which also always already resides in this neighbourhood of proximity between self and other.<sup>21</sup> Hence,

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<sup>18</sup> See Levinas, (note 17), 187-253.

<sup>19</sup> As opposed to the traditional Kantian (liberal humanist) split subject (the subject of our contemporary human rights’ discourse) which is ontologically whole in its own conscious capacities of reason and will and then split ‘from’ its social self (the private individual and the public citizen) – what Marx terms the terrestrial life of the private individual and the celestial life of the communal/political being. Refer to Karl Marx, ‘On the Jewish Question.’ *The Marx-Engels Reader*, 1978.

<sup>20</sup> It is commonly suggested that Levinas’ second great intellectual work, *Otherwise than Being*, is a revision of *Totality and Infinity* in response to Derrida’s reading of Levinas’ earlier work. Refer to J. Derrida, ‘Force of Law: the Mystical Foundation of Authority.’ *Deconstruction and the Possibility of Justice*, 1992; and J. Derrida, *Violence and Metaphysics, Writing and Difference*, 1978.

<sup>21</sup> Emmanuel Levinas, *Otherwise Than Being or Beyond Essence*, 1998.

simultaneously, personal ethics becomes social justice and decisions and calculations must be made regarding responsibility to all and not only one intimate neighbour or (more traditionally) in the service of the individual self. Justice becomes the ‘taking into account’ of the many within which we are in proximity.

Hence, with the third party active in the neighbourhood of proximity, society, law and the socio-political are not formed around the limits of a coincidence of equal autonomous individuals of rationalised self-intention, mediated by a reasoned law of a restricted State (that is, restricted by the human rights of the individual). Rather, prior to this sociality of equal individual reason and will there is already an ethical founding – an ethical animation – in the sense of being and in the structure of human identity. Put simply, prior to a political, economical or cultural sociality (prior to the human rights of the individual) there is always already an ethical sociality between the self, the other and all others, from which everything else emerges. The significant corollary from this Levinasian position is that the structure of law, society and justice are pre-configured within an ethical openness (rather than limited within the margins of individual legal rights and obligations) and the subject personally engaged in a prevenient responsibility for-the-other (rather than pre-occupied by the sovereignty of self). To this extent reason is not the conscious calculation in service of what can best serve my own self-interests, but rather, is the rationalisation of how responsibility can best be distributed amongst a collective of distinct others separate from me. Radically here, ethical, inter-human responsibility is an irrational concept – it forces us to go against the self-service of the ego-I in order to meet a more profound and pre-foundational sentiment ingrained in the fabric of human identity – the consideration of/for the other.

This ethical sociality of responsibility and consideration ‘above/before’ the individual’s rights of self-interest may cause discomfort for more traditional liberal humanists. But unlike the anti-humanist aims of many postmodern/post-structuralist projects (think of Foucault and Leotard), Levinas’ aim is not to defeat the image of the autonomous, individual of conscious capacities and reasoned will (as articulated within our contemporary human rights’ discourse). Rather, Levinas’ project is more post-humanist/critical-humanist, aiming at reinforcing the subject with personal, ethical integrity beyond the ego-I’s concern for it-self. His aim is not to defeat the ontology of being, but rather, to underscore its effort of existence with an ethical

humility, balancing the acts of the ego-I with the considerations of the ethical-I. His aim is to justify the existence and energies of the subject with the ethical considerations and integrity always already held within its very own energies of being and acts of existence.

This prevenient, ethical inter-human relationship between the self, the other and the many others of the third party leads us to a further novelty in Levinas's pre-foundational sociality of ethical proximity. Within such a prevenient ethical relationship, the uniqueness of the self is *not* directed by the determinates of self-consciousness and intentional will in the sovereignty of self over self. That is, the traditional moral *potentia* of the individual as working itself as 'its own ends' is *not* what makes each of us distinct and unique. Rather, the uniqueness of the subject rests upon the personal, ethical, response – *respons-ability* – of the subject to the other. The novelty and transformative potential of this Levinasian post-modern ethic is that freedom and justice are not found in the potential of the ego-I's self-promoting enate powers of being. Rather, freedom and justice are found in the escape from the limits of being and from the potential violence in the reduction of others in the exercise of being.<sup>22</sup> This is an escape/a freedom into the consideration of some-thing other, beyond my individual existence and understanding, beyond my own insecurities and anxieties for my own self-existence.

