

Practical Reason, Ius, and objectivity on Human Rights

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1. Introduction

Article 1 of the Universal Declaration of Human Rights (UDHR) states: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” It is built with three ‘building blocks’. A fact, a duty and a link between the ontological reality and the ethical obligation. The fact states a situation, a starting point, all human being exists with an inherent dignity and essential rights. The duty description falls upon everyone who claim those rights: “should act towards another” with solidarity, as members of the same family. The epistemological section –an inherent vehicle of knowing human rights- is described as “reason and conscience”².

What kind of rational operations must be performed to enter into the realm of human rights? What kind of ‘facts’ must be taken into consideration to reach a reasonable conclusion related to human rights?

If we notice, the Enlightenment ideas and language of inherent rights can be recognized in the first and factual section of the article. But if we look closely, there is no *right* claimed in the first article of this declaration of *rights*. In fact, there is a call to solidarity and a duty to be performed by the right holder. There is a rational argument to be built and a conscience duty to be fulfilled. It seems that an emphatic ‘right holder’ who recognize his own duties next to his rights, replaces the Enlightenment individual, with his essential autonomy and freedom³.

What does this mean? What consequences of this approach can be followed in our understanding of human rights?

We think that UDHR, with some of its roots grounded in Enlightenment soil, requires a new understanding of human rights and our practical discovering of these rights. Enlightenment’s school of thought understands human rights as entitlements and claims of an individual that express his autonomy and freedom through those rights.

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² The first recital of the Preamble has a similar idea: recognition (an epistemological statement) of an inherent and universal human rights (ontological statement): “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”

³ For the drafting process and its relation with Enlightenment, see Glendon, Mary Ann, *A world made new. Eleanor Roosevelt and the Universal Declaration of Human Rights*, Random House, 2001; Morsink, Johannes, *The Universal Declaration of Human Rights: Origins, Drafting and Intent*, University of Pennsylvania Press, 1999, specially Chapter 8; Morsink, Johannes, *The Philosophy of the Universal Declaration, Human Rights Quarterly*, Vol. 6, no. 3 (1984), pp. 309 y ss. Also see, Charles Malik, *The Challenge of Human Rights: Charles Malik and the Universal Declaration*, edited by Habib C. Malik, Oxford: Center for Lebanese Studies, 2000.

When these abstract and faceless human beings determines its human rights, he does not sees as starting points neither the reality nor the objectivity of the facts; the ‘things’ are not relevant. These ‘individuals’ demand only its equal freedom to claim their rights; individual wills who express their desires through rights that must be respected. Is it an abstract freedom or is the will of individual a reasonable ground to respect human rights? Can we discover the shared rights of a shared with humanity if freedom and will as the starting point?

UDHR recognizes that common humanity has essential links to reason, and a conscience as a process of discovering and commitment to rights of solidarity. We will try to explain what kind of “reason” and “conscience”, what kind of “reality” is known by a reason that oversees the individual just as an atom of freedom and autonomy. Our argument will have three sections: (i) the relevance of recovering the understanding of *ius* not only as “right”; (ii) how certain realities are relevant to determinate human rights besides freedom and bare dignity; and (iii) what kind of acts are performed by the “reason and conscience” in order to integrate those aspects of reality in the responsibilities implied in ‘solidarity’ or *spirit of brotherhood*.

2. ‘*Ius*’ as the proper balance of ‘rights’.

Ordinarily, we understood human rights as subjective rights. Faculties of the human person that express her autonomy and the requirements for the fulfillment the basic human needs and purposes, in other words what human dignity entitle to as claims. Rights considered as “protected choices and as protected interests”⁴ with a basic scheme: a “right holder” with a correlative “duty-bearer”. In human rights documents, the “right-holder” usually is determinate as “a individual human being (...) located at the center of a whole series of concentric circles of duty-bearers [...] extended from our families and next of kin to our local communities with their school boards and the like, to regional and state affiliations, and from there to states and international organization like the United Nations, all the way until we reach the human family”⁵

This description of human rights focused its interest on the basis of moral rights that belong to an individual subject, that ‘right’ allows him to claim against an unfair intromission or unjust omission. This approach centers its analysis in a subject, an individual, with entitled *right* that can claim something in its benefit from another one. The weight of the concept is on “qualities”, “faculties”, “entitlements” or “claims” of the individual. A *power* “drawn from the being itself of the subject, from his essence, from his nature”⁶.

⁴ Tierney, Brian, *The idea of natural rights: studies on natural rights, natural law, and church law, 1150-1625*, Emory University, 1997, p. 7.

⁵ Morsink, Johannes, *Inherent Human Rights. Philosophical Roots of the Universal Declaration*, University of Pennsylvania Press, 2009, p. 44.

⁶ “Donc ce terme de droit subjectif désignait cette espèce de droit qui serait en dernière analyse tire de l’être meme du sujet, de son essence, de sa nature” Villey, Michelle, “Droit subjectif, I”, in *Seize Essais de Philosophie du droit. Dont un sur la crise universitaire*. Dalloz, Paris, 1969, 145.

Tierney states that in the origins of natural rights theories –and in human rights theories– “we can find an important shift of language, a new understanding of the old term *ius naturale*, as meaning a kind of subjective power or ability inhering in individuals”⁷. In his controversial account, Villey asserted that “subjective rights” was used as a claim –an ‘eclosion’– by Ockham, a “Copernican moment” in jurisprudence which took place on 14th century. Since Ockham, *right* implies subjective rights as an “attribute of the subject”, a power that “appertained to his essence, that was inherent in him”. Finnis explains that “somewhere between the two men [Aquinas (1270) and the Spanish Jesuit Francisco Suarez (1610)], we have crossed the watershed”, between *ius* as *the-just-thing-itself* and *ius* as a *facultas* or a “kind of moral power”⁸.

