

Some Reflections on the Foundation of Human Rights – Are Human Rights an Alternative to Moral Values?

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I. Introduction

Human rights again? Yes, but not the same as yesterday's. Today the human rights discourse has become fashionable and often seems to be a substitute for the moral discourse. When terrorist attacks, discrimination, slavery, torture, arbitrary arrest etc. occur, it seems that there is something morally wrong. But there is no general agreement on this

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and so for those who are convinced that these are immoral acts, there is the challenge of rationally justifying and defending this.

This paper examines how the concept of human rights has been influenced for centuries by different philosophical trends especially from medieval times to the present. Moreover it examines the nostalgia of present humankind for lost moral values and thus, natural law. In fact it will also show the importance of founding human rights on moral values and natural law. The role of states and the United Nations as guarantors of human rights will also be analysed. The article will conclude that the human rights of today are not only used as alternative to moral values but that they also contain moral values themselves. This being the case, taking human rights seriously is the *sacrosanct* duty of everyone.

II. Human Rights today as a Fashionable Discourse for Moral Values

The 20th century and the threshold of the 3rd Millennium have been described by many as the age of Human Rights.¹ The human rights discourse of this age seems to substitute the moral and ethical discourse.²

¹ See L. Henkin, *The Age of Rights*, 1990; N. Bobbio, *The Age of Rights*, 1996.

² See C. Santiago Nino, *The Ethics of Human Rights*, 1991, 8 et seq.; D. Warner, "An Ethics of Human Rights", *Den. J. Int'l L. & Pol'y* 24 (1996), 395 et seq.; T. Campbell (ed.), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations*, 2004; D. Chandler, "Universal Ethics and Elite Politics", *International Journal of Human Rights* 5 (2001), 72 et seq.; C.W. van Wyk, "Human Rights and the Declaration of Helsinki: Law and Ethics in Dialogue", *South African Yearbook of International Law* 26 (2001), 144 et seq.; M. McKeever, "The Use of the Human Rights Discourse as a Category of Ethical Argumentation in Contemporary Culture", *Studia Moralia* 38 (2000), 103 et seq.; B.L. Rockwood, "Human Rights and Wrongs: The United States and the I.L.O. – A Modern Morality Play", *Case W. Res. J. Int'l L.* 10 (1978), 359 et seq.; M.L. Westmoreland-White, "Contributions to Human Rights in Dietrich Bonhoeffer's Ethics", *Journal of Church and State* 39 (1997), 67 et seq.; B. Tibi, "Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations", *HRQ* 16 (1994), 277 et seq.; K. Asamoah Acheampong, "Our Common Morality under Siege: The Rwanda Genocide and the Concept of

When something happens in our societies, it is more fashionable to say that it is wrong because it is a violation of human rights rather than an immoral act. Today people have an aversion to the word 'morality' and indeed the word has few fans. When someone does something morally wrong one of the most common answers offered today is that "it is a violation of human rights." With such a response, human rights are being used as an ethical category in the sense that the actions are classified as morally wrong on the basis of a set of criteria supplied by, or implicit in, the idea of human rights.³ So human rights are used in many circumstances instead of human ethics and are taken for granted in such a way that it somehow constitutes another way of doing ethics.

The 20th century was the century of human rights and the notions of rights and human rights have become part of the basic vocabulary of people throughout the world, especially those who have struggled against tyranny and oppression. Ultimately no one wishes to be treated in an immoral manner. Thus the principle: "do unto others as you would have them do unto you" is spontaneously put into practice, implying also "Don't do to others what you do not want to be done to you." Underlying is not only the justice of the act but also its honesty which originates in the conscious intention of the human being indicating the interior nature of morality (the will).

A serious moral issue concerns those "who get hurt".⁴ If this is true, a key focal point of moral discussion must be the suffering of human beings, particularly the suffering imposed on innocent human beings by the wrongdoing of others. The human rights discourse undoubtedly constitutes one of the greatest efforts in contemporary culture to respond to some of the most horrific hurts done to human beings every day, in every corner of the world. This shows that human rights in themselves contain the fundamental moral principles, such as the principal "*bonum facendum et prosequendum et malum evitandum*" (good should be done and pursued and bad should be avoided).

Consequently, there is a need, today more than ever, to found human rights on morality. Tibi rightly argues that in this age of human rights, there is a tremendous need for morality based on a common set of norms and values shared by the entire international community. If

Universality of Human Rights", *Revue of the African Commission on Human and Peoples' Rights* 4 (1994), 20 et seq.

³ McKeever, see note 2, 104.

⁴ Cf. U. Baxi, "Voices of suffering and the future of human rights", *Transnat'l L. & Contemp. Probs* 8 (1998), 125 et seq.

the underpinning of this indispensable international morality is not basic human rights, what else can unite humanity?⁵ Douzinas emphasizes too that the family of humankind is in need of human rights which are founded on natural law and human rights which are founded on moral values.⁶ And these human rights are individual entitlements that evolved from western modern thought on natural law.⁷ The institutionalisation of these rights to the current legal standards, was a process from natural law to natural rights and from natural rights to human rights.

III. The Concept of *ius* and the Triumph of Natural Law

Although there is interrelation between human rights, natural rights and natural law, the confusion between them is traditional and longstanding. This confusion is caused mostly by the term *ius* itself. *Ius* is often translated as either “right” or “law” and *Recht* e.g. in German can mean either right or law. This ambiguity has led jurists to make a distinction between objective *ius* and subjective *ius*.

For Romans and Greeks, *ius* was equally something lawful and something just. Thus *ius* indicates the proportional righteous thing. It is something which is mine and which is righteous in conformity with justice. And justice according to Ulpian is “*constans et perpetua voluntas ius suum unicuique tribuere*” (to give to everyone what is due to him with constant and perpetual will).⁸

The concept of an objective right was developed in the medieval period. For St. Thomas Aquinas, the term *ius* indicated a thing in itself: “*ipsam rem*” and thus its definition was simply *ius est res*. *Ius* is the same as *suum*. This *ius* does not indicate any *res* but a just thing: *ipsam rem iustum*. In St. Thomas’ time, the terms right (*ius*) and just (*iustum*), were identical, so, they were often and commonly used with the same meaning: *ius sive iustum*, and thus right (*ius*) is what is just and the purpose of justice is to promulgate rights.⁹ Later St. Thomas used the same definition of justice with a slight modification and so justice becomes

⁵ Tibi, see note 2, 277.

⁶ C. Douzinas, *The End of Human Rights*, 2000, 376.

⁷ Tibi, see note 2, 278.

⁸ Ulpian, *Digest*, I, I, 10.

⁹ *Summa Theologiae*, II-II, questio 57, articulus 1.

the *habitus*, that is, the inclination to give to everyone what is owed to them with constant and perpetual will.¹⁰ From this St. Thomas defines law as the ordinance of reason for the common good, made by those who are entrusted with of the community and then promulgate it.¹¹ Right is inherent to human beings and law is the instrument and measure to protect it. The rule and measure of human acts is the faculty of reason, for reason directs man's activities towards their goal. But this does not mean that reason, which gives orders, is the source of obligation. The primary object of practical reason is good. From this comes the first moral principle: good is to be done and pursued and evil avoided.¹² Obligation therefore is imposed by reason found immediately in human nature itself; moral law is rational and natural, in the sense that it is not arbitrary or capricious.

