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# Which Foundation for Human Rights?

## *Quale Fondazione per i Diritti Umani?*

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**Abstract:** The article argues the thesis according to which the problem of the foundation of human rights is not well formulated in the classic debate on it. The reason is that there are different kinds of foundations, depending on the different concepts of human rights, but also in consideration of the different aspects of their practice. The question is then which foundation fits with a notion of human rights as a legal and social practice. The second part is dedicated to the analysis of the idea that the practice of human rights is part of the current *jus gentium*. It aims at showing the implications of that relationship in terms of their appropriate legal grounds.

**Keywords:** Human Rights. Legal practice. International Community. *Jus gentium*.

**Abstract:** L'articolo sostiene la tesi secondo cui il problema della fondazione dei diritti umani non è ben formulato nel classico dibattito sul tema. La ragione è che vi sono tipi diversi di fondazione, a seconda dei diversi concetti di diritti umani, ma pure in considerazione dei diversi aspetti della pratica dei diritti. La questione è allora quale fondazione vada bene per la nozione di diritti umani come pratica legale e sociale. La seconda parte è dedicata all'analisi dell'idea che la pratica dei diritti umani sia parte dell'attuale *jus gentium*. Si propone di mostrare le implicazioni di questa relazione per quanto riguarda il carattere giuridico dei diritti umani.

**Parole chiave:** Diritti umani. Pratica del diritto. Comunità internazionale. *Jus gentium*.

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## Introduction. Theoretical vs. Practical Foundation

We are used to thinking that how we shape the foundation of human rights will depend on the ethical and philosophical background conceptions, those views labelled by Rawls as “comprehensive doctrines”. Therefore, it has been for all of us a great welcome result that—notwithstanding an insurmountable ethical pluralism, some degree of convergence on the subject of human rights had been reached—whether this was the outcome of a lucky overlapping consensus or an agreement on the fundamental values of human life and the need for them to be politically and legally protected. I am not planning to question the validity of such an observation. However, I would like to shed light on one of its weaknesses, or anyway an important element that tends to be overlooked by such a description: the way we structure the foundations of human rights is determined to a great extent by how we understand and conceive them. Therefore, it may be the case that the supposed practical convergence is in fact the result of a misunderstanding on the correct interpretation of what human rights are. We may refer to the same object, but oftentimes we move from a different interpretation—sometimes a very different one, of what that object is.

We must not forget that those—like Jacques Maritain, who observes that agreement on human rights is reached insofar as we do not question its whys—also add that for those rights to be granted protection in practice, a common practical conception is needed: there must be an agreement on a hierarchy of values, a shared philosophy of human life understood not as a speculative, but a pragmatic view.[3] We have to find the genuine practical foundation of human rights in this shared “philosophy of life”. As a result, the issue of the foundation of human rights takes two different lines: the theoretical or speculative one, which calls into question the comprehensive doctrines involved or the whys of the rights; and the pragmatic one, which deals with the shared and common justifications of the practice in its actual implementation. However, in both cases, one must need to clarify first what human rights are.

[3] “Pour que les peuples s’entendent sur la manière de faire respecter effectivement les droits de l’homme il faudrait qu’ils aient en commun, si implicitement que ce soit, je ne dis pas une même conception spéculative, je dis au moins une même conception pratique de l’homme et de la vie, une même *philosophy of life*, s’il m’est permis d’employer pour une fois le mot philosophie à la manière outrageusement impropre du pragmatisme populaire d’aujourd’hui” (MARITAIN, 1990, p. 1215).

Although this is quite an obvious observation, it has a double effect: it makes the foundational issue simpler, while at the same time it makes it also more complicated. Simplification is the result of avoiding many controversies over the foundation, acknowledging that different issues are in question in different cases. However, other issues get more complicated, insofar as the supposed convergence on the rights is compromised, as soon as it is made clear that by referring to them, we often mean different things.

It may be objected that the background conception is anyway what shapes our understanding of human rights. This is not only a possibility but is rather what often happens. However, if this were the only option, then there could not be any dialogue between different conceptions: each one of us would be isolated between the four walls of our conception of human life, without any door or window giving them access to the outside world. By contrast, culture generates forms of shared life and social relationships that have their own identity independently from the intentions of those who have contributed and cooperated to their coming into existence. These are undoubtedly human creations that are made of conventions, customs, common ways of doing and acting, but they are not fully under the control of those who take part in social interaction, and they rather often develop spontaneously and in unexpected ways. Human rights are to be classified under this category of objects.

When American colonists declared all human beings to be equal in rights, clearly they did not have in mind their black slaves, nor it was the then prevailing comprehensive doctrines—notwithstanding their religious character—that were leading to the abolition of slavery. By contrast, it was the same internal rationale of the rights that was claiming the doctrine to be adjusted or reviewed. Not always human rights are what we would like them to be, or what our anthropological and ethical views indicate they are. Quite the opposite, human rights work as a testing ground for our conception of the good life.