The Tierney-Finnis debate⁹ is focused on two issues: first, if medieval thinkers understood *ius* as ‘subjective rights’ –where to draw the line between the use of *ius* as ‘*the-thing-owed-to-another-one*’ or *ius* as *right-to-claim* or *facultas*. And second, they debate on the meaning of ‘subjective right’.

Finnis argues that the concept of *ius* includes a personal right or subjective claim, a *facultas*, because *ius* is not only ‘the what’s fair’, “*the just thing itself*”¹⁰ but also it takes into consideration the persons in relation through the just thing. If *Ius*, defined from objects, is an owed thing that manifests, expresses, and evokes the relation between two persons. Or if we rephrased the meaning, now from subjects, the relationship between two persons adjusted through the owed thing. A (i) *personal relationship element*¹¹, we may say a subjective aspect of (ii) the ‘*just thing*’¹², an objective element. Therefore, ‘*ius*’ could be defined from the ‘just thing’ to ‘two persons related through it’ or vice versa; but always including this two related components. Thus, a synonym of ‘*ius*’ would be *just-thing-as-a-mean-of-personal-relationship* or *two-persons-related-through-the-just-thing*.

Tierney understands ‘subjective rights’ as a certain choice. “The word ‘*ius*’ as used here (as we have explain) did not have the same meaning as our English word ‘*right*’ used in a subjective sense. The modern word implies a certain freedom of choice, a freedom to act or not act in the relevant sphere”¹³. According to Tierney, even if we

⁷ Tierney, *The idea of natural rights...*, p. 8

⁸ Finnis, John, *Natural Law and Natural Rights*, Clarendon Press, Oxford, 1980, p. 207.

⁹ Cf. Tierney, Brian, “*Natural Law and Natural Rights. Old Problems and Recent Approaches*”, *The Review of Politics*, Vol. 64, No. 3 (Summer 2002), pp. 389-404. In the same volume a Finnis’ response could be found as “*Aquinas on ius and Hart on Rights: A response to Tierney*”, pp. 407-410. The Tierney’s Rejoinder appears on pp. 416-420.

¹⁰ “[A] thing, action, object, state of affairs considered as subject-matters of relationships of justice”

¹¹ In Aquinas’ account: “it is proper to justice... to direct man in his relations with others (...) for equality is in reference of one thing to some other [*quod iustitiae proprium est... ordinat hominem in his quae sunt ad alterum (...)* *Aequalitas autem ad alterum est*]”

¹² Therefore justice has its own special proper object over and above the other virtues, and this object is called the just, which is the same as “*ius*” [*Et propter hoc specialiter iustitiae prae aliis virtutibus determinatur secundum se obiectum, quod vocatur iustum. Et hoc quidem est ius.*]”

¹³ Tierney, *Natural Law and Natural Rights...*, p. 392.

accept that Finnis could find a subjective element on Aquinas account¹⁴, the modern meaning of *right* and therefore, *subjective right* and *human rights* implies “the idea that persons have rights that others must respect”, “choice rights”, “liberty rights” or rights to a sphere of human autonomy or liberty.

In any case, both authors agree that our modern use of ‘right’ cannot be used as translation of ‘*ius*’. In consequence the translation from ‘*ius naturale*’ to ‘natural right’ is not only a substitution of words but also a switch of meaning. If so, then, the transition from *natural rights* to *human rights* might be more than a justification of personal entitlements without a theological foundation explained by Grocio, Puffendorf and the Enlightenment.

How might this switch of meaning be relevant in human rights discourse? Let me use three examples. A criminal trial imposes just ‘penalty’. If justice is to give everyone that which he deserves, to render to every man his due, or “*ius suum quique tribuere*”, the criminal deserves and is owed his penalty. His punishment is his *ius*. It lacks any coherent meaning using the word *right* as a translation of *ius* if we understand that a penalty as a *ius* that must be given to its owner¹⁵. It is not commonly use the word *right* to describe a burden, a weight, a charge a punishment.

John Finnis offers this example. Gaius said “the ‘*iura*’ of urban estates are such as the *ius* of raising a building higher and of obstructing the light of a neighbor’s building, or of not raising [a building], lest the neighbor’s light be obstructed; that [the *ius*] of allowing the dripping of rain-water on the roof or the ground of a neighbor (...)”¹⁶ Here the use of *ius* covers either “*ius* of raising” or “*ius* of preventing a raising”; includes either “*ius* of the dripping of rain-water” or the “*ius* or not do so”. Finnis explains that “[o]bviously, we cannot replace the word *ius* in this passage with the word *right* (meaning ‘a right’), since it is nonsense (or, if a special meaning can be found, it is far from the meaning of this passage) to speak of a ‘*right not to raise one’s building, lest the neighbor’s light be obstructed*.’”¹⁷

¹⁴ Besides, Tierney argues that we cannot say that ‘there is a line’ between Aquinas and Suarez about the meaning of ‘*ius*’ as ‘*just thing*’ or ‘*facultas*’; “because references to *ius* as *facultas* or *potestas* existed in the juridical language of Aquinas’s own day”, but he never uses in the sense of expression of autonomy.

¹⁵ For example, the barbarous execution of a parricide is *ius*.; (D. 48.9.9) “as prescribed by our ancestors, is that the culprit shall be beaten with rods stained with his blood, and then shall be sewed up in a sack with a dog, a cock, a viper, and an ape, and the bag cast into the depth of the sea, that is to say, if the sea is near at hand; otherwise, it shall be thrown to wild beasts. [*Poenā parricidii more maiorum haec instituta est, ut parricida virgis sanguineis verbaratus deinde culleo insuatur cum cane, gallo gallinaceo, et vipera, et simia; deinde in mare profundum culleus iactatur; hoc ita, si mare proximum sit, alioquin bestiis obicitur*].” Villey use this example to show this nonsense. I do not want to distract with the cruelty aspect of this punishment. I just want to clarify the idea that the word ‘right’ do not describes correctly the meaning of ‘*ius*’. This distinction it is part of the argument of this essay.

