Human Rights. Philosophical Foundations and Legal Dimensions

Keynote speech

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Human Rights, Rule of Law and the Contemporary Challenges in Complex Societies
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Outline

I. The phenomenon

1. Human rights, the modern State and international order

What is justice? Justice can best be defined as the respect for and the protection of human rights. This at least appears to be worldwide the most accepted answer of our time to this perennial question. Human rights define fundamental rights such as the right to life and freedom that are believed to vest in every human being. The rise of the modern State with a democratic parliament and a government under the rule of law[1] has been promoted and accompanied by declarations of human and civil rights.[2] Today, human rights are recognized and protected in many constitutions of Western democracies and elsewhere in the world where they form part of a set of protected and warranted civil rights.

In the twentieth century, human rights became part of public international law. On the basis of the United Nations Universal Declaration of Human Rights of 1948,[3] there emerged a UN human rights treaty system that encompasses nine major treaties, i.e. on the elimination of racial discrimination, on civil and political rights, on economic, social, and cultural rights, on the elimination of discrimination against women, against torture, on the rights of the child, on the protection of the rights of migrant workers, on the rights of persons with disabilities, and for the protection of all persons from enforced disappearance.[4] On the basis of the UN Declaration, conventions with a regional character were concluded, such as the American Convention on Human Rights of 1969 and the African Charter on Human

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1 Cf. Brieskorn, Menschenrechte. Eine historisch-philosophische Grundlegung (Human Rights. A Historical and Philosophical Foundation) 1997; Buergenthal/Thürer, Menschenrechte. Ideale, Instrumente, Institutionen, (Human Rights. Ideals, Instruments, Institutions), 2009; Wellman, The Moral Dimensions of Human Rights, 2011.

2 Virginia Bill of Rights of June 12,1776; US Declaration of Independence of July 4, 1776; French Declaration of the Rights of Man and of the Citizen of August 26,1789; Kriele, Einführung in die Staatslehre (Introduction to the Theory of State), 6th ed. 2003.

3 UN General Assembly Res. 217 A (III) of 10 December 1948.

4 The UN established a number of committees with the task to monitor the implementation of treaty obligations.UNTCDatabase (4.Oct.2012) http://treaties.un.org/pages/Treaties.aspx?id=4&subid=A⟨ Introduction to UN Human Rights Treaty System; http://www.bayefsky.com/introduction.php.

and Peoples' Rights of 1982. Already in 1950, the European Convention for the Protection of Human Rights and Fundamental Freedoms was promulgated that established the European Court of Human Rights and came in force in 1953.[5]

2. The growing list of human rights

Since the human rights movement entered the historical scene in the late 18th century, the number, contents and scope of human rights expanded considerably. In the beginning, the movement was mainly confined to the rights of life and freedom with their political implications, i.e. free elections, freedom of press and free exercise of religion, protection against unlawful acts by the government, e.g. freedom from taxation unless approved by a freely elected parliament. Political rights of citizen were confined to men only. Female voting right was gained and legal equality of women with men was achieved in the 20th century in the Western world, social rights for the working class and the socially weak were established, [6] as well as rights to freedom from racial discrimination and for the protection of children.

II. The legal dimensions of human rights

1. Normative structure; equality and universality

Human rights are subjective rights of a human being; they share the normative nature of all rights. Rights invariably imply a command addressed to other persons who are obliged to respect such rights.[7] The main thrust of human rights is to establish obligations of the State. Human rights such as the right to life and freedom are broadly termed, and Wellman describes

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5 In 2000, the European Union proclaimed the Charter of Fundamental Rights of the European Union of 7 December 2000, 2000/C 364/01, O. J. 18. 12.2000.

6 Art. 22-28 Universal Declaration of 1948, inspired by the Atlantic Charter's promise of "freedom from want". Joint declaration of the President of the US and the British prime minister of 14 Aug. 1941 (Atlantic Charter) Art. 6; J. Schapp, Probleme der universellen Geltung der Menschenrechte (Problems of a universal validity of human rights), 2000, reprinted in Schapp, Über Freiheit und Recht (On freedom and law), 2008, p.181 et seq; F.X.Kaufmann, Die Entstehung sozialer Grundrechte (The Rise of social fundamental rights), 2003.

7 This is a prerequisite of the validity of all and any right, not only of so-called claim rights, as proposed by Wellman (note 1), p. 41, but also of so-called liberty (privilege) rights, power rights or immunity rights; these categories are borrowed by Wellman (p.19 et sec, p.41) from Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 1919.

them as a "rights package" with manifold correlative obligations,[8] not only to respect those rights, but also to protect them actively. Human rights are elements of the basic political and legal principles of a democratic State under the rule of law. They are claimed to vest in every human being and thus are categorically linked to the idea of equality of men and to the idea of a universal, global ambit of validity.

Under the conventions, human rights constitute obligations of the States under international law, including those towards private persons that are citizens of other States, e.g. foreign refugees or investors. Finally, human rights can have horizontal effects in the relationship between private persons, as in the Ogoni v. Shell case, where a Nigerian ethnic minority, suffering from the destruction of its natural habitat through oil exploitation and from suppression by its own government, brought suit against Shell.[9]

2. Political, moral and legal rules

a. The different categories. Since the beginnings of the human right movement, human rights were the subject of political claims. At the same time, they were meant as moral prescriptions. The moral dimensions of human rights appear indispensable to their understanding (Wellman).[10] Many human rights were cast into legal rules. Human rights, in their majority, are law. Some formally promulgated human rights, however, are too broadly defined to be law. Art.28 of the Universal Declaration declares that "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized". This is a general principle of political ethics. It needs further specification to become law. A number of social rights in constitutions and conventions do not confer subjective rights, others do.[11]

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8 Wellman (note 1), p. 42.

9 Center for Constitutional Rights http://ccrjustice.org/learn-more/faqs/factsheet-case-against-Shell; Vanguard http://vanguardngr.com/2012/03/0goni-shell-us-supreme -court.; Frankfurter Allgemeine 1 Oct. 2012, p.10. In a law suit before US courts under the Alien Tort Statute of 1789, a 15.5 mio US$ settlement was reached in favour of Ogoni victims in 2009. The case was still pending in 2012 before the US Supreme Court.