The assumption that human rights are a cultural object, to be acknowledged and described before any investigation on its foundations, does not necessarily lead to relativistic conclusions. Not everything which is part of a culture is, just for that reason, good. Therefore, not all human rights are good just because people see them as good. We still have to deal with the critical character of the foundational issue, that is what really matters. Human creations—by

contrast to divine ones—cannot derive from nothing, but always move their steps from some presuppositions, that in the end determine their standards of correctness. If the human rights practice develops along a certain path, this does not mean that they are not subject anymore to ethical scrutiny or public debate: it will always be a matter of deciding what is due, for the protection of human dignity. In this respect, human rights are human beings' duties towards other human beings. It is not true—as some people argue—that the ethics of rights can do without any reference to duties, or as a matter of fact, has got along without them. Nonetheless, it is true that such ethics relegate the duties to a subordinate or derivative role.[4]

Therefore, the foundational issue deals with two different tasks, to be distinguished: the issue of the nature of those rights in general, and the issue of the justification of every single category of rights. This is strictly speaking a matter of distinguishing them, rather than isolating one from the other: indeed, it is clear that our conception of the rights' nature weighs in the justification of every single category of rights. However—as mentioned above, it is also clear that we would not be able to discuss the nature of those rights without taking into account their already existing and changing cultural existence. It is exactly this "nature" or "factual matter" that needs first to be accounted for, renouncing to any attempt of dissolving it into an ontological foundation—aimed at finding an original (metaphysical or empirical) source of those rights, or in a gnoseological foundation—to be found in self-evident truths or compelling arguments. Under this perspective, the foundational theories of human rights sound hopelessly abstract and not very enlightening.[5]

## 1. Human Rights as a Process of Positivization

At the end of the day, if we want to summarize the complex and articulated debate on the foundation of human rights, we must acknowledge that it still relies solidly on the original dichotomy: are rights recognized or rather granted? They are the result of the recognition of the natural rights of human

[4] See, in general, Viola (2000), chapters VII and VIII.
[5] See Viola (2000), chapter XI, for a general summary on foundational theories.

beings, or they rather derive from human will and political institutions? Until this dilemma will be sorted out, nobody will be able to give an adequate description of the nature of human rights.

We should start by observing that human rights, unlike natural rights (VIOLA, 2012), are positive rights, not only because they are included in official legal documents, starting with the Universal Declaration of 1948, but also because they are actually put into practice, *i.e*. protected by the courts and supported by widespread national and international consensus. However, their abovementioned positive character must be read dynamically, unlike the static and accomplished fashion under which the law has been traditionally (and mistakenly) seen. That is why I much prefer referring to a "process of positivization". Human rights are identified by such a process.

The process of positivization allows the determination of something pre-existent, and that is itself the result of a previous determination. Clearly, there must be a starting point, or beginning of the whole process. However, such a starting point, at the time in which it is apprehended and expressed through the practical reason, to a certain extent becomes specified, inevitably loses some of its original potentials, and becomes itself the starting point of further determinations. Through such a process, practical principles become part of human history and culture and distance themselves from nature, which anyway will always play a role as a backup resource as well as a limit.

It is important for the nature of these determinations to be made clear, as they must not be understood either as arbitrary acts of will or as necessary logical deductions, *i*.e. a sort of forced outcome. Rather, they are the result of interpretation and argumentation, often deliberations, where a choice is made among many possible solutions, all of them legitimate. We do not face a choice between good and bad, but between more or less good, adequate, profitable options. As it is known, in the field of practical reason often we do not have one right answer, also in consideration of the inevitable influence of changing circumstances. In short, to grasp the nature of these determinations, one must reject the rigid separation between intellect and will, as it is strenuously defended by Kelsen.[6]

[6] See Viola (2017).

The human rights path is very articulated. These are the different stages towards their development: values-principles-norms. Human rights originate as values owned by the human person, and they ground a number of demands for justice; further to this stage, they become legal principles to allow the values to be put into practice in a social context; they generate norms whose content is the attribution of legal powers and the imposition of legal duties, in order for the rights to be claimed and protected.[7]

If we ask ourselves where exactly those rights have to be located, the answer is that the concept of a human right is fully implemented only through the entire sequence. Values are overriding reasons, but not yet rights, insofar as they do not affect human relations yet; legal principles are a social and legal engagement and commitment towards the dignity of the human person, and they create human relations; norms are legal instruments for implementing those rights, and without them, any entitlement to rights is just a rhetorical exercise.[8]

Jurists start from this last stage and investigate what is the right in question, but this legal inquiry leads them to go back through the whole sequence and get to the value, that express the reasons supporting the same right, by this way obtaining a better understanding of the kind of legal powers ascribed and how they should be exercised. In fact, powers and duties must be only those strictly necessary for the right to be effective. Insofar as jurists are, by definition, in the first place interested in legal norms and remedies, it is normal for them to think that these rights are nothing else than the result of a transformation of certain remedies into substantive legal norms. By contrast, they are rather the result of a transformation of certain normative reasons through norms into procedural legal tools, aimed at rendering justice to those individuals. Rights are authentically understood when one shifts from understanding them as powers to understanding them as ends.

Therefore, we must resist any temptation of delving into an inquiry into what element in this process should represent the essential core of human rights, able to define them as a concept. Human rights are defined on the basis of their process of positivization as a whole.

[7] See Zagrebelsky (2002).
[8] See Viola (2014).

