

What moral theory for human rights?

Naturalization vs. denaturalization. (*)

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Abstract

The United Nations universal declaration of 1948 celebrated the belief in human rights as a great moral value. But what does 'the belief in human rights' precisely mean? What exactly are human rights? Admitting that human rights exist may cause difficulties for certain moral theories and raise various questions. Some questions concern the problem of the justification of human rights: are these grounded on *nature*, that is on something unalterable and absolute, or are they the product of history and social life? The various theories of human rights answer these questions differently. This paper, therefore, examines the controversial question of the justification of human rights by comparing the two main forms of argument which are developed by the predominate theories of human rights: *naturalization* and *denaturalization*. After showing the advantages and disadvantages of these rival arguments, the author draws some conclusions regarding the issue of justification of concepts, such as the concept of human rights, on which our present social life appears to be intrinsically based.

The Universal declaration of 1948 celebrated the belief in human rights as a great moral value. But, what does this belief mean exactly? What are human rights precisely? Admitting that human rights exist may cause difficulties for moral theories, raising different questions, about the analysis of the concept of human rights, of the advantages or disadvantages of the rights vocabulary, or about the content of these rights or even about their justification, whether there is any ground for believing in something universal and inalienable like human rights.

The problem of justification is particularly relevant: are human rights grounded on *nature*, that is on something unalterable and absolute or are they the product of history and social life? The moral theories of human rights answer differently. Some maintain that human rights represents the moral rights that "human beings have in virtue of being human" (1), and others, on the contrary, say that human rights are "the choice of a particular moral vision of human potentiality and the institutions for realising that vision"(2) or "a proposal concerning the morally appropriate way of treating men and organizing society" (3).

The crucial point, so, lies in the choice between nature and history: "Any right-based moral or political theory has to face the issue whether the rights it endorses are 'natural' or 'human' rights, universally valid and determinable *a priori* by some kind of reason, or historically determined in and by the concrete institutions of a particular society, to be found out by analysis of its actual laws and practices" (4).

The aim of this paper, therefore, is to investigate the controversial question of the justification of human rights by comparing the two main forms of argument as to their existence, *naturalization* and *denaturalization* which are developed inside the main moral theories of human rights. After showing the advantages and disadvantages of these rival arguments, we shall try to draw some conclusions that could throw some light on the question of the justification of a concept, like that of human rights, on which our present social life appears to be intrinsically based.

Let's begin with some general remarks.

Any moral theory that claims to be right-based ought to be able to derive all the ethical relevant notions from that of rights. Traditionally, rights have been included in theoretical patterns like consequentialism, utilitarianism and deontology (5). But the challenge of rights and, in this case, specifically of human rights is about the possibility to define their meaning and content without any reference to other notions, like those of duty, utility or good: rights are to be based only on themselves. As J. Mackie wrote, "on reflection, we might find an assignment of [...] rights to persons a more acceptable starting point for critical moral thinking than any other" (6).

Moreover, a theory of human rights has to define clearly what it means by human rights, in what way each individual is a bearer of those higher and universal rights to life, freedom and well-being which seem to need only their 'naturalness' as justification. That is, any ethical theory of human rights, as noticed, will have to answer precisely the question whether human rights are to be based on history or nature.

Historically, the most influential moral theories of human rights have been those belonging to the tradition of the Law of Nature. In these theories, human rights depend directly on the natural order and are subject to a universal moral law, superior to positive law. However, the attempt to explain the notion of human rights by some appeal to natural order can be found also in the contemporary debate inside the so called ethical naturalistic theories of human rights. This attempt is made in two ways: either in scientific and empirically ascertainable terms by means of some cognitivist theory or in rationalistic and absolutistic terms, grounding the notion of human rights on the giusnaturalistic or aristotelic-tomistic tradition.

But it is to be pointed out that in the course of history human rights have mostly appeared as a vindication of freedom against the established power and as social and economical demands, following a path which usually sees the notion of human rights as the contemporary inheritance of the modern concept of natural rights. This might mean that nowadays the notion of human rights no longer needs to be based on nature, but that it represents human requests, historically defined and morally and politically justifiable, by means of some *non-naturalistic* theory.

But it is not so: if human rights exist, it is said, they are to be based on human nature, on the simple fact that individuals are human beings. If it is so, how is human nature to be defined? What are the consequences of this assumption on the ethical theories of rights?

Let us answer these questions through the examination of the two main types of human rights moral theories mentioned above, the naturalistic one and the non-naturalistic one.

Naturalistic theories.

