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From Human Rights to Fundamental Rights.  
Consequences of a conceptual distinction.

**GIANLUIGI PALOMBELLA**



Department of Law

**EUROPEAN UNIVERSITY INSTITUTE  
DEPARTMENT OF LAW**

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## **Abstract**

This article introduces a peculiar distinction between “human” rights and “fundamental” rights, explaining through diverse areas, the role that the difference can play. Rights are loaded with contrasting properties and burdens, opposing features and values (neutral, pre-political, negotiable, democratic, etc.). On the contrary, we should accept -on one side- human rights as *moral* visions of what is due to human beings, deontological imperatives, even if abstract. But on the other side we cannot ignore the *ethical* problems: e.g. those resulting from their blind implementation. We need to enhance the institutional, legal and ethical-political meaning of “fundamental” rights, i.e. those which *are assigned a meta-normative role in a legal order and an ultimate value* in the corresponding social and ethical context. The article shows also how the use of these definitions can clear some theoretical misunderstandings, improve our critical analysis and help in explanation of real processes. This article will be published in “Archiv für Rechts- und Sozialphilosophie”, in 2007

## **Keywords**

Law, Rights, Ethics, Justice



***From Human Rights to Fundamental Rights.  
Consequences of a conceptual distinction.***

Gianluigi Palombella\*

**1. The discordant properties of rights.**

Generally speaking proponents of human rights begin with abstract assumptions, which aspire to universal validity. Even when they renounce an absolute foundation, they nonetheless consider human rights to be an essential prerequisite of coexistence, irrespective of the way in which it subsequently orientates its goals. The abstract quality of human rights is the necessary condition of their aspiration to or presumption of “universality”. In spite of international (or European) treaties and declarations, which aim to manifest themselves in nuclei of “positivised” rights, the deontological, and therefore Kantian, principled, categorical and pure emphasis of human rights is testament to their “moral” force. The strength of human rights lies in the fact that they are after all a philosophy. If it is true that they presuppose an ontology, an epistemology, an anthropology, a vision of justice, their persistent abstractness may also function as a kind of permanent critical principle. By contrast, as many commentators argue, human rights have had, and continue to maintain, an individualist and liberal meaning: their neutral language has also assisted in the perpetuation of forms of domination (as has long been argued e.g. in the feminist tradition, in relation to gender based domination<sup>1</sup>); and today the question of rights in general seems to be double edged sword, being motivated by the undisclosed interests of the West, or at least of part of it, yet ringing with humanitarian proclamations.

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\* Gianluigi Palombella, Professor of Legal Philosophy, Head of Department “Studi Giuridici e Sociali”, Via dell’Università 12, PARMA (Italy) and Fernand Braudel Senior Fellow, European University Institute, Florence. Email: gpalomb@unipr.it

<sup>1</sup> In contrast to those based on sex, differences based on “gender” are a social construct. Thus *gender-neutral* policies tend to reproduce hierarchies and discrimination (see D. L. Rodhe, *Justice and Gender*, Cambridge (Mass.) 1989; or C. MacKinnon, *Crimes of War, Crimes of Peace*, in S. Shute, S. Hurley (eds.), *On Human Rights*, New York 1993, 83-109 ).

Making a range of concessions to the critics of human rights, and in an attempt to propose a reasonable reconstruction, Michael Ignatieff brought the thin nature of human rights<sup>2</sup> to the forefront in his “apology”:<sup>3</sup> they concern the conditions of *negative* freedom, and are equated with that which is right, and not to that which is good. “People may enjoy full human rights protection and still believe that they lack essential features of a good life”.<sup>4</sup> This covers the minimum conditions for any type of life. “Human rights are universal, not in the sense of being a vernacular of cultural prescriptions, but rather as a language for the bestowal of moral power. Their role is not that of endowing culture with a substantive content but of seeking to condition all actors in such a way that they can liberally fashion that content”.<sup>5</sup> At the same time, rather than as the cutting rigidity of deontological arms, human rights must be conceptualised as the content of a politically moulded *deliberation* perceptive toward consequences: according to Ignatieff, human rights are therefore “a form of politics”<sup>6</sup> which must introduce moral ends into reality; moreover the rights are “political” because they imply a confrontation between the holders of the rights and the holders of power.<sup>7</sup> This means that “human rights is the only universally available moral vernacular that validates the claims of women and children against the oppression they experience in patriarchal or tribal societies; it is the only vernacular that enables dependent persons to perceive themselves as moral agents and to act against practices – arranged marriages, purdah, civic disenfranchisement, genital mutilation, domestic slavery and so on – that are ratified by the weight and authority of their cultures”.<sup>8</sup>

As I will argue in greater detail below, I believe that this political and teleologically oriented character of “human” rights, which I have recalled in the argument proposed by Ignatieff, conflicts with the definition of its neutral, thin, preliminary, moral nature: the latter would imply simply a coherent deontological struggle, or in other words a “categorical” (and thus not politically negotiable) struggle. Therefore this theoretical presentation of human rights exposes its flank to recurrent objections. Given this state of play who underlines<sup>9</sup> the ideological and in any case

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<sup>2</sup> A significant contribution on the nature of human rights – leading in part in a similar direction - is offered by J. Rawls, *The Law of Peoples*, Cambridge (Mass) 1999, 78-81.

<sup>3</sup> M. Ignatieff, *Human Rights as Politics and Idolatry*, Princeton 2001. Significantly, a “reasonable apology of human rights” is the title given to the Italian edition of Ignatieff’s book: *Una ragionevole apologia dei diritti umani*, Milan 2003]

<sup>4</sup> Ignatieff, *loc. cit.*, 55.

<sup>5</sup> Ivi, 75. This argument is also proposed by S. Veca, *La priorità del male e i diritti umani* (in the article accompanying the Italian edition of Ignatieff, *loc. cit.*) who associates *minimum* justification with an awareness of the “priority of evil” (human rights after the holocaust clarify their sense) and attributes to human rights the capacity to highlight and focus on the “reasons of the non eligibility of a life” (ivi, 120, cf. also 123 ). Veca consistently concludes that human rights must at this stage however be considered as trump cards (ivi, 133).

<sup>6</sup> Ivi, 26.

<sup>7</sup> Ivi, 69.

<sup>8</sup> Ivi, 70.

<sup>9</sup> As for example does D. Zolo, *Fondamentalismo umanitario*, in the article which follows the Italian edition of Ignatieff, *Una ragionevole apologia dei diritti umani*, cit..

ethically loaded character of human rights, on the presumption that Ignatieff's definition is incorrect, will not encounter difficulties: rights are anything other than minimum or empty, but are rather the expression of ethical ideals that are much more "loaded" than the restitution of negative liberty may appear (even though this however is nothing other than a representation of individualistic cultural ideals, which in turn conflict with collective rights).<sup>10</sup>

The stance adopted by Ignatieff illustrates with particular clarity an intrinsic *impasse* which seems to me to be even more in evidence due to the theoretical inadequacy of a linguistic and conceptual use of expressions "human rights" and "fundamental rights" as equivalent and interchangeable. On this view human rights are a minimum, Kantian, neutral, transcendental, moral, deontological condition, but they are also *at the same time* a structure of values, ethically framed, politically negotiable and consequence-sensitive; they are individualistic but at the same time are conditions of collective unities.

These qualities and these diverse *status* may be attributed to rights in general, but in the end they cause their collapse. These different groups of propriety are relevant in the evaluation of questions of protection, in the discussion of cultural rights, equality or discrimination. But if we want to understand them we must identify *two* "theoretical" types of rights, namely *fundamental* rights alongside *human* rights, perceiving them as two different conceptual ways of talking about rights, and to which these groups of connotations may be separately referred.

I have argued elsewhere<sup>11</sup> that expressions such as human rights and fundamental rights should not be considered as equivalent and interchangeable, and that it is important to appreciate the diversities in their meaning, precisely in order to have at our disposal less "flat" conceptual instruments to carry out various tasks, fend off a range of attacks, and also identify the many aporias, which encumber rights.

Generally speaking, human rights are – or at least one would prefer that they are – also "fundamental" rights: this should mean that a given *society* considers the protection of human rights essential. It would appear that, if this is not a tautology, human rights are *also* fundamental, (if and) because they posit at the *basis* of our life *in common*, and they are concretely implemented through the fabric of an organised social system. Any change in fundamental rights' model would result in a change of the societal model. As human rights they are therefore "abstract", whilst as fundamental rights they cannot be so. In order to propose a description of fundamental rights it is necessary to accept the burden of establishing that a specific core of rights (including, where appropriate, "human" rights) plays a pivotal role in a society or in a social system, such as to constitute a basic pillar within it, and an objective which orientates institutions and *policies*.

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<sup>10</sup> Zolo, *Fondamentalismo umanitario*, cit., 145 et seq.

<sup>11</sup> See my own, *L'autorità dei diritti. I diritti fondamentali tra istituzioni e norme*, Roma-Bari 2002.



When they are also fundamental, human rights – which are in themselves philosophical conceptions about human beings – at the same time form part of a conception of both man and social system: a kind of social system which necessitates the inclusion of human rights protection within the rules of the game and among its own constitutive and essential obligations. A theory of “human” rights, in itself, concludes by bringing a deontological claim, concerning that which we owe to *human beings*, and which is linked at least to a moral theory and probably also to an anthropology<sup>12</sup>. A theory of “fundamental” rights by contrast obliges us to focus also on that which is capable of contributing to the existence of a *society* (or also to recommend them as that which could or should do so): this involves analysis or prescriptions which are not expressed in deontological terms, but in ethical, institutional, political or teleological terms. Fundamental rights must be concretised just as human rights must be considered in the abstract.

In the area of human rights it is possible to make philosophical choices that are quite subtle and also consistent with a broad range of potential justifications invoked as support.<sup>13</sup> The difference of viewpoints relates not to non-Western countries but also those *western countries* which adopt different perspectives: one amongst many examples concerns the forms of protection or of international justiciability. The opposition of the United States<sup>14</sup> to global agreements on environmental policy or to the establishment of international courts for the defence of human rights, or its frequent use of the death penalty constitute a sufficiently eloquent example. A universal consensus on “universal” rights is often lacking: at times it is the case that conceptions of that which is deontologically owed to human beings diverge. Nonetheless, this only skirts around the real issue. Disputes between particularism or relativism and universalism of rights have over the last decades<sup>15</sup> have betrayed their own sterility: at best it is possible to present only inconclusive proof in favour of one of the other position; hence there

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<sup>12</sup> This deontological status is in turn understood in different ways. For example, in the sense proposed by Michael Perry for human rights: identifying "what ought not to be done and what ought to be done for human beings" (M. Perry, *The Idea of Human Rights*, Oxford 1998, 56). A substantive neo-Aristotelian or neo-Thomist philosophy of an analytical nature, such as that of John Finnis, for example, makes the question of (natural) human rights converge into an *objective order of goods*, participation in which, in a just manner, delineates the common weal and also the welfare of the individual in the community (J. Finnis, *Natural Law and Natural Rights*, Oxford 1980).

<sup>13</sup> In the process of drafting the UN Charter, Eleanor Roosevelt is granted the merit of having facilitated a “thin” *agreement* despite often deep differences in philosophical, ethical and political positions (Ignatieff himself discusses the overall event of the framing of the Universal Charter: *Human Rights as Politics and Idolatry*, cit., 77-92). The thin nature of this *agreement* is synonymous with its abstractness, understood in this case as a lack of greater connotation. According to Mary Glendon, *Foundations of Human Rights: The Unfinished Business*, *American Journal of Jurisprudence*, 1999, 3: “The Framers of the Declaration did take account of the diversity of cultures by leaving room for a legitimate pluralism in interpreting and implementing its open-ended principles”.