## 2. Human Rights as Natural Rights

Some people argue for this definition of human rights, grounding it in the fundamental values characterizing human dignity, and state that human rights are inherent to human beings as such. This view is rooted in the Preamble of the Universal Declaration of Human Rights, and its article 1, stating that all human beings are "born" free and equal.[9] Each one of us is entitled to these rights, just because we are humans. But this equates to seeing human rights as natural rights, as they were depicted by the paradigm of Enlightenment. It is true that the text of the abovementioned Declaration contains quite a lot of the natural rights jargon, as this was the only one available at the time in which the human rights practice started to take shape. It is anyway obvious that there is a family resemblance between the two traditions of rights: history always consists of a process of transforming the past.[10] But the human rights practice has developed along lines that are different from those of natural rights. It is not just a matter of taking some distance from the essentialism that characterizes natural rights;[11] we must acknowledge that human rights are a conceptual novelty.

At this stage, we must ask ourselves why it has been deemed necessary the creation of a new list of rights, judged to be an inviolable shield for human dignity. What has pushed towards a further determination of these principles? In my view, this question has got a simple answer, which nonetheless has itself a number of implications that are much more complex than we usually think them to be.

It is evident that there has been a clear willingness to start a new process of positivization, aimed at warranting a full implementation of those rights. Full implementation understood both in the sense of a more and more detailed identification of the subjects in charge of protecting those rights and in the sense of a more and more encompassing provision of legal and political remedies. True, the Universal Declaration is nothing but a soft law instrument. It

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[9] See, for instance, Morsink (2009).

[10] For a different history of rights, that takes into account this on-going process of reconsidering the tradition, see Davidson (2012).

[11] Morsink (2009) argues that this would be enough for distinguishing natural rights from human rights, although it is quite unlikely that any doctrine of inherence can be uncoupled from essentialism.

does not include any sanction. However, it does ascribe to each single signatory state the responsibility for protecting human dignity, in front of their own citizens and the whole international community, and this is the first step for human rights to be implemented. If this were not the case, the Declaration would not be, strictly speaking, a legal instrument at all, but only a pious and compassionate tribute to the victims of the Holocaust—in line with the hidden wishes and intentions of some of its drafters.

The tragedy of the Holocaust, which (at an emotional level) represented the first trigger towards the practice of human rights, awakened human souls not only with regard to the scars left on everything human but also concerning the ascription of individual responsibility for those crimes and the inadequacy of the legal remedies offered by the pre-constitutional legal orders. As a matter of fact, a proper moral conscience not only makes you discern good from bad, but also allows you to feel indignant and, as a result of it, urges you to act. If we want the epistemological dimension of human rights to be rooted in the conscience of humanity, we cannot but see it always under the lenses of practical reason, *i.e.* a form of knowledge that is functional to acting. What I mean is that the implementation of human rights is already *in nuce* at the time of their primal stage of apprehension.

Two world wars have shown that the most serious breaches of human rights have been perpetrated by states. Therefore, the Universal Declaration and the subsequent International Covenants address the states, first subjects called to fulfil the duty of protecting those rights in any possible way. These are not simply moral duties—let alone supererogatory acts. Rather, their respect is a strictly legal requirement and they must be given full effectiveness. When these duties are not fulfilled, I would not argue—as Luigi Ferrajoli does—that there are legal gaps in the legal system as a whole, but rather that a commitment made by the law has not been fulfilled, or a legal remedy has not been granted, without any justification for this specific lack of protection.

The path of human rights shows that they are not only threatened by the states, but also by concentrations of political and economic power. Moreover, the responsibility to protect them is now assigned also to international organizations and the international community as a whole, although any specific ascription of individual duties is more and more complex and uncertain. At any

rate, this allows us to distinguish even more clearly human rights from natural rights.

Natural rights are conceived as having a universal entitlement or category of beneficiaries, not as addressed to a universal category of obliged subjects. They must be internally respected by each state, only insofar as every single social covenant has conferred them powers and duties relating to their protection. Therefore, it is the same people who are entitled to those rights, that end up imposing the government a responsibility to protect them, *i.e.* creating special duties stemming from the status of citizenship itself.[12] This is not the case for human rights.

Human rights practice stems from a covenant between states, focusing on their joint recognition of their own duties towards human beings as such. The actors are not the individuals entitled to those rights, but the obliged entities, *i.e.* the states and step by step the international community as a whole; entitled are not the citizens, but each human being, simply in virtue of being human. They are not special duties, such as those stemming from citizenship status, but general ones, towards mankind as such, and they are structured as a basic universal undertaking of responsibility, from everybody towards everybody.[13] It has been powerfully observed that "human rights are standards for domestic institutions whose satisfaction is a matter of international concern".[14] The same cannot be said with regard to the natural rights tradition, as in this case whether they are implemented or not is an internal matter of every single state that may have recognized them.

Therefore, human rights assign to every instance of human life a value that everybody—first of all national and international institutions and, more generally, political and economic powers, must acknowledge.[15] Transforming them into legal rights allows—as observed by Hart—the ascription of rights and responsibilities. The international practice of human rights is based on the idea that the responsibility to protect and respect human rights is borne not only by every single state and by the international community as a whole, but also by all

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[12] For a critical inquiry into the dogma of the preference for the national community, and the view in accordance to which equality exists only in the domain of a political community, see Trujillo (2007).
[13] True, also the American and French declarations had a universal character, but they had just a domestic scope, and they were self-imposed obligations—not international covenants.
[14] See Beitz (2009, p. 128).
[15] See Benhabib (2004).

those powers that could potentially threaten as well as protect human dignity. This means that such a practice tends to acquire a cosmopolitan character. Indeed, universal legal responsibility is a principle of implementation that matches the universality of human rights, taken seriously.[16] This is a feature that is fully absent among the theories of natural rights, and we should try to understand its implications.