The present *revival* of natural rights theories is mainly due to Robert Nozick's view (7). He made of the inviolable freedom of individuals and of the absolute control of property in the self and its possessions the natural rights which constitute the foundation of a libertarian and well ordered society. The core of Nozick's theory lies in the opening sentence of his *Anarchy, State and utopia*: "Individuals have rights" (8) which express their 'separate existence' according to the Kantian principle that individuals are ends and not simply means.

The problem of their justification soon arises: an idea of natural rights like this, in fact, meets with various epistemological difficulties. In general, any naturalistic theory, that is to say any theory which takes completely the field of morality from the empirical reality of human life, must explain at least three points: *whether and in what way* these natural rights are inalienable, prescriptible, forfeitable, defeasible or self-evident, what the *source* of these rights is and, last, *what it means* to assign them to people. For this reason, often the philosophers of natural rights do not agree on the question whether *what* makes a right a natural right and, furthermore, what

makes such rights *natural*. As a consequence, the epistemological difficulties have brought to distinguish between those theories which, in some way, refer to the classical or modern tradition of natural rights and those ones which appeal exclusively to empirical data which are scientifically ascertainable, refusing any reference to the law of nature or to jusnaturalistic principles.

Therefore, we can distinguish three main kinds of arguments which characterize the naturalistic ethical theories of human rights: first, the human rights theories which refer to modern jusnaturalism; second, the theories which go back to the aristotelic-tomistic tradition; and last, those naturalistic theories which try to find a scientific basis of the ethics of human rights without any reference to the law of nature, but appealing exclusively to empirical ascertainable data.

These arguments make use of three different meanings of the term 'natural': one which explains ethics through the same metaphysical and ontological principles employed to explain reality; the other which establishes that what is natural is a synonym of what is rational; and a third one, which refers to the term natural as meaning empirically verifiable. The first two meanings are twisted together, in different ways, in jusnaturalism and in the aristotelic-tomistic tradition. The third belongs to those contemporary naturalistic theories which derive from empirism and are criticized by the anti-cognitivists and by those maintaining the naturalistic fallacy and Hume's law.

With all the theories using the term natural in these ways, we are faced with the problem to ask to what extent the consideration of facts concerning human nature determines moral conclusions. One way or another, we face a 'naturalistic reduction' of the notion of human rights. Why a naturalistic reduction?

Since it is a general conviction that "if there are such things as human rights, then they are rights we have independently of laws, conventions or special moral relations" (9), it is easy to see them as universal and inalienable. And what can the source of these rights be if not a law of nature, universal and inalienable? Actually, at the origin of the idea of natural rights there is the attempt to affirm, appealing to human nature and to a higher justice, that individual liberty has inestimable value above or against the established power.

However, the link between the idea of natural rights and that of the law of nature is controversial and widely debated. Surely it seems interesting to connect natural rights, as something independent from existing laws, to a universal and incontrovertible 'moral' law. But there are philosophers who see natural rights as more parasitic of the vocabulary than of the content of natural law: they would be, as K.R. Minogue wrote, "an assertive and individualistic version of what appears in the [...] philosophy of natural law as an elaborate and compendious account of human moral obligations"(10). In this sense, natural rights would not depend on the law of nature for their justification and could be seen as something less obscure.

Leaving aside this question, however, the idea of natural rights still arouses interest and fascination. The main reason seems to be that it ensures a solid basis for human rights: "The firm ground needed for the idea of human rights isn't likely to be secured without the basis promised by natural rights theories" (11). Only by giving human rights an empirical ascertainable basis or an ontological and rational one, are we convinced that we can explain their universality and unconditionality and, besides, that we can allow them to be of some weight: it is said, in fact, that if a human right does not depend on a natural fact and has no legal force, what weight can it have?

Common sense is the first to advocate the naturalistic reduction. Individuals possess human

rights only in virtue of their being 'by nature' human beings and rights are conceived as something vague, abstract and morally universal and inalienable, obscuring their source and value. In the name of these universal natural rights it seems possible to challenge the dictates of all existing governments and the pressure of every society if they seem oppressive, that is if they do not recognize the natural rights of every individual.

Ethical theories, then, would imitate common sense, sharing with it the abstractness and imperscrutable appeal to natural rights or to the law of nature and hiding, therefore, the eminently *relational* value of the moral discourse. As it has been noticed, "if moral philosophy or 'moral science' is concerned to guide action, if its content is a set of [...] commendations, prescriptions, demands, commands or requirements, then we have to recognize that the moral predicates are in fact *relations*" (12) and relations are constituted at least by two terms, the demander and what is demanded. The moral language adopted by common thought and by the naturalistic theories connected with it, would conceal the source of the requirements expressed by natural rights, by dealing with incomplete relations. That is, ethical theories would come to present as impartial what is partial, as desirable what is simply desired, making the language of human rights the instrument of a normative science which can explain the naturalness and rationality of human rights. Therefore, in some ways, the various naturalistic theories of human rights present the same characteristics, which can be summarized in the four following points (13):

in these theories rights are included;

such rights are affirmed as morally fundamental;

the possession of such rights by individuals is linked to the possession of some natural property;

a natural property being the condition for a human right, in these theories there is necessarily some form of realistic epistemology.