After Aquinas, justice largely abandoned its critical potential for jurisprudence and its supremacy in natural law disappeared. Social justice was transferred from law to economics and socialism. It moved from *ius* justice to *ius* freedom and equality which now became the rallying cries of modern natural law.¹³

Nominalism, as the first scholastic school in the 14th century led by Duns Scotus and William of Ockham, reflected abstract concepts and denied general terms like law and justice. For them law is a universal word with no discernible empirical difference and has no independent meaning. With their philosophy the source and method of law started changing. It gradually moved from reason to will, pure will, with no foundation in the nature of things.¹⁴ The jurist's task was no longer to find the just solution but to interpret the legislator's commands to the loyal subjects.

The second scholastic school, argued that natural law is a branch of morality and linked religious rules of conduct with modern reason. The Spanish scholars led by Francisco Suárez, totally abandoned the idea of *ius* as an objective state of affairs and fully adopted the individualistic conception of right.¹⁵ Suárez continued to develop the subjective right in the modern age as a faculty, a moral faculty or *potestas moralia* and

¹⁰ *Summa Theologiae.*, II-II, questio 58, articulus 1.

¹¹ *Summa Theologiae*, I-II, questio 90, articulus 4.

¹² *Summa Theologiae*, I-II, questio 94, articulus 2.

¹³ Douzinas, see note 6, 61.

¹⁴ Douzinas, see note 6, 62.

¹⁵ F. Suárez, *Tractatus De Legibus ac Deo Legislatore*, 1, capitulus 12, numerus 5; J. Finnis, *Natural Law and Natural Rights*, 2000, 206.

not a physical one.¹⁶ This mentality is also seen when he defines law in the words of St. Thomas, as a certain, common, just and stable precept which has been sufficiently promulgated.¹⁷ Hence, it is an act of a just and upright will binding an inferior to the performance of a particular act. For Suárez therefore, it is essential for law that it should prescribe what is just and that it should prescribe acts which can be justly performed by those upon whom the law is effected. Suárez also describes both a law (*lex*) and a right (*ius*). According to him, *ius* denotes a certain moral power which everyone has either over his own property or with respect to what is due to him.¹⁸ Thus the owner of a thing has a right (*ius*) over the thing (*res*), in reality a thing actually possessed, while a labourer, for example, has a right to his wages, *ius ad stipendium*. The foundation of this understanding about a right and a law comes from moral and natural principles and the law that determines or measures the *ius* should do so for the common good of all, as St. Thomas originally insisted.

Today's human rights phenomenon – though different in emphasis – can be traced back to the beginning of this period. The *Magna Carta Libertatum*¹⁹ can be understood in the context of the right of resistance. It is also worth reflecting on the criticisms made by St. Thomas Aquinas, when criticizing the tyrannical regime. He states that the tyrannical regime is unjust because it is not ordered for the common good but for the private person who governs and therefore, disturbing or upsetting such government is not a proper uprising. In reality the tyrant is most seditious in so much as he nurtures discord in people and creates uprisings that enable him to dominate all. This is the proper essence of the tyrannical government: commanding things for the private benefit of the governors and in turn leading to the destruction of the people.²⁰

Society at the end of the medieval period, with its hierarchy of commands, namely, the categories of professional and social groups known as *jura et libertates*, reserved and sided with groups and not with individuals. The initiative was collective in the sense that there

¹⁶ He argues that *ius* is a kind of moral power, a faculty which every man has, either over his own property or with respect to that which is due to him. Suárez, see note 15.

¹⁷ Suárez, see note 15.

¹⁸ F. Copleston, *History of Philosophy*, Vol. III, 1960, 382. This idea was taken from Suárez, see note 17, 1, 2, 5.

¹⁹ See H. Wagner, *Magna Carta libertatum*, 1951.

²⁰ *Summa Theologiae*, II-II, questio 42, articulus 2 ad 3.

were organized and recognized groups subject to rights and that society was not without rights before the king.²¹ The most famous letter of recognition of rights and liberty is that of the King John Lackland²² addressed to the Archbishops, the faithful and the subjects. This, after being re-promulgated, was made longer in successive years but it was one part of the 1215 version which came to be known as the Magna Carta.²³ This shows that there has always been a need to recognize rights and liberty.

IV. Modernity: From Juridical Positivism to the Nostalgia of Human Rights

1. From *ius* justice to *ius* freedom and equality

The problem of the concept of human rights and the crisis in its ethical foundation as manifested in today's world is rooted mainly in modern philosophy. Descartes employed a methodical approach with a view to discovering whether there was any indubitable truth. He found this truth and thus his affirmation "*Cogito, ergo sum*" that is: I must exist, otherwise I could not doubt. In every act of doubting my existence is manifested.²⁴ When Descartes says "*Cogito, ergo sum*," he is thinking of *ordo conoscendi* which is fundamental since it cannot be doubted; while with *ordo essendi*, one can always doubt or place doubt on things. The Cartesian principle begins with a subject instead of an object: "*Cogito, ergo sum*". To him, reality is rational and rational is reality. Man gained extra power from his reason to the detriment of the value of nature. From unity in faith, modern man moved on to insist on the unity in common human reason. Today's post-modern man is afraid of nature. While natural law theorists derived their ideas of rights from God, reason or *a priori* moral assumptions, positivists argued that the content of rights could be derived only from the laws of the state.²⁵ It was David Hume who first raised the dichotomy between the "is" and

²¹ Compagnoni, *I Diritti dell' Uomo*, 1995, 46.

²² See T. Richard, *An historical essay on the Magna Carta of King John*, 1980.

²³ The king affirms that he has also accorded to all the free men of the reign, and for their heirs, all the freedoms specified in the document, to be possessed and conserved by all, cf. Compagnoni, see note 21, 46.

²⁴ Copleston, see note 18, 90.

²⁵ S. Davidson, *Human Rights*, 1993, 30.

the “ought”²⁶ which has permeated the discourse between the naturalist and positivist schools of jurisprudence. Along with this crisis of being in its objectivity, Hobbes defines law as norm backed by sanction, which is the very means that protects a man from the caprice and violence of other men.²⁷ So the law does not command because it is just but it is law because it commands inspiring the saying: “my rights end where the rights of others start” and removing all moral foundation.

Hobbes also developed the aspect of subjective rights i.e. *ius* as a faculty, but he did not base his argument on moral law. Freedom, according to Hobbes, is no longer a disposition or auto-movement towards good as emphasized in medieval times but, it is the capacity of doing what one wants or likes. Hobbes thus argues: “A free man is he, that in those things, which by his strength and wit, is able to do; he is not hindered to do what he has a will to do”.²⁸ So, the morality of what I do is not founded on moral values but it depends on whether the legislator has sanctioned such an act. The actions do not need to be based on but depend only on the will. Hobbes’ natural law is self-preservation. For him *ius* is no longer something which is just, instead right is identified with freedom from law and all external and social impositions.²⁹ New natural rights are born as the power to do something, and unlimited and undivided sovereignty of self and natural rights is de-

²⁶ According to Hume “is” deals with facts which can be proved to exist empirically and which can be demonstrated to be true or false. And “ought” deals with the morality which cannot be proven to exist objectively and about which people might have legitimate differences of opinion; cf. Davidson, see note 25, 30.