## 3. Human Rights as Institutional Rights

On the other side, it is argued that, because human rights are fully-fledged positive rights, they only exist insofar as they comply with all necessary conditions required for them to have full legal effect. In other words, the law must identify who is going to have the legal duty of respecting and protecting them, which sanctions and remedies are envisaged, and which rules of procedure before courts are going to be applied. If any of this is missing, then we are in front of just nominal rights, unrealistic claims, wishful thinking, or, perhaps, moral reasons which do not have strict legal value, like those underlying the so-called "moral rights". In such a context, proclaiming a universal responsibility is not so different from stating that nobody is responsible for not respecting human rights.

This line of reasoning has been rightly targeted for falling into the fallacy of implementation. "To commit the fallacy of implementation is to say that without such (obviously desirable) practices and customs human rights do not exist" (MORSINK, 2009, p. 48). As a consequence, if society does not provide any legal remedy for the protection of rights, then that society does not recognize any human rights, insofar as they must be not only justified claims, but justified claims protected by the law (MARTIN, 1993, p. 84). As it can be easily observed, this line of thought locates the conceptual core of human rights in the will manifested by the laws regulating them, and not in a sort of pre-legal inherence of them in the human being as such, or supposed natural rights.

It is clear that, under such an institutional conception of human rights, positivity is understood as those rights having a full status of determination,

[16] The important role played by a conception of universal responsibility for human rights has been recently highlighted by Pope Benedict XVI (2009), n. 43.

not as being partially determined step by step through a process of positivization. Strictly speaking, such a full determination would be accomplished only when each concrete right is specified, whether through its unimpeded exercise or further to a court decision. As we know, lists of rights cannot but have very abstract features, and they are still undetermined to a great extent: that is why we can only see them as *prima facie* rights. Which rights I am in fact entitled to, I can only know in the concrete circumstances, when looking at exercising them in any given case. Only then, all things considered, the real dimension of that freedom is determined, as well as the character and the nature of the content of those rights—*i.e*. the goods relating to them, the kind of inter-subjective relationship called into question, and the outcome of any conflicts of rights (*final rights*). However, no static conception of positivity can go that further. Those who defend such a conception are happy with those rights being envisaged by statutes—in the first instance, constitutional ones and protected by legal remedies. Before getting to this level of implementation, strictly speaking, there would be no human rights yet, but rather a pre-legal entity that would represent them at an incubating stage. Without laws, there would be no rights.

However, passing a statute that contains human rights not only does not exhaust such a process of implementation, but not even represents its only and necessary starting point. As already mentioned, the first step towards the implementation of human rights has been made already when states and the international community have recognized that human rights must be protected, despite the lack of legal remedies. In the frame of practical reason, knowledge is functional to action. Acknowledging that something is good, already implies a commitment towards its realization (*bonum faciendum est*). Instantiating those rights constitutes already the first step of their implementation. Of course, such a process may come to a halt, and we know that this is what happens too often. But we can always claim that unfulfilled commitments shall be satisfied. The fallacy of implementation is not explained by the fact that the implementation of human rights is not sufficiently distinguished from their instantiation (that is judged enough for them to exist, in accordance to the theory of inherence) —as argued by Morsink. Rather, the fallacy consists in not acknowledging the “practical” reach of an abstract recognition of those rights. Analogously, the theory of the inherence of human rights – that they are acknowledged just in virtue of being human, also

known as the theory of natural rights, can be judged to fall into the “fallacy of the origin”. Such a fallacy consists of a kind of ethical objectivism that does not give any weight to the views of those for which something has value, or is valuable. As a result, such a conception is unable to acknowledge that recognizing those rights is already a principle of action.

Human rights are a process of positivization from start to end, from their recognition to their full implementation. Practical reason follows a series of subsequent determinations, starting already at the stage of the apprehension of the good to be implemented and its formulation. The specific identity of human rights, compared to other families of rights, is rightly expressed in terms of them being able to be fully understood only as a product of practical reason.

## 4. Human Rights as a Social Practice

For the above-mentioned reasons, I have often argued that human rights are a social practice, in accordance with the theorization of it made by its most famous proponent, Alasdair MacIntyre.[17] This might sound inconsistent, as MacIntyre himself judges human rights to be fanciful creations of the Enlightenment—like unicorns. Evidence in support of this view is, as MacIntyre himself argues, that there is no record of any such rights—which human beings should have, just in virtue of being humans, until the 15th century (MACINTYRE, 2007, p. 69). However, it is clear that MacIntyre has mistakenly identified human rights with the natural rights of modernity, and in that respect, he is right in judging them as not classifiable as a social practice. But this is a mistake. Human rights are not an abstract conceptualization, rather a transversal cultural creation of our times, supported by a historical consciousness triggered by the experience of the most serious breaches of justice and hideous violations of human dignity. They can also be taken as an instance of *jus gentium* of our times.

If we adopt the paradigm of social practice in order to better understand the nature of human rights, then we must look at the practice itself to tackle the subject of their foundation. Under this perspective, this issue can be seen in a quite different light than the one offered by the traditional approach.