While the first and the second characteristics may be satisfied by any theory of rights, what makes an ethical theory a naturalistic theory are specifically the third and fourth characteristics. Besides, the various naturalistic theories can be distinguished for the way the third point is exemplified. Let us see in what way.

The jusnaturalistic or aristotelic-tomistic theories of natural law refer to human nature as something metaphysical, essential and immutable, pertaining to all human beings and to rationality, as a distinctive trait of the human species. As something rational and natural, the law of nature is common to all men. Such law is however difficult to justify. (14). "The doctrine of natural law [...] is very obscure [...] It seems a strange law which is unwritten, has never been enacted and may be unobserved without penalty" (15). Even if we must recognize the plurality of the natural law tradition and, so avoid the risk of oversimplifying, one of the basic features of this tradition seems to be its being general and abstract. These features are the cause of the limited value of the whole doctrine of the law of nature as a practical ethics: "The idea of natural law provides no shortcuts for moral reasoning" (16). And, if natural rights are conceived as an 'emanation' of this natural law, they meet with the same controversies (17).

Nevertheless, as was said above, natural rights are affirmed even independently from the natural law. H.L.A. Hart, for example, in the attempt to safeguard, at least in part, the jusnaturalistic tradition and, at the same time, avoid the difficulties connected with admitting the existence of a natural law, defined the subject of rights 'any *adult* human being *capable of choice*' and affirmed that "if there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free" (18).

Therefore, Hart tries to defend the existence of traditional natural rights, but refusing any appeal to a law of nature or to a higher order and stating, as it were, the *natural* value (that is, intrinsic to human nature) of individual liberty. The right to liberty is in fact defined as a natural right because it is possessed by all men, as human beings and because it is not created or granted by the voluntary action of man. But this right is not absolute or incontrovertible: "My thesis is not as ambitious as the traditional theories of natural rights; for, although on my view all men are *equally* entitled to be free [...] no man has an absolute or unconditional right to do or not to do any particular thing or to be treated in any particular way" (19). Thus, this view is an example of how the complex question of the relationship between natural rights and the law of nature is approached. However, it is to be noticed that, even avoiding the adoption of the idea of natural law, the problem to justify the meaning and source of this alleged *natural* liberty remains.

In order to escape this problem also, some have tried to defend the traditional idea of natural rights, by adopting actually only the form and changing the content. K. Minogue wrote, in fact, that "the natural rights doctrine is a vindication of the space people need to play the game of life" (20). To wit, natural rights, being completely autonomous from the law of nature, are not demands, but *proposals* concerning the changing of the rules of the game of life. According to Minogue, "what seems [...] to have been less recognized is the significance of natural rights in opening spaces within which people who felt themselves suffocated by the repetitive purposiveness of their lives might be allowed to play a part in the wider game of life" (21). If it were true that natural rights are something different from natural law, nevertheless, this does not mean that their significance lies in their relation to the rules of life: if we conceive natural rights in this way, it seems we change their traditional significance. A special conception of life then, that is a kind of 'wider game', strongly influences Minogue's comprehension of the meaning of all the tradition of natural rights.

The *empirical* naturalistic theories, instead, completely refuse any appeal to tradition, both of the natural law and natural rights: they are based either on empirical ascertainable elements, like goods or needs, or on rationality, intended, however, as a *contextualized* quality, that is founded on a scientific but not metaphysical view of the ability of human beings to understand reality.

The *needs* theories, at a first glance, seem to be very plausible, because human needs represent an important part of 'human nature'. They seem also attractive, because such needs (at least in principle) appear scientifically determinable, in this way easily avoiding the problem about the development of a convincing view on human nature, from which to derive a list of human rights. According to the needs theories, human rights are "norms that regulate actions by the norm-receiver relative to other human beings in general and their need-satisfaction in particular" (22) or, in other words, "are statements of basic needs and interests" (23). That is, a 'human need' is not intended as a mere desire or interest, but as a *basic* and *universal* need, which everyone has simply because they are human.

