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Abstract

This article considers the narratives of law through the lens of the form-substance divide. Different legal theories have provided for opposite definitions of law, legal rules and individual rights, enhancing their identity as due to some substantive content or, on the contrary, to some formal-functional features. The form-substance antinomy reflects both institutional and theoretical reasons. It bears down on the relations envisaged among *rights*, *norms* and *ends*. Different conceptions of rights are best understood as a special articulation of those three terms, and offer different patterns for rights, depending on their relation-opposition with collective ends, ethical values, legislation. The following pages show how in contemporary constitutional democracies the identity of the s.c. "fundamental" rights and the reason for their being "fundamental" are due to the functional role they play (as validity criteria in the structure of a legal order), and to their place among main collective ends.

Keywords

Legal Theory – Constitutional Theory – Legal norms – Fundamental rights

Summary:

1. The nether theoretical story of rights: between “norms” and “substance”.
2. The appendix. Rights and 'norms'.
3. Rights and 'values' (deontological vs. teleological?).
4. Legal positivism and the status of fundamental rights.
5. Fundamental rights and the institutional definition.
6. Conclusive remarks.

Rights as Norms and as Ends

Gianluigi Palombella

1. The nether theoretical story of rights: between “norms” and “substance”.

1.1. When individual rights are discussed, there are always 'overall' conceptions of law, of legal orders and of social systems that emerge in the background. This holds true also when we deal with the subject of 'definitions'. With reference in particular to those put forward in the 19th and 20th centuries, we realize that each of them possesses a theoretical advantage, because of its connection to a relevant *Weltanschauung* or of its capacity to function heuristically, with some sort of representation and clarification potential; in a way, each of them reveals valuable qualities, generally accompanied by corresponding limits. I shall highlight some headlines of this theoretical history of rights; this shall bring me, thereafter, to present, among the many perspectives, an institutional sensitive approach that can enhance, in particular, the relation between *rights, norms and ends* (public goals).

As is well known, one of the problems with “fundamental” rights is said to be their effectiveness, still perceived as an unsettled question. Effectiveness is often traced back to the presence of suitable guarantees, and can be related to the 'justiciability'; nonetheless, ineffectiveness is also interpreted as the consequence of the ambiguity or vagueness that proclaimed rights assume in the concrete, or can be due to the difficult assessment of the priority to be granted, from time to time, to rights: when they enter in conflict with each other or with values seen as socially equivalent. Nonetheless, the most basic issue, before justiciability, should refer first to how some rights must be considered as “fundamental” and through which criteria.

Naturally, this last normative issue can be dealt with from many perspectives (and different argumentative strategies): *e.g.* through neo-Aristotelian or neo-natural law doctrines, as in John Finnis, or through the identification of the fundamental conditions (“essentials”) for a just society, as in J. Rawls; or looking to human 'capabilities' to be guaranteed, as for Amartya Sen, or resorting to a set of 'universal' requisites of *human flourishing* as in Martha Nussbaum, and so forth.

For lawyers too, the issue of a theoretical definition of “fundamental” rights has come to be inextricably linked to, and made dependent on, the question of the alleged value of their *substantial content*. The fundamental character of some rights therefore is held to be due to the fundamental values of their substantive claims. This common belief, though, might be considered in some more of its meanings from a wider angle, or following a fil rouge through the quandary between legal formalization and substantive justification which actually have contended the very concept of rights.

1.2. To begin with, most of two last centuries were marked by a different theoretical attitude, by a crucial process that I would call a constant 'de-substantialisation' of individual rights. A series of divergent theoretical attempts led to a change in paradigm vis-à-vis past conceptions.

Lawyers and scholars of legal positivism in the 19th and 20th centuries had been preceded by an activity of *hypostatization* of individual rights conceived as sacred *properties*, mainly under the tradition of natural law doctrine. The natural law conception had raised them to the status of self-evident truths, pre-legal and pre-political, rooted in the very fabric of reality. These were 'doctrines' of rights, whose prominent characteristic was to aim at supporting, through implicit value judgements, specific precepts of social coexistence, to embrace some sort of human nature 'vision' considered as objectively and universally cognizable¹. The whole "natural law model" was based on the *a priori* construction of a hypothesis of society compliant with substantial criteria allegedly inferred from the knowledge of human reality, a rationality based attempt to overcoming the limits of the Aristotelian model, whose criteria of social truth were based on consensus, and therefore *a posteriori*². This link between rational universality, truth and rights has been the real distinctive element of natural law substantialism.

That almost metaphysical elevation of rights was strongly opposed last century, and followed by an activity of redefinition, whose outcome, or rather purpose, was a dilution of the previous substantial density, a sort of legal emptying, and a demythicising on the ideological plane. This activity rendered, at least apparently, the structure of rights more ductile and their form less saturated.

From the historical-political perspective, there had been concomitant changes that contribute to explain the different approach. The declining ideal was that of a rationalistic (or natural-law type) social re-foundation project: the ideal conceived of a natural (and nonetheless) normative force of rights as socially independent and pre-institutional; rights were *potentially* opposed to *power* (and had also been seen as a revolutionary weapon³). What emerged instead was a vague reconciliation of reality under a unitary and self integrated paradigm of law: it was the need to recognise (objective) law as a *neutral* instrument. Even power legitimacy changed consequently its face and, as Max Weber wrote, it no longer depended on (controversial) substantial, "material" reasons, but on the recurrence of typical 'formal' characters⁴, which legislative rationality was structurally made of. Legitimacy is based on the *legal-rational* character of modern State. "Law" is first of all a structure of

¹ See of course J. Locke, *The Second Treatise of Civil Government*, in Id., *Two Treatises of Government* (1690), P. Laslett ed., Cambridge 1960, § 6, p. 289. and *passim*. But also, emblematically, the *Declaration of Independence* of 4 July 1776: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness".

² Cf. N. Bobbio, *Il modello giusnaturalistico*, in N. Bobbio, M. Bovero, *Società e stato nella filosofia politica moderna*, Milan 1979. Obviously, I must stress that what I call 'substantialism' is, in this case, a characteristic of the natural law doctrine of Aristotelian inspiration as well.

³ I am referring once again to N. Bobbio, *The Age of Rights*, translated by A. Cameron, Cambridge 1996 (see esp. the essay on the French Revolution).

⁴ According to Max Weber 'formal rationality' means a rationality which is absolutely indifferent towards any material postulates: ("emotionally colored ethical postulates") which would constitute for legal decisions a danger and an intrusion by substantive law; he also highlights the 'formal' character of law in modern State. M. Weber, *Economy and Society*, edited by G. Roth and C. Wittich, vol. II, Berkeley 1978, pp. 886. As to the "anti-formalistic tendencies of modern legal development", see, *ivi*, pp. 882 ff. Cf. my *Legittimità, legge e costituzione*, in "Sociologia del diritto", 2/1993, pp. 123-70.

predefined rules, rules whose function is due to the extent that they are 'resistant' (or insensitive) to the goals pursued from time to time, and are unassailable by them.

This *rarefaction*, *i.e.* making substantive ideals *external* to the definition and function of law as such, has also marked the *science* of law: especially in the pre-totalitarian period, the main moves aimed at avoiding the pressure of ethical and political contrasts on the structure of legal orders, to make their 'form' immune to manipulations and arbitrariness (a part from the ideological connotations).

From this viewpoint, *reason* and *law* do not intervene on ends, but through formalization are valued as instruments of compatibility between "polytheistic" ends and the horizon of civil coexistence and peace: unfortunately, this 'technical' reductionism of law and reason did not always prove to be, in the concrete, an efficient means to control and safeguard even itself or the rule of law⁵.

The *formal* rationality of law develops through a 'set of norms' which do not depend on anything else and impose themselves, as in Kelsen, as an autonomous *object* of knowledge. This version of "formal" rationality ends up in some way emptying itself, until it coincides, regardless of intellectual intentions, with that merely "instrumental" rationality, in Max Horkheimer's words,⁶ which was the target of XX century criticism of (legal) positivism: a place where justification or foundation of 'forms' on political or ethical ground seems to be lost.

When reading Weber's sociology of law, on the other hand, what emerges is the clear enhancement of an aspect of law: inherently, norms are something that *must be followed*. Their "ought" is unrelated to external sources, is part of overall State-bureaucracy enduring, and as far as norms are concerned, an existing rule is not the theatre for goals assessment.

After all, this decisive aspect brings as its reverse side that the legal order emerges as a sort of differentiated system, which may be studied separately: it resists invasive factors and (from the neutral vision) does not just surrender to power. From this angle, law is and must be *this* generality that *survives* the contingent purposes of majorities and policies. Therefore norms, *not* ends.

But looking at the institutional development of the pre-constitutional, "legislative" State in continental Europe, as far as individual rights are concerned, they are no longer something that can be defined autonomously (on their own standing). In comparison to the great ideality of the Enlightenment, the affirmation of the State in continental Europe comes to raise the issue of the incompatibility between an extra-legislative foundation (morality, natural-law based) of individual rights on the one hand, and the original nature and supremacy of the will of the State (conceived as a "macro"person) on the other hand. After Gerber, Laband, Jellinek, then, there is no way to 'recover' some sort of originarity and autonomy of such individual rights (in the framework of neo-state positive law, they stemmed, could legally exist and were only justifiable as State's legislative sovereignty *self-obligation*).