Hence, society founded upon this 'first philosophy of ethics' speaks to the proximity of alterity, speaks to a pre-configured consideration of/for distinction. To achieve this, Levinas acknowledges the potentiality of modern democracy and the openness of contestation which resides at the centre of the modern democratic State. And this is why our contemporary human rights discourse, with its focus on civil and political rights, is so significant. But for post-humanists such as Levinas, Bauman and perhaps even Derrida and Critchley there is never enough democracy because there is never the certitude of alterity (of the other) within the space of being (of the individual). Democracy must always be engaged in the effort of vigilance, must always be a dialogue of doubt to ensure that it does not concretise into 'the past of what it has become and what it has achieved' and thereby closing itself to the infinite possibilities of the distinctions beyond what it is (in itself) to be.<sup>23</sup> If alterity – the very otherness of the other – is

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<sup>22</sup> See Levinas, (note 17), 200.

<sup>23</sup> A. Loumansky, 'Levinas and the Possibility of Justice.' *Liverpool Law Review*, 2006, 156; Simon Critchley, *Ethics, Politics, Subjectivity*, 1999, 188-247; Drucella Cornell, *The Philosophy of the Limit*, 1992, 110-150; Derrida, (note 20), *Force of Law*, 61.

always beyond the sameness of the self, then the self, society, law (human rights law) and politics must always be open to the possibilities of distinction and rupture. This is Levinas' 'good state' – a State aware of the weight and limits of its own being. Thus, politico-legal actions and efforts must necessarily always fail.<sup>24</sup> The good state is a State in 'permanent revolution'. Law aims towards justice and justice signifies an ethical trait of human identity which leaves the experience of being always already open to responsibility-for-the-other. The law cannot satisfy itself with the measure of its own limits. Justice resides outside the law to inspire the law to always engage in the effort of going beyond itself, doubt itself, critique itself, push itself to 'always do better' in the name of justice and in the service of our ethical relations.

In this light, human rights law must always strive to do better as well. One of the dangers in our contemporary human rights' discourse is in its own structural certitude – in its own self-importance underscored by its claim to a 'universal truth' regarding human identity, which (within the discourse itself) is rarely questioned, critiqued or contested. But human rights law must do more than simply be certain. It must also always exert the energy to consider what it has left out and must always be flexible to change in order to re-consider the nature of itself in response (responsibility) to distinctions outside itself. The efficacy of human rights is not measured by the completeness of its universality. Rather, it is measured by its ongoing concern for the distinction of alterity, by its never-ending responsibility towards, and in the collective of, all others. This is not an action of accepting difference for the sake of difference. Such an action all too easily allows for a localised totalitarianism which marginalises and excludes at the local (small group) level. This, unfortunately, is something the arguments for cultural relativism often defend in the name of 'difference.' Rather, human rights law ought to consider (ought to include) the ethical conduct in the effort of selfhood which mitigates, first-and-foremost, the violence of reduction and exclusion on all levels – in personal engagement with others and then on a large social (international) scale. This energy of constant consideration in rights' law to 'strive for more' than it already is, is not a stretch towards more individual politico-legal rights (as seen in the West since the late twentieth century). Rather, in the endless interplay between the efficacy of law and the ethics of justice, human rights act as the *provocateur* of the law, of society and of the individual. Without denying the necessity of modern democratic politico-legal rights, human

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<sup>24</sup> Levinas, (note 21) 160; E. Levinas, *Entre Nous: Thinking of the Other*, 1998, 167.

rights necessarily speak to the ethical integrity of human identity and to the social responsibility we all have for-the-other (all others).