If we closely examine the meaning of these theories, however, we meet with some difficulties. The most important one is about the link between 'X is good for human beings' and 'there is a human right to X'. Needs theorists seem to fail to justify the needs-rights link: if the needs referred to are only the primary ones, then they are inadequate as the source of human rights, since they concern the maintenance of life, rather than its quality; but, if we refer also to the secondary needs, more abstract and general, then their empirical status is no longer scientifically ascertainable, as instead this kind of theory claims. As a consequence, it would follow that, as it has been pointed out, "even leaving aside the alleged problems of inferring values from facts, [...] needs theories ultimately fail because they simply are not scientific theories and yet have based themselves on their alleged empiricism" (24).

The naturalistic theories based on the concept of *rationality*, then, refuse the reductionism of

contemporary thought (developing, some way or another, a kind of neo-aristotelic metaphysics) and are convinced they can escape the difficulties met with by the natural law theories, affirming that "natural rights theory does not depend on the view that the nature of man, for example, consists of some timeless, intrinsic essence found *in* everyone, i.e., a metaphysical view of natures. Instead, it is sufficient to be able to defend an epistemological view of natures, whereby what human nature is may be demonstrated from what we know about reality, i.e., by a rational integration and differentiation of the evidence of reality we are aware of" (25). The epistemology underlying this kind of theory, however, does not show less problems than those determined by the natural law theories. It is a cognitivist epistemology, which claims to determine the ethical universe on the basis of empirical knowledge, falling also in the naturalistic fallacy. Therefore, it meets with all the known criticisms made to the realistic and cognitivist ethical theories, first of all that of deriving values from facts (26).

In all these naturalistic theories, so, we face above all the problem of *deriving* values from facts: from facts concerning human nature, or epistemic rationality or the law of nature, the human rights are inferred, which are typically moral rights, standing for values regarded as fundamental in the life of human beings.

The naturalist, nevertheless, insists on conceiving human rights as the vindication of some traits inherent in human nature. Some, like G. Vlastos or J. Feinberg (27), have tried to sidestep the question by proposing a *non-reductionist* naturalistic theory, in which the concept of human rights would be neutral as to the issues of ontology and moral epistemology. Human rights would be based on the *human value*, whose attribution to individuals does not involve the assignation of any property, but the expression of a disposition to respect towards the humanity of persons. Once again, however, as with the idea of human nature, we find ourselves facing the difficulty of defining precisely the idea of human value.

The attempts to naturalize the notion of human rights, in conclusion, show some aspects of intrinsic weakness. First, they seem inadequate in explaining what it means to be a human being, without meeting with epistemologic and 'metaphysical' difficulties; second, as it is vague and obscure to affirm that human beings possess human rights in that they are human beings, from a naturalistic approach it is not possible to give a precise content to the notion of human rights, but only a rhetorical emphasis; and, finally, they seem to represent, on the logical level, a case of infringement of Hume's law, as they derive norms and evaluations from descriptive premises on human nature.

Non-naturalistic theories.

In the light of all these difficulties, philosophers have proposed a *denaturalized* concept of human rights. Such a concept is based, *in primis*, on the recognition of the strictly moral and political content of human rights and on the awareness of their fundamental dependence on social institutions. In this sense, the doctrine of human rights would be a proposal concerning the morally appropriate way of dealing with men and of organizing society (28).

Human nature ceases to be an ontological foundation and becomes essentially a "moral description of human possibilities" (29). That is, society and morality play a crucial role in determining how human potentialities are to be realized. We can quote here the view of the Italian philosopher N. Bobbio: "Human rights, however fundamental they are, are historical rights, that is born in certain circumstances [...] To talk about natural rights or fundamental

inalienable or inviolable ones, means using expressions of persuasive language which have no theoretical value" (30).

On these bases, it has been argued in favour of moral theories of rights in which the concept of human rights has a definite moral and social content and, therefore, is *not* independent of institutions. Human rights are no longer connected to the idea of natural law or, generally, of nature, but to the ethical-historical reality and are explained as a mixture of requests, vindications of liberty, power and immunity by people. The subject of human rights is the person as moral agent, responsible of rights and actions.

Some important theories - that, for example, of C. Wellmann, A. Gewirth, R. Dworkin, A.I. Melden, J. Rawls and J. Donnelly - have been offered without appealing to natural rights, but it seems not so easy to provide substantive arguments to undercut the difficulties involved in what we have defined the naturalistic approach to human rights.

C. Wellmann, for example, has affirmed that human rights, according to the model of legal rights, consist of different elements (31) and are those moral rights that individuals have in front of the State, the rights that moral agents share with one another by means of institutions. In such a proposal, there is a real progress towards the understanding of the notion of human rights as a human and cultural product. However, the real problem is that, as public relations are given absolute priority, the single individuals and the various forms of private relations are excluded as addressees of human rights. Anyway, the value of this proposal lies in the attention given to the historical, social and political dimension of human rights.