As to the legal science view, the problem of individual rights is then influentially conceived of against the background of 'pure theory' (Kelsen): and here it goes beyond, and coherently fades away in the simple horizon of 'objective' law.

⁵ Force, abuse and then totalitarian regimes in the 20th century made an aberrant use of law. Naturally this does not mean that German National Socialist irrationalism and decisionism should consider the 'normativism' of which Kelsen was the greatest theorist, as an antagonist and incompatible conception.

⁶ Cf. among the many references, M. Horkheimer, *Eclipse of Reason*, New York (Continuum Int.) 1974 (see esp. the chapter "Means and Ends").

It is worth stressing that this outcome can be seen with reference to both normativism⁷ and legal organicism *à la* Larenz, in Germany⁸. But it is normativism – which has no totalitarian sympathies, but rather belongs in democratic intellectual inspirations, as in Kelsen – that represents the most credible indicator of the review of individual rights: simply because such a normativistic review does not correspond at all to the will of their elimination, nor to the submission of individuals or minorities to the crude “value”- based exercise of pure force. And it persists over time: its demystifications concern both the thesis of a priority of individual rights over objective law, and the definition of the *rationale* of rights of the individual as the “power of the will”, or the protection of his interest by the legal order⁹.

Moreover, among other factors that can be identified against the background of this 20th century scenario, there is a brand new, emerging awareness of the *artificial* character of law: this is the echo, in many cases, of a perception according to which what matters most is not the substance but the *function*¹⁰.

The Kelsenian *reductio* of subjective rights to objective rules ends up in a clash against the personification of entities, legal persons, rights, the State itself, and against the assignment of alleged concrete substance to what is nothing more than a stratified *factio*: *i.e.* to what in any case does not depend on some sort of underlying 'material' reality, but rather on the existence of legal norms. At the end to follow Kelsen was- if a metaphor can be used- to 'decalcify the fetish', to reabsorb the metaphysical surplus of the law. This just meant eventually explaining the legal theoretical “figures” and concepts without reference to some either illusory or juridically irrelevant ontological *Sein*.

As far as this issue is concerned, there are certainly other concomitant circumstances that contributed to fulfilling the process of rights 'dematerialization': among these, an influent common factor is represented by the complex epistemology of neopositivism: the latter is capable of imposing the study of law the great division between metaphysics (*delenda est*) and science, through criteria of truth based on the verifiability principle and influenced by some ontological forms of realism¹¹.

⁷ Hans Kelsen perceived the dualism between “subjective” rights and objective law as an artificial clash between "principles", a clash that is totally unfounded except possibly on ideological grounds, since rights *are* “objective law”: H. Kelsen, *Introduction to the Problems of Legal Theory*, translated by B. Litschewski Paulson and S.L. Paulson, Oxford 1992, pp. 37 ff. (It is “a translation of the first edition of the *Reine Rechtslehre* or *Pure Theory of Law*”, 1934).

⁸ About this issue, M. La Torre, “*La lotta contro il diritto soggettivo*”. *Karl Larenz e la dottrina giuridica nazionalsocialista*, Milano 1988.

⁹ Kelsen criticises the German “Historical school”, such as Blackstone's theses in the *Commentaries*, with reference to the priority of 'absolute' rights that logically precede the objective law, and confutes both B. Windscheid and R. Jehring. Cf. Hans Kelsen, *General Theory of Law and State*, transl. by Anders Wedberg, New York (Russell & Russell) 1961, pp. 78 ff.

¹⁰ Starting for ex. from Hans Vahinger, *The philosophy of 'As if': a system of the theoretical, practical and religious fictions of mankind* (1911), transl. from the 6th German ed. by C. K. Ogden, London (Routledge & K. Paul), 1965.

¹¹ See A. Pasquinelli (a cura di), *Il neopositivismo*, Torino 1969. The ideas of the Vienna Circle are mentioned mainly through M. Schlick, R. Carnap, L. Wittgenstein of *Tractatus logico-philosophicus*, transl. by D. F. Pears & B. F. McGuinness; with the introduction by Bertrand Russell, revised ed., London (Routledge and Kegan Paul) 1974. With reference to neopositivism, one cannot neglect Bertrand Russell (*Logic and knowledge: essays, 1901-1950*, edited by R. Ch. Marsh, New York (Macmillan) 1956; see also W. V. O. Quine, *From a Logical Point of View: 9 logico-philosophical essays*, II ed., Cambridge Mass. (HUP) 1980) for the beginning of the turning point towards post-positivism, further elaborated by Lakatos, Kuhn, Feyerabend.

These peculiar trends are confirmed, beyond Kelsen, and not by chance, by *legal realism*: also (Scandinavian) legal realism believes¹² that rights are not at all 'strong' contents, but rather imaginary hypotheses, with no empirical referent. This holds true despite the admission that, empirically speaking, they end up corresponding to socially useful beliefs or to expressive or representative techniques of legal order¹³. In the general theory of 'realist' law, individual rights are an elaboration that does not derive from anything 'effective'. Therefore, even legal realism neo-positivist premises do not 'help' in concentrating on the potential of individual rights and for several reasons act in favour of their de-construction. Alf Ross demystifies metaphysical conceptions of rights, although remarkably he defends their existence against the radical attacks launched by Lundstedt or Duguit. In fact, it is realist empiricism that renders the autonomy of rights, the recognition of some sort of essential content and even their reference to real *norms* impossible to propose.

Indeed, realism recognises *facts*, not norms, as these latter are seen as descriptive texts of habits or predictions. In this general view of law as a set of mere regularities of behaviour, the binding 'sense' we attribute to norms, which is impossible to reduce to 'facts', is then lost. Realism ends up equating subjects submitted to a legal order to 'external' observers: each of them can only account for the behaviours of the other members of that order and for the habits, including linguistic ones, they have adopted. It is therefore impossible to say that such behaviours *depend* on norms, and that there is someone able to take on some critical-reflective stance vis-à-vis norms, or vis-à-vis the ends and the choices that legal norms presuppose¹⁴.

With legal realism, the purpose of theory is not just (kelsenian) overcoming the metaphysical content of individual rights, but turns into the wider and anti-normativistic criticism of the metaphysical character of *normativity in general*.

There is therefore a double emptying process: the first concerned rights as referring to some presumed *qualitas essentialis* pertaining, more or less ontologically, to the individual, the legal subject, the person. The second concerned rights (not as a "substance" but also) as norms: even if they reduce themselves to norms, this would not help constituting their binding nature, because the selfsame concept of legal order normativity is, in itself, imaginary, through realist lens.

As I mentioned before, the issue is the impossibility to reduce individual rights *and* norms to scientifically verifiable experiences, the impossibility to reduce them to 'data' that can be verified, according to the neo-positivistic paradigm. If we remain within that paradigm, the assumption that norms are not 'facts' seems to prevent any further analysis of legality. Realism offers a deconstructing account for the 'ought', i.e. for the obligatory accent or dutifulness, which obviously, cannot be inferred from the simple external observation of facts. However, as Weinberger wrote, it makes a difference whether the delivery of a sum of money is the fulfilment of an obligation, the protection of an

¹² K. Olivecrona, *Law as Fact* (1939, but riv. 1966), London (Stevens) 1971; A. Ross, *On Law and Justice*, Berkeley (Univ. of California Press) 1974; Id., *Directives and Norms*, New York (Humanities Press) 1968.

¹³ Cf. for ex. A. Ross, *On Law and Justice*, cit., pp. 170-5; pp. 183 ff.; pp. 186 ff.

¹⁴ Hart's criticism to this conception of norms is well known. On the opposite, Hart writes that the existence of norms can be proclaimed by a point of view that is external and, thus, purely descriptive of a state of affairs; but validity of norms is an internal assertion, which means that it assumes a critical reflexive attitude about the normative character of the practices used, understood as complying with norms (H. L. A. Hart, *The Concept of Law* (with a *Postscript* edited by P.A. Bulloch and J. Raz), Oxford 1997², pp. 108 ff., especially pp. 111-112.

individual right or an extortion, or even something completely irrelevant from the legal point of view. The reality of 'norms' undoubtedly goes beyond the observation of 'external' reality¹⁵.

Against the background of this conception, Kelsenian normativism appears surprising in its Kantian complexity. It reaffirms, indeed, the cognizability of norms as 'objective' data, although they belong to a different normative world (*Sollen*), vis-à-vis the reality of being (*Sein*) and are submitted to another principle (normative attribution, *Zurechnung*) that differs from natural causality. The cognizability of law is therefore safeguarded by a duplication in the 'real' universe. Normative attribution is man made, it establishes a dutifulness and an obligation: this is exactly what can be analysed by 'pure' theory, i.e. theory free from any contamination due to ethical postulates, social facts, and value assumptions that Weber (too) would have called 'material'¹⁶.

This new framework leads to some 'further' consequences:

1. in order to be cognisable, rights *must* be norms (if they were not, as Kelsen claims, they would be uncontrollable metaphysical hypostases);

2. since norms define obligations and regulate the exercise of force, there can be no rights unless they present themselves as an aspect of norms, and in particular as an aspect visible only 'in negative': objective law imposes obligations, it does not create individual rights as protected *interests* (*à la* Jehrings), it simply establishes forms of action (i.e. legal *protection*). An individual right *is* the negative of somebody else's corresponding duty and of the related legal action (to claim its fulfilment).