¹⁶ D.8.2.2: “Urbanorum praediorum iura talia sunt: altius tollendi et officendi luminibus vicini aut non extollendi: item stillicidium avertendi in tectum vel aream vicini aut non avertendi: item immittendi tigna in parietem vicini et denique prociendi protegendive ceteraque istis similia.”

¹⁷ Finnis, *Natural Law and Natural Rights*, p. 209.

My last example will focus on human rights that protect certain freedom. A *right* to freedom of speech means the right to choose whether to speak or not; a *right* to freedom of movement means whether to travel or live in certain city or somewhere else. We understand freedom as a *right*.

A medieval jurist Pedro de Bellapertica (d. 1308), explains that our freedom—more specifically our inclination to it—is a fact, a datum, or ‘a happening’. This natural capacity is a *fas* (faculty, fact) rather than a *ius* (right). There is a difference between the “*naturalis facultas*” to do something and the ‘*ius*’ that would exist to do so. For example, going through a field of another one is allowed event (*fas est*), still there is no true right (*ius*) to do so [...] because freedom is a natural faculty, not a right. In the same passage, Bellapertica points out that if the owner prohibits to going through without his permission, then, the fact (*fas*) has been introduced to the realm of ‘rights’ as *ius* or *iniura*¹⁸. We are dealing now with something more than freedom. To this jurist, freedom needs to be understood under the light of “personal relations” and “owed things” in order to become an *ius*.

Is this important to human rights? Freedom is relevant because in some rights it is the only way to make them relevant to the human being, as a person with dignity, like freedom to access to a situation—i.e. the right to marriage—or to realize it—i.e. the right to education-. But this freedom interacts with the fair adjustments between things, situations and persons.

If the human right to education is understand as a *subjective right*, the affair would be seen from a right-holder and his freedom in front of the duty-bearer and its burdens. Without the proper balance, it could obscure the objective requirements of the education by itself, its ends (*telos*), process, tradition, social capacities, state’s possibilities its available resources, etc.

To center the analysis of the human right to education in its consideration as a ‘*ius*’, the task would be the consideration of ‘due things’, the ‘fair relationship between persons through this affair’, the discovering of rights and duties of the persons and institutions required to develop the education. The task would be to establish an objectively adjusted state of affairs in the context of the education. The benefits and charges would be established accordingly: to the students, they would have the right to attend class and study, and the duty to answer an exam and to respect their classmates. If we notice, the fair requirements of the educational affair and the personal relationships created through it, illuminates the rights and duties of the people involve in the situation. Human rights would be not only an expression of an autonomy, and the respective right-holder facing a duty-bearer.

¹⁸ “Per agrum alienum ire fas est... Sed per agrum alienum ire fas est, sed non ius. Ideo si dominus me prohibeat non ibo; sed si irem sibi tenerer actione iniurarum. Et ideo dicit est naturalis facultas. Non dicit quod est ius vel omnes homines liberi sunt non processit ex statuto; in hoc differt ius naturale a iure gentium, ut dixi. Nam omnia permissa sunt nisi prohibita sint; et ideo erat non ius uti plena libertate». Cfr. *Lectura Institutionum*. Printed by Forni, ed. 1536, «De iure personarum», no. 11, pp. 120-121. in Carpintero Benitez, Francisco, “*El Derecho Natural Laico de la Edad Media. Observaciones sobre su metodología y conceptos*”, *Persona y Derecho*, vol 8, 1981, pp. 76-77.

The language of rights to certain freedoms is focused on the minimum liberty required to live those realities as human persons and assume its consequences and responsibilities: the right to marry or not, to choose a profession or vocation of life, to choose religion or worship. Without freedom, we may not been able to fulfill the just requirements of these kind of affairs. We call ‘rights’ to the ‘liberties’ to engage those activities because in this case, freedom is not only ‘*fas*’ -a fact- but also ‘*ius*’. But ‘freedom as right’ do not mean that everything ‘that I want’ or ‘I can’ is equivalent to ‘I have a right, then you ought to’.

If human rights language reduces its sources to a scheme of “right in one side of the relation, duty in the other remote side”, if human rights tightens its scope to be just a claim, a ‘*right*’ it would be left without the real, objective and rational criteria that must be found through the objective and just requirements for an personal relationships adjusted through the owed things. “Individual autonomy” or a “mere dignity of the person” has not enough rational criteria to justify or determinate a human right or an owed situation. How can we determinate the right to education, if we focus our justification in a mere freedom to choose or not to be part of the educational process? Or, how can we determinate the right to free press considering only the *free will* element and forgiving the technical process of the media?

We know that actual language of human rights has an “emphasis on the powers of the right-holder, and the consequent systematic bifurcation between ‘right’ (including ‘liberty’) and ‘duty’ is something that sophisticated lawyers were able to do without for the whole life of classical Roman law”¹⁹. We are not trying to turn the clock back. We just want show how a human rights rational justification improves when it is balanced with the consideration of *ius*.

The rational justification of human rights that forget any consideration of the ‘*ius*’, would be as misleading as thinking the human person *qua* human person with complete, finish and definitive rights. Because that kind ‘person’ is not real. Neither the person is just a person-*qua*-person, ‘floating’ by herself, demanding the fulfillment of individual desire and will, nor human rights are absolutely determined (completely finished) as an a priori abstract entitlement or requirement opposed to another one.