A. Gewirth's theory of action, on the other hand, is an ambitious attempt to justify human rights by grounding them in the foundations of morality itself: in Gewirth's perspective, human rights are implicit in the very idea of *acting* morally such that anyone who acknowledges that human individuals are moral agents must accept that they have certain equal rights. However, what emerges from Gewirth's proposal is that human rights are prudential rather than moral rights, since they are grounded only in what the agent himself needs if he is to act purposively. Even with the recourse to what he calls the principle of generic consistency it seems he cannot avoid this consequence (32).

Anyway, even the most celebrated contemporary attempt to delineate the features of a just society, that is J. Rawls's *A theory of justice*, has its problems with human rights. In Rawls's theory human rights are conceived as the rights of citizens rather than the rights of human beings since his theory is constructed for a body of people who form a political society rather than for the human race forming a moral community. So the main problem of Rawls's theory with human rights is the relation between that rights and the hipotetical contract: if rights are antecedent to the contract, in accordance to the veil of ignorance they should be thought of as entirely formal categories which have yet to be given content by the contracting parties; if rights are included in the list of primary goods, they are not grounded on the contract, they not issue from the original position, as Rawls maintains (33).

At this point we ask: can we argue in favour of a non-naturalistic approach to human rights? As regards the elements qualifying the naturalistic ethical theories of human rights, an approach trying to overcome the difficulties noticed above would be based on the following aspects:

the concept of human rights is stated as *prima facie*, not as absolute and inalienable;

the priority of rights is maintained on the basis of a descriptive or critical-reflective conception of normative ethics, refusing the idea that a moral normative science exists;

points 1. and 2. are supported by a non-realistic and non-cognitivist epistemological

metaethics;

human nature is not an immutable essence, but a mixture of elements and values, such as possibilities, interests, powers and immunities, dignity, rationality and liberty.

This last point will be dealt with in the next paragraph. Let us now examine the other points.

1. The issue of rights conflicts has attracted the attention of rights theorists for a long time and among them the suggestion to regard rights as *prima facie* and not as absolute has emerged (34). To say that a right is *prima facie* means exactly that it is not absolute and that, only case by case can we give a definite account of its weight. The notion of *prima facie* compared to that of being absolute seems to allow a more plausible conception of the universality that rights at any rate claim to the world. All individuals, in this perspective, can claim to have, *prima facie*, a universal right, because the indefinite weight of the notion ensures that all rights will be taken into consideration in the different circumstances and that their application will depend on the comparison and not on the opposition. Rights become relative and defeasible, this however does not establish their weakness but their realizability: "The fact that most of the basic rights are only *prima facie* ones, capable of being overridden in particular cases, does not mean that they are, like the rights that would be recognized in many utilitarian systems, merely derived principles whose rationale lies in their tendency to promote something else, say the general happiness. The suggested rights are basic, though defeasible [...] and the conflicts are to be resolved by balancing these *prima facie* rights themselves against one another, not by weighing their merits in terms of some different ultimate standard of value, such as utility" (35).

As it has been noticed (36), the function of normative ethics, that is of analyzing our practices and our moral thought in view of action, can be effectively carried out also by a purely descriptive discipline. The task of such a discipline is, first of all, to direct us to an increasing understanding of the nature of ethics and the way it works. In examining the moral phenomena we do not claim to come to a prescriptive science and to guarantee a *solid* basis to rights, but to understand as much as possible their meaning and applications.

If we give up the scientific and prescriptive demands, nevertheless, the ethical theories of human rights seem to lose the authority and ability to guide behaviour. The role of the law of nature, particularly, is not easily replaced. Its great force lies in fact in its being above positive laws, in defence of the highest principles of our moral conscience. As early as in the *Antigone* by Sophocles, when the laws of the state are unfair, the law of nature guarantees that there is a higher justice inscribed in heaven, that shows us what is morally right. Even today, when we are faced with the necessity to vindicate a human right, we tend to do it not because it is prescribed by positive laws, but because it is fair and universally valid. For these reasons, natural law theories still turn up even in the most critical thinking.

In order to go beyond the theoretical view proposed by the natural law, therefore, it is essential to keep some features that characterize it, such as the appeal to the universality of human rights and to the idea of authority raised by the *laws* of conscience, but to place them within a historical frame of some relevance.