<sup>14</sup> Ignatieff, *Human Rights as Politics and Idolatry*, cit., 12-14.

<sup>15</sup> Naturally, harks back in time at least to the debate amongst the framers of the universal declaration. Mary Glendon refers to this in her paper (*Foundations of Human Rights*, cit.) noting that critiques based on cultural relativism in reality are motivated by a false proposition, according to which “universal principles must be implemented in the same way everywhere” (ivi, 7).

may be a legitimate suspicion as to whether the discussion concerns an incorrectly formulated frame of reference.

In reality, since we only have available the notion of universal “human” rights (still understood as a direct equivalent of the expression “fundamental” rights), these oppositions and these differences appear only as philosophical questions, whilst in actual fact they are “real” questions. And even when there is agreement on the unassailability of human rights, understood as a moral question, there is still to complain of the ideological use of rights or of their weak justiciability.

In order to remain consistent, *human* rights (in contrast to the view proposed by Ignatieff) should in fact be conceptualised as *trump cards*<sup>16</sup> precisely because *moral* rights must (for Dworkin and for Habermas) be attributed to individuals on the strength of arguments of principle and entirely independently of any *policy* consideration. Habermas too, in framing the relationship between the rights of individuals and collective goods, has often taken for granted that individual rights can be set aside by political goals only when the latter are justified in terms of the defence of further individual rights, in other words following the argument of Ronald Dworkin.<sup>17</sup>

In fact, a theory of human rights is referred by definition to human beings and is capable of identifying that which in terms of (essential) justice should be due to every human being. Therefore, why such theory of rights should shrink back from advocating their priority and ultimate value? Why should it not require them to be trump cards, claims from which no derogation is possible, claims which cannot “lose”? A coherent theory of human rights must consider them to be *trump cards*. Human rights are those which should not be “negotiated”. By the same token, just as human rights involve a question of *principles* rather than *policies*, they do not involve *political* questions nor the aims of divergent community *ethics*, in relation to which “human” rights must boast an independence or a principled “superiority”.

This of course makes it very difficult to argue that, although they are not negotiable, they may have some political content following a specific (and contingent) public debate. Nonetheless, Habermas himself has stressed the “democratic” development of the universality of rights;<sup>18</sup> he has recognised the importance of the ethical-political “self-clarification” of the meaning of rights demanded by communitarianism, whilst at the same time attempting to maintain the necessarily moral and individual character of the rights themselves.

In an attempt to square the circle, a double and indecisive nature is introduced. If therefore Habermas believes rights are trump cards before the Courts, as well as entities the substance of which is politically elaborated, Ignatieff reaffirms their minimum (and ultimately “neutral”) content but then he opts out their value as winning claims in return for a reasonable, pragmatic, and political, inter-subjective clarification

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<sup>16</sup> R. Dworkin, Rights as Trumps, in J. Waldron (ed.), *Theories of Rights*, Oxford 1995<sup>7</sup>, 153-67.

<sup>17</sup> J. Habermas, Struggles for Recognition in the Democratic Constitutional State, in Ch. Taylor (ed), *Multiculturalism: Examining the Politics of Recognition*, Princeton 1994, 123-4.

<sup>18</sup> Ivi, 125-6.

of their meaning and scope. As will be argued below in relation to this point, the theoretical debate does not assist us in an identification of coordinates for resolution. I shall attempt to establish the expediency of other means, and at the close of this article I will turn again to the reasons for this aporia.

## 2. Human rights and ethics

Such difficulties would not be encountered if we undertake a separation of human rights from fundamental rights: according to the definition proposed here only the latter are located on the ethical-political plane; I have also elsewhere proposed the argument that the content of rights is ethical-political when they are elevated to a substantive criterion to which *both public and private actions must conform*.<sup>19</sup> In such cases, the issue is no longer whether we are dealing with moral rights to which the courts must give priority and justify *ex post* with principles arguments. The issue is rather that normative ideals which have effective priority within a social order and have become, as I shall argue below, part of its *rule of recognition*, attain such status if they are pursued *in any case* both in the administration of justice, as current ethical criteria, as well as in the definition of fundamental political goals.

Although this different denomination has just a prized analytical and conceptual utility, I maintain that *in contrast* to that of “fundamental” rights, a theory of human rights has an essentially *moral* status. Within this context there is a difference between morals and ethics: ethics in fact consists of a scale of values, possessed both by individuals and groups, and which sets out the ultimate and hierarchical priorities of their agendas.<sup>20</sup>

On this point there is in the final analysis a broad, though at times only apparent, consensus. On the good-right pair, contemporary liberal thinking responds to the communitarian critique, and other criticisms of the inconsistency in separating the rights from the good<sup>21</sup>. This distinction is effectively useful, also for justifying the

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<sup>19</sup> Palombella, *L'autorità dei diritti*, cit., ch. IV.

<sup>20</sup> This distinction is currently operated within liberal Anglo-Saxon moral literature. Naturally there are numerous arguments on which the distinction operates, which can include the very idea of moral autonomy of Kantian inspiration. In any case, when conceptualised as a question of justice, in the general sense of that which is due to each person as a human being, human rights can formulate more or less tenuous and more or less vague catalogues, yet nonetheless claim to represent an irreducible universality: they do not (or at least they should not) take on the burden of choosing “ethics”. It is however true that catalogues of rights, or international treaties are already an institutional instrument and as such are subject to convergent interpretative disputes, which leads to their encumbrance with objective cultural contents every time they receive some kind of “application”.

<sup>21</sup> Scholars like A. MacIntyre, M. Sandel or Ch. Taylor, among others, hold that substantial moral principles are a non-eliminable component of our view of justice, while “fundamental” rules are never independent of traditional, culturally conditioned, “teleological” conceptions of human nature. Even “autonomy” itself can be understood from a communitarian standpoint above all in relation to the values, substantive ideals and personal goals for whose achievement it is exercised. (Alasdair C. MacIntyre, *After Virtue. A Study in Moral Theory*, Notre Dame (Ind.) 1984; Id., *Whose Justice? Which Rationality?*, London 1988; Ch. Taylor, *Sources of the Self*, Cambridge 1989; Id., *The Liberal-Communitarian Debate*, in N. Rosenblum (ed.), *Liberalism and the Moral Life*, Cambridge (Mass.)

notion that the viewpoint of individuals cannot be absorbed into that of the community, within which the “good” is established, and in which individuals formulate their cultures, preferences and identities<sup>22</sup>. The existence of margins of justice, the necessity of an inter-subjective morality, equal consideration and respect, depend on a conceptual form that is not reducible to the declination of the “good”: within this form develop the conditions to defend ethical *diversity*, and put in place reasons against intolerance, and totalising or fundamentalist ethics.<sup>23</sup>

The rights which we are talking about, *if* we are thinking of conceptions of human rights, tend to salvage themselves gaining acceptance to the universality of justice rather than to particular ways of living a good life.

However this privileged *status* proves to be too simplistic when measured against reality. Above all it seems to be excessively detached and distant from reality.

Let us assume that there is some transcendental purity of the minimum essential “human” rights of individuals: they perhaps concern autonomy, as Ignatieff or Engelhardt<sup>24</sup> also writes, to cite contributions in two apparently distant fields (namely international relations and bioethics). And it is particularly useful to distinguish the conditions of autonomy when dealing with issues of protection: and in particular the protection of the rights of weaker categories. What sorts of guarantees should they receive? What can they expect? The aspiration to a viewpoint that is detached from ethical disputes is justified, if for no other reason than that of establishing a moral border and defining a limit, in favour of weaker categories, that cannot be superseded by new utilitarian, communitarian, majoritarian, contingent or any other type of argumentation.

Notable attempts to determine this boundary include the thesis which separates autonomy understood as the typically human faculty of choice, in the Kantian transcendental sense, from individual autonomy as an objective, the mainstay and

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1989; M. Sandel, *Liberalism and the Limits of Justice*, Cambridge 1998<sup>2</sup>; Id., *Democracy's Discontent*, Cambridge (Mass.) 1996).

<sup>22</sup> Among various attempts made to introduce content into universalistic definitions of “human rights”, a valuable contribution is Martha Nussbaum’s, who derived from Amartya Sen’s conception of “capabilities” (A. Sen, *Commodities and Capabilities*, Amsterdam 1985; or A. Sen, *Well-Being and Capability*, in M. Nussbaum and A. Sen (eds.), *The Quality of Life*, Oxford 1992; A. Sen, *Inequality Reexamined*, Oxford 1992; more recently, Id. *Development as Freedom*, Oxford 1999) her own moderate- “essentialist” proposal which she qualified as “thick-vague”, according to which at least some basic human “functions” can be defined “essentially” (the ability to conduct a life without its being prematurely interrupted, the enjoyment of good health, being adequately nourished, avoiding needless suffering, the ability to co-exist with others, to play, to smile and so on) (The first attempt is in M. Nussbaum, *Human Functioning and Social Justice. In Defense of Aristotelian Essentialism*, *Political Theory*, May 1992, 222).

<sup>23</sup> I defend this *cleavage* in my book *Dopo la certezza. Il diritto in equilibrio tra giustizia e democrazia*, Bari 2006, both in general terms and also with reference to different questions, such as the implementation of ethical programs into the standard scheme of compensation for wrongs, or *tort law*.

<sup>24</sup> Cf. H.T. Engelhardt Jr., *The Foundations of Bioethics*, Second Edition, New York-Oxford 1996, 103 ff.

ultimate value of a “comprehensive” conception of a theory of ethics.<sup>25</sup> It has been in fact suggested to separate *content neutral* from *substantive* autonomy: this latter type of autonomy is the priority value of an ethical project of freedom which puts it before anything else; the former by contrast does not stake a claim to values to be pursued, but only requires that a choice be made in conditions of autonomy.<sup>26</sup>

Within the framework which I adopt here, *content neutral autonomy* is obviously a prerequisite of a moral order, whilst substantive autonomy is a goal contained in a particular “worldview”, and in a word is an ethical problem. There is no doubt that the guarantee of the conditions which permit human beings to remain able to exercise their capacity as moral agents is a presupposition of every effective ethical choice; recognising in this sense that human beings have the “right” to “consent” is a question of justice towards all people and therefore a moral question. This involves an obligation which, considered in itself, stands over and above any chosen ethical context.

Thanks to this conceptual distinction, we may assert that once the “consent” of the right holder has been ensured, from the viewpoint of a theory of human rights dedicated to identifying that which *is due to a human being*, the accepted or “permissible” ethics could be particularly varied. This would be guaranteed by the separation between the meanings of autonomy, which is without doubt of particular analytic importance. But as I shall argue below, it is understood in this sense at the risk of becoming unrealistic. “Autonomy” itself can be understood from a communitarian standpoint above all in relation to the values, substantive ideals and personal goals for whose achievement it is exercised. As Carlos Nino observed, nobody ultimately “has as his end to be autonomous, rather to exert his autonomy for such and such end”<sup>27</sup>.

Whoever understands the meaning of autonomy in *content neutral* terms must nourish some perplexity at least in respect of those ethics (or ethical choices) which *de facto* jeopardise some very basic conditions of respect towards human being, or rather the very same *content neutral autonomy*. Those conditions are in fact prerequisites of “agency”, and ground the capacity to choose from ethical goals, and should therefore be safeguarded *in abstracto* by (and within) each and every ethic.

The struggle for human rights often avails of the critical value which they possess with reference to ethical-cultural traditions with which they clash. But seen in this light, which is by the way their best light, as a weapon of principle, a “content neutral” resource and neutral-universal criterion, human rights may on the one hand aspire to a consistently categorical and deontological character, whilst on the other hand, and precisely for this reason, *cannot* (in contrast to what is sometimes believed) in any way lend themselves to a teleological struggle, nor participate in it: i.e. proposing themselves in the place of different goals or values socially pre-chosen ethics attempt to

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<sup>25</sup> Engelhardt’s theory is particularly revealing; he writes that “to make any value, including the value of freedom, the cardinal value is to endorse a *particular* ethic. Valuing freedom does more than elaborate and justify the fabric of morality itself” (*The Foundations of Bioethics*, cit., 105-6).