10 Wellman, as cited (note 1).

11 Kradolfer, Verpflichtungsgrad sozialer Menschenrechte (Degrees of Obligatory Effects of Social Human Rights) 50 AVR p. 25-284 (2012); F.X.Kaufmann, Variations of the Welfare State,2013.

Both moral and legal norms prescribe or forbid a certain behaviour. There are, however, differences. Legal norms are guaranteed by the State, and compliance with the law is enforced by legal sanctions. Moral rules, in contrast, are not enforced by the State. According to classic moral philosophy, moral rules are designed to give guidance for the decisions between good and evil, right and wrong.[12] Moral judgments of each individual depend on the individual's conscience; they may vary greatly and differ from one another. Nevertheless, every human society develops commonly recognized moral principles and rules that H. L. A. Hart labelled "positive morality".[13]

b. The interrelation of law and morals. Lawyers know that a safe and predictable functioning of the legal system requires that moral rules, that are not clearly covered by the wording and purpose of a law, cannot be the basis of a legal decision.[14] The legislator also cannot cast all consented moral rules into law. Law mainly deals with actions and forbearances[15] and sometimes with intentions or negligence accompanying them (criminal law, fraud etc). Moral principles or rules encompass the personal mental and emotional life and moral consciousness of the individual. Making them a subject of law outside defined acts or forbearances would suffocate personal freedom in a totalitarian system. E.g., there are good reasons to believe that husband and wife have the moral duty to protect the integrity of their marriage and to foster their mutual love. But the legislator must not penalize the lack of love nor marital unfaithfulness.[16]

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[12] Thomas Aquinas, Summa Theologica 1-2 q.94 a.2 c: Bonum est faciendum et malum vitandum (Leonine ed. Rome 1862-1948); Grisez, The First Principle of Practical Reason, 10 Nat. L. F. (1965) p.168 et seq. On moral scepticism infra III.1.c-d.

[13] H.L.A. Hart, Liberty and Morality, 1963, reprint 1984, p. 19, 20.

[14] On the exceptional case of a bluntly unjust law infra note 20.

[15] Cf. Thomas Aquinas, „Iustitia est circa actiones" (Justice is about actions); In Ethicam Nikomacheiam 5,1; No. 886; Pieper, Gerechtigkeit (Justice), 2d ed. 1954.

[16] The death penalty for adultery of women (!) exists still in some countries, as a gross violation of human rights preserved by morally mislead cultural traditions.

The differences between law and morals caused Kant[17] and many others to believe that both categories and sets of rules must be kept strictly separate. Such separation is the highest virtue also of legal positivism. On the other hand, such strict separation would be a mistake in the administration of law. Human rights are strong evidence for the fact that legal rules also have a moral dimension. This is not exceptional. Every law wants to carry out an aspect of justice, e.g. safety in road traffic, trust in freely agreed contracts, protection from crime. This widely accepted insight has found an expression in the three-dimensional theory of law of the renowned Brazilian philosopher Miguel Reale.[18] The moral purpose of a legal rule is crucial for its interpretation and application. This does not mean that the validity of a law can be challenged because of its moral short-comings. Classical moral philosophy teaches that abiding by the law is as such a moral duty and virtue ("justitia legalis").[19] In extreme cases only, a law violating supreme moral principles of justice may be void.[20]

3. Legal and moral interpretation of human rights

Basic human rights are broadly termed and judges have difficulties in their application, a problem we meet in all constitutional civil rights.[21] The right to life can serve as an example. The Pretty case (in 2002) before the European Court of Human Rights raised the question of whether the right to life includes the right to commit suicide including the right (of a paralysed patient) to the assistance of other persons for this aim.[22] Could the British

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17 Kant, Metaphysik der Sitten (Metaphysics of Morals) 1797, introduction AB 6,7; Horn, Einführung in die Rechtswissenschaft und Rechtsphilosophie (Introduction to Legal Science and Philosophie of Law; hereinafter cited: Introduction), 1st ed. 1996; 5th ed. 2011, no. 334, 339. (Portuguese translation of the 2d ed. by Antoniuk 2005: Introduçâo à ciência do direito e à filosofia jurídica).

18 His theory integrates sociology of law, legal positivism and natural law. Cf. Filosofia do Direito, 1st ed. 1953, 19th ed. (3d print) 2003, chap. xxxvi et passim; Moreira Lima, A Brazilian Per-specitve on Jurisprudence: Miguel Reale's Tridimensional Theory of Law, Oreg. Rev.Int'l Law vol 10 (2008) 77 et seq.

19 Aristoteles, Ethica Nikomachea 1130b; Thomas Aquinas, S.Th.II.II, 57-79.

20 Radbruch, Grundzüge der Rechtsphilosophie (Outline of Legal Philosophy) 1914, p.171; A. Kaufmann, as cited p. 41; Horn, Introduction, no. 428; Finnis, Natural Law and Natural Rights, 2nd ed. 2011, p. 26-28, 281 et seq.

21 Cf. Alexy, A Theory of Constitutional Rights, 2002;. R. Dworkin, Taking Rights seriously, 1977.

22 Pretty v. the United Kingdom (application no. 2346/02) Chamber judgment of 29 April 2002 (http://www.echr.coe.int.).

legislator penalize such assistance? The court confirmed this law and denied a human right to suicide assistance. The logic operation involved runs that a right to a good (life) does not include the contrary of this good (death). It was, however, rightly accompanied by value oriented reasoning, taking into account the cultural moral tradition and widespread opinion which, under the influence of Christian religion, consider life as a gift and a value that man cannot freely dispose of. The court furthermore took into account the social defence against the criminal misuse of a permitted assistance to suicide.