²⁷ F. Copleston, see note 18, 45. Velasio criticises this way of understanding the law as well, by stating that in today’s dominant positivistic culture, sanctions are considered essential integral elements of the law, to the extent that a law without sanctions cannot be considered complete. The law must have all necessary elements in order to be of any use; amongst these sanctions and coercion are essential. But in this case we run the risk not so much of having the force of law as such but the force of law which considers norms to be only those prescriptive rules which use force and coercion; V. De Paolis, “La Protezione Penale del Diritto alla Vita”, in: R. Lucas Lucas/ E. Sgreccia (eds), *Commento Interdisciplinare alla “Evangelium Vitae”*, 1997, 504.

²⁸ This idea is taken from Hobbes, *Leviathan*, Chapter 2, 21.

²⁹ T. Hobbes, *Leviathan*, edited by R. Truck, 1996, Chapter 14, 91.

defined as the liberty of man to do anything he wishes himself; liberty itself is defined as “the absence of external impediments.”³⁰

This approach caused rights to be seen as identical to law and justified only by the fact that it was passed by a legitimate authority: the maxim something is commanded because it is just, was substituted by stating that something is just because it is commanded. While the first implies that ethical foundation, and thus justice, is superior to the authority which has passed it, the latter instead affirms that it is only the legislator who makes a behaviour just or unjust: *auctoritas, non veritas, facit legem* (authority, not truth, makes the law).

Throughout the 17th century, the Grotian view of natural law was refined and eventually transmuted into the natural rights theory through which subjective, individual rights come to be recognised. One of the proponents of the natural rights doctrine was John Locke.³¹ Locke argued that all individuals were endowed by nature with the inherent rights to life, liberty and property; rights which were their own and could not be removed or abrogated by the state. Where the ruler of the state violated the natural rights of individuals, the subjects were free to remove the ruler and replace him or her with a government which was prepared to respect those rights.³² Contrary to Hobbes’ totalitarian position, Locke presented an early manifesto of liberalism. The language of both the American and French Revolutions, and the writings of the French philosopher Rousseau and German moral philosopher Immanuel Kant, demonstrate the philosophical pedigree of natural law and natural rights. While Rousseau followed the natural rights ideas of Locke, Kant developed his own idea departing from a general non-empirical natural law and natural rights tradition.

Contemporary culture, as inherited from the modern period, is characterized first by pluralism,³³ which is a phenomenon that exists at

³⁰ Douzinas, see note 6, 71.

³¹ Davidson, see note 25, 28.

³² In this way Locke used his social contract theory to explain the English Glorious Revolution of 1688. King James II, by violating the natural rights of his subjects, had forfeited his right to rule and had legitimated the consequent change in government, cf. J. Locke, *The Second Treatise of Civil Government and a Letter Concerning Toleration*, edited by J.W. Gough, 1946.

³³ E. Graig, “Pluralism”, in: E. Craig (ed.), *Concise Routledge Encyclopaedia of Philosophy*, 2000, 683. Pluralism in the late twentieth century philosophy is used to describe views that recognize many sets of equally correct beliefs

an organizational level of society. A state which remains neutral to all religions, cultures and ethnicities often ends up compromising and marginalizing moral values and as a consequence, absolute values and truth are sooner or later rejected.

The second characteristic of modernism is secularism. This is a vision of a world in which all that which is beyond the empirical and relative vision of the world is marginalized. This was further developed by illuminists such as Voltaire and scientific positivists such as Comte. Later by the idealist dialectics of Hegel, the materialism of Marx and the naturalism of Nietzsche. One of the principles of this tendency is the principle of immanence that conceptualises man without his transcendental dimension. The divine dimension of man is not considered as such, that is, his participation in the absolute being and his truth is denied. In this way and according to this principle, man remains only in his empirical phenomenon which becomes the only possibility of knowledge and evaluation. Another characteristic of secularism is the principle of historicity,³⁴ where the immanent structure of theories turn history into historicism.³⁵ Here nothing is absolute. Knowledge is determined by what happens in history. These events are always new, contingent and transitional; they are brought into being, evolve themselves and die. The idea is not opposed to the real, but is realised by itself.³⁶ Consequently, nothing escapes the empire of the existent. The fact or value distinction disappears, rights theories become exclusively historical and unable to grasp anything eternal, a fake antidote to legal positivism.³⁷

or evaluative standards and in this sense it is akin to relativism. Societies are sometimes called “pluralistic” meaning that they incorporate a variety of ways of life, moral standards and religions.

³⁴ C. Thornhill, “Historicism”, in: Craig, see note 33, 355. Historicism is defined as the affirmation that life and reality are history alone, an idea developed in the 19th century by B. Croce. It is an insistence on the historicity of all knowledge and cognition and on the radical segregation of human from natural history.

³⁵ This also puts theories of morality and rights at risk whereby rights are creations of the imaginative interpretation of a particular political, legal and moral history. They exhibit coherence in style, consistence in principle and stability over time. Douzinas, see note 6, 246.

³⁶ L. Ferry/ A. Renaut, *From the Rights of Man to the Republican Idea*, 1992, 30.

³⁷ L. Strauss, *Natural Right and History*, 12.

The third characteristic is that of pragmatism. What is important for a human being is no longer “being” in the sense used in the ancient and medieval periods, but rather “doing”. Therefore, doing substitutes being. Man is no longer the one who is, but the one who does – *Homo faber*. As Heidegger affirms in his ontology, the domination of technology is the result of the forgetfulness of being.³⁸ All this to the detriment of humankind, as Pope John Paul II stated, “today’s man seems to be threatened by what he produces, that is, with the result of the work of his own hands and worse still, with the work of his own intelligence and with the tendencies of his own will. The result of the multiplicity of man’s activities, is not only alienation, in the sense that they are simply removed by the one who puts them, but that these effects also return to the same man and destroy him.”³⁹

New morals form yet another aspect of the modern era. Due to pluralism and secularism, ethical and moral values are relative. Therefore, neither absolute values nor absolute norms exist. The moral field becomes a private issue. Every one does what he wants and asks for recognition from the state or another institution. The international community in this modern period concentrated on the sovereignty of the state and the independence of states. In this environment, individuals were not considered. If individuals were occasionally mentioned, it was merely to say that every state was to treat the citizens of other states in a civil way. International relations were sour and states dominated. International relations were relations only among the entities of government⁴⁰ and not among individuals.

Thus the international community was really a juxtaposition of subjects with each one preoccupied only for his own well-being and his own liberty; each one mindful only of his own economical, political and military interests. Individuals during this period wanted to consolidate and expand their own power and authority, rather than protect collective interests. Ordinary people did not have much importance and weight. It almost seemed that they did not exist and so were observed as merely objects of domination of the different sovereign states which were the only real speakers on the world scene.⁴¹ The awareness of human rights, which developed during this period, was mostly realized by

³⁸ M. Heidegger, “Letter on Humanism”, in: D.F. Krell (ed.), *Basic Writings*, 1977, 204.