3. obviously, an individual right does not exist outside the set of norms – objective law- that induces us to identify it.

If rights are norms, they can only be 'pure' objects, whose scheme and structure can be studied as form, regardless of their material content, the ends which they serve. But through reducing rights to norms, and concentrating on the structure of norms, Kelsen also does something more. For sure, he has defined individual rights by avoiding any particular connotation (e.g. relating rights contents to elements such as power, will, protected interests, and so forth). But, by doing so, he has also rejected any definition, even a *formal one*, that makes reference to their *substance*.¹⁷ Kelsen does not say that having an *individual* right means being the holder of some sort of worth-protecting goods, or that rights correspond to interests to be sustained.

There is no room for acknowledgment of rights' point as granting the autonomy or the choice, in the sense of Herbert Hart¹⁸, nor any other substantive social or economic interest of the individual, in the sense of Neil Mac Cormick¹⁹ or Joseph Raz²⁰.

¹⁵ O. Weinberger, *The Norm as Thought and as Reality*, in N. MacCormick, O. Weinberger, *An Institutional Theory of Law*, Dordrecht 1986, p. 37.

¹⁶ I personally favour Weinberger's and MacCormick's ontological theses, which make reference to the existence of norms in a different way from Kelsen, i.e. by assuming that norms possess an 'ideal' reality *as well as* an institutional, social reality: this double characteristic, of which perhaps Kelsen does not consider the second aspect, represents what, according to Weinberger, is the positivity of law itself, which cannot be presupposed by a theory that only deals with the 'ideal' aspect. In this sense, the reality of norms has a complex nature and an institutional meaning: cf. *ibid*, pp. 37 ff., 41 ff., 44 ff..

¹⁷ The individual nature of rights is justified, he writes, "only if the application of the legal norm, the execution of the sanction, depends upon the expression of the will of an individual directed to this aim": therefore, the 'subjectivization of law', implied in the concept of right, is justified only if law serves individuals, because it indicates "the presentation of an objective legal norm as a subjective right of an individual" (Kelsen, *General Theory* cit., p. 83).

¹⁸ See for ex. H. L. A. Hart, *Are there any natural Rights?*, in J. Waldron (ed.), *Theories of rights*, Oxford 1995, p. 82.

The question here is not dealing with *which* specific values individual rights must incorporate (a traditional issue for human rights, where values such as the inviolability of life, freedom and even property are recommended; or is straightforwardly proposed a set of goods considered essential for human beings – cf. J. Finnis). The question regards whether defining rights by making reference, as in Kelsen, exclusively to the *how* they are protected, or to the *what* they do protected, i.e. to what individual rights are *per se*.²¹ It is as much consequent as revealing that for Kelsen (as legal theorist), fundamental rights (despite his elsewhere neatly apparent liberal democratic belief) would not be *condicio sine qua non*, the essential element for the existence of a legal order. It is not by chance that the Constitution itself is for Kelsen essentially ('in the material sense') an organisation of powers and procedures, consisting of “those rules which regulate the creation of general legal norms”, hence a regulated set of sources and 'forms'²².

Nonetheless, to day (and even then, as with Weimarian Constitution or with the Kelsenian Constitution of Austria) liberal democratic constitutions do incorporate and enunciate values, principles of justice, and fundamental rights. They state purposes and enhance substantive limitation as well. They are meta-norms concerning also the overall 'ends' that (legislative) rules-production can legitimately pursue and should be constrained by. But this aspect amounts to a 'fact' that in Kelsenian doctrine appears as such contingent in itself, unrelated to what connotes and safeguards the conceivability and the autonomy of a legal order.

2. The appendix. Rights and 'norms'

Kelsen is a prominent protagonist of the long confrontation between individual rights and objective law²³; instead of starting from the subjects, the individuals, the juridical vantage point recommends to take the perspective from the legal order. Instead of believing in rights as pre-institutional entities or moral resources, a pre-legal expression of autonomy, and similar pre-understandings, we must commence from the legal system.

Taken in itself this viewpoint can be the relevant one for lawyers and legal theorists, perhaps even inevitably, provided that it should not result in the withdrawal from critical stance, nor drive them into the unsolvable and sterile dilemma, positive law vs. natural law. If we adopt the legal order perspective we don't have to fall into the ancient confrontation as to the priority between rights and legislation, which was at stake for centuries in Europe. The historical contrast between 'fundamental' rights as 'external' (extralegal) sources and fundamental rights as the product of norms can be now seen as a legitimate divergence about the way in which legal orders *take shape*. *But once this is said*, today the same issue is logically translated into the self containment of the legal order, it presents itself differently, affecting the *boundaries* of the positive legal order, vis-à-vis natural law and morals (as I will

¹⁹ N. Mac Cormick, *Taking the “Rights Thesis” seriously*, in Id., *Legal Right and Social Democracy*, Oxford 1982, p. 145 and pp. 148 ss. And Id., *Children's Rights: A Test Case for Theories of Rights*, in ARSP, 62, 1976, pp. 309 ss., pp. 313 ss.

²⁰ J. Raz, *Legal Rights*, in J. Raz, *Ethics in the Public Domain*, Clarendon Press, Oxford 1984, and Id., *The Morality of Freedom*, Clarendon Press, Oxford 1986, ch. 7.

²¹ But, as we know, Kelsen highlights mostly the fact that rights have a legal action content (the lawsuit) depending on another subject's 'logically' related obligation.

²² Kelsen, *General Theory* cit., p. 124.

²³ a contrast highlighted in a well known essay by Riccardo Orestano, *Diritti soggettivi e diritti senza soggetto*. *Linee di una vicenda concettuale*, in “Jus”, 1960 XI, fasc. II, pp. 149-196.

also come to say later on). But from the legal point of view, rights are and can only be 'positive (law)'.

Natural law theorists like Locke or Kant also believed that moral claims needed a legal translation. The imperative *exeundum e statu naturae*, can only be understood from this perspective: providing solidity to what is 'precarious', establishing the 'perentory' character of the civil-legal state as the measure of reality for natural and/or rational rights. And we could go further. This same line of thinking can also be found (beyond Kelsen's antinaturalistic 'form') in the most influent contemporary apology of individual rights by Ronald Dworkin (who does not accept to be considered a supporter of either natural law or positive law doctrines). Dworkin too believes that a constant interpretive endeavour must be pursued: showing that what is believed to be, from time to time, a 'moral' right of individuals, is already and always *positive* law. The *one right answer* by the interpreter must be explained, after all, also as the correct answer in the given framework of law, stemming from the best theory of the law, even despite being firstly urged through its moral substance.

The fundamental rights, then, could not certainly lack legal positivity if, as I will explain later, they are considered fundamental *for* a legal order and not only for some sort of ethical, religious, moral, or political conception.

However, if fundamental rights are positive law, it is not possible to follow Kelsenian de-construction up to its uncertain outcome, which dissolves what individual rights are into how they are guaranteed (through first order guarantees, i.e. the correlative obligation and second order guarantees, the judicial remedy). While those guarantees are part of the effectiveness of rights, they are not what connotes them.

Lawyers in continental Europe, familiar with legal positivism, found a radical change of paradigm in Ronald Dworkin's work. It is known that Dworkin's polemical target is not Kelsen's positive law vision, but Hart's, and that his criticism against Hart derives indeed from his attempt to reply to what Dworkin considered insurmountable *impasses* of normativism, with special reference to those *hard cases* in which the rigidity of positivism rule-book conception seemed to deprive the interpreter of any criteria to reach fitting solutions: leaving thereof the areas of "penumbra" without any consistent normative guidance. This critical genesis of Dworkin's work is a testimony to the importance he attributes to the validity of a solution from the legal point of view.

Unlike Kelsen, obviously Dworkin 'thinks' the legal order in terms of its full manifestation of inspiring principles, historical values, commitments to justice. In a sense, law is *justice*. And the (American) Constitution has been conceived as the moral *humus* for individual rights.

In fact, if Kelsen goes as far as *emptying* rights to reveal them as norms, Dworkin certainly tries to give their 'substance' back to them. Now, this happens, though, exactly by resorting to a straightforwardly anti-normativistic distinction between rights and norms (rules): the autonomy and belonging of 'moral' rights in the legal order can be obtained, in the end (in Dworkin), as we shall see, by *opposing* rights to norms, and therefore by criticising the identification of rights as *legal norms*, in particular in the sense of legislative rules.

Contrary to Kelsen's statement, if rights were norms (in the mentioned sense), they would lose their ontological status. Dworkin believes that rights have a sense because they can be claimed against the State, and in a way their point is to protect each of us from its policies and from majority rulings. While the liberal accent of both is beyond contestation,

Kelsen, instead, thinks that norms *are* the protection; therefore, "there can be no legal rights before there is law"²⁴.

3. Rights and 'values' (deontological vs. teleological?).

This theoretical story of rights through the "norms and substance" lens proves to be meaningful in the light of the issue here at stake: as I stated it elsewhere, "fundamental" rights are norms and safeguard certain goods related to individuals. Fundamental rights are part of the core choices on which the legal order is socially based²⁵.