<sup>26</sup> Marilyn Friedman, *Autonomy, Gender, Politics*, Oxford ( OUP) 2003 , 190 et seq.

<sup>27</sup> C. S. Nino, The Communitarian Challenge to Liberal Rights, in Id. (ed.), *Rights*, Aldershot 1992, 321.

satisfy. Human rights in fact place themselves at a different level, heterogeneous in relation to that of ethical, cultural or political ends.

On this plane we rather posit fundamental rights, and this is certainly not on merely nominalist grounds. If we think that some rights must be *fundamental* in a social system, our problem then becomes that of determining the internal ethical conditions and operating within the scale of values actually adopted by the institutions. Here the question is also political, and it concerns no longer simply the idea that individuals must have a (neutral) capacity of choice. The important point is that the system be able to give institutional protection to choices and above all to their results.

This means that the theoretical responsibility of fundamental rights is linked to an ethical understanding of the institutional depth which is often taken as a point of reference, whilst the theoretical responsibility of human rights on the moral plane is more simply independent from the inclusion of those rights into collective goals, but rather depends on their ethical purity and “independence”.

It is clear that the *less dramatic* the situation, the *more complex* is the obligation to operate a *material* conjugation of rights in contingent circumstances: an intervention to halt the genocide in Rwanda should not have been such a complex decision at the ethical-institutional level, before such an overwhelming tragedy, a civil war without quarter involving unending massacres of children, women and men. A government of “peace” would be a different thing altogether: this would lead to a rise in complexity, with the problems of “implementation” and contextual and ethical-political problems becoming extremely delicate and priority. Thus for example these issues require a great sensitivity, in particular as one must (because in certain circumstances *one can*) give consideration to the consequences of intervention: as Amartya Sen observed in 1994, the methods which Western imperialism used to confront the problems of local populations should appeal to the reasonableness and collaboration of human beings, whereas choices such as that which gave priority to policies imposing a strict discipline in family planning issues in the Third World, instead of prioritising health care or education, ended up having negative effects on the welfare of individuals and reducing their freedoms.<sup>28</sup>

In any case, the ethical-institutional depth of the problem weights on whomever wants to implant “rights” into the ethical fabric of others (or indeed into one’s own). We may accept that human rights are conceptualised in such a way as not to progress beyond minimum conditions: but if these conditions have a bearing on the distribution of institutional power, for example by restoring independence, the absence of domination and autonomy to women, the resulting distortion of common ethics is a catalyst for political conflict. It is not that by restoring the ability to choose to weak individuals in any given society a political power struggle is precipitated, *without* precipitating in the mean time a far-reaching revision of shared ethical priorities (as for

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<sup>28</sup> See A. Sen, Population, Delusion and Reality, *New York Review of Books*, September 22, 1994, 62 et seq.; 71.

example Michael Ignatieff appears to argue). On this view, human rights, as a thin morality, may require de facto the acceptance of an alternative ethics, before (and beyond) any choice over political strategy and collective goals. This leads to a notable drift from the philosophical plan of human rights to that of fundamental rights, ethically connoted as such and imposing consistent institutional or systemic responsibility.

However, the recognition that the “imposition” of human rights implies the courage to identify and resolve also “political” questions is not enough. This recognition, regardless of the degree of realism it displays, contributes to conceal a problem which afflicts “human rights”, namely that they can *use* politics as a way introducing themselves into a given social context by exploiting the important logics of “power”, and therefore operating politically. But the process of *bargaining* with “power”, a point on which even Ignatieff insists, does not guarantee against any potential arbitrariness and the incisiveness of interventions in the forms of social life and in pre-existing identity-based practices. Even the “democratic” or pacific garb of the contracted consensus may be able to divert attention from, and hence conceal, responsibility for the often dramatic consequences flowing from the “political” arrival of the new rights, from the salvific epiphany of the “power of human rights”; the responsibility to those who endure the – at times caustic – law of rights. It may well be the case, and it often is, that the latter *ubi desertum faciunt, pacem appellant*: their albeit “political” affirmation might produce a “lunar” situation, a situation of ethical deconstruction and of collective disorientation in which, following the breakdown of the preceding pivotal points, individuals are not able to recognise their own “life form”.

In the light of these observations, I shall in the following paragraphs elucidate on a series of circumstances, from the *accommodation* of cultural groups in liberal societies, to the protection of the citizenship rights of women, from individual discrimination to the preservation of the values of a community, from the protection of the good of autonomy to that of the political participation of women: each of these striking dynamics cannot be accounted for using the abstract of individualist logic of human rights, but may be better accessible using the institutional concept of fundamental rights. In the conclusion I shall revisit the issues of the ethical or simply moral depth of rights, of their deontological or political character, and of the consequences which answers to these questions may have. I shall attempt to define the issue also invoking some critical observations of the work of Jürgen Habermas, to whom however must be recognised the most profound and powerful attempt to marry an individualist logic with a democratic logic of rights, thus avoiding any naive oppositions.

### **3. Abstract and neutral?**

The forms of these dynamics of rights are somewhat complex and eloquent in multicultural societies. Here for example one of the most classic dilemmas arises,

which I hinted at in the preceding paragraph: it concerns the “sufficiency” of consent of the “weak” members of a non liberal community to endure conditions of subordination or social practices which appear to offend human rights, such as restrictions on education, marital choice, violations of the physical integrity of women in traditional cultural groups. Naturally, the argument of consent is often at the forefront, a variant on the maxim *volenti non fit inuria*. Solutions which justify the violation of individual rights by recourse to the consent of the injured party burdens the consent with a value of redemption: nonetheless, even as a question of fact, the nature of this consent and the ascertainment that it was effectively given, and finally that it was given by individuals in a condition to choose, throws up a range of fully valid interrogatives. But let us assume for the moment that consent is effectively given, is conscious, free, informed, mature, etc: it is in such cases that our dilemma arises. In what sense is the “permission” redeeming? In what sense is it possible to believe that one can consent to practices which violate human rights, be it those of fully aware adult women? I do not intend to engage here with the whole spectrum of debates which surround this case, but simply to evoke some persistent obstacles: for example, the notion of the “irrenounceability” of some rights vested in the person, which could not be waived by “consent”. Consent does not in itself offer the solution to all problems. Why should respect for consent bear more weight than the protection of other goods implied by human rights (life, physical integrity, equality, dignity and so on)? Although a rejection of the sufficiency of consent often coincides with a (more or less “perfectionist”) paternalism, even where “consent” is over-valued, it is difficult to consider it to be immune from the viscous circle from which it arises.<sup>29</sup>

In a different light, it is important to consider whether the internal argument within the liberal theory of autonomy is that it effectively incorporates the *right to do wrong*, to make irrational, “mistaken” or inconsistent choices.

Finally, on the *collective* plane of the relationship between liberal priorities (rights) and democratic priorities (self-determination): can the exercise of freedom of choice be consistent with the value which it protects *if it is self-destructive*? The *self-defeating* exercise consists in the making of an ethical choice which leads to conditions in which freedom of choice is definitively suppressed. It has the blessing of irreversibility.

But whoever underscores the priority value of autonomy does not appreciate the “moralistic” limitations on substantive choices effectively to be made, and clearly is suspicious of them. On such issues he or she will remain neutral. Moralistic limitations may indeed impact in ways which are unpredictable or too far-reaching, and even

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<sup>29</sup> On this last point, C. R. Sunstein (*Designing Democracy. What Constitutions Do*, Oxford 2001, 198) observes that: “Even differences in desires, preferences, aspirations and values are in significant part a function of society and even law (...). Preferences are often adaptive to the status quo, and a status quo containing caste-like features based on sex will predictably affect the preferences of men and women in different ways. It will lead to distinctive processes of preference formation, inclining men and women in different directions in both the public and private spheres”.



cancel out effective freedom of choice: the start of a slippery slope. It is worth rejecting them, with justified intransigence, in order to favour the real availability of a right to choose, and the consequence of protecting the autonomy of women from unacceptable social and paternalistic meddling. However, there is also an uncalculated consequence: the elevation of *consent* to a legitimising and redeeming condition of traditional practices, subordination and violation of rights. But is it right that women “choose” social practices which place them in enduring and insurmountable circumstances of inferiority, in which they are no longer able to cultivate their freedom of choice?

Seen from the “collective” point of view of a democracy, it almost appears as if this were a legitimate exercise of self-determination; from the viewpoint of moral justice however it appears contradictory. Once an oppressive society which violates rights has been constructed, it would violate its own foundational presupposition by depriving individuals of their moral capacity (or rather of the conditions for expressing their own moral capacity through the choice of the conditions of their own existence). Assuming (but not accepting) that original consent (irrespective of how it is subsequently used) is sufficient to establish a “democratic” framework, a “liberal” society could not accept a choice with a “Hobbesian” content.

The truth is that not even a democracy could accept this; a democracy is an institutional asset endowed with temporal extension, and not a simply isolated deliberative act: it therefore requires that the conditions of the free and equal deliberating subjects be persistent in time.

Accordingly, the indifference of *content neutral autonomy* in relation to substantive choices to be made, the indifference of the *moral* question in relation to pre-chosen ethics is doubtful, if for no other reason than the *self-defeating* choices. From this angle, different ethics and cultures- although cannot be *judged* on the ethical plane- are also different in secondary outcomes with greater or lesser tendency to preserving those moral conditions, of justice, which could be recognised within a theory of *human rights*. The idea that not all ethics are morally “permissible”<sup>30</sup> coincides with the notion that not all cultures are morally admissible and entirely attainable within the limits of a society which translates respect for human rights into its own fundamental rights.

The important point now is that human rights in reality, for that which they are, namely a pure grill of criteria for the recognition of humanity, do not exist. Moreover rights can only exist within a particular ethical (or political) framework. In other words justice is a moral concept, but it is never encountered *on its own*; its deontological tone is devoid of ethical goals, of teleology towards particular ends and belongs to an imaginary society which does not exist: this is because each society clearly is not a sterile place for relationships of mere justice. Every society constitutes an ethical order. The morality of human rights is only visible *ex ante*: it can be understood as the

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<sup>30</sup> John Rawls has given an explanation of this within the domain of his own conception of “political justice”. The clarification of the idea within that context is nonetheless helpful, and was given in great detail since John Rawls, *The Priority of Right and Ideas of Good*, in *Philosophy and Public Affairs*, 17, 1988, 251-76.

patrimony of transcendental faculties with which we encounter experience, or perhaps in a Kantian sense, as the totality of conditions of practical reason which are necessary for coexistence. But in reality these are wedded to social structures in which rights are articulated materially and become intertwined with prevalent opportunities, freedoms, cultural availability, the resources available to individuals, legal orders, political organisations, traditions and customs. Considered in concrete form, rights which take on an effective function in political society and within the legal order are already *fundamental* rights, they are endowed with this ethical depth and are subject to transformations or drift, are dynamic and not static, and can only be articulated by physically live voices in culturally connoted situations.<sup>31</sup>

But this movement towards fundamental rights is also the movement of “justice” in itself to justice *in* history. The contribution of the feminist literature in this context has been particularly instructive: the critique of the Kantian notion of moral justice has been stringent and directed towards the impossibility of realising notions such as impartiality and universality. And the fact that the father of the contemporary theory of justice, John Rawls, did not take sufficient account of problems of “gender” has been considered as a weakness, the lapse into the abstractness of de-contextualising debates, at least with reference to sexual difference.<sup>32</sup>

#### **4. Fundamental and concrete.**

The notion of fundamental rights, if distinguished from that of human rights, can be useful in providing a better, and separate, representation of the *philosophical* space (and the notion of justice, or of morality), which should be earmarked for human rights thanks to the status of human rights theories, as well as the *institutional space* of rights. I have argued elsewhere<sup>33</sup> that fundamental rights are to be understood as encompassing those selective and substantive criteria which, together with others, enable judgments of “validity”: the recognition of belonging to a legal order, legitimacy, compatibility of institutional behaviour and norms within a given legal-political system. If some

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<sup>31</sup> In this sense, Michael Walzer’s suggestion (*Thick and Thin: Moral Argument at Home and Abroad*, Notre Dame (Ind.) 1994) – according to which “thin” expressions of morality may be articulated but inevitably commence from a self “situated”, and connoted within a “thick” morality – might be accepted.