³⁹ Pope John Paul II, Encyclical, *Redemptor Hominis*, 15: AAS 71 1979, 286.

⁴⁰ A. Cassese, *I Diritti Umani nel Mondo Contemporaneo*, 2000, 5.

⁴¹ *Ibid.*, 7.

religious entities and renaissance philosophers from the whole of Europe; by the struggle of the English against the king and the struggle against the oppression of new peoples, by the struggle against the cruelty of slavery and the slave trade; and by the American and the French revolution.⁴²

Never before has man talked as much about human rights as during the modern period. Human rights are sometimes referred to as a homesickness. Man always seeks unity, a return to lost human values and morals. And so in human rights man seeks to recover the lost human values of society. However it is sad to note that sometimes, due to technical structures and different philosophical theories, man is reluctant to return to these moral values. As a result sometimes human rights seek foundations that perhaps do not exist.

2. From Natural Rights to Human Rights

Paradoxically, it was during the years following the adoption of the great declarations of rights that a decline in the popularity of natural rights occurred. The reasons for the decline were political and philosophical. Politically the great monarchies of the 19th century treated natural rights as a dangerous, revolutionary doctrine which could be effectively utilised by the emerging democratic and socialist opposition movements.⁴³ A good example is that of the naturalist ideas which were successfully used against the old regimes in France and America. Against these Bentham argued that natural rights were not only nonsense and mere fallacies, they were also mischievous and anarchical.⁴⁴ This was an era of state and empire-building, of utilitarianism and social engineering, a time of the emergence of nationalism, racism and sexism.⁴⁵

The devastating critiques of natural rights, argues Douzinas,⁴⁶ were made by some of the more famous philosophers of the late 18th and 19th centuries, like, Burke with his abstraction and rationalism, Bentham with his utilitarianism and indeterminacy and Marx with his close link to class interests. The most important philosophical force in law

⁴² A. Cobban (ed.), *The Debate on the French Revolution*, 1950.

⁴³ G.M. Trevelyan, *The English Revolution 1688-1889*, 1965, 36 et seq.

⁴⁴ Davidson, see note 25, 29.

⁴⁵ Douzinas, see note 6, 109.

⁴⁶ *Ibid.*, 110.

was positivism. The positivist approach and empiricism, its handmaiden, already dominant in the natural sciences and triumphant in technology with its many marvels, migrated to law and emerging social sciences. The beginning of all modern law which is by definition positivist law, can be traced to this: positivism, the claim that valid law is exclusively created by acts of state will, is the inescapable essence of legal modernity. This development of positivism united the major Western legal systems.⁴⁷

From being eternal, natural rights were transformed into historically and geographically local inventions; from being absolute into being contextually determined; from being inalienable into relative cultural and legal contingencies. The new morality was the morality of groups, classes, parties and nations, of social intervention, legal reform and utilitarian calculations.⁴⁸ Natural rights were reduced to the scrapheap of ideas. Hegel's philosophy of history, although the antithesis of utilitarianism, further undermined natural rights. Hegel argued that clear knowledge can only be acquired within clear historical constraints. And the historical horizon could not be transcended, because it formed the absolute presupposition of all understanding.⁴⁹ The historicist rejection of natural rights meant that: "all right is positive right", implying that what is right is determined exclusively by the legislators and the courts of the various countries.⁵⁰ These critics pointed to the *a priori* moral or value structures and assumptions derived from the personal preferences of the various theorists and declared that natural rights could have no objective existence.

Despite the decline of natural law and natural rights, after World War II natural rights triumphed and re-emerged as human rights. The

⁴⁷ In England, Austin and Dicey removed remaining naturalist fallacies from jurisprudence and proclaimed the absolute primacy of state law. A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 1885; 10th edition, 1959 with an introduction by E.C. Wade, 198 et seq. In the United States race relations were defined for a century by the apartheid principle of "separate but equal", this was set aside as late as 1954; cf. Douzinas, see note 6, 111. And the German legal theorist Otto Gierke, in 1934, as the Nazis were taking hold, stated that in Germany, "natural right" and "humanity" have become almost incomprehensible ... and have lost altogether their original life and colour", cf. O. Gierke, *Natural Law and the Theory of Society*, 1934, 201.

⁴⁸ Douzinas, see note 6, 113

⁴⁹ L. Strauss, *Natural Law and History*, 1965, 33.

⁵⁰ Ibid.

symbolic moments of the success of human rights include the Nuremberg and Tokyo Trials, the foundation of the United Nations and the adoption of the Universal Declaration of Human Rights which was followed by other international and regional human rights treaties, conventions, declarations and agreements.⁵¹ Although human rights had their origin in natural law, it took a system of positive law to provide a definite and systematic statement of the actual rights which people possessed.⁵²

V. Some Human Rights Approaches

1. Pragmatic Approach

In contemporary society, the human rights discourse is used whenever there is oppression, slavery, conflict, war and genocide to name but a few. The call for action in such situations has been always pragmatic, that is, the presentation of a need for an urgent humanitarian, political or juridical response. It is sufficient to recall the practice of slavery, the atrocities of World War II and the apartheid regime which all called for a political response. Thus the human rights discourse has become the most preferred idiom in which to press for almost every imaginable kind of social, political and legal reform or development.⁵³ This approach is connected with utilitarianism and, for almost a century, the intellectual community e.g. in the United States has tended to support pragmatism, the philosophy in which the very idea of firm principles is regarded as unsound and tantamount to dogmatism. It treats human rights as rules of thumb, with ample room for compromise.⁵⁴ The proliferation of human rights claims has another almost inevitable consequence: at least some of the many claims are incompatible. To concede the claim of one person or group involves rejecting the claim of another. One of the most controversial cases in this respect is that of the right to life of the unborn child which clashes with the right of the mother to choose. In contemporary culture the claims of many interest groups

⁵¹ See amongst others for an overview, I. Brownlie (ed.), *Basic Documents on Human Rights*, 1994.

⁵² Davidson, see note 25, 29.

⁵³ McKeever, see note 2, 110.

⁵⁴ A.S. Rosenbaum, *The Philosophy of Human Rights. International Perspectives*, 1980, 216.

have had a growing effect and influence on the political and legislative process. In view of this, there is a real danger that a new version of the classical political dynamic of might in right will prevail, in the sense that those who have the strongest lobby will be able to claim rights which weaker lobbies are not in a position to claim.

The pragmatic response to human rights claims may be considered at the level of public relations. If an individual, group or institution were simply to accept every claim of human rights as *ipso facto* legitimate, such parties would quickly be used to promote alleged rights which are ethically questionable.⁵⁵ And thus, the problem of the pragmatic approach consists both in the act of judgement about which claims to accept as morally legitimate and in the public communication of the reasons for this decision in the context of a highly polemical debates. The main pragmatic issue is the judgement on how the human rights discourse should be used in a given context. The human rights discourse should be used as an ethical category which explains why it is right for the attainment of pragmatic ends. Without the foundation of human rights on an ethical underpinning it remains utilitarian and, as Douzinas points out, “when the apologists of pragmatism pronounce the end of ideology, of history or utopia, they do not mark the triumph of human rights; on the contrary, they bring human rights to an end”.⁵⁶

2. Semantic Approach

At a semantic level, a look at the evolution and the use of the term, *human rights*, reveals the nuances and resonances with which the term has become charged. The addition of the adjective *human* to the term *rights* firmly places the concerns of all human beings at the centre of rights discourses.⁵⁷ The notion of human rights shows the close tie between the concept of right and the concept of freedom. With the use of terminologies of semiotics, one can argue that the “man” of the rights of man or the “human” of human rights, functions as a floating signifier and is

⁵⁵ McKeever, see note 2, 111.