Their general social *importance* is a function of their inherence to various "dominions", of their presence not only in legal culture, but also in the moral order and in the different views of political justice, belonging in many of what John Rawls would call "comprehensive" conceptions of good²⁶, or Michael Walzer the "thick", profound conceptions of morality²⁷. Nevertheless, they are also among the "essential", "constitutive" elements of a Rawlsian area of "overlapping consensus", that is to say, the area that identifies the requisites of political justice towards which the quite disparate ethical beliefs may converge sharing some thinner and morally universalized propositions.

It is this dual belonging that maintains rights: in terms of their substance, they are an ethical expression, of a worldview or of a culture, but at the same time they are beyond it, the elevation of a *moral* claim for justice according to the measure of universalizability (and thus of rationality in the "formal" Kantian sense).

With reference to "fundamental" rights it seems that the two distinct sides - the *deontological* (norms' "*ought*" in general) and the *teleological* (the axiological indicating purposes and ethical choices) actually emerge. And, in effect, it is not needed for legal positivism to ignore the teleological substance of norms, while the latter does not necessarily exclude the deontological character that rights, as forms of justice, possess. As Hart or Mac Cormick have written, law is ultimately always a social practice that does not stop with regular obedience, but is enlightened by the awareness of legal obligations in terms of conscious reasons for action. It has been stressed that there is a complex edifice behind this *reflexive* attitude: the teleological background of the law (the purposes and values it supports) is connected to its deontological nature (justice and the generalizability of its precepts), as law stands "on teleological and value-oriented foundations"²⁸.

As Neil MacCormick believes, Hart cannot deny that, from the point of view of one who feels he is a "participant" with respect to a legal order's fundamental rules, "from the internal point of view rules must either constitute or subserve values"²⁹. If law is not reduced (as in the positivist tradition that dates back to Bentham and Austin) to the mere

²⁴ Kelsen, *General Theory* cit., p. 79.

²⁵ I have analysed at length these theses in, *L'autorità dei diritti. I diritti fondamentali tra istituzioni e norme*, Roma-Bari, Laterza 2002.

²⁶ Cf. J. Rawls, *Political Liberalism*, New York 1993, especially pp. 154 ff.

²⁷ Cf. M. Walzer, *Thick and Thin. Moral Argument at Home and Abroad*, Notre Dame (In.) 1994.

²⁸ This opinion was expressed by Ota Weinberger, *Beyond Positivism and Natural Law*, in N. MacCormick, O. Weinberger, *An Institutional Theory of Law*, Dordrecht 1986, p. 113. From a point of view of the rôle to be accorded to values, within a relatively closed system such as the legal one, consideration should be given to the circumstance - singularly significant, yet often forgotten by neo-constitutionalist critics - that Hart's reduction of law to social practice and thus the strict correlation between effectiveness, validity and law, cannot be assimilated to a simple habit of automatic obedience.

²⁹ N. MacCormick, *Law, Morality and Positivism*, in MacCormick, Weinberger, *An Institutional Theory of Law* cit., p. 133.

habit of obeying the sovereign, it cannot be explained solely by means of "external" descriptions, but requires that someone adopt the attitude of the person who accepts the normative system³⁰. It also requires a critical interpretative approach, intimately permeated by (positive) value judgements: thus the "hermeneutic" aspects connected to norms will represent values, the theory of norms "is neither value-less nor therefore valueless" and "important values are *eo ipso* moral values"³¹.

This connection does not oblige us to translate the study of law into the study of values (a result that a "constitutionalism by values" ultimately would risk achieving). It simply indicates that the deontological character of legal rights lives through some shared social meanings. In other words, we cannot say that a normative system exists if no-one is prepared to follow its fundamental norm *because she accepts its teleological-axiological foundation (which is always substantive and determined)*.

As to the contrary, Kantian model would bring to single out the deontological strand of rights.

The logic of the precepts of (moral) legislation as we find it in the Kantian philosophy is often referred to as a parameter of the structural otherness of rights and of moral principles compared to ethics and material values. In this model, the "law" only indicates the *action* that *must be* taken "objectively", regardless of the reasons for taking it (which may well be subjective and plural). This neutralization (or, also, this formal setting aside) of the problem of the purpose³² in exchange for the clarity of the *ought to be* is certainly at the root of modern so-called "formal" law and of the differentiation of law. But it is not in question here. It lies at the root of what is called the birth of the "legal category", which arose by scission (secularization) from the original sacred (ethical, religious, natural and legal) unity within which the "ought" (the answer to 'what should be done?') was classified directly under the heading of ultimate values and descended from them analytically, even before depending on the *emanation* of "legal" norms. According to Kant, what it is right to do does depend on the pure *rationality* of precepts *a priori* form: and the latter does not rest upon conforming to any particular ethics (or view of goodness and happiness). "Jus strictum", as a definite object of thought, is for Kant that which "is not mingled with anything ethical"³³.

Nevertheless, this separation between the (universal) norm and values is the most delicate theme. Generally speaking, the *test* - of whether a given precept can be elevated to the status of universal law - can hardly be conducted if it is not clear in which reality this is supposed to take place³⁴. The precept's universal character can be conceptually

³⁰ Ivi, pp. 130 ff.

³¹ Ivi, pp. 133-34.

³² I. Kant, *The Metaphysic of Morals* (1797), in *Practical Philosophy* cit., p. 387 (*Introduction to the Doctrine of Right*): in legal relations "no account at all is taken of the *matter* of choice, that is, of the end each has in mind with the object he wants".

³³ Ivi, p. 389. "Jus strictum" is "das strikte Recht" ("strict law"). The English edition gives good reasons for translating as "strict right" (see, ivi, pp. 357-9).

³⁴ Suppose the maxim that it is permissible to appropriate property of others if left unused: how can I consider that this maxim can be raised to the status of *universal* law, quite apart from my own ethical beliefs, my political ideas or my personal religious faith, without judging the material context, without establishing objectives to pursue? A similar problem was raised by Hegel about Kant's celebrated argument of the deposit: given the maxim on using all secure means to increase one's own substance, the principle according to which everyone may deny a deposit "which no one can prove has been made", is not acceptable for Kant: it is actually self-destructive, because if it were followed, there would be no more deposits at all (nobody could rely on restitution). The principle cannot therefore be raised to the status of universal law (I. Kant, *Critique of practical reason* (1788), in *Practical Philosophy* cit.,

distinguished from its teleological character (the purpose of the rule), but cannot be institutionally and socially *separated* from it, as no test of universalization can be conducted, except in an ethical environment in which it is clear which good is to be safeguarded³⁵.

Juergen Habermas further defended the deontological character of norms, and of rights in particular. Following Ronald Dworkin, Habermas rejects their teleological meaning, so to make impossible for them to be liable to comparative appraisal with regard to collective choices. Therefore, rights escape "cost-benefit analysis"³⁶ and cannot be set to compete against "values" because they are situated on a different plane. Rights would thus respond simply to the *what to do* and undergo a mere scrutiny of universalizability, according to Kant's moral *test*. I might also add that, under this view, they are therefore a question that has already been decided, not one that is still open.

As Habermas insists, "[a]s soon as rights are transformed into goods and values in any individual case, each must compete with the others at the same level for priority. Every value is inherently just as particular as every other, whereas norms owe their validity to a universalization test"³⁷. Thus his main thesis becomes: "The conceptual transformation of basic rights into basic goods means that rights have been masked by teleology, concealing the fact that in contexts of justification norms and values take on *different roles in the logic of argumentation*"³⁸. Legal norms must be reciprocally coherent and may not contradict each other, while values may tend towards mutual conflict; values (for *us*) are an expression of particularism, principles and norms (for *all*) are an expression of generalizability. And dutiful, "commanded" (deontological) (norms) is not always the same as *advisable*, "recommended" (values). Just on this premises, it is possible to constrain the Courts in their discretion when adjudicating rights.

Indeed Habermas underestimates the fact that, when some norms are *fundamental* pillars of a system and operate deontologically, they no longer function as "recommended

p. 161). Nonetheless, Hegel wrote: "But if no deposit existed, what contradiction would there be?". G.W.F. Hegel, *Über die wissenschaftlichen Behandlungsarten des Naturrechts, seine Stelle in der praktischen Philosophie, und sein Verhältnis zu den positiven Rechtswissenschaften* (1802-1803), in *Gesammelte Werke*, vol. 4: *Jenaer Kritische Schriften*, herausgegeben von H. Buchner und O. Pöggeler, Hamburg 1968, p. 436. Hegel returned to this point in his *Phenomenology of Spirit*, translated by A.V. Miller, Oxford 1977, p. 262, underlining that the problem depends exclusively on an "ethical disposition", failing which, no form of illegality can be recognised. In particular, Hegel wrote that the deposit "is the property of someone else"; but if I should keep it for myself, "I am not in the least guilty of contradiction; for then I no longer look upon it as the property of someone else", and "[a]lteration of the *point of view* is not contradiction". He concluded: "It is not, therefore, because I find something is not self-contradictory that it is right; on the contrary, it is right because it is what is right. That something *is* the property of another, this is fundamental; I have not to argue about it, or hunt around for or entertain thoughts, connections, aspects, of various kinds".