[17] See Trujillo; Viola (2014, p. XI-XIV).

First of all, the existence of social practice is justified by the fact itself of observing that the practice is actually operating. On that basis, we must be careful when talking of a foundation: the core issue becomes the correct exercise of the practice in question, *i.e*. its implementation in the best possible way or its striving towards excellence. The foundation is called into question not just with regard to the existence, rather for allowing the exercise itself of human rights. Therefore, Norberto Bobbio's (1990, p. 16) statement—that protecting human rights is more important than justifying them, is still indirectly mirroring that traditional foundationalism. Experience has widely shown that protecting human rights necessarily triggers a debate on their foundation or justification.

With this regard, not only do we need to identify the constitutive elements of social practices but also, we need to shape a virtuous interaction among them. Social practices are made of cooperative behaviours, belonging to a shared horizon, intentional participation to this shared enterprise, a series of somewhat official interpretations and implementations of the rules, and, last but not least, values that shape those ends around which the practice has been woven and established.

Each one of these elements has got its own test of validity and effectiveness. Cooperative behaviours, which give substance to the practice, will be observed, intentions inferred, interpretations monitored, arguments tested, rules that are going to be followed will be ascertained, and rules which have in fact been complied with, will be determined *ex-post*, while values and ends will be justified. Each one of these "foundations" will have its own internal criterion of validity and effectiveness, but the practice in itself does not lie in any of them individually taken. The practice is the result of their historical convergence and interaction.

Of course, values and ends enjoy a privileged role, insofar as they represent the *raison d'être* of the practice of human rights, the element that provides an identity to the practice itself. Their justification is still open to the ontological view, which takes into account the human being as such, as well as to the epistemological view, which relies on them to be self-evident, and to the political and institutional view, which finds in them in any case some human will at play. Human rights are recognized just in virtue of being humans, or based on the nature of government and political society? This debate is still open, and far

from begin exhausted. At any rate, if we keep ourselves on the sheer level of values, we will not be able to label them as rights any more than by metonymy. Declaring the existence of fundamental values connected to human dignity is not enough for real human rights to be there. We must locate that statement in a practical context, even if at an embryonic stage. Therefore, we can accept the view that human rights exist insofar as they are in fact implemented, but if we also acknowledge that their recognition and protection are "due". But does this mean that, if recognition and protection were completely withdrawn, strictly speaking, we would not have "human rights" anymore? Exactly! Although they would still be natural rights, to be labelled also as "moral" rights, duties not recognized and unfulfilled, and most importantly serious violations of human dignity.

The practice of human rights is a major historical endeavour, aimed at humanizing the world of human beings and adjusting it to the practical task of respecting their dignity.

## 5. Human Rights and *Jus Gentium*

The thesis according to which human rights are a social legal practice, started and supported by a historical awareness of extreme iniquities and violations of human dignity, points at their parallel with *jus gentium*, which is the topic of this section. Here the core aim is to test the idea that human rights are a component of (current) *jus gentium*. The assumption is that *jus gentium* is part of the legal practice and, even before, that it exists as such in our days. *Jus gentium* seems to be a topic of the past, yet it comes back from time to time. The guess is that *jus gentium* plays a crucial role in some legal crossroads, but it recedes to the backstage in other times, in particular, in epochs of consolidation and formalization of legal systems as a step in the so-called process of positivization. It does not disappear completely because it belongs to the very dynamic of law as a social practice. The hypothesis is that *jus gentium* is a sort of the first stage in the process of building a legal practice as an answer to a demand of coordination or about the conditions of legal interaction. In this first legal stage it is easier to see not only how concrete and specific claims of justice

move the legal articulation of rules and procedures, but also that their same formulation in legal terms is already in itself an answer for those demands of justice. As a primeval law, *jus gentium* is tentative and only some of the best answers (nowadays we would say the best practices) will subsist and progress towards a more established form of law, generally through the effort of implementing rule of law's requirements. Both the original contacts with real social demands and the process of formalization are necessary for legal practice. In fact, a law that loses its roots in specific social dynamics and a law that does not reach a good pattern of formalization could be considered defective.

In order to realize the purpose of this second part, it will be necessary to test some of the main elements of *jus gentium*, trying to identify its nature and goals. This will be done along the way, instead of sequentially.[18] In this perspective, it is worth anticipating that, on the one hand, human rights would not cover entirely the area of what can be called *jus gentium* in our world, but a relevant portion related to the treatment of human beings. On the other hand, and because of the nature of *jus gentium*, that is law in its objective sense, human rights might be considered under the point of view of a practice taken as a whole characterized by its goal (the protection of human beings), rather than a collection of subjective individual rights to claim for, in accordance with the first part of the article.

If there is any *jus gentium*, it is a law appliable to all or almost all people, in other words, a law universally valid. Roman jurists distinguished it from natural law and civil law.[19] In the latter case, the difference was that civil law was the law of the city of Rome, a law valid for a specific people, whereas *jus gentium* extends beyond the people to *gentes* (other peoples). This is the reason why *jus gentium* has been historically referred to the international field, even if for Roman jurists *jus gentium* regards also private relationships (contracts, obligations, property), in addition to (international) relationships with other *gentes* (diplomatic customs, *jus ad bellum* and *jus in bello*). The progressive identification of *jus gentium* and international law—until the apparent dissolution of the former in the latter in modern times—started with the use of the idea of *jus gentium* as a law

[18] There are many kinds of research on different aspects of the current emergence of *jus gentium* in the law of merchants, in the criminal responsibility of individuals, in the use of foreign law, as an international theory of justice, famously Rawls (1999). An introduction on different aspects of this presence in Clark (1919).
[19] Gaio, *Digest*, 1, 1, 1, 9; Ulpiano, *Digest*, 1,1, 4 (IUSTINIANUS IMPERATOR, 1908).