In the following section I shall describe some elements that may be necessary to consider in order to determine what configures and shapes the content of human rights. But I would like to clarify two ideas. First, the ‘human rights’ concept is commonly used as a (i) political goal, (ii) an ethical expression, moral object or a requirement of socially good behavior, (iii) a legal or juridical issue. These different points of view may have connections, but in any case, each one has different ways to rationally justify human rights within their realm; they have diverse means to protect or promote human conduct; they offer a distinctive kind of means to defend human dignity. Unfortunately, this confusion in the realm of human rights, or layer within human rights, misleads our understanding and expectation of the same.

¹⁹ Finnis, *Natural Law and Natural Rights*, p. 209.

‘Human Rights’ as a legal or juridical set of issues must deal with (i) state duties to respect, to assure, to protect, to promote or to fulfill, in relation with (ii) normative content or the right under consideration like life, freedom, work, and so on. The legal approach to human rights must find (iii) if can be an imputation to the state; must analyze if there is a viable (iv) judicial remedies and consider its procedural rules; and finally (iv) what kind of reparations can be requested. The rationality in this area is more technical and specific than the ethical description of UDHR’s Article 1.

‘Human Rights’ as an ethical requirement embraces a wider range of issues and purposes than the legal approach. At the same time, it is different from the political use of ‘human rights’ as a goal of a political system. Because as an ethical issue, it shows a language of dignity as an end of human actions. A political approach must deal with the social relevance of the personal claims, the available resources, the different moral projects of people, the bureaucratic organization, etc.

And secondly, our account of human rights uses an abstract language but the real human right exist only “here and now” in a concrete case, with a concrete duty-bearer, and object of the right. The abstract language used by the Declaration of Human Rights or by any other general declaration has the task of indicating the general aspect of a human right, but the abstract description is not the real human right.

Therefore, I think that it is not necessary to say things like “my having a human right does not require that the corresponding duty-bearers be immediately identifiable. Since my having, for instance, the right to food depends only on my own humanity and since that presumably is not in question, I have that right even if it is not immediately clear who—among a range of possible duty-bearers—has the moral duty to actually feed me.”²⁰

The duty bearer is not identifiable in the general description, because the language of the general statements, and the description of *rights*, does not require that kind specification. Precisely because the concept is weighted to the side of the *right holder*. But a judge deals with concrete cases and situations and determines who are the right holder, who is the duty bearer and what is the concrete things, actions and situations that needs to be adjusted and ordered. Administrative authorities determinate—if the concrete person—‘someone’ who can be included in the formula “everyone has the right to”—fulfills the requirements to receive a specific benefit from social programs.

Something similar can be said when we deal with ‘dignity issues’ among human persons: that I am a real person with real and my concrete entitlements is related with another real people. General accounts of human rights do not deplete the real human right.

Sometimes, the emphasis on the claim of the right holder can mislead, because the excessive weight on that aspect can easily incite the conclusion that the right exists by itself without a concrete duty bearer or without any owed *just-things*. The real human

²⁰ Morsink, *Inherent Human Rights*, p. 40.

rights exist only if there is a clear duty bearer and a concrete situation in which the human right comes to be.

As we have said, in the language of the UDHR's article 1, the scheme "right-holder and duty-bearer" is contrasted—or better, watered down—with the call to solidarity and the recognition of duties of the owner of the rights as relevant as his claims. The person, who holds the right, is called to embrace his duty of solidarity. This duty is discovered by an 'inherent' capacity of knowledge. Article 1 implies that when a right holder discovers his right through "reason and conscience", he also discovers that the dignity claimed as foundation of his right is shared with the other members of the human family and in consequence he has a duty to fulfill. The dignity is used as the foundation of rights, but also as the source of duties of the right holder. The claims of his entitlements has are born of and are bound to duties.

Article 1 opens the human rights discourse to duties of the right holder included in his own rights. If so, the person in relation with others, and the things, situations or affairs which are the environment in which that relation exist and develop, became relevant to the rational justification of human rights. We have called '*ius*' that *just thing as a mean of personal relation or to the personal relation through the due things and affairs*. Ancient Roman and medieval jurists used the adagio "*ius oritur ex facto*" to synthesize the need of examining the 'relevant facts' in order to determine the appropriate *ius*. Human rights are shaped with more facts than the mere autonomy and freedom that can be opposed to the other members of society.

Which *facts*, then, are relevant in the configuration and determination of human rights? What kind of *facts* express the objective and right state of dignity's affairs in a particular context? Which situations are inherent to the expression of human dignity or what kinds of requirements are inherent to the situation in which the dignity is at stake?

3. Real and relevant human situations as sources of '*human rights*'.

3.1. *The person as such.*

Being a person means someone—not something—that expresses her existence throughout decision; an existence that not only "happens" to her, but also is able to "take a position" before existence. Being a person means being "*sui iuris*" or the owner of herself. This quality allows persons to recognize himself as irreplaceable. Nobody can be replaced as a person. To be a person means more than 'a specimen of humanity', it is being irreplaceable, '*alteri incommunicabilis*'. Someone cries the burial of a beloved, not because the lost of group of cells by decomposition, or the lost of a member of the human species; but because "*I have lost her... it is you whom I have lost*".

Being a person means, in consequence, being a part of an existential web of relationships. Everybody is 'son/daughter' or '*being-originated-from*', her existence happens and is accomplished within a society ('*being-with*') and developed through her commitment towards others ('*being-for*')

The experience of being '*sui iuris*', '*alteri incommunicabilis*', '*being-from-with-for*', the experience of person is also the discovery of someone with a radical and absolute

value. This is the idea of Article 1 of the UDHR, we do not know human persons just as a ‘fact’ but as a someone with dignity and absolute value. The Second World War was the consequence of forgetting that experience.