³⁵ It seems to me that if he were not to acknowledge the importance of this aspect of the question, even Habermas would not be able to argue - as he did when dealing with a comparable topic - that Hegel's objection can be overcome (cf. J. Habermas, *Morality and Ethical Life: Does Hegel's Critique of Kant apply to Discourse Ethics?*, in Id., *Moral Consciousness and Communicative Action* (1983), translated by Ch. Lenhardt and Sh. Weber Nicholsen, Cambridge 1990, p. 214, footnote); and that in particular it is overcome when we admit that the maxims of action do not come from the "philosopher", but from "life" (Habermas writes: "The content that is tested by a moral principle is generated not by the philosopher but by real life", *ivi*, p. 204), in other words they are "taken up by law-testing reason as empirical givens" (*ivi*, p. 214, footnote), and if they are controversial they must be solved by the "participants", so that the solutions appear to be "just" for "everyone", rather than simple preferences due to a singular conception of "the good life" (*ivi*, p. 204).

³⁶ Habermas, *Between Facts and Norms* cit., p. 260.

³⁷ *Ibid.*

³⁸ *Ivi*, p. 257.

values", but as *given values*, which makes them founding and non-negotiable, unlike all the others.

What may appear to be deontological from *outside* (and indicates a prescription to which obedience is owed, apart from any new appreciation of its worthiness), is seen from the *inside* also as the interpretive consolidation of an acceptable "value": one that cannot be forsaken and constitutes the irreplaceable foundations of a legal order. Rather than a contradiction between the universality (dutifulness) of a norm and the conditioned character (advisability) of values, then, there is a balance that descends from the transformations that have taken place in the constitutional democracies.

Even if indebted to Dworkin, Habermas' thesis should not be completely assimilated to the dworkinian philosophy, at least with reference to the theoretical-institutional context in which the deontological priority of rights belongs. Habermasian "system of rights" has deontological force but it does stand co-original with democratic sovereignty, so to govern from its roots its procedural structure. The system of private autonomy and the public autonomy do support each other reciprocally³⁹. Nevertheless, in Dworkin, they oppose each other in principle and there is a sort of separation of (moral) rôles, matching the separation of powers: the behaviour of the legislative majorities (belonging in public autonomy) only compete with individuals' moral rights (private autonomy) and are never congruent with them. Paradoxically, though, it is because of this same (antagonistic) division of rôles that Dworkin can support what is dear to Habermas: namely, that there is a difference between acting according to generalizable normative principles and acting according to local preferences (or according to "principles" rather than "policies", in different words).

4. Legal positivism and the status of Fundamental Rights

It is not just through a sort of teleological sterilization that is possible to offer rights their priority. The objective of pursuing rights cannot be achieved just through a moral-rational conception of rights themselves. This leads to acknowledge the value of an "institutional" perspective on fundamental rights. But before addressing the institutional sense of fundamental rights (which will also be made in the next paragraph) it is nonetheless necessary to recall how their belonging in the rule of recognition can be framed, even under the perspective of the legal theory.

To begin with, for (some) rights to be "fundamental" (which points to their significance being interpretatively settled), it is different from just being inserted in a constitutional text: these rights should become criteria internal to the selective practice of the legal officials, to the class of lawyers, to the legislator's political choices, to the institutional organs, and have a stance in the wider public sphere (as large as its democratic statute would entail). As control criteria in the rule of recognition of valid norms, they are part in the meta-norms on the production and merit for institutional activities and rulings to be legitimate.

It is clear that my reference to the concept of rule of recognition does not in itself exclude (but allows) the conceivability and availability of *substantive* criteria of recognition, nor their being part of the controllable and consistent normative rationality that

³⁹ This leads Habermas, to take an example, to appreciating the fact of the social elaboration of rights: despite creating a risk of circularity between rights and democratic choice, this is the basis on which it comes the ethical loading of the law. J. Habermas, *Struggles for Recognition in the Democratic Constitutional State*, in Ch. Taylor (ed), *Multiculturalism: Examining the Politics of Recognition*, Princeton 1994, pp. 122-3.

reconstructs an "ethical legal culture": of course, this rationality is not an individual gift and exceeds a purely autocratic or rigidly "conservative" view of judicial activity. Under the traditional view of legal positivism, this statement raises some essential concerns, as regards to the role played by a norm's moral value as a condition of its validity. Dworkin criticised Hartian legal positivism dubbed the "separability thesis", since his rule of recognition enables to "recognize" which norms belong to the legal system on the base of their origins, of their "pedigree"⁴⁰ and thus simply of their *source*. Of course, this allows for criticism both of the conservative and the "rule-based" character of Hartian theory: the latter prevents from understanding how "principles" play a decisive rôle and moral arguments are capable of acquiring binding force. Similar criticism to legal positivism has also been reiterated by a series of "neo-constitutionalist" theorists, who have worked mainly from a continental European standpoint to develop the idea that principles and values tend to be incompatible with positive law doctrine and have drawn the lines of a conflict between neo-constitutionalist perspectives on the one side and "legalistic" perspectives on the other⁴¹. Nonetheless, it seems that some excessively simplified theses have been attributed to the Hartian doctrine of positive law. One such claim is that which would reduce the rule of recognition to a mere reference to the sources of statute enactment and thus, in the English legal order, to the formula "What the Queen in Parliament enacts is law"⁴². In reality, in constitutional states, legal positivism would have no difficulty in agreeing nowadays with the importance to be ascribed to principles and not only to "rules", nor apparently, albeit in different ways, in accepting the rôle played by moral considerations. One of the crucial passages with regard to this is the progressive clarification in the definition of the "rule of recognition".

Even Hart confirmed that this "rule", unlike other rules and norms (which are "valid" from the moment they are enacted and even "before any occasion for their practice has arisen"), is a "form of judicial customary rule existing only if it is accepted and practised in the law-identifying and law-applying operations of the courts"⁴³. Hart then admitted that he may not have attributed sufficient importance to the rôle played in legal reasoning by principles or other relatively open standards, but concluded that there is nothing to prevent that rôle from being accepted without the need, as Dworkin would have it, to deny the very doctrine of the rule of recognition⁴⁴. Accordingly, he stated, he argued on more than one occasion that in some "systems of law, as in the United States, the ultimate criteria of legal validity might explicitly incorporate besides pedigree, principles of justice or substantive moral values, and these may form the content of legal constitutional restraints"⁴⁵.

⁴⁰ R. Dworkin, *Taking Rights Seriously*, London 1978², pp. 17 ff. and *passim*.

⁴¹ R. Dreier, *Konstitutionalismus und Legalismus. Zwei Arten Juristischen Denkens im demokratischen Verfassungsstaat*, in E. E. Dais, S. Jorgensen, Ehr Soon Tay (eds.), *Konstitutionalismus versus Legalismus?*, Beiheft 40 of "Archiv für Rechts- und Sozialphilosophie", 1991; R. Alexy, *Zur Kritik des Rechtspositivismus*, *ivi*, 37, 1990; and Id., *Rechtssystem und praktische Vernunft*, in "Rechtstheorie", 18, 1987. By Alexy, cf. also *Begriff und Geltung des Rechts*, Freiburg-München 1992. Dworkin made his "neo-constitutionalist" contribution even more unequivocal (if that it at all possible) with *Freedom's Law. The Moral Reading of the American Constitution*, Oxford 1996. Common premises include Dworkin's opposition (Dworkin, *Taking Rights Seriously* cit., pp. 15 ff., 46 ff.) between "model of rules", "plain fact view" on the one hand and "gravitational force" of principles, integrity (*Law's Empire*), the constitutional state, on the other.

⁴² Cf. R. Alexy, *Begriff und Geltung des Rechts* Freiburg (Alber) 1992, p. 38.

⁴³ H.L.A. Hart, *Postscript*, in *The Concept of Law* (with a *Postscript* edited by P.A. Bulloch and J. Raz), Oxford 1997², p. 256.

⁴⁴ *Ivi*, p. 266.

⁴⁵ *Ivi*, p. 247.

Moreover, principles may also be identified by virtue of their "pedigree" (as in the case of "norms": i.e. if those principles are created or adopted by a recognized authoritative source)⁴⁶; while, on the other hand, a rule of recognition may contain further criteria in addition to those of "pedigree"⁴⁷ (in addition to those that refer to the source), criteria of merit for identifying valid norms. These latter, according to Hart, do not escape the rule of recognition, but are actually included in it, although in that case it will select (norms and) principles on the basis of their content⁴⁸.

This is one of several reasons why the theoretical debate between different "positivistic" attitudes is significant when it addresses the manner in which the "boundaries" are drawn around the legal sphere, and especially towards morality. The clearest (and best known) thesis - the source thesis - rules out the possibility that a norm's moral character can be a reason for its legality⁴⁹. While this can also be represented as the "exclusive" thesis, not all legal positivism is "exclusive" in nature. Jules Coleman, for example, insists on the possibility of an "inclusive" positive law doctrine, whose peculiar trait, compared to that of Joseph Raz and his source thesis, is its admission that moral principles can be a legitimate part of legal discourse, even as "binding standards that are part of the community's law in virtue of their merits"⁵⁰, i.e. by virtue of what they prescribe. Of course, "*whether or not morality is a condition of legality in a particular legal system depends on a social or conventional rule, namely, the rule of recognition. [...] If the rule of recognition incorporates no moral principles, however, then no such principles figure in the criteria of legality*"⁵¹. In my opinion, this conclusion complies better than others with the state of things, more accurately reflecting the circumstances in our legal systems, which on the one hand maintain law as a limited field, while on the other introducing "moral" variables which aspire to condition with varying force the very existence of the law.