To be satisfied with a prescriptive set of civil and political rights and duties – to be left in a collective of symmetrical sociality of politics and law (the legal equality of all citizen subjects) – leaves us within the limits of being and in the struggle of/for the autonomous space of individual being amongst the collective. This leads us back to the promotion of self-interest and self-care as the primary goal of rights. Rather, human rights should agitate a moral conscious – not of/for self as currently in the image of human identity within our contemporary human rights – but of our ethical relations and social duties to others. This is the transformative potential in Levinasian, post-humanist ethics to move from a focus on individual free will to a condition of good will.<sup>25</sup> It runs parallel to Marshall's evolution of the citizen subject from one with civil and political rights alone focussed on individual freedoms, to one animated within rights of social justice, focussed on the collective.<sup>26</sup> In both cases, both thinkers are suggesting that we as human beings and rights as human rights are not fully realised until each begins to open to the sociality of responsibility for others that we share as a collective community.

In Levinas' work there is a reminiscence of a pre-modern sentimentality – a 'kind of' natural law (though Levinas and other post-humanists do not use such a language) prior to man made law. This post-humanist natural law is the ethical law which attempts to limit the ego-I's exercise of being and struggle for self. This is the ethical law of an anterior, ulterior, openness in the very structure of human identity, which attempts to prohibit the violence of ontological reduction in the presence and in the struggle of self existence. But there is a great difference between post-humanism and pre-modernity. Levinas is not denying freedoms (the autonomy and liberty) won by the modern individual, but rather, attempts to supplement it with a pre-foundational epoch of human sentiment – what he terms the *hitherside* of the (ethical) *otherwise-than-being* of human identity.<sup>27</sup> It is this ethical hitherside of self which, Levinas tells us, 'cramps the self in its own skin.'<sup>28</sup> The difference (pre-modern v postmodern) is toward which direction our (personal) ethical duty/responsibility lay. For in pre-modernity, obligation and responsibility

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<sup>25</sup> Levinas, (note 17), 200.

<sup>26</sup> Though Levinas would still place the sociality of the self, the other and all others prior to the individual.

<sup>27</sup> Emmanuel Levinas, Substitution, *Basic Philosophical Writings*, 1996, 86.

<sup>28</sup> Levinas, (note 27), 86.

are to social and cultural structures and institutions (King and Church), which close us from personal engagement with the uniqueness of the alterity of others. But for post-humanist/critical humanist ethics there is a personal, one-on-one relation between self and other – and the third party of all others – unmediated by a cultural foil.

This personal relationship is the attempted balance in post-humanist ethics which was missing in pre-modern structures: a balance of individual autonomy while still giving consideration towards an ethical sociality – a collectivity of prevenient inter-subjective responsibility and consideration. This is a balance that is perhaps (at best) de-prioritised within our contemporary human rights' discourse and its historical, philosophical tradition regarding the nature of being. In the epoch of the modern individual moral *potentia* is measured by the extent reason and will is exerted towards the prioritised atomised self-interest. Hence the importance in the human rights discourse to continue to ask questions regarding the philosophy of being, rather than be solely consumed by politico-legal issues and the machinations of politico-legal institutions. For Levinas, this balance is expressed in his concept of the 'hard/soft command' of this 'ethics of alterity.'<sup>29</sup> Without the strength of enforced pre-modern hierarchical social structures, contemporary (post)modern ethical relations between people are 'softly spoken.' Hence, while the prevenience of the ethical relationship of proximity between self and other obliges the individual to make an ethical choice (the hardness of ethic's demand) it cannot oblige us as to how we choose to respond (how we exercise our respons-ability). Thus, how each of us chooses (even the choice of saying 'no' and rejecting our responsibility) is still a decision for individual agency (the softness of the ethical demand). In the complexity and ambiguity of this hard/soft character of ethical obligation, of the inter-human balance between individual and collective, of the variance amongst right and responsibility, human rights law must do more than prioritise a unifocal focus on simple individual agency. Rather, from a Levinasian post-humanist perspective, the priority in human rights ought to be the ethical obligation of making ethical choices in the first place.

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<sup>29</sup> R. Burggraeve, *The Wisdom of Love in the Service of Love: Emmanuel Levinas on Justice, Peace and Human Rights*, 2002, 98.

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