WHAT HUMAN RIGHTS ARE NOT (OR NOT ONLY)

A NEGATIVE PATH TO HUMAN RIGHTS PRACTICE

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PRESENTATION

After the phase of constitutionalization in the domestic domain and decolonization in the international field, law has faced a new challenge, the emergence of human rights. Their origins are rooted in the past, but they have become protagonist of the domestic and international scene only during the last decades, and now their status and methods can be properly observed. Their emergence, expansion and development have been accompanied by discussions and different understandings, not always appropriate.

This book aims at offering an overview of the current human rights practice, indicating some of the main specific features which are able to provide a meaningful explanation of the complex phenomenon. It attempts to highlight its moral, social, political and legal dimensions, its theoretical and institutional origins, but also the specificity of the current phase of the protection of rights, and its uses in the domestic and international domain. The negative approach allows us to learn from different perspectives and from their criticisms, but also prevents us from simplifying their multifaceted character for the sake of a coherent, intuitive or exhaustive account.

The starting point is the connection between the idea of law as a social practice and the social practice of human rights, the former working as an explanatory framework, the latter being our focus. Law is not only a system of rules, but a complex assortment of acts, institutional facts, normative meanings, inherent goals, in which different actors are involved. Human rights identify some core values, and they are a relevant part of the legal enterprise, although they do not exhaust all the values belonging to it.

The negative method of defining the subject is grounded on the idea that human rights as a social practice cannot be squared within a rigid classificatory semantic, and for this reason it is easy to misunderstand their

meaning. At the same time, they are not adequately captured by external descriptions, and on the contrary it is necessary to adopt the point of view of participants.

From a theoretical perspective, human rights as implemented today are only partially in a *continuum* with the revolutionary proclamations (French and American). The Holocaust introduces a new approach: they are not vindications of "our" rights, but of the rights of others, those who are at risk or whose rights are being violated. This simple idea explains many aspects of the current human rights practice: the necessity of identifying the duty holders, the way of understanding the international community and the role of rights in it, their forms of protection and promotion, their anti-discriminatory character. And it explains also some possible misunderstandings, like the idea that human rights are natural rights, or a theory of values, or self-affirmations, or tricks for military intervention.

In the first chapter our aim is to show how the current configuration of human rights is to be distinguished from that of the long run history of natural rights and to devote a more in depth analysis to their configuration after the Second World War. Even if they are not natural rights and they belong to positive law, they attract moral values in the legal context.

The second chapter shows their complex structure, as rights not only legal but also moral. They are not only against the state, but they need the state's intervention under certain conditions together with the international community. Their universality is different if referred to their position as values, principles or rules. They are pluralistic and compatible with a high number of theoretical perspectives without losing their distinctiveness.

In the third chapter the analysis of their content is functional to distinguishing human rights from the possessive heritage that liberalism has linked to them through the legal concept of subjective right. The notion of dignity and the need of specification of rights in the concrete conditions of individuals exclude minimalist accounts of rights, and the idea that some rights are less urgent or important than others in the abstract.

In the fourth chapter it shall become clear how human rights are not compatible with an arbitrary exercise of political power or uses of force. They involve non-state actors belonging to the global civil society, but they need also the state – and the institutional dimension in general – as their counterbalance. They play the role of criteria of legitimacy and justice, but they are not the solution for everything.

Francesco Viola has written the introduction, the whole first chapter, and paragraphs 2.3, 2.4, 3.1 and 4.1. Isabel Trujillo has written the presentation and conclusion and paragraphs 2.1, 2.2, 3.2, 3.3, 3.4, 4.2, 4.3, 4.4.

The book is dedicated to our PhD students in Human Rights, University of Palermo (Italy).

Introduction

AN ACCOUNT OF HUMAN RIGHTS AS A SOCIAL PRACTICE

If we wish to consider human rights as a unitary and inclusive set, the most appropriate way to define them is not to see them only as moral values or as legal powers or as political but as a social practice. One can, however, legitimately doubt that in this way greater clarity is achieved. The concept of 'social practice' is vague and indeterminate (Taylor 1989, 204). Its best definition is still the one given Alasdair MacIntyre (2007, 187), who, however, did not consider it applicable to human rights:

> By a 'practice' I am going to mean any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended.

In this definition, there are aspects that with some adjustments help to grasp the general meaning of human rights and to have a broader or less sectorial vision of them. In this connection, it is often assumed that human rights have a merely instrumental role in ensuring external values that moral and political philosophy have the task of indicating. The gradual penetration of rights into the field of positive law favors this conviction. As a result, human rights are exclusively considered as legal forms of protection of values established elsewhere. In addition, the language of rights is not without ambiguity and obscurity, also because of legal doctrine itself; indeed, one might say that it is highly controversial from many points of view (Nussbaum 2000, 97). Considering rights,

instead, as a social practice means to some extent claiming their self-justification and at the same time seeing them as a meeting-place of the fundamental spheres of practical life. We therefore propose to examine the reasons why human rights belong to all intents and purposes to the main social practices of our time.

In the contemporary world, marked by diversity, pluralism, disagreement and conflict, no shared ethic is possible, but a common language does still seem possible. Rights appear as a *lingua franca* that promises to connect individuals with different identities and cultures. The broad social consensus that rights receive concerns not so much their content, which indeed is often controversial, but rather the priority of this issue in debates on justice. Rights are claims that individuals make toward each other and all toward the public authorities. In this sense, the struggle for rights appears disruptive with respect to social integration and highly destabilizing. And yet rights require complex forms of social cooperation, both in terms of domestic societies and in terms of international society. It is not only important to stress that rights demand to be recognized by other individuals and public authorities, that they are tied to correlated duties of others, and that their protection requires special social and political institutions. Above all it is important to emphasize that the effective enjoyment of rights ultimately requires a favorable social environment. Purely legal recognitions are only the first step, which can easily be thwarted by the absence of an adequate social response. In this sense, human rights require social cooperation. Practical agreement about rights is already a commitment to human rights, but it is only the starting point of a cooperative activity in the search for adequate forms of expression. A social practice exists when the related acts are not only accepted as facts, but also as enactments of a cooperative commitment.

Cooperation is normative by its very structure. It implies mutual responsiveness, commitment to joint activity and commitment to mutual support (Bratman 1999, 94-95). But above all, cooperation is achieved by following the rules and modalities of action dictated by the *telos* pursued and not by one's own judgment, however illuminated. However, there is a lot of controversy about how to see this goal and what forms of activity it requires. Agreement relating to the priority of rights does not mean that we agree on their foundation or justification and, consequently, on their recognition and the modalities of their implementation. Cooperation is always searching for itself. The search for reasons for cooperating requires cooperation. Ronald Dworkin (2011, 160) correctly pointed out that these forms of social cooperation are guided by "interpretive concepts:"

> We share these concepts […], not because we agree in their application once all other pertinent facts are agreed upon, but rather by manifesting an understanding that their correct application is fixed by the best interpretation of the practice in which they figure.

The fact is that if we consider as interpretive concepts the internal values toward which the practice of human rights is directed, we easily realize that we agree on their paradigmatic identification, but not on their precise contents or on their application to concrete cases. We agree, for example, that torture is always a violation of human dignity, but we disagree in judging whether or not a specific action is to be regarded as an act of torture. This often means that further upstream we disagree on the very concept of torture. If we want to continue to use Dworkin's point of view, we should say that the most correct concept of torture is the one that best fits the best interpretation of the practice of human rights as a whole. But this search is never over once and for all.

Human rights as a social practice are therefore a research program on the way of understanding and applying values that are fundamental for the human being and for social life. These internal goods make this practice an end in itself. Any subordination of human rights to other purposes, whether those of economic well-being or social development or peace, can lead to a misinterpretation of this practice and distorted applications.

The internal values of the practice of human rights appear as highly heterogeneous and sometimes even conflicting. But there is a common reference that unites them. They are all core values of the human person, so that it can be argued that the real internal value of this practice is the respect, the development and realization of the person. This does not mean, or at least should not mean, a paternalistic project, because it is people that determine what is owed to people. At the same time the practice of rights contributes to formulating the needs of the person and enhances or extends the person's capabilities (see e.g. Rawls 1993, 187-188), helping the person to find and to become himself or herself, as is stressed in the last part of MacIntyre's definition, which – as everyone knows – in this way appeals to the ethic of virtue. The practice of rights therefore also has a constructive and promotional function.

The practice of rights is geared towards excellence. This concerns both the individual right and the practice as such. No fundamental right can be wholly sacrificed in the name of the social order, but not even the boosting and extension of a particular right can unduly restrict the recognition of other rights or effective enjoyment of rights by all people. Regulation, determination or specification of

rights should not be considered as a way of limiting them, but as the way in which the rights exist, that is to say are effective, practicable and enforced. But practice as such transcends its particular specifications and goes beyond them. For this reason it is always subject to revision.

A last remark concerns the role of practical reason in the working out of interpretive concepts. A social practice is mainly made up of acts of interpretation and argumentation. The role of authority, to the extent to which it is necessary for the purposes of the final decision and the protection of rights, should be limited as much as possible. We must not forget, however, that reasoning is 'practical' not simply when it relates to human actions, but precisely when it aims to determine the action to be taken. Practical reason is not a reflection *on* human action, but a reflection *for* human action. For Aristotle, reflecting on the goal is already acting (Finnis 1983, 1).

Practical reasoning begins when it sets itself the goal to be attained and ends when, all things considered, we determine the action that is best suited to achieving it. Between the beginning and the end different subjects can act with different roles, so that the continual flow of reasoning can be divided into sections with relative autonomy that each become a precondition for the subsequent phases. But in the end human rights are a unitary enterprise based on a shared agency.

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Chapter 1

ORIGIN AND STRUCTURE

ABSTRACT

The long run history of human rights links them to the natural rights of Natural Law tradition at the beginning of Modern Age. Even if there are many similarities between them, human rights differ from natural rights from many points of view: their relationship with law; their being part of historical and cultural processes; the idea of human nature they involve. It is possible to say that human rights seem to have developed their very shape only after the Second World War, when it became clear that human rights were others' rights. Being the outcome of a process of reacting to violations and discriminations against human beings, they engage others' commitment in avoiding those discriminations and violations. What is human in human rights then is not mainly to be referred to the right-holder, but rather to those who have the duty to protect rights.

Human rights belong to the legal world. But from human rights' point of view, law is a social practice. The protection human rights require is not limited to a narrow conception of legal tools necessary for their implementation. In other words, human rights need a wider conception of law, with ethical and social important interconnections. Both in the legal context and in the wider area of social interaction, human rights involve a complex exercise of practical reason. They deal with values, principles and rules in the context of a legal practice porous to morality and public reason.

1.1. HUMAN RIGHTS ARE NOT NATURAL RIGHTS

It is possible to extend to human rights the remarks that Richard Tuck (1979, 2) expresses with regards to natural rights: that we are talking of a theory-dependent concept. This means that rights in general belong to a constellation of interpretive concepts not only of an ethical-legal character (like those of power, duty, obligation and law), but also of a political and anthropological character (like those of authority, liberty and responsibility). Theories of rights are distinguished from one another mainly on the basis of the relations among these fundamental concepts. They are all based on the moral idea that all men have an equal right to be free and that any restriction of this freedom must have a moral justification.[1]

Theories of rights, in turn, are a salient part of theories of justice, since recognizing or attributing rights is dictated by a need for justice. Having a right means that someone is entitled to something. In this sense justice logically has a priority over rights. Nevertheless, not all theories of justice necessarily produce a theory of rights as their central point. It is obviously possible to find not entirely derivative conceptions of rights, i.e. totally independent of theories of justice, as we can find in the thought of Hobbes [1588-1679] or in anarchic thinkers.[2]

One wonders whether human rights are adequately understood if they are considered in the outlook of modern theories of natural rights.[3] The problem is raised, among others, by Beitz (2009, 50-51), when he affirms: "our understanding of international human rights is distorted rather than helped by conceiving them on the model of natural rights."

In general, modern theories of natural rights are constructed inside the presupposition of a general moral order (Haakonssen 1996). In the modern epoch this order is becoming more and more impersonal in the wake of the disenchantment of the world, and social forms are conceived in a categorical way

[1] As is well known, Hart considers this a general natural right and distinguishes it from special rights, which arise out of special transactions between individuals or out of some special relationship in which they stand to each other. However, it is not a true right as it is devoid of determined content (Hart 1955).

[2] For the controversial thesis of the original character of natural rights in Locke [1632-1704] cf. Zuckert 1997.

[3] "Although the concept of 'natural rights' has not been completely displaced, the expression human rights certainly has a greater popularity today than has been true of 'natural rights' since the days of Tom Paine… [P]eople differ about the significance of the shift in terminology from 'natural' to 'human' rights. Is this shift merely terminological? Or may it be that to speak of 'human' rather than 'natural' rights implies and fosters alteration of the original understanding of 'fundamental rights'?" (Pennock and Chapman 1981,VII).

and based on legislative codes (Taylor 2007, 704). Nonetheless, an impersonal moral order preexisting social institutions needs natural or moral laws too, but these laws are no longer, in form and role, similar to the medieval ones, though they are largely able to preserve the content of Christian ethics. Even when attempts are made to do entirely without the idea of a natural law – as happens in the Scottish Enlightenment – and to replace it with moral sense, common sense and the ethics of sympathy, the impersonal moral order is not foregone as the necessary background to rights. It is only a matter of replacing the tasks and role once carried out by natural law.

On the contrary, human rights do not imply a general moral order. They are grounded on a conception of ethical-legal subjectivity which is different from that proper to the natural rights's tradition of modernity, but which can only be understood within the great narrative of the history of rights in the Western world.

In the process of humanization of the world of man there are acquisitions or conquests that, far from being disowned, are the presuppositions inside which the different theories of rights are worked out. The three main acquisitions are all already present together in the seminal thought of Hugo Grotius [1583-1645].

The human being is endowed with a subjectivity that is ontologically distinguished from other natural entities. This subjectivity is expressed in the forms of agency, that is to say as a center of decisions and actions that sets it in a relation of superiority to things (objects) and in a relation of otherness towards others (subjects). Dominion over things and dominion over the self are the decisive characteristics of subjectivity. The subject is that entity that reaches out his or her hand on things and takes himself or herself in hand.

The powers of the subject have a moral quality (*moralis facultas*) in the sense that their use modifies the world of the ought, making new obligations arise and modifying the moral status of other subjects. There are no moral qualities or aims relating to the physical world. Moral modalities are introduced into nature from outside, that is to say things or natural events take on value if they are related to norms; this can only be done by beings that can understand the norms, being endowed with intellect and free will and therefore able to follow them or otherwise to do good or evil.

The third conquest lies in the principle of equality, which is a transcendental condition of all theories of rights. Without equality rights turn into privileges and these by definition do not produce moral obligations of respect. Equality founds a necessary connection between rights and a common rule, which substantiates the principle of reciprocity. To say that A has a right towards B is the same as affirming that A is equal to B, that is to say participates by the same token in

common goods. This right can be derived from a common ontological nature, or from a common modality of action, or from a common existential condition of mankind (*state of nature*), or from an equal consideration of human dignity. The central issue is certainly not whether to accept equality in rights or not, but how best to interpret it (Kymlicka 2001, 4).

These three assumptions (subjectivity of the human being, his or her moral dimension and equality among moral subjects) are present in all theories of rights, but each one conceives and justifies them in different ways, and in this there lies to a great extent the reason for the difference between theories.

Between modern natural rights and human rights there is, first of all, an evident difference in origin and development.

Natural rights arose in the cabinets of philosophers for the purpose of dictating the conditions of existence and legitimacy of political society and were very slowly rooted in history, to finally triumph with the French Revolution and the War of American Independence. Human rights, instead, have been sanctioned in international treaties and in national constitutions as a reaction to the Second World War, and have developed through an ethical-legal practice that is in continual expansion today. Natural rights have been a theory (or several theories) in search of a real practice, while human rights are a widespread practice still searching for a satisfactory theory (Beitz 2009, 120). This in itself is a first significant sign that prevents assimilation of the ones to the others or at least makes it problematic.

The pathways of the justification of rights are also very different. Natural rights follow the top-down trajectory, that is to say from the rights that the human being has (or should have) in the abstract to those that are effectively recognized in political society. Human rights follow the bottom-up trajectory, that is to say from real practice of rights to its criticism and internal correction (Griffin 2008, 29). Consequently, theories of natural rights come into being as an external critique of existing societies, while theories of human rights are (or should be) a critical reflection on the internal meaning of this practice and on the values that sustain it. Hence applying the model of natural rights to the practice of human rights would not only cause the theory to lose explanatory scope, but would also mortify the internal richness of the practice. The attempts to assimilate the ones to the others inevitably lead to drastic downsizing of the number of human rights due to their homologation to a single subjective model. In this connection, what is at stake is precisely the multiplicity of human rights and, above all, their elevated heterogeneity.

Natural rights directly refer to human nature and to a natural condition of life of humanity in which human institutions, positive law and authority are absent.

This hypothetical model serves to deduce the contents of the social covenant. One of the fundamental purposes of society is, in fact, to avoid serious offenses to human nature in order to protect, in the first place, its biological tendency to self-preservation and the original right to judge what is good and what is bad, for the purpose of orienting one's own life. For this reason freedom and property are considered the fundamental natural rights, often seen as "perfect rights," that is those rights preexisting social organization itself. They constitute the entitlement that allows participation in the social covenant, and they ground the legitimacy of authority and political society itself as an artificial construct.

Human rights, instead, are produced by historical processes, and they come into being steeped in culture. This does not mean that also their destiny is linked to Western culture, something that today is often noticed in order to uphold the relativism and the particularism of rights, nor even only to mean that such rights have been proclaimed through legal and historical deeds, like international declarations and treaties. Human rights are produced by the painful process of people becoming aware of the serious violations of human dignity by political powers that could and can actually exhibit their legitimization. This sensitivity to threats to human dignity has been extended towards powers of every form and type and today is becoming more and more acute. Human rights are a response to dramatic historical events and for their development require a watchful historical conscience. Human rights arise from the ashes of history, from a widespread application of liberation from atavistic discriminations that now are perceived to be absolutely intolerable. Reference to offenses (*iniurae*) is always necessary, but now it is no longer a matter of establishing the preliminary conditions of social life, but instead of protecting the human being from the established powers themselves and from the threats coming from the growth of man's power over man and the world.

The heterogeneous variety of threats to human dignity makes it impossible to identify a single form of protection of human rights. Consequently, they cannot be contained in a single legal category, nor even, sometimes, in the consolidated concepts of the Western legal tradition. It is not rare to come upon human rights without adequate guarantees and precise identification of the subjects of the correlative obligation. The very monitoring of violations and the very agitations can be considered as processes for identification of such obligations (Sen 2004, 320). The practice of human rights therefore has also to be seen as a dynamic search for a more adequate legal configuration of them, a pathway of rights towards law.

Even when they lack strong protection, which natural rights instead demanded in order for society not to be destroyed (Tuck 1997, 685), human rights can nevertheless be part of the life of law if they are in some way used in legal practice, for instance as important arguments in the decisions of domestic and international courts. At times they have a symbolic character and they are called "manifesto-rights" (Feinberg 1973, 67), but this does not necessarily mean depriving them of their legal status; on the contrary, this shows that a right can guide social and political action even when all the necessary legal resources are not yet available for its satisfaction.

While natural rights are in this sense univocal, human rights exist at various degrees of intensity in the process of making them positive rights and in enforcing them. They are all rights in an analogical sense. The focal point of human rights lies in the normative reasons for acting or for requiring action by other people, while that of natural rights lies in normative powers and in the corresponding obligations (see chapter 3.4). It is obvious that normative reasons postulate recognition of powers correlative and necessary to their satisfaction. However, the fact remains that a human right is essentially a reason to act in the search for powers that make it operative, while a natural right is essentially a normative power justified by the essential aims of human nature.

Against the background of human rights there is neither natural man, nor a natural condition of human life, nor even a natural moral order, but oppressions, discriminations, inequalities and injustices from which the reasons derive for demanding recognition of violation of rights.

At this point it is necessary to face two strong objections. The first one it is of a logical kind and it rings as follows. One cannot denounce offenses to human dignity if one does not have an idea of what the human being as such is entitled to. Are human rights not perhaps those rights that man has through the simple fact of his humanity? And if it is so, then it must be acknowledged that they are natural rights to all intents and purposes, even though today we have an idea of human nature that is different from that of the past. We should only update the list of natural rights and introduce into it greater flexibility and greater attention to history. In this way human rights would easily be identified with natural rights.

This objection seems to be strengthened by textual arguments like for instance the fact that in the Preamble of the 1948 *Universal Declaration of Human Rights* it is observed that "[the] recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world", and in article 1 it is affirmed that "all human beings are born free and equal in dignity and rights." There is no doubt that the language of natural rights is very much present above

all in the aforesaid Declaration, since it is the only one available in the *status nascendi* of the practice of human rights. Rights that belong to humanity as such must be related to human nature, however this is considered.

The second objection to the idea of making the existence and justification of rights dependent on the threats coming from state powers and on the facts of history, is that the meaning and scope of human rights may be gravely relativized. Precisely with this argument, Hart, among others, criticized the "rights conception" that Dworkin opposed to the "rule-book conception."

According to Dworkin, a political society is characterized by a public vision of individual rights, that is to say of the moral rights (and of the duties) that citizens have towards one another, and of the political rights that they have towards the state in order to defend themselves against policies of collective wellbeing (Dworkin 1984). If we understand this conception to mean that rights are trumps, that they exist insofar as there are powers against which to defend oneself, then such rights are constructed rather than preexisting (Freeman 1994). If it were so, should we perhaps believe – as Hart has objected – that in the absence of a welfarist policy human rights would lack justification? A political justification of rights cannot save them from contingency, as instead is possible with an independent or pre-political justification. But this latter would confer on human rights the timelessness that is proper to natural rights.[4]

If it is maintained that the *raison d'être* of human rights is to defend individuals against the decisions of the majority, since each has the right to choose his or her own life plan, then the very fundamental right is the latter and the other rights are only a contingent logical consequence of it. This right can only be conceived on the basis of the natural rights model. Human rights would only be a mere derivation of natural rights or an application of the latter to the circumstances of our time.

It would seem, therefore, that there cannot be a third way between taking human rights back to the ontological dimension of natural rights and the consideration of human rights as a political doctrine that has been consolidated for historical and contingent reasons tied to the modern state. Nevertheless, more careful reflection helps us to glimpse the specific meaning of human rights.

The reference to humanity must not only be seen as regarding determined subjects, that is to say human beings, but above all as a reference to the way of considering them: it is necessary to consider human beings in a human way. This

[4] Dworkin himself arrives at this conclusion when he distinguishes between political rights, for which there holds the logic of *rights as trumps*, from human rights founded on the dignity proper to all human beings (Dworkin 2006, 33-36).

second meaning is so prevalent in human rights as to include in a way animal rights too and even the "rights" of inanimate nature.

If we now try to understand better what is implied by "human consideration," we immediately have to notice that while natural rights are identified from the point of view of the holders or beneficiaries, human rights, instead, are configured from the point of view of those people that are called on to respect them, that is to say of those who have an obligation. Indeed, making them positive law means nothing but this.

Since the experience of the two world wars showed that the most serious violations of human rights came from states, the *Universal Declaration* and the subsequent international covenants addressed state as subjects obliged first of all to respect such rights in all possible forms. These duties are not merely moral, or even less supererogatory, but are strictly legal (or at least they tend to be so) and they also have to become so on the plane of effectiveness. Nevertheless state are not alone in having obligations, but if they fail to fulfill their obligations or are incapable of doing so, other responsible subjects or institutions take over, like for instance specific international organizations or the international community as a whole, even though identification of this responsibility is more complex and uncertain: "human rights are standards for domestic institutions whose satisfaction is a matter of international concern" (Beitz 2009, 128).

Hence human rights indicate the value that every human life must have in others' eyes, that is to say in the first place in the eyes of domestic and international institutions and, in general, of political and economic power. Legalization has a meaning – as is well known – insofar as it ascribes rights and responsibilities. International practice of human rights is supported by the idea that responsibility to respect and protect rights extends beyond states and concerns all those people who are able to protect the human being. This means that it potentially has a cosmopolitan character. The universality of human rights must also be worked out to mean universal legal responsibility. This profile is very often neglected, but it is entirely absent in theories of natural rights. And we now have to try to understand its implications.

Natural rights are conceived as universal in reference to their right-holder or beneficiary, but not from the point of view of duty-holders. To protect rights is the task of states, on which the social contract has conferred the power and the obligation of protection. Therefore it is the very rights-holders that determine the duties of the rulers, creating some special obligations linked to citizenship.

Quite the opposite has happened and continues to happen regarding human rights. The social covenant that concerns them is not made by the individuals that are beneficiaries of the rights, but by states, that is to say by the duty-holders, and

it also extends to states that have not participated in the relevant international treaties, that is to say to the whole international community. This pact does not create special obligations, but attributes rights to all human beings. It is an assumption of responsibility by the contracting states and the whole international community, a potentially universal responsibility, that is to say one of everybody to everybody. Accordingly, interpretation of human rights as original claims that every human being makes towards political powers is not adequate to account for this practice and still bears the impress of theories of natural rights. The focal point of human rights is, instead, recognition of responsibility towards the life of people. People are "human" when they consider the life of others as having the same importance as their own and when they live in a world of mutual recognition, in a humanized world.

In this outlook the inadequacy of the concept of human nature as a basis of human rights appears evident. The human nature implied by natural rights is clearly a world closed in itself, which finds its ultimate goal in the principle of self-preservation and its main means in a possessive conception of freedom. The self of natural rights is an unencumbered self or a "buffered self" (Taylor 2007, 41), but one certainly not open and permeable towards a common human world. Precisely to distance himself from the subjectivity of natural rights the bearer of human rights is referred to as a "human person."

The person takes a stand towards his or her own nature, he or she protrudes beyond it and even goes against its constitutive interests and precisely for this reason affirms himself or herself and is a person. The person transcends the distinction between inside and outside that is proper to everything that is psychic. The paradox of the person consists in the simultaneous presence of the maximum singularity with the maximum interdependence. The key to understanding the person is certainly not the minimal principle of self-preservation, but the maximal one of freedom of conscience, because the person is someone and not something (Spaemann 2006). Who we are is not the same thing as what we are. For this reason people need recognition in order to be themselves, need protection in order to develop, and need care in order to flourish. Human rights are not natural rights.

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1.2. HUMAN RIGHTS ARE NOT OURS BUT OTHERS'

In the *Universal Declaration of Human Rights* the subject of rights is sometimes called, beginning from the Preamble, a "human person." This qualification is considered in art. 6 as endowed with a special right to recognition: "Everyone has the right to recognition everywhere as a person before the law." By states, that is to say by the positive law of all countries in the world (everywhere),

every human being (everyone) is to be considered as a person. It is not specified, however, what legal consequences being considered as a person has or must have and, above all, what it means to be a person. This is entrusted to the practice of human rights. In any case, behind this language, which is certainly not new, there is largely hidden the interpretation of the evolution of human rights in the contemporary world.

That respect for the person is one of the main reasons why law is constituted is a conviction going back to Roman law.[5] Nevertheless, the concept of person and his or her role in law is continually evolving. So much water has passed under the bridges since the time of Roman law, even though comparison with the past helps us better to understand the narrative of the human person of which we are part.

In Roman law, people are qualified on the basis of their status, that is to say on the basis of the rank that they have in fundamental social relations (*libertas*, *civitas*, *familia*). Despite the presence of the philosophical and universalistic roots of the concept of person, deriving first from Stoicism and then from Christianity, in Roman law status prevailed and with it the factual needs of organization of social life. Extraneous to Roman law is the principle of the "legal" equality of all men.

The modern conquest of legal equality of subjects has only been possible through a process of decontextualization or rather of abstraction from the concrete circumstances of life. All men are proclaimed equal in front of the law aside from differences of sex, race, language, religion, political opinions and personal and social conditions. This – as we have already seen – is the undiversified subject of law of modernity. But the person is not a form of subjectivity enclosed in himself or herself and independent of the multiplicity of forms of life that she or he can personify. Let us remember that originally the term "person" derives from the mask of the theatrical actor. The person is not independent of the characters. Hence full legal protection will have to concern directly not only the rights common to all people, but also all the identities that they can assume. This is the utopia of the age of rights that furtively entered human history in 1948 and took its first timid footsteps without being aware of its final outcomes.

The definition of the human being with reference to the person makes it possible to ensure the full legal equality based on equal concern and respect that is hindered by reference to human nature. Today nature is exclusively seen in a

[5] "Knowledge of law amounts to little if it overlooks the persons for whose sake law is made." Justinian, *Institutes* 1.2.12.

factual sense and, from this point of view, human beings are not equal to one another. The person, instead, is a normative concept, that is to say one serving to regulate the attitude to take towards beings defined as such. It prescribes that it is necessary to take care of these beings, first of all by recognizing and protecting their rights, and then by guaranteeing the social conditions most suited to their flourishing. The term 'person' indicates at one and the same time the bearer of particular moral qualities and an ethical task that the person has to perform towards himself or herself and others. Only people can recognize other people. Only people can protect and take care of other people, since they are oriented not only towards good for themselves but also towards good in itself. If there were no people, there would be no one to recognize the rights of animals. In a word, without people there would be no rights.