In particular, an "inclusive" positivism of this kind enables me to repeat that the "substantive morality" conveyed by traditional "fundamental" rights acquires the value of a condition necessary for norms to be legal. This strength of fundamental rights (as of every other provision that can only be determined after considerations of a moral nature) is not "direct", then, as would appear in Dworkin's theory, but is subordinate to the dynamics of the social or conventional (normative) practice to which we have referred as the rule of recognition.

Being the rule of recognition capable of including substantive criteria, fundamental rights are merit parameters to be followed by the relevant legal action of all the institutions. Following a "practice theory" of the rule of recognition – in the Hartian sense –, once we agree to attribute a meta-normative role to fundamental rights, we have *fundamental* rights

⁴⁶ For example, the principle that "no man may profit from his own wrongdoing" is identified, according to Hart, by the "pedigree test", because it has been invoked by the courts in numerous cases (ivi, p. 265).

⁴⁷ Ivi, pp. 264 ff..

⁴⁸ Ivi, p. 265.

⁴⁹ Cf. J. Raz, *The Authority of Law*, Oxford 1979, pp. 47 ff.; Id., *Ethics in the Public Domain*, Oxford 1996, pp. 210 ff., especially pp. 230 ff..

⁵⁰ J. Coleman, *Constraints on the Criteria of Legality*, in "Legal Theory", 6, 2, 2000, pp. 174-75.

⁵¹ Ivi, p. 175. This is the direction taken by W.J. Waluchow, *Herculean Positivism*, in "Oxford Journal of Legal Studies", 5, 2, 1985, when he argued that, if moral principles can be incorporated explicitly in a legal system's rule of recognition, then the validity of a norm X cannot be solely a function of its source, but also of its content, seeing that it must be considered in relation to its potential violation by a principle of justice. Although both the norm X and the "moral" principle depend on having a "pedigree", it "remains, however, that *more* than X's pedigree is relevant in determining its legal validity" (ivi, p. 194).

only as long as they function as "criteria of legality". From this standpoint, the "founding" character of such "rights" does not depend on their being "decided" by some political authority, nor simply on their being included in some catalogue of normative propositions of principle, with a more or less vague semantic spectrum.

From the *descriptive* point of view, this is not tantamount to restoring the choice of fundamental rights to a "*de facto* consensus"⁵². Rule of recognition does not derive from what judges have done, from their mere practice, but as long as it includes substantive principles, it is the complex result, by even tortuous routes, of the progress in *normative ideals*. As criteria of recognition, rights, too, must have this quality of effective normative ideals. In contrast to what may appear, it does not put the moral criteria of validity once more at the disposal of legal doctrines alone, or of courts alone, setting them beyond the reach of other concurring instances. Rules of recognition criteria are not at the disposal of the courts: judges cannot in any legal system *decide* 'on the basis of their own will' which practice of recognition they should follow. They do not choose in the medium term nor they can in an autocratic, isolated, oscillating and random manner: by definition, as they have to operate in terms of generalization submitted to public rational standards⁵³, the criteria of recognition are only such when they function constantly and within margins of acceptable certainty. Which only happens if, rather than a projection of a mere "consensus", they express a filter, a rational and reflexive mediation, which of course is not at the disposal of any power taken alone. This leads to a clarification and to a conclusion: *valid norms* (the same applies also to rights) can be decided and represent the fruit of an artificial system that attributes the force of a practical authority⁵⁴ to the normative source; *fundamental rights* cannot be simply "decided", enacted by some authority or other because, on a par with formal criteria (of sources) or other substantial criteria (of merit), they belong to the rule of recognition of a legal system and thus express a more profound, less "alterable", constitutive practice depending on the normative rationality of the system's social structures.

5. Fundamental rights and the institutional definition

For a right to be "fundamental", even just on a moral plane, we have to conceive of it as endowed with an *ultimate* value, such as we tend to believe in the case of those rights that protect a fundamental interest, for instance life, dignity or the freedom of the individual. It must be an interest that is *not derived* in turn from another (of a higher degree) but one that integrates an ultimate objective, as the welfare of human beings is generally held to be.

⁵² Of course, pluralistic democracies are not even capable of producing something like a "*de facto* consensus"; instead, consensus is a regulative ideal. But then the very idea of consensus as a factual convergence must be suspected (as in the Pilate style appeal to people: see lastly, G. Zagrebelsky, *Il "Crucifige" e la democrazia*, Torino 1995)

⁵³ F. Schauer, *Giving Reasons*, in "Stanford Law Review", April 1995, pp. 633 ff., 656-59, shows how, even in a case-by-case decision-making scenario, the justification for decisions, which consists of providing reasons for them, "involves committing" for the future, so determines a necessary "commitment of generalization" as to the chosen *ratio*.

⁵⁴ In the sense made clear by Joseph Raz, who considers that the law has "practical authority" if one of its directives constitutes a sufficient reason for us to do what it prescribes. There is much more about, though, which can be followed through J. Raz, *The Authority of Law*, Oxford 1979 (cfr. p. 297 and *passim*); Id., *The Morality of Freedom*, Oxford 1986 (cfr. p. 41, pp. 46- 47); or Id., *Ethics in the Public Domain*, Oxford 1996 (cfr. pp. 214-5; pp. 219-20).

How this specific quality (that of possessing an ultimate value) of a “fundamental” right is relevantly translated and shown under a legal point of view, i.e. in the terms proper of a legal order? To be sure, the most acclaimed answer refers to the (some self generative, perhaps) *capacity* of rights to *oppose* the expansive force of the state institutional action, on the basis of their pre-positivistic and pre-political foundation.

This capacity hinges upon a pre-understanding of rights nature as in principle extraneous to “institutions” and embodying a defensive bend. As a legacy of the modernity, the intrinsic value of rights is defined (and “saved”) for the very reason of the proclaimed impossibility of reducing them to the rationale of public institutions: their “deontological” scope contrasts the extemporaneous mediations proper to the political arena, eroding their will and their scope (an area legally un-decidable). This representation of rights by ascribing to them a *raison d'être* *external* to the “state” and certainly *autonomous*, even of the deliberations of democratic “majorities”, is nonetheless both theoretically and historically one of the highest achievements of our civilization. Among other implications, this entails, valuably in the progress of most Euro-continental countries on institutional plane, that they do not receive legal validity, and legal existence, *merely by virtue* of their being incorporated into “legislation”. On the contrary, when constitutions do formally exist, foundation on the constitution - and not on legislation - is the one apparent evidence of the autonomy of rights, truly long awaited on the old continent. The autonomy of their legal force comes eventually alongside and on the same level as “legislation”: it is not subordinate nor secondary.

To be sure, this relatively recent achievement, which is definitive after the II world war European constitutions, rests inside the progressive, classic, liberal paradigm. It is proper to the nature of our liberal-democracies, and in no sense belongs in the transient play of political choices, but rather in the structure of minimal justice requirements of that same play. This notwithstanding, such non-institutional conception of rights can be interpreted unilaterally and can prevent from seeing the other side of the “institutional” coin and its historical relevance as well.

This is visible even if we look at this conception of rights through their best light, the one shed on them by Ronald Dworkin. The attribution of priority to rights passes through the application of “arguments of principle” and the exclusion of arguments that establish a collective goal⁵⁵. One collective purpose encourages “trade-offs of benefits and burdens within a community in order to produce some overall benefit for the community as a whole”⁵⁶; while on the other hand “It follows from the definition of a right that it cannot be outweighed by all social goals”⁵⁷. Those who recognize the right of free speech, but add that it must yield every time it is required to do so by a public interest, are no longer truly invoking a *right*, considering that its affirmation is reduced to highlighting the importance of collective goals: “the putative right adds nothing and there is no point to recognizing it as a right at all”⁵⁸. Once the distinction has been drawn, Dworkin proceeds to use it for a specific institutional theory, which starts from the assumption that moral rights have precedence: as United States constitutionalism includes a Bill of Rights, it “is designed to protect individual citizens and groups against certain decisions that a majority of citizens might want to make, even when that majority acts in what it takes to be the general or common interest”⁵⁹. As a consequence, the nerve-centre of this discourse could be

⁵⁵ R. Dworkin, *Taking Rights Seriously*, London 1978², p. 90.

⁵⁶ Ivi, p. 91.

⁵⁷ Ivi, p. 92.