<sup>32</sup> S. Benhabib, Die Debatte ueber Frauen und Moraltheorie- eine Retrospektive, in C. Kulke, E Scheich (ed), *Ziellicht der Vernunft: Die Dialektik der Aufklaerung aus der Sicht von Frauen*, Pfaffenwieler 1992, 139-48; S. Okin, *Women in Western Political Thought*, Princeton 1992, II.; Id., *Justice, Gender, and the Family*, New York 1989. Although Okin does not believe so much useful to presume that the logic of justice is male (this presumption is normally referred also to the logic of rights, by those who assert that only the ethic of care and relationship is female: for example Carol Gilligan). According to Okin, and other writers, the point is that the effort of contextualisation is completely undeniable: once again this is because there is no logic of justice without a material place in which it must function. If a lesson is to be drawn from this, it is that rights have an ethical and hence situational meaning, but their justice- structure can only be premised as a conceptual framework. Besides, it is important to guard against ethics without (moral, not social) justice.

<sup>33</sup> G. Palombella, *L'autorità dei diritti*, cit.

individual “rights”, such as that to life, freedom of thought, equality before the law, the right to the personal pursuit of happiness, are *effective* within a legal system, this means that they are used every time it is necessary, and even for rejecting or pre-empting legal norms at any level that are capable of violating the substance of those rights. The capacity of “fundamental” rights to be effective is therefore a quality which they possess by definition: but it does not depend only on the existence of legal remedies, but rather more deeply on the possibility of their playing a role which, within a general theory of law, is that of fundamental meta-norms of “substantive” nature (i.e. not simply “procedural”).

We may, in passing, note the corollary thanks to which, if such rights are indeed fundamental, they protect individual *goods* deemed “fundamental”; and finally the further consequence that, if they are goods deemed to be fundamental, then they are protected, fostered and pursued with the available means as principal *objectives* not only of the courts but also of all institutions, including strictly “political” institutions. Their *fundamental* character for an institutional system is descriptively recognisable from the function attributed to them and the “attention” dedicated to them. As noted above, the concept of “fundamental” has some utility only if it does not coincide with the concept of “human” rights. “Fundamental” relates therefore to a system and implies affiliation and relevance.

Naturally, we may have recourse to this conceptual separation even where there is doubt as to the universal nature of some “human” rights. One may doubt whether the right of human beings to pursue happiness according to a purely “private” model is *effectively* susceptible to universal consent. Some *conceptions* of human beings do not contemplate this “right” in their own catalogue. But there is also a different lack of universality which takes place not in theory but in fact: this right may be is not “fundamental” for some legal-political systems – including Western liberal-democratic systems – and within the institutions of those systems. One could also doubt whether this right *to the pursuit of happiness* is effectively “fundamental” and included among the substantive principles of the Italian constitutional order.<sup>34</sup>

Function, affiliation and relevance are the requisites which identify a right as “fundamental” and clearly give witness in favour of the separation between fundamental and universal. On the opposite, it is not possible, and in fact it is contradictory, to argue in favour of any conception of human rights without positing their universality. Whoever celebrates a vision of “human” rights necessarily refers to all human beings. This has nothing to do with any readiness to recognise that others may hold a different view, or that there may be other and different theories of human rights. Universality is an inevitable prerequisite or an inevitable implication of the concept of human rights, whilst it is a wholly different matter to suppose that the theory of rights which each person proposes is, or should be, universally shared.

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<sup>34</sup> F. Busnelli, *Bioetica e diritto privato*, Torino 2001, 53.

*From Human Rights to Fundamental Rights*

In this context, only theories of human rights may be afflicted by the tension between universal denotation – i.e. the reference to all human beings – and the particularism, as dependent on consent, of their own substantive claims: in relation to which they are even open to a possible universal *dissent*.

This certainly does not happen with fundamental rights. On the one hand they make no claim to universality, whilst on the other hand *presuppose* consent – or “recognition”. That consent is a condition of their “existence”: of course, not necessarily over the whole planet, but within a given system.

As far as fundamental rights are concerned, they may carry out reflections that are less exposed to “prescriptivism”: it is possible coherently to adopt a cognitive and non normative stance by asking *which rights* operate as criteria for substantive convalidation, or as meta-norms for the recognition of validity, within a given system. It is an operation which has possible performative implications, but its status is nonetheless scientifically legitimate, analogous to that of descriptive sociology, or an “ordinary” check of valid and efficacious law, etc.

Since there is a substantial difference between systems in which individual rights are enjoyed and systems in which such rights are denied categorically, when some rights are “fundamental” this means that the legal-political system has embarked on a journey capable of progressing towards liberal democracy. Within this type of system it is plausible that conceptions of human rights may interact with one another and that philosophical auspices may translate themselves into new “fundamental” rights, capable of “acceptance” and capable of fulfilling that positive function of criteria of recognition to which I alluded above.

If we use this latter conceptual distinction, which I have set out above, we may for example argue that on the international level the contest between human rights and political systems which deny them is a difficult dynamic because it evolves into an asymmetrical struggle between mere philosophies (of human rights) on the one hand and on the other hand pregnant institutions (within which there may or may not be fundamental rights), entities which operate on different levels.

The philosophies of human rights are different with respect to “real” political and social systems. They limit themselves to preaching the inherence of given claims in human beings: this is their philosophical status. This is why the category “human rights” taken alone is not enough. There is a further issue: *what would happen to a social system if it attributed a “fundamental” character to those rights, how could a social system be possible which protected such claims?*

It is precisely because rights (or the same rights) are not fundamental in any system, that the struggle for their affirmation is a complicated question, because it presupposes, alongside a philosophy, an awareness of social structures, institutional questions and the capacity to act on “systems” in such a way as reasonably to produce (that is really to produce, and not at the cost of *ruat coelum*) an elevation of rights to

basic pillars of legal legitimacy, to criteria for the substantive legitimation of behaviour<sup>35</sup>.

Here, in other words, the inadequacy of visions of human rights which exceed their own philosophical space becomes apparent, through their demands for a resolute “justiciability” (the lack of which they then criticise, almost as if the problem could be resolved by the action in courts). Assuming that it is possible to operate a clear distinction, neither cases of totalitarian oppression of a people coerced by arms, nor cases in which traditions of life and thought are simply repugnant by rights, could be resolved through the institution of Tribunals. The latter alone can never make the pure rationality of rights effective within a system which overall follows a different social (ir)rationality. The power of human rights supported by the sole rationality of judges is at the end just metaphysical. The insufficiency of a right-based rationality, as such, has been many times underscored: the most significant example is the transformative process of Eastern European countries in the ‘90ies. What makes rights effective is their elaboration within the fabric of political ethics of the countries, within the whole functioning of the system, thus not just the Court but also the development of a democratic culture.<sup>36</sup>

In conclusion, whoever really holds dear human rights and accepts some kind of theoretical description, must then so to speak reason from the inside: he must therefore keep for himself the abstract weapon of human rights as a key to justice and move instead from the prevailing ethic, whatever the latter is. When rights become fundamental in a legal order then they *de facto* no longer belong within a theory of morality, but to an articulated system of ethical priorities. The judicialist rationalism of human rights however ignores this aspect of the question.

## 5. Rights and multicultural societies

It is important to return to the contrast between cultural rights and the indirect consensus which through their protection a liberal state would appear to offer to eventual violations of human rights which the “protected” culture made. This obviously ties in to the heated debate between human rights enshrined in the constitution of a liberal-democratic state, and the debilitating practices of some cultural groups towards their own members, in particular women. At a more general level the question has also

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<sup>35</sup> As argued by Flavio Baroncelli, *Le quattro indegnità dei liberali irrisolti*, *Teoria politica*, XVII, n. 3, 2001, 31. Were we able to convince “all Indonesians that the rights set out in the various international declarations and conventions must be guaranteed for all”, we would discover that once we set about doing it “there is no longer any possibility for Indonesia to develop itself economically without external help on account for example of those rights of workers and children, of which there was no trace when the West began to develop itself”.

<sup>36</sup> For similar comments on Eastern European countries, B. Ackerman, *The Future of Liberal Revolution*, New Haven-London 1992, 99, 100 ff. ; S. Holmes, *Constitutionalism, Democracy, and State Decay*, in H. Hongiu Koh, R.C. Slye (eds.), *Deliberative Democracy and Human Rights*, New Haven-London 1999, 131.

been posed in terms of the possibility or not of protecting *minorities of minorities*.<sup>37</sup> But I believe that in this context the question has been posed in such a way as to engender misunderstanding.

The problem does not depend on the tension between internal majorities and minorities within cultural groups, or alternatively the question of having a “voice” within a potential democracy. It rather concerns a distribution of power and a division of roles which substantially negates the recourse to the democratic rule of the majority; it is the idea of equality which underpins the “democratic” use of majority rule which is missing, and therefore also negates and banishes the very concept of minority.

This very situation is in fact *sub iudice*: how can a liberal-democratic society cohabit with *internal* groups and communities which, to say it in the language of our Constituent Assembly, do not possess a “democratic” status and are structured in such a way as to deprive the “free exercise of deliberation” or the “public” autonomy at its very heart of any meaning? And moreover, how can debilitating cultural conditions be overcome which prevent interested parties (the “potentially interested” of *liberal* public reason) from having competing or dissident opinions and from making a valid contribution in the common arena?

On the other hand, even if we admit that we are rather looking at a community in which individuals are effectively able to choose (thus shifting the analysis from the substantive and procedural conditions of “consent” to the merits of collective choices actually made), the question does not appear any less thorny: the results of these choices, occurring “internally” within single communities, may be considered as intangible, and immune from the scrutiny of the broader social system to which the communities belong? Can cultures and practices of minority communities be reduced to quasi-private exercise of non-public liberties, and therefore inherent in the private sphere (albeit as *groups*), as such of no interest for the overall order of public institutions of the host society?

As a matter of principle, the first issue to address is how to reconcile “cultural rights” (group rights) with the individual rights of single members where particular traditions, for which some type of protection is deemed necessary, are evidently harmful for the latter.<sup>38</sup> A more concise description of this dilemma is found in the title of the famous and much debated essay of Susan Okin: *Is multiculturalism bad for women?*<sup>39</sup>

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<sup>37</sup> I.e. an internal minority within a community which in turn constitutes a minority in a Western society.

<sup>38</sup> The problem, according to Ayelet Schacar is as follows: “Multicultural accommodation presents a problem (. . .) when pro-identity group policies aimed at leveling the playing field between minority communities and the wider society unwittingly allow systematic maltreatment of individuals within the accommodated group—an impact which in certain cases is so severe that it can nullify these individuals’ citizenship rights. Under such conditions, well-meaning accommodation by the state may leave members of minority groups vulnerable to severe injustice within the group, and may, in effect, work to reinforce some of the most hierarchical elements of a culture” (A. Shachar, *Multicultural Jurisdictions. Cultural Differences and Women Rights*, Cambridge 2001, 2-3).