Well, now it is affirmed that the normative concept of "person" must also be taken as a legal concept. And this is destined to test very severely the traditional legal order, more inclined to institutionalize factual situations than to oppose them in the name of superior values. Law is now asked to perform a function of liberation from unjustified discriminations between people.

Certainly it can be noticed that we always stay inside the well-known definition of justice, which indicates willingness to act for the good of others: "Justice is the stable and lasting willingness to give to each his right."[6] But this task has now become immense, because people's demands are manifold and each of them brings into being social relations that must be governed by special rules. Indeed, "a rule is a relationship between persons" (Finnis 2011, 24).

One might believe that there is an ongoing return of the importance of status, since the bearer of human rights is protected in relation to the conditions of life in which he or she finds himself or herself. Norberto Bobbio has famously observed that human rights starting from "the consideration of abstract man developed into those of man in the various stages of life" (Bobbio 1996, xii and also 43-45). But this is very different way of conceiving social statuses. The statuses of the past served to define the legal and social conditions of a group of people with the exclusion of others. The legal specification of human rights, instead, aims to protect in the most appropriate way people's different forms of life.

Today's statuses are defined on the basis of various parameters, among which we can mention, just by way of example, that of the various phases of human life (children's rights, adults rights, elderly rights), of gender (women's rights, homosexuals' rights, transsexuals, lesbian, gay, bisexual's rights), of health (patients' rights, rights of disabled persons), of affiliations and of identities

[6] *Digest* 1. 1. pr.

(citizen's rights, minority rights, cultural rights), of economic and social relations (workers' rights, economic rights, consumers' rights, rights of the users of public services). But the list is and must remain open, because people's conditions of life change incessantly in relation to historical circumstances and technological progress.

Everyone will necessarily find themselves in some of these existential situations sooner or later, all may in principle find themselves in others either through their own choice or because of the natural lottery. In any case, they all belong to common humanity and are, therefore, endowed with universality, so everyone can recognize that in each of these existential conditions it is necessary to protect the human person in his or her need to flourish and in his or her vulnerability. Thus these are statuses that are internal to the person and, at the same time, are constituted by the relations between people.

This rich typology of the human now attempts to give shape to legal regulation without losing its true normative meaning. It is not a matter of establishing categories of persons and of assigning to each of them a cluster of rights. People's forms of life are not categories or classifications but specific places in which the universality of the value of the person has a concrete shape. If we speak of women's rights, we must not think of rights to be attributed to a particular category of people, but that full and complete protection of the person also includes these rights. Accordingly, the request for a recognition of rights made by a category of people is not to be seen as a class action, but as something having universal scope, and, as such, proper to "everyone." Others' rights are part of everyone's rights. This means that every authentic claim for rights is not made in order to obtain privileges for the category of people to which the claimants belong, but for the sake of human persons in themselves. Fighting for others' rights is the sign of the disinterested character of the human person.

It is significant that the framers of the *Universal Declaration* (and first of all René Cassin) expressly excluded designating it as "international" in the hope that it would serve as a model for national charters of rights, that is – according to the Preamble – "as a common standard of achievement for all peoples and nations" (Glendon 2001, 221-233). Hence universality is taken here as an autonomous legal concept. This is a challenge that the Western legal tradition still has difficulty in assimilating.

This is already evident in the two International Covenants (on Civil and Political Rights and on Economic, Social and Cultural Rights), in which the reference subject is no longer "all human beings," that is to say humanity, but

peoples as cultural realities: "all peoples have the right of self-determination."[7] Therefore there is a shift from universality to generality and the antithesis between individual and social group appears. The denunciation of the imperialistic character of human rights and their false universalism, which would conceal the cultural expansionism of the West, finds its good arguments precisely in the difficulty of translating the universality of rights into appropriate legal categories, increased by the prevalence of national interests. But the universality of rights belongs to the original sense of this practice. Without it rights are empty rhetoric.

"Universal" does not mean "absolute," but means "common;" it is what unites very different things (Perry 1998, 88). If there were no commonalty, there could be neither communication nor any relationship between different individuals, cultures or conceptions. Universality allows relations between people and reciprocity of rights.

If we now ask ourselves what is common in human rights, the question is soon answered: the human. We do not say "humanity", which is a dangerous abstraction, but the human in its most elementary and fundamental characteristics and also in the richness of all its forms that belong to it by the same token. It is assumed that there is a widespread trans-cultural conscience of what is suited to the dignity of man and what constitutes a clear violation of it. The test proposed by Ramcharan well expresses what I mean: "Just ask any human being: Would you like to live or be killed? Would you like to be tortured or enslaved? Would you like to live freely or in bondage? Would you like to have to say in how you are governed?" (Ramcharan 1994, 106). The questions could continue, but would become more and more controversial and uncertain. The commonalty among people is still largely uncharted territory. There are, however, common existential spheres that can constitute the starting point for intercultural reflection (Nussbaum 1997). In any case, what is human must be recognized and protected for all human beings.

Universality does not only refer to "commonalty," but paradoxically also to "singularity" and "uniqueness." Persons, taken as a whole, do not constitute a natural species (Spaemann 2006). Each of them is an individual in an incomparable and unexchangeable way. It is not a "case" of a generality, it is not a part, but a whole (Maritain 1947). Every person is something unique and unrepeatable. To respect this uniqueness is an ideal limit of the practice of human rights and makes it a dizzy utopia.

[7] This art. 1 is common to both Covenants. In this way peoples are identified with states, which are the parties to the treaties.

Individualism has found in this uniqueness of the single person one of the arguments in its favor, translating it into the terms of a vision of man as "a free, self-determining, and self-sufficient individual" (Glendon 2006, 104). Accordingly, counting only on one's own strengths and privacy are seen as the main aspirations of the person. According to Justice Brandeis "the most comprehensive of rights and the right most valued by civilized man" is "the right to be let alone" (Glendon 2006, 109). Nevertheless, even to practice this right others' help is needed; there is a need for a stable and safe social order; there is a need for social services that come to the aid of human vulnerability. This means that those who are not self-sufficient (the children, the elderly, the poor and the sick) are also people by the same token and that their rights have the same value and must not be considered as special or subsidiary rights, that is to say as a derogation from the general human rights dictated by the particular conditions of life of "weak subjects." It is not correct to introduce a value difference between people.

For this reason it is difficult to apply the principle of equality to people. In order to treat them equally we would need to treat each of them as an incomparable whole. This is equality in difference. People are treated equally when each of them is treated in the best possible way regarding how that person must be treated, respecting the differences and making up for the disparities. It is necessary to be able to distinguish between "difference" and "inequality."

It is worth noticing once more that this orientation severely tests the most evolved legal systems. Certainty of law requires general and abstract categories and models of behavior, that is to say generalization. But this could lead to failure to recognize the variety of the ways of fulfillment of the dignity of the person. Human rights cannot exclusively be protected by law, but require involvement of all the other resources of culture and, notably, of politics, the economy, public opinion, and religions. Full respect for the person transcends the possibilities of law and, indeed, is one of the main reasons for its current loss of stability.

It must not be believed that this representation of the practice of human rights was present at the time of the *Universal Declaration* and even that today it is dominant or uncontroversial. It refers to an ideal model that peeps through confusedly in the *Universal Declaration* and only in the 1970s takes on more recognizable features.

It has been acutely observed that in actual fact the birth of human rights as a moral utopia with cosmopolitan scope is not to be placed in the postwar period, but much later, that is to say at the end of the process of decolonization, the end of the Cold War and the crisis of ideologies. It was only then that "morality, global

in its potential scope, could become the aspiration of humankind" (Moyn 2010, 213). Before, on the contrary, there was a tendency of states to undervalue the effects of the proclamation of rights even though states had also wanted it. When the new utopia triumphs, the signs of its distant origin seem to have disappeared.

In effect, immediately after World War Two anti-colonialism and decolonization almost totally captured the attention of the United Nations. The principle of self-determination of peoples, absent in the *Universal Declaration*, became the first right in the Covenants and the prerequisite of all fundamental human rights. It is almost superfluous to notice that we are talking about a collective right, from which the centrality of the single person certainly cannot spring. Decolonization necessarily implied a growth of the importance of the state and then human rights served, at an international level, to check, not always with good intentions, the birth of new states, often constituted by people culturally very distant from the tradition of rights. In general, the strengthening of state sovereignty produced by the Cold War was not a favorable terrain for the flourishing of human rights. This was without doubt the main cause of the ineffectiveness of the *Universal Declaration* and its drowsiness. Nevertheless, when human rights reawakened, it cannot be said that they were a totally new thing, both because they could appeal to the *Universal Declaration* to justify their legal pedigree, and because they found the germ of the person already sown.

Therefore, however important one may consider the *Final Act of the Conference for Security and Cooperation in Europe* (Helsinki, 1975) for the purposes of the beginning of the age of rights (Moyn 2010, 148-150), it must always be inscribed in that practice of rights inaugurated by the *Universal Declaration*. The power of states was needed to give life to human rights, but the sovereignty of states was the biggest obstacle to their implementation. On one side, the crisis of the international order required a new legitimization of state sovereignty; on the other, new subjects belonging to international civil society, such as NGOs, became the paladins of human rights, denouncing the hypocrisy of states.

A confirmation of the long-sightedness of the *Universal Declaration* can be seen in the conviction, very much in evidence in the preparatory work, that the future of rights depended on their presence in national constitutional charters. But this certainly would not have been enough if rights themselves had not become the guiding principles of jurisdictional routine. Without this they would have remained mere oral proclamations and in substance a dead letter. The political and social turn of the 1970s allowed judges to open their eyes on the person as a new subject of law and thus there began, in the most advanced legal systems, in Europe and in America, a process of reinterpretation of law in the light of the

primacy of the constitution. This new trend of constitutionalism, which now took the proclamations of rights seriously, is well indicated in the *Charter of Fundamental Rights of the European Union* (2007), when in the Preamble it is stated that "it places the individual at the heart of its activities."

The effects of this change of perspective have been overwhelming, so much so as to represent a true cultural revolution that cannot only be explained in terms of law. Judges are public officials, which means that they are not only organs of the state but also in a sense officials of public opinion, and their interpretations cannot fail to be sensitive to the common perception of values. Beliefs and behaviors held to be quite obvious just a decade before suddenly appeared illegitimate, discriminatory and, in the last analysis, immoral. But not for everybody in the same way. Personal convictions, no longer channeled by the big ideologies, divided into a thousand rivulets and the doors were opened to pluralism.

The legal centrality of the person and his or her rights does not in the least imply complete rejection of the past, but on the contrary brings into play aspects coming from different conceptions and traditions that are very difficult to keep together. Here we will only mention two types of problems that travail the practice of rights in the societies of our time.

Respect for the person induces us, on one side, to exclude behaviors that are a clear violation of the person's dignity, that is to say are absolute evils around which there is ample consent (murder, slavery, torture, persecutions, discriminations, inequalities); but, on the other, it also necessarily implies that the very conscience of the person is to be constitutionally protected in the sense that, at least in principle, law should respect everything that the person's conscience considers as strictly required for his or her fulfillment, recognizing rights connected to the demands of identity and freedom of choice.

These two aspects move in opposite directions. The first one is based on ethical objectivism, which holds that it is always unjust, for instance, to torture a person or to enslave him or her. It is true that this objective ethic concerns more directly what is unjust rather than what is just (Shklar 1990). Nevertheless, behind illegitimate behaviors there are also always positive values to respect. Against the background of the prohibition on murder there is the right to life and the prohibition of slavery derives from the right to personal freedom. In short, human rights require an objective ethic. But, on the other hand, respect for people's consciences implies a subjectivist dimension, which can conflict with the ethos of the political community and with the very principles of critical morality. And then

the question remains open: on what ethic and meta-ethic are human rights founded?

The second set of problems is even more disruptive. Persons are dangerous for the stability of the legal order. Even when in principle they share the same fundamental values, there are big differences in the way of seeing them and interpreting them. When the content of people's conscience takes on legal importance, every member of society can challenge the legal rules, opening up ever-new conflict fronts. Accordingly, the legal system can never guarantee its stability in a definitive way and is perpetually committed to resolving the conflicts that have been produced by law itself. Hence the political community runs a serious risk of losing its identity and the state of losing its cultural basis and with it the legitimization of its values, coming down to being an administrative apparatus and nothing else.

In this brief narrative of the political and legal vicissitudes of the concept of the human person from World War Two to our own day, we can notice the passage from a vision of the person oriented towards the community, which was exploited and accentuated by the international conjuncture, to an individualistic conception, which is very far from ignoring the importance of the relations between people but on condition that they only have the horizontal character of reciprocity. This latter conception tends to reduce as much as possible the role of authority and the political community and, nevertheless, also always needs them to be present and to act. The fact is there are no rights without public recognition and it is also for this reason that human rights are not ours but others'.

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1.3. HUMAN RIGHTS ARE NOT SELF-SUFFICIENT. THE LINK BETWEEN HUMAN RIGHTS AND PRACTICAL REASON

We have already seen that human rights, though belonging to a consolidated legal and political tradition, aspire to such pronounced cultural specificity as to be able to a great extent to do without their past. Their promise is to point out what human beings are entitled to as such, considered as participating in fundamental social relations, and to set up stable and effective forms of legal protection. This presupposes the believing that there exists an overlapping consensus around some fundamental values on the part of very different cultures and very different conceptions of the human life. This hope is entirely understandable if we consider the tragic experience of two world wars, totalitarian regimes and the Cold War. But we now have to ask ourselves not only whether human rights by themselves can face these challenges and reach these goals, but also whether they are capable of self-assessment. The fact is that the issue of the self-sufficiency of human rights concerns both the practical aspect of their implementation and the theoretical aspect of their justification. These two aspects are closely connected, because rights are not theoretical doctrines but legal practices and politics that go in search of their foundation.

We are wondering whether the advent of the age of rights does not lead to the affirmation of a true ethic of rights able to reach that universality and commonalty

that seem to disappear from the traditional ethic because of contemporary pluralism.

As is well known, Dworkin distinguished political theories into goal-based, right-based and duty-based (Dworkin 1977, 171-2). It is controversial whether this distinction also holds for moral theories in general. If it were so, there would seem to be a true "ethic of rights" when rights have a leading role, that is to say when the fundamental ethical issue is not whether it is good or rightful or useful to perform a determined action, but whether one has or not the right to perform it. In this case having a fundamental right would contain a moral connotation in itself, and indeed we speak of "moral rights."

The moral connotation of fundamental rights, nevertheless, is not sufficient for the purpose of considering them as an autonomous and rival ethic in relation to the traditional ones. There are manifold contrary arguments. The first one is reductionism: the ethic of rights reduces the ethical universe to that of social and political ethics, because rights always concern one or more social relations. The personal or private ethic would be excluded. The second is the argument of incompleteness: the ethic of rights could not aspire to cover the whole moral field and that of law, because there are undoubtedly duties (also legal ones) not deriving from rights. Every violation of human rights is unjust, but not every unjustice is a violation of human rights (Alexy 1998, 251-2 and also Raz 1986, 210-213). Hence even in relation to the social field the ethic of rights is incomplete. The third argument is that of non-derivation, which is the most decisive: rights cannot be considered a first and undefined term in relation to which the other moral terms are defined. The fact is that in the beginning there are no rights but reasons formulated from the viewpoint of another to whom something is owed or due, and who would be wronged if denied that something (Finnis 2011, 205). Only following the consideration that these reasons are sufficient reasons for holding other persons to be subjected to duty, other things being equal, and only "if not counteracted by conflicting considerations" (Raz 1986, 166 and 171), can one start to speak properly of "rights." In turn the existence of others' duties justifies providing guarantees and imposing sanctions, so that a right becomes fully legal. Fundamental ethical concepts are always interconnected, so that one cannot be defined without having recourse to the others. The corresponding duties do not derive from rights, but contribute to founding its justification.[8] The concept of a right is by definition relative.

[8] It is significant that Mackie (1978), a supporter of the rights-based moral theory, actually considers it a variant of the goal-based ethic under some conditions: that the goal is an activity, that there is not a single goal but indefinitely many diverse goals and that they are the objects of progressive choices.

In the absence of a shared conception of good, an ethic of rights represents the hope of social cohabitation respectful of the differences and equal consideration of people. Nevertheless, these public reasons, which everyone should accept, are very far from being merely procedural, because they imply value judgments regarding the relations among people and what conforms or is contrary to respect for human dignity. An ethic of rights does not succeed in avoiding the moral debate which is a source of social conflicts, but indeed, in a sense, it accentuates it. Even when there is agreement on the attribution of fundamental rights, conflicts inevitably arise between rights and their use that force us to reconsider the reasons on which they are founded. Precisely because of rights in contemporary society, moral debates on what it is just or unjust are much more present and lively than in the past. Accordingly rights cannot be considered as the ultimate answer, but on the contrary as the emergence of the moral question put by people to society as a whole (see chapter 2.1).

Human rights belong to the more general category of subjective rights, which are legal powers from whose exercise there arise legal constraints on other people's behavior and legal relations are created or modified. The long theoretical process of working out this legal category, going back at least to the beginning of modernity, has wondered about its own role. People have wondered what purpose subjective rights serve. Evidently behind them there are values to protect or demands to respect, otherwise there would be no justification for imposing constraints on human freedom. Western legal science has worked out two possible justifications (see in general Waldron 1984).

The Will or Choice Theory of Rights sees the role of the subjective right consisting in protection of the value of individual autonomy, which is exerted by the right-holder by controlling the duty attributed to somebody else (Hart 1982, 183). This theory, typically liberal, according to Immanuel Kant [1724-1804] envisions the legal order as a formal system of coexistence of each person's freedoms with the other's, according to a set of principles which represents the mutual compatibility of individual wills (Simmonds 1998, 123). However, it has been criticized both as a general theory of subjective right and as being able fully to grasp the whole meaning of human rights. It has also been noticed that the choice theory implies that the right-holder is able to choose, that is to say is able to express an autonomous will. Accordingly, children for instance would not be rights holders. The weakness of this theory is even more evident in the case of inalienable and non-disposable rights. The identification of the right with willpower requires one being able freely to renounce the exercise of that right in

that one can always forego exerting a power. But inalienable and non-disposable rights by definition cannot be foregone.

For this and other reasons to the choice theory there has been opposed the Interest or Benefit Theory of Rights. It maintains that rights exist to protect an important interest of their holder, so that the corresponding duty serves to ensure this benefit. This theory does not hold that by itself the possession of a right implies the existence of given duties or powers, but from the recognition of a relevant interest it is possible to derive the reason for imposing duties or attributing powers necessary requested for the best protection of that interest (Simmonds 1998, 149-150).[9] In this way inalienable and non-disposable rights would also be justified. Indeed, for instance on the basis of this theory children can be recognized to be rights holders, such as being fed and brought up, because this is in their interest (MacCormick 1976). The same right to freedom of choice would thus have to be reinterpreted as an interest proper to natural beings so created as to find their fulfillment in the exercise of their autonomy.[10] The strongest difficulty about this theory lies in its ethical implications. In order to be fully acceptable it requires that fundamental interests can be objectively determined. In this connection, one wonders what interests are to be protected. Certainly not all, because some of them are secondary and others even trivial. Accepting all possible interests would mean transforming desires *ipso facto* into rights. It can also be affirmed that private interest has to be approved as worthy of protection by the political community in that it is linked to values it considers prevalent (Raz 1986, 251). But accepting some interests because they are considered more important on the social level can easily turn into a form of paternalism. However, if this approval originates from the international legal order, then it decreases the danger of subordinating the attribution of rights to the utility of a particular political community.

As a matter of fact, neither of the two theories is sufficient by itself to explain the meaning of human rights. The debate, which is still ongoing, witnesses the flourishing of hybrid or mixed theories that strive to take on board the just demands of the one and the other. But one also wonders if a mixed theory is possible in principle, because it should contemplate two apparently conflicting demands: the existence of objective values, on one side, and the people's freedom of choice on the other. Human rights – as we saw in the previous chapter –

[9] "The interests are part of the justification of the rights which are parts of the justification of the duties" (Raz 1986, 181).

[10] For this consideration cf. Spaemann 1994, 79.

contain both of them. They imply that the concept of the human person's good involves its endorsement, above all with reference to their use.

To sum up, human rights contemplate freedom of choices, or protection against an offense, or a benefit and have the following distinctive characteristics: universality, because they potentially concern all human beings through the simple fact of being human; non-disposability, because human rights are so important that they cannot be left to the mercy of the holders themselves; inalienability, which implies prohibition on disposing of them in favor of others, because the values that they represent are inseparable from the person; inviolability, because they must be respected by others and in particular by public powers, and for this reason they are protected by guarantees that seek to prevent violation, setting some substantial limits to the exercise of public force; imprescriptibility, because they cannot be lost either through the passing of time, or through lack of exercise or through illegitimate or immoral exercise.

If we consider that in modern times the subjective right as a legal category has been worked out on the basis of the right of property, which concerns goods that are by definition disposable and alienable, one immediately perceives the peculiarity of human rights and the challenge that they throw out to contemporary legal science.

The characteristics of human rights clearly reveal that the reasons on which they are founded are so strong on the normative level as to justify limitations to other people's freedom and even to one's own. For the very rights to freedom too it must be affirmed that one is not free to renounce them in principle. One can certainly decide not to make use of them in particular cases, but this too still means exerting one's freedom of choice. For example, being free to express one's thoughts also means being free not to be forced to do so; being free to profess a religion also means being free not to profess any. The very rights of freedom do not have as their object freedom as such in all its extension, but only specific spheres of freedom regarding particular fields of action: for instance, expressing one's thoughts, professing a religion, starting a family, getting together or joining up with other people, participating in political life and so forth. It is the importance of these objectives for respect for human dignity that requires that the relevant actions be practiced in the way that is suited to the human person, that is to say with freedom. Hence rights imply not only respect for the person's free way of acting, but also identification of an objective good that cannot be denied to the person without doing wrong to him or her. This requires value judgments having as their object the fundamental goods of the person. Consequently one has to base

oneself on "a conception of the person given in advance" (Rawls 1993, 308), that is to say before recognition of his or her rights.

In conclusion, a right is founded on a prevailing reason to put some kind of constraint on others' behavior since this is deemed necessary for the purpose of guaranteeing the right-holder a fundamental good linked to respect for his or her dignity as a human person.

What these fundamental goods or values are or must be and hence what the conception of the person is or must be – from which to derive them – is the object of public debate, which has its ultimate outcome in national constitutions and in international treaties. This means that rights are not able to justify themselves, but are the outcome of an argumentative and deliberative process of public reason, which has its ultimate term, even if provisionally always being revisable, in lawmaking. The explanatory justification of rights cannot be expressed in terms of rights, but of value judgments shared by the national and international political community. And it is for this reason that an ethic of rights always hides in itself an ethic of underlying values, which constitutes the reasons why someone has a right or believes that he or she has one. These fundamental values, joined with the demand for justice or recognition of what the person is entitled to, are the real ethical resource on which rights are founded. From these values the reasons on which rights are grounded derive. In turn rights justify the powers to attribute to people and the corresponding duties of others. These powers will have to be those, and only those, that are necessary for people to participate in or have access to fundamental values. In this way value judgments, that is to say the reasons founding rights, are incorporated in law and in legal science as their internal element. Accordingly, these value judgments also continue to be operative in the phase of application of rights to concrete cases and they need to be continually revisited. Interpretation of rights is shaped not as an analysis of textual meanings, but rather as an argumentative process serving to reconstruct and rephrase the reasons for the attribution or recognition of rights. These debates are very much present in public life and, notably, in the public forums of legislation and jurisdiction, and they highlight the controversial character of the content of rights, the vagueness of the principles that support them, and the emergence of conflicts between rights. The ethic of rights is very far from being a stable arrangement of moral orientations, and is a continual settlement of moral disagreements (see, in general, Waldron 1999).

The process of making rights positive comes about through their formulation as legal principles. In this connection, it is not a matter of prescribing an action, but of indicating an orientation to assume or a good to be respected or a goal to be reached. In general, legal principles do not describe an action, but have an

explicitly evaluative content that actions are called on to respect or to fulfill (see Perry 1997, 788). This is the only way in which values can be directly expressed on the legal domain. Rules or norms too are obviously inspired by values, but these remain implicit and concealed in the way of configuring the characteristics of the expected actions. The fact is that the aim of norms is to regulate classes of actions. Then, if the whole law consists of principles, the aim of coordinating human actions would fail due to their high degree of indeterminacy.

Ronald Dworkin, who – as is well known – has the merit of having stressed the role of principles in the legal practice, defines them as follows: "I call a 'principle' a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality" (Dworkin 1977, 22). Obviously not all principles concern rights, but only those whose content concerns respect for human dignity and the fundamental values of the person. Just as not every unjust action is a violation of rights, in the same way not every just action concerns respect for rights.

The ethical-legal transformation of values into principles is a way to make the values themselves practicable, that is to say able to guide social behaviors. Values are absolute demands that would make personal and social life impossible and highly conflicting, since they are attracted by a plurality of goods that are all indispensable and enjoyed in an ample variety of ways. For civil cohabitation to be possible, values have to be urbanized, that is to say led to dialogue together so as to reconcile the demand for their maximum fulfillment with access to a plurality of goods. Indeed, rights as principles are not absolute demands but orientations to be kept in mind and not to be ignored at least in their essential nucleus.

The presence of these legal principles cannot be shown in the same way as norms for which one simply has to have recourse to a formal act of the authority contained in some official legal document. Principles prevail in virtue of their content of justice that has already received recognition as a structural element of legal practice and emerges through contextualized reasoning (Dworkin 1977, 36). They do not exist because they are produced or decreed by the authority, but in virtue of an act of adhesion to contents of justice justified by reasons. Accordingly their official formulation only has the character of being indicative of a value direction to follow, since the content of principles goes beyond their wording and is subject to continual revision, often in a very controversial way.

Principles do not only serve to put values into social and political contexts, but also to drive action. They not only give it a beginning or commencement,[11] but they also establish an end to pursue and in this way prescribe the most convenient means to achieve it. Human rights assumed as supreme principles of the legal order confer on legal action a practical dimension, since this is founded not when there are commands to obey, but when there are aims to be pursued that are the initial reasons of the practical reasoning that leads to action. In virtue of the common reference to the values of the person, human rights as legal principles exist in a group, that is to say support each other and limit each other (see, in general, Gewirth 1996). As is well known, from this starting point Dworkin drew a model of community of principle and a political ideal of law as integrity, which is based on a set of coherent principles (Dworkin 1986, 164-167). But we will return to this point subsequently (chapter 3.1).

Rights as principles are by definition incomplete, since by themselves they are not able to guide us towards specific actions. In order to reach this objective, norms must be derived from principles, that is to say very precise directives, circumscribed as regards the cases of application. In this connection, applying a principle does not mean solving a case, but, through legislation and adjudication, formulating a rule for solving the case at stake. At the end of the day, cases are always solved (and must be solved) on the basis of rules. That together with rules law also contains principles, among which there are those related to rights, means that law cannot be conceived as a system of rules already fully worked out, but as a law-generating social practice. In other words, law is a cooperative enterprise of social formulation of norms driven by pre-established formal and material criteria of correctness.

The implementation of rights is therefore very complex. The sequence of the stages of their development is the following: values-principles-rules. They come into being as values proper to the human person, who puts forward demands for justice; they turn into legal principles for the purpose of making values practicable in social contexts; they produce rules whose content is the attribution of legal powers and the imposition of legal duties, so that the rights will be practiced and respected. If we ask ourselves where rights really lie, we have to answer that their concept is only fully enacted by the whole sequence. Values are reasons, but they are not yet rights, because they do not concern social relations; legal principles are a promise and a social and legal commitment to the dignity of the person and produce social relations; rules are the legal means of exercise of rights without

[11] "Principle" derives from the Latin "principium," deriving in turn form "primum capere," i.e. first undertaking.

which having a right becomes a rhetorical expression. The lawyer starts from this last stage in order to know whether a right is involved or not, but legal exploration leads him or her to go back up the sequence in order to find in the value the reasons for the right and thus to understand better the type of powers attributed and the way in which they are to be practiced. Indeed, powers and duties – as has already been said – must be those and only those strictly necessary for the right to become effective. Since the lawyer is interested in the first place in rules and forms of legal protection, he or she is led to think that rights themselves are nothing but the transformation of forms of legal protection (remedies) into substantive norms, while in reality what is involved is the transformation of normative reasons to do justice into procedural forms. True understanding of rights is achieved when we pass from considering them as powers to considering them as goals.

In order to make respect for rights fully guaranteed, though still formally, all that is not yet enough. The fact is that in general the very exercise of a public power is a threat to rights. For this reason it is necessary to establish the substantial and formal presuppositions of its legitimate exercise: like, for instance, the principle of legality, the principle of the non-retroactivity of law, the prohibition of analogy in criminal law, *favor libertatis*, presumption of innocence, categorical determination of the cases in which rights can be limited (for instance, reasons of public order or public health), the principles of natural justice (for instance, the principle of cross-questioning) and so forth. The very principle of the separation of powers and that of the rigidity of the constitution must be considered as functional to the protection of rights. In short, without the *rule of law* it is not possible to ensure the full recognition of rights, even if they are solemnly proclaimed and apparently contemplated by the legislation (chapter 4.1). Respect for rights is a general undertaking that involves the whole legal and political arrangement of social life.