Catalogs of human rights, specially the UDHR, describe how dignity is recognized by itself, and how person is expressed in different situations as a live and free member of the human family—as well as others—as a worker, as governed, as a subject of trial, as a member of multiple social institutions between the person and the state: religious, cultural, familial, educational, economical, leisure, political communities, etc. Their goal is to describe dignity as such.

3.2. *Person as member of human condition or the ecology of human condition.*

Aquinas inquires if it is possible to discover a universal rational order of human ends and affairs—human ecology—that must be followed by human persons in order to establish a community of solidarity²¹; are there certain duties owed to every single human being that binds every single human action? How can we discover the essential human goods that cannot be destroyed without destroy human beings and human freedom?

His answer starts on a previous step: how universal is that kind of knowledge. Aquinas states that there is “a certain order is to be found in those things that are apprehended universally”. In theoretical knowledge, it is self evident that any thing whatsoever is apprehended by man is “being”. This apprehension includes a “first principle” or first statement about this “being”: “the same thing cannot be affirmed and denied at the same time”. Analogically, practical reason’s first known object is “good” as an “end to be reached by action”. Similarly, the first statement—the first principle—that our practical reason discovers is, therefore, “good must be done and pursued, and evil must be avoided” or “the action that reach an end must be performed and the action that keep us away from it must be avoided”.

If “good” is universally known as the practical end that ought to be pursued, how do I know what is ‘good’? How does our reason discover those ends universally? Aquinas understood that our human condition is directed to an end. Those ends are built in our way of being and we are inclined to discover them when the action that we are going to decide puts that essential end at stake. He calls that ends, “natural inclinations”.

Being human, being a member of the *homo sapiens* species, implies some “natural inclination” that are discovered as an ends by the reason, and therefore, as “objects of pursuit”. Which means that, when a human being acts as a rational and ethical person, he would discover the path of his fulfillment through the rational discerning of the ends of his nature as the goods that must to be done. These natural inclinations are predispositions of his being to be fulfilled toward certain kind of actions discovered by reason.

²¹ S.Th. I-II q. 94 a. 2.

As post Kantians, sometimes our understanding of the word “nature” is reduced to mechanical and biological process. “Natural inclination” would be understood as biological tendencies. For Aquinas biology is not ethics. He uses “nature” meaning *human nature*, a rational being, with biology—of course—but a person who tries to find out what action must be done, rationally speaking, here and now.

The ‘natural inclinations’, the ends intended by our nature, imply that human actions must seek (i) the actions that preserve his existence as a *being*, as well as all *beings* procure, (ii) the action that express the ‘coherent ecology’ of the human beings, as well as all *animals* tries to do with their existence;²² (iii) the actions that preserve and express the rationality toward his social nature and his personal relationships.

Therefore, *natural inclinations* are those predispositions or suggestions that pointed out the goods and ends from our human condition that are at stake on a particular action, discovered in the context of a practical reason. The universality of that rational disposition for discovering the common ends of our *being humans* (“this action is the good to be pursued”) and its ethically binding nature (“you must do and pursue this good”) show us that our *being humans* shapes the *human rights* claims²³.

We only are able to know how or what that *kind of being*—the human person as a member of human species—through out action. And human action shows us that a reasonable action, a reasonable human being takes into consideration that *human being’s ecology*. Human rights are shaped by these requirements of the human existence.

From a liberal perspective, Martha Nussbaum’s account on *human capabilities* focuses on “what people are actually able to do and to be, in a way informed by intuitive idea of a life that is worthy of dignity of the human being”. In other words what “core human entitlements [...] as a bare minimum of what respect for human dignity requires [...]”²⁴ and therefore should be respected. She does not want to offer a metaphysical ground for human rights, but to show how central human capabilities express the demands of every person who shares the human condition²⁵.

Her central human capabilities are: (1) life; (2) bodily health; (3) bodily integrity; (4) senses, imagination and thought; (5) emotions; (6) practical reason; (7) affiliation;

²² Aquinas use as examples, the procreation—as animals—or education and foster of the offspring.

²³ Traditions, culture, society, have synthesized this kind personal and ethical experience in theoretical sentences. Theoretical approaches try to describe and justify these ethical sentences. They explain how and why human nature operates like that. But general accounts *are* not the *natural inclination*, just a recount of it. And *natural inclination* is not general descriptions of human nature.

²⁴ Nussbaum, Martha, *Frontiers of Justice. Disability. Nationality. Species Membership*, Belknap, Harvard, 2007, p. 70.

²⁵ She recognized that her purpose is to build a bridge between Rawls’ liberal contractualism and Grotian natural law tradition. A philosophical tradition quite different than Aquinas. She said that her goal is to offer a “source of political principles for a liberal pluralistic society”, implicit in the idea of a life worthy of human dignity, but in “a manner free of any specific metaphysical grounding” in order to get a “consensus among people with very different comprehensive conceptions of the good”, in *The frontiers of justice*, p. 69-70.

(8) living with concern for and in relation to other species like animals, plants, nature; (9) play; (10) control over one's political and material environment.²⁶

These two approaches try to explain what kind of rational claims can be extracted from the consideration of the common human condition. Still, some times the fair provisions of human right exceeds what can we rationally obtain from the requirements of the person and her dignity (3.1) or the claims based on natural inclination, central human capabilities or human ecology (3.2).

3.3. *Social role or social position.*

Both, the Latin "*persona*" (literally "*sounding through*") and its Greek equivalent, "*prosonon*" (literally "*look toward*") use a prefix that express "heading for", relatedness²⁷. The Greek concept "*prosonon*" express an essential idea of "in direction to"; the Latin "*persona*", a relation through dialogue. As is commonly known, *prosonon* indicates the mask that constructs character into the embodiment of someone else. This *personhood*, this mask, allows the interaction with the others. Personhood allows the character to be placed in a play, to have a role to fulfill, to have relations and responsibilities toward its community. Without its place within society, person could not have any kind of communication with others or fruitful relations.