<sup>39</sup> The paper originally appeared in the *Boston Review* in 1997 and also in S. M. Okin and Respondents: J. Cohen, M. Howard & M. Nussbaum (eds.), *Is Multiculturalism Bad for Women?*, Princeton 1999.

The point in fact is not just that existing “cultural rights” (guaranteed by liberal-democratic States) allow violations of *human rights* within the protected areas of single communities: but that rather those violations of individual “fundamental” rights occurs accordingly *in the general, state legal order*. Which socio-legal system can allow itself to protect cultures and practices which within themselves trample on fundamental rights of the legal order (to which they belong)?

The real protagonists of the conflict are not human rights, but fundamental rights: in fact, they are the minority “groups” on the one side and the majority in the liberal-democratic “state” on the other. Here the majorities protect individual rights, whereas the minorities do not. Both sides – the groups and the state – are in disagreement regarding that which is owed to individuals, and therefore about human rights; but this would remain a purely philosophical debate, were it not for the fact that the contrast consists in the *institutional detriment* which a system could bear in the event of derogations from its own “rule of recognition”, that is from “fundamental” rights (which belong to its substantive criteria).

Philosophies of human rights are capable of resisting these frustration and disappointments. Their violation is therefore not a reason for the collapse or unacceptability of their pretensions. The “violation” related to the respect for fundamental rights is however completely different in nature, and unleashes a crisis: crumbling of the sphinx before the solution to the riddle. The proposition that some rights are “fundamental” within a particular system is *descriptive*, and cannot in truth be “violated”; any presumed violations or derogations constitute proof of the falsity of the proposition.

Rights are fundamental if their normative ideals are effectively used as criteria of recognition of the validity of legal norms and of relevant institutional practices. In a certain sense, constituting substantive criteria of public life, fundamental rights also select accepted cultural rights, including the very possibility of affiliation for groups which are right holders within the system to which they appeal and in which they demand protection.

This means that the situation becomes somewhat critical in which by contrast the social conventions of a (limited) “cultural” group seek to define on their own which fundamental rights are valid as substantive meta-norms.

The legitimacy of patriarchal social practices which traditionally subjugate women and rigidly impose roles on them, cannot receive direct recognition within a

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However, Okin herself returns to this article also as a response to the misrepresentation of her positions, in particular those of Ayelet Shacar (*loc. cit.*). Significantly Okin’s paper, presented in a seminar of the *American Political Science Association* of 2002, is entitled *Multiculturalism and Feminism: No Simple Question, No Simple Answers*, available at: <http://www.law.nyu.edu/clppt/program2003/readings/okin.pdf>. Susan Okin, who died recently, at the peak of her talents, offered a valuable contribution to political theory, reincorporating feminist thought into an understanding of the classics, rejecting all stereotypes, and placing it at the centre of the contemporary philosophical debate with passion and above all with a rare balance.

liberal-democratic legal order, not even by hiding this aim under the defence of self-determination and ethical autonomy of a minority ethnic group.

Normally, the most insidious forms of discrimination or subordination, are those which do not come see the light of day in courts (in the realm of “justiciability”), but which perpetuate themselves through collective day-to-day behaviour based on rules internal to families and groups, at time religious in nature. These rules prevent the emergence of a “formal” problem and an open conflict between claims to protection of individual rights and *de facto* contravening practices.

Opposing this tendency does not by any means imply reciting an apology for the social majority which dictates arrogant conditions: here it is not the profile of democracy which is in discussion but that of rights. And it does not end here: the important point is that the subjective right of the individual within a protected minority group passes into the background. Once again, the democracy of the majority displays a much more benevolent face towards the individual than the minority group to which he belongs does or is able to. But this is a contrast the results of which are unpredictable and changeable.

The famous Shah Bano case is eloquent testimony to this. Rejected by her husband in 1975, the seventy-three year old Shah Bano was obliged in 1978, in order to survive, to apply to the courts for a maintenance order, applying article 125 of the Indian Code of Criminal Procedure<sup>40</sup>. The multicultural tension unfortunately led to a *defeat for women*.<sup>41</sup> As has been observed, after a long and ultimately vain struggle, Shah Bano was confronted with a tragic ‘your culture or you rights’: and she felt obliged to confirm her own loyalty to the *nomos* to the detriment of her citizenship rights.<sup>42</sup>

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<sup>40</sup> The husband – who immediately divorced her unilaterally by the *talaq* foreseen under Islamic law on the *status* of persons – contested her application and brought the case before the Indian Supreme Court. The Court applied article 125 of the Indian Code of Criminal Procedure even concerning the *status* of persons falling under the *Shariat* (Islamic religious law) since it was bound by the Indian federal constitution; in passing judgment it spoke in favour of unifying civil law, and eliminating the difference in sources. Naturally, the problem of the prevalence of the one or the other source of law was connected to the respect or not of religious autonomy within the Islamic communities. These communities inseparably linked their religious convictions with their personal lives and with the legal regulation of marital relations. Following a 1937 decision of the British colonial courts, cases similar to that of Shah Bano had to be decided under Islamic law; on the other hand, according to another law of British origin, article 125 of the Code of Criminal Procedure, the lady’s claim had to be accepted in order to prevent vagrancy and its consequences. The Indian Supreme Court denied that it was possible to avoid the obligation to pay maintenance, and confirmed the necessity of supporting a category of persons who would otherwise be unable to support themselves, that is to satisfy their elementary needs: also a collective interest in relation to which the particular religion practised cannot make any difference. In the ideological debate which followed, the system deferred to parliament the burden of providing a definition: with the enactment of the *Muslim’s Women’s Bill* in 1986 parliament denied divorced Muslim women rights of action to claim maintenance rights, since this burden should be borne by the original family or by charities.

<sup>41</sup> Commented in S. Benhabib, *The Claims of Culture. Equality and Diversity in the Global Era*, Princeton 2002, 93.

<sup>42</sup> Shacar, *Multicultural Jurisdictions*, cit., 83. In effect, it is as if the individual were crushed between the group and the state, though he does in reality have an interest in cultivating a dual identity, that of



Significantly, Seyla Benhabib<sup>43</sup> considers the question with high sensitivity as to the interaction of public and private positions, and therefore between political and ethical positions. In the end, the same Rawlsian thesis which stipulates the *overlapping consensus* in the public sphere as the requisite condition of a political liberalism rests on the separability of the public and private spheres. It therefore presupposes that philosophical or religious divisions remain unsettled as private questions, yet superseded in the context of the common public sphere (for example the shared criminal code coexists with various religious regulations of the private sphere).

I should like to add that it is this separation which leads to turning rights into a purely rational question, a political question, but not also a question ethically interwoven with cultural and religious diversities, which stand far below political (public) justice.

Instead, this salvific divarication between public and private is difficult to accept and sustain in these cases: which is precisely due to the paradox of multicultural vulnerability, of the contradiction between the essential rights of liberal-democratic citizenship and the atavistic practices of religious groups. “Fundamental” rights do help, at least conceptually, also in this case because they indicate how a convergence is necessary between public goals and private prerogatives: collective goals must reconnect themselves with individuals goods (“dignity”, “freedom”, “equality”, education, freedom of expression, health care, etc), the advantages of which are not solely located in the public sphere, since they penetrate deeply into the private sphere, into the law “of persons”, into the traditions of *family law*, into religious creeds.

More than further separating the public sphere from the private, we should rather consider individuals as mobile between *divergent* and not necessarily monolithic appearances (stereotypical coherence between ethnic groups, cultures, religions, political choices, etc) which operate in a “fluid” dynamic, and where are always an interplay between public and private; one can even be Italian in many original ways which combine one’s religion practised, received culture, community frequented, political ideological as elements wholly independent from one another. The potential combinations are abstractly variegated and cut across the public-private divide, whilst religion and (private) culture are not always an inseparable pair.

If nothing else, fundamental rights constitute a category which is not founded on an unrealistic juxtaposition between (“public”) human or universal rights and (“private”) rights of religion and culture. Unrealistic because clearly each of the two spheres implies the support of the other, or at least some form of consistency with the other. Naturally, this does not entail the revocation of negative liberty, or of the modern achievements of the individual, but rather only an understanding that “fundamental”

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citizen, whose rights are universally consistent and identical to those of any other member of the state’s community, and his identity as a *group member*.

<sup>43</sup> *The Claims of Culture*, cit., 108 et seq, et *passim*

rights may well be a “private” issue of protection of the individual, provided that a public culture exists which recognises in them the value of fundamental goals.<sup>44</sup>

The order of priorities which a system determines between (individual) goods and the protection of minorities will often be in discussion. An essential criterion of respect for fundamental rights is a systemic problem at least as much as the criterion which guarantees cultural rights. For this reason, it is clear that the result cannot be left up to the capacity of resistance and simple individual courage, and even more so where there is a functional need not to consent to derogations when they would undermine the stability of the overall boundary of a liberal-democratic state<sup>45</sup>.

Western public reason for the defence of cultural rights is in logical terms secondary to the defence of individual rights, of which it is an advanced form. This means that cultural rights cannot be invoked where they fail to protect or they harm individuals who are members of protected groups. But this contrast is not always regulated by the “logic”, also because that logic starts from questionable value assumptions, and hence may not be shared: some more communitarian understandings would reasonably confute the individualist premise, let alone hierarchical societies, collectivist cultures and traditional utilitarian philosophies, which implant common development upon sacrificing even the concept of individual. The truth is that the contrast is regulated by *supportable tension* between the social system, which legally turns on certain fundamental rights of individuals and pursues them politically, and the institutions or internal social practices of cultural groups. The contrast proclaimed between these spheres is not a philosophical but an ethical-institutional problem.

This is not however a problem which can be resolved simply by recourse to common *political* institutions, capable of generating an *overlapping consensus*. The construction of this superimposed consensus in Rawls depends on a specific mode of staking out the separation between the private sphere of individuals and the public political sphere: this would resolve the tension on account of its distribution on different

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<sup>44</sup> Fundamental rights are to be understood as a relational concept, and one of belonging: if fundamental rights are well connected to individuals in any given system, if they evolve in relation to the ethical-political transformational capacities of a social system, this notion proves to be essential because it discards the idea of rights of the somewhat abstract absolutism of whoever is seen as “imposing” catalogues of “human” rights; at the same time, it is important however not to lose sight of the normative meaning of rights: in fact, this “separate” notion of fundamental rights does not “relativise” their sense and function. Ultimately, it insists on the fact that they are goods which are (meta)normatively reconnected to – and hence capable of being invoked by – individuals, on the fact that such goods are posited as ultimate goals, and finally on the fact that a society in which there are fundamental rights is qualitatively incomparable to one in which there are none at all.

<sup>45</sup> As should now be clear, solutions must therefore attempt to determine a form of linkage between the two systems that is able to avoid crushing cultural minorities and single individuals. For these reasons, I believe that cultural communities to whom a role of the bearers of collective rights has been recognised and which have embraced a framework of co-partnership for the resolution of conflicts between individuals, groups and the state, are necessary interlocutors and actors in a process in which fundamental rights represent and display the consequences of internal dynamics within ethical-political relations (individuals, groups and state).

levels – which cannot overlap with one another – of “public” political justice on the one hand and “private” ethics, cultures and religions on the other.