⁵⁶ Douzinas, see note 6, 380.

⁵⁷ Amongst several authors on the nature of rights see M. Cranston, *What are Human Rights*, 1962, 2 et seq.; J. Raz, “The Nature of Human Rights”, in: M.E. Winston (ed.), *The Philosophy of Human Rights*, 1989, 44 et seq.; I. Shapiro, *The Evolution of Rights in Liberal Theory*, 1986; P. Hayden, *The Philosophy of Human Rights*, 2001, 13 et seq.

empty of meaning. But the “humanity” of human rights is not just an empty signifier; it carries with it an enormous surplus of values and dignity bestowed upon it by revolutions and declarations and augmented by every new struggle for the recognition and protection of human rights.⁵⁸

At a semantic level, then, the use of the human rights discourse in contemporary culture constitutes something of a dilemma. It is probably no exaggeration to say that it is almost the only form of ethical discourse which finds consensus among people today and so is a necessary language in order to communicate in today’s world.⁵⁹ But the acceptability of this discourse is at least partly due to the fact that it reproduces the culture in which people are living, including some of its morally doubtful aspects.⁶⁰ And so the dilemma is using a discourse that is at times loaded with nuances of individualism and rationalism, but which at least finds a certain consensus.

3. Normative Approach

The normative⁶¹ perspective of human rights is just as important as the pragmatic and semantic approaches yet is often ignored due to the preferred use of the other two. An examination of the human rights discourse in a normative perspective entails asking how this form of argumentation relates to a systematic theoretical understanding of ethics.⁶² Thus, it is clear that many of the issues which have emerged in the other perspectives have their roots at this normative level. It is the question of the moral foundation of human rights.⁶³

⁵⁸ Douzinas, see note 6, 255.

⁵⁹ McKeever, see note 2, 115.

⁶⁰ Ibid.

⁶¹ This term refers to the norms of natural law and not directly to norms of positive law. Of course the advocates of natural law would name the age of human rights as a step toward establishing natural law features, when their protection is sought for. However, in the legal application of human rights and due to the great influence of positive law, it is not easy to refer directly to natural law. In details see, L.W. Sumner, *The moral foundation of Rights*, 1987; McKeever, see note 2, 115 et seq.

⁶² McKeever, see note 2, 115.

⁶³ Sumner, see note 61, 4 et seq.

There have been a variety of declarations and conventions of human rights at an international and regional level, but the Universal Declaration of Human Rights remains the cornerstone of the human rights discourse. Its reading reveals a richness of pragmatic and semantic perspectives, but from the normative point of view it remains ambiguous and vague. The central question, which concerns normative ethics, is the manner in which one knows what is good and how this knowledge can be used in the formulation of moral precepts for the guidance of human behaviour. If one reads the Declaration, one discovers that the primary good is the dignity and worth of the human person. On the basis of this dignity and worth the text recognises the human person as the subject of “equal and inalienable rights” which determines how the person may and may not be treated, but it does not elaborate upon the source of this norm beyond the generic appeal to human dignity.⁶⁴ The text does not explain how one comes to know the dignity and worth of the human person and how this knowledge leads to the recognition of human rights. This does not mean that the text is of no interest from a normative ethics point of view. Suffice it to say, the idea of the dignity and worth of the human person requires each human being to be the possessor of certain values and this implies that each human being has the ability to know what is good and to deduce the implications of this knowledge for human behaviour. Similarly when the terminology of the inherent dignity of human beings and their “equal and inalienable rights” is used implicitly there is the perception of a good – the dignity of the human person. The inherent logic of the declaration is that we are morally obliged to behave in a certain way; there are things which one may and which one may not do to a human being.⁶⁵ The text indeed implies a normative ethical system, even though it does not postulate one explicitly.

The main problem with the human rights discourse at a normative level arises out of the tendency in contemporary culture to refuse, or at least to consider with suspicion, any discourse which dares to have rationalist, universalistic or absolutist premises. An alternative proposal is a pragmatic and relativistic utilitarianism: human rights help people so we should support and protect human rights here and now without delay.⁶⁶ This diminishes the common response when there is violation of human rights and atrocities occur because they are invoked only when

⁶⁴ McKeever, see note 2, 118.

⁶⁵ McKeever, see note 2, 119.

⁶⁶ McKeever, see note 2, 120.

they are useful to us. On a normative level this response remains unsatisfactory in view of the fact that it risks falling into a nihilistic stance on ethics, which undermines the human ability to know right and wrong and to articulate that knowledge in prescriptive terms based on something more than spontaneous individual impulse.

VI. The Universality of Human Rights

Never before has there been such debate on the universality of human rights as there is now.⁶⁷ As a result of the modern crisis of philosophical moral truth, whereby every truth is relative, the response to the fact of cultural heterogeneity often goes by the name of relativism.⁶⁸ From the relativism of philosophical moral values to the relativism of human rights, the question, whether or not human rights declarations can be applied to all, remains. The era of globalization with its pluralistic character has been named not only as the age of human rights but also as the era of a clash of civilizations.⁶⁹ This implies not only a clash of moral values,⁷⁰ but also a clash of human rights,⁷¹ which in the contemporary world have become the most fashionable alternative to morality.

⁶⁷ See R. Badinter, *Universality of Human Rights in a Pluralistic World*, 1989; J. Ayala-Lasso, "The Universality of Human Rights", in: D. Warner (ed.), *Human Rights and Humanitarian Law*, 1997, 87 et seq.; I. Fall, "Universality and Relativity of Human Rights from the Perspective of the World Conference", in: Warner; *ibid.*, 76 et seq.; M. Goodhart, "Origins and Universality in the Human Rights Debates", *HRQ* 25 (2003), 935 et seq.; E. Riedel, "Universality of Human Rights and Cultural Pluralism", in: C. Starck (ed.), *Constitutionalism, Universalism and Democracy*, 1999, 25 et seq.; B.H. Weston, "The Universality of Human Rights in a Multicultural World", in: B.H. Weston (ed.), *The Future of International Human Rights*, 1999, 65 et seq.

⁶⁸ Cf. D. Wong, "Relativism", in: P. Singer (ed.), *A Companion to Ethics*, 1993, 442.

⁶⁹ Cf. S.P. Huntington, "The Clash of Civilizations?", *Foreign Aff.* 72 (1993), 22 et seq. For more details see S.P. Huntington, *The Clash of Civilizations and the Remaking of World Order*, 1996. From the clash of civilizations it has been turned to a clash of globalisations; cf. R. Kiely, *The Clash of Globalisations. Neo-liberalism, the Third Way, and Anti-Globalisation*, 2005.