In this field, some form of non-cognitivist metaethics can be adopted, so avoiding the criticism based on the naturalistic fallacy and, at the same time, the ontological and metaphysical consequences of natural law. Thus, human rights can be explained on the basis of an ethical theory that does not claim to reach the strictness and objectivity of science, but interprets the moral phenomenon, for example in the light of Hume's sentiments and artificial virtues or of some features not scientifically ascertainable, but morally comprehensible (37). In this non-cognitivist and non-realistic type of theory, in which moral sentences are not *true* or *false* and

there is no correspondence between things or natural properties and values, human rights may become a practice, that is a mixture of rules, attitudes, behaviours and evaluations which *tend* towards universality, but do not *demand* it.

Let us see now the last point by underlying the conclusions that can be drawn from the investigation carried out in this paper.

Towards a mediation.

Is there something which can justify human rights in their universality and moral authority besides nature? Can we answer the question about the meaning and content of human rights without being compelled to choose between nature and history? Perhaps we can.

The way is shown by those theories of human rights that appeal to human *possibilities*, to the ability to make choices and to the value of the person's dignity (38). In this sense, Kant was right to affirm that the person, as bearer of rights, is consonant with the moral law, capable of self-determination.

Human rights would primarily deal with what individuals *can be* and not with what they *are*. Then, they would have to do with the moral person and not the natural one, but they would not exclude, for this reason, a part of humanity from the world of rights (39). It would be true that "the human 'nature' that grounds human rights is [...] an essentially moral account of human possibilities" (40).

Human rights would show, first of all, which opportunities are to be guaranteed, what a life worth of value that completely realizes the human being is to be like. That is, human nature definitely ceases to be an 'ontological' structure and appears as a 'project': "Human rights aim to establish and guarantee the conditions necessary for the development of the human person envisioned in the underlying moral theory of human nature" (41).

In this way, what is good or proper for man would be, as it has been observed (42), something like Aristotle's *eudaimonia*, that is it should come within the category of activity and, as "people differ radically about the kinds of life that they choose to pursue [...] and they choose successively to pursue various activities from time to time, not once and for all" (43), the concern of rights would be, first of all, to guarantee to each person to choose progressively how to live.

Nature and history could overlap here: if human nature is 'a moral description of human possibilities' and if 'people differ radically about the kinds of life that they choose to pursue', historical and social development becomes an essential part of the realization of human nature in its highest values, human rights.

In this paper, therefore, the aim has not been to give a full explanation to the issues dealt with, but only to draw the attention to the complexity of the notion of human rights and of the problems about its justification. In spite of the results, it has to be underlined that what gives value to the different attempts, naturalistic and non-naturalistic ones, to justify human rights is the firm purpose to attribute a state of universality to the highest values of human existence.

* I would like to thank two anonymous referees for their helpful observations on an earlier draft of this paper. [back](#)

- (1) Tibor R. Machan, *A reconsideration of natural rights theory*, "American philosophical quarterly", 19 (1982), p. 61. [back](#)
- (2) J. Donnelly, *The concept of human rights*, Croom Helm, London-Sydney 1985, p. 31. [back](#)
- (3) E. Kamenka, *The anatomy of an idea*, in AA. VV., *Human rights*, ed. by E. Kamenka and Alice Erh-Soon Tay, Edward Arnold, London 1978, p. 12. [back](#)
- (4) J.L. Mackie, *Can there be a right based moral theory*, in J.L. Mackie, *Persons and values. Selected papers 2*, ed. by Joan and Penelope Mackie, Clarendon Press, Oxford 1985, p. p. 116. Surely, this issue has to do with the question whether human rights are to be conceived as absolute or defeasible, but it is not the same. To refer to nature or history in order to justify human rights means wondering directly about the source and the intrinsic qualities of these rights and only secondarily, does it allow us to establish if they are absolute or defeasible. There are, for example, theories which do not retain that natural rights are absolute (cfr., for example, K.R. Minogue, *Natural rights, ideology and the game of life*, in AA. VV., *Human rights*, cit., pp. 13-35) and theories which retain that human rights are not *natural* rights and that, however, they are absolute (cfr, for example, J. Feinberg, *Social philosophy*, Englewood cliffs, N.J. 1973). [back](#)
- (5) Consequentialism at least in its main form, that is utilitarianism, proposes as basic the realization of the common good by the direct or indirect application of a principle of aggregation and maximization of desires and satisfactions. The single individual, in more or less moderate