Nevertheless, the Rawlsian “political” model (of *Political Liberalism*<sup>46</sup>) already contains its basic, substantive and taxing premises in the very essential constitutional elements (of the institutional area, of the *overlapping consensus*); although referring only to “political” values, these are not neutral and end up having in the long term the effect of privileging “comprehensive”<sup>47</sup> theories that are closer to the comprehensive liberal-democratic model. This means that choices made (within the *essential constitutional elements*) “only” in a public-political context overstep the mark and evince a known tendency to spill over: that is not only to regulate the common area, politics – to which one must consent and share (through an overlap) – but also to influence and *de facto* favour just those “comprehensive” doctrines which are more akin to the *set* of socially acceptable *political* values.<sup>48</sup>

And in particular, the dilemma of protecting weak individuals in communities belonging to multicultural societies is not resolved in this way by invoking separations (between public/political or not): this is precisely because in such cases the protection of individual rights (justice) *collides directly* with the protection of cultural rights (as well as ethics or comprehensive theories).

However, also under the Rawlsian model, despite the separation between politico-public and private, how could a culturally “guaranteed” community be “authorised” not to follow the rules of recognition of the legal-political order which guarantees it?

The violation of certain “positive”, “fundamental” rights would fatally undermine the function of selective criteria internal to the rule of recognition of the legal-constitutional order, it would expel them from this position and from this role, thus furnishing proof that their fundamental character in that system is purely imaginary.

The litmus test therefore consists of the *public* value of “private” goods: if they are used to ascertain the admissibility of behaviour and norms within the legal order we are no longer confronted with a discretionary judgment of predominance between individual and collective rights (equally strong and yet in contrast): we are dealing with the confirmation of some rights already acquired as “fundamental” i.e. meta-normative conditions for the legitimacy of cultural rights. This is the reason why in the public arena any partial adjustments inevitably amount to an overall reinterpretation of the general nature of liberal democratic societies and not simply a form of concession or of largesse towards single communities. This is why the case of Shah Bano still throws up unresolved doubts, because the Indian “constitutional” society, which finally pushes Shah Bano to renounce her rights against the law of the Islamic community, is symbolic of a contrast in liberal societies which also risks the opposite conclusion: the defence

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<sup>46</sup> J. Rawls, *Political Liberalism*, New York 1993.

<sup>47</sup> For a definition of “comprehensive” theories, cf. *ivi*, esp. 174-176.

<sup>48</sup> For a general discussion of the issue (of the problem of neutrality in relation to comprehensive conceptions, of the division between political and apolitical areas ,etc. ), cf. *ivi*, eg., 190-200.

*sine glossa* of the rights of the individual, with the potential collapse of the fragile multicultural superstructure.

## **6. Rights and the common interest**

A different case is that in which the liberal democratic state must confront discrimination not protected under the shield of cultural rights. The use of the concept of fundamental rights may also in this case however appear more appropriate than that of human rights in describing the nature of the problems. In other words rights are again an institutional problem, much more than they may be a purely “individual” question thanks to the logic of “human” rights.

The American Supreme Court ruled in 1982 on the case *Plyler v. Doe*. At issue was a Texas state law which prohibited underage children (born abroad) of illegal immigrants from being admitted to secondary schools. This law could not be struck down by recourse to the principle of discrimination. The principle of equal treatment, or the right not to suffer discrimination – in this case as immigrants of any ethnicity, i.e. non citizens – is a blunt blade against differentiated treatments which have at their disposal good reasons and shared public, political goals. The possibility of discrimination in general is the *corollary* of a right to equality which does not prohibit *in absoluto* to allow differences between individuals, but clearly admits them to the pursuit of legitimate goals with which the “discriminatory” criterion proves functionally linked. Moreover, not every difference must be considered irrelevant, and may be ignored. According to the Supreme Court, the constitutional illegitimacy of the prohibition imposed on the children of illegal immigrants flows from the *Equal Protection Clause*, but more closely not from the prohibition on discrimination but rather, as noted by Owen Fiss, from the prohibition on transforming the structure of society into an organisation of castes and pariahs: “it prohibits the creation of socially and economically disadvantaged groups which are obliged to live on the margins of society, isolated from the life of the majority, always at risk, and which perceive themselves and are perceived by the dominant group as inferior.”<sup>49</sup>

The argument of equality with reference to the protection of the right to education would be mistaken, since the federal constitution does not contain any express provision on education. It is not a problem of just allocation of goods among individuals, but it is the prohibition on creating castes and pariahs, and hence the principle of *non subordination*. The deontological principle of inter-subjective justice does not apply here: at issue is rather a structural principle, which I would like to call systemic, the perspective of which is if anything the protection of the common objective of constituting and maintaining a “community of equals”.

A deontological vision of individual rights allows us to conceptualise them – perhaps – as *trumps*, in the sense that the dignity of each person, and the absoluteness

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<sup>49</sup> O. Fiss, *A Community of Equals. The Constitutional Protection of New Americans*, Boston 1999, 12.

of that which “we owe to a human being”, withdraw from every transaction without giving way in the face of various prevailing goals. In the case of immigrants however, the abstract anti-discriminatory mechanism of protection of the individual would only come into operation with difficulty, and would encounter significant obstacles in socially functional considerations against immigration. But if one considers the same question armed with an institutional vision of fundamental rights, then this might prove the importance of conceptualising some rights even from the point of view of their ability to also *constitute the structure of collective goods*, which have *inherent value*<sup>50</sup>. The notion that each human being has the right to his own dignity and also, where appropriate, to an education belongs to a philosophy of human rights and seeks to establish a principled front, the resistance and solidity of which cannot however be guaranteed by the logic of human rights alone. There is always the possibility of imagining a social end which renders any given discrimination anything other than arbitrary, as it likewise does to any refusal to guarantee the development of “human” and social opportunities to the immigrants. Moreover, membership and citizenship fall amongst the legal criteria for discrimination which are most common and “legitimate”. This simply means that some “human” rights are in reality not at all “fundamental” in a social system, since they are not included in the goods which receive the attention and care granted to the substantive goals which the legal order and social system posit for themselves.

According to Fiss, we should insist “on the fact that the laws on admission cannot be implemented or carried out in ways which would transform the immigrants into pariahs”.<sup>51</sup> There is no objection to barriers and expulsions, or to criminal penalties, but there is a steadfast opposition to the creation of disabilities or of social incapacities. In this sense, the principle against subordination is equivalent to the prohibition on selling oneself as a slave or deciding to become a slave under the 13<sup>th</sup> Amendment. In conclusion: “we must not subordinate or subject immigrants, not because we owe them something, but to preserve our society as a community of equals”.<sup>52</sup>

A further argument which proves the emergence of the *functional* problem of rights in contrast to the purely deontological position clearly lies in the different value and treatment which would be due to *political* rights with respect to elementary social rights. The exclusion of political rights for immigrants, according to the Yale constitutionalist, would be based on a legitimate discrimination consistent with the borders of a community, as a voluntary, non “natural” organisation: but the negation of particular social resources is illegitimate. This is not because it discriminates between individuals but – to repeat – because it creates a social structure which is inconsistent with the concept of community contained in the American Constitution.

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<sup>50</sup> I recommend to deepen this point through the pages by Joseph Raz, Rights-based Moralities, in J. Waldron (ed.), *Theories of Rights*, Oxford 1995<sup>7</sup> (182-200) esp. 188 ff.

<sup>51</sup> Fiss, *loc. cit.*, 16.

<sup>52</sup> Ivi, 17.

As we have seen, the recourse to the idea of human rights is not always a winning argument in the area of immigration. Although it is the most radical argument, it is not also the most functional in the light of the persistent desire of states to regulate citizenship and to attribute a meaning, at times excessive, to its own borders. The same applies to the idea that not only the rights of immigrants, but social rights in general are to be considered as human rights: some maintain that a global and universal society must recognise that the protection of the individual reaches beyond political borders and that there is no reason for denying to human beings that which is owed to them to protect their dignity (also in terms of opportunities, resources, commodities, etc.).

But the real issue is how to transform these deontological priorities from judicial *trump cards* of the one hypothetical global order into a concrete objective of the diverse social and legal systems. Defending rights involves creating or elaborating their material meaning within institutions and current practices, displaying versions which are internally compatible with normative and institutional ideals which characterise a legal culture and a determinate social system (always assuming that a particular system cannot be eliminated for reasons of principle or on pragmatic grounds).

A bar on access to education (of some individuals on ethnic, sexual or other grounds) cannot be legitimated by reasons of pure and simple conservation of social equilibria. In this case, the prohibition – due to some particular traditions- would require us the *renunciation* of that abstract but morally exacting arm of human rights. The defence to the last of “cultural” rights frequently entails just an apology of the *status quo*, relieving of social critique. We cannot renounce an implicit philosophy of human rights, whatever its foundation. But even if we assume that we are dealing with the sound philosophy of human rights, this will certainly not be enough. The law would require overcoming the confusion between human rights and fundamental rights, and creating a presumption of equilibrium between the two types.<sup>53</sup>

If rights prevail therefore, this will never be because they are simply “human” rights, but by contrast because they progressively enter into the representation of the self which communities carry out, thus entering into the *conditions* of self-understanding or acceptance of the self which a community or culture is able to posit for itself.

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<sup>53</sup> The point is that both are necessary, but to support it one must know how to distinguish between them. If there is something equivalent to the restitution to women of a form of sexual or educational liberty, it is necessary to obtain it, even if it does not sufficiently measure up to the pure and absolute model, which for us is the Western model. Even if for example, it does not determine conditions of real parity in relation to men, or even if it is nothing more than a compromise with stability and power, the absolute degree of formal liberty would not have any substantive meaning in the face of the persistence of strong material or ethical-social links which condemn the appropriation of that freedom with relevant ethical-social sanctions. The rights must take on a historically practicable garb: to this end they must be interpreted and embraced, but whatever way, as goods the use of which is not socially disastrous for individuals. This is why it is important for them to be translated first into goods compatible with collective goals, or more precisely must be assimilated within a specific interpretative form as collective goals themselves.

## 7. Political equality, substantive equality.

In the case of the *anticaste principle*, social equality is preached as a systematically necessary good, directly derived from the regulative idea of a community of equals. But the principle is not able to replace or cancel the rule of *citizenship as a source of political rights*. On this view immigrants can be legitimately subordinated if their subordination flows only from their lack of political rights, whilst it is illegitimate if their subordination derives from unmotivated social disadvantages.

Many forms of discrimination, including those which still exist against religion, race and sex or sexual orientation in Western countries constitute a violation of equality rights by virtue of prejudices and disparity in individual treatment. This does not mean that these types of discrimination are nonetheless capable of producing genuine social subordination of whole groups or classes of subjects identified on the basis of these characteristics. In order for the *anticaste principle* to apply, there must if anything be a form of discrimination which is so systematic as to contribute to the creation of second class citizens: this means that evident but morally irrelevant differences are elevated to reasons for establishing the existence of systematic social disadvantages.<sup>54</sup> If the *anticaste* principle implies the protection of a fundamental goal, as writes for example Sunstein, then civil rights movements should essentially focus on the resolution of social questions, such as the lack of opportunities in education or employment.

On this view, it may be noted that the nature of fundamental rights can be inferred from their inclusion among collective goals. There is an analogy between the creation of castes based on race and the possibility of creating second class citizens on the basis of sex. In such cases, the operative principle clearly is not that “women must be treated like men but that women cannot be second class citizens”.<sup>55</sup>

Feminist writers such as Iris Young have often argued that subordination does not depend on discriminatory behaviour, but on the use of neutral categories and formal justice: in a society where some groups are privileged, insisting to take on a general and neutral point of view, which would not take account of the differences, would end up reinforcing the privileges; the formal super-partes view would therefore permit privileged groups to dominate this unified public sphere.<sup>56</sup>

This sense of equality (absence of subordination, well before non discrimination), confers evidently a kind of collective institutional responsibility which does not exempt anyone and extends both to the courts as well as to other social and political institutions. This allows us to move the emphasis from equality in the formal sense (i.e. equality before the law, abstract parity of treatment), to equality in a substantive sense. Sometimes this substantive meaning includes a quest for equality in

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<sup>54</sup> C. R. Sunstein, *Designing Democracy. What Constitutions Do*, cit., 170.