4. Conflict of human rights

It is widely held that human rights protecting high ranking primary goods such as the right to life, are absolute rights and must never be the target of a direct action against this protected good.[23] This does not exclude the necessity to weigh one protected good against the other in a conflict. A German somewhat untypical case relating to the strict prohibition of torture illustrates the problem. A man had kidnapped a schoolboy to blackmail his wealthy parents. He was arrested and confessed the kidnapping, indicating that the child was still alive, but refusing to disclose the place where it was kept. After two days, the chief police investigator threatened to apply torture against the suspect to squeeze out the information where the child was kept, in order to save its life. The man gave up under pressure and led the police to the place where the dead body of the child was found, killed by the kidnapper. The district court of Frankfurt found the police investigator guilty of having violated the prohibition of torture by his menace, though for honourable reasons; the court did not impose a penalty. In my view, the prohibition of torture was not violated. The victim's right not to be tortured and killed outweighed the kidnapper's right not to be tortured.[24]

III. Philosophical foundations of human rights.

1. The need for a rational foundation of moral rules

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[23] Finnis, Natural Law and Natural Rights, 1980, 2nd ed. 2011, chap. VIII.7, p.223-226.

[24] Horn, Introduction (note 17) no 420d.

a. The question. When we ask whether human rights exist as moral rules irrespective of their legal quality or political prestige, we need a moral-philosophical foundation. The answer must explain whether and why human rights have a morally binding validity. Such foundation is of interest also for lawyers. For it supports the legal authority of a corresponding legal human right and helps lawyers in their interpretation of such right.[25] Good moral quality is also relevant for human rights as political rules; for political ideas cannot survive when their moral authority is challenged for good reasons.

b. The historical answer: God and natural law. The historical answer is well known. The authors of the Virginia Bill of Rights and of the American Declaration of Independence saw human rights founded in God and natural law.[26] Christian religion was the decisive spiritual force behind the American Revolution.[27] John Locke, an author most influential on both documents, in 1690 recognized human rights of life, freedom, equality and property as vested in every man by the "law of nature and reason" that "teaches all mankind…that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions; for men being all the workmanship of one sovereign Master…".[28] With these two inter-related foundations – God and natural law – human rights became the basis of modern Western societies, of States and legal systems, and this basis warranted the high political and moral prestige of human rights.

c. Moral scepticism. In the meantime, these foundations in God and in natural law have lost their universal approval in the Western countries, though this approval partially continues to exist. Western philosophy of the last two and a half centuries struggled to emancipate philosophy from

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[25] Alexy, The Existence of Human Rights, ARSP-B 136 (2013), p.9-17, at p. 9-10.

[26] The same applies to the French Declaration of 1789; its preamble invokes the natural rights of man and the presence and protection of the „Highest Being".

[27] R. Middlekauff, The Glorious Cause. The American Revolution 1763-1789, 2nd ed. 2005, p. 4- 5, 52, 302, 622.

[28] Two Treatises of Civil Government, 1690 (reprint 1970 by Dent, London) II chap.II no 6 p. 119. Locke was inspired by the Glorious Revolution (1688) and the Convention Bill of Rights (1689) in England.

religion and to exclude religious thought from philosophical discourse.[29] The same happened to the great tradition of natural law as a guide for positive law. Classical moral philosophy was attacked by utilitarian, empiricist and sensualist philosophy [30] and David Hume told the Western intellectual world that "the distinction between vice and virtue is not ..perceived by reason".[31] A little later, Kant, in an attempt to defend the reasonability of morals against empiricism and moral scepticism, declared that the universality and binding force of moral laws cannot be found in human nature but only in the notions of pure reason.[32]

Today, the possibility of a philosophical foundation of human rights as moral rules remains controversial, though the value and prestige of human rights is mostly unchallenged. The critique comes from different angles. When MacIntyre says that there are no such rights, he argues from the point of view of classical moral philosophy, criticizing the rationalism at the time of enlightenment.[33] Rorty, in contrast, argues from a sceptic perspective of blunt anti-rationalism, when he rejects as futile any moral discourse on human rights grounded on rationality and universalism.[34] Habermas says that philosophy has no answers of its own to questions of morals that could compete with personal moral intuition: "It is before all philosophy that we experience and learn what moral and immoral behaviour is."[35] This is certainly true and applies to all sectors of intellectual and moral life, but it misses the point. The question, instead, is whether philosophy can explain

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[29] We will postpone here the issue of religion; cf. infra III.4.b.

[30] David Hume, Enquiry concerning human understanding, 1748; Enquiry concerning the principles of morals, 1751.

[31] Hume, A Treatise of Human Nature, 1740, Book III Part i sec.1 (Raphael, British Moralists 1650-1800, 1991, para. 504).

[32] Kant, Grundlegung zur Metaphysik der Sitten (Foundation of the metaphysics of morals), 1785, p. 389, 410.

[33] MacIntyre, After Virtue (1981), 3rd ed 2007; Whose Justice? Which Rationality? (1988) in MacIntyre Reader ed. Knight (Notre Dame University Press), p. 107.

[34] He recommends instead education for more tolerance and empathy; Rorty, Human Rights, Rationality and Sentimentality, in On Human Rights. The Oxford Amnesty Lectures ed. Shute/Hurley, 1993, p. 111-134; crit. Hayden, in Philosophy in the Contemporary World vol 6 Nos 3-6, 1999, p. 59 -66.

[35] Habermas, Diskursethik (discourse ethics), 2009, p. 254.

morality and help to better understand and perhaps improve our moral capacities. The position of Habermas, however, is in line with widespread moral scepticism.[36]

d. Rebuttal of scepticism. The restrictive theories of empiricism, subjectivism and positivism that see a cognizable world only in the material world that can be sensually perceived, measured and counted, and thus exclude ("metaphysical") moral reasoning from a rational discourse are useless. For this exclusion cannot be justified by the methods they adopt, and constitutes itself an unfounded metaphysical hypothesis.[37] Moreover, this sceptic position is in contrast to the fact that human rights enjoy a substantial moral prestige, and their core moral values and principles – universal justice, equality, freedom and self-rule - are widely accepted by different philosophical schools.[38] These values are constantly discussed in private and public life on the assumption that they exist and can be ascertained in a rational way. Scepticism cannot end this discussion, but at most could exclude philosophers from taking part in it.

2. Evasive philosophical strategies

Since David Hume and the rejection of a metaphysical foundation of morals by the English empiricists and their many followers, we can identify evasive philosophical strategies that substitute the rational foundation of morals by other approaches. The most prominent ones still in our days are utilitarianism (a) and consented truth (b and c).

a. Utilitarianism. Utilitarianism substitutes the classical moral distinction of good and evil by something else: utility. According to the utilitarian argument, man, "governed by pain and pleasure" in his actions, does not

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[36] Further references on moral scepticism in jurisprudence in Horn, Introduction (n.17) 5th ed. 2011, no. 158, 337, 349, 359.