Being a *characters* or *personage* means (i) to be part of a common relationships as the personification of a role, (ii) to deploy a precise function relevant to that society. Every person is not just a plain human being with his individual autonomy "as such", but "male", "female", "mother", "father", "son", "husband", "wife", "citizen", "indicted", "summoned", "teacher", "student", "judge", "buyer", "seller", "student", "worker", "citizen", etc. A juridical aphorism of Middle Ages said: "One man bears multiple persons"²⁸.

Any single social role, social function, *officium*, involves a specific task in society, a social expectation of fulfillment within the community to which it belongs. If we notice those social requirements are relevant to human rights. Being a "professor" implies some benefits and burdens, rights and duties that are indispensable for the development and fulfillment of the education's ends. A person can decide weather or not become a professor, but being a professor imply some inherent actions to that *officium*.

It cannot be part of the firefighter's contract to withdraw or suspend all rescue services and become a call center for cellphone repairs. Nor can it be removed from a teachers contract the inherent requirements of the social function of teaching. He has the right of teach not only because he is a person with dignity, but also because he perform a specific role in society. Being a "father" requires some rights and duties inherent to the social function of the fostering and education of his offspring.

²⁶ Cfr., Idem, pp. 76-78.

²⁷ "Pro-" (toward, Greek), "per-" (through... to, Latin).

²⁸ *Unus homo sustinere potest plures personas*.

Some rights and duties are born just because someone bears an *officium*, without a reference to autonomy: being a “citizen” implies pay taxes, being a “son” implies the right to care for elderly parents and the duty to do so, being a “parent” implies the right to choose the education of their children and the duty to provide it.

Thus, *officium* provide rational requirements for determining the *ius* of human rights or what would be the rights and duties that allows a *normal* development of that social function. The *normal* requirement of a “judge” is that he hands down justice, and that the behavior of a parent toward their son and daughter may be *normal*. This expected *normality* is related to the end of the social relation of the *officium*.

Here, we are using *normal* more as an *ethical normality* rather than *empirical normality*. Normal is the practice or human action that fulfill and develops the human dignity, the human condition, and the social function or *officium*. It would be *normal* (an empirical fact), if, unfortunately, a wife would be frequently beaten by her husband, but that kind of behavior is not *normal* (ethically justifiable). There may be many caring people unwilling to pay their debts, but that kind of debtors are not *normal*.

The common standard of behavior required by an *officium* in order to reach its social goal is relevant to determinate the human right. Here, *normality* is *normative*. Any parent must be good parent. Being a person means also to fulfill the requirements of *normality* of the *officia* that she embraces. Human rights are not only a requirements or entitlements of the individual autonomy of freedom.

Officia contributes to the determination and configuration of human rights through: i) the social role or social function of the *person-in-this-social-situation*, ii) the action and behavior required for the *normal* fulfillment or effectiveness of the *officium*, and iii) in a certain way, the historical or cultural stereotype in which that social function is expected to be realized.

This does not mean that the human person can be diluted in the social role. Rights and duties of the prosecuted in a criminal trial find their rational justification in the person’s dignity but also in the social situation and in the ends of the trial. He appears in court in the *officium* of defendant, he has the rights related to his fair defense but also, those rights are intent to respect that the accused embodied not only that *officium* but also, being a person.

Even though, a *professor* has some preeminence in a university not only because the dignity of the *professor-as-person*, but because the institution of university and the *professor-as-social-function* in it, requires certain actions to be executed by him in order to fulfill its social goals or to develop the common good of the university. At the end, a university must respect persons, but human rights recognize the ends of social institution and the role of a social function required to reach that goal.

Persona-qua-persona, and *persona-qua-officium* must be considered related and fair and balanced in the consideration of human rights. An unjust person may want to use the person as a mere function in his benefit, rounding up people in their social roles. But he cannot concentrate his attention to the unique value of the person as such, because he would not know, or it would be impossible, to discover what may be required to a father, professor, worker, etc. In other words, the “*ultimate atom* of the human

individual will”²⁹ cannot provide by itself, enough rational criteria to justify the rights and duties of a father, but the fact that “I’m the father” and there is a personal relation with a human being who needs to learn and develop his capacities.

We just want to clarify that human rights grounded only on the individual interest or on individual as an atom of rightfulness and freedom, or just in a floating personal dignity, are fictional rights because that kind of person is not real. It would depend on the human right issue to determine how relevant would be the *officium* for the rational justification of an adequate solution. Being a “father” means that it is expected to fulfill the functions of fatherhood, but does not imply that everything is defined only by this *officium*.

Subjective rights needs to harmonize its demands with some objective requirements of the social function. The facts of the case, the objective demands of the situation under examination, will determine—or maybe “suggest” or “incline” would be a more precise verb—what would have more weight in a just solution, the subjective right over the social function or vice versa.

3.4. Culture

Culture is the common effort and tradition of understanding the flourishing of the person and social requirements that frame it. The human rights are not an abstract and complete claim that looks for its place within a society.

The person receives from the communities a peculiar way to resolve the fact and meaning of their existence in relation to God, the world, other human beings and herself. These common understandings of human existence, are integrated and presented in a particular cultural way. “Christmas”, the date, places, rites and the ‘proper’ way of celebrating it offers a mean to express, to transmit and to discover the fact and the meaning of family, society, religion and their interaction. Islam may have different rites, places and dates, but they have a cultural way to express, to transmit and to discover the fact and the meaning of family, society, religion and their interaction.

That culture expresses the way in which a person understood herself and her proper existence. Therefore, culture is relevant to determine some human rights, because culture, and the cultural way of expressing a human right appears as ethically bound to the members of that culture and in consequence a matter of the legitimate expression of personhood.