forms (the utilitarianism of the act, of the rule and of the two levels) is sacrificed to the needs of the community. Deontology works out a model for action in which motives, and not results, are fundamental. It proposes a system of duties that is to be respected for the intrinsic correctness of what is commanded. Kantian ethics is the most important example of it. The task of such a system should be that of guiding us at the moment when we have to decide what to do. The theories of rights are, in this context, a 'third' alternative against the attempts, on one side to tie the notion of right to that of a deontologic bond and, on the other to insert the consideration of rights within utilitarian perspectives. G. Vlastos, for example, affirms that, if rights have to do with the value and dignity of human agents, they have priority over any consideration of utility and, at the same time, they will not merely express bonds of deontologic nature between individuals, as it is often affirmed (cfr., G. Vlastos, *Justice and equality*, in AA. VV., *Social justice*, ed. by R. Brandt, Prentice Hall, Englewood Cliffs 1962; besides, cfr., among the various arguments, those of Josep Raz in his *Right-based moralities*, in AA. VV., *Theories of rights*, ed. by J. Waldron, Oxford University Press, Oxford, 1984, pp. 182-200; of Alan Brown, referring to Nozick's theory, in his *Modern political philosophy*, Penguin Books, London 1986, pp. 87-110). That, however, the ethical theories of rights are actually based not on rights, but on elements such as individual goods or duties continues to be a topic of dispute in the contemporary debate. [back](#)

(6) J.L. Mackie, *Rights, utility and universalization*, in J.L. Mackie, *Persons and values*, cit., p. 198. [back](#)

(7) As suggested by many commentators, like T. Machan (cfr. his *A reconsideration of natural rights theory*, cit., p. 61), A. Brown (cfr. his *Modern political philosophy. Theories of the just society*, cit.) or W. Kymlicka (cfr. his *Contemporary political philosophy. An introduction*, Clarendon press, Oxford 1990) we may assume this in view of Nozick's explicit reliance on *Lockean* individual rights, which are indeed natural rights. Cfr. R. Nozick, *Anarchy, state and utopia*, Basic Books, New York 1974. [back](#)

(8) *Ivi*, p. 5. [back](#)

(9) J. Griffin, *Towards a substantive theory of rights*, in AA. VV., *Theories of rights*, cit., p. 138. [back](#)

(10) K.R. Minogue, *Natural rights, ideology and the game of life*, in AA. VV., *Human rights*, cit., p. 17. [back](#)

(11) T. Machan, *A reconsideration of natural rights theory*, cit., p. 61. [back](#)

(12) E. Kamenka, *The anatomy of an idea*, cit., p. 11. [back](#)

(13) Cfr. L.W. Sumner's analysis of naturalistic theories in his *Rights denaturalized*, in AA. VV., *Utility and rights*, ed. by R.G. Frey, Minneapolis, Oxford 1984, pp. 20-41. [back](#)

(14) Some contemporary philosophers of the law of nature (especially of *continental* inspiration) have tried, as it were, to 'reduce' the metaphysical difficulties which the law of nature meets with, by proposing a return to the classical and aristotelic vision of nature as *physis*, that is as a dynamic activity tending to a certain end and, a conception of rationality as *logos*, as an activity more expressive than calculating (Cfr. J. Maritain, *The rights of man and natural law*, (1944); E. Mounier, *Le personnalisme*, Paris, 1950). Nature that gives foundation to human rights and natural law, therefore, would no longer be an immutable essence, but a dynamic activity and the subject of rights would be conceived in its vital aspects, as a rational substratum which is person by means of the *logos* and of the continuity of life and of the conscience. In these approaches, nevertheless, the epistemological difficulties tied above all to the underlying

metaphysical vision, remain. In particular, the alleged coincidence (in the light of an idea of nature that includes in itself its future development as self-determination and improvement) between nature and culture, nature and history and nature and liberty inevitably involves, one way or other, a deterministic view of culture, of history and of liberty. [back](#)

(15) M. MacDonald, *Natural rights*, in AA. VV., *Theories of rights*, cit., p. 22. [back](#)

(16) S. Buckle, *Natural law*, in AA. VV., *A companion to ethics*, ed. by Peter Singer, Blackwell, Oxford 1991, p. 161. [back](#)

(17) One famous contemporary author, J. Finnis (cfr. his *Natural law and natural rights*, Clarendon Press, Oxford 1980), have tried to avoid some of these controversies by developing the so called neoclassic theory of natural law (from an article by G. Grisez, *The first principle of practical reason: a commentary on the Summa theologiae, I-2*, "Natural Law Forum", 10 (1965), pp. 168-201). Finnis's account of rights is based upon a conception of basic goods and reasonable conduct. For Finnis the principles he calls of practical reasonableness are the principles of natural law and the source of natural rights. In his conviction, this allows him to avoid the naturalistic fallacy: rights are natural only in virtue of their reasonableness and of their derivation from basic goods. Nevertheless, even so his conception of the basic goods remains a "a conception of what is good for human beings with the nature they have" (*Natural law and natural rights*, p. 34) and a theory of the human good that was wholly unconnected to our natures as human beings would be a strange theory. See, on this point, P. Jones, *Rights. Issue in political theory*, MacMillan Press, London 1994. [back](#)