⁷⁰ K. Brooke Snyder, "A Clash of Values. Classified Information in Immigration Proceedings", *Va. L. Rev.* 88 (2002), 447 et seq.

Since the adoption of the Universal Declaration of Human Rights in 1948, the issue of universal applicability of the international human rights documents has often been raised.⁷² In the first place it has been claimed that human rights are Western constructs, with no universal validity.⁷³ In the Islamic world it has been claimed that some provisions are contrary to the Islamic culture and religion.⁷⁴ The Universal Declaration and subsequent international documents on human rights did not and do not create human rights, rather they recognize and list them, although such a list can never be exhaustive. The human rights of the African and Asian people were proclaimed and claimed to be respected even before the Universal Declaration and other human rights documents.⁷⁵

In the formulation of the Declaration itself one notices that universal rights exist, when we read; “Everyone has a right to ...” or “No one

⁷¹ P.M. Sniderman, *The Clash of Rights. Liberty, Equality and Legitimacy in Pluralist Democracy*, 1996.

⁷² Already in the draft of the Universal Declaration of Human Rights (UDHR) itself the formulation of the title of the Declaration needs to be noted clearly in the sense that it has been entitled “Universal Declaration of Human Rights” and not “Declaration of Universal Human Rights”. The intention was to have a declaration, which could reach as many people as possible despite their different theories and ideologies.

⁷³ For instance the UDHR and the two International Covenants – the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights were drafted without the participation of most African and Asian countries because they were under colonial rule. In detail see R. Pannikar, “Is the Notion of Human Rights a Western Concept?”, *Diogenes* 120 (1982), 75, et seq.

⁷⁴ C.M. Cerna, “Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts”, *HRQ* 16 (1994), 751 et seq.

⁷⁵ For instance the Maji Maji War of 1905 in Tanzania arose from resistance to German colonial rule, the Mau Mau war in Kenya arose from resistance to British colonial rule and many of the freedom movements especially in 1960s were expressions and claims respecting the rights of others. Mahalu points out that the way the colonial administration was effected denied peoples their human dignity and the ruthlessness accompanying the enforcement of colonial powers indicated a disregard for the lives or rights of those who, in their traditional conviction, opposed foreign authorities, cf. C.R. Mahalu, “Africa and Human Rights”, in: P. Kunig/ W. Benedek/ C.R. Mahalu, *Regional Protection of Human Rights by International Law: The emerging African System*, 1985, 4.

shall be ...". This shows clearly that the task of enjoying rights and responsibilities belongs to everyone without exception. The use of words like "all" and "every" demonstrate the universality of human rights. We read: "The General Assembly, proclaims this Universal Declaration of Human Rights as the common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society ...".⁷⁶ The presence of the universal property of human nature that all possess, at least in its universal principles, is the same for everyone everywhere and coexists in the whole of humanity. This has universal values for all people in every time and in every place.⁷⁷ In effect, the acknowledgement of the personal dignity of every human being demands the respect, the defence and the promotion of the rights of the human being. It is a question of inherent, universal and inviolable rights. No individual, no group, no authority, no state, can give them and no one can eliminate them as long as the human being is there.

This understanding is possible if one starts from natural law theory. With a positivistic theory discourse, the universality of human rights is problematic because each state or individual has the right to list his own human rights. And the role of the state and international bodies of human rights is not to create human rights but to recognize and protect them. But when the starting point is natural law theory, in the sense that one has rights not because an institution or individual has given them but because it originates from the very fact that one is a human being, then it is possible to talk of the universality of human rights. It is to this end that the Universal Declaration of Human Rights alludes to when it begins with: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."⁷⁸

Universality in the human rights discourse does not mean that all rights are identical. Human rights are as many and as different as human beings, although considering the inherent dignity and the inalienability of rights of every one, it is true that fundamental rights are common to all.⁷⁹ The feelings of pain when one's rights are hurt or violated

⁷⁶ Universal Declaration Preamble, para. 8.

⁷⁷ Finnis, see note 15, 198.

⁷⁸ Universal Declaration Preamble, see note 76, para. 1.

⁷⁹ The question here regards the universality of human rights which one possesses. Of course, possession of these human rights does not automatically mean their use, but they demand to be recognized and protected, sometimes not directly but under the title of the fundamental right to freedom.

are valid for everyone. When a culture or ethnic group is given room to draft its own human rights document, as has been rightly suggested by Pannikar,⁸⁰ the result will correspond to others in *grosso modo*. After the adoption of human rights documents on a regional level and their insertion in individual states' constitutions, they should not be decorative, but instead taken seriously and put into practice by each individual. The protection and respect of human rights must be taken seriously otherwise it will again be too late.

Although the pragmatic approach plays a great role, it is not a sufficient response to the relativism of human rights because it is usually applied as an urgent response to oppression, exploitation, war, etc. and generally does not explain why it is right or wrong to do something. It must be pointed out that the pragmatic perspective is closely related to utilitarianism and so the promotion and protection of human rights may only occur when and where there is interest in doing so. In order to defeat relativism an ethical normative perspective is needed, as expressed by natural law, which by its nature is unwritten law, inherent in every human being independent of his culture, religion or race. In every culture there is a concept of good and bad, rights and wrongs. The content of good and evil or right and wrong may differ from one ethnic group to another, but the idea of good and evil is always present. No human culture, no matter how rich it may be, can exhaust the entire truth regarding morality and values. Each culture is called to perfection and the purification of its values. It is universally valid that everyone needs to be treated well and that everyone is happier when his own rights are recognized, respected and protected.

VII. The United Nations as Custodian of Human Rights

The idea of the promotion and protection of human rights is much older than the United Nations.⁸¹ The state has been and remains the

⁸⁰ He suggests that room should be given for other traditions to develop and formulate their own homomorphic views corresponding to or opposing Western "right". This is an urgent task, otherwise it will be impossible for non-Western cultures to survive. Cf. R. Pannikar, "Is the Notion of Human Rights a Western Concept?", in: H.J. Steiner/ P. Alston (ed.), *International Human Rights in Context*, 2000, 389.

⁸¹ "Those who seek to move the earth must first, as Archimedes explained, have a place to stand. Moral clarity provides us with a place to stand, a reference point from where to leverage our talents, ideas, and energies to cre-

principal guarantor and protector of human rights of its citizens. But while the state should be the principal guarantor of the human rights of its citizens, history has shown that this is clearly not always the case. Many human rights violations could be described as a breach of this basic compact between the state and its individuals. When state protection metamorphoses into state abuse, the international community, through the mechanisms of guarantees it has put in place, becomes the only recourse for the protection of the universal rights of individuals failed and abandoned by the state.⁸² Indeed, in the aftermath of World War II, representatives of Member States of the United Nations drafted the Universal Declaration of Human Rights, against the background of the atrocities of the war. The contribution of the United Nations in the promotion and protection of human rights is enormous. Since 1948 many human rights treaties and conventions under the auspices of United Nations have been ratified. The number of treaty bodies stands at seven at the moment.⁸³ The proliferation of human rights conventions and treaty bodies in themselves does not make a difference, as experience has already shown. And because of this, the 21st century, as Viljoen rightly argues, should be the century of implementation of these human rights conventions: a move from the elaboration of human rights to their enforcement.⁸⁴

1. Moral Foundation of Human Rights and the Universal Declaration in Practice

Throughout the preparation of the Universal Declaration the question of the foundation of human rights was raised. It was not easy for the Western and the Eastern blocks to reach agreement. This tension was

ate a better world. Without moral clarity, without a reference point, those same talents, ideas, and energies are just as likely to do harm as good”, this was described by the Soviet dissident Natan Sharansky, see N. Sharansky, *The Case for Democracy: The Power of Freedom to overcome Tyranny and Terror*, 2004, 193.