⁵⁸ *Ibid.*

⁵⁹ Ivi, p. 133.

summarized, also symbolically, in the conclusion that "a black child has a moral right to an equal education, for example, if it is wrong for the state not to provide that education, even if the community as a whole suffers thereby"⁶⁰. It is a question of throwing light on rights as moral rights *against the state*⁶¹. The fact that these rights must be guaranteed outside the democratic process is ultimately looked on as natural, because "decisions about rights against the majority are not issues that in fairness ought to be left to the majority"⁶². Both strong theoretical and historical reasons do support the extraordinary relevance of Dworkin's theses. But if seen from a different angle, what raises doubts is certainly not the conceptual distinction between individual rights and the purposes of public policy, but the alleged "institutional" correspondence with the separation of powers, already mentioned. It is by virtue of the latter that the questions of "principle" relative to rights come under the aegis of the judicial power, while the goals, the purposes relative to the "common weal" are the competence of the political process (of policies). Therefore, the fundamental rights "area" should be thought of in terms of an unreachable one by the public deliberation, which is expressed finally through the legislatures' acts. But how can this be institutionally justified? This does not seem to depend on the *structure* of liberal democratic constitutional states: that structure obviously requires the separation of powers, but does not assign to those powers any *a priori* content, except the activities they can undertake legitimately (administration, jurisdiction and legislation). As a matter of *institutional* principle, in fact, jurisdiction should be protecting law, lower and higher. Strictly taken, rights are also legal norms and as such are no more connected to jurisdiction than they are abstractly connected to legislation.

In a sense, the visual angle I am proposing here - one that highlights the "institutional" inherent, and if the case ultimate, value of rights - requires us to proceed differently. It certainly enables us to begin by classifying political and legal institutions according to whether they are organized by ascribing rights to an autonomous normative domain, constitutionally rooted, and not just dependent on legislative choice. It recognises the thereof role of rights which through liberal constitutions prevents from the risk of arbitrary will by operating through the *limitation of power*.

However, there is no theoretical reason for the balance between rights and legislation to be conceptualized by making "fundamental" rights a sort of vacuum from the point of view of the power. If rights have an intrinsic value (in the same way as the democratic principle), they therefore *have value* for us regardless of others' interferences and of the "threat" that legislation is portrayed as presenting. It therefore follows that they *commit* us, positively, as *normative* objectives, and it is only in this way that they become an "institutional" question, a constant critical element and a test of our institutions' contents. If some rights are "fundamental" this should depend on a) the "good" that through them is defended; b) the function that those rights play, i.e. criteria for the recognition of valid norms; c) the institutional relevance of those rights: their realization- or optimization- should be part of the essential objectives of the legal-social system, i.e. should be among the fundamental aims of the public institutions, as well as condition of their legal legitimacy.

Since (fundamental) rights constitute values in themselves (i.e. not *instrumental* to purposes representative of the common weal), the issue is simply passing over a long-established doctrinal fence, and binding them to the face of public ends, of *goals*, *without* depriving them of their normative weight referred to individuals. In Europe, in the United

⁶⁰ Ivi, p. 139.

⁶¹ *Ibid.*

⁶² Ivi, p. 142.

States, as in the rest of Western countries, this task is linked to factual evidence, for example to the awareness of the social costs of any rights, to the growing weakness of the idea of rights as pure guarantees which ask for the “abstention” of public institutions. On theoretical plane, it entails the conceptual acceptance of rights within the dimension of norms.

It is perfectly possible, of course, that overcoming rights as mere freedoms and translating them into norms, into *objektive Grundsatznormen*, force fundamental rights to be measured, i.e. interpreted, on the basis of the political and social variables that prevail from time to time; and it is also possible that rights will have to pay for "their claim to extend further than the liberal tradition with an unquestionable loss of weight and of normative force; in a word, they would try to normativize the political dimension and are remorselessly relativized by it"⁶³. This is a risk that in any case we cannot *choose* to run, simply because it is already implicit in the evolution of liberal rights: their normative, deontological status, which eludes any political quantification, is possibly more legendary than real.

Historically, the hypothesis of the absoluteness of liberal rights, entrenched in private spheres and protected within legal confines, paid in the European past of XX century for its dogmatic claims, with the complete abandonment of the public sphere, with the reduction of the public sphere to the mere territory of uncontrollable passions. Collective goals remained affected by that material irrationality whose opposite - and in a certain sense escape - route (though perhaps only for a single class⁶⁴), was the non animated, crystalline structure of legal forms. But it would indeed be strange to support this view, to day, in the face of the transformations of the State, and more, of the welfare State⁶⁵.

Of course, some liberal theories, or rights-based ones, would argue that, from a Kantian point of view, this would jeopardize the guarantee of equal concern and respect for each individual, in the name of a paternalistic vision of the common weal: in other words, a surrender to utilitarianism. On the other side, it seems unreasonable to exclude *a priori* that the realization of fundamental rights be conceivable as a collective goal as well. In a sense, if fundamental rights are those possessing ultimate value, they can no longer appear to be incompatible with collective ends. Perhaps Amartya Sen, ever since his very first works, has offered arguments for following the path along which I intend to conduct rights. Sen argues that goal-based theories are not necessarily opposed to those that attribute priority to rights, but only utilitarian theories are. A long tradition, from Bentham onwards, puts the public weal in pride of place, ruling out the possibility that any other rights can enjoy priority over collective happiness, just as even the *a priori* assumption of the existence of natural rights (or moral rights and so on) appears to be untenable in the logic of utilitarianism. But it is not logically impossible to reconcile the priority of rights and theories of collective goals: the goal of equality, for example, is one that coincides with the moral idea that the underprivileged have *rights* to a better treatment⁶⁶.

⁶³ M. Fioravanti, *Quale futuro per la 'costituzione'*, in "Quaderni fiorentini", 21, 1992, p. 632.

⁶⁴ There is ample reference to this in the insistent description of the liberal state as the *one-class* state given by Giannini, *Il pubblico potere*, Bologna 1981.

⁶⁵ An extensive *excursus* is devoted to these "legal" transformations by Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (1992), translated by W. Rehg, Cambridge 1996, pp. 396 ff.

⁶⁶ A. Sen, *Rights as Goals* (Austin Lecture), in S. Guest, A. Milne (eds.), *Equality and Discrimination: Essays in Freedom and Justice*, ARSP, Beiheft 21, Stuttgart 1985, p. 12. This is certainly not the first hypothesis of "conciliation" between rights and the common weal, nor will it be the last. But we cannot follow

If they are vested with intrinsic value, rights - at least some of them - cannot be thought of as subordinate to collective ends (utilitarianism), but - and this is the most important critical element with regard to "liberal" conceptions - neither can they be viewed simply as the reverse of that medal. *We cannot coherently attribute intrinsic value to rights and at the same time consider them identifiable only by virtue of their aptitude for repelling alternatives justified by the common weal.*

Again, Sen confirms what I have argued thus far: the specific advantage of considering rights as goals consists essentially of the fact that it is impossible to assume them as simple limits where social action has to cease: they must be conceived as social objectives deserving of maximum attention⁶⁷. In conclusion, if they cannot be selected to number among the objectives of normative production, nor rights are assumed as such in the premises for validating a legal order, it would follow that there are no *fundamental* rights. Sen expresses a concept that is by no means far from this when writing that "if rights are fundamental, then they are also valuable, and if they are valuable intrinsically and not just instrumentally, then they should figure among the goals"⁶⁸. There is certainly also a great advantage in considering the guarantee of "negative" rights (freedom from discrimination, immunity from interference etc.) to be a collective goal⁶⁹, because that is the only way in which the achievement of each individual's rights can be seen as a problem of system, in the links that connect rights and violations on the one hand, while on the other justifying the use of means of protection and intervention (in defence of violated rights) that affect the rights of third parties.

Of course, this means that there is no contradiction at all between a moral deontological theory (which therefore pursues no external "goal", but imposes what is morally right and universalizable) and the evaluation of the consequences of actions, even with regard to the exercise of one's own "moral rights". Only utilitarianism is incompatible, as the maximization of preferences conceived holistically, like an aggregate⁷⁰; yet the deontological value of rights does not impede, but on the contrary requires, an awareness and evaluation of the consequences of an action, in order to conform to the moral principle and make sense of it⁷¹. Sen is also of the opinion that rights must be guaranteed

the trail of attributing value to rights *because* they coincide with a catalogue of collective goods that are in turn morally objective and rationally pre-determinable. This trail's universalistic substantialism (essentialism) is open to the objection that stigmatizes its link with a special and binding conception of good (i.e. with a specific, substantive list of value choices. A neo-Aristotelian or neo-Thomist philosophy of an analytical nature, such as that of John Finnis, for example, constitutes a sophisticated way of persuading the question of (natural) fundamental human rights to 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 (Finnis, *Natural Law and Natural Rights cit.*).

⁶⁷ Sen, *Rights as Goals*, *op. cit.*, p. 15.

⁶⁸ *Ibid.*

⁶⁹ According to Sen, the advantage of considering individual rights in this way (as collective goals) lies in the systematic relationship in which they are included: if rights understood as immunity were considered statically, one by one, each one separate from the others, it would be impossible to make inroads into other people's rights to defend our own, i.e. it would be impossible to take the links into account as a whole for safeguarding individual rights.. Once an individual right is not respected by those who primarily ought to do so, third parties can wield a moral justification for defending that right, even arguably while violating someone else's legitimate but inferior, less essential right.

⁷⁰ One classical reference is to B. Williams, *A Critique of Utilitarianism*, in J.J.C. Smart, B. Williams, *Utilitarianism: For and Against*, Cambridge 1973.