The process of transmission of culture or tradition (from Latin “*tradere*”, to deliver, to transmit) is also a process of a new learning, thinking and validation process. Because the sciences grow by the accumulation of data, but culture implies reason and freedom. Each generation received the experience of its tradition but must live, think and reformulate that cultural expression. They can correct some misunderstandings of the culture or emend the expected standard or cultural solution. Culture is not transmit-

²⁹ Carleton Kemp, Allen, *Legal duties and other Essays in jurisprudence*, Oxford, Clarendon Press, 1931, p. 164, he is quoting Paul Vinogradoff.

ted as science; it is more an invitation of action, it is a challenge to freedom and a requirement to think, again and again, the reasons for doing certain actions.

Besides, sometimes the cultural solution does not express human dignity. Meals and food have a cultural aspect and biological element that must respect ‘human ecology’. The culture must be grounded and adjusted in the light of the person’s dignity. A culture can learn about itself and correct its deviations if it maintains and open its solutions to reason, truth and other cultures.

In the case of the “*Street Children*” (*Villagrán-Morales et al.*) vs Guatemala the Inter-American Court of Human Rights condemned Guatemala, among other things, for damaging personal integrity of the parents, caused by the murder of their children. Specifically, the court stated that the damage was caused because: “it is evident that the national authorities did not take any measures to establish the identity of the victims, [...] This evident negligence of the State should be added to the fact that the authorities did not make adequate efforts to locate the victims’ immediate next of kin, notify them of their death, deliver the bodies to them and provide them with information on the development of the investigations. All these omissions delayed and, in some cases, denied the next of kin the opportunity to bury the youths according to their traditions, values and beliefs and, therefore, increased their suffering”³⁰.

Furthermore, “the Court must stress the treatment of the corpses of the youths whose bodies were discovered in the San Nicolás Woods, (...) were not only victims of extreme violence resulting in their physical elimination, but also, their bodies were abandoned in an uninhabited spot, they were exposed to the inclemency of the weather and animal scavengers, and they could have remained thus during several days, if they had not been found by chance. In the instant case, it is clear that the treatment given to the remains of the victims, which were sacred to their families and particularly their mothers, constituted cruel and inhuman treatment for them.”³¹

The remains of the dead must be treated according to certain traditional rites. The court has taken into consideration the culture in order to determine the human right violation. Culture is part of the content of human rights because it shows a paradigm of worthy behavior towards others that must be followed the persons and their community. In the case of *Moiwana vs Suriname*, the Inter-American Court grounded the state’s responsibility in the light of the indigenous emphasis “upon punishing offenses in a suitable manner”³².

In this context, “[t]he State’s failure to fulfill this obligation has prevented the Moiwana community members from properly honoring their deceased loved ones” had a “particularly severe impact upon the Moiwana villagers, as a N’djuka people. As

³⁰ INTER AMERICAN COURT OF HUMAN RIGHTS, Case of the “Street Children” (*Villagrán-Morales et al.*) v. Guatemala. Merits. Judgment of November 19, 1999. Series C No. 63, par. 174.

³¹ *Ibidem*

³² INTER AMERICAN COURT OF HUMAN RIGHTS, Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs, Judgment of June 15, 2005, Series C, No. 124, par. 93.

indicated in the proven facts, justice and collective responsibility are central precepts within traditional N'djuka society. If a community member is wronged, the next of kin—which includes all members of his or her matrilineage—are obligated to avenge the offense committed. If that relative has been killed, the N'djuka believe that his or her spirit will not be able to rest until justice has been accomplished. While the offense goes unpunished, the affronted spirit—and perhaps other ancestral spirits—may torment their living next of kin.”³³ This cultural assumption and the failure of the state originates, as a victim said, a “great fear of those spirits and much remorse that their efforts at justice had not yet succeeded.” In consequence, “not only must the Moiwana community members endure the indignation and shame of having been abandoned by Suriname’s criminal justice system—despite the grave actions perpetrated upon their village—they also must suffer the wrath of those deceased family members who were unjustly killed during the attack.”³⁴

3.5. State determination of Human Rights

The social dimension of the *search* and configuration of human rights can be determine by state actions: in general terms, by laws; in concrete conflictive cases, by judges and remedies; or by the concretion of a political disposition.

Some times, the law determines the prudent and the law usually determines minimal standard for the content of human right, or what would mean and imply a specific normality of an *officium* or a situation with social relevance. For example, the determination of reasonable time for judicial processes; or the number of years of basic education; or the duties of parents or professors.

By law, also, a society can choose one of the multiple, possible and reasonable ways in which a certain right can be developed, providing legal certainty. Finally, the law provides legitimacy to the limits of human. Our language of human rights is over-focused on right-holder subjective rights and its relations with the duty-holders and the objective requirements of social situations must to be balanced with social limits imposed by laws.

In addition, if the rights—and duties of everyone else—must be balanced with legal limits duties rooted on the right holder, this law and duties are counterbalanced with certain rules that must be applied to this kind of laws, as proportionality, fair ends, possibility of judicial review, etc.

Courts determinate, also, the human rights when determining particular cases. They study the situation, the entitlements or requirements of persons’ dignity, the *normality* of the relevant *officium* of the case, the concrete and specific social goods at stake. The judge analyzes what is considered socially *normal* by the basic and social principles, the international standards of human rights, the necessary structures and disposition of state branches, and then, decide what is the content of human rights, what

³³ Idem, par. 95.

³⁴ Idem, par. 96. <https://doi.org/10.5771/9783896658074-230>, am 08.06.2024, 09:52:33

are the rights contended, the duties that must be attended, the objects that must be given and the actions that must be performed, the reparation and restitution that must be granted, in order to respect, to fulfill and to complete the specific human right.