<sup>55</sup> Ivi, 197.

<sup>56</sup> I. M. Young, *Justice and the Politics of Difference*, Princeton 1990, 257.

the social conditions, and asks the law a guarantee of material consequences, i.e. the grant of some specified “results”.

In the light of this idea, the whole range of affirmative action apparently takes on a central importance. But which affirmative action? If the point is not to be treated equally, but to remove social obstacles and balance positions of disadvantage, one should intervene offering incentives and where possible cancelling out the “initial” disadvantage, thereby impacting on substantial delays. But how can this objective be promoted and how can it be implemented? On this point a 1995 judgment of the Italian Constitutional Court striking down the principle of (male-female) quotas in electoral lists required by the law is paradigmatic, at least in its effects.<sup>57</sup> According to Italian Constitutional Court the principle of equality ( "all are equal before the law without distinction as to sex, race, language, religion, political opinion, or personal and social conditions ": article 3.1, *Italian Constitution*) is placed “above as a rule mandating the legal irrelevance of sex and other possible differences”. Accordingly, given “the absolute equality between the two sexes in the possibility of acceding to high public office, in the sense that the membership of one or other sex can never be taken as a prerequisite for eligibility”, it is not legitimate to determine quotas on the basis of sex. In particular, “in the area of passive electoral law, the inderogable rule laid down by the very Constituent Assembly under article 51(1) is that of absolute parity since any differentiation on the grounds of sex cannot but be objectively discriminatory, undermining for some citizens the substantive content of a fundamental rights in favour of others belonging to a group which is deemed to be disadvantaged”<sup>58</sup>.

The issue of quotas throws up the fact of the different admissibility of affirmative action in favour of handicapped people,<sup>59</sup> for example, who can profit from the direct attribution of benefits, i.e. “results” (for example they are granted a job, through privileged quotas) .

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<sup>57</sup> Judgment n. 442/95. See further “Giurisprudenza Costituzionale”, 1995, 3255 et seq.

<sup>58</sup> Also revealing for our purposes is the Court’s finding that “measures such as those before the Court do not appear to be consistent with the goals set out in article 3(2) of the Constitution, since they do not propose the ‘removal’ of obstacles which prevent women from attaining specific results, but rather directly attribute to them those very results: the disparity of conditions identified, in short, is not thereby removed but rather constitutes the motivation legitimating a preferential protection on the grounds of sex. But it is precisely this, as has already been stressed, which is the type of result which is expressly excluded under article 51 of the Constitution, since it would end up creating contemporary discrimination as a remedy for past discrimination” (ivi, 3264). The Constitutional Court also found that: “It is finally important to note that the said measures, constitutionally illegitimate insofar as imposed by law, may instead be evaluated positively where freely adopted by political parties, associations of groups participating in elections, even through dedicated provisions in their respective statutes or regulations regarding the presentation of candidates. Valid results may therefore be achieved through an intense action of cultural evolution, inviting political parties to recognise the indeferable necessity of pursuing the effective parity of presence of women in public life, and in representative offices in particular. A decisive aspect of this could be the direct commitment of the female electorate and its consequent behaviour”(ibid.).

<sup>59</sup> See this issue discussed by A. D’Aloia, *Eguaglianza sostanziale e diritto diseguale*, Milano 2002, 264.



Now, to proceed according to a *result oriented*<sup>60</sup> logic, or holding in a narrower sense to *the removal* of obstacles, is considered to be an alternative in respect of (two different) *means*, both of which however are directed towards the achievement of the same goal, substantive equality. In reality it is not only a question of means, but of ends, of social priority of goods which are earmarked for protection. Between a *result oriented* policy and a policy of removal of obstacles in the narrow sense there is a difference concerning the *protected good*. In one case it is the granting of a job, and a quality of life comparable to that of people not affected by disabilities. In the other case, it is the protection of women's autonomy, i.e. a starting point which does not limit their capacity to choose; in the case of the disabled the point is that they actually obtain certain results, including the acquisition of a salaried job, notwithstanding disadvantages in the starting point.

The Court had invalidated *result oriented* actions *because in the system's priorities*, disparate treatment, which is fully acceptable in the context of social policy, is neither legitimate nor desirable in the context of political democracy, where it would violate the parity rights to political participation, which are clearly understood as *gender-neutral*. This appeared to be an application of the principle according to which political citizenship should not be subjected to distinctions on the grounds of sex.<sup>61</sup>

All this leads us to the conclusion that the protected *fundamental* right, in the case of women, and the desired result, was not so much their presence in parliament (to be attained through in direct means), but rather only the guarantee that they enter into a fair and equal competition with men. Accordingly, the goal was not to endow parliament with the political contribution of women.

Unsurprisingly, there has been a new provision contained in the amended text of article 117(7) of the Italian Constitution conferring on regional laws not only the task of removing obstacles to political participation but also to *promote* parity in access to official positions; and there is now even a new article 51 of the Italian Constitution which introduces the *promotion* of equal opportunity between the sexes in the area of public and elected offices. This is setting in motion a new dynamic leading also to the revision of the definitive principle of the Court from 1995. The new provisions propose as a socially fundamental good no longer only individual female capacity and autonomy in participation, but also the effective participation (or more correctly: election) of women in political life and their presence in the elected organs. This is no longer an issue reducible to equality between individuals: it is *the community interest in a pluralist political representation marked by diversity*, and in particular, sexual difference. This good did not yet have the same fundamental status in the constitution

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<sup>60</sup> On the opposite, M. Cartabia, *Le azioni positive come strumento del pluralismo?*, in R. Bin, C. Pinelli (ed), *I soggetti del pluralismo nella giurisprudenza costituzionale*, Torino 1996, 70 et seq; endorsing the recourse to *indirect* remedies, akin to prizes, incentivising the participation of women in politics, expects "a renewal of social relationships which should spontaneously lead to the achievement of results that are more favourable to penalised groups" (Ivi, 77).

<sup>61</sup> Cfr. Ch. Mouffe, *Feminism, citizenship, and radical politics*, in Id.(ed.), *The Return of the Political*, London (Verso) 1994, 74-89.

and in the ethical-normative self-interpretation in the period marked by the Court's ruling in 1995. In reality, the Constitutional Court indirectly explained that the effective participation of women and the differentiated composition by sex of parliament could not and should not constitute the object of any fundamental right, especially in the light of the priority of political rights, which are neutral in relation to sex.

### **8. Rights in equilibrium: between “justice” and “consent”.**

It is in relation to political rights that a conceptual, not contingent, resistance arises. In fact, the exercise of public and political autonomy presupposes above all else the protection of equality *sans phrase* between individuals. It presupposes the consistence of the idea of equal justice.

But it is precisely in the area of justice where the unending conflict between *liberals* and *communitarians* is played out,<sup>62</sup> along with the equally instructive debate between different trends within feminist thought: traditionally divided between those who invoke “impartial” or formal arguments of justice and those focusing on contextual or community arguments, as well as other similar tensions (for example, between the preference for redistributive policies aimed at producing *equality*, and for a policy of recognition, aimed at valorising *specificity*<sup>63</sup>).

It is certain that a pure and simple recourse to deontological arguments such as impartiality and universality is not always sufficient: in spite of these abstract conditions of justice, inequalities may at times be overcome, but they often simply perpetuate themselves. Within feminist thought this problem is always at the forefront. The real obstacles to equality may well be due to income disparities or imbalances in economic power, to the (male) distribution of economic wealth or secondary goods, or alternatively to the chronic cultural subjection of women, or as Iris Young wrote to exploitation, marginalisation, lack of power, cultural imperialism or violence. This means that “simple” justice in the abstract is a minimum and insufficient parameter. Any theoretical argument must preferably commence from a concrete perspective.

On the other hand, whoever remains constrained by contextual and concrete experience loses the advantage which can be gained from general theories of justice, as for instance that of Rawls: a more abstract theory may commence from moral principles which constitute a challenge, and which offer the critical arguments to overcome it. In the final analysis, no historical-empirical context can itself be criticised or evaluated other than on the basis of pre-constituted moral criteria. Finally, even an ideal objective

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<sup>62</sup> Cfr. E. Frazer, N. Lacey, *The Politics of Community. A Feminist Critique of the Liberal-Communitarian Debate*, Toronto 1993.

<sup>63</sup> N. Fraser, From Redistribution to recognition? Dilemmas of Justice in a ‘post-socialist’ Age, in *New Left Review*, 21 (1995), 68-83.

such as equality cannot be understood in practice without first having pre-chosen the criteria for affirming it.<sup>64</sup>

Consider for example the fact that every distributive inequality, every unequal treatment (of the unequal) presuppose a choice, a decision about *what the relevant differences are* which count as reasons for disparate treatment. Such a decision is ethical-political in nature (eg that we should opt for a distributive approach and not a formal one of political equality) and hence depends *in turn* on the exercise of public autonomy. As has been shown above, inequality without distinction between individuals in electoral matters (and therefore without distinction on the grounds of sex) appears to be a foundational principle of liberal democracy. It is extremely risky to intervene by “modifying” political equality; such interventions should be made only in conditions of political equality (and should aim at preserving it): the reflexivity of this operation requires that the guarantee of the equal-universal position of each stakeholder be transcendental with regard to the democratic process and not dependent on its choices.

Unfortunately every version and every criterion of substantive equality which imply the consideration and choice of particular differences as relevant for the purposes of differentiated treatment are the fruits of an ethical ranking order defined in political terms.

Sometimes the response is given, according to which even neutrality or “formal” equality cannot escape the same limits (since they in turn lead to the choice of *not* bringing differences to the fore which from the point of view of persons occupying “weak” positions are decisive and inhibitory). But this is mistaken. Equality is a moral criterion, whilst its applications are questions which depend on the available social rationality and also on negotiable social conflicts. Equality as a moral criterion cannot be totally renounced unless a moral criterion is also thereby renounced: formality, as was long repeated throughout the 1970s, may be an ideological weapon, a screen of the ruling classes, but it can also show itself to be an effective shield, capable of deflecting irrational, fundamentalist or illiberal considerations from public life.

Similar reasoning may also operate for moral and strictly deontological value which “human” rights possess: although they might conceal ideological, economic or political interests, or impose a false uniformity between human beings, or cultivate abstractions from real contexts and consequences, the moral action of justice to which they aspire remains a necessary (yet insufficient) critical-moral threshold.

Whoever refuses to abandon formal equality (which renders differences immaterial), in political rights thereby also reinforces the analytic separation between rights and democracy, between justice and ethical-political choices.

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<sup>64</sup> On this, see W. Kymlicka, *Contemporary Political Philosophy: An Introduction*, Oxford 1990, 287. For a comparison of the *liberal* theory of Rawls and Walzer’s *communitarianism*, see Susan M. Okin, *Justice, Gender and the Family*, cit.

Habermas tackled a similar problem with a spirit of reorganisation, of *Aufhebung*, attempting to demonstrate how a large part of the debate on the protection of individual rights or of collective deliberation both depended on a misunderstood contrast. As he reminds us, “liberals like Rawls and Dworkin propose an ethically neutral legal order, which assure each person equal opportunities in the pursuit of their personal conception of the good”; by contrast “communitarians like Taylor and Walzer dispute the ethical neutrality of the law, and thus can expect the constitutional state, if need be, actively to advance specific conceptions of the ‘good life’ ”.<sup>65</sup> Habermas correctly understands this opposition as being founded on the misunderstanding of the link between individual freedom and public autonomy, rights and democracy. Challenging Taylor’s position, Habermas maintains that an individualist and liberal system of rights has no need to be corrected, overcome and integrated, by a limitation of its individualism in favour of (rights of self-determination and therefore) collective goals of cultural communities: this is because “private legal persons cannot even attain the enjoyment of equal individual liberties unless they themselves, by jointly exercising their autonomy as citizens, arrive at a clear understanding about what interests and criteria are justified and in what respects equal things will be treated equally and unequal things unequally in any particular case”.<sup>66</sup> For this reason, according to Habermas, the protection of individual integrity cannot be dissociated from the protection of “life contexts” which guarantee identity.