[37] Horn, Introduction (n. 17), no. 402 et seq. On the different methods of humanities (hermeneutics, phenomenology and rationality of moral values) as opposed to natural sciences cf. infra III.3.d-f. For a defense of philosophical scepticism in morals, Habermas, Nachmetaphysisches Denken (Post-metaphysical reasoning), 1988; critical of Habermas: Schapp, Metaphysisches und nachmetaphysisches Denken (Metaphysiscal and post-metaphysical reasoning), ARSP 1997,p.193, reprint in Schapp, Über Freiheit und Recht (On Freedom and Law), 2008, p. 117.

[38] Charles Taylor, Sources of the Self: The Making of Modern Identity, 1989.

make a choice between good and evil, but each individual follows its own interest and utility to attain happiness as its predominant goal. Utilitarian ethics aim at "the greatest happiness to the greatest number", as Bentham puts it.[39] In fact, human rights can be partially explained as serving this aim. Historically, utilitarian philosophy had a strong influence on the human rights movement and its success. Art. 1 of the Virginia Bill of Rights cites the pursuit of happiness as a human right. This utilitarian argument is indispensable in political life of all times, e.g. to win the majority in a democratic vote. But utilitarianism, by substituting the core notions of morals, the distinction of good and evil, by pleasure and pain, has substantial defects as to its moral dimensions. Utilitarianism, at least as advocated by some of its followers, neglects and sacrifices the interests of individuals if the greatest happiness of the greatest number so requires.[40] Moreover, many phenomena of ethics, in particular unselfishness, are not considered.

b. Rawls' consensual approach. Rawls undertakes a consensual approach to justice in the tradition of the doctrine of social contract as the basis of States (Hobbes, Locke, Rousseau, Kant).[41] He defines the preconditions for a consensus on distributive justice within a society. A man in a free and unbiased "original position", entrusted with the task to establish, together with others, just principles of a society, without knowing what his own position in that society will be, would make a rational choice for Rawls' proposed principles of distributive justice and fairness in the pursuit of the primary goods of self-respect, liberty, opportunity, and wealth. On this basis, fair principles of a just society can be worked out by consensus. The optimistic conclusion from consensus (of a few) to fairness is logically weak.[42] It is not convincing as a justification of principles of morals and justice, whatever merits Rawls may else have in the rational analysis of

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[39] Introduction to the Principles of Morals and Legislation, 1789.

[40] Singer, Practical Ethics, 2nd ed.1993;Smart/Williams,Utilitarianism for and against, 1973, p.69.

[41] A Theory of Justice, 1971.

[42] Finnis, Rawls' theory of justice (1973), in Finnis, Human Rights and Common Good (coll. essays vol III) 2011, p. 72, 75.

those principles. The desired justification of moral principles can only be brought about by moral arguments, as Dworkin rightly observes.[43]

c. Discourse theory. In a similar way, the discourse theory proposes that men can come to a reasonable consent about moral values and rules through a procedure, i. e. a discourse or exchange of arguments (Habermas, Apel, Alexy). Habermas, in his theory of communicative action,[44] claims that the ideal discourse must be free and unbiased between participants vested with similar capacities. Their words must have the inherent aim to be true and honest and must not be confused by ideology and other errors. This communicative process can lead to moral answers by consent. The discourse theory remains silent as to the moral values and rules as the very substance of a moral discourse, on the grounds that we allegedly live in a "post-metaphysical era",[45] and moral values belong to the realm of "metaphysics" that, as Habermas and many others believe, are not suited for scientific reasoning. At the same time, however, moral values can, as the discourse theory presupposes, be the subject of a rational discourse, and the outcome of such discourse should, even more surprisingly, be the establishing of a justified moral rule or decision, at least in questions of justice.[46]

The silence of the discourse theory as to the contents and meaning of moral values and rules has been rightly criticised by Taylor as defining practical reason as exclusively procedural. These theories "utterly mystify the priority of the moral by identifying it not with substance but with a form of reasoning around which they draw a firm boundary. They then are led to defend this boundary all the more fiercely in that it is their only way of doing justice to the hyper-goods [i.e. freedom, altruism, universalism][47]

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[43] Dworkin, A matter of principle, 1985, p.171- 177.

[44] Theorie des kommunikativen Handelns, 2 vols. 1981 (=Theory of Communicative Action vol.I 1984); Moralbewusstsein und kommunikatives Handeln, 1983 (=Moral Consciousness and Communicative Action, 1992).

[45] Habermas, Diskursethik (Discourse ethics), 2009, 250-254, 443; id., Nachmetaphysisches Denken (Post-metaphysical Reasoning), 1992; Critique of Habermas: Schapp, Über Freiheit und Recht (On Freedom and Law), 2008, p.117 et seq. Cf. supra III.1.c.

[46] Habermas, Diskursethik as cited (note 45), p. 13.

[47] Brackets added.

which move them although they cannot acknowledge them".[48] The emptiness of discourse theory as regards moral values and principles renders it unfit to explain the moral dimensions of human rights. There are, however, attempts by prominent proponents of discourse theory to cure this deficiency, to be discussed in a moment (infra III.3.b).

3. In quest of truth and objectivity in morals

a. The transcendence of morals. The philosophical foundation of moral human rights depends on the capacity of human reason to find true and objective answers against empiricist scepticism (supra III.1.c). Can human reason perceive and answer the core question of good and evil, justice and unjustness (supra II.2.a)? Moral questions undeniably transcend our empirical world, if one understands by this the material world of space, time and matter and its sensual and rational perception. But the realm of human experience does not end here. The "transcendent"[49] experience of morals and its rational analysis are the subject of moral philosophy.[50] Is such rational analysis possible? This is the question. Two affirmative answers are to be considered. One is given by Kant: man can find the rational answers in the innate (a priori) notions of pure practical reason independently of any experience. The result is the strictly formalistic "moral law" that can be generalized. The other answer could be that human reason can find substantive moral answers in a general and objective way.

b. Kantian answers. Among the many legal philosophers influenced by Kant's rationalism and universalism, R. Dworkin is one that came closest to

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[48] C. Taylor, Sources of the Self. The Making of the Modern Identity, 1989, p. 88f. Countercriticism by Habermas, Diskursethik (Discourse ethics), 2009, p.248 et seq.