*inter gentes* of a *communitas orbis* proposed by Francisco de Vitoria[20] (16th century). Thanks to Alberigo Gentili, Hugo Grotius, Samuel Pufendorf, and Emer de Vattel, at the time of the consolidation of states as the main legal actors in the context of a Westphalian model of international relationships, *jus gentium* did become the first form of modern international law as a law interstates. With this development, nevertheless, *jus gentium* has been doubly reduced, since, on the one hand, as it has been said, Roman *jus gentium* was relevant also for private relationships and for what we would call public domestic law, and, on the other hand, it was the law of a universal community, and not only the law among states. Paradoxically, even if *jus gentium* was recognized as the forefather of modern international law, the Westphalian phase of international law was one of the ages of *jus gentium*'s eclipse. The first question to be examined is the kind of universality of *jus gentium* and its comparison with that of human rights.

The second perspective to be scrutinized concerns the relationships between *jus gentium* and natural law. The Roman tripartition of law in *jus gentium*, *jus naturale*, and *jus civile* indicates clearly that they do not overlap, even if the question of the positive or natural character of *jus gentium* has been the object of countless discussions throughout history. The main opinion since the Medieval Age is that *jus gentium* is positive law (AQUINAS, 1911-1925),[21] or, according to Vitoria (2018 [1557]),[22] a law more positive than natural. Vitoria's ambiguous statement shows an important line of reasoning that leads to the third facet to be examined: *jus gentium* is a positive law grounded widely on consensus. It can change and evolve as positive law does, but it is referred to as a common understanding of what is right and just. *Jus gentium* and *jus naturale* do not overlap but they are in some way related to each other. If they exist, *jus gentium* ought to be consistent with *jus naturale*. Jeremy Waldron, in his famous article on foreign law and *jus gentium*, explains that the difference between *jus naturale* and *jus gentium* is that the latter does not consist of theories and ideas about justice to be applied to positive law—as rationalist natural law theories use to conceive natural law—but it consists of what law had actually achieved in its

[20] The author speaks of an international community with an immanent authority for creating equal and universal laws. His main work is available in *Relectiones Theologicae XII (2018 [1557]),* at *The School of Salamanca. A Digital Collection of Sources*: <https://id.salamanca.school/texts/W0013>

[21] *In*: *Summa Theologica*, II-II, q. 57, a. 3.

[22] *In*: *Comentarios a la Secunda Secundae de Santo Tomás*, q. 57, a. 3.

history worldwide, accumulating shared insights on rights and justice (WALDRON, 2005). In this sense, *jus gentium* can be correctly said a common law of civilization (MARITAIN, 1986, p. 54). This definition does not preclude the possibility of mistakes and injustices. Roman jurists, for instance, brought back slavery and private property to *jus gentium*—, and these matters are (and were) manifestly contended. In her last book on the cosmopolitan tradition, Martha Nussbaum suggests that Grotius' preference for natural law and his criticisms against *jus gentium* were precisely motivated by *jus gentium*'s dependence on cultural and historical reasons. This rooting in history explains how sometimes *jus gentium* violates moral law (NUSSBAUM, 2019, p. 113-118).[23]

## 6. The Universality of *Jus Gentium* and Human Rights

Since its beginning, *jus gentium* deals with elements of foreignness, and in this sense is a law able to handle relationships beyond borders. Even as a body of law attempting to provide Roman merchants with suitable legal tools for commercial exchanges with non-Romans, it implied the relationships among individuals belonging to different peoples.[24] This feature was at the same time amplified and reduced when *jus gentium* became a body of law that governed relationships among states. It was amplified because it involved all the states, and it was reduced because it concerned only the states. On the contrary, the universality of *jus gentium* would start as the possibility of going beyond borders, but it points at a universal sphere of influence, applicable to the whole of humanity, and this was the main Vitoria's contribution to international law as the law of a *communitas orbis*. The more importance is given to interstates relationships, the less salience must be recognized to *jus gentium* for individual relationships, making universality a feature related to just one class of actors, the

[23] Nussbaum (2019) seems to share with Grotius the idea that natural law is a moral theory, whereas being a sort of law, natural law should be distinguished from moral theories *tout court*. At least, natural law should be considered a moral theory for the law.