At the end of this institutional pathway each person may wonder what rights he or she effectively has or can practice and believes that in order adequately to answer it is enough to consult the constitutional charters, the national laws and the international treaties (rights in books). But the lists of rights thus formed have a very abstract character that is still too indefinite, so much so that we can only consider them as *prima facie* rights. The rights that people effectively possess can only be seen in the concrete situation when people want to exert them in particular cases. Only then, all things considered, are the real spaces of freedom, the character and the nature of the object of the rights, that is to say the goods that

concern them, the type of intersubjective relationship required and the outcome of the *final rights*, determined.

It is therefore necessary to distinguish two phases of practical reason in relation to rights: the institutional phase, serving to define in general the fundamental values and distributing in the abstract the fundamental freedoms required by respect for the human person; and the application phase, serving to determine and specify the concrete enjoyment of rights in concrete cases. But the latter must not simply be seen as mere application of rights that are already fully formed, since the indeterminacy of rights can be specified in a different way in relation to heterogeneous factors, such as the conceptions of the person implied, the particular conditions of life of the society, the thresholds of its development and the ecological equilibriums. In short, in the second phase too practical reason continues to operate as at the beginning of the pathway of rights.

The vital center of political life is precisely this reasoning on rights and this deliberation around them. Should the freedom rights include abortion and euthanasia? What limits must there be to freedom of speech or freedom of association? Is pornography a form of expression protected by the clause about freedom of speech? What constraints does the institution of the family place on the exercise of rights? On this kind of issues public reason measures itself at work in city squares, in parliamentary chambers and in courts of justice. Reasoning on rights in relation to possible types of action highlights the extreme variety of the connections between rights, develops hidden implications that can lead to new rights and makes it possible to take a critical attitude towards the historical and social conditionings of the past. Rights are often a challenge to our most deeply rooted moral convictions. For all these reasons the general principles of justice are not enough and even the constitutional charters or the universal declarations of rights are not enough. One has to resort to practical reasoning, which by its nature is never concluded once and for all, but only suspended by provisional decisions. The ethic of rights is therefore marked, much more than all other ethics, by the central role of practical reason in its public dimension (see, in general, Raz 1999).

We have tried to show that the presence of practical reason in the formation of rights is pervasive, both on the level of their justification and on that of their implementation. At the same time, on the topic of rights, the main role of authority is to guard the conditions of practicability and correctness of the public debate rather than to put an end to it through peremptory diktats. Besides, pluralism is by definition an enemy of voluntarism and a friend of reasonableness. This, even before being a method of public discourse, is a civic virtue, that is to say willingness to take into account the consequences of one's own actions for the wellbeing of others. It is an attitude that predisposes one to participate in equitable

cooperation, respectful of the other as free and equal and marked by reciprocity. Being reasonable means recognizing that others have the same rights to pursue their own goals and therefore that it is necessary to create conditions that are acceptable by everyone (Rawls 1993, 48-54). The reasonable person perceives as a fundamental value and goal in itself a social world in which all can cooperate as free and equal individuals, at conditions acceptable to everybody, in full reciprocity and mutual benefit. Reasonableness requires us to offer others reasons that they can and must share and also requires willingness to let ourselves be persuaded by others.

Since rights are first of all a search for the good of people in social life, reasonableness also requires trust in the possibility of a cognitive ethic (Alexy 2012). The appeal to fundamental values of the human person would be meaningless in a purely relativistic outlook and the passage from them to their political and legal consequences would be unjustified if there were no objective reasons driving us towards determined solutions, and excluding others. Today the language of values has taken the place of natural law. They are translated into reasons that justify the attribution or recognition of rights. The very question on what is due to others in terms of justice implies that it is possible to determine that something is undoubtedly a wrong. The positivization of human rights not only does not eliminate the need to search for non-positive law, but on the contrary strengthens it. Nevertheless this is the arrival point of a search for practical reason and not a starting point. This search – as has been seen – is a cooperative enterprise in which many heterogeneous factors are brought into play. Rights are not something original, but are an ethical-legal reflection of values. For this reason human rights are not self-sufficient.

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Chapter 2

IDENTITY

ABSTRACT

The debate on the moral or legal status of human rights is strictly linked to the idea of law which "legal" is referred to. Their "legal" status must include tools able to deal with values translated in principles, instruments for determining rules starting from their justifications, measures for promoting rights and not only preventing their violations, and obviously also sanctions against those who violates them. In addition, the idea according to which the coercive character is the main element for establishing their legal status is to be confronted with the very justification of the role of governments in protecting rights, considering the recent evolution of constitutional states. In this model, characterized by the primacy of the constitution over the government, the recognition of strong powers over states goes together with an intrinsic limited sovereignty that makes borders porous. Human rights work both at the international and at the domestic level.

Under this perspective, the crucial question is the tension between the particularity of rights' protection and their universality. We distinguish different levels of universality, regarding respectively values, principles, and rules. Universality of values arise the problem of thick or thin conceptions of good. Neither a totally objective doctrine of good, nor the full primacy of right over good fit in with human rights that require objectivity and endorsement. Universality of principles and rules clashes with generality, being persons (the rights holders) resistant to fit perfectly in general categories. Their uniqueness is also the key for facing the antidiscrimination character of human rights, hardly reducible to simple readings of equal treatment. Equal treatment must be delivered to the single being, and this is difficult without distinguishing among different forms of diversities: those due to birth, ethical diversities, phenomenological diversities, and their combinations.

2.1. HUMAN RIGHTS ARE NOT ONLY MORAL, NOT ONLY LEGAL RIGHTS

The milestones in the most recent phase of the human rights history are properly legal (covenants, declarations, courts, comities), and as a matter of fact international law plays currently a crucial role in imprinting a strong mark inspired by the idea of human rights on international relations. Nevertheless, as underlined by Historians, the rise of human rights in international law seems to be determined not because of internal (legal) reasons, but because of ideological, political and social developments. In fact, at their very beginning human rights were underestimated in the international legal framework. Even after their consecration in declarations and covenants, international law resisted to the affirmation of human rights for a long period. The main reason may be that, during the ripening of human rights as a crucial element of the global moral background, international law was engaged in a far more global social movement: anticolonialism, which was using a different legal register and different conceptual categories (Moyn 2010, 176-211). Anticolonialism's key concepts are peoples, self-determination,[1] sovereignty, the principle of non-interference, and all these concepts are controversial in the context of the human rights practice, being nonetheless of the highest importance for political life.

Even though human rights have an indubitable legal component, their legal definition is problematic. Human rights are currently engaging every kind of social agents and movements, and in any kind of contexts, all over the world. Apart from political entities, indigenous minorities, social justice movements, trade organizations, military bodies and solidarity networks use human rights language and techniques. The performance changes in consideration of agent's status, but it is possible to say that all of them are taking part in the same practice, i.e. they are acting in the human rights pursuit. From this point of view, human rights seem to require a change in the approach to legal practices. On the one hand, the ability of involving different kinds of agents in a legal activity shows that this kind of legal practice is neither only in the hands of the specialized class or elite of lawyers and other public officials, nor it requires only legal tools. On the contrary, human rights can be supported by social, cultural, religious, political actions. Many different agents can share its goals and work in different ways for its implementation and empowerment. On the other hand, the wide spread of commitments provoked shows also that the legal practice is not an isolated field.

[1] Cassese (1998, 46) has explained the transition of international law towards human rights as the shift from external self-determination and internal self-determination.

Human rights constitute a complex practice in which social, moral, legal elements overlap.

Even if it seems to be possible to identify the very legal dimension of human rights (identifying proper laws, courts, sanctions, compensations), that side of the practice is not the only relevant one: social and moral dimensions also play an important role. The crucial point is whether those different dimensions are just additional to the legal one in the sense that they reinforce it, and then the former can be judged to be essential, or they are equivalent. The difficulty of deciding whether human rights are moral or legal rights is a consequence of that situation. It is dubious which category is prominent. But for sure human rights are one of the crossroads where morality and law meet.

The nature of rights as legal, moral and social entities is well explained in the logic of law as a social practice (see Introduction). According to this idea, different elements (of moral, legal and social kinds) are integrated by practical goals and values, in particular the respect for every person. Human rights protection does not obviously exhaust the complex and rich goals of the whole legal practice – that is oriented mainly to coordinate human actions –, but they represent a pivotal challenge both in the domestic and international domain. Human rights constitute values and ends regarding human dignity, and as such they tend to be incorporated into (and to perform in) different legal systems. As already explained, human rights are different from natural rights from the point of view of their necessary positive character (see chapter 1.1). Their "positivity" (i.e. legal features) must be nevertheless adequate to the mixed nature of the practice.

The relevance of social action in their implementation and the moral content of human rights make plausible the idea that human rights are primarily ethical demands (Sen 2004, 320). From this point of view, rights-based moral statements can be compared to and compete with utilitarian or duty-based moralities. Utilitarianism is unable to explain the moral concern for each individual as a central value in the contemporary legal practice (Dworkin 1977, 176). The problematic point appears to be whether a rights-based morality is satisfying as a moral background for the legal practice or not. Its advantage is the simplicity of the definition of rights as moral grounds for duties: where there is a right, there must be a duty. But, as is well known, a rights-based morality is not a satisfying moral account of the legal practice, even that of human rights (see chapter 1.3). First, it does not solve the question of which claims are justified and which not. Second, it does not justify duties related to private or public powers or the general duty to obey the law. What is most important, the moral reading of human rights seems to assume that only rights are moral, while what derives from them

(correlative duties) is legal. But the very point is that human rights are only "primarily" moral, because they are "also" legal, and the same can be said about duties: they are both legal and moral. The duty of non-interference in other's liberty can be said legal, but also moral, as well as the duty to assist poor people can be said legal and moral. In this use, "moral" means "important for reasons different from the existence of legal sanctions."[2] The problem then is to draw a clear distinction between legal and non legal tools. Is the promotion of human rights compatible with such a clear cut? The ability of human rights for including social actions appears to defeat that hypothesis. Moral can have different meanings.

The idea according to which human rights are properly "legal rights" penalizes their (concurrent) moral strength. As is well known, in this case the point is not only that a right is a ground for holding someone else under a duty, but rather the idea that a right is a "legal" reason for that duty, in the sense that it is a reason generated by the same legal practice (Raz 1984). For justifying the legal statement according to which someone's interest should be protected we need another legal statement. Even in the context of a theory of law as a practical reasoning, at the end of the day, the Kelsenian idea of legal validity as "belonging to the legal system" is coming back again (Kelsen 2007, 122). The role of human rights seems to deny that view. They are practical statements able to introduce changes in the existing legal system. From this point of view, they are also ethical demands.

When rights are observed from a practical point of view – in the context of their incorporation in international and domestic practice of law – it is easy to observe that they do not coincide with their concrete enactments. Their further potentiality is to be connected precisely to the axiological content that rights propose, which their codifications and contingent implementations do not wholly cover. The fact that the axiological content of rights exceeds the actual concretizations explains in part why rights are to be considered ethical demands, rather than exclusively legal statements. They are performing the role of principles in the legal system, i.e. they are norms indicating ends, that must be determined into the (legal) practice (chapter 1.3). Law does not decide on ends, but adheres to them and at the same time decides on means for achieving those ends (Viola 1990). As principles they originate a specific model of legal reasoning able to combine the moral attention to relevant goods and the process of determination typical of legislation and adjudication. Even if – as we will see

[2] One of the most common intuitions is that rights are legal only when their violation is prevented by legal sanctions. This is the consequence of the idea that law is defined precisely by its coercive character. On this topic, see next chapter.

(chapter 3.4) – rights and duties are strictly linked, rights-based normative systems differ from duty-based ones. In the latter, duties are grounded in norms establishing duties. On the contrary, in a rights-based normative system duties are grounded on rights, and the tension towards rights generates responsibility, a wider form of reaction compared to what is owed to the right-holder than mere duties. It is not a case that the human rights practice is oriented to promote and not only to protect rights: the range of possible actions in favour of rights is more complex than the mere omission or provision (in particular, by states), as well as the domain of their implementation is wider than the mere application of penalties and punishments or compensations.[3] Responsibility implies accountability, which underlies the idea that responsibility cannot be reduced to penalties and sanctions, even though they are necessary too. Accountability includes participation and involvement in the process of rights implementation. It is neither limited to public officials, nor to the domestic institutions (see chapter 2.2).

Sometimes the distance between what rights require as such and what it is possible to realize in the concrete conditions is so strong that rights appear utopic. The tension between effectiveness and normativity – resolved by realist theorists to the detriment of the normativity of rights – is to be considered a characteristic of the human rights practice, in the form of potentiality. A practice is not limited to the developments already attained, but requires a continuous updating process. The dimension of effectiveness is the one that concerns what is already enacted and acquired, established and determined; the dimension of normativity and potentiality consists in the opening up to new demands and new problems, even though things are more complex because effectiveness sometimes goes beyond what is established and determined.

The practice exceeding its enactments can be observed, very clearly, in the process of codification of rights. Their incorporation in norms has a progressive and gradual character, inevitably insufficient and incomplete for their purpose. But this very characteristic also makes it flexible and versatile, holding out new possibilities. The actual protection of rights is always insufficient in comparison to its potentiality. The specific demand for protection of the human person – being inexhaustible as long as it is possible and rightful to do it – makes the practice of rights dynamic (Bobbio 1996, 40-45).

Sometimes the explanation of human rights in terms of legal rights lies in the conviction that once rights have been implemented in legislative provisions their problems are solved, because their legal/positive character protects them. The true

[3] It is not then the official disrespect the very touchstone of human rights (Pogge 2002).

problems would arise in abstract, before the interventions of legislative power. At is well known, the idea that rights come after laws, as their children, is famously proposed by Bentham (2002). On the contrary, Hart's famous criticism sees them as the parents of laws (Hart 1984).

However, both readings are only partially correct. Rights are the result of the legal codification, but they are also able to generate norms. When we insist on the first description, we are emphasizing that human rights not translated in legal provisions are putative, and it is true because every right needs to be determined and implemented (and this is the aim of the legal practice). In the second case, we are emphasizing that rights are reasons for creating norms and other legal elements, and also this is correct. It is clear that one of the most difficult tasks is the identification – in the immense sea of subjective candidate claims – of the subjective prerogatives that are justified and should become legal demands in the form of rights. But it is similarly hard to implement rights once identified. The issue of rights is not limited to their legal consecration. Even after they have been recognized in international charters and constitutions, rights are to be interpreted, balanced, pondered on, and all these activities can only be done correctly in the light of the practice and its ends, and in the light of the very nature of rights (see chapter 3.4). In this sense, it is necessary to focus on the specificity of legal reasoning on human rights, as well as on the peculiar mechanisms of promotion and protection.

For this reason it is necessary to guarantee some epistemic features of the practice, like the openness towards different epistemic communities involved in the human rights protection (Buchanan 2009, 51-53), such as NGOs, associations, observers. Then, the openness of the practice is not a defect, even if it is a reason of uncertainty: it is a necessary requirement of rights. In this line, the controversy on the foundation of rights has to be concluded not by foregoing the problem of shared justification, but by intensifying the search for the most convenient and explanatory justification of the complex character of the practice. The problem is to determine if that justification is to be found inside the practice or outside it. In other words, the question is whether the reasons for rights belong to the concept of rights or not. But the point is just conventional: it depends on what inside and outside mean. What is to exclude is that human rights should have no foundations (Raz 2010), if foundations means justifications.

A very concise way to make explicit the immanent goal of the practice of rights is recognizing that what is at stake in it is the protection of the human person, without discrimination, in his or her singleness and specificity. This is evident if we observe the dominant trends in rights from the Second World War on: generalization and specification. Within the former there is affirmed the

principle of non-discrimination and within the latter it has been recognized that the protection of the person has to do with the status in which the person finds herself. Certainly, rights are not the only possible way to protect the human person, being law in general an instrument for it, but they proved to be the most suited to protect particularly important and socially and politically influenceable goods, precisely because they can achieve a balance – according to the priority of the individual but at the same time respecting affiliations and dependences (chapter 1.1) – between the individual and the community to which she belongs. In this relationship of priority lies the essence of rights: a priority that at the same time affirms the indispensable character of the relationships of affiliation.

The problem of the unfamiliarity with the concept of individual rights in non-Western cultures is to be measured with the eventuality that in the different cultures this conceptual possibility may be accepted, and not with the fact that the concept of rights in fact belongs or not to their tradition: it is the *use* of the concept of human rights and of its potentialities for the protection of individuals that attests to the capacity of the instrument to adapt to different cultures. In this sense, the Tiananmen Square or Tariq protests took place in light of human rights. The various articulations of rights are meaningful in the light of this central idea.

A practice guarantees internal goods, which are the benefits to be recognized to each individual. In this case, they are benefits in relation to which other human beings can constitute an obstacle, or a yardstick, or a help (Sen 2004, 338). For this reason it is not satisfactory to consider rights as something owed to man as such, independently of relationship with others. Obviously, the validity of the practice is to be appraised on the basis of its effective capacity to protect the human person through protection of her rights. That the human person is to be protected certainly remains "the" basic problem, but this must not be confused with the difficulties of implementation. Paraphrasing an argument in favour of global justice in general, it can be affirmed that the present insufficient capacity of institutions to enact rights, a sort of *current international institutional incapacity* (Buchanan 2004, 193), is not a reason to exclude the duty of protecting them, because this condition is not necessarily definitive or irreversible, and the normative force of rights has precisely the aim of changing that state of things. What, instead, is desirable and rightful is a transformation and reform of international institutions, including national states, which remain the main instruments for protection of the rights of individuals (see chapter 2.2).

In conclusion, the meaning of "legal" in the locution "legal rights" must be understood not as an off and on feature, but as a process, susceptible of improvement, and obviously of worsening. Additionally, as we have seen,

"moral" cannot mean only "non legal." Otherwise, being the legal dimension of rights so difficult to determine, it would be also difficult to determine the meaning of moral. Its meaning in the locution "moral rights" deals rather with the kind of subjective right human rights consists of. "Moral" has to do with the status of the human subject of right and with the human duty-holder, because of their humanity. It is not just referred to their categorical and exclusionary status, or to the fact that their cost is irrelevant for their normative force, or even to the idea that their violations represent an offence, or they are independent from the right-holder behaviour (Tasioulas 2010, 114-120). All those features depend on the moral status of human rights. The point is that they are "moral" as they belong to every human person, because of their humanity and not because they originate in the context of voluntary relationships (contractual or political). It is the moral concern for human persons to support the human rights practice. The moral, social, and legal dimensions of human rights practice give each other feedback. In other words, other human persons are values for the community of human persons (see chapter 3.1).

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2.2. HUMAN RIGHTS ARE NOT ONLY AN INTERNATIONAL PRACTICE, BUT A DOMESTIC PRACTICE TOO

The protection of individual human rights constitutes the core of current international law. This assertion, which seems self-evident today, is the result of a striking transformation of the legal practice, not only in the international domain, but also in the domestic one.

In the context of international law, the centrality of human rights is a recent development: after World War Two "for decades after, there would have been no way to believe or even to guess that human rights might become the touchstones they are today" (Moyn 2010, 176). The main reason of resistance to human rights in the international domain has been their link with the traditional reading of the principle of sovereignty, understood as the supremacy of state consent and the prohibition of external interference in the light of the Westphalian paradigm of international relations (Lauterpacht 1950, and Koskenniemi 2001). As we have noted before, even after the 1948 *Declaration*, the atmosphere during the process of decolonization was not in favour of a transformation of the principle of sovereignty. In any case, human rights have had a relevant role in that transformation, and in particular they have contributed to modify some international law mechanisms. These mechanisms, according to the supremacy of state consent, and in the absence of a superior enforced authority able to ensure compliance with agreements, established that if a party has materially breached its treaty obligations, the other party may invoke this breach as ground for suspending or terminating its obligations. Treaties on human rights have eliminated the possibility of that mechanism of self-termination under these conditions, introducing a different quality of international legal obligations,

stronger than those generated by promises and characterized by variable force (typically indicated as obligations *rebus sic stantibus*). Peremptory norms do not admit any violation, and their content cannot be altered by international agreement. The prohibition of gross violations of human rights, the banning of genocide, slavery and torture, have been included in the core of what we call *jus cogens*, the part of international law that does not obey to the logic of voluntary state agreements. This is certainly one of the most remarkable manifestations of the limitation of sovereignty, which was typical of the Westphalian fashion.[4]

Taking this international development to the extreme and emphasizing together its implications on the domestic sphere, it is possible to elaborate a definition of human rights according to the patterns of interaction they instantiate between the international level and the domestic law. In this view, their most significant character is that they work "as a public normative practice of global scope whose central concern is to protect individuals against the consequences of certain actions and omissions of their governments" (Beitz 2009, 14). Governments and states represent the strongest threaten to the human rights of their citizens.

Even if the core of this idea could be convincing, such a definition of human rights would be reductive. It would keep out of sight the simple consideration that governments and states are also the most important agents in protecting human rights, even though they can be their most powerful enemies, given their intruding proximity to individual lives. The apparent paradox is to be solved looking at some characteristic of the modern state. Together with the idea of popular sovereignty, its most significant character is legitimate coercion, to be exercised both inside its territory, as the power of enforcing certain behaviours, and outside it, as using armies for defending justified causes. The modern state has some rights-powers – called sometimes "territory rights" (Meisels 2005) –, the right of legislation, war and peace, jurisdiction, minting coins, levying taxes, regulating the use of natural resources and controlling borders, all of them supported by force. Nevertheless, coercion is legitimate when the use of force is controlled by individuals involved in the political community, and it is so because the state derives its legitimation from individuals and then it would be at their service. The modern state is not then an entity legitimated to use its powers for unidentified and indifferent objectives. At the end of the day, territory rights are oriented to protect citizens, and, as such, they can be evaluated as useful or useless with respect to that aim. From this point of view, sovereignty is limited intrinsically by

[4] The bibliography on the Westphalian paradigm and its evolution is enormous. As a reflection from the philosophical point of view, see Dworkin's last paper (Dworkin 2013).

its origin and finality.[5] For this reason, a global theory of justice, as an account of what is fair in the international domain, and a political philosophy, as a critical assessment of the state finalities, can be a good background for the examination of the role of states in the international order. In other words, the doctrine of the state derives its correctness from considerations of justice not self-generated and from its practicability.

Looking at the evolution of contemporary states, it is worth noticing that the link between the state and citizens' rights is formalized in the constitution. From the domestic perspective, indeed, the bond between state and human rights is notoriously established in the same idea of modern constitutions. As the *French Declaration of the Rights of Man and of the Citizen* (1789) asserts, a society in which there are no provisions for guaranteeing rights does not have a constitution (art. 16), and through these provisions constitutions are linked to the international legal practice of human rights. Constitutional or fundamental rights are mainly citizens' rights. However, like human rights, also constitutional rights are progressively attributed to, first, non-citizens but residents in the state territory, and second, to every human being. According to the constitution, the state is responsible of its own citizens, and of the protection of human rights in its territory. But – as instruments of such a universalistic constitutional task – they also could be potentially responsible for the protection of the rights of others.

What we are saying is confirmed by a salient character of the contemporary evolution of states that would be summed up as the superiority of the constitution over the state. This primacy is the consequence of state multicultural and pluralistic developments, that excludes the idea of a state characterised by ethnic uniformity or by the sharing of common values linked to a common history (Miller 1995). On the contrary, the state is the context of possible disagreement on values in the common framework of the political community drawn by the constitution (Waldron 1999). From this point of view, contemporary states differ widely from the modern paradigm. In the latter, the common political identity has been the background for separate states in the international domain, fitting the idea of an insulated sovereignty. In the former, the constitution rules public powers whereas state is the framework in which different interpretations of constitution (including different interpretations of rights) face each other. What's more, through their constitutional values, the state liaises with other states. The primacy of constitution makes possible the dialogue among fundamental values,

[5] One way of developing this idea is through the connection between popular sovereignty and human rights in a discursive process of opinion and will formation (Habermas 1994).

and among them mainly human rights, and so states becomes porous. One of the most representative manifestations of this cooperation is the dialogue among courts, not only constitutional ones.

Nevertheless, constitutionalization of rights is not a conclusive fact, but a step in the process of rights protection (chapter 1.3). It is an important step, obviously, because it produces a sort of grammar of rights: the constitution establishes how rights are concretely distributed – including the relationship between citizens and non citizens – and how they can be combined with other political values. Only then rights become principles to be balanced and determined in relation to the final and concrete conditions of life. In other words, they can become final rights after a process of determination through the legal practice. Their exercise depends on normative and factual conditions, and needs institutional practices, procedures and special forms of reasoning (Alexy 1986). This is valid not only in the strictest legal approach, as adjudication, but also for the implementation of public policies. At this point, it is clear that the relevance of the state for human rights is neither exclusively connected to the use of coercion in supporting state norms, nor due to the state primary role for sanctioning violations of human rights, but it is related to a more comprehensive understanding of human rights practice. From this point of view, a theory of law centred on coercion is not adequate to explain human rights and contemporary law, as well as it is not enough an exclusive state theory.

This schematic account of the constitutional dynamic of human rights seems to leave aside one important question, crucial for the classic doctrine of sovereignty, the question of security. On the one hand, internal security is clearly linked to the origin of the modern state, as Hobbes teaches us. For this reason, the right to punish (*jus puniendi*) is one of the strongest prerogatives of a sovereign power. Today, it is evident how international terrorism has reinforced the role of the states. Nevertheless, the fight against what is bad for the community is only the one side of a coin in which, on the other side, the state also promote what is good for the community. From this point of view, together with an increasing importance of security, in international law there is a growing convergence on what must be penalized by criminal law. The same tradition after World War Two has contributed to identify crimes against humanity that are clearly connected to human rights (gross violations, genocide, slavery, torture). In addition to that, as long as international law recognizes individual criminal responsibilities, criminal law cannot be parochial (Fletcher 2005). On the other hand, it is altogether true that the idea of concentrating coercion powers in international agencies is not to be welcome. At the end of the day, the use of force is better controlled by the state. Not only because of the old idea according to which democracies resist to decide wars (Kant 1996). Also because it should be acknowledged that what states

can do in favour of human rights is not only to impose sanctions upon those who violate them, but to promote and protect them, in so far as they are the agencies closest to the individuals.

In sum, the process of internationalization of human rights and the settlement and evolution of constitutional systems are strictly linked. The transformation of Westphalia's pattern of international relations has been possible because there has been a domestic development towards the primacy of the constitution over the state, i.e. because of the process of internal – and not only external – limitation of sovereignty.

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2.3. HUMAN RIGHTS ARE NOT ONLY UNIVERSAL AND NOT ONLY PARTICULARISTIC. THE CONTROVERSIAL UNIVERSALITY OF HUMAN RIGHTS

The tension between the moral and legal dimensions of human rights and the overlapping of the international and the domestic dimensions belong to a more general set of philosophical problems, which is that of the universal or particularistic character of human rights. In this connection, while critical morality tends towards universalism, legal positivity is restricted to particularism; while the domestic sphere is by definition particular, the international one aspires to be valid for all peoples.

There is no doubt that the language of human rights has a deliberately universalistic character that sets itself above the national sphere and also above the international one (see chapter 1.2). Besides, if human rights are not universal, why on earth call them this way? If human rights were indissolubly tied to given cultural presuppositions, like Western philosophy, the Judaeo-Christian religion, or liberal society, why not say clearly that we are talking about the rights of Europeans, of Americans, of whites, of Christians or of democratic citizens? (Kriele 1993, 47). One might only suspect that this is an attempt to hide an enterprise of cultural colonization aiming to render Western values hegemonic and to legitimize the expansionistic aims of the Western democracies (Milne 1986).

First of all it is necessary to reflect on the meaning of the attribution of a universal character to human rights. What is this meant to affirm? It is evident that it is an endeavor to maintain that human rights already derive their original justification not from a contingent decision of human will, but from a fundamental commonalty among all human beings: *something* holds for *everybody*, because it is *common* to everybody (O'Neill 1996, 74). The universal is what particular cases have in common in some significant respect. Even if this common content is still very indefinite, so as to appear like nothing more than a horizon of research on what every human is entitled to as such, this does not mean that it is empty or meaningless. We are talking about values in which all human beings have to be able to participate, so that their life can be *human*. Preventing or not favoring access to these fundamental goods would mean seriously wronging them. What is human must be recognized and guaranteed to all human beings. Though very abstract, this is the formula of the universality of rights.