[49] The term can denote 4 different things:(1) the existence of the object perceived outside the consciousness of the individual cognizing subject (gnoseological transcendence); (2) the (inter-subjective) intellectual sphere beyond the material empirical world of empiricism (Aristotelian logic and metaphysics being a reflective part of it), (3) the (inter-subjective) moral sphere beyond the material world (a subject of "metaphysics" after Kant) and (4) something beyond our world as a whole (God; special metaphysics). We use here the third meaning without excluding the fourth one. We find the term „transcendent" in context with the controversial, today ill-famed but hardly dispensable term „metaphysics". On the discredit and indispensability of metaphysics see Kant, Prolegomena zu jeder künftigen Metaphysik (Prolegomena to all Future Metaphyiscs), 1783, p. 367; id., Grundlegung der Metaphysik der Sitten (Foundation of the Metaphysics of Morals) 1785, p. 410 et seq.

[50] The answers are called "metaphysics" by Kant, Metaphysics of Morals, 1797, and note 49. On the proclamation of the „post-metaphysical" era" that allegedly holds sway today, see Habermas (supra III.1.c). Finnis keeps metaphysics and morality strictly separate; Philosophy of Law (coll.essays vol. IV, 2011), p. 94.

a workable theory of human rights in discussing substantive moral issues. His work, however, focuses on the judicial review of legislation by the US Supreme Court. A decided critic of legal positivism (Hart) and its strict separation of law and morality, Dworkin submitted a theory of general legal principles and their application in court, comparable to jurisprudence in civil law countries. In this framework, he put forward a legal theory of civil (human) rights of the individual based on equality, the integrity of the rights holder and the overriding authority of civil rights as basic rights.[51]

Within discourse theory, attempts were made to overcome the stunning Kantian emptiness of this theory as to substantive moral values and rules. Such values and rules are found in the necessary preconditions for the ideal discourse. Apel uses them as an ultimate foundation of the discourse;[52] Habermas disagrees.[53] Alexy puts forward a foundation of the existence of human rights through an analysis of the essential preconditions of the discourse:[54] the required freedom and equality of the participants is the basis of respect for others and thus of human rights and human dignity ("explicative argument"). He supports this result by an "existential argument": if a person takes the results of such discourse as guidance of the correctness of his own actions, he subscribes to these values and rules in an existential manner.[55] The last argument is not convincing; for the fact that a person follows a certain rule does not mean that this rule exists morally. As a result, Alexy analyses certain human rights as elements of an

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[51] Taking Rights Seriously, 1977; A Matter of Principle, 1985; Law's Empire, 1986.

[52] Apel strives to establish those rules as an „ultimate foundation" of the moral discourse; Auseinandersetzungen in Erprobung der transzendental-pragmatischen Ansatzes (Disputes in testing the transcendental-pragmatic approach),1998. This reasoning, however, is not seen by Apel as ontological, but as internal to the discourse theory.

[53] Habermas, Diskursethik (Discourse ethics), 2009, p. 435 et seq.

[54] Alexy, The Existence of Human Rights, ARSP Supp. 136 (2013) p. 9-17; id., Discourse Theory and Human Rights, *Ratio Juris* 9 (1996), 209-235; id., Recht, Vernunft, Diskurs. Studien zur Rechtsphilosophie (Law, Reason, Discourse. Studies in Legal Philosophy), 1985; critical comment by Brieskorn, Menschenrechte (Human Rights), 1997, p.158. See also K. Günther, Liberale und diskurstheoretische Deutungen der Menschenrechte (Interpreting Human Rights under Liberal and Discourse-Theorical Aspects), in Brugger/Neumann/Kirste (eds), Rechtsphilosophie im 21. Jahrhundert (Philosophy of Law in the 21st century), 2008,338-359.

[55] Alexy, The Existence of Human Rights, as cited, at p. 16 et seq.

aprioristic structure of the discourse.[56] Is this new "metaphysics" of morals? If so, then unintentionally and, so to speak, through the backdoor. For both Apel and Alexy apparently want to stay within the formal boundaries of the discourse theory.

c. In quest of ontological answers beyond subjectivism. Is it possible to find an ontological foundation of moral human rights beyond the subjectivist and formalistic approach of Kant? The core thesis of Kant that man discovers the moral law by virtue of his own moral consciousness and recognizes it autonomously, is a universal thesis, i.e. it is claimed to apply evenly to every reasonable human being. Could it – against Kant - not better be interpreted as an ontological statement on human reasonable nature? In fact, Kant strived to save the universality of moral philosophy from the attacks of empiricism,[57] and Finnis rightly observes that Kant's *Metaphysics of Morals* "is in some ways the most sophisticated exposition of modern natural law theory".[58]

For practising lawyers and judges, an ontological approach to moral values contained in the law (supra II.2.b) - be it in legal human rights or other legal rules – is implicitly common ground in their daily work. These implied values are conceived, interpreted and applied in law as objective criteria independent of the persons involved in a given case. This is simply a description, not yet an argument, but it contradicts the wrong description of an alleged "post-metaphysical era". Ontological arguments are submitted by legal philosophers from many countries, who developed theories of supreme principles, values and rules of justice that are prior to any human choice and that are not at the disposition of the legislator. The Brazilian author Miguel

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[56] A similar approach is used by Nino who strives "to uncover an underlying structure of moral reasoning, discourse or action which supports basic moral rights"; Nino, The Ethics of Human Rights, 1991, p.83. Critical comment on Nino's theory by Alexy in Festschrift (Liber Amicorum) Kriele, 1997, p. 187 et seq.

[57] Kant, Prolegomena (note 49), preface p. 255-264; id., Grundlegung der Metaphysik der Sitten (Foundation of the Metaphysics of Morals), 1785, preface p. 387-392; Horn, Introduction (note 17), 5th ed. 2011, no.330, 333.

[58] Philosophy of Law (coll. essays vol.IV, 2011) p. 97.