⁷¹ See also B. Ackerman, *Private Property and the Constitution*, New Haven 1977, pp. 71-72; R. Posner, *Utilitarianism, Economics and Legal Theory*, in "Journal of Legal Studies", 8, 1979, p. 104; D. Richards, *Rights and Autonomy*, in "Ethics", October 1981, p. 216.

with a certain *sensitivity* to the resulting state of affairs, although, unlike a simply *consequentialist* outlook, individual and social actions are not appraised purely on the basis of the quality of the resulting state of affairs. Despite the importance of this sensitivity, it represents an aspect that is all too often ignored by the idea of rights as winning instruments of the individualistic type⁷².

These considerations once again reveal how impossible it is to assert the anti-political character of fundamental rights: for they also serve the interests of everyone and of each individual, in the sense that they preserve a specific conception of the common good. The common weal contributes to explain the significance attributed to fundamental rights. Thus (as it was significantly stated) the idea that rights are an individual question that keeps public matters out "is based on a profound misunderstanding of the nature of rights generally and of civil and political rights in particular"⁷³. Meanwhile, the decisions about fundamental rights that are usually the responsibility of Constitutional Courts, Supreme Courts and the judicial power justify the intervention of these Courts, since they are a question of concern to everyone, as much as the protection of justice does, rather than a question that concerns just a given individual sphere: they pertain to the traditional fabric of law and thus concern a society's general ends. And this above all explains why they are a matter that is not dealt with in the zero sum game of the legislative process.

Naturally, as I maintain that there is a constitutive relationship between rights and fundamental ends, I cannot subscribe to Dworkin's theses based on the non-political character of rights, conceived as an active form of limitation, and subtracted by definition from the logic of issues public.

But - allow me to make this clear - neither can I share the pure and simple support of the authority and dignity of *legislation, ut sic*⁷⁴. To be sure, democracy must not be restricted to the right to vote about "issues of policy that have no compelling moral dimension", and questions of relevance in this sense should not be left to the courts and the lawyers. Still Hartian sentence teaches us that "law is (...) too important a thing to leave to lawyers"⁷⁵ especially when it comes to "essential human needs" or "constitutive legal rights"⁷⁶.

We cannot just entrust our destiny to a "judicial aristocracy" rather than to a "participatory majoritarianism"⁷⁷. On the other hand, the community for which the decisions have to be taken is essentially plural and even its representative assembly cannot be "conceived on the model of one man's action"⁷⁸. I can agree that in an irreducible arena of disagreements, there is no right solution; the legislative process, which attributes the "victory" to the majority, therefore has the praiseworthy merit of not claiming to represent

⁷² As Richard Posner has written, comparing his with Dworkin's view of rights: "Although he denies that pornography contributes to crime or to discrimination against women, he would give much less weight than I would to any bad consequences of pornography even if they could be proved beyond a reasonable doubt, because he attaches great importance to the nonconsequential principle that people ought to be allowed to read what they please, which to me is simply one value to be weighed against others" (R. Posner, *Conceptions of legal "Theory": A Reply to Ronald Dworkin*, in "Arizona State Law Journal", 29, 2, 1997, p. 385).

⁷³ J. Raz, *Ethics in the Public Domain*, Oxford 1996, p. 56.

⁷⁴ As expressed in the admittedly persuasive pages of J. Waldron, *The Dignity of Legislation*, Cambridge 1999 and Id., *Law and Disagreement*, Oxford (OUP) 1999.

⁷⁵ H. L. A. Hart, *Legal Rights*, in Id., *Essays on Bentham. Studies in Jurisprudence and Political Theory*, Oxford (Clarendon Press) 1982, p. 192.

⁷⁶ Ivi, p. 186.

⁷⁷ J. Waldron, *Law and Disagreement*, pp., 15, 248.

⁷⁸ Ivi, p. 66.

the right answer, the measure of what is right and what is wrong, but exclusively the position that has attracted more preferences than its contingent losing counterpart: whose claims are not reducible to a "mistaken" idea of justice. It is to be refuted, as Waldron suggests, the "protective" function that the judicial review is said to fulfil with regard to individuals and rights of minorities vis-à-vis majorities: "the idea of rights is based on a view of the human individual as essentially a thinking agent"⁷⁹ and that it therefore makes no sense to deprive him of the possibility to discuss essential issues.

Despite this, it is perfectly understandable that the ordinary political process does not appear the most suitable place for deciding about *fundamental* goals. The latter cannot be placed at the mercy of a single majority. But however, even beyond this, as I have argued thus far, fundamental rights and their sense and function in a legal order are not understandable as the outcome of alternate majorities ruling: as fundamental norms and fundamental goals, they become – through their time sensitive institutional interpretation – part of the meta-norms of recognition, on a necessary tension critical with valid norms. As a matter of fact, our liberal democracies never function, even with regard to fundamental rights, by attributing the force of a "fiat" to any power, but are the result of a complex tension between diversely competing factors. Fundamental rights cannot be entrusted to anyone but public institutions as a whole, and exceptionally perhaps to that process of higher lawmaking that may take on a variety of forms, but certainly cannot be reduced either to legislation (Waldron) or to the courts (Dworkin), taken separately from each other. None of the public instances and powers is entitled (nor is it capable) to have *a sort of autocratic, lasting and last word*.

6. Conclusive remarks

The foregoing pages have addressed mainly the problem of the ambivalence of the fundamental rights themselves, which take the form both of "enactments" and of substantial extra-legal reasons of positive law. The recent centuries story of the debate on rights as "norms or substance", showed how this ambivalence was at the core of rights' leading conceptions. The processes of formalization and materialization have displayed how rights conceptions have been a consequence of wider sets of doctrines concerning the validity of law on one side and on the other the role of law and the borders of the legal systems vis-à-vis norms ethical needs and political ideas of liberty and of democracy.

If the prescriptive force of fundamental rights were to spring from their reduction to enacted law, the former would be unable to justify the latter. If they were *only* law in force, they could not aspire to outclassing the precarious nature of every legal norm and thus of every passing political decision, nor would law enjoy a legitimacy that it actually does possess in contemporary constitutional democracies, even by virtue of the existence of fundamental rights. And if they were no more than substantial (ethical and political) reasons, that would not be sufficient justification for them to be counted as part of *current law*. It is suggested therefore, that starting from the legal system point of view, firstly, "founding" and not "founded" rights are positive law - rather than "simply" natural law (that is, outside positive law). Secondly, they are crucial for *attributing legal* validity to the enactment of norms, rather than "simply" for arguing on their (external) ethical, political and social legitimacy. Thirdly, that their fundamental character does not so much arise from opposition to the "gubernaculum", to the power of government, but instead implies a

⁷⁹ Ivi, p. 250.

different way of being on the part of the power and a certain way of conceiving public action. This is linked to the inconsistency of excluding fundamental rights from being enumerated among a system's fundamental *ends*. Once again, the neo-Kantian attitude usually adopted in this case does not allow fundamental rights to appear among collective ends, for otherwise the former could not be protected against the latter. Nevertheless, it is the opposite that is true: if fundamental rights are not substantial objectives, as well as essential deontological conditions, they have no substance and no hope of seeing the normative and declaratory plane coincide with the effective one.

There is in fact a reverse and complementary conception, beyond the perspective of rights as limits to power: in a liberal democratic culture, where sovereignty is putatively vested in the people, rights are a good that sculpts the sovereign's features. Seen from this standpoint, fundamental rights, conceived in their normative tension, are a *different way of being on the part of the power*, and also its own "grammar"⁸⁰. The generalised guarantee of this premise is the guarantee of individuals' fundamental rights. This different manner of being on the part of the power is its different *ethos*, which permeates that set of subjects who are considered to be its holders (subjects who have to defend rights even if their purpose is to preserve the "power").

This view of things does not weaken the conviction that rights have achieved an autonomous legal foundation (on a *constitutional* ground) and that fundamental rights ought to be guaranteed - *if* indeed we have such rights - regardless of any decision the "normal" democracy "power" may contingently intend to make. But exactly because of this, it therefore makes no sense to argue that fundamental rights are inherently just limits set on the power, nor do I see how (and "where"?) there could be any such "external" limits. What power would support them? Rights are in any case an expression of power, the "critical" power of the minorities, the power of public opinion, the power of individuals, the power of religious faiths, of ethical conceptions and altogether of a culture that is incapable of preserving itself in any other way. Rights influence and determine the political power's *modus vivendi*, they change its orientation and redefine its collective goals⁸¹, as well as being defined by them.

While the entire theoretical discussion has been facilitated until the modern day by the great divide between subjects (governed) and power (governors), and while this has enabled an opposition to be conceived between that which happens *a parte populi* and events *a parte principis*, with fundamental rights at the basis of a democratic political order (provided to assume seriously the demanding significance of all these words), what has become relevant is the absence of a sole centre, as the multi-centrism and the polyarchic character of the political order are reflected in an organisation where that which happens *a parte populi* ought to be the case *a parte principis*.

⁸⁰ I used this term and expressed the point at greater length in my *Costituzione e sovranità*, Bari 1997. .

⁸¹ A reading of the theses expounded by Raz in *The Morality of Freedom*, Oxford 1986, will lead to the same impression: "The special protection which the courts give to the constitution is not meant to stop it from changing. It is merely designed to make it change in response to different social processes from those which determine ordinary political change [...]. The fact that the constitution affects the existence of the basic political culture, which is - if a good at all - a collective good, is a *prima facie* reason for holding it to be a proper subject for political action" (ivi, pp. 260-61).