[24] *Jus gentium* was administered by the praetor peregrinus between *peregrini* (foreigners) or between Romans and *peregrini*. Its role was to make possible the interaction among citizens and foreigners. The task of the *praetor peregrinus* was to accommodate and simplify the civil rules in ways accessible to those who were not part of Rome. They did soften the forms and preferred the substance of the case. For this reason, even Romans chose to solve their conflicts under *jus gentium*. The *praetor peregrinus* was created when Rome conquered Sicily, in particular in the West part of the island, which was occupied by Phoenicians.

states. This is the reason why some authors support the idea that only the post-World War II has set the pre-conditions for a very law of Nations that can be brought back to *jus gentium*. The existence of *jus cogens*, a law valid for the international community as a whole, has been identified as the main indicator of *jus gentium* 's revival (BOUDREAU, 2012, p. 27). Here the idea is that *jus gentium* is a law to which all the states are obliged to, even beyond their will or acceptance. This view tends to suggest the assimilation of international law, *jus cogens*, and *jus gentium*, that it is neither the necessary conclusion of this analysis nor a good description of current international law. What can perhaps be said is that current international law is more similar to the old Roman *jus gentium* than the international law of the Westphalian style. A key reason is a presence in international law of mandatory and universal laws related to common goals of the international community, some of them associated with the protection of human rights. But there are also other crucial purposes, such as the protection of the environment. The latter and the respect of human rights are not optional and they restrain the content of treaties and the mechanism of reciprocity and states' self-protection in international law.

The question is: in which sense are these changes related to *jus gentium*, and not only to *jus cogens*? The answer is that while *jus cogens* is a quality of some norms, *jus gentium* is a stage of the legal practice as a whole. The latter illustrates the physiognomy of law as a social practice, in particular in its capacity of extension beyond political borders. The former is a component of this picture. International law and *jus gentium* are made also by customary and conventional law. In that sense, also the medieval *lex mercatoria*, as well as its current version,[25] that is not part of *jus cogens*, could be led back to *jus gentium*. It deals with demands of coordination, according to shared goals and purposes, to be worked at by rules and procedures compatible with differences. Then *jus gentium* has to do with the universal domain of *jus cogens*, but also with the more modest opening capacity of law as an inclusive practice of coordination.[26]

If we look now at the human rights practice, and, more precisely, at the way in which it has been set up in the international law of human rights, it

[25] Bibliography on *jus gentium* and *lex mercatoria* dates from more than a century ago; see Howe (1902).

[26] In this sense, it can be said that *jus gentium* gives a more inclusive picture of the law, rather than state law, whose specificity is determined by political membership.

seems that the most recurrent meaning of universality is the generality of rights holders. The universality of rights means certainly equality in attributing them to all human beings just by virtue of being human. They differ from rights of the citizens. Both classes are general if we understand it as the result of a universal quantifier (it applies to everyone in the same category). But the parameters are different. While the practice of human rights validates rights for human beings, political communities consider them as members. The protection of citizens within political communities could be certainly grounded on their being human, but the responsibility to protect those rights is typically requested to the specific community they belong to and because of that, and to all of them.[27] Looking at human rights, it can be said that the key point is not only the universality of rights holders—that is proper of any general class—but the universality of recipients of duties. This element is clear in the act of birth of the new practice of human rights, the United Nations Universal Declaration of 1948. It is true that it recognizes a list of rights for everyone, but the most important point is that proclaims it "as a common standard of achievement for all peoples and all nations" (UN, Preamble). This side of universality is the very character of the practice of human rights and the key of the comparison with *jus gentium*. It is not the kind of rights holders—that within the human rights practice admits internal differences according to their different statuses (children, elders, women, citizens, refugees, and so on). The universality of human rights is to be identified as a universal responsibility to protect them. The implementation of such protection could and must be canalized through the activity of one or more of its actors, mainly the states. It involves not only the responsibility of the whole humanity, nations and international organizations, but also civil society and every person of goodwill. That protection must be guaranteed equally, in other words, without discrimination. Effective and non-discriminatory protection of rights is the task of the practice of human rights. If this practice is characterized precisely by duties and responsibilities, then the parallel with *jus gentium* is viable, since the latter is a version of the law in its objective sense. Human rights can be said part of current *jus gentium* when understood as a practice of protection of rights.

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[27] Even if modern constitutions have at least an implicit universal scope insofar as they recognize human rights.

The universal engagement in the protection of rights shows the importance of the task for the entire international community. It puts rights at the center of legal efforts establishing their primacy in the legal enterprise (and so it does not shift them simply in a practice of duties). In particular, rights prevail over national interests in international relations, another key of the predominance of conventional international law in the Westphalian model. From this point of view, it is easy to appreciate the core of political conceptions of rights. According to them, any state not only has the duty to respect and promote human rights, but is also legally subjected to interference by other states or entities of the international community in case of violations or incapacity to promote them (RAZ, 2020). The limit of political conceptions is that rights are neither only the reflection of state's obligations, nor they have exclusively a political status (TRUJILLO; VIOLA, 2014).

## 7. Human Rights and *Jus Naturale*

A second element typical of the study of *jus gentium* regards its relationship with natural law. There is no way for facing here the problem of natural law with its myriad of versions. But it is obvious that the different traditions of natural law would correspond to different versions of *jus gentium*. It has been said that in its origin and the medieval debate on the topic, *jus gentium* is not natural law, or it is more positive than natural law. In other words, *jus gentium* shares the characters of positive law rather than those of natural law. Maritain (1986, p. 51) explains the difference between them from an epistemological point of view. While natural law is known by natural reason,[28] *jus gentium* is the result not of a single, but a common effort of reasoning and deliberating along the way of justice, and not in the abstract, but the concrete field of human actions. In this sense, it is the result of artificial reason. This explains why evidence of injustices and violations play an important role in the work of making clear what is not right and must not be repeated.[29] Waldron (2005, p. 138) describes *jus gentium* as accumulated wisdom in rights and justice, an established body of legal insights