Reale can again be named here, [59] together with a number of German[60] and American authors. Wellman defines the grounds of moral human rights as "morally relevant facts that exist independently of our social practices or moral convictions".[61] Dworkin and Finnis endorse the philosophical possibility to ascertain the truth, or objectivity, of moral judgements; they insist that arguments pro and con the truth of a moral judgement have to be moral arguments.[62] There are various methodological approaches to an ontological cognition of morals, the most prominent ones are: (i) hermeneutics, (ii) phenomenology of (objective) morals, and (iii) modern theories of natural law.

d. Hermeneutics and phenomenology of good and evil. (i) The hermeneutic method (Dilthey, Gadamer) teaches the understanding of texts with the genuine methods of humanities as opposed to the methods of natural sciences that are unfit for this purpose. Hermeneutic methods are suited to understand and describe moral phenomena. They lend themselves for subjectivist or ontological theories. (ii) Phenomenology originally designates an attempt to overcome cognitive subjectivisms[63] and to define moral phenomena that we experience in the "life-world" [64] as a reality that exists independently of our feelings or moral convictions. This way, the German philosophers Scheler and Hartmann described and analyzed substantive

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[59] Reale, Filosofia do Direito, 19th ed. 1999 3rd print 2002, p. 481 et seq.; Moreira Lima, 10 Oreg. Rev. Int'l Law 77, at 95 (2008).

[60] Coing, Grundzüge der Rechtsphilosophie (Outlines of a Philosophy of Law), 5th ed. 1993, chap. IV; Arthur Kaufmann, in Kaufmann/Hassemer /Neumann, Einführung in die Rechtsphilosophie und Rechtstheorie der Gegenwart (Introduction to Legal Philosophy and Legal Theory of Today), 8th ed. 2011, p.143-146; Horn, Introduction, as cited (note 17), nos 417-422; Jan Schapp, Freiheit, Moral und Recht (Liberty, Morals and the Law), 1994; Dreier, Rechtstheorie 18 (1987) p. 372: Hassemer, Festschrift (Liber Amicorum) Maihofer, 1988, p.185.

[61] The Moral Dimensions of Human Rights, as cited, at p. 85; cf. also p.41 et seq. Similarly Taylor, Sources of the Self: the Making of the Modern Identity, 1989, p.14. The most prominent systematic ontological approach is provided by Finnis, Human Rights and Common Good (coll. essays vol. III) 2011, p.7. Natural Law and Natural Rights, 1980, 2nd ed. 2011.

[62] Dworkin, A Matter of Principle, 1985, p. 171-7; Finnis, Human Rights and Common Good (coll.essays vol.III) 2011, p. 25.

[63] Husserl, in his earlier work, adopts an understanding of „phenomenology" that is directed against the psychologism of his time and towards objectivism; Logische Untersuchungen (Logic investigations), 1900/01. Later on, he returns to Kantian subjective approaches.

[64] „Lebenswelt"; Husserl introduced this ambiguous notion in phenomenology.

ethics of values (*materiale Wertethik*), declining Kantian formalism.[65] The perception of moral values has emotional elements ("feeling of values"), but this supports and does not dominate the rational cognition and analysis of those values. The descriptive and analytical aspects of moral phenomenology have been enriched by modern empirical and analytic work of moral psychologists that finds a remarkable cross-cultural uniformity in the ontogenetic evolution of young peoples' moral conscience (Kohlberg), "a universal moral grammar" of each child despite persisting cultural variations (Hauser).[66]

The phenomena of immorality and unjustness, as the counterpart of the good and just, have their own strong evidence complementary to the evidence of moral goods, values and rules. The substance of moral human rights can be understood best when we look at the evils those rights were designed to cure. The legal history of human rights explains these rights as normative responses to a certain unjustness, e.g. the suppression of religious belief or taxation without representation in parliament. The main subject of classical moral philosophy was the problem how man can overcome "evil", i.e. his own inclination for wrongdoing, and what efforts he must make in this respect through reason (sapientia, prudentia) and self-control (temperantia). This philosophical position of morality according to reasonableness[67] (logos, ratio) was enriched and transformed by the Christian ideas of human freedom, sin and grace.[68] "Post-metaphysical" philosophy has gradually lost sight of the problem of the evil.[69]

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[65] Max Scheler, Der Formalismus in der Ethik und die materiale Wertethik (Formalism in ethics and the substantive ethics of values), 2 vols, 1913, 1916. See also Nicolai Hartmann, Grundzüge einer Metaphysik der Erkenntnis (Outline of methaphysics of cognition), 1921; id., Ethik (Ethics), 3 vols. 1926. Scheler's approach was used in legal philosophy by Coing, Grundzüge der Rechtsphilosophie (Outline of Legal Philosophy) 5th ed. 1993.

[66] Kohlberg, The Claim to Moral Adequacy of a Highest Stage of Moral Judgment, J. of Philosophy vol.70 no.18 p. 630-646 (1973); id., Die Psychologie der Moralentwicklung (The Psychology of Moral Development) 1995, p. 345; Horn, Introduction (n.17) no.411, 412; Hauser, Moral Minds, 2006, p. 429 et seq et passim. The critics of Kohlberg give more emphasis to the emotional aspects and cultural environment of moral decisions and acts; Hoffmann, Empathy and Moral Development, 2000, p. 3; M. Nussbaum, Emotionen and der Ursprung der Moral (Emotions and the Source of Morals), in Edelstein/Nunner-Winkler (eds), Moral im sozialen Kontext (Morals in Social Context), 2000, p.82 et seq.

[67] On Platon and Aristotle in this respect, see Finnis, Natural Law, chapt. xiii.3.