If we consider a value as a strong or prevailing reason of desirability of a behavior, then it shall be realized what in concrete circumstances it may promote

or foster the value and what it may on the contrary hinder its realization. This is the task of practical reasoning and political deliberation. But in the practical field there is no one correct answer, because it is necessary to take into account the different circumstances, contexts and cultures. In this sense it can be affirmed that practical reasoning aims to communicate the passage from the universal to the particular or to recognize the universal in the particular. At the very moment when rights are formulated in legal texts, the universal comes face to face with the particular, because language always has a cultural character. The *Universal Declaration* itself, at the moment when it is formulated, inevitably already bears in itself a particular dimension. However, it is necessary to distinguish what is particular from what is particularistic. What is particular is an occurrence of the universal, while what is particularistic is by itself incommunicable and incommensurable, that is to say not referable to the universal. Are human rights universal or particularistic?

The attack on the purported universality of human rights goes back at least to the time of the 1789 *Declaration of the Rights of Man and the Citizen* and unites thinkers with very different tendencies: the liberal Jeremy Bentham, the conservative Edmund Burke and the socialist Karl Marx. Despite the difference of perspectives the accusations are very similar. Human rights are rejected because of their abstractness, their metaphysical character, individualism unaware of social bonds, down to the mockery with which Bentham liquidated them, defining them "nonsense upon stilts" and Marx as the rights of egoistic man (Waldron 1987). The extension of rights, in particular to welfare rights and cultural rights, has weakened the solidity of a large part of these criticisms. Nevertheless, distrust remains toward abstract universalism incapable of recognizing cultural pluralism. On the other side it is objected that it is only on the basis of significant commonalty that authentic intercultural dialogue is possible.

The fact that rights have a particularistic historical origin, having come into being in France, England and America, does not mean that they are such by nature. Philosophy came into being in Greece, but it is not Greek. Why should this not also hold for those rights whose end is respect for the human being as such?

If it is true that the origin of human rights is to be found in Western cultures, nevertheless it is significant that their evolution has escaped full control and has followed a logic of development of its own or an oriented course of action. When the New England settlers claimed their rights from the English Crown, they certainly did not think that they would not be able afterwards to deny the same rights to their black slaves. The history of human rights is rich in such surprises and unexpected, unintended and undesired results. Human rights come into being

particularistic, but aspire to become universal. It is necessary to see whether this aspiration is well grounded on the conceptual plane. In this connection, it is not enough to postulate their universality as desirable on the practical level after denying it in theory, as Rorty would like (1993, 117 and also Feinberg 1973, 94), because a beneficent deception is still a deception.

There are two possible pathways for exploring the universality of rights. Which one is chosen depends on the starting point and on the direction taken: bottom-up or top-down. These two pathways are not only compatible with one another and corroborate one another, but also need one another.

One can start from the bottom of human rights that are fully positivized and therefore particular and *situated* in determined cultural contexts, and go in search of the universal, implicit in them, through the very capacity to judge "reflecting" on the case being examined, taken as exemplary, and on all other similar cases. We know that *reflective judgment* in a Kantian sense is not a matter of subsuming the particular in the universal, but, on the contrary, of going up from the particular to the universal, which is implicit in the very affirmation of particularity. If we consider something as particular, it means that we presuppose a universal of which it is an occurrence or in relation to which it is a deviation or an exception (Ferrara 1998). There is universality when particularity can be decontextualized. Nevertheless, this must not be seen in the logic of the *genus et differentia specifica*, but in that of the similarity between functional equivalents, that is to say between cultural practices linked by a family likeness in that they are oriented toward the same goal though along different pathways. In this way an intercultural convergence of the manifold pathways of recognition of human dignity can be perceived and it is possible to set up a normative criterion that is wholly internal to human rights and, at the same time, communicable, that is to say not indissolubly tied to cultural conditionings. This normative force of the reasonable is founded on the ethical superiority of a world in which human rights are respected compared to one that ignores them or, even worse, denies them and violates them.

We can consider this method of investigation as a form of *hermeneutic universalism,* which is founded on paradigmatic cases of practice of rights as principal models that do not exclude the legitimacy of other cases considered as functional equivalents. This method favors intercultural dialogue and also affords an opportunity to take into consideration to some extent in the general discourse on human rights the *Asian values*, saving them from authoritarian readings (Sen 1997).

The other way of defending the universality of human rights is the more traditional one and at the same time the one most hotly contested today. It consists

in wondering whether the current practice of human rights can legitimately be considered as "universal" by itself. This qualification does not only refer to the extension of rights to all human beings (*universalism of holders*), because this by itself is a form of generalism regarding such a vast category as to include all men; it also refers jointly to the universality of the contents of rights. In this connection, one wonders how it can be maintained that in a multicultural and pluralist world like ours all human beings have the *same* rights or rights that are variants of the same essential contents. Behind this pretension there peeps out the abhorred idea of a common human nature as the ultimate foundation of human rights. Nevertheless, it is necessary to reject the identification between the problem of the content of rights and that of their foundation.

Indeed, it is possible to agree on the content of rights and to disagree on the way of justifying them. "Yes, we agree about the rights but on condition no one asks us why" (Maritain 1949, 9). Even if one maintains the impossibility of founding rights in a rational and peremptory way, this does not imply in the least that for this very reason they are not universal for their content (*contra* Zolo 2007, 52). Convergence on given contents could be the fruit of an *overlapping consensus* by doctrines that reach the same convictions through different routes.

The thesis of the separability between "universalist content" and "universal justifiability" (Larmore 1996, 57) implies a consideration of universality not as the arrival point of definitive rational knowledge, but as the departure point of knowledge that is still confused and imprecise. Our knowledge goes from the universal to the particular, from what is common to what is specific, from the indistinct to the distinct, from the indeterminate to the determinate. Furthermore, practical knowledge is oriented, as its specific end, toward the determination of the action to be performed, and this action is necessarily particular. Practical reasoning and authoritative decisions will help to specify universal human rights in the particular. At the end of the day, the right that I have here and now, in relation to this determined situation and with these specific guarantees, is always particular, though continuing to be a human right insofar as it is continuous with the universal principles from which it originates and can be considered as an application of them or, more precisely, as a case belonging to their normative horizon.

There is, therefore, a universality of departure and one of arrival: a poor universality, in that it is still very indeterminate and confused, and a rich and concrete universality, in that it is enacted in every particular instance, though not captured by each of them. If it is admitted that particular cultures can communicate with one another, then necessarily one has to recognize something

common already existing between them. But it is not to be seen as the hegemony of a culture over all the others, but rather as the horizon of agreement of manifold particular cultures. Universalism must not disguise ethnocentrism (Todorov 1993).

If we go over the fundamental stages of the practice of human rights as delineated before (chapter 1.3), then the question of the universality is posed in a different way for each of the three stages of the sequence "values-principles-norms."

Universality enters into human rights through their connection to fundamental values in which all human beings aspire to participate in some way. Cultural relativism denies that common values can be identified, every culture being walled up in its own identificational particularism. If it were so, then not only would all form of communication between cultures be impossible, but also the demand for recognition of cultural identities would not make any sense, because this too is a form of communication. Actually, what is not common is the way of enacting common values, and it is for this reason that it is very difficult to identify behind such different social practices orientation toward the same value. This requires progressive elimination of the particular elements in order to allow us perceiving the ultimate goals of a social practice. Relativists believe that at the end of this purging of particularistic aspects from actions nothing is left. In effect in a positivistic outlook nothing is left, because goals and values are not made but are schemes of interpretation of facts, that is to say of human actions. That common values exist therefore means that social practices that are apparently very different pursue the same goal or aspire to participate in the same value and, consequently, can only be adequately understood in the light of the same scheme of interpretation. Cultural anthropology studies seem to confirm the assumption that there are spheres of ethical and social experience common to all peoples and that inside them the same fundamental values are pursued in diversified ways (Renteln 1990). What is really problematic is not whether there are common values, but what they are and how they are to be understood.

In this connection three principal trends of thought can be identified.

According to a *thick* trend some basic values are evident, which all human beings cannot avoid appreciating for themselves and, to a varying extent, practicing. For instance, John Finnis (2011, 81-99) identifies them in the value of life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness and religion. To these principal values we can link all the secondary or derived ones. These general horizons of good do not yet constitute either moral or legal norms or specific moral choices, but only common principles

of practical life for ethical-political choices governed by the requirements of reasonableness.

Two objections have been made to this line of thought. On one side it is noticed that, though admitting the existence of fundamental human values, not all agree in identifying them, and that it is impossible to formulate them in a clear and complete way without making the contingent convictions of contemporary man into eternal truths. But it can be replied that every list has an indicative meaning and is subject to continual revision and purging of contingent interpretations. On the other side – and this is the strongest objection – the idea is rejected that these fundamental values must concern the ultimate goals of human life, because this would imply recommending a particular ethic, violating the regime of pluralism. John Rawls (1999, 54-55), for instance, maintained that we have to recognize as "primary goods" only those that are functional to the working out of any plan for life, that is to say liberty, opportunity, wealth and self-respect. This *thin* conception of common good would make it possible to safeguard impartiality and neutrality toward all conceptions of the good life. Nevertheless, if we were to accept Rawls' point of view, we could not justify the fundamental character of many rights affirmed in the *Universal Declaration* itself and in the Charters of Rights that are inspired by it. Accordingly, these rights would be linked to particular conceptions of the good life and to contingent political choices.

The third trend aims to correct this defect of Rawls' conception, broadening the sphere of "primary goods," but taking care not to formulate a specific conception of the good life that would violate the liberal principle of pluralism. If we consider the thought of Martha Nussbaum as an example of this line of thought, we have to notice preliminarily that this approach to the notion of "value" stresses, much more than the preceding ones, the role of the appraising subject. Something has value *for* someone, because it has importance *for* someone. Value implies a relationship between a subject and a good.

What is extremely important for the human being? Nussbaum's answer – as is well known – is of Aristotelian derivation: what is extremely important for the human being is the fulfillment of his/her humanity through actions of free and informed choice. Accordingly every human being has the original right to develop all those potentialities (*capabilities*) that make him/her able to give form to his or her own life project without any constraints (Nussbaum 1997). The use (*functioning*) of these potentialities will obviously be very diversified and particularistic, but the existential spheres in which this choice is made and the required capabilities are common to all human beings. Precisely in these

capabilities there lies the universality of values that are sought not only because they allow informed and free life choices, but also because they are goods in themselves. We thus encounter a new list of values or fundamental capabilities: life, bodily health, bodily integrity, senses, imagination and thought, emotions, practical reason, affiliation, relationships with other species and with nature, play and control of one's own political and material environment (Nussbaum 2000, 78-80). The specificity of this line of thought lies in deeming necessary a global vision of human opportunities and, therefore, in a way of human nature itself or of what we find valuable in our existence (Searle 2010, chap. 8), which both Finnis and Rawls, for different reasons, have avoided presupposing. Nevertheless, this is a dynamic vision that excludes ends common to all human beings and only requires a family of common existential experiences which in turn require common abilities functional to the performance of a human being as such. Whether this conception succeeds in maintaining Rawlsian neutrality in relation to every conception of the good life is something very debatable. Nussbaum admits that in some cases one has to demand from people a determined form of functioning with consequent restriction, at least up to a certain point, of the scope of choice (Nussbaum 2000, 90-91).

Despite the difference in approaches, these three orientations agree on the existence of common universal values and on the derivation from them of fundamental rights that political societies must guarantee to every human being, since a right is a political and legal matter based on the presupposition of an ethical vision of human values. It is interesting to notice that the divergence between the different ethical conceptions decreases considerably when it comes to identifying in the abstract what fundamental rights are to be guaranteed to all human beings. Agreement on fundamental rights is greater than that on the fundamental values and on the way of interpreting them. Hence rights as principles or *moral rights* still preserve a universality that grows weak in the subsequent process of specification in norms and sanctions. Rights in action, all things considered, are particular. Nevertheless, the particularism of rights, if it is not acceptable on the plane of cultures, is proposed in a new guise on the plane of holders.

A right institutes a normative relationship between a sphere of action and a holder. Anyone that is recognized to be a person, that is to say someone and not something, can be a holder of rights. This holds both for conceptions and cultures that give priority to the individual and for those that give priority to social relationships and social solidarity. The difference between them does not consist (or should not consist) in considering the person as someone or as something, but rather in the way in which the entitlement is played out, now being more centered

on non-interference and now on liberty more attentive to relational goods, to the real conditions of life and to care for others (Taylor 1986, 52-53). In any case the person is an incomparable whole and not a part of a whole. Consequently we cannot think that people constitute a single category or class inside which to apply formal equality, that is to say identical and undiversified treatment, without in this very way judging the diversity of people irrelevant. Thus we have to think that people, though being equal, in a strict sense do not constitute a class, as there is the class of citizens, of owners, of farmers, and of workers. Persons, taken as a whole, do not constitute a natural species, since they behave in relation to the species in a different way from the exemplars of other species. They are individuals in an incomparable and non-exchangeable way, because each of them is not a "case" of a generality.

A "category" whose members are not part, each instead being a whole, requires that equality of treatment should not be purely formal. If people were all treated equally, they would each be considered as particular cases of a species and not as a totality. For this reason it is difficult to apply the principle of equality to people. In order to treat people equally it will be necessary to treat each of them as an incomparable whole. People are treated equally when each of them is treated to the best as *that* person must be treated, respecting the differences and making up for the disparities. It is necessary to be able to distinguish between "difference" and "inequality" (chapter 2.4).

The process of constitutionalization of law, to the extent to which it has introduced the personalistic principle that is the root of pluralism, makes legal rules less and less generalizable, and therefore endangers the principle of legality. People are by definition incomparable and require equality in difference. But it is extremely difficult to treat different people equally. Concrete cases have become normative, because single people have become normative.

Constitutionalization of the dignity of the human person presents extremely problematic and potentially contradictory aspects: on one side, there are behaviors that are in themselves a violation of the dignity of the person, that is to say are absolute evils (for instance, homicide, slavery, torture); on the other, even the very conscience of the person is constitutionalized, in the sense that the demands for recognition of identity and liberty of choice through the attribution of rights belong, at least *prima facie*, to respect for the dignity of the person (chapter 3.1). The first perspective requires ethical objectivism. The second perspective, that of respect for people's conscience, can clash with the first and put the person in conflict with the ethos of the community and with the very principles of a critical morality.

Because of what they have in common, people constitute a community, but this is necessarily the place of encounter and clash of so many universalisms, that is to say of different visions of the common values and their specification. Accordingly, respect for the person can collide with the imposition of a public order of values, the order in the soul with the order in the city (Hampshire 2000). And nevertheless, if the person is a being in a relationship, his or her vision of society cannot be solipsistic, since by definition it also concerns what others should share and practice and, consequently, in the end it will have to be the result of a discursive interaction serving to reach common agreement. Hence the centrality of the value of the person, while it weakens the stability of the constituted order, at the same time activates a search for new and more adequate public orders of values.

When the dignity of the person is the fundamental objective of a political community, both people's common values and their different visions of the common good are at one and the same time placed at the center. Persons, as already noticed, are dangerous for the stability of community life, but this is a price to be paid when the dignity of the person is placed at the center of law and politics. For this reason rights are not only universal because of the values to which they refer, but also particularistic because of the prerogatives of the holders to whom they are attributed.

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2.4. HUMAN RIGHTS ARE NOT INDEPENDENT OF THE DIVERSITY OF HUMAN LIFE. RIGHTS AND DIVERSITY

Natural rights exist over and above diversities between human beings, whatever they are: sex, language, culture, religion, color of skin, personal identity and social role. Human rights are instead conceived as real "rights of diversities." They affirm the right to be different and, at the same time, to be treated with equal

consideration and respect, because diversity is always recognized within common humanity. While natural rights imply a decontextualized and unitary anthropology, human rights imply an anthropological pluralism linked to diversity in man's ways of being.

If we wished to review all the forms of common humanity that are officially endowed with rights, it would not be enough to consult the numerous legal documents that concern them. It would also be necessary to search though all the interpretations that come from the constitutional courts, with particular attention to the most influential ones. This is a boundless field of investigation which is also continually evolving. The only way to get one's bearings is to identify some parameters of a general character and observe their implications in the conception of human rights.

The centrality of the human person in the debate on rights sets in the foreground protection of the person's identity. The person is not a faceless being, that is to say one deprived of identity, but is marked by his or her biography and by his or her choices in life. Both make claims to be protected in the form of rights. But because of this very fact, personal and collective identity takes on political importance, in that the recognition demanded through rights implies that without the contribution of others the person cannot fulfill himself or herself. Obviously society can intervene with various degrees of intensity in the construction of the self. It is well known that this is one of the main differences between communitarianism and liberalism, between the self seen as a social product, though not in a deterministic sense,[6] or as an "unencumbered self," that is to say independent of its contingent attributes.

According to a critical interpretation of the thought of Rawls (1999, 118-123; but also 1993, 27 note 29) the connection between the self and its qualities is not essential, but fortuitous. If I possess my qualities, I am at the same time connected to them and independent from them.[7] If qualities are contingent, it is possible to think of oneself without them (the *veil of ignorance*). Even if rights should come before the social institutions, they would belong to those furnishings from which the self is detached.

The extreme form of libertarian individualism is happily expressed by Nozick (1974, IX) when he wonders: "how much room do individual rights leave for the state?" This implies that rights belong to the individual independently of society and that they must be seen as natural rights according to the orientation of

[6] "The self is a social product, but that product is a unique person." (Selznick 1987, 447).

[7] Sandel (1982, 55) maintained that according to Rawls a quality is "*mine* rather than *yours*," is "*mine* rather than *me*."

classical liberalism (Taylor 1985), something that – as we have tried to show – does not mirror the real practice of human rights and their political character (see chapter 1.1).

The liberal conception of identity rights and the communitarian one are both defective and unilateral. Liberalism correctly defends the concept of culture as informed search and free choice, but then it wrongly thinks that the individual is uprooted from the social context and from the start is deprived of all cultural identity. Communitarianism correctly claims that individuals from birth belong radically to communities of life, but it also wrongly believes that this impress is entirely indelible and unreformable.

It is not possible to classify different personal identities, because every person is an incomparable individual. We can only examine their common or recurrent aspects. The elements that constitute the different identities of people from the point of view of their political importance can be placed in three general categories identified on the basis of the intersection of the parameters of *willingness* and *shareness.* There are involuntary and particular dimensions of personal identity, dimensions that are involuntary and (potentially) common to all people and, finally, voluntary dimensions that can be common or particular depending on the case.

The first category (*involuntary-particular*) is linked to factors of a biological, cultural and historical character that the natural lottery assigns from birth. We refer to diversity in physical and psychic constitution, color of skin,[8] ethnicity and culture. Nobody can choose either the biological equipment or the family or the social and cultural group in which they find themselves at the moment of birth. This also depends to a great extent on the natural lottery and to some extent on choices made by other human beings. But one wonders to what extent it is permissible to condition, where possible, the biological and cultural life of other human beings and if this is compatible with the principles of a liberal society (Habermas 2003). It is even less acceptable that this should be done by the state for the purpose of ensuring equality between newborns regarding starting and development conditions, as Plato planned in *Republic.* What is certain is that the circumstances of birth have not been desired and cannot be totally changed. Even when it is possible to distance oneself from them, the signs of their origin still remain in some way. Language, culture or nationality can be changed, but one can never be a "native" in the new language, culture or nationality.

[8] The concept of "race" is inappropriate to human beings and promotes racism (Blum 2002), but deleting it from the legal lexicon is likely to have perverse effects (Carlson 2013).

Not only are these forms of *diversity through birth* involuntary, but they are also not common. They are the principal source of diversity between human beings, precisely because they cannot entirely be wiped out by subsequent choices made in life. In a multiethnic and multicultural society, from this point of view citizens feel they are separated by confines that appear impassable. Extraneousness easily leads to disapproval of other people's behavior and this in turn can become moral condemnation of personal identity down to its legal criminalization. The politics of a multicultural society oscillate between the extreme of assimilation and that of ghettoization, because we do not resign to seeing the political community as a place of mere coexistence between separate tribes.

What cannot be chosen can be accepted instead as a constitutive part of one's own self, since personal identity is not a mere fact but also requires at least endorsement. If the individual is not free to choose, he or she must be free to express – if he or she so wishes – what he or she is. Therefore each person must not be prevented from being himself or herself and expressing his or her own identity; otherwise the person's self-fulfillment would be hampered and the self would be mortified by it. For this reason cultural rights, alongside rights to cultural participation and education, also include individual and collective opportunities of choosing a culture, to cultural inheritance and accessing to the means of communication and expression of one's own identity.

Accordingly the anthropology of rights does not only require the value of autonomy, but also authenticity, that is to say the liberty to express one's own self however it is formed. This demand is already found at the origin of the history of the human rights. When the American framers demanded religious liberty against the state, they did not so much or did not only intend to demand the liberty to choose their own faith, but above all the liberty to be able to profess their calling without interferences. Indeed this is the right to be able to do what one sees as one's duty. A duty is not chosen, but to fulfill it one needs to be free to carry it out. Besides, a right that is inalienable is also in a sense a duty and this also holds for the right to personal autonomy. We are not free to forego our liberty. Autonomy too can in a sense be seen as a calling to which one has the duty to respond. Autonomy and authenticity are complementary values.

In actual fact different identities are treated unequally in social life. The discrimination concerns very meaningful spheres like, for instance, education, social segregation and voting rights. Antidiscrimination laws aim to reaffirm equality of treatment. Since they concern groups that are in fact disadvantaged, they are often perceived as conferment of special rights, that is to say as rights not enjoyed by other groups, while in reality they are equal rights in that such laws are

intended to ensure equal treatment of different but disadvantaged identities. Equality might sometimes require different treatment and sometimes require special treatment helping to eliminate inequalities (affirmative actions or quotas).

The practice of human rights starts in civil society in the form of agitation, as in the historic movements for civil rights, and continues in legislation, which cannot limit itself to preventing inequalities of treatment, but also has to try to eliminate their causes. Indeed, human rights are positivized so that they will effectively be respected; otherwise they would be purely rhetorical. Nevertheless, antidiscrimination laws are not enough by themselves if they are not accompanied by a transformation of the cultural attitude towards diversities. The struggle for rights must not be seen as concluded with legislation. Agitation has to continue through education to the practice of rights and a sense of responsibility (Rubin 1998-1999). Otherwise, antidiscrimination laws could have unintended outcomes, accrediting the conviction that special rights are substantially a preferential treatment or entitlements violating the principle of equality.

The second category (*involuntary-common*) concerns the existential phases of human life. Aristotle long ago related to the age the roles and specific tasks of the citizen on the presupposition that the cycle of life was connected to the development of determined abilities and the emergence of determined needs and demands. From the phenomenological point of view, every human being is characterized by age and by existential situations or contingent but recurrent roles. He or she is a baby, a child, an adult, elderly, healthy or ill, disabled, a worker or unemployed, a consumer or someone needing means of sustenance. These conditions of life too are often entirely involuntary. It is not in our power to grow old or otherwise and often it is not in our power to find a job either. At the same time these states of life are common not only in the sense that they are shared by vast groups of people over and above cultural diversities, but above all in the sense that every human being is able to understand the needs and demands of those people that are in a different existential situation, because he or she knows full well that it could be their own situation. It is proper to the person to put herself in other's shoes. I mean that states of life belong to the whole human family, and therefore their values, their needs and their requests can be understood by all men through empathy. Accordingly, this makes it possible to envision a set of fundamental rights on the basis of a general interpretation of the needs of that particular state of life that is typically seen as a human situation.

To the anthropology of autonomy and hence of authenticity we therefore have to add an anthropology of the situation and the relationship. The human being is situated in the coordinates of time and space and is also characterized by

relationships with other human beings. If rights did not have to take stock of the real circumstances of human life in their typical forms, they would not concern the person, but an unreal being. Besides, as is well known, subjective right came into being to govern the particular relationship with material goods. The situational anthropologies of the past were those of the man-owner and of the man-worker, i.e. of *homo oeconomicus.* They have not disappeared, but others have now been added through a process of stratification and phenomenological fragmentation. Human life is now divided into regional ontologies and into distinct axiological clusters. Personal identities are constituted by the intersection and overlap of different faces of human dignity in a way that is not always compatible.

The great multiplications of rights following on from this anthropological pluralism can induce people to adopt a deflationist procedure aiming to identify a small set of fundamental rights valid for everyone, relegating the others to a merely welfarist dimension. The theory of minimum rights, upheld recently by Ignatieff (2001), is animated by the worry that the consideration of different states of life leads us to impose a determined conception of human good for each of them. Human rights have to be compatible with the most different cultures and with the most different conceptions of good and this is only possible if is founded on a *thin* conception of what is just. Nevertheless, it is very difficult to indicate what it is without for this very reason being compromised with a vision of good, however minimal. Certainly ethical individualism, which is indicated by Ignatieff as the only acceptable basis for rights, is not neutral. Not only is it not compatible with cultural diversity, but it also suggests a decontextualized vision of the person, which exposes him or her to serious violations of his or her dignity (on minimalism, see also chapter 3.3).

A very different strategy consists in identifying, within the fundamental rights, some of particular importance that must be independently guaranteed to all men by their particular conditions of life. Rights of everyone and for everyone. They concern some elementary goods, like the right to food, clothing and housing, that is to say *subsistence rights*, and for this very reason they also concern some positive liberties. Henry Shue (1996, chap. I) argues that subsistence, along with security and liberty, is a "basic right" because it is necessary to the enjoyment of all other rights. This is not properly a theory of minimal rights, but a theory of rights that all the other fundamental rights imply. It avoids us forgetting the conditions of life of the most disadvantaged men on the planet, while we are committed to guaranteeing human flourishing to the inhabitants of rich or more developed countries.

Here too the ambiguity of special rights returns: they are such not only because they do not concern everyone but also because they have a content that is not valid in general for all rights holders. Special rights raise the problem of their justification or the reasons on which they are founded. Do children, for instance, have rights as children or as citizens or moral agents or, more simply, human beings? One could think that the rights linked to states of human life, such as that of childhood or old age or illness, are an exception to the general human rights valid for "normalcy." But this would be quite wrong. All forms of human life have the same dignity. These "weak subjects" reveal essential aspects of the human being and at the end of the day they are precisely the people that most need protection of their rights. The philosopher Gabriel Marcel [1889-1973] efficaciously affirmed this when he noticed that the sacrality of the human being appears more evident from his or her nakedness and weakness, that is to say in the unarmed human being, to be seen in the child, the elderly person or the poor man (Marcel 1964, 168). Human life is not an aggregation of separate parts, but is all present in every phase of its development and its decline. The human being is always in a particular vital cycle, but every time is wholly in it. The paradox of the human person lies precisely in making reference, together with vulnerability, to autonomy and sacrality. Vulnerability and suffering are not signs of erosion of human dignity. If it were so, the special rights concerning them would be nothing but the rights of compassion and care, that is to say relief rights or, more exactly, just others' duties.

This unitary perspective also makes it possible to underdetermine the diversities between states of life and to perceive in each of them demands that are present to varying degrees in all the others. For instance, art. 14 of the 1989 *Convention on the Rights of the Child* already recognizes the right of the child to liberty of thought, conscience and religion, just as the vulnerability of the child is certainly not absent in the world of adults. Considering one vital cycle as superior to the others, as more representative or, worse, as more important, is a discrimination that disturbingly resembles racism, generational racism.

The third category of diversity is that linked to entirely voluntary choices and –as is well known – is that of the fundamental liberties around which the original nucleus of rights formed. We are talking about *ethical diversities* in which the value of autonomy is prevalent. Every informed individual in a regime of political liberty has to be free to give to his or her own existence the form that seems most suitable to him or her. He or she formulates plans for life that must be possible to fulfill using the means and opportunities that society affords. In social contexts marked by ethical pluralism the result is a rich variety of ways of seeing human

good, and therefore a big diversity between personal identities. This diversity is voluntary and implies a certain potential commonalty in the fundamental liberties necessary for self-fulfillment in any plan of life. If instead we look at the use of the fundamental liberties, we can ascertain that there are choices that are convergent for their content (*voluntary-common*) and choices that move away, at times very much so, from the broadly shared and traditionally consolidated ones (*voluntary-particular*) and therefore conflict with them. The former are more easily protected, because they enjoy the favor of social consent, which – as we have already seen – is a necessary support for practice of rights. For this reason greater attention must be paid to the second type of choices, those that diverge from the common ones. The fact is that it is precisely the divergent choices that encounter greater difficulties about receiving that public recognition that is constituted by the attribution of rights. Accordingly, the use of personal liberty proves to be restricted in a way that, if it is not adequately justified, is entirely arbitrary and paternalistic.

Law is by nature opposed to all discrimination, but, since it is produced by political communities, which tend to strengthen their stability by giving an order to liberties, are also the *loci* of limitations and exclusions. A rule is always a limit to human liberty, but paradoxically this limit can only be overcome or annulled through other rules in a process that never seems to end. Law is always struggling against itself. Besides, if a political community forewent giving an order to liberties, public discourse would lose importance for the search for the good life by citizens and politics would be concerned with mere coexistence.[9] If this happened, the recognition of new rights would also prove very weak, linked to contingent political majorities, devoid of solid roots in society. New rights would remain on paper, since social consensus is necessary not only for making laws but also for adequately applying them. Hence broadening the spaces of personal liberty is not a purely legal matter, but mainly a political and cultural one. Here, more than elsewhere, good practice of rights does not only depend on law.