[28] Maritain (1986, p. 53) speaks also of "*la raison commune de l'humanité*".
[29] It is easier to agree on injustice, rather than on justice, as Plato taught; the same idea in Shklar (1990).

reminding problems that have been confronted before. But the historical dimension is not limited to its origin, because it characterizes all the way along with its development. For human rights, it means not only that they have historical grounds and then they differ from natural rights, but also that it is precisely in this historical course that it is possible to see which strategies and happenings are convenient to the practice of protecting rights and which ones are unfaithful readings and implementations. On the one hand, being the practice of human rights a collective legal enterprise, the process of identifying its methods and contents is not achieved once and forever. On the other hand, it is always necessary to tune goals, facts, and strategies, because success is not guaranteed. Behind this feature, there is the dynamic version of positivization that has been introduced in the first part of the article.

As the outcome of a search for justice, *jus gentium* is similar to *jus naturale*. But as long as that search is done through human reasoning, argumentation, and deliberations in history, *jus gentium* could depart from natural law. The requirements of natural law do not change, while *jus gentium* is more changeable and time-bound, and may be modified as conditions of life change. This possibility makes controversial *jus gentium* conclusions. In other words, the looking for justice in history is inevitably uncertain. It is the reason why along history *jus gentium* could contain legal institutions clearly unjust from the point of view of natural law, that means also from the point of view of more careful consideration. The most significant ancient example is slavery: Roman jurists noted that while it was for sure that it belongs to *jus gentium* and *jus civile*, slavery was unjust under natural law because human beings are born free. In order to understand this point, it is worth noticing that Roman jurists were not reasoning about *jus naturale* and *jus gentium* in terms of top-down relationships. They neither make a list of principles of natural law to be translated in positive law (*jus gentium* and *jus civile*) nor a list of natural rights. They were instead reasoning on positive law and were able to notice that a specific legal institution, even well consolidated and perhaps useful for the most, was legal but not just. The message, at the end of the day, was that positive law would look for just institutions, even if it does not always succeed.

The difference between *jus gentium* and *jus naturale* could depend on the fact that what is evident and clear in natural law is just a very restricted

core of the very first principles for actions, a sort of very basic rules orienting human actions to do good and avoid evil.[30] Beyond this threshold, everything is doubtful and controversial, but again this does not prevent the battle for justice. *Jus gentium* is the result of humanity's efforts trying to discern right and wrong ways in its path for justice and peace. Rather than ideas and principles, it is a lab in which tentative solutions are tried and tested until they are settled in full positive law. The collective nature of this effort could make it more certain but does not eliminate the risk of mistakes and missteps. In the perspective of Aquinas' practical reason, for instance, the two forms of deriving positive law from natural law were by conclusions, and by determination. If conclusions could seem difficult to be misleading, because of the presumptive logical strength of deductive reasoning, determination, *i.e.* the process of establishing how to implement natural law given the abundant range of possibilities to be followed in uncertain conditions, is obviously less reliable. *Jus gentium*'s research for justice is then plausibly progressive and tentative, not infallible, as well as not systematic.

From this point of view, it is apparent that the parallel between *jus gentium* and human rights is far from being related to their translation in natural rights fixed on human nature. It shares with *jus naturale* the aim of searching for justice.[31] The parallel between human rights and *jus gentium* is referred to the general meaning of the practice. The dynamic of this process belongs to positive law—in other words, to law—, not only in so far as it aims at establishing the practice and its implementation but also from the point of view of the search for the best way of interpreting and developing it. All these tasks come together in the international law of human rights.

## A Practice Grounded on Consensus

The third character of *jus gentium* is the question of its being grounded on consensus. The tradition points at the idea of an implicit consensus at its origin. This consensus is linked to its customary source and confirmed through the application of those norms, in the form of a performative acceptance

[30] The more basic rules are summed up in the formula "to do good and avoid evil".
[31] Finnis (1980) affirms that respecting and promoting each person's rights is a different way of speaking of the common good.

of the rule as a correct basis for action. It is obviously not necessary that it counts on the consent of every actor. The virtual consent of all is enough. Some authors think that, once *jus gentium* is established, in order to abolish it, actual consent would be required, and that is almost impossible (VITORIA, 2018 [1557]),[32] but this thesis is against the changeability of *jus gentium*. In any case, in the field of customary law, it is always difficult to prove that practice no longer remains general and consistent, and then that a customary rule is not more binding, but even if difficult, it is not impossible.

The universal scope of the responsibility towards human beings raises the question of the ground of its normative influence. As it is well known, at the time of the Universal Declaration of 1948 it was said that there was a practical agreement on those rights, even if major disagreement about their foundations. In fact, most of the UN members supported the final draft of the Declaration, while no one voted against it. But what it is important to look at is that in the effort to build the practice of human rights initiated by that agreement, there are many clues about the common efforts for cooperating in their legal enterprise, not only through reiterations and international conventional law but also in terms of cooperating in the mechanism of implementing them as well as expanding their effects in the field of domestic law. And that is evident even if the real development of the practice needed a long time to flourish. In some way, the time needed for the emergence of the practice plays a positive role in the expectance of its endurance. But, as a legal and social practice, it needs an active engagement in implementation and the search for appropriate interpretive insights and suitable means. The future of human rights is open to history.

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