⁸² Cfr. K. Annan, “Strengthening United Nations Action in the Field of Human Rights: Prospects and Priorities”, *Harvard Human Rights Journal* 10 (1997), 2 et seq.

⁸³ See F. Viljoen, “Fact Finding by UN Human Right Complaints Bodies”, in: R. Wolfrum/ A. von Bogdandy (eds), *Max Planck UNYB* 8 (2004), 49 et seq. (50).

⁸⁴ Viljoen, see note 83, 50.

due to the Western block with its liberal traditions and the Eastern block with its communist ideologies. For example, the Soviet Union and its Eastern European allies were against the draft declaration because it recognized individual rights with little reference to collective rights.⁸⁵

Another reason, which caused disagreement between the parties was the different conception of human rights due to a diversity in ideologies and theories of human rights. For this reason there was difficulty in agreeing on the Declaration since the moral relativist held that human rights could not and should not be extended to all peoples of the world.⁸⁶ Islamic countries were another group which had reservations in respect of the Declaration because there were serious conflicts between human right norms and Islamic beliefs in practice.⁸⁷ With people of diverse cultural traditions and moral backgrounds, the question, which was raised was a universal application of the Declaration of Human Rights.

Perceiving the disagreement dominating the Declaration, Maritain⁸⁸ in his remarks, with the intention of facilitating the acceptance of the Declaration, suggested that differences in ideologies and theoretic perceptions of human rights should be left aside to focus on the practical aim. He argued that after the scourge of World War II, the centre of attention should be common practical notions rather than common speculative notions.⁸⁹

⁸⁵ W. Sweet, "Theories of Rights and Political and Legal Instruments", in: W. Sweet (ed.), *Philosophical Theory and the Universal Declaration of Human Rights*, 2003, 104.

⁸⁶ In fact during the debate on the draft of the UDHR a multitude of people from different cultures, religions, races, languages as well as different ideologies and philosophies raised the question on its applicability.

⁸⁷ It is often argued that Islamic law stands in stark opposition to the UDHR, in the sense that the latter guarantees the freedom to choose one's religion and spouses; both of which are restricted under Islamic law. For details Cerna, see note 74.

⁸⁸ Maritain led the delegation from France to UNESCO's second General Conference held in Mexico City in November 1947 and was elected chairperson of this Conference.

⁸⁹ "How ... is an agreement conceivable among men assembled for the purpose of jointly accomplishing a task dealing with the future of the mind, who come from the four corners of the earth and who belong not only to different cultures and civilizations, but to different spiritual families and antagonistic schools of thought? Since the aim of UNESCO is a practical

The common practical conviction does not sweep away theoretical convictions as such, as Maritain argued further.⁹⁰ Thanks also to these remarks, the Universal Declaration became the Magna Carta of humankind. Other international⁹¹ and regional⁹² human rights conventions followed. Colonized territories obtained their freedom, slavery in its multi-faceted form was abolished, discrimination was undermined, apartheid was finally consigned to history. Indeed the last century was characterized as the century of triumph of human rights. However, although the 20th century was the century of the triumph of human rights and as such named as the age of human rights, still, it was the century of massive violations of human rights. The genocides in Rwanda and the former Yugoslavia, civil wars in different corners of the world, the violation of the rights of children as well as torture, terrorist attacks, and severe poverty have increased. There have been so many violations of human rights during the last century and at the beginning of this Third Millennium that some have called it the end of human rights.⁹³

Some of the factors for the decline of the human rights and of their violation is the utilitarian concept of human rights and the dominance of the pragmatic discourse of human rights which ignores the ethical foundation of human rights. Human rights get their ethical justification in natural law. Of course “natural rights” and human rights are closely related but they are not synonyms. If someone is considered to have a natural right, it is also a human right, but not every proponent of hu-

aim, agreement among its members can be spontaneously achieved, not on common speculative notions, but on common practical notions, not on the affirmation of the same conception of the world, man, and knowledge, but on the affirmation of the same set of convictions concerning action.”, J. Maritain, *Man and the State*, 1951, 77.

⁹⁰ “I am fully convinced my way of justifying the belief in the rights of man and the ideal of freedom, equality, and fraternity is the only belief solidly based on truth. That does not prevent me from agreeing on these practical tenets with those who are convinced of their way of justifying them, entirely different from mine or even opposed to mine in its theoretical dynamism, is likewise the only one based on truth”, *ibid.*, 78.

⁹¹ See for a list, Brownlie, see note 51.

⁹² The Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, and the African (Banjul) Charter on Human and Peoples’ Rights are examples of human rights documents which are also inspired by the UDHR.

⁹³ Douzinas, see note 6, 371 et seq.

man rights subscribes to the theory of natural law. Even though natural right is distinguished from natural law, natural law addresses fundamental moral duties; natural right concerns itself with fundamental claims or entitlements. Wasserstrom defined human rights as a basic moral entitlement possessed only by persons.⁹⁴ Rights are thus seen as entities that are naturally possessed rather than conferred. This implies that every person has not only rights to claim from others, but also obligations to fulfill. On the one hand, there are those with an utilitarian concept holding that rights are correlative because rights confer obligations.⁹⁵ On the other hand there are those who claim that higher obligations themselves confer rights. Pope John XXIII, writing in the natural law tradition, sums up the inseparability of rights and obligations:

“... every fundamental human right draws its indestructible moral force from natural law, which in granting it imposes a corresponding obligation. Those, therefore, who claim their own rights, yet altogether forget or neglect to carry out their respective duties, are people who build with one hand and destroy with the other.”⁹⁶

Considering the ethical foundation of the human rights discourse and reflection on the triumph and violation of human rights during the age of human rights, Dalla Torre argues that the human rights discourse is the expression of the nostalgia of natural law.⁹⁷ Despite their differences, natural law and human rights, argues Douzinas, also share common resistance and dissent to exploitation and degradation and a concern with a political and ethical utopia, the epiphany of which will never occur but whose principle can stand in judgement of the present law.⁹⁸ The ethical foundation of human rights makes one aware of the personal responsibility of living together with others under the moral principle: “do to others what you want others to do to you.” This makes clear that every right implies a duty. The recognition of the right not to be reduced to slavery implies the responsibility of those who own others to give them their freedom. The right not to be tortured

⁹⁴ R. Wasserstrom, “Rights, Human Rights, and Racial Discrimination”, in: A.I. Melden (ed.), *Human Rights*, 1970, 96.

⁹⁵ *Ibid.*, 32

⁹⁶ Pope John XXIII, *Pacem in Terris*, n. 6, 1963.