Among the criteria for justifying public restrictions of personal liberty the liberal harm principle is the one most commonly shared: "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others" (Mill 1974, 68). But the definition of what constitutes "harm" is very vague. The question of what counts as a self-regarding action and what actions, whether of omission or commission, constitute harmful actions subject to regulation is still open, above all as regards

[9] "It is the goal of all political action to enable individuals to pursue valid conceptions of the good and to discourage evil or empty ones." (Raz 1986, 133).

cases of psychological and social harm. In the narrowest interpretation of the harm principle, at the end of the day damage is physical damage or producing a potential climate of physical or psychological violence. As is well known, Mill clearly distinguishes between "harm" and "offense" and maintains that an action should not be restricted because it violated the conventions or morals of a given society. If, instead, we adopt a broader interpretation of the harm principle, we then have to wonder whether a vision of public good is not an integral part of individuals' plans for life (George 1993, 7). If it were so, then they would be damaged by living in a society whose institutions and laws do not correspond to their forms of life. For instance, the moral environment of the marriage is modified when marriage of homosexuals is recognized. But, on the basis of the principle of reciprocity, the same could be said by those that have a different and opposite conception of public good, even if they are in a minority. At this point all that is left to do is to submit revision of the social order of liberties to public debate and public reason so as to avoid the tyranny of absolute power and the anarchy of absolute liberty.

This small map of the diversities of human life is only a non-exhaustive analytical scheme and must not suggest that in practice the distinctions are so easy (Gallangher 1999). In real life, complications and inextricable combinations are present. On the one side there are diversities that are difficult to place and others that belong to more than one category, and on the other it is evident that every human being always participates simultaneously in the three forms of diversity with the possibility of crossover discriminations and rights that are not always compatible (Crenshaw 1991).

As regards the first set of problems, people discuss, for instance, where to place women's rights and gender analysis, whether to place them among diversities due to birth or among ethical ones, or whether to place sexual orientation among diversities due to birth or among ethical ones, distinguishing it from sex.

Cultures have conceptions proper to states of life and very different attitudes, for example, towards age and health. Accordingly diversities due to birth also tend to absorb phenomenological ones, challenging the transversal value of the latter.

Diversities due to birth also tend to absorb ethical diversities, since it is thought that the individual has a liberty of choice limited to the alternatives effectively possible within his or her cultural market. The abstract individual, potentially open to all possible options, is replaced by the contextualized individual limited by the effectively practicable options. There is a potential tendential aporia between liberty of choice and cultural identity.

The religious problem lies somewhere between diversity due to birth and diversity due to ethics. Religion is not only a voluntary choice of an ethical type, but also a cultural and institutional fact. This means that religion has at one and the same time a private dimension and a public dimension. Hence the right to religious liberty can collide with protection of a cultural environment marked by religious identity.

There is thus a struggle between diversities for the conquest of hegemony, with particular reference to cultural and ethical diversity, that is to say to the values of authenticity and autonomy, although the latter – as already stated – should in principle be complementary. Rights and their interpretation thus depend on more general political conceptions than justice and human good.

Liberalism attributes great importance to ethical diversity and tends to consider diversity through birth as irrelevant to the goals of identity problems. The maximum communitarian effort of liberalism leads to cultural structures being considered as the contexts of choice, that is to say as the market of the available values (Kymlicka 1989, 164 ff.). Liberalism believes that our true identity is not that which we discover we have without wanting it but that which we choose in full liberty. Cultures, therefore, should be protected for the purpose of ensuring the liberty of choice of those who belong to them, and not for the purpose of protecting a nonexistent collective identity.

Communitarianism attaches decisive importance to diversity through birth and thinks that our projects for life always have common cultural presuppositions, which we cannot eliminate but find ourselves living in. The liberty of the individual is defended above all because it allows self-discovery of identity and not so much the exercise of autonomy.

The dispute on the existence of collective rights, and not only of individual rights linked to community and cultural contexts, is in substance a chapter of the debate on the prevalence or otherwise of diversities through birth over ethical ones.

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Chapter 3

CONTENT

ABSTRACT

This chapter is dedicated to the content of rights. The starting point is the concept of dignity, as candidate to sum up the content of human rights. The two main approaches, dignity as endowment and dignity deriving from performances, are both necessary to define it. The former arises from rights holders' point of view, and the latter from duty holders' point of view. We discuss also the most recent idea of dignity as equal social rank.

After discussing the meaning of dignity and its normative status, it is necessary to examine the proliferation of rights necessary to protect human beings not in the abstract, but in their various stages of life. In this context the rights generations offer a *prima facie* contradictory frame that would explain a development of human rights practice, i.e. the quest for specificity in protection. Generations proceed by stratification and not by replacement, and this explains why different anthropological theories could converge in the interpretation of a human identikit for human rights holders. Against proliferation it has been proposed minimalist accounts of rights. This position is satisfying only in the context of a discussion of military intervention. From the point of view of determining rights, the human rights practice is certainly maximalist, precisely because of dealing with dignity.

Another aspect of the research on the content of rights regards a more formal question: whether they are claims or liberties or powers or immunities, according to Hohfeldian classification. Rights certainly imply relationships between rights and duties, not only from the point of view of other subjects, but also from the same rights holder point of view, as the risk of abuse of rights may demonstrate.

3.1. HUMAN RIGHTS ARE NOT SEPARATE RIGHTS. GLOBALITY AND DIGNITY

The ever-increasing variety of rights and their polysemy can generate the belief that there is little in common between them, they are not *species* of a single *genus* and ordinary uses of language in this regard are hardly justified. This, indeed, has notoriously been the effect of fragmentation produced by the analyses by Hohfeld (1978) of legal concepts related to legal relations, perhaps against his intentions (Simmonds 1998, 146-148) (see also chapter 3.4). However, the plurality of forms of human rights and their legal protection does not depend on the ambiguity of the concept, but on what they refer to (MacCormick 1983, 171 ff.). The goods to which one is entitled, the required and protected actions, the protected and newly instituted relations produce a lush flourishing of distinct types of rights. Accordingly, one must not seek after unity of the concept, taking a particular group of rights or a specific form of legal relation as being most important, no matter how important they may be, but one must rather refer to that practice of life that rights intend to protect.

This practice is typical of the person who has a sort of global right to rights, that is to say potentially open to all their possible forms. Other living beings, while admitting that they have rights, have them in a limited way. Animals, for example, have a right to life and the right not to be treated cruelly, but not that of liberty of thought or liberty of religion (Galvin 1985; against Rachels 1976). The theory of limited rights is dangerous for people, because it leads to the ever-lurking distinction between human beings with limited rights and human beings with unlimited rights. People's rights do not tolerate nuances or exclusions: either all rights or no rights (Feinberg 1980, 152). The treatment required depends on the practice of life of the rights holder. Animals have rights, but these are not "human rights."

The globality of human rights concerns not only their holder, but also the relationship between the rights themselves. The history of rights is marked by significant interrelationships. Rights never live alone, but are inserted in an increasingly complex network of relations of a normative type. The evolution of a particular type of rights is conditioned by that of all the others and in turn influences them. One can thus speak of a unitary narrative event whose general meaning must be reconstructed each time during the balancing of rights. The globality of rights, which Dworkin has called "integrity," carries with it the requirement that the *raison d'être* of the protection of any particular right also contains the requirement that all other rights must be protected, without exception.

A society that only protected life and not liberty, or vice versa, could not be said to be sensitive to certain rights and not others, and we would have to say that it did not participate in the practice of rights. The globality of rights requires a single reference point that lies in the concept of human dignity.

The connection between human dignity and rights is controversial. If human dignity meant nothing but a summary way to indicate all rights, then it would be a superfluous concept and – according to some – empty, rhetorical and even "stupid" (Pinker 2008). If human dignity were independent of rights, then respect for the human being would not necessarily require recognition of rights, and this may appear an illiberal attitude: once you recognize the principle of autonomy, "dignity" adds nothing (Macklin 2003, 1419). But, if human dignity came down to autonomy, then the Nazi crimes would be a violation of the dignity of the victims just because they were not asked for an informed consent. No doubt lack of respect for a person's life and integrity, as well as the infliction of torture and inhuman or degrading treatment or punishment, are violations of human dignity.

Hence dignity sums up all the rights and all the values associated with them, but in an indeterminate way: "the vague but powerful idea of human dignity" (Dworkin 1977, 198 and 2011, 203-204). Is this its only role? We do not believe so.

Dignity can be related to rights in three main ways: as their foundation; as a source for determining their content; as a yardstick in their balancing, that is to say in the practice of rights. One notices, indeed, that the peculiar characteristics of human rights, i.e. inalienability, non-disposability and inviolability, come directly from dignity, which is a notion that is independent of and logically prior to that of rights.

Dignity is a moral quality that obliges us always to treat a person as an end in himself or herself and never as a means, but its foundation is controversial. Dignity can be seen as an endowment that every human being possesses at least from birth and through the mere fact of being a person, or it may depend on factors that are involved in the progressive historical development of the human being and as a result of human action. These factors can be identified in merit, in virtue, in power, in wealth or rank. In these cases, dignity is not an original endowment, but a performance or its outcome.

According to the conceptions of dignity as an endowment, it belongs to all those who are part of the species called *Homo sapiens*. The empirical characteristics of this species are the external manifestation of a rational nature capable of liberty and, therefore, of performing moral actions. This also applies to

humans who are seriously or wholly impeded in the exercise of rational and moral faculties. In this connection, if it were possible to remove these impediments (and indeed today it is possible in many cases), we should not say that a new member has been added to the human species, but that a person can now fully exercise what is proper to that nature that he or she already possessed.

The difficulty that this concept encounters is constituted by the importance that it gives to nature as a source of rights and duties. As is well known, from this point of view, nature is now more than ever discredited. Even appealing to a "rational nature" seems to be like evoking a kind of centaur, half fact and half value. However, the "practical" advantage of the ontological pathway, and the theory of endowment that is connected to it, is total non-discrimination between beings belonging to the human species. The ontological pathway does not tolerate any discrimination arising from color of skin, gender, state of health, degree of capacities currently held, or intellectual and moral development. All those that belong to the human species have *ipso facto* that particular normative status that is usually designated as "dignity." If instead dignity were dependent on particular personal conditions of life or on particular social circumstances or actions performed, then ample categories of beings undoubtedly belonging to the human species would remain excluded, because they are severely disabled, extremely poor, or members of cultures or ethnic or social groups considered inferior, not to speak of gender discrimination.

Therefore, each alternative concept to the ontological one should achieve the same results on a practical level, i.e. not discriminate between humans, and lay the foundations for their treatment as all having equal dignity. If one agrees – as one should agree – that this ought to be the ethical outcome of theories of human dignity, then the importance of their philosophical justification is resized. At bottom we debate human dignity not in order to satisfy our intellectual curiosity, but to meet our obligations to our fellow human beings and their rights.

One of the paradoxes of the concept of human dignity lies in the observation that our current universalistic ethical beliefs are not fully satisfied by the theoretical justifications that we accept today (Andorno 2011). As a result ethics is freed from meta-ethics and follows its own path. In any case, the endowment theory cannot be entirely abandoned without completely entrusting the recognition of dignity to human decision, which is no less dangerous than recourse to nature.

Human dignity, like self-respect, is a relational property (Luban 2010, 40). We have dignity in relation to someone else. The human being is a sacred being for the other man (Perry 1998, 5). If this is the case, then the endowment theory is clearly not sufficient. The relational character of dignity seen in a practical or

normative sense implies that recognition is one of its constitutive elements. This does not mean that if recognition is lacking or lost, then man loses his dignity, but that recognition is due, and is a moral duty of justice, perhaps the greatest, that man has toward the other man. The full discharge of this duty of justice requires that it also be made manifest in the forms of law and politics. However, the act of recognition confers on dignity a concrete cultural form, with the risk of introducing unjustified and historically conditioned discriminations. Social consensus can exert a paternalistic action, affecting self-esteem. For this reason it is necessary that legal and political recognition of human dignity should always be open to the criticism of reason that is not a prisoner of historical contexts. For full consideration of dignity, respect as recognition is not sufficient: respect as appraisal is also necessary (Darwall 1992, Sennett 2003).

Therefore, the endowment theory must be supplemented by the performance theory if the latter means first and foremost performance on the part of others and of society as a whole that with the act of recognition confer on natural endowment a social status that is always open to moral revision.

The progressive importance taken on by the performance theory, combined with concern over excessive reliance of law and politics on morality, has favored attempts to construct a purely legal-political conception of dignity. This has found its vital core in recognition and protection of the rights proper to constitutional democracy. It follows from this that the relationship between dignity and rights is overturned: it is now rights that confer dignity on people. The more rights people have, the greater social dignity they have.

Jeremy Waldron (2012) has argued that dignity is the normative status of a social rank supported or conferred by law and consisting of a plexus of rights and duties related to the office held. He criticizes both the Kantian vision and the Catholic view (Coughlin 2003-2004) of dignity since both look to the intrinsic value in itself of the person and not his or her social rank. This is a return to an approach that dates back to Roman law, under which a human being is worthy of consideration in relation to his or her status and the way of honoring him or her. But the evolution of rights in modern times has led to an extension to all citizens of this privileged status that was previously reserved for the few. In the *Declaration of the Rights of Man and the Citizen* of the French Revolution there was a witting extension of "dignity," in the sense of the privilege and offices of the aristocracy, to all citizens (in a democracy the citizens are all public officials) through a process of upward equalization. Consequently, modern society rejects the division into castes or classes as the privileged status of a few and aspires to become a society with a single caste, the highest possible, which encompasses all

citizens. Hence, according to Waldron, the most appropriate term to describe this single status is that of legal citizenship, which is a plexus of rights and duties.

Waldron's intent is clearly to transfer onto the legal and political plane the universalistic practical advantages of the ontological theory, breaking away from its uncomfortable metaphysical presuppositions. A society in which there is only one rank can prevent those discriminations that may be allowed by other theories of dignity as a performance. This raises the question of whether a society in which there is only one social rank is not in effect a society without social ranks. The concept of rank implies that there is a plurality of social levels or at least two. When there is only one general status, it means that the very concept of rank is outdated and belongs to an old-fashioned phase of social evolution. But this is only a formal criticism. The real difficulties are others.

The identification of dignity with the set of rights which are in actual fact attributed in social contexts appears like a circular argument: we have dignity because we have inalienable rights, and vice versa. In this way dignity becomes a useless or duplicative concept. If we want it to continue to have significance, it must be possible to distinguish dignity from rights, which in turn are a sign of social consideration of the human person. Besides, in the name of what can it be said that the allocation of rights is a duty toward the human person? In the name of what can we criticize a society that does not recognize certain rights, even if it defends the equality of all citizens without distinction of classes?

In the conception of dignity as rank its normative statute is that proper to positive morality and positive law. In effect, the notion of human dignity always has a cultural character. Every culture exhibits its own idea of human dignity because this is its main task, even though not all cultures connect it to rights. However, there is no denying that the notion of human dignity also belongs to critical morality, without which the evolution and development of cultures are not possible. Citizens' rights are not simply the extension of the privileges once reserved for the aristocracy, but also a different and more adequate way of understanding human dignity. It was the critical morality of the Enlightenment that laid the foundations of this legal and political revolution.

Performance theories cannot prevent inequality sneaking in alongside formal equality, because in doing and acting men are not at all equal to each other. It is not enough to have a social role: it must be honored with behavior, and then we will have good or bad citizens, and worthy or unworthy public officials or rulers, and it is this difference that counts, and must count, for a performance theory. If a public official can be worthy or unworthy of his or her role, then dignity cannot be identified purely and simply with the role.

The ongoing process of constitutionalization of the person can only be understood properly if it does not claim to solve the problem of the dignity of the whole person wholly in the legal and political dimension, because in that case we would lack the ethical resources for a critique of law and politics. The ultimate meaning of the concept of dignity lies in leaving open the possibility of contesting legal and political choices in the name of the value of the human person, who therefore must maintain his or her ethical independence from political and legal institutions. The defense of human dignity does not always necessarily lead to rights, but can also be a limit to the exercise of rights (McCrudden 2008). I too believe that democratic citizenship is currently the best way to respect human dignity on the legal and political plane, but I do not want to deprive myself of the opportunity to denounce its limits.

This incomplete exploration of some dimensions of human dignity in its relations with rights leads to very problematic results that it is very difficult to hold together. On the one hand it should be noted that the present sense of human dignity lies wholly in consideration of the human being as a person. This person does not depend for his or her intrinsic value on social recognition, which, however, is due to him or her. On the other hand, it is also true that the forms and modes of this recognition construct the self-representation of personhood and tend to imprison it in a social image that can become a cage to escape from. On one side, dignity is something inherent in the person, but on the other it depends on his or her behavior, that is to say being faithful to what he or she is, or to his or her social role, or to his or her identity, which is not always freely chosen. On one side, it is a set of rights or the "right to have rights," but on the other it is a source of duties and responsibility to oneself and to others, so much so that perhaps the latter is its specific meaning. The ethics of rights thus springs from an original duty to recognize the other and his or her rights (Fletcher 1984), as well as to exercise one's own rights so as not to forfeit one's self-respect.

Dignity as happiness does not have a definable content. Whenever an attempt is made to circumscribe it, something is lost that undoubtedly belongs to it. If one places the emphasis on fundamental human interests, one runs the risk of forgetting that it is also proper to the dignity of the person to go against one's own interests and put oneself in others' shoes or take responsibility for the good of others. If one places the emphasis on the capacity to act morally and concentrates on the values of autonomy and liberty (Griffin 2008, 32-33), one neglects the fact that there are other important human goods, such as knowledge or avoiding suffering, without which dignity is impaired. If one seeks dignity in excellence or in fullness of human fulfillment, one no longer recognizes the dignity present in

the poor, the suffering or the child. One must not reduce the person to a part of the person.

We must therefore conclude that, while the concept of endowment contains the minimal meaning of dignity that is present in all human beings as such, the concept of performance reminds us that dignity as fulfillment, unlike rights, is not equal for everyone, since it depends on the recognition that is received from society and from the use that everyone makes of his or her natural endowment and his or her role in society.

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3.2. HUMAN RIGHTS ARE NOT BASED ON A SINGLE ANTHROPOLOGY. INDIVIDUALISM, VULNERABILITY AND INTERDEPENDENCE

In the framework of the human rights practice it is possible to find rights in which the holder is not just a human being. It is the case of the rights of "peoples" concerning self-determination and the use of natural resources, or minority rights, or future generations' rights. In addition to that – and in force of the principle of non discrimination and because of the difficulties to define neatly *genus* and *species* – human rights exert also influence on the sphere of animal protection, even though, in the latter case, it would be appropriate to speak of "animal rights." The claim of protection which inspires human rights also extends to inanimate nature. Anyway, the extension of the logic of human rights to non-human beings can be considered a secondary application. It is in fact convincing the idea that the central case for human rights holders is just the human being. From this point of

view, the common feature between "peoples," "minorities" and "generations" is their collective character refereeing to human beings.

As the problematic of rights and diversity in human life has shown, one of the most crucial points in the research on human rights is then "what counts as a human being or what counts as 'human'." It is an open-question in the context of the human rights practice, and its answer is permanently in discussion because of the normative character of the practice.

A possible answer to the question concentrates on the possibility of identifying one suitable anthropological perspective for that human practice. In other words, it would be useful to identify which face has the human right holder, a sort of human identikit. In the context of a theory of human rights, the expectation of identifying just one anthropology would be justified, for reasons of theoretical coherence and simplification. But as we have seen in chapter 2.4 in the human rights practice is easy to observe different human pictures together, coming from different anthropologies, sometimes in conflict between them, sometimes clearly complementary among them. The final account is not clear, congruous, unproblematic and completely convincing, but this feature fits with a dynamic practice. In part, the reason is that the human rights practice was not established in advance and following a linear abstract project, as sometime the natural law theory or the utopian readings of rights seem to suggest.

On the other hand, the merging of different human pictures is neither the outcome of a blind evolution nor a process of natural selection. The human rights practice is rather the product of a process of stratification driven by an immanent goal which confers a whole meaning to the practice, and makes it able to exclude some inadequate inputs and to stimulate temporary revisions and amendments. It depends on the discursive character of the practice: human rights are reasons for acting in order to protect human beings, and that protection is not something static, achieved once and forever. It needs to take into account concrete conditions and possibilities, a sort of fine-tuning between history and reasons. Notwithstanding, the convergence between history and reasons is always provisional and the equilibrium between them depends on who participates to the practice and on its consequences. In part, the dynamic character of the practice can be observed looking at the different models of human beings that can be identified in the evolution of the human rights practice. From this point of view, the history of the human rights practice requires a long run and holistic perspective.

Even if there are relevant differences between natural rights and human rights, historically and theoretically both categories are linked to the idea of subjective rights, and this legal concept is clearly linked to an idea of human

beings. The origin of subjective rights may be traced in the Western evolution of Roman law at the end of the Middle Age. Hugo Grotius – and before him Francisco de Vitoria [1483-1546] and the Second Scholastic, following the Franciscan conceptualization of poverty – gave form, for the first time, to the idea that someone has a right (*jus*). Before that, *jus* was understood as an objective concept: *jus* was "the right thing," what is right in certain cases (Villey 1975). This topic is out of our concern here (see chapter 1.1), but from our point of view in this chapter it is worth noticing that the main problem with subjective rights is to determine which distinguishing features the subject has to show when claiming a right. The classical answer is: the *dominium sui*, i.e., the ownership of one's own actions, the ability to command them for the sake of an end. This presupposes knowledge and volition. To own one's actions is nothing else than self-determination, one of the names of freedom. Only who is *dominus sui* may have *potestas in alio* (ownership of other persons), *potestas in re* (ownership of other things). In the context of the first discovery of radically different humans, the Indians in America, the question was: are they owners in private and public spheres? If yes, in spite of strong cultural differences, they have the same rights Europeans have (Vitoria 1967). The link between self-determination and rights – declined afterwards in the form of the necessary but controversial relation between freedom and property – shows a picture of the human being as single, independent, strong in himself. The image is that of a small sovereign in his kingdom, claiming the protection of his rights against interferences from others: political institutions, or other single individuals. Some of his most important rights are functional to negotiate the social contract conditions, because only self-obligation is a ground able to create duties in the world of single individuals owners. "[T]he individual's capacities and attributes owe nothing to any other individual or to any social relationship; they are alone. The contractarian individual necessarily is the proprietor of his person and his attributes or, in C. B. Macpherson's famous description, he is a possessive individual. The individual owns his body and his capacities as pieces of property, just as he owns material property" (Pateman 1988, 55).

In this context, human rights assume the form of shields for resisting the interference of another person or of the public power without special justifications (negative freedom), or the right to exercise a power in the public or in the private sphere (positive freedom). Many human rights today as well are understood under one of these two mentioned types of rights: liberty rights and personal security, no arbitrary arrest, protection of privacy in family, home, correspondence, right to property, right not to be genetically manipulated, etc.

This version of rights is also in accordance with some ideological presuppositions of the American tradition – as distinguished from the French tradition of Man's Rights – but, this time, the main emphasis is on the religious freedom, considered the root of any other kind of freedom: religious freedom is the right to judge by ourselves what it is good and right for us. What is at stake here is not any more a *suum* to preserve but a self to realize autonomously (see chapter 2.4). The anthropological keys of rights were isolation and self-sufficiency, even from the moral point of view. Rights had mainly the task to warrant independence without interference. It is not the case of elaborating on this point further, but it is well known that in the Aristotelian tradition the moral knowledge is – on the contrary – reached in the political community: this is the reason why the communitarian tradition has emphasized the inescapable belonging to moral communities or traditions, even though some times this trend has led to the denial of the idea of human rights for individuals (MacIntyre 2007, 69).

It is worth distinguishing in the liberal tradition its institutional dimension – together with its ability to defend individuals from political power – and its anthropological assumptions. The superiority of the liberal tradition is located at the institutional level: it is able to affirm the priority of the individual over the political power acting for public reasons. In this sense, rights are correctly trumps against utilitarian or other collectivist justifications for laws (Dworkin 1977, 269). From this point of view, communitarian theories are less convincing than liberal ones. The same cannot be said of the liberal anthropology of rights, that is clearly controversial looking at human rights from at least three perspectives.

The first defect of the liberal anthropological account results from a honest reading of human rights recognized to human beings, and it requires a different reading of the concept of freedom. The idea of individuals using their rights as shields to defend their liberty is a little bit abstract, for it does not consider all the necessary (even though not sufficient) conditions for exercising it. From this point of view, the enjoyment of economic, cultural and social rights can be understood as a factual condition for exercising freedom: from education to shelter and food, housing, clothing, together with political liberties (Sen 2004). In short, it is free to fast only who has something to eat. The exercise of freedom requires some basic conditions, the kind of rights that we are used to call "basic rights" (Shue 1980).

A parallel evolution could be observed looking at the relationship between civil and political rights, on the one hand, and economic and social rights, on the other. For a long time, the opposition between the two main treaties – the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social, and Cultural Rights*, within the UN Human

Rights system – has been interpreted as a reason for considering liberty and social rights incompatible. But historically it is clear that social rights were never excluded from the list of rights, as the *Universal Declaration of Human Rights* in 1948 and the same content of the treaties confirm. Each of these documents includes both categories of rights. We are not saying that between these two categories of rights there are not differences, but that they are jointly relevant for the practice. The complementarity of these two categories is confirmed by a character developed by the human rights practice, i.e. the rights indivisibility, expressed by the idea according to which whoever is entitled to a certain human right is entitled to have all the others. This idea not only derives from the same concept of human rights, but is also the content of an international agreement (*Vienna Declaration and Program of Action,* 25th June 1993).

The second defect of the possessive and individualistic account of human beings is linked to the idea of moral agency. Interesting considerations against the liberal anthropology come in this field from the feminist criticisms to the so-called ethics of rights and its moral tradition, which is blamed to have caused women subordination. The point here is that the idea of a human being as an autonomous, self-sufficient and single subject, comes from an abstract ideology (Meyers 1998, 373). Human beings are embedded in a web of relationships, interdependencies, links that determine and limit human identity: some voluntarily, others involuntarily (against the idea of contractarian agreement as the only source of moral obligations); some among equals, some with dependents. Obviously, it is not intended to deny any form of autonomy, but rather to propose a different concept of autonomy in which links and limits are the starting point, and not rivals.

As is well known, in a first phase, some feminist thinkers affirmed the opposition between the ethics of rights and the ethics of care, and the priority of the last one. The ethics of care is characterized by an approach to moral problems sensitive to interdependence and responsibilities. The ethics of rights is an approach in which the main problem is to determine which rights have to be assigned to each individual. This contrast, as is well known, has been emphasized by the *Difference Feminism*. Other trends – as the radical and postcolonial feminisms – have assumed rights as the main tool for eliminating discrimination against women. These approaches can be combined because they can play a role in different fields.

What is worth noticing is that this kind of criticism has underlined the weakness of a certain notion of moral agency in which the weight of relationships is decisively irrelevant. The human being is not only a single and isolated entity,

but she is embedded in relations with others. These relationships are not always – even though sometimes they are – conflicting, nor they are always driven by the logic of reciprocity (*do ut des*), but they answer to the logic of responsibility and co-responsibility. We are responsible for the future generations, even though we cannot expect any sort of compensation from their part. This kind of considerations seems to turn attention from the right holder to the duty holder, and our main focus in this chapter is on the first. Nevertheless, the anthropology of human rights involves both of them, and one would wonder which kinds of rights belong to a human being who is responsible for others.

It is even trivial to recognize that the rights holder is someone who needs in some way help and assistance, otherwise she would not claim protection for a right, any protection would be superfluous. The right holder is in this sense vulnerable, weak, needy. The same idea of right recalls our dependency from the cooperation with others (not only other individuals but also social and political institutions). Not every human need has to be recognized as a right, but only those goods and interests, which are potentially threatened or supported by other human beings. According to Sen, rights are goods of a certain importance and socially influenceable (Sen 2004, 329).

The idea of vulnerability is not new. However, the level of vulnerability has grown in the last decades, as well as its perception. From the Second World War the perception of the human rights holder is that of a radical exposure to radical evils: nuclear weapons, natural disasters, technological risks, terroristic attacks. Threats to integrity are today subtle and insidious: it is not only the right against arbitrary arrest or the prohibition of torture, but the right not to be genetically manipulated, to protect personal data, and other invasive forms of violation of freedom. Poverty is without doubt a radical form of vulnerability, because it eliminates any possibility of human flourishing and participation.

Vulnerability increases also because of the global dimension of interdependency. By becoming aware of the weakness of human beings as rights holders, the perception of risks is amplified. Paradoxically, it is the idea of dignity to be considered the ground for human rights. Dignity then cannot be connected to self-sufficiency and autarchy. The idea of human dignity is not in contrast with the weakness of human beings. As Nussbaum puts it, it is not the separateness of moral and natural features and the prevalence of the first one that is worthy of recognition of rights, but it is our vulnerability to deserve respect and protection (Nussbaum 2006, 74-75). Rights are neither shields nor awards, but tools.

Liberty and self-determination are part of the meaning of human rights, but they do not exhaust their content. The core of human rights practice is as well linked to our dependencies on others. It is not an atomistic anthropology which

explains the existence of rights, but rather the idea that each of us depends on others, and that the rights of others depend on us.