[68] Schapp, Freiheit, Moral und Recht (Freedom, Morals and Law) 1994; Schapp, Metaphysisches und nachmetaphysisches Denken (Metaphysical and post-metaphysical reasoning) 1997, in: Schapp, Über Freiheit und Recht (On Freedom and law), 2008, p.117, 123 et seq.; Kobusch, Die

e) Human rights as natural rights. The quest for an ontological approach to human rights as moral rights inevitably leads to the great European tradition of natural law.[70] This tradition has survived until today in various forms. Since the time of enlightenment, however, it was accompanied by a fierce critique (supra III.1.c) to the effect that, for many today, natural law means something irrational and below scientific standards. Remarkably, the moral prestige of human rights remained unaffected by this critique. The survival of natural law as a subject of philosophical and practical curiosity can be explained by its perennial core idea that there are goods, values and rules prior to human choices and suitable to guide the making and practising of law. Modern proponents of the idea of natural law since the mid-20th century eschew the ambiguous notion of 'nature'[71] and prefer to focus on human reason.[72] They furthermore reject the historical concept of a complete system of rules of natural law.[73] Instead, they assume the existence of supreme objective rational values (goods) and principles of justice that, though invariable in their core ideas, need to be adapted to varying situations that do not allow such a system.[74]

Entdeckung der Person. Metaphysik der Freiheit und modernes Menschenbild (The discovery of the person. Metaphysics of freedom and modern idea of man), 2nd ed. 1997, p. 23 et seq, p. 44 et sec. For a historical overview, see Horn, Introduction (note 17) 5th ed. 2011, §§ 10-16.

69 Schapp, Metaphysical and post-metaphysical reasoning, as cited, at p. 125. On the problem of the evil, cf Paul Ricoeur, Philosophie de la volonté (Philosophy of Will), 2 vol 1950/60, especially part II on the symbolism of evil (English translation 1967).

70 A. Kaufmann, in Kaufmann/Hassemer/Neumann, Einführung (Introduction) as cited, p. 27 and historical survey p.26-147; Horn Einführung (Introduction), as cited, nos. 401-421 and historical survey no.221-390.

71 This ambiguity of the notion of nature (physis) is found already in classical greek philosophy. Roman law absorbed the stoical double meaning of the nature of man as (a) rational (naturalis ratio) and (b) animality (quod natura omnia animalia docuit); Horn, Introduction no.271.

72 Coing, Grundzüge der Rechtsphilosophie, 5th ed. chap IV, III.2; Finnis, Natural Law as cited, chap. xiii.1 p. 374; Horn, Einführung (Introduction) as. cited, no.374-382.

73 Critical on the dogmatism and abstractness of natural law theories in the 17th –mid-20th centuries Böckenförde and Franz-Xaver Kaufmann, in Böckle/Böckenförde, Naturrecht in der Kritik (A critical appraisal of Natural Law), 1973; Coing, as cited; Horn, Introduction (n.17) no. 403; Reale, Filosofia do Direito, at p.482 no. 185.

74 A. Kaufmann, as cited, and Naturrecht und Geschichtlichkeit (Natural Law and Historicity) 1957, p.8, 16 et seq.; Coing, as cited, chap. iv; Horn, as cited, no. 402-414; Kühl, Rückblick auf die Renaissance des Naturrechts nach dem 2. Weltkrieg (Looking back on the Post-WW-II Renaissance of Natural Law), in: Giessener Rechtswiss. Abhandlungen vol. 6 1990, p. 331. Furthermore, Miguel Reale, as cited p. 482, can be named here, and among the Anglo-American authors Finnis, Natural Law and Natural Rights, 1980, 2nd ed 2011; id., Human Rights and

A renowned proponent of such modern theory of natural law and natural rights, John Finnis, undertakes an ontological approach based on human reason in a revised understanding of the classical moral philosophy of Aristotle and Thomas Aquinas. A reasonable human conduct is oriented towards the pursuit of a limited number of basic goods such as life, freedom or knowledge that are self-evident and not reasonably questionable. The pursuit of these various and sometimes conflicting goods can be structured by principles of practical reasonableness (right or wrong).[75] As a result, universal rules of morals can be found, including rules of justice and individual basic rights. Some of those basic moral rules are a part of Christian tradition, such as the Golden Rule or the last six of the Ten Commandments. Practical moral rules of reasonableness are to be worked out for the unlimited number of individual situations and moral conflicts. Such a flexible natural rights theory, based on the evidence of basic goods and of rules of the reasonableness (rules of justice) to be applied in the pursuit of such goods, offers a rational philosophical foundation of human rights that, in the classical tradition, would be called natural rights.[76]

f) Ascertaining moral human rights beyond subjectivism

Moral values and rules are understood and ascertained by the individual through intuition and reasoning. Intuition helps us to build up moral experience (supra III.3.d) and initiates its rational reflection. This reflexion must be balanced and use all reasonably available arguments for and against. [77] Moral evidence of goods or values has an emotional element of attraction, that may be amplified by the contrary element of indignation at an unjustness to be cured (conscience). These and other emotional

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Common Good (Coll.Essays Vol. III) 2011; R.George, In Defense of Natural Law; 1999; Dworkin, Taking Rights Seriously, 1977; Wellman, The Moral Dimensions of Human Rights, 2011, as cited (supra note 61) p. 41 et seq., 81; Taylor, as cited (supra note 48).

[75] Finnis, Natural Law and Natural Rights, 2011, chapt. III-V.

[76] On the qualification of human rights as natural rights Horn, Introduction (note 17) 5th ed. no. 381; id., Festschrift (Liber Amicorum) Jan Schapp, 2010, p. 267, 271 et seq., 279, 281; Finnis, Natural Law chap. VIII.1 p. 274.

[77] Wellmann (note 1), p. 41 describes it as a „wide reflective equilibrium"; a similar approach is used by Brieskorn (note 1), p. 159 et seq., and Finnis, Human Rights and Common Good (Coll. essays vol.III, 2011), p.7.

elements (contrary inclinations), however, can be controlled by reason. Moral evidence and intuition are the starting point for an ontological reasoning of morals. There are few logical operations involved. Both the basic values and the rules of reasonableness, to cite Finnis, "are not inferred or derived from anything", not from speculative principles nor from facts.[78]

Moral values and rules are perceived as intersubjectively valid or true. Communication of various kinds, education and learning, play their roles. Since Plato wrote his dialogues, we know the merits of a discourse as an argumentative procedure for the ("maieutic") finding of the moral truth, not to forget the internal dialogue of the individual that weighs different arguments. Substantive arguments are required. Communication is needed for the social acknowledgement of such values and rules. Here, the theories of discourse have their instrumental place.