⁹⁷ G. Dalla Torre, *La città sul Monte. Contributo a una teoria canonistica sulle relazioni fra Chiesa e comunità politica*, 2002.

⁹⁸ Douzinas, see note 6, 380.

implies the responsibility of the torturer not to torture. The exercise of the rights and freedoms proclaimed is 'subject to duties'.⁹⁹

The natural rights, which we have been dealing with, are however, undeniably connected to the very person who is their subject just as much as the respective duties; and rights as well as duties find their source, their substance and their inviolability in natural law, which grants or bestows them. In human society one man's right entails a duty for all other persons; the duty, namely, of recognizing, respecting and protecting the right in question.

2. The United Nations and Human Rights Challenges

The role of the United Nations in the field of human rights is immense. This has lead Malik to point out:

"the world viewpoint on human rights must be that of the United Nations, and the reconciliation of conflicting views must be the outcome of the patient activity of the United Nations (...). Therefore the story of human rights at an international level is none other than the story of human rights in the United Nations."¹⁰⁰

However, all efforts of the United Nations could not stop the torrent of criticism concerning the efficiency of the protection of human rights, in particular in connection with the Commission on Human Rights. Sadly enough, the Commission over the years has devolved into a feckless organization that human rights abusers used to block criticism or actions to promote human rights.¹⁰¹ The failure of the United Nations to prevent e.g. the genocide in Rwanda or the tragedy of Srebrenica remains a challenge, as do some cases of abuses of human rights which have been reported in the UN human rights system itself. Considering the tattered state of the UN's reputation in the wake of the Oil for Food scandal, abuses of civilians within the Peace Keeping Mission

⁹⁹ Finnis, see note 15, 211.

¹⁰⁰ C. Malik, "Human Rights in the United Nations", *International Journal* 6 (1950-1951), 275 et seq. (275).

¹⁰¹ See in this respect the discussion about a Human Rights Council, in particular the Report of the Secretary-General, "In Larger Freedom: Towards Development, Security and Human Rights for All", Doc. A/59/2005 of 21 March 2005, 45; B.D. Schaefer, "The U.N. Human Rights Council is Not Enough: Time for a New Approach to Human Rights, available at: <www.heritage.org/Research/InternationalOrganizations/bg1910.cfm>.

to the Democratic Republic of the Congo¹⁰² just to name a few,¹⁰³ one poses the question: who can heal the physician?

The recent reform of the United Nations human rights system concerning the establishment of the Human Rights Council¹⁰⁴ is promising and might give a new chance for the promotion and protection of human rights. However, it is questionable whether this new Council will be a really effective response to today's situation of human rights.¹⁰⁵ After all, the past teaches us that although there are 192 Member States many of them fail to adhere to the principles embodied in the UN Charter, including the commitment to fundamental human rights. Indeed, still many Member States actively subvert those principles and repress their own population.¹⁰⁶ In many parts of the world, the states, instead of being guarantors of human rights, sadly have become violators instead. Regrettably some guarantors of human rights forget that the enterprise of human right is the question of "do to others what you would like others do to you".

VIII. Conclusion

The human rights discourse, which has enjoyed a significant amount of support in recent times, is not only an alternative to moral values but also contains and has its foundation in moral values. The human rights discourse is both an expression of the nostalgia for natural law and for its revival. The moral values of human rights are connected to natural law by the fact that moral precepts are the precepts of natural law. Human rights, the contemporary name for what has been usually known as

¹⁰² see S. Price, "Democratic Republic of Congo sex abuse claims upheld, available at: < www.news.bbc.co.uk/2/hi/Africa/4746216.stm>.

¹⁰³ In respect of Kosovo see E. Abraham, "Sins of the Savoir: Holding the United Nations accountable to International Human Rights Standards for executive Order Detentions in its Mission in Kosovo", *Am. U. Int'l L. Rev.* 25 (2003), 1293 et seq.

¹⁰⁴ A/RES/60/251 of 15 March 2006. The vote was 170 in favour to 4 against (Israel, Marshall Islands, Palau, United States), with 3 abstentions (Belarus, Iran, Venezuela).

¹⁰⁵ For a short overview compare S.R. Lyons, "The New United Nations Human Rights Council", *ASIL Insight* 10 (2006), available at: <<http://www.asil.org/insights/2006/03/insights060327.html>>; Schaefer, see note 101, 2.

¹⁰⁶ Schaefer, see note 101, 3.

natural rights or rights of man, contain moral elements. The moral content expressed in the concept of natural law has consistently influenced legislation, being subsequently expressed with the name of natural rights and human rights rules. Human rights are part of natural rights and natural rights are that part of natural law which commonly refers to natural sources of justice.¹⁰⁷

The age and triumph of human rights has been proclaimed, yet it has been paradoxically accompanied by grave violations of human rights. Action must be taken because all human beings are born free and equal in dignity and rights, endowed with reason and conscience and should act toward one another in a spirit of brotherhood. This can be achieved in a variety of ways but especially if humankind will have the courage to return to lost moral values and a conception of human rights according to the natural law theory. Of course, the natural law of our time cannot be that of the medieval era because, after all, natural law has been developed over time and no human culture or philosophy can exhaust the entire truth about morality, values or knowledge of natural law.¹⁰⁸

In the move towards the age of implementation, if human rights are separated from natural law, they remain an instrument for reform and, occasionally, a sophisticated tool for analysis, but they stop being the tribunal of history.¹⁰⁹ By founding human rights on natural law and human rights in moral values, the binding of human rights is no longer problematic whether written or unwritten.¹¹⁰ Considering that nowa-

¹⁰⁷ Natural law concepts, as a universal moral law, are the basis for natural rights and human rights transcending the law of states. When positive law coincides with natural law it has the authority of both force and conscience. Positive law is the enforcement of positive rights while natural law gives justice to natural rights and human rights. Whereas a positive right is necessarily enforceable, is written in law books, creating what is normative, a moral right differs because it is not necessarily enforceable, is not written, may consist of jurisprudential thoughts, creating what ought to be, cf. R.A. Tokarczyk, "Interrelations Between Human Rights, Natural Rights and Natural Law Concepts", in: L. Leszczyński (ed.), *Protection of Human Rights in Poland and European Communities*, 1995, 34.

¹⁰⁸ See B. Mondin., *Philosophical Anthropology*, 1991, 70.

¹⁰⁹ Ibid.

¹¹⁰ "It is true that the document, in itself, is not binding in the same sense as a treaty. However, arguably, it can now be said to be part of customary international law, and under all circumstances it incorporates in a very succinct manner rights and freedoms which later have been elaborated upon in

days some human rights are enshrined in conventions and constitutions, Brant argues that when human rights are upheld by positive law – where people have what they ought to have – natural rights and human rights are both moral rights and positive rights.¹¹¹

the instruments that now make up the international Code of Human Rights and related treaties”, cf. H. Corell, “The United Nations and the Legal Community in Promotion of Human Rights”, *Fordham Int’l L. J.* 21 (1997-1998), 519 et seq.; Cranston, see note 57, 17; Finnis, see note 15, 205.

¹¹¹ I. Brant, *The Bill of Rights. Its Origin and Meaning*, 1967, 34.