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3.3. HUMAN RIGHTS ARE NOT MINIMALIST. ON URGENT AND NON URGENT RIGHTS

From time to time someone proposes the idea that human rights ought to be "minimalist." The minimalist approach is a strategy oriented to solve some problems coming from the very demanding character of human rights. The intuitive reason why some thinkers support that strategy is the assumption that the agreement on rights would be easier if some controversial points under debate

were eliminated. In general, minimalism is a solution for disputed rights as well as a strategy against the proliferation of rights.

Minimalism is not only a strategy in the context of human rights practice. A thin/minimalist approach to values, goods, rights, duties, seems to be less problematic than a thick/maximalist one (Walzer 1994). Behind every proposal of minimalism there is the idea that the maximum consent can be reached by eliminating controversial elements and looking for the "essential." In the case of rights it seems that the wider is the range of recognized rights, the less are the chances of a common consent on them. Obviously, the crucial point is to distinguish among rights those which are essential, and those which are not. The most important rights would be called "basic," "urgent," or "fundamental" human rights. They would express the core of human rights practice.

Nevertheless, it is worth noticing that the minimalist reading of human rights is not an account of the very practice of human rights, but rather a proposal for amending some problems concerning that practice. A honest look at the human rights practice shows straightforwardly that this is very far from being minimalist: it includes a very high number of rights different in content and structure, and relevant in a very wide range of spheres of protection.

The strategy opposite to minimalism is the "rights holism." It affirms that the acceptance of any specific right implies the acceptance of all the others because rights are interconnected (Caney 2005, 83). Rights are related to each other from many points of view. A logical relationship between two rights exists when one is necessary for the other: the right to privacy as inviolability of residence implies the right to housing (Fabre 2000, 123-4). An empirical relationship exists when the best way to protect a right is to keep another one: in order to guarantee the right to life we need to ensure healthcare. A normative relationship exists when the rationale of one right grounds one right, as in the case of freedom of speech and religious freedom.

On the contrary, minimalist approaches are grounded on the suggestion that rights can be separated. But it is difficult to find a satisfying minimalist theory of human rights, because they seem not to exist in isolation. This is due to the fact that when a subject has a right she is normally entitled to have all the others. Notwithstanding, that universal entitlement does not correspond totally to the implementation level. Even if the recognition is universal (everyone who is member of a certain category will have recognized the whole set of rights of the category), their implementation depends on ascertaining factual conditions through the practice (who is really a woman, or an elder, or a migrant). But, according to rights holism, human rights stand or fall *as a package* (Caney 2005, 83). On the one hand, it depends on their belonging to the whole practice. The

practice has internal goals and a common meaning. In addition to that, it develops through continuous implementations, and precedent applications are enriched and transformed in time. In this advancement there is a propensity towards excellence, in the direction of identifying the best use of its practical aim (MacIntyre 2007). In this context, the preference for rights holism derives from the awareness of the requirements of the human rights practice, as has been confirmed by the *World Conference on Human Rights*, which acknowledges the indivisibility of rights and their interdependence in the so-called *Vienna Declaration and Programme of Action* of 25 June 1993, reached after fifty years of human rights implementation. On the other hand, as long as the human rights practice central concern is to protect individuals and their dignity, it tends to assure not only conditions of subsistence, but the flourishing of person. From this point of view, a theory of human rights practice differs from the classic natural rights theories: the core of human rights is not limited to self-conservation, even though it includes that. It is not the survival of human nature at stake in the human rights practice, but the protection of human dignity, and this latter aim could never be completely reached. It is obvious that human nature is the starting point of human dignity, but the latter is something more and of a different quality compared to the former. It includes the personhood and its development in the social interaction. It is not a case that theories that have insisted on "basic" rights, at the end of the day, include many other rights that cannot be defined as subsistence rights, embracing self-determination, political participation, liberty of conscience, and so on (Shue 1980, Griffin 2001, Nussbaum and Sen 1993; Finnis 2011). If we assume the specific perspective of the content of rights, and we assume it to be the only parameter for distinction, we can affirm that natural rights theories can be absorbed by theories of human rights practice but not the opposite.

In any case, the maximalist trend of human rights practice does not mean that everything which is good for human beings is a human right. In other words, not every human good has to be protected as a human right. In the perspective of rights as "others' regarding," human interests become human rights only if they are able to generate duties on others and their violation constitutes an offense for someone, or in cases of compensation for past discriminations. From the content perspective, the distinction between human rights theories and some natural rights theories depends on the meaning and use of what is a right (Tasioulas 2010, 112-113).

Anyway, from the content point of view, what is at stake in the human rights practice is protecting human person without discrimination in her singleness and specificity. This is evident if we observe the dominant trends in rights from the

Second World War on, and one of them in particular: the process of specification (Bobbio 1996, 19-20). According to it, it is recognized that the protection of the person must be realized considering the specificity of conditions in which the person finds herself, and these conditions are very different one from another. This is the reason why the process of rights implementation has followed the path of the proliferation of rights, for the aim of protecting people defined in the most concrete possible way: as children, as women, as people with disabilities, as workers, as prisoners, as elders, as migrants. This development is not by accident, but each vindication can be explained both on the basis of historical facts – as long as human rights originate from violations and discriminations –, and of reasonable argumentations: against race or gender discrimination, about the opportunity of protecting human beings in this or that situation or this or that way (chapter 2.4).

Nevertheless, a theory of the human rights practice plausibly needs to introduce an order in the wide variety of human rights. One attempt to it is the idea of "generations of rights," that presents a sort of classification of human rights. It is possible to mention at least four generations: the first, of freedom rights; the second, of social and economic rights; the third of rights linked to peace and development; the fourth, of rights protecting risks deriving from technological and scientific progress. It is worth noticing that rights generations have developed through stratifications, not by replacements: the latters have not supplanted the formers, but they are compatible among them.

The traditional division into generations persuades people to think that rights are distinct and separable on different grounds: for the value by which they are inspired (freedom, equality, respect for future generations and for inanimate nature), the modalities of protection (non-interference, interventionism), the normative structure (mandatory negative rights *erga omnes*, specific rights to positive services).

As is well known, the difference between first and second generation of rights has been so much emphasized to put them in a strong opposition (Hayek 1976). But the taxonomy of rights in conflicting generations is problematic because of their co-existence and *prima facie* compatibility. Another perplexity depends on the fact that some rights tend to change their position in classification: the right to a job seems to be sometimes the typical social right that requires state efforts to guarantee it or to substitute with auxiliary provisions. But other times it is understood as a right to freedom, when the focus is placed on the freedom of choosing a job (see art. 15 of the *Charter of Fundamental Rights of the European Union*, "Freedom to choose an occupation and right to engage in work," in the liberty section). The same can be said on the right to health: it could be a right to

health assistance, but also to choose health treatments and to decide whether to be treated or not.

From the point of view of their structure, freedom rights aim to protect a space of self-determination, excluding interferences from outside. Social rights instead are rights to state or other institutions benefits. These second generation rights are often referred to as positive rights to distinguish them from first generation rights, often called negative liberties. In term of the current analysis, it is important to note that social rights require the comparison with others in order to establish average of health, education, and living condition, and usually they take the form of social benefits. This is the reason why social rights are often founded on solidarity and cooperation. Other justifications for social rights can be the principle of equality or the freedom from want.

Economic and social rights have been also identified as "antipoverty rights." In this fashion, they are understood as non-comparative standards of wellbeing: to food, clothing, housing, shelter, and they seem not to include equality (Beitz 2009, 161). Nevertheless, the two categories of rights do not completely coincide: the right to a fair salary is not an antipoverty right (at least, directly) but it is a social and economic right (and performs an important role against poverty). It seems that to speak of "antipoverty rights" is to introduce an extra-information that complicates the classification of rights, but antipoverty makes actually reference to the purpose that many rights aim at. In addition to that, even though levelling down the standard of equality to a minimal measure, i.e. basic needs, antipoverty rights perform without doubt a distributive role. Distributive justice is inspired by the principle of equality: as every human being, also this one needs clothing and food. It is really difficult to disregard equality in the practice of human rights, even though it performs different roles in the context of social rights and the one of anti-discriminatory rights. In the first case it would be the equality of (vital) resources to be involved; in the second case, equality of opportunities.

In many cases the demand of goods and services requested by social and economic rights turns into state benefits as long as the state performs important roles of social assistance. Even assuming this key role for the state in the protection of social rights, it does not result that social rights do not belong to the international practice of human rights, as long as states are the main (but not the only) international agents in that practice. But it is worth noticing that the state rationale is cooperation among citizens and human beings, and, indeed, when the state is not able to meet those owed needs, the logic of rights claims for subsidiary

duty holders, to be found among the other participants to the practice. In the light of the human rights practice, the role of states is relevant but it is not exclusive.

It can be objected that this mechanism strengthens a risk of uncertainty: it is not determined once forever who is the duty holder. A common criticism against social rights affirms that they give rise to "imperfect" duties, because holder and/or the exact obligation involved are not clearly defined. In the case of social rights in particular there are two reasons for this qualification. First they do not generate a definitive duty on states and, second, the duty is easily defeated for reasons of scarce resources. In these cases, they are qualified as "manifesto" rights. If every principle that defines a right "always by implication defines some obligations" (O'Neill 1996, 128, and 2005) then, when the duty holders are not easily identifiable, affirming that one has rights is nothing but a rhetorical exercise. This reproach has often been counterbalanced by the observation that freedom rights too, contrary to what may intuitively appear to be the case, need institutions and adequate resources, and imply also an active role from the duty holder side, at least the state vigilance on possible interference (Holmes and Sunstein 1999). The only difference is that freedom rights need institutions mainly at the pathological moment of their violation, while social rights need them *ab initio*. "Without institutions, supposed universal rights to goods or services are radically incomplete. To institutionalize them is not just to secure the 'backing' of the law and the courts, but to define and allocate obligations to contribute and provide the relevant goods and services, and so to fix the very shape of these rights and obligations." (O'Neill 1996, 134).

Nevertheless, the idea, according to which a perfect obligation exists only if the holder of the related duty and the required behaviour are both specified, does not explain the notion of a right and its use in the human rights practice. It does not take seriously the normative character of rights: a right is a *claim*, a normative demand, a ground for determination of duties and obligations on others. The act of claiming for the purpose of obtaining protection is precisely the role of any right, not its presupposition. The criticism treats rights as isolated facts, disjointed from co-related duties. The fact that the corresponding obligation in many cases is not identified simply means that what is claimed in the form of a right requires that actions have to be taken to determine it, and this is the role of the practice. Additionally, the practice can make recourse to different actions: for some rights the best way may not be legislation, but something else, like agitation or public discussion, with the purpose of changing the behaviour of who is violating human rights (Sen 2004).

The objection does not work from the strictly legal point of view. The legal dimension of the human rights practice is a dynamic process. It is possible that

rights recognized in a legal system – endowed with primary normative guarantees – are not effectively protected by secondary guarantees – modalities of realization and possible sanctions for violation. This lack seems to originate normative gaps that must be integrated specially through adjudication (Ferrajoli 2001, 1-40). In any case, a right is the ground of a duty (Raz 1988, 170-171), such that if the corresponding duty is not (yet) identified, it is necessary (a rational necessity) to do so. Not accepting this means ignoring the normative character of rights and the fact that rights belong to a complex practice. As has already been mentioned, the dimension of the concrete enactment of rights, of their implementation, is obviously significant for the practice. However, as well as the existence of rights is not denied by their violations, inadequate implementation does not determine the extinction of rights, which continue to exert their normative force. And from this point of view, freedom rights and social rights are not distinguishable. The cost of rights is irrelevant from the normative point of view, even though it is relevant for their implementation (Tasioulas 2010, 115).

The relationship between freedom rights or first-generation rights and social rights or second-generation rights is connected to another important area of interest for minimalist theories: indeed, the social justice-legal justice dichotomy is based on that distinction. Legal justice includes mainly freedom rights and rights connected to the *rule of law*; social justice consists of a wide range of rights inspired by the idea of distributive justice (Miller 1976, 22). On the basis of the distinction between the domestic domain of justice and justice beyond borders, it seems that domestic justice is both legal and social, whereas the possibility of international principles of distributive justice is very controversial (Miller 2005). If we accept the rights holism, the whole consideration of human rights (including the all set of generations) can be taken as the content of a global social justice (Clapham 2007, 162). But this thesis is too demanding (Beitz 2009, 142-143). International justice seems better to be defined as involving exclusively a form of legal justice. In particular, a global social justice seems to violate the respect for pluralism in the international arena,[1] and would support again the argument for minimalism. On the one hand, it is possible to observe that social rights are not the only content of social justice, but just a part of it. Their identification is the result of the logical fallacy of taking the part for the whole. Accepting that social justice is not only a question of social rights, we can accept the idea of rights holism independently from endorsing a theory of global social justice (but this is

[1] As is well known Michael Walzer has developed the idea that the moral discourses is both thin and thick. Thinness and intensity go together, thickness and complexity too. His idea is that any full account of how social goods ought to be distributed will be maximalist (Walzer 1994, 21).

not our topic here). On the other hand, as long as the problem is based on the difference between the international and the domestic domain, it is interesting to further analyse this point in the context of another of the backgrounds for minimalist theories: the political conceptions of human rights.

As it is well known, these include a group of theories in which human rights are defined in the light of their effect on political institutions, being human rights reasons for national and/or transnational and/or international political action. In particular, human rights seem to be correctly understood as reasons to be followed by international agents when domestic governments fail to act (Beitz 2009, 173). In the context of political conceptions of human rights, the state is not only an actor that can violate human rights (and at the same time human rights defenders are not only non-state actors), but it can be also an instrument for protecting human rights against other violators (institutional or not). Human rights are reasons for attributing duties to peoples (Rawls 1999b), states (Raz 1988), international coercive systems (Pogge 2002): those duties are not exclusive. In this sense human rights violations would provide inputs for international interventions, but also reasons for state action when international agents violate human rights.[2] It is obvious that the crucial point here is the meaning of "intervention," question which we have to put into brackets because its answer deserves more attention (chapter 4.3).

What is worth noticing here is that the wider is the scope of human rights, the more extensive is the opportunity for any sort of international intervention, and then the more convenient appears to be minimalist versions of human rights. In this context, it would be particularly appreciated the exclusion of social justice from the international domain, in order to limit the pretexts for international interventions would be copious. As Beitz puts it "it is not unreasonable to expect the requirements of social justice, at the level of institutions, laws, and policies, to vary across societies in ways that respond to differences in the economic, social, and cultural background" (Beitz 2009, 143). It is clear now that the most plausible reason for a minimalist revision of human rights is motivated by the respect for international pluralism, one of the aspects of the wide problem of cultural acceptability of human rights. The issue is not whether different cultures are able to use the language of rights (that is a fact), but rather whether human rights reflect a cultural biased system of values, those of Western liberal democracies or not. If it is already hard to show that freedom rights are not biased, it is even more difficult to show that social justice is not.

[2] It is licit to aspire to contest violations of international forces in occupied territories. This is one of the problems of the right to access to justice.

In part the problem is not correctly framed, though. Unlike natural rights, human rights have a birthplace, are developed according to the law of time, space and conventions, even though they are also the fruit of convergences among different traditions. Accordingly, rights are inevitably conditioned by the features of the community in which they develop. The question is whether the genesis of rights definitively determines their identity and content. The fact that a concept has a certain origin does not mean that it cannot become universal. In other words, that something is inscribed in the genesis of human rights does not necessarily mean that it is also inscribed in their structure. The crucial point is whether the human rights practice, as an institutionalized practice, is able to amend the cultural limits of human rights, i.e. to avoid parochial uses of the human rights practice (Buchanan 2009). In any case, it has to be admitted that the human rights practice is now the result of a wide international interaction, not only driven by Western countries. The simple fact that states make restrictions to international agreements is the proof of a dissent compatible with the acceptance of the practice.

Among the different minimalist proposals that face the problem of pluralism, Rawls' theory of international justice occupies a relevant role. According to *The Law of Peoples*, there are some fair principles of international justice accepted by liberal democracies and decent states (not aggressive, but non democratic states with some forms of popular consultation). These latter states – but even benevolent absolutisms – have to recognize some human rights as principles of the *Law of Peoples*, but not all of them. The reduced list of human rights are called "urgent" rights: a right to subsistence, a right not to be enslaved, a right not to be a serf, the freedom from genocide and ethnic murder, a right to a sufficient measure of liberty (Rawls 1999b, 65). This account has been attacked by different perspectives, not only for reasons of internal coherence with the rest of the Rawlsian ambitious theory of domestic justice (Caney 2005, 78-85).

What is worth noticing here is that the Rawlsian proposal represents only a little contribution to a normative theory of international justice, as long as he just proposes principles that form part of the international legal system, particularly as the content of *jus cogens*, i.e. as compelling international law incompatible with the self-protecting principle of reciprocity. The problem is not if his international theory of justice is not sufficiently ambitious, but if it is just a *normative* theory of justice in the same terms of *A Theory of Justice* (Rawls 1999a). On the contrary, it seems to be a good account of what is mandatory in the international legal system. If this intuition is correct, the point is that for sure the human rights practice is minimalist: how to harmonize the maximalist and the minimalist readings of

human rights, both plausible? The problem is neither how to combine pluralism and the value of international toleration, nor whether the object of toleration are individuals or communities, nor whether pluralism in international domain is similar to domestic pluralism or not (Beitz 2009, 144-159). All those are abstract questions. The very issue is once more the possibility of intervention because of violation of human rights. And it is clear that in this framework the human rights practice tends to be minimalist. In part the reason is that the same word "intervention," even though with the "humanitarian" qualification, invokes immediately not only military invasion, but simply coercive external interferences. Then one may wonder which is the best solution: letting the current violations go on or causing new violations by external impositions? The topic will be discussed in deph in the last chapter. We can conclude noticing that as far as the content of human rights is concerned, the practice tends to be shaped as maximalist. But as far as the means for enforcing human rights are taken into consideration (and in particular the possibility of intervention), the same practice tends to be shaped as minimalist. This character helps to explain the difference between the two different levels, and the controversial nature of the second one. The point is admitting the legitimacy of some forms of international intervention in case of state violations of human rights, following partially the political conception of human rights. The very challenge for human rights practice will be then to find ways of intervention that are not – at the same time – violations of human rights.

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3.4. HUMAN RIGHTS ARE NOT ONLY CLAIMS, BUT ALSO DUTIES. THE RISK OF ABUSE OF RIGHTS

The most important questions concerning the content of human rights seem to be "whose rights" and "which rights," but one cannot avoid an enquiry into "what means to have a right." In order to answer to this latter question, it is again pertinent the difference between moral rights and legal rights. The enquiry on what having a right means regards mainly the second case, i.e. the right holder's normative position and other legal consequences derived from the claim. Nevertheless, as long as moral rights are justifications for legal rights, both expressions indicate the same thing from two different points of view. The first expression indicates the moral *status*, the second one refers to the owed protection. As we will see in the following pages, at the end of the day, both dimensions go always together.

As it is well known, the classic debate on the language of legal rights finds in Hohfeld's analysis a pivotal reference (Hohfeld 1978). He identifies at least four possible meanings of "right": claim (right in the strictest sense), privilege, power, and immunity. According to Hohfeld, these four meanings are linked to four correlated positions: duty, no-right, liability, disability. Each of the four meanings of right implies always one of the correlated positions. It means that for any right there is a duty holder, for any privilege, a subject with no-right, for any power there is a liable subject, for any immunity someone who is not legally able to act. Following this approach rights are three-terms relations. The three elements are the right holder, the correlative position and the object of the right, something that is good for the right-holder. This reading offers a good contribution to clarify the rights language and enlightens the relational status of legal rights: as they are able to modify the normative positions of different subjects (human or institutional), rights are not relevant only for the right-holder. Legal rights refer simultaneously to the duty holders and have an object.

Hohfeld's approach leads to another important conclusion about human rights, i.e. that rights are able to introduce changes in the social/legal system. A right is a reason for a duty, a reason for excluding the power of others, a reason for finding someone who is liable or non legally able to act, even though it is not yet clear who and how that correlativity will be completed, because the direction is not univocal. The same right can be completed by different correlative normative positions in different times or contexts: a claim would require a no-right, or a duty, and so on. It depends on the most convenient form of protection for that right in those circumstances. Being rights normative reasons for actions,

they are compatible with different forms of protection, not just one. For this reason, the non-correlative rights language is also suitable in the context of the human rights practice. It well expresses the idea that someone has a right to some good and that its legal consequences are to be determined through the practice. In fact, practice is essential in the process of rights determination. In legal terms, it is also possible to say that recognized rights produce normative gaps in the legal system (Ferrajoli 1998), gaps that must be filled with proper legal tools in consideration of the concrete context. But this is possible only if we assume that law is a practice and that there is something that unifies the different legal relationships. In other words, it is necessary to know what having a right means (Finnis 2011, VIII, 2) and this is not compatible with a formal approach to law.

In fact, Hohfeld's analysis of the language of rights is usually combined with theories that are able to answer to that question. The most common approaches are the choice theory (Hart 1982,183) and the interest theory (MacCormick 1977, 192) (see chapter 1.3). As it is well known, this debate reproduces the conflict between two main positions regarding the concept of public subjective rights, in the German public law debate at the end of XIX century. The conflict regards the prevalence of individual's will, on the one hand, or individual's interests, on the other hand, in the process of assigning/recognizing rights. The legal system allocates rights in presence of relevant choices or important interests. The first reason why justifications of rights are relevant for their translation in legal rights is precisely this. In fact, the prevalence of rights as individual choices would tend to be translated in powers and immunities; the prevalence of rights as interests would be translated in claims and privileges, but the contrary is also true. It is worth noticing that the prevalence of the agent's choices emphasizes the belief according to which rights respond to agent's power, as the natural rights theories generally asserted.[3] But rights are also needs to meet and vulnerabilities to protect. In some way, even freedom is a benefit for the individual and her dignity. Then, the interest theory would absorb the choice theory, but not the contrary, and in this sense the former theory is superior.[4] On the other hand, interest's theories risk to become paternalistic. What is most important, rights are goods that the legal systems recognize, not only as goods for individuals, but also for the domestic and the international community. Human rights are neither powers of the natural man (as in natural rights theory), nor individual claims against the state (as liberal

[3] The idea according to which a right is a power on what its holder has or what is due to him belongs to Francisco Suárez [1548-1617] (*De Legibus*, I, II, 5).

[4] When Leif Wenar (2005, 241-242) analyses the weak side of interest theories, he is reflecting on the use of rights in general, not human rights.

theories assert). They are best represented as fundamental values in the context of different levels of political interaction.

The difference between the idea of public subjective rights and natural rights is related to the position assumed by the state in each of them: in the first case, states create rights because they depend on state's will; in the second, states recognize rights, that are limits to the state's will. From this point of view, human rights are similar to natural rights and different from public subjective rights: human rights represent an external limit to positive law. But human rights differ from natural rights (see chapter 1.1) because they are not only individual powers that the state must recognize and translate in legal relationships. States have to acknowledge them and give them protection, as part of their aim. This is the very core of the idea of "responsibility to protect,"[5] even if this international legal principle seems too much linked to the possibility of military intervention. Rights language is another way of talking about justice, from the point of view of who has a benefit from it (Finnis 2011, VIII, 3). Because there are different points of view, human rights are only a form of a limited discourse on justice. But a relevant part of it.

Starting from the idea of the correlative relationship of which legal rights consist, the question concerning the priority of rights or duties[6] is a nonsense. The practice of human rights is dynamic. Its dynamism consists in part in the versatility of the correlative positions, in consideration of circumstances and possibilities to act. Sometime the duty holders are many, not just one, not of a same kind, and not exclusive. In this sense it is not surprising that different systems of rules participate in the protection of the same rights, without becoming redundant. It is the case of the convergence of universal, regional and domestic systems of human rights on some specific right. The sort of extra protection so reached is a warrant for the implementation of human rights. Duty holders are different in number and quality. They are not only states or international agencies. They are also other individuals and social entities: many other actors are able to perform duties for assuring a certain right.

We have yet noticed another confirmation of this human rights practice feature, coming from the appearing dichotomy between social rights and liberty rights. Paying attention to the role of both categories, it is possible to say that they

[5] As is well known, *Responsibility to Protect* is a recently emerging international legal principle that gained notoriety not mainly when it was proposed in 2000 with the *International Commission on* Intervention *and State Sovereignty Report*, but rather when it was invoked by the United Nations Security Council to justify sanctions against Lybian leaders. The key idea is that state has more duties than rights, and in particular duties to protect and prevent crimes against its citizens.

[6] We will refer to the duty holder, but it is the same for the no-right holder, the liable and so on.

are not qualitative different, provided that sometimes what at a certain point is a liberty right is transformed in a social rights and vice versa (chapter 3.3).

But rights and duties are not linked only in the form of a correlative relationship between the right holder and the duty holder. A link between rights and duties can also be observed in the case of the right-holder. In fact, in some way rights oblige also the same right-holder, the one who is entitled to a right. This is a consequence derived from the idea that the right holder cannot dispose of his right as he wants. Again, this represents an important difference between natural rights and human rights. In the first case, at least in many natural rights theories, the one who is entitled to something in terms of natural rights could dispose of them and even renounce to them. The main example is liberty, but also property: in the natural rights theories they can be alienated, as affirmed by Hugo Grotius. Alienability is proper of what is totally in our power (chapter 1.3). A right that is not alienable is in some way the content of a duty for the same right holder, and human rights are inalienable.

Another suggestion in the same direction comes from the doctrine of abuse of rights, the case of controversial uses of rights (for instance, the hate speech as exercise of freedom of expression). The same risk of abusing rights shows further limits imposed to the right-holder. The abuse of rights consists in using a right beyond the limits allowed. The hypothesis of abuse of right is linked to the idea that a right is established in order to achieve an interest of the right-holder, and that the exercise of the right must be directed to that achievement. When the exercise of the right does not aim at that interest, this is censurable. It is not an illicit behaviour because the subject is acting according to a legal right, but it is an incorrect use of the right, considered *ex post*. It is worth noticing that, once again, the reason why the exercise of the right is censurable coincides with the reasons for its attribution. Thus the debate over the abuse of rights shows again the link between moral and legal rights. The legal consequences linked to the exercise of rights – in other words, the correlative relations deriving from the normative force of a right, and its legal aspect – need a justification. In order to distinguish correct and incorrect uses of right, we need to make appeal to that justification.

By the way, this discourse on limits seems to misunderstand the very meaning of human rights, well explained by the idea that the agent has the "right to do wrong." Otherwise, which kind of defence of liberty is implied by human rights? Natural rights do not give an answer. The idea is that human rights are not only rights to goods (as interest theorists emphasize). Rights correspond to agent's capacities to reach goods, together with the risk of not achieving them. From this point of view, choice theories are more representative of the logic of human rights

than interest theories. It is true that – in general – wrongs are dangerous, in particular for third persons, and there must be limits to them. But rights are expression of an ethics in which something is really good only if the agent endorses it, not independently from her endorsement.

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Chapter 4

USES

ABSTRACT

This last chapter is dedicated to examine possible uses of human rights, and to evaluate their acceptability from the point of view of human rights as a practice. The intrinsic link between human rights and the *rule of law* comes from the necessity of limiting the exercise of political power and the difficulty of protecting rights without that condition. It implies the extension of the principle of *rule of law* in the international domain, where the *rule of law* must find new forms and developments. The following paragraph – regarding the use of force in its sharpest way, through military intervention – faces a controversial implication of the political readings of human rights. In it, we face the analysis of relationships between international human rights law and humanitarian law that shows how the fragmentation of international law can lead to schizophrenic results in the context of the protection of the person as a common value in both bodies of international law.

We will start by pointing out the transformation of the state as a result of human rights; and then we will signal the emergence of a global civil society with a relevant role in human rights' practice. Both phenomena need to be stressed for they counterbalance each other in assuring different dimensions of the same practice.

We complete our research with the analysis of the role of human rights as criteria of legitimacy and justice in international domain.

4.1. HUMAN RIGHTS ARE NOT INDEPENDENT OF THE RULE OF LAW

Human rights come together with the principles of the *rule of law* because of the simple fact that they are, or aspire to be, positive rights. They therefore need positive law to protect them and make them effective. The relationship between human rights and the *rule of law* depends on the relationship between the latter and positive law. Still today we wonder whether and in what sense positive law and legal systems have to be respectful of the principles of the *rule of law.* In actual fact, especially in international legal documents, with particular reference to the treatises of the European Union, the formula of the *rule of law* is often evoked as a *condicio sine qua non* of international cooperation, but without its content being specified. It is often found listed alongside human rights and democracy, suggesting that there is an ideal affinity between all these principles and mutual support between them.

As is well known, the notion of *rule of law* is very controversial, as regards both its content and its role inside the legal system.