The history of the human rights shows the dynamics of the social learning processes concerning the basic moral values and principles involved. This movement started when the political emancipation from autocratic political systems was at stake. This epoch gave particular weight to the "autonomy" of the individual as a citizen, a view we today would express less forcefully in consideration of our responsibility for the common good. Moreover, inconsistencies in the historical movement had to be overcome. The equality of all men was proclaimed, but originally not conceded to women and not to Indians and blacks. Property was protected, but the social protection of workers was only much later taken into account. This learning process will go on and promote the further development of most human rights, perhaps put less emphasis on or skip some others.

4. Human person and human dignity

a. Freedom and human dignity. It is widely held that the basic human rights to freedom and equality dwell in the dignity of man as a person. This dignity can be explained by human freedom. Freedom is the solid core of human personality. It confers to persons the dignity of self-direction and of being

[78] Finnis, Natural Law, as cited, p. 33, 34.

responsible agents.[79] Human dignity is another expression for the immeasurable value of human personality (Kant).[80] This basic value of human dignity and the rights of freedom and equality that follow from it, are – at least in our days – strongly self-evident, and this can be seen as one further step in the rational foundation of human rights.[81]

b. Religious and intercultural aspects of human rights

We can end here our quest for such foundation. Though the classical texts on human rights name God as the final source of those rights, we may eschew such further explanation,[82] taking into account widespread agnosticism. There is, however, "an awareness of what is missing" also among agnostic philosophers. As Habermas puts it, key notions such as human dignity, morality and ethics, freedom and emancipation cannot be totally understood by people of the Western culture unless they know their own Christian religious tradition.[83] In fact, the ideas of personal freedom and equality of all men as the leading ideas of the human rights movement have their roots in Christian tradition.[84] On this basis, Christian theology early developed the concept of the human person as a moral being (ens morale) vested with freedom and thus vested with dignity.[85] This person is later on seen as vested with individual ("subjective") natural rights. These rights became the leading political idea of enlightenment and found their way into the declarations of human rights.

What do Christian roots mean today? Habermas holds that "modern reason will only learn to understand itself, if it clarifies its position to the

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[79] Finnis, Natural Law, chapt. X.4.

[80] Kant,Grundlegung zur Metaphysik der Sitten (Foundations of Metaphysics of Morals), 1785, 428; Finnis, Natural Law, p. 225.

[81] Brieskorn, as cited; Finnis, Human Rights and Common Good, p.7: the identity of a person with interests "that are truly intelligible goods … is the ontological foundation of its human rights".

[82] Finnis, Natural Law p. 49, not excluding that such further explanation is available, p. 371-410.

[83] Habermas, Nachmetaphysisches Denken (Post-metaphysical Reasoning), 1988, p. 23; id., in: Reder/Schmidt (eds), Ein Bewusstsein von dem, was fehlt (An awareness of what is missing), 2008, p. 26, 29 et seq.

[84] Schapp, Freiheit, Moral und Recht (Freedom, Morals and Law) 1994, p. 25-79.

[85] Kobusch (note 68), p.23 et seq.

contemporary religious consciousness that has become reflexive".[86] In western societies, where believers and agnostics have to discuss issues of public morality and law making in common, rules of mutual tolerance and respect must be adopted so that the semantic potential of religion is not lost.[87] - Besides, philosophical ideas have only a limited impact on the mentality of societies. Also in secularized Western societies, a morality based on religious belief in God can contribute to the building of a mentality of society that supports the rule of law and the respect of human dignity and of human rights of others.

In the worldwide discussion on human rights, we must take into account cultural and religious differences. The optimism that those boundaries can be crossed, is supported by empirical and analytical psychological findings (supra III.3.d). Remarkably, the idea of human rights, despite its visible Christian roots, appears to be also attractive to men and nations of other cultures, who may, in their own religious tradition, find elements that support the ideas of human rights.[88] For a worldwide success of human rights, this is crucial.

IV. Concluding Remarks

Human rights represent a strong movement towards the building of a worldwide consent on the moral foundations of law and political systems. The moral prestige of human rights helps their implementation in a world that is full of violations of human rights through unjust political regimes, corrupt authorities and many other causes. The moral philosophical foundation of human rights, however, remains controversial, and some progress in this matter is highly desirable, for human rights as political ideas, legal principles and moral rules will, on the long run, lose their

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[86] Habermas, in Reder/Schmidt, as cited, p. 29.

[87] Habermas, in Reder/Schmidt,as cited, p.34; Habermas/Ratzinger, Dialektik der Säkularisierung: Über Vernunft und Religion (Dialectics of Secularization: On Reason and Religion), 2012; Knapp, Faith and Knowledge with J. Habermas, Stimmen der Zeit 4/2008, p.270-280.

[88] In this sense, with reference to Confucian tradition, Horn, Festschrift (Liber amicorum) Schapp, 2010, p. 267 et seq, p. 282. For a more detailed discussion, see Ch. Taylor, Conditions of an unenforced Consensus on Human Rights, in J.R.Bauer/D.A.Bells (eds), The East Asian Challenge for Human Rights, 1999, p. 129; A. Morita, A Difference in the Concept of the Self as the Subject of Human Rights Between the West and Japan: Can Confucian Self be strong enough to exercise positive Liberty in an Authoritarian Society, ARSP-B 136 (2013) p.23.

momentum if such foundation is not available. Legal positivism has little to contribute in this respect. Utilitarianism, influential from the beginning of the human rights movement, in a way can still support this movement, because the appeal to human self-interest is a powerful political argument. The moral deficiencies of utilitarianism, however, make it unfit as a moral philosophical foundation.

This foundation can only be found in human reason. Discourse theory strives to promote a reasoned discourse; it defines practical reason, however, in a strictly formal way and refuses to engage in substantive moral arguments. This is far away from a philosophical foundation of human rights. To fill this gap, Alexy identifies some human rights as a priori principles of the discourse. Preferable to this still formalistic approach is an ontological approach on the basis of a broader and realistic concept of human reason, that is unimpressed by the argument of a "post-metaphysical era" and the empiricist self-mutilation of moral human reason. Basic human values can be reasonably discerned and rules or reasonableness and justice for the attainment of those values can be found (Finnis) which every reasonable person can understand. This is natural law in a modern sense. Human rights are the most prominent part thereof.