(18) H.L.A. Hart, *Are there any natural rights*, in AA.VV., *Theories of rights*, cit., p. 77. [back](#)

(19) *Ivi*, p. 78. [back](#)

(20) Minogue, *Natural rights, ideology and the game of life*, cit., p. 30. [back](#)

(21) *Ibidem*. [back](#)

(22) J. Galtung and A.H. Wirak, *Human needs and human rights. A theoretical approach*, "Bulletin of Peace Proposal" 8 (1977), p. 252. [back](#)

(23) S. Benn, *Rights*, in *The encyclopedia of philosophy*, MacMillan, New York, 1967. [back](#)

(24) J. Donnelly, *The concept of human rights*, cit., p. 30. [back](#)

(25) T. R. Machan, *A reconsideration of natural rights theory*, cit., p. 65. [back](#)

(26) The refusal of cognitivism in ethics means, first of all, to deny the possibility to prove, show or establish with certainty that something *is* morally right or wrong, good or bad, or that people *must* act morally in certain ways and refrain from acting in certain others. Non-cognitivism, to wit, maintains that it is not possible to make of ethics the object of scientific knowledge. [back](#)

(27) Cfr. G. Vlastos, *Justice and equality*, in AA. VV., *Social justice*, cit. and J. Feinberg, *Social philosophy*, cit. [back](#)

(28) E. Kamenka, *The anatomy of an idea*, cit., p. 12. [back](#)

(29) *Ibidem*. [back](#)

(30) N. Bobbio, *L'età dei diritti*, Einaudi, Torino 1990, pp. XIII-XVI. [back](#)

(31) Cfr. C. Wellman, *A new conception of human rights*, in AA. VV., *Human rights*, cit., pp. 48-58. [back](#)

(32) Cfr. A. Gewirth, *Reason and morality*, , University of Chicago Press, Chicago 1978 e ID., *Human rights, essays on justification and applications*, University of Chicago Press, Chicago 1982. [back](#)

(33) Only in one occasion Rawls describes his rights as ‘natural’ (cfr. *A theory of justice*, cit., pp. 505-506n). Anyway, the question is misleading. See, for all, R. Martin, *Rawls and rights*, University Press of Kansas, Kansas 1985, spec. pp. 22 ss. [back](#)

(34) As it has been noticed, "in order to recognize and describe the incompleteness and indeterminacy of rights, especially as regards their weight in competition with other considerations, a number of vocabularies have been introduced [...]But the most widely used vocabulary in this area is that of *prima facie*" (Rex Martin and James W. Nickel, *Recent work on the concept of rights*, "American Philosophical Quarterly", 3 (1980), p. 173). [back](#)

(35) J.L. Mackie, *Rights, utility and universalization*, in J.L. Mackie, *Persons and values.*, cit., p. 186. [back](#)

(36) Starting from a statement of S. G. Clarke (contained in his *Anti-Theory in ethics*, "American philosophical quarterly" 24 (1987), p. 237), we refer here to the ‘anti-theorists’ in ethics, who insist on the narrowness of the traditional or prescriptivistic rationalistic conception of normative ethics, as in their opinion it is not able to catch the most important aspects of ethical experience. They are authors, like B. Williams, Charles Taylor, Annette Bayer, Stuart Hampshire, Charles Larmore, who have sided in favour of a complete revision of the interpretative canons employed in the analytic investigation of ethics, thus bringing new light to the contemporary debate, but becoming ambiguous because their criticism might be interpreted not as a *refusal* of normative ethics, but as a *further aspect* of its complexity and articulation [back](#)

(37) As, for example, J. L. Mackie did. See his *Ethics. Inventing right and wrong*, Penguin Books, Harmondsworth, 1977. [back](#)

(38) Cfr. A.I. Melden, *Rights and persons*, University of California Press, Berkeley, 1977; R.E. Goodin, *The political theories of choice and dignity*, "American Philosophical Review" 18 (1981), pp. 91-100; E.M. Adams, *The ground of human rights*, "American philosophical quarterly" 19 (1982), pp. 191-195. [back](#)

(39) For this point, that is for the relevance of the notion of *moral person* for human rights, let me refer to B. de Mori, *Rilevanza della nozione di persona per un’etica dei diritti umani*, "Verifiche", 3-4 (2000), in press. [back](#)

(40) J. Donnelly, *The concept of human rights*, cit., p. 31. [back](#)

(41) *Ivi*, p. 32. [back](#)

(42) Cfr. J.L. Mackie, *Can there be a right based moral theory?*, cit, p. 111. [back](#)

(43) *Ivi*, p. 112. [back](#)