As concerns the content of the principles of the *rule of law* the most recent debates have been polarized around the opposition between formal conceptions of the *rule of law* and substantial ones (Craig 1997). The latter are also favorable to incorporating rights, that is to say demands for substantial justice. The "rights-conception" of Ronald Dworkin is one of these substantial conceptions, since Dworkin believed that the *rule of law* must incorporate a public vision of moral rights and of the duties that citizens have towards one another and the political rights that they have against the state (Dworkin 1980, 262). In this context the relationship between the *rule of law* and human rights is the closest possible one. But, if we believe that the formula of the *rule of law* only has a contingent relationship with human rights and that instead its central point is formal and procedural, then it is necessary to show why the practice of human rights can never do without it.

As regards the function of the *rule of law* there is ample consensus about the idea that it dictates neither the conditions for the validity of legal norms nor those necessary for their justice, but rather the requisites for the development of legal practice in which the relations between governors and governed are not conceived in the outlook of dominion of the ones over the others. The political evil that the *rule of law* combats is precisely arbitrary power seen in a specific sense.[1]

[1] Arbitrary power is distinguished by discretion, which is inevitable in the exercise of the legislative and judicial authority, but should be subject to controls. The *rule of law* is not directly aimed even

The purpose of this formula is not to establish the just law, but to establish on what conditions a society is governed by law and not by the whims of men. It is true that it requires autonomy of human beings, but not as a central political value – otherwise the *rule of law* would only be valid for liberal societies. We are talking simply – as Fuller (1969, 162-167) rightly noticed – about an anthropological condition which is the same as that presupposed by human rights: in order to obey a law, properly speaking one has to be free and aware. The slave does not obey, but – as Aristotle stressed – is used as a tool. The *rule of law* first of all says that law is not proper to a society of slaves, but to a society of free men.

Guiding a human action is a very different thing from causing it or producing it. For the concept of law the mode of obedience to it is at least as important as actual obedience. This itself renders inadequate all those conceptions of law that look exclusively at its capacity to put order in society or at the effectiveness of its results for the purposes of social coordination. For instance, defining law as that set of commands of whom others are in habit of obeying but who is not in the habit of obeying anyone else (Austin 1995) means eliminating from its conception the claim to furnish reasons for action. Slaves too obey the commands of their masters and they usually do it in a habitual way.[2] Even referring to practical acceptance of rules by officials or citizens (Hart 1994) is not yet sufficient if it is wholly set aside from the importance of the reasons for this acceptance.

Law is not meant to order society in any way, but aims to do it in a specific way, namely by coordinating the actions of rational agents, who as such need reasons to act in social life. Guiding an action refers not only to the way in which the authority directs the actions of those people that are subject to it, but also to the way in which these people govern themselves. Indeed, not all man's actions are *human actions.* The latter are only those that are performed freely and deliberately, that is to say in full awareness of the terms of the choice and its consequences. Besides, as the term itself suggests, at the root of deliberation there is liberty. The primacy of law is aimed at guaranteeing the moral prerogatives of the partners in contexts governed by an authority, which is often tempted to avoid the risk of the recipients being free not to obey its commands, preferring causally determined responses to real human actions. Law protects the possibility of moral

against anarchy – as some believe (Fallon 1997, 7) – since, to avoid the latter, police methods are more effective.

[2] According to Aquinas [1225-1274] the character of the law is to guide actions ("lex omnis directiva est actuum humanorum"). Its *vis coactiva* is secondary to its *vis directiva*. See e.g. *Summa Theologiae*, I-II, q. 95, a. 1.

action in social life. Without this teleological presupposition, law itself loses its specificity in relation to other methods of social control (Finnis 2003). All attempts to consider law mechanically deny precisely its specificity (e.g., Summers 1986). If law could be considered mechanically, the place of legislators, judges and jurists could be occupied without any loss by managers, psychiatrists and technocrats (Fuller 1969, 38). For this reason the priority demand represented by the *rule of law* belongs in an essential way to the concept of law and its normativity (Waldron 2008). An arbitrary law, unlike an unjust law, is a contradiction in terms, because it would not be true law. In this sense the first principles of the *rule of law* are inscribed in the central nucleus of the concept of law.

If we now go back to considering the content of the *rule of law*, it is not surprising if it is not fixed once and for all. In this connection, in the *rule of law* we have to distinguish three fundamental aspects: the goal toward which it is directed; the legal practices that it defends; and the legal contexts of application. The *telos* is the only stable and permanent aspect. In it there lies the identity of this formula. As has already been said, it is a matter of avoiding the arbitrary will of the governing class and the mechanical imposition of legal rules. This leads to the upholding of legal practices in which the governed clearly know what rules are to be followed, are able to foresee the legal consequences of their actions and can rely on an administration and a jurisdiction based on fidelity to law and practical reasonableness. This is the second aspect, but it is the third one that makes this formula highly indeterminate, in that the forms of legal rules and legal systems are variable in time and space according to different cultures and changes in international orders. Hence the requirements of the *rule of law* are modeled each time to face different threats toward agency.

The legal ideal of the *rule of law* started inside non-liberal societies (Tamanaha 2004) and was consolidated with reference to *common law*, whereby law is not created by the state, but is found in tradition, customs and legal principles based on "artificial reason" of judges and lawyers, that is to say at a time when on the horizon there had not yet appeared either the monopoly of law by the sovereign or human rights in the present-day sense.

This general order of positive law changes radically in *civil law* systems. Legal traditions and customs are, at least apparently, swept away. The sources of law are simplified, concentrating on the primacy of the commands of the sovereign that have the form of law. Legal science takes as its specific object these laws of the sovereign, which jurisdiction has the task of applying faithfully. In this context there is no other positive law than that emanated by the political sovereign. This law does not come into being as an independent social practice,

but comes from above and has to be conveyed downward into social life. Under these new legal conditions the only way to ensure that law and not the will of the sovereign governs is to require that legal norms can become part of the practical reasoning that is proper to agency. This means that legal norms have to be identifiable and practicable, that is to say they have to be able to guide citizens' actions. Hence the canon of the *rule of law* has conventionally been fixed in eight *desiderata* to which the legal rules have to correspond, that is to say being general, promulgated, prospective and not retroactive, not impossible to carry out, clear, coherent with one another, sufficiently stable, applied consistently, in accordance with its tenor and with respect for the principles of natural justice (Fuller 1969, chap. II).

When the constitutions of the post-war period began to reveal their potentialities, the first effect was the gradual loss of centrality of the code regime (*legal decodification*). This is quite comprehensible, since there is now a law (*suprastatutory law*) above statutory law. But we are not only talking about a formal change in the legal system, since this superior law dictates the values and the goals that ordinary legislation has to pursue. Among these values obviously there are also human rights. The innovation in comparison to the past is that these values and goals, which by their nature have an ethico-political character, are now also "legal" in that they are prescribed by a legal document, which is eminently a constitution. Every form of legislation has always been governed by values and goals, but these were considered as external to the strictly legal sphere. This made it possible to construct a concept of law and legal science marked by autonomy and separation from the other spheres of practical life. But now this is no longer possible, also because the plurality of these values and goals would be wiped out by the standardizing uniformity of the categories of legal science. In this connection, there is an increase in special laws and sectorial regulations because of attention to social pluralism.

The teleological tendency of legal reason is further enhanced by the diffusion of human rights in the practice of domestic and international law. The central importance taken on by human dignity sets going a process of constitutionalization of the person, which not only implies recognition of the presence of objective values, but also confers legal weight on the conscience of individuals and their autonomy.

Objectivism of values and subjectivism of choices often coexist in a sharply conflicting way. The sharing of a common morality, which appeared to be strengthened by consent about human rights, actually dissolves with the passage from general declarations to the practice of rights. And law now has to deal with

ethical pluralism which law itself had favored. Human rights have no frontiers and develop a transversal language or *lingua franca*, establishing communication between legal systems conceived previously as closed in themselves. Positive law opens up to communicative perspectives with universalistic tendencies.

Suprastatutory law opens up the way for a form of legal regulation through principles as a guide to legislation, and consequently to adjudication. Since the *rule of law* has to deal with all forms of legal normativity in that they all contribute to guiding social behavior, there is configured a *constitutional rule of law* in which a central role is taken on by interpretation and legal reasoning, without which principles are inert. Legal reasoning is now set within the formation of the legal norm and no longer only in the last phase of its implementation. And it is for this reason that the methods of legal interpretation and the rules of correctness of legal reasoning become part of the *desiderata* of the *rule of law*.[3] All this is particularly evident if we consider the central role taken on by the principle of reasonableness, which is connected to the principle of equality.

The principle of reasonableness has become the reference point of the processes of balancing of rights and of the argumentation typical of constitutional courts. In order for the solution of conflicts between fundamental rights to be considered "reasonable," it is necessary for judgments of suitability, necessity and proportionality in the narrowest sense, in which the principle of reasonableness is worked out, to satisfy their claim to objectivity. Since these are evaluative judgments, a cognitivist perspective is required. Nor can one object that we are only talking about instrumental judgments on the means adopted, because at least the judgment of proportionality in a narrow sense also requires evaluation of the goal pursued by the legislator, of its importance and of the degree to which it is useful to satisfy it. Balancing is not a mechanical or merely procedural operation, but requires a judgment of relevance.

The primacy of the constitution over the state (chapter 2.2) now allows commonalty and dialogue between constitutional values also present to some extent in other constitutions (especially in relation to human rights) and hence tending to universality. On the inside, constitutional discourse has to reshape to intra-state claims and sub-state movements regarding the relations between different groups (national, ethnic, territorial, religious, gender, linguistic or other cleavage) in a way not tending to ghettoize them, separating them from the common discourse, but to include and legitimize a plurality of visions and

[3] The *constitutional rule of law* remains despite everything a formal model and therefore should not be confused with Dworkin's rights conception or with Allan's (2001). Both are substantive conceptions of the *rule of law*.

interpretations of the constitution itself through mutual recognition and an "agonistic" process of negotiation. This means that we have to abandon the assumption that cultures worthy of recognition must already have a "national" dimension or be accomplished and autonomous forms of life, and also that we have to challenge the idea, accredited by an ideological use of the principle of self-determination of peoples, that nations must for this very reason be recognized as states (see in general Tully 1995, 9 ff.).

In a plural order the legal system no longer presents itself as a uniform legislative flow from a single centre of authority, but as the result of the unstable relationship between different types of authority or claims to authority situated at different sites or in different processes outside and inside the state itself (Walker 2002, 30).

In this context international law, considered by legal science, down to Hart included, as a defective law, becomes the reference point of the world legal dialogue and, in addition to developing as interstate law, develops in the new forms of transnational and supranational law, as well as law of international organizations. International law is affected by processes of constitutionalization, also manifested in the recognition of peremptory principles, which besides were already present in the traditional *jus gentium.* Indeed, just to give one example, in 1969 the *Vienna Convention on the Law of Treaties* affirmed that there exist some norms having the character of *jus cogens*, from which no derogation is permitted by an agreement *inter partes.* In this way in international law too suprastatutory norms are now recognized, with the consequence that, at least in theory, the will of states is no longer the last word. In general, despite the fragmentation of legal systems, there are processes of standardization making it possible to prefigure global law, though in a way that is still vague.

In what sense does the formula of the *rule of law* still have a function in this perspective? Can we speak of an *international rule of law* and in what sense?

A widespread allocation of political power in centers displaced inside and outside the territorial borders, at times without a recognizable place, is certainly no less a threat to the individual and to communities than the concentration of power in institutional organs that are well identified in composition and competences. What becomes more difficult is identification of the centre of assignment of responsibilities, which is – as Dicey teaches us – one of the most effective ways to control the exercise of power by officials. It is also necessary to consider that the emergence of new competences regarding sectors previously regulated exclusively by state law, and now also by international or supranational organizations, multiplies the number of competent authorities, and hence produces

a surfeit of restrictions of individual freedom in the absence of well-defined and stable hierarchies.

From this point of view the *rule of law* should be accompanied not only by a revision of the principle of the separation of powers, but also by common rules on the circulation of authorities and on the interconnections between the corresponding legal orders. All this requires processes of constitutionalization of international law and supranational law, which are being worked on, together with close cooperation among the national constitutions (*multilevel constitutionalism*). It will be necessary, for instance, to resort to the *principle of subsidiarity* as one of the possible ways of putting order among the authorities, giving priority to the one closest to the interests to be regulated and to the individuals affected, this being a solution inspired by the subject dealt with and not by a preset and formal hierarchy of legal sources (MacCormick 1999, chap. 9).

The *international rule of law* should pay particular attention to the work of judges in contemporary legal pluralism. The independence of adjudication renders possible communication between different legal orders that the legislative and administrative institutions generally block. This communication can be expressed on the vertical and official level with the constitution of international and supranational jurisdictions or, on the horizontal and informal plane, in more and more numerous forms of spontaneous collaboration or operational coordination between the national jurisdictions. From this there also derives the need for mutual recognition that is preliminary to communication. It is not only a matter of affinity between people that carry out the same functions inside legal systems, but even more a recognition of the methods used for the interpretation of rules and the plausibility and reasonableness of the very rules of the other legal systems.

In the evaluation of this process of globalization of adjudication it is necessary to proceed with great prudence without underestimating the risks. The multiplication of the relations between the national jurisdictions and the now widespread judicial activism must not be interpreted as the emergence of a global community of courts (Burke-White 2002 and 2003) or as the sign of a new world order (Slaughter 2004). What is revealed, instead, is a situation of disorder and a still unsatisfied demand for orderly pluralism. Deeper down it is a matter of facing a new way of conceiving the relationships between legal systems and positive law itself in general.

These considerations clearly show the great flexibility of the *rule of law*, the impossibility of establishing definitive canons for it, and its progressive adaptation to the variety of legal rules. The *rule of law* is a legal and political ideal and as such is enacted with various degrees of intensity. The elimination of arbitrary will is not work that is done once and for all.

The multiplication of the ways of seeing the *rule of law* and the openly political use made of it today they have thrown this formula into disrepute because of its indeterminacy and vagueness. Anyone can ascertain that – exactly as happens with the concept of democracy – an amply rhetorical use is made of the *rule of law* as if it were a label guaranteeing the genuineness and at the same time the correctness of the legal output. It is even invoked by the World Bank and by the IFM and used as a passe-partout for heterogeneous purposes like economic growth, protection of rights, democracy and international security. The demand for respect for the principles of the *rule of law* is often a condition for opening up economic and commercial relationships, especially with non-Western states, since it is thought that this also favors the introduction of political and social reforms (Silverstein 2003). But in any case this is certainly not the main goal that justifies the *rule of law.* It is not justified by what it allows people to do, but by what it is meant to avoid, that is to say arbitrary power of man over man. All this can also be expressed in a negative way, by saying that "one of the most important functions of the *rule of law* is to set limits to what we may do, as a society, to reduce injustice," (Waldron 1989, 94) or better, in a positive way, by saying that the way in which things are done influences the determination of their value in terms of justice. This is the reason why, for instance, we consider a paternalistic political regime unjust regardless of the content of its policies. Obviously this does not rule out the possibility that apparent respect for the rule of law, i.e. doing the wrong things in the right way, and its exploitation may help the bad ruler or deceitful official to make people accept an iniquitous and nefarious regime, that is to say to make people believe it is just. This, however, confirms that the common sense of the term the *rule of law* as a state of affairs has something to do in its own way with issues of justice. Though we cannot fault Hart (1994, 207) when he notes that the *rule of law* is "compatible with very great iniquity," nevertheless it is also true that a just society is not compatible with systematic violation of the *rule of law.*

In this sense the practice of human rights depends very much on the greatest possible respect for the principles of the *rule of law.* This dependence does not so much concern the content of rights, but above all the way of protecting and exercising them. In this connection, considering human rights as a social practice means not only determining what rights human beings are entitled to, but also *how* these rights must be treated by the authorities and by the holders themselves.

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4.2. HUMAN RIGHTS ARE NOT PRETEXTS FOR WAR. THE ANTINOMY BETWEEN RIGHTS AND WAR

Political conceptions of human rights emphasize their role in terms of obligations they create on coercive institutions at large (Pogge 2008, 52). The most significant version of this general account regards the influence of human rights on the transformation of the state sovereignty in terms of duties and responsibilities that human rights generate. In this context, from the point of view of the uses of human rights, the sharpest and most relevant role that they can perform is the possibility of justifying external military intervention of international organizations or a group of states in another state's affairs. In this sense, human rights have been defined as limits to independent political communities' freedom from external interference (Raz 2010). We have seen in chapter 2.2 that this has to do with the deep transformation of constitutional states. Now we will look at this evolution and its implications from the point of view of the international community.

The aim of this chapter is neither to discuss in general the political conceptions of human rights, nor to explore which kinds of intervention would be more compatible with human rights. The main focus is just related to the use of force for violations of human rights. As it is well known, in the normative framework of the new paradigm of international law that affirms the centrality of human rights – in particular, the *UN Charter* in chapters VI, VII and VIII, but also those documents that propose and endorse the *Responsibility to protect* declaration of the International Commission on Intervention and State Sovereignty (ICISS)[4] – the international community sets up different possible reactions to gross violations of human rights: from diplomacy to cooperation in development, from international prosecution to economic sanctions. The use of military force is the extreme form of intervention, but it is to be recognized that also the alternatives are supported by force.

The idea of war as one of the prerogatives of sovereign states – recognized among their modern territorial rights, as it is linked to the protection or enlargement of their territory – has been excluded in international law by the end of the Second World War. At that time became clear that the most important goal of the international law regarding wars had become their prevention rather than their regulation. In fact, the *UN Charter* recognizes only one condition in which

[4] http://www.responsibilitytoprotect.org/index.php/publications/core-rtop-documents

war could be legally permissible, in case of self-defense. The right to war is then strongly limited, even though it does not disappear at all: in its VII chapter we can find what remains from the *jus ad bellum* in international law. It is worth noticing that the *UN Charter* article 51 speaks of a natural right to defense, but at the same time indicates the expiring time of it, when the Security Council will take the measures to warrant peace and security in the international community. Even if presented as a natural right, the use of military force seems to have been thought as limited in time.

It is unfortunately well known, nonetheless, that states do not always comply with their duties regarding protection of human rights and violate seriously those peremptory international norms. These kinds of violations cannot go unpunished, and this is the context in which a coercive intervention is invoked. International law seems still to have just one way of reacting to that violation, i.e. authorizing to use force. But war is the last *ratio*, and then it is necessary to exhaust other remedies. Sometimes the use of force is called humanitarian intervention, but it is worth distinguishing it from humanitarian law. This latter body of norms is involved only once war is declared.

In fact, the term "humanitarian law" refers to a subset of international norms aiming to limit war violence and to protect the victims of conflicts. It is the name that is given today to the ancient law of armed conflicts, so-called *jus in bello*, which prohibited the killing of civilians not involved in the conflict, as well as other behaviours in war (recently, the use of chemical weapons or of landmines). As is well known, law *in* war together with the right to resort to war, or *jus ad bellum*, for a long time has been the content of the Law of Nations in the modern epoch (the first form of international law).

The famous doctrine of "just war," which partly operated ambiguously as a justification for wars, arose from the need to limit armed action by imposing careful reflection before war was declared (the problem of the causes of the war or *jus ad bellum*), by prescribing respect for certain conditions of war management (*jus in bello*), and by clearly establishing public responsibilities. The requirements of a just war are (since that time, with small changes): just cause, right intention, legitimate authority, final resort, proportional means, and reasonable prospect. It is worth noticing that the medieval tradition of just war aimed to mitigate the harshness of war, and to limit specious causes of war. But at the bottom was marred by the presupposition that a "just" war was possible, and even necessary. It is not a case that this doctrine originated in 12th-century dialectical thought, and it is the result of the methods of conciliating opposites: some authors wondered how to reconcile the evangelical precept of turning the other cheek with the authorization in Roman law to repel enemies with force. The way of reconciling

these conflicting demands was to limit the causes of war and the modalities of its enactment (Berman 1985).

The origin of humanitarian law had preceded the emergence of human rights after the Second World War, but – as we will see below – both sets of norms can be integrated. Since 1864 different conventions drawn up in Geneva and the Hague have progressively given rise to a body of rules inspired by the protection of the person-victim on the basis of the principle of humanity, both in international and internal conflicts. At the moment this body is formed by four conventions (1864-1949), some of them renewing old conventions for the protection of wounded and sick in Armed Forces in the Field, at Sea, prisoners, civilians, and protocols regarding the safeguard of victims in international and not international conflicts (1977). In that process, humanitarian law was extended to the protection of the victims of natural calamities, whether caused by man or not. This last development underlies clearly the very logic of this subset of international law: the protection of persons in serious conditions of vulnerability. It is possible to recognize in this logic a manifestation of the need for protection of human beings under certain conditions. A further but not marginal problem is that there would be a difficulty in identifying those situations of crisis that are not strictly defined as wars, like riots and arbitrary detentions, or even peacekeeping operations, which equally threaten the survival of people. The best understanding of humanitarian law becomes clear in its role of protecting victims in cases of emergency.

The development of humanitarian law forces us, then, to distinguish it from the ancient law of war as described above. The main reason is because current humanitarian law excludes the right to resort to war or *jus ad bellum.* In other words, it does not concern the norms that discipline the possibility of declaring war. This specification is very important for understanding the ambiguity of some uses of the adjective "humanitarian" when reference is made to armed intervention (Walzer 1977, 62, 108).

The norms of the ancient law of war were directed to the prince that had to decide whether to declare war or not. By contrast, one of the characteristics of humanitarian law is neutrality, the requirement according to which anyone who makes use of it does not take part in conflicts.[5] This is certainly a remarkable change. If and where there is an ongoing war, humanitarian law authorizes intervention with a series of rules serving to protect victims. The principle of

[5] A frequent criticism of human rights is grounded on the idea that they could easily become a politic tool in hands of governments. This is an important point, because it implies the fear that the politicization of human rights could damn the neutrality of humanitarian law.

neutrality, together with impartiality, independence and humanity, structurally characterizes those institutions whose aim is to achieve the objectives of humanitarian law, including, for example, the Red Cross and the Red Crescent. An additional and controversial case concerns the intervention of those who try to keep the peace in territories in which there is/was a war and the legitimation to use force in peacekeeping operations.

According to this account, the possibility of war as the extreme *ratio* in cases of violations of human rights appears to be reinforced in the context of the principle of responsibility to protect, and in particular in the commitment of international community of acting collectively when one state perpetrates crimes against humanity (the so called third pillar). It is not humanitarian in the sense of belonging to the historical humanitarian law. "Humanitarian" as an adjective in this case is used because the act of intervening is a reaction grounded on the sake of protecting human beings from violations of their rights, and it is directly linked to the protection of human rights. But the intervention is rather the answer to a demand of justice, in particular, a demand of corrective justice for violations of international law, in order to avoid that crimes remain unpunished. This impunity would be fatal for the consistency of the international system, because unable to support its norms with sanctions. At this point, it is worth recalling again that the responsibility to protect is not limited to that extreme form of intervention: the first and second pillars aim at preventing gross violations of human rights (crimes against humanity) and furthermore at helping states to comply with their obligations.[6] The force for supporting a legal system is not only military, but it depends also on its ability to prevent crimes and to induce to alternative behaviours.

There is no doubt that the international human rights law (this time we are speaking precisely of the international norms regarding human rights) and the international humanitarian law can be considered two manifestations of the emergence of the respect for the human person as a key principle of the international order. Both correspond to the same logic, that is to say the consideration of the person and her rights as a good to protect in and on behalf of

[6] The three pillars of the responsibility to protect establish that the state carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement; that the international community has a responsibility to encourage and assist states in fulfilling this responsibility; and that the international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes. If a state is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the *Charter of the United Nations* (Secretary-General's 2009 Report on Implementing the Responsibility to Protect).

the international community, and both together constitute an important challenge for international law. Even if their different origin can be isolated, they can be interpreted as coordinated, and this is what happens in the international legal domain.

Humanitarian law is the law in wartime, while international human rights law is valid in time of peace. This difference is mitigated, however, by the suggestion that international human rights law also has to be protected in wartime: intuitively the protection of human rights cannot cease in times of war. In this sense, these two systems can be deemed complementary because they can be applied together (*Teheran International Conference on Human Rights*, 1968).

As is well known, the International Court of Justice has interpreted their relationships following one criterion for solving legal antinomies in the same system: human rights law would be *lex generalis*, whereas humanitarian law would be considered *lex specialis*.[7] According to the tradition, *lex specialis derogat generali*, i.e. the former would prevail over the latter, and the reason is precisely the stricter sphere of application.

The application of the rule *lex specialis derogat generali* in this case is controversial because this interpretative criterion is linked to the existence of antinomies in a "unique" legal system. And this rule is not a standard for solving conflicts between bodies of law, rather between single norms of the same system in a concrete case, when two opposed solutions are offered for the same case. The idea of using the criterion for antinomies then suggests that human rights and humanitarian law form an integrated system. Certainly, this point of view is controversial insofar as international law is often characterized by fragmentation.[8] Unity in domestic law is warranted by values, and this seems to be problematic for the international system. Otherwise, we have to say that the International Court of Justice is inspired by the idea that there are also common values in the international community and that the protection of human beings is one of these.

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[7] Three decisions are relevant: the Advisory Opinion of 8 of July 1996 on the Legality of the Threat or Use of Nuclear Weapons, the Advisory Opinion of 13 July 2004 on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory and Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda), Judgment of 19 December 2005. Against the idea of *lex specialis*: "Symposium: The Relationship between International Humanitarian Law and International Human Rights Law," issue of Journal of Conflict and Security Law, 14, 3, 2009.

[8] The International Law Commission seems to confirm the idea of separate bodies, see the *Report of the Study Group of the International Law Commission*, International Law Commission, Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law. UN Doc A/CN.4/L.682, 13 April 2006.

Insisting on the specificity of humanitarian law, the International Court of Justice is pointing at its more determined conditions of application in comparison with international human rights law; it is then recognizing a sort of "epistemic advantage" of the former over the latter. But the point is that the advantage is only a question of degree.

As we have seen in chapter 3.3, one of the most evident feature of the recent evolution of human rights is that they aim at protecting human beings in all or many of their dimensions, in their diversified states of life, and in the different contexts within which that protection is to be enacted. Human rights law looks both at the specificity of the contexts and at the adequate instruments required for such protection, according to the highest standard of protection of human beings. This ambitious purpose has raised some problems, those that minimalist versions of human rights try to solve. In chapter 3.3 we have seen that the maximalist interpretation of human rights is not a defect, at least because it highlights the idea that the human being is much richer than the rights that are supposed to protect her, or – on the other side of the coin – that the legal instrument is insufficient to protect human beings. But undoubtedly this feature makes the practice of human rights more difficult, above all if a comparison is made with humanitarian law, which concentrates on the idea of the victim.

In addition to that, there is a widespread conviction about the legitimacy of the limitation or even the suspension of human rights in wartime, as emerges from art. 4 of the *Covenant on Civil and Political Rights* or from art. 15 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*. In the last document, for instance, article 15 authorizes clearly the derogation of the rights in the Charter in case of emergency and in particular in case of war, against the idea of indivisibility of human rights. Nevertheless, among international lawyers it is commonly established that this possibility does not work in the case of economic and social rights (Mothershaw 2008), with the consequence that a part of human rights is always applicable, also in time of war. The provision of limiting (some) human rights in time of public emergency is not a pass for whatever derogation. It implies that the limitation must be proved and must be justified as proportional to the situation of emergency. Furthermore, it means that the derogation must be tested case by case. From this point of view, the question is not again a problem of relationship between bodies of law, but a question of concrete application of norms, and it is correct governing this process by adjudication.

By contrast, from the point of view of restrictions linked to the conditions of application, humanitarian law appears to be less "controversial," because it admits no waivers. The reason is that its requirements – the distinction between civilians

and soldiers, necessity and proportionality – represent the minimum threshold that states cannot go beyond in situations that justify waiving of human rights. There can be no waiving of waivers. Another time, humanitarian law and human rights are interpreted together, and, in particular, the understanding of the former depends on its relationship to the latter.

The derogatory nature of international human rights norms has to be tempered also with the consideration that not all human rights can be waived: the prohibition of torture would be valid at every times, although it is not so in some cases, for example, in the case of the right to a fair trial. In order to understand this difference, it has been proposed a distinction between those formulations of rights that appear to have conclusive or peremptory force ("no one shall be subjected to torture") and the most generic formulations of a directive nature, like the right to life, to freedom or to safety, which are meant to be applied within certain limits (public order, for example) (Finnis 2011, chapter VIII). Peremptory formulations appear to certify the absolute character of certain rights, where "absolute right" means precisely a right that cannot be waived. The only way to justify torture is to argue over what is meant by torture.

In conclusion, the advantage of humanitarian law concerns the delimitation of the context within which a right is valid: not at every time but in time of war (even though, as was said before, this is not completely exact). The crucial point is that wartime is in itself a period in which individuals' rights are in serious danger. It is not enough – in the light of recognising rights – to protect human beings against the extreme evils of war. It is too easy to notice a split between protection of rights and war: if the aim is to protect people, in no way and in no case should there be war.