This confirms what in *Faktizität und Geltung* (1992)<sup>67</sup> was concerning the “co-originality” of rights and democratic deliberation. On one hand, it turns on a demonstration of the futility of a dedicated category of “collective” rights; on the other hand to explain individual rights as human rights, i.e. as non-renounceable conditions.

Therefore, rights are not exclusively individualist and are in no way opposed to a collective self-understanding: “The individual rights that are supposed to guarantee women the autonomy to shape their private lives cannot even be appropriately formulated unless those affected articulate and justify in public discussion what is relevant to equal or unequal treatment in typical cases. Safeguarding the private autonomy of citizens with equal rights must go hand in hand with activating their autonomy as citizens of the nation”:<sup>68</sup> this therefore involves a kind of deontology of rights, albeit supported by a democratic-communitarian base. The latter corollary constitutes a rather delicate theoretical step.

I believe that the consequences of this version of co-originality (re-proposed in relation to collective rights in multicultural societies) have become too dangerously close to the *circularity*: on the contrary, the sense of the idea of co-originality is to posit individuals and principal human rights as special, necessary conditions for the exercise of “civic” (public) autonomy. It is only in this way that the protection of individuals and

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<sup>65</sup> J. Habermas, *Struggles for Recognition*, cit., 111.

<sup>66</sup> Ivi, 113.

<sup>67</sup> J. Habermas, *Between Facts and Norms* (Cambridge (Mass) 1996) .

<sup>68</sup> Habermas, *Struggles for Recognition*, cit, 116.

their identities can be ensured (and therefore, according to Habermas, of “cultural” life contexts which guarantee it, and of the associated collective rights). It is clear that if co-originality need not be refuted, and above all if the theory need not falter before the case of Shah Bano and other similar cases, then it is not possible to reduce the meaning of principal human rights to community deliberations: this is a cage which could transform itself into illiberal conservatism. The principled independence of human rights from the exercise of collective choices cannot be renounced.

Nor however can one ignore the fact that rights “work” only through a communitarian understanding, and this link can clearly not be abandoned because, as well as taking the sting out of the contradictions between cultural rights and individual rights, it allows for the contextualisation of the latter, stressing their “functional” role.

In reality there is a doubt over the risk of “circularity” (in summary: of no longer being able to salvage the reciprocal independence of rights and politics, of justice and democracy) leading to a conceptual collapse of rights.

This discussion revolves around what Habermas would call the ethical *neutrality* of law. I share the idea that this ethical neutrality does not exist, as it is clear enough after the reading of the debating theses of liberals and communitarians<sup>69</sup>. The circularity between rights and democratic choice, according to Habermas, ensures the ethical loading of the law<sup>70</sup>. But it is still important to clarify how to prevent this circularity from dissolving the conceptual distinction of moral rights and collective ends.

There is a certain distance separating moral claims to justice from legal norms, if for no other reason than that only the latter can be considered as the fruits of an ethically orientated political will. Accordingly the notion that the legalisation of moral claims (i.e. the fact that they become “positive law”) is political in nature is fully comprehensible. Having said this, it is easy to perceive a certain discomfort precisely in respect of the *status of (fundamental) rights*. How is it possible that they are politically pre-chosen, thereby rendered into “objective” law, positivised, yet at the same time aspire to an ethical virginity, to remaining a transcendental, non contextual resource that is independent of such political positivisation and inaccessible from it? How is it possible for them to remain a critical threshold of minimum moral guarantee towards the very same common venture which translated them into fundamental norms and produced their “ethical pregnancy”? Is it not perhaps that rights *tout court* have too many faces? Perhaps rights in the final analysis are spread over too heterogeneous areas, taking on mutually incompatible meanings?

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<sup>69</sup> It is puzzling to follow the circle of argumentation, out of which Habermas’s co-originality theory should have taken us: theories of minimal human rights are “individualist” (according to those who criticise *liberal* rationalism); the content and meaning of legally posited rights express a specific depth of choices flowing from democratic will protected by fair procedures; but democratic *procedures* are in turn democratically enacted, one must suppose, by presumably free and equal subjects, i.e. guaranteed by “rights”.

<sup>70</sup> Ivi, 122-123.

The co-originality of the relationship between rights and ethical-political choices, between private autonomy and public autonomy can be purged of any ambiguity on condition of linkage to diverse and corresponding denominations of rights.

As a rule, autonomy as a moral faculty exists with reference to human beings and to the philosophical context of human rights as a constant, together with other variables which indicate that which should be covered by the “right”. The right does not depend on “consensus” , but emerges from a rational exercise: *if* public institutions exist which can let the better argumentative- communicative method prevail, the engagement with justice takes place in a channel potentially separated from power and from negotiation, and uses different resources (although there is no certainty that premises and results of the “debate” always appear unequivocal and uncontroversial). There is no doubt that the pursuit of the “right” amongst individuals, as a condition of coexistence, is a conquest of civilisation owed to positivisation of rights and to the separation of law from its ancient sacred, religious foundations. But it is clear that not even the “right” can impose itself “on its own”, without being included in the at least implicit and intangible priorities of liberal democratic societies: this does not however mean that it depends either on political negotiation or on simple “consent” in the broad sense, since it instead contains the *framework conditions* for both.

Human rights should be effectively considered as components of such conditions. John Rawls separated human rights from rights inherent in liberal democracies, distinguishing for example article 1 of the Universal Declaration of Human Rights of 1948 (“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood” ) from other articles such as article 3 (right to life, freedom and security of person) and article 5 (prohibition on torture or cruel, inhuman or degrading treatment), which are to be considered as human rights in the strict sense, and finally from other provisions (social security, equal pay for equal work) which instead require particular institutions. But article 1, according to Rawls, already possesses a “liberal” inspiration. I do not know whether Rawls is right about this; article 1 considered as a whole amalgamates diverse inspirations alongside liberalism. However, it appears to establish not a *minimum* level, but one in line with “high” principles of convergence between different inspirations. In any case, for Rawls we are certainly not operating within the framework of human rights, which instead “set a necessary, though not sufficient, standard for the decency of domestic political and social institutions in individual societies”.<sup>71</sup>

I am convinced that the meaning of human rights cannot be so easily separated from that of “other” albeit “universal” rights present in the *same* document; we are now accustomed to recognising an *indivisibility* between groups and categories of rights, and even more so where they appear within the same declaratory or constitutional document.

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<sup>71</sup> J. Rawls, *The Law of Peoples*, cit., 80.

But I believe that Rawls intends to argue, and considers necessary, that human rights are a *presupposition* that is not vanished nor blemished by political elaborations.

Yet it is precisely this achieved idea which could be jeopardised by an excess of “communitarianism”, or more simply by a pervasive reference to the “communitarian” elaboration of the meaning of human rights. The foundation and justification of human rights must be liberated from constraining dependence on the “contexts”, removed from positive, cultural forms in which human rights take on their own material significance, and are fleshed out with particular meanings. This implies that a *separation* is necessary: it allows for the identification of limits, or rather the definition of insuperable borders beyond which, for example, even the internal autonomy of a regime can no longer be considered intangible.<sup>72</sup> How “objective” this limitation appears to be is another question, as is that as to how sharable by peoples which, returning to Rawls, he identified as hierarchical or governed by “indecent” regimes which appear to ignore human rights.

Up until now I have referred to the area of human rights, which yet again proves to be minimum, indicating the “right”, a deontological area which appears to be wholly inhomogeneous compared to the teleological and collective area of substantive goals. But we cannot ignore the fact that human rights do not exhaust the available concepts of rights; they may be a “special class” as suggested by Rawls, but at the same time are a *way* of looking at rights and conceptualising them. Conceptualising rights as an irreplaceable presupposition of the survival of the human race and of human beings as such means conceptualising them as human rights. The rational and/or reasonable discussions for identifying *which* rights have these qualities and are inextricably linked to that which is owed to human beings, have advanced over the course of the last fifty years towards every broader *agreements*, in which however new leaks and divisions open up, which tear at the fabric of cooperation between peoples.

On the other hand, that which I have identified as the (ethical and political) affiliation of “enacted” rights to collective goals requires a different conceptual elaboration of rights that is not reducible to the “philosophical” elaboration of human rights and thus, as I have already argued in the above, a separate definition in the garb of “fundamental” rights. The fact that some rights are understood as a presupposition of “decent” institutions, means only that they are candidates for labelling as fundamental rights. But this is a very “particular” garb. It is clear that the respect for life or the prohibition on torture in a Western liberal democratic state like Italy are theoretically speaking a super-partes presupposition of “decent” institutions; but- in addition- this premise belongs within a constitutional context in which it is paralleled by the pursuit of values such as dignity, solidarity or equality. It is not however pursued alone. Our

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<sup>72</sup> Ivi, 79-80. But on the same point, it is of great relevance and importance the Report by the “High Level Panel on Threats, Challenges and Change” (appointed by the U.N. Secretary General), titled *A more Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565 (Dec. 1, 2004), at <http://www.un.org/secureworld>.

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constitutional society is not neutral, and its invocation of rights is integrated into a network of a broader axiological project, embracing basic goals which incorporate and re-elaborate the conditions of justice. Against this background, we recognise fundamental rights as substantive criteria of legal validity and as principal collective goals of the very same institutions.

The lack of a distinct conceptual elaboration for fundamental rights (in the sense I have suggested with relation to human rights) leads to various difficulties, as we have seen: these include the contradictory request that the rights at the same time be *the product* of a social system (according to the definition proposed here of “fundamental” rights) as well as a *presupposition* of it, a minimum, transcendental, categorical *ought* beyond any single ethics. In this latter meaning, the rights are not “fundamental” rights, but rather “only” that which our best philosophical arguments strive to indicate as being owed – in a kind of spatio-temporal suspension – to human beings and to justice. But *fundamental* rights are by contrast a shared normative social practice, inspired by ethically demanding objectives and raised to the level of criteria of legitimacy around which the socio-legal system turns. If human rights therefore remain above ethical conflicts, fundamental rights are the highest normative moment of the public legal equilibrium between conflicts.

Habermas ultimately believes that the reflexivity of political rights (their characteristic of deciding- about- themselves) and the co-originality of rights and sovereignty, may promise us that the exercise of political sovereignty will protect *in itinere* “human rights” in their pure and deontological form. Maybe he is right. But human rights risk being distorted (and then “used” as a formally “neutral” instrument) if their meaning and content is to be “decided” through political consensus within a community. Their critical power would tend thereby to evaporate. If anything it is “fundamental” rights which are subjected to this circularity and certainly not human rights. The latter indicate a discipline of *abstaining from evil*, only if they are *not* rendered ubiquitous, if they are not confused as *one* amongst many ethical choices of a democracy.

In reality, such rights concern the content of justice which contemporary Western legal systems render intangible and stabilised with reference to changeable ethical-political pressures. When some a philosophy of human rights appears to be protected by a legal order, it certainly undergoes a legal transformation, and therefore expresses itself through the instituted fundamental rights which belong to a system. Here they are subjected to the concreteness of “local” decisions and collective interpretations. But the task of law is to prevent ethical choices from causing a violation of those very rights which generate and structure justice towards all, rights which define a set of “border conditions”, of which the different historical versions and philosophies are only a variable incarnation, at least from the viewpoint of contemporary liberal democracies.