Here it is possible to perceive one of the problems presented by humanitarian law in the framework of international law, similar to the perplexities raised by the doctrine of just war. The presence of humanitarian law makes international law contradictory and inconsistent or, at least, fragmented into different components that can hardly be harmonised, even if the existence of war is not the fault of humanitarian law. We lack the courage (or the interest) to banish war from international law and then we try to mitigate its consequences, but it is clear that this implies lowering the level of protection of human beings and their rights, or – at the end of the day – even violating individuals' rights. It is precisely the aim of protecting human rights which makes war controversial. The result is an apparent impasse between two (inadequate) actions: omission, in case of failure to react against violations and properly causing violations through war. It is the case of a conflict among rights, because in both cases violations are the necessary

consequences. Nevertheless, we face an apparent impasse until international law does not exhaust properly its alternative strategies.

A different question is the implementation and enforcement of an international criminal system able to punish crimes committed by states and public officials, following the principle of individual responsibility in international law under certain conditions. The work of International Criminal Court is too timid and uncertain, for the main reason that it is not properly supported. With many defects, in the areas in which regional systems of protection of rights are functioning – in the area of the Council of Europe with the European Court of Human Rights and in the context of Organizations of American states with the Interamerican Court of Human Rights – it is possible to exercise a force on states that violate human rights. The authority of law has always a double face. On the one side, it is a question of requirements and rules regarding who is exercising it; on the other side, it is also a question of consent. Constitutional and even decent states have the possibility of supporting international prosecution with their consent.

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4.3. HUMAN RIGHTS ARE NOT A TOOL FOR POLITICAL AND CULTURAL HEGEMONY. STATES AND GLOBAL CIVIL SOCIETY IN THE HUMAN RIGHTS PRACTICE

As we have seen before, political readings of human rights emphasize an important aspect of their practice, without exhausting all their dimensions. If we focus on the role of the states in the international human rights practice, it would be easy to agree with two different thesis: on the one side, human rights are thought as rights against the state as long as they are states' duties; on the other side, states play a crucial and important but not exclusionary role in the task of protecting rights. In fact, human rights have proved to be able to engage different actors in their implementation, generally indicated as non-state actors: social movements, transnational networks, international organizations, religious groups. The form of denomination of these actors by reference to what they are not indicates that they mainly deal with states, they work across borders too and interact with interstate institutions, including international ones, confirming in all these ways the centrality of states in human rights practice (O'Neill 2003, 198).

It is worth noticing that not all those different actors can be defined as proper legal agents, even though they play a role *within* a legal practice. The enlargement of the human rights practice beyond what we usually consider the strict field of law is a matter of fact, not controversial from the empirical point of view. The fact would sometimes make it difficult to delimitate the different dimensions involved (political, legal, social, moral ones), as well as clarifying its implications in terms of defining the nature of the practice legal status. At the end of the day, this difficulty is probably linked to some epistemological premises, too much devoted to classificatory aims, but it would be less worrying from a broader and flexible approach to legal phenomena (Lacey 2013). What is interesting here is that from the point of view of the very protection of rights, the inclusionary nature of the international human rights practice is a good point for the rights' defense: every force or resource in that direction must be appreciated; every form of agitation, pressure, or moral advocacy would contribute to strengthen their implementation.

In the context of recent transformation of international relations, we have often observed the quest for a new approach to sovereignty, if not a new paradigm of it. It shifts from the Westphalian conception of sovereignty based on territorial rights and prevalent national interests to the idea of setting out limits to state

power in the form of citizens' rights, human rights or constitutional or fundamental rights.[9] It is the aim of the principle of primacy of constitution over the state (chapter 2.2). Again, it is clear that states are indispensable to the rights-agenda. For this reason the post-Westphalian configuration of international community follows neither the abolition of states nor the building of a utopic world state. The cosmopolitan nature of human rights must be understood as including (not only the state but) a *plurality of states* as well as a plurality of actors *together with* states. The reason is not only that – as well as states – global governance can degenerate into global tyranny and global injustice (O'Neill 2003, 189), but rather the adequacy of the principle of international subsidiarity, according to which the nearest institutions have an epistemological and practical advantage in protecting individuals' rights.

An important consequence of the universality of human rights together with the indispensable role of states is their position in international relations as equal sovereign states. This equality has relevant implications from the point of view of ensuring the fulfillment of the state's human rights obligations. As well known, the international community shows a deficit of enforcing mechanisms, being it an acephalous organization. The developing of international mechanisms such as the Universal Periodic Review for the United Nations Human Rights Council or the same procedures of signing and ratifying international agreements requires the voluntary cooperation of states, giving objective and reliable information, interacting in dialogue with others, engaging in voluntary internal challenges and developments. From this point of view, the genuine interest of states in human rights is shown also through their disposition to submit their actions and strategies to peer reviews and through their acceptance of considering themselves in the same rank with all the others. In any case, at the end of the day, an important part of states compliance depends on the same states, and this could be obviously ineffective.

In the domestic domain, a long tradition has found the only remedy for its parallel risk in the existence of a strong civil society. Civil society is the community of free, virtuous, well informed citizens, aware of their common interests and able to advance them by means of political institutions, as well as to preserve those institutions and to follow up the achievement of their goals. Civil society is typically the public realm of actors different from states, capable of pursuing interests divergent from the state's interest in a struggle against tyranny and anarchy. Citizens usually organize independent associations for resisting or

[9] The difference between human rights and constitutional or fundamental rights is to be established in terms of mechanisms of protection.

influencing the governmental policies. As well known, theories of civil society are very different, from Aristotle onward (Forst 2007). In terms of the current analysis, it is worth noticing the spreading out of that phenomenon, not more confined within territorially defined state-like areas – the reason why we call it *global* civil society –, and its relevance for human rights.

The notion of global civil society is controversial from many perspectives, first of all concerning its transnational character, since the original cultural, economic and political context of the concept was that of a nation state (Baker and Chandler 2005). Nevertheless, global civil society is celebrated for promising action on a global scale in favour of human rights (Frost 2002). Its most important actors are international non-governmental organizations such as Human Rights Watch, Doctors Without Borders, Oxfam, Red Cross and Red Crescent, and many others. They are able to mediate between individuals and domestic, transnational, international and even private institutions and organizations. Their number is continuously increasing as well as their power. Their growing influence arrives at the point of being crucial for defining what constitutes a human rights violation (Risse 2000, 186). Even from a more modest view, they play an important role in reinforcing the mechanism of states cooperative compliance of human rights obligations. Their only practice of "naming and shaming" has shown to be a strong deterrent for human rights violations, and not only for states.

The rise of a global civil society seems to be the result of processes of globalization from below, more than the outcome of a top-down construction of a global polity through the spread of democratic institutions (Baker 2005, 115 on Held 1995). From this point of view, the emerging of a global civil society can be considered as less intrusive in a context of world political pluralism than the promotion of democratic institutions, because it does not necessarily impose a model of political organization. It is also controversial whether democratic participation and civil society can be parted or not (Habermas 1996), but it is for sure that they can be distinguished. In this chapter, we are examining mainly the relationships between global civil society and human rights practice, and, from this perspective, the recourse to global civil society "adds to the human rights discourse the notion of individual responsibility for respect of human rights through public action" (Kaldor 1999, 211).

There is no doubt that democratic participation within the state has relevant implications on the setting of the international system, since the latter is in part just the result of agreements among states. This is the reason why is reasonable to affirm that citizens in democratic societies have a strong responsibility in eliminating the iniquities of the international legal order, since they can make

pressure on their own governments, determining changes in (or otherwise supporting) the international system. This intermediate action is a central feature of so called interactional cosmopolitanism (Pogge 2002), as distinguished from different models of legal cosmopolitanism. The latter assigns responsibilities to institutions, the former concentrates on the responsibility of individuals through their states (Pogge 2007). In terms of our analysis in this chapter, the point is that global civil society action goes beyond this indirect democratic participation in global polity, towards the setting of struggles in which human rights are common aims. It is not the case of discussing whether this different struggle must be indicated as "a global ethic" (Baker 2005, 115), being clear at this point that the human rights practice is a political, legal, moral, social practice. Before examining some risks of the growth of the global civil society, we can observe its multiple advantages.

One of the most meaningful features of this global civil society in the task of protecting human rights is a sort of necessary solidarity. In fact, it is unlikely that in presence of state violations associations coming from the local level have the opportunity of undertaking actions against their own state. More probably, they would appeal to foreign civil societies groups for support in actions against their governments. Different civil societies are then mutually implicated in other's affairs. This point is easily explainable in the light of the idea that human rights are others' rights.

In addition, civil society involves a wider area of activities, and not only the legal or political ones. Then it constitutes a good observatory of discriminations and violations that can be notice only from inside those social practices.

In any case, perhaps the more important contribution of civil society to the practice of human rights is the possibility of censuring what from the point of view of states can be seen as settled once for ever. It is not only the possibility of staging protests governed by prescribed channels, but also a more radical criticism that genuinely arises the question whether certain established forms of lives or even of rights' protection can be justified in the light of the best account of human rights we can achieve (MacIntyre 1999, 320). From this point of view, civil society can assure a crucial openness necessary to the practice of human rights, strictly linked to its universality, as well as it can explain many steps in the history of the affirmation of human rights.

The main weakness is that the work of global civil society movements cannot be developed under equal conditions, whereas the position of states in the international community is characterized by (at least, formal) equality. In fact, civil society is the realm of inequality and fragmentation (Walzer 1999, 63 and 65). On the one hand, bearing in mind the ability of transnational movements to

make pressure on individual states and considering that the most powerful global civil organizations are Western or resourced by Western countries, a perverse effect can be produced: i.e. the concentration of power in the Western societies, not only in the form of the political hegemony of democratic states, but rather as both political (of states) and cultural (of civil societies) hegemony. This means that it is not clear what criteria are used for selecting what will be contested, whose voices are heard and why (Shaw 1999, 223). In addition, there could be a risk of paternalism, when the assistance from outside is not asked for by the local actors, but foreign associations take the initiative, following their own understanding of human rights. There is finally a problem with accountability: to whom does global civil society respond? The point is not to arise an infinite circularity, but the search of limiting an inevitable arbitrariness.

The emergence of a global civil society is a factor that contributes to the implementation of human rights representing a good counterbalance to the centrality of states in the same practice. Arguments for rights produce firstly arguments for states, but – as we have seen – at the same time arguments for rights produce also arguments for civil society, both inseparable (Baker 2005, 120). As well as a global civil society is a good counterbalance for states, states – and more generally the institutional dimension of the human rights practice – are a good counterweight for the uncertain impact of global civil society on rights. Human rights protection requires developing and supporting institutions able of introducing equal treatment under equal conditions. These institutions can be complete communities, using an Aristotelian characterization of political communities as those in which the human being finds everything they need for their fulfillment,[10] or otherwise they can be referred to a specific sector. The formers are the states in their best clothes: political communities whose members take part in the process of public decision making and regularly set the common good over their private interests, according to an architectonic conception of the general interest. In other words, institutions *prima facie* oblige to guarantee impartiality both toward every person and toward all the dimensions of the common good. The latters are very often the case of international institutions, being fragmentation the international community trend, in addition to its acephalous condition. The very advantages of the institutional dimensions of

[10] It is difficult to establish whether the state is the inheritor of the idea of complete community or not in the context of the existence of the manifold (partial) communities both inside and outside the state. It is clear that it makes hard the search of a common good and this is an aspect of the crisis of the modern state. Neither the anonymous position of citizens in the international domain is satisfying. The very political community is the place of communication of diversity in order to find an agreement on justice and injustice. But this aspect cannot be faced here. See Viola 2001.

human rights practice – apart from their wider insight – are two features of institutions: firstly, the uncontroversial and justified expectation of their duty of equal treatment for everyone; secondly, the possibility of arising the problem of their legitimacy (chapter 4.4), even when – as in case of non-democratic states but also in many cases of international institutions – the current international system has not offered hitherto enough satisfying solutions for verifying it.

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4.4. HUMAN RIGHTS ARE NOT ONLY CRITERIA OF LEGITIMACY. COSMOPOLITAN JUSTICE IN THE INTERNATIONAL ORDER

After the Second World War the principle of political legitimacy has faced a complex evolution. On the one side, the modern notion of formal or procedural legitimacy (Weber 1946) has been considered insufficient. The main (technical) reasons are the constraints that the constitutional system of values imposes on the exercise of power. Formal legitimacy has been transformed in a new principle of constitutional legitimacy. According to this new paradigm, procedural requirements are necessary but not sufficient conditions for a legitimate power. On the other side, the dispersion of power in different levels and agencies (within and outside the political community) arises a wider demand of legitimacy, as far as it is a necessary requirement for any kind of power. The demand for legitimacy spreads out in new fields different from the state. Among other implications, this development originates the quest for international legitimacy, as the search of parameters of legitimacy for international agencies of any kind. It is worth noticing that this new challenge influences also the criteria that states have to meet to be legitimate, even if this second development is not only a feedback to the transformation of the international order but also the outcome of an internal process. In both cases – international and domestic – human rights are involved. In chapter 2.2 we have observed the transformation of states under the principle of primacy of constitution and its link with human rights. Now we will observe the other side of this evolution, the implications on the international level.

The transformation that human rights are introducing in the international order is similar in some aspects to the domestic process of constitutionalizing values. In short, it consists in taking certain values away from the domain of public decision, making them immune from majoritarian choices under certain conditions. As well as constitution detracts some contents from the domain of majoritarian rule, human rights are not at disposal of states' consent in international law. In other words, norms concerning human rights limit the content of other international rules. Any treaty or agreement violating them would be invalid. Obviously, human rights are not the only parameters to be considered. And in any case, their presence in the list of international parameters of legitimacy is not uncontroversial.

The enquiry on international criteria of legitimacy is very rich and articulated (Fabienne 2010). It seems enough clear that the domestic analogy is not necessarily a good method for identifying them, because the transit between domestic and international domain requires inevitably some adjustments. Domestic analogy supports the continuity between criteria of legitimacy within and outside. The alternative position affirms that domestic and external parameters of legitimacy are not homogeneous. The point is that the validity of domestic analogy depends on how we understand it. For instance, the analogy between individuals' will in democratic communities and states' consent in the international order (Beitz 1998, Walzer 1977) is not satisfying. Once we recognize the value of individual participation in the formation of common decisions on the basis of individual autonomy as the ground of a correct use of power in the political context, the use of states' consent as legitimacy criterion in the international order would create an unjust asymmetry between democratic and not democratic systems. On the one hand, in this case the domestic analogy must be stricter: in the name of the principle of equal concern for their autonomy, individuals must be involved also in the international context. On the other hand, the modalities of their participation must be adapted to the specific context. What is clear is that an adequate base of democratic participation integrates inevitably the list of criteria of legitimacy in the international order. The respect for individuals' autonomy can assume different forms, and it is a requirement for accountability necessary not only for states, but also for any kind of international organization (Buchanan and Keohane 2006, 406). As we have noticed in other chapters, the concern for individual autonomy, as well as the related involvement in public decision-making process, is clearly linked to the tradition of human rights as political liberties, in coherence with a very long narration of human rights. It is uncertain how this principle must be implemented in the long run in

the international context, directly or through the states, but it is an unavoidable demand.

In addition to that – and together with some characteristic related to the rule of law (see chapter 4.1) – international legitimacy includes some standards concerning how those who are subjected to the power must be treated. It is what it has been called a minimal standard of justice for international legitimacy. It can be proposed as a positive requirement, the protection of basic human rights (Buchanan 2003, 266), but also as a negative condition, the prohibition of gross violations of human rights. It is worth noticing here that this standard is not only a requirement requested to political authorities in the classical sense, but rather to any international agency as long as they are able to create and to impose rules and constraints. In any case, this parameter seems to work as a residual principle: it is something that cannot be missed as a sort of levelling-down threshold. But, even if minimal, it is clear that human rights introduce elements of justice in the notion of legitimacy.

This conclusion is problematic from at least two points of view. On the one hand, it is controversial from the point of view of the question of which kind of justice human rights import in the international order. In chapter 3.3 we have analysed the problem of the minimalist and maximalist readings of human rights. In this context we will exam only the relationship between human rights and the idea of global justice.

On the other hand, and independently, we cannot notice that the link between legitimacy and justice is in itself problematic in a wider sense. In fact, the principle of legitimacy serves to guarantee the possibility of exercising power in the absence of an agreement on justice. The role of legitimacy is precisely to permit that the authority could solve conflicts on justice. The intuition is that legitimacy is relevant in the initial stage, in order to identify who has the title for exercising authority, whereas justice concerns outcomes of exercising power, in order to evaluate its work.[11] It is not difficult to admit that outcomes are important as well as inputs (Nussbaum 2006, 83). The reason is that results are particularly relevant in the evaluation of the exercise of power, as far as authority (legitimate power) is a practical device. Indeed, we would say that – from the point of view of a practical performance – outcomes are more important than inputs. What an

[11] The presence of elements of justice among the criteria of legitimacy has permitted to distinguish between an in-put oriented notion of legitimacy and another out-put oriented (even if the second one is always a mix of in-put and out-put elements). It is the case of the debate on European Union (for instance, Greenwood 2007). But the convergence on the use of word "legitimacy" does not exclude that the second one is referred to justice.

authority has to show is to be able to produce right results (Finnis 2011, 245-252). This does not mean that inputs are not of great significance. It explains why legitimacy is understood as presumptive just: we assume that an authority satisfying certain formal characteristics is able to produce right outcomes, and in this sense we recognize it as legitimate. But legitimacy cannot fail to aim at justice. Legitimacy is rather the name of the presumption of justice necessary for authorities dealing with disagreement on justice, but in order to do justice. The reason is that right outcomes are not justified if they are obtained without respect for those upon whom it wields power. An in-put justified authority is initially legitimate; an in-put and an out-put justified authority is wholly legitimate. In conclusion, legitimacy and justice are distinct but are not averse.

Nevertheless, the translation of this relationship in the international order is not always convincing and it is producing tension between legitimacy and justice. On the one hand, this tension appears in the form of a residual/exceptional formula: legitimacy is denied in case of intolerable injustice, as the prohibition of gross violations of human rights shows. It is the idea of a threshold beyond which it is impossible to presume justice. Complying with this requisite does not satisfy at all what human rights demand (their full demand of justice), but in this case human rights are performing only a role of minimal standard of presumptive justice. They appear in their most reduced version, even though it is impossible to deny that they are introducing elements of justice in the field of legitimacy. Obviously, from the point of view of justice it is not enough. What states have stipulated in agreements on human rights and what international community aims to in terms of protection of human beings is much more.

On the other hand, this point is seriously problematic from the very perspective of international law and the real development of international relations. The reason is again the contrast between the principle of domestic self-determination and human rights in international law (see chapter 2.2). According to the balance in favour of domestic self-determination and non interference, international agencies including states tend to use a drastic levelling-down criterion in recognizing legitimate authorities: usually those agents that are able to assure control and territorial integrity in their countries are recognized as such. But this parameter is easily considered inadequate from the point of view of human rights: control and security are compatible with intolerable crimes against citizens and foreigners. This risk goes together with the uncertainty that alternative options – as external intervention (see chapter 4.3) – would present in terms of serious violations of human rights. In addition to that, there is also a reason linked to the respect for pluralism. International order tends to omit compulsory directions or to impose schemes of institutions in favour of models

suited to local history, culture, environment, and, above all, independent choices. In this perspective, the maximalist account of human rights seems to be too thick for being peacefully accepted. It appears to be an account of global justice elaborated on the basis of Western biases. We have yet discussed the problem of parochialism of human rights and how their universality must be understood (chapter 2.3).

Now it is interesting to emphasize one aspect of the problem: the nature of human rights as a social practice permits to distinguish it from the theories of justice, even if they play the role of criteria of justice. Human rights are not the conceptual components of a theory of (global) justice, even though they can serve as guidelines for identifying global (universal) contents of justice in the form of basic goods to warrant to individuals. As well, they can be considered as a (partial) implementation of a global theory of justice. From this point of view, human rights differ from natural rights: the latters are the result of a conceptual elaboration deriving legal and political conclusions from a theory of human nature. Natural rights have a clear normative status; they can be indicated as a normative theory. On the contrary, human rights are the content of moral, social, legal norms and institutions. They constitute a normative practice. They are part of a concrete history and evolution of institutions, both domestic and international, and this is precisely the reason why they can be accused of being imperialist. In fact, they are spreading out on the basis of political and international influence, and not as the result of the rational reasoning or reflective equilibrium from which a theory of justice emerges.

They do not integrate a theory of justice, but they perform the role of criteria of justice in the international domain. Their peculiarity is that they are compatible with more than one theory of justice: in general with theories of primary goods (Rawls 1999), or resources (Dworkin 1981), or subsistence rights (Shue 1980), but also with the capabilities approach (Sen and Nussbaum 1995), or with theories grounded on harm principle (Pogge 2002), or on impartial duties (O'Neill 1996). From this perspective, human rights are pluralistic. As well as they are compatible with many theories, they are compatible also with a high number of different institutions and political systems.

Their high compatibility with a big number of theories of justice increases the believing of their reasonableness, but it arises also the problem of the best and most appropriate justification of human rights. Nevertheless, even though they are compatible with many theories, not all of them are good accounts of rights. In this sense, human rights are rights in search of a theory, of that theory that proves to be the most capable of explaining their whole meaning and ways of performance.

And this research is open-ended as long as its aim is to make the most appropriate choices for the implementation and development of a general principle of protecting human beings in this or that context.

But human rights' compatibility with many theories does not imply indifference to everyone. From this point of view, some elements can be generally fixed. First of all, the theory (or theories) adapted to human rights must concern justice and not benevolence. What is ascertained as a human right is something due to the right-holder. It is not the result of individual or collective humanitarian sentiments, even though humanitarian sentiments are so important for human cooperation. Their status implies that they are able to modify the normative position of other agents. Furthermore, the clear evidence of their insufficient implementation is not an objection against their soundness, but rather the consequence of their normative status, that tends to change the state of facts and not the contrary (to adapt itself to it).

Second, a good theory for human rights includes the idea of equality, as it is pertinent to the concept of justice. This requisite is the answer to the approach according to which the principle of protection of human rights is not a reason for supporting a theory of global justice, but an independent element, deriving rather from the principle of sufficiency, that indicates what is due to human beings as human beings (Miller 2005). Defenders of this view distinguish between the domestic sphere of justice, including equality, and the global domain in which equality is not applicable. This distinction is grounded on the basis of the believing that human rights are not comparative, in contrast with domestic fundamental rights. Human rights seem not to be rights to the same opportunities than others (Moellendorf 2002), or the same amount of resources than others. The reason is in part the difficult comparability between radical different situations all over the world that human rights would require; in part it is again the principle of respect for pluralism.

Preliminarily, we can say that equality in human rights corresponds to the logic of the generality of the category of right-holders, otherwise human rights would be privileges. "Every human being has the right to freedom of expression" means that in the category of human beings we cannot distinguish this or that one when conditions of attributions are met. Whatever content human rights could have, it would be acknowledge as equal for everyone. Leaving aside this premise, it is clear that what is really at stake behind the denial of the comparative character of human rights is the intuition that distributive or redistributive justice is possible only in the domestic context (Miller 2013). The comparative nature of rights would request distributions of resources or opportunities, and at the moment only the domestic community possesses the requirements for doing that.

Not only because of the state has developed institutions able to do that and it is situated at a good epistemic proximity, but also because of in the domestic context it is possible to take part to the formation of rules and to determine measures of distribution, and then it would be a legitimate distribution. Observing the international current conditions, all this is uncertain.

Nevertheless, on the one hand, the objection seems to be based on a state of fact. It is a question of current world conditions, rather than a conceptual impossibility. At the moment, the conditions for global justice do not exist, but, in a foreseeable future and working to achieve this result, it could be possible to realize. Beside, human rights are reasons for reforming the international order, both in terms of instruments to distribute with equity, and in terms of including the voices of those who are worse off. On the other hand, it is also true that the answer to the question "what equality" is constantly open also in the domestic domain, and it needs always updating debates. The uncertainty of the content and intensity of equality is precisely the object of debates on justice, and not its precondition.

There would be another background for supporting the same rejection of human rights as expression of a theory of human rights, and it is the distinction between general and special rights (Hart 1984, 83-88). The latters are rights that arise out of special transactions between individuals or of some special relations among them (promises, citizenship, natural obligations). In contrast with them, general rights are those that arise out of the consideration of human being as such. Whereas the first kind of rights creates normative correlations between the parties, the only correlated obligation general rights generate is not to interfere with everyone else. According to Hart's view, this is properly the definition of a moral right (see chapter 2.1). Moral rights lack of the reciprocity that is typically expression of justice.

As Beitz has conveniently emphasized, it is possible to avoid this objection looking at human rights as a practice (Beitz 2003, 43). Human rights are not rights deriving from the abstract consideration of human beings as such, but they are the expression of special relationships among human beings. They can be considered the concrete (moral, social, legal) answer to the increasing interdependency among human beings in a global community. In sum, they are giving form to the demand of justice coming from new rules, organizations, institutions, that are operating in the global domain. In this sense, human rights are expression of global justice. This means at least two things. The first and most fundamental is that human rights practice does not obey the logic of national frontiers, even though a large part of protection of rights is channelled through the state and

citizenship. These ideas do not contradict one another, because it is perfectly possible to maintain that the justification for the work of the political power in protecting individuals is requested by an international or global statement of justice (Føllesdal, 2000, 163). In this case the term "global" refers to the scope of the practice, and coincides, though only partly, with its universality. Certainly, a practice that is valid for everyone is global and universal. The basis of the universality of rights in this respect, that is to say the domain of application, is the equality in dignity of every human being. Hence in order to deny universality to rights it is necessary to deny the principle of non-discrimination, this time on the basis of citizenship. The social and legal world is plenty of justified differences that motivate discriminations, but it is controversial that certain preferential relationships as those originated by citizenship – even though *prima facie* justified – can always have the priority over others. The practice of human rights teaches us that under certain conditions of intolerable iniquity, other preferential relationships can (and must) be defeated. The preference for our fellow-countrymen cannot always have a priority over the rights of other "human beings." The reasons for preferring one's fellow-countrymen in a practical judgment may be outweighed by stronger reasons concerning people that do not share our affiliation to this particular political community. In part, the explanation is in the involuntariness of citizenships, that it is – as default – the consequence of the luck. Whereas the luck in itself cannot be changed, social institutions of justice are created and supported precisely for mitigating the result of the natural lottery.

When this result is not obtained, often the cause is a fallacious reasoning called "*restricted universalism*" (Black 1991). In many theories of justice, the recognition of rights inside the borders of a political community follows the logic of an increasing universality: they are granted to everyone without discrimination due to race, sex or language. Nevertheless the push towards universality is interrupted – inexplicably – at the country borders. The discrimination between inside and outside inevitably privileges some human beings over others, and for involuntary reasons. The global character of the practice of rights implies overcoming discrimination due to affiliation through a principle of progressive inclusion that expands the benefits connected to the protection of rights to people who do not share the same citizenship. In this sense human rights are a practice of global justice.

Insofar as the practice of human rights is able to shape institutions with varying scope, from the domestic to the international institutions, it will be an expression of cosmopolitanism. The difference between global and cosmopolitan is that the latter is able to integrate different levels of interaction (Cohen 1996,

12). Human rights in fact work in a world of existing (and necessary) borders, precisely on the grounds of the demand for protection human beings. The alternative option is the idea of a world state as the maximum expression of the use of the method of domestic analogy. But it would present a deficit from the point of view of rights protection. Human rights practice is a good remedy for injustices deriving from the principle of self-determination and its consequences on discrimination. As such, it is an institution of justice.

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CONCLUSION

At the end of our journey through the dynamics of contemporary law in which human rights are involved, it is possible to make a balance of our methodological and conceptual achievements.

First of all, the negative approach has shown the partiality and incompleteness of those versions of rights dependent on ideological presuppositions or comprehensive philosophies. Secondly, it is evident now the weakness of the idea according to which the human person or the individual is formed before his or her social relationships, and this is what the tradition of natural rights and liberalism sometimes forget. We have rights because we have social relationships and these relationships are meaningful for the self.

The book has aimed to present an overview of the practice of human rights in its main features, even if the picture could result superficial with regards to many details. This calculated risk depends on the idea that the phenomenon of human rights is a social practice, linked to the legal enterprise, and yet autonomous.

At the beginning we affirmed that it is not possible to understand human rights other that taking part into the practice. Now it is clear why. On the one hand, it is impossible to separate different social practices (even if we can distinguish them in the abstract). Their interdependences make it hard to identify the line that divides the political and legal dimensions, or morality and law, or social interpretations and the legal application. This intersection is the cause of many misunderstandings and may also give rise to opportunistic instrumental use of human rights, as it occurs, when a certain political doctrine or a theoretical account would claim for certain readings of human rights, or when strong powers (states, but not only) would try to turn rights how it may be convenient for them. On the other hand, only by acknowledging that it is impossible to clearly separate those relevant practices, we may avoid all these degenerations. The best

epistemological position for understanding human rights is to take part in their practice, to grasp its goals – the expansion of human freedom and the protection of vulnerable human beings – and to learn its methods. These methods include an inclusionary practice of argumentation both in political communities and in civil society in the search of limiting arbitrariness in the exercise of power of any kind.

The point is that in the context of practical reason the only discussion on the topic is a deliberation on it. In other words, to discuss of the goal is in some way to endorse it: discussing of human rights implies an engagement with them.

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