Executive power determinates human right when transform the “type of person” described in law and recognized in a specific case, and granted the benefits described by law. Then it realizes the content of the human right. Also, this kind of authority elaborates programs of action, public policies in order to distribute their available resources that determinate how much, where, when, and how, a human right can be satisfied.

3.6. *Practical reason and the basic spheres of experience*

Martha Nussbaum explains that we can recognize that there are common “*basic spheres of experience*” or “certain areas of relatively greater universality can be specified (...) something that is experienced differently in different contexts, we can nonetheless identify certain features of our common humanity”.³⁵ Sooner or later, it can be said that all human beings would be part of a practical situation, or common experiences, in which every human being will have to deal with. For example, mortality: “No matter how death is understood, all human beings face it and (after a certain age) know that they face it. This fact shapes every aspect of more or less every human life.”³⁶

These spheres of experience ground our life in a certain way, in our common humanity. Cultures and ethical schools of thought try to explain what kind of actions, reasons and virtues are consistent and consist in a reasonable, worthy and human response within³⁷. What kind of practical situations express this being-acting-person? What kind of practical situations are common to the existence of everyone? Consequently what kind of practical situations must be taking into consideration as relevant to human rights? We propose the following open-ended catalog:

- (i) Regarding the radical meaning and significance of our personal history, the freedom of conscience, and the decisions related to our personal role before God, the others, and ourselves, integrated in a coherent personal history worthy to be lived, told and repeated;
- (ii) In relation to our vocation to communion with others, our duties and response to our ancestors and to our community;
- (iii) Concerning to the presence and existence of the others, our duties and respect to their life, body, and integrity;

³⁵ Nussbaum, Martha, “*Non-Relative Virtues: An Aristotelian Approach*”, World Institute for Development Economics Research of the United Nations University, WP 32, 1987, http://www.wider.unu.edu/publications/working-papers/previous/en_GB/wp-32/_files/82530817639581768/default/WP32.pdf, accessed March 2012, p. 26. Also in *Quality of Life*, ed. By Amartya Sen and Martha Nussbaum, Oxford, Oxford University Press, 1993.

³⁶ Idem, p. 27.

³⁷ Cf. Idem, pp. 27-29.

(iv) About our common existence, the duty of recognizing the beauty of the person shown through its being-male or being-female, including their body and emotions and sexuality.

(v) Regarding the practical experience of just things, their property, the duty to give those owed things to the owners as the first step of social life, and as minimal recognition of the dignity of others;

(vi) In relation to the discovered truth and good faith, the duty to speak and live according to the known truth and respect for the honor of others.

4. “Reason and conscience” in discovering human rights.

We have said before, that human right is a porous concept. It can be used as a part of justification of a political project; it could be analyzed as a matter of legal theory and jurisprudence. Or it could be studied as an ethical inquiry. Each area of knowledge is connected to the others, as communicating vessels. They may share some results and reasons. But they have different intellectual tools; they attend unequal requirements and attempt diverse results.

Section 3.5 was focused, primary, in the state’s role on human rights. But, as an ethical issue, we must now to discuss an essential element in the configuration of the human rights as ‘*human iura*’. The integration of all the previous elements within the practical reason, and the personal commitment established by it.

Human Rights tend to be understood as personal entitlements that express freedom and autonomy. We have “rights” (juridical) and that express the “right” sense of our existence (ethical), and political communities must be created to develop our rights. We usually are educated to appraise our rights and freedoms and defend them against unjust intromission. But then, we have to recognize that we embodied some social functions, with burdens and benefits, that are reasonably beyond any consideration of our autonomy and freedom; as a professor, son, brother or citizen-. We realize that society demands to provide efforts to common goals.

The generalization of human rights language tends to understand these right as a complete, terminated, and definite ‘thing’. With right-holders, objects and duty-bearer previously and absolutely determined. But the historical, contingent and real person, realizes that she is under a circumstance in which she has to discover what is the just-right thing to do, here and now.

The task of practical reason is not to describe a general and definitive formula of freedom or dignity, as a riverbed, in order to make the human rights always flow within that kind of borders. General descriptions of autonomy, freedom, “natural inclination” are not human rights, but the suggestion of possible actions, and therefore provide a starting point of the rational analysis of any given situation. Practical reason sees in those general accounts or in those “natural inclination” or in those “human capabilities”, an indication, inclination or direction about the intelligibility of the owed things that must be delivered as an *end-to-pursued-by-action*.

General formulas may indicate, incline or propose a course of action, but a rational and practical determination must be employed. Practical reason allows positioning

ourselves within the real requirements of the situation in which we are looking for the right thing to do. “What is happening here? What is the ethical issue at stake? What are its inherent and just requirements? What I have to do, here and now?” Practical reason is the reason in discerning, in choosing, in assuming commitments the specific means—here and now—to reach specific ends.

We have explained how many requirements have to be taken into consideration, how many demands must be *adjusted*, in the determination of human rights. Sometimes *person-as-such* would be relevant enough to find out the *adjusted* human right in a specific situation. But some times we would have to *adjust* the human right giving more relevance to *person-as-officium*, to *person-as-relation*, to *person-as-human-condition*, to the culture, to laws, to judicial sentences, or to administrative provisions.

The subject described in article 1 of UDHR, “endowed with reason and conscience” has the duty to “act towards one another in a spirit of brotherhood”. What means “reason and conscience”? What kind of rational process must be performed in order to fulfill her duty of solidarity? That rational operation, I think, means the art, the rational intuition of situate ourselves “inside” the state of affairs or *things*—in Latin *res*, the origin of *real*—that *relates* or *mediates* persons through or by the those things; *medium rei* in Aquinas’ account-. And then, trying to calculate, to measure or to discover what is the *adjusted* thing, relevant for dignity, within that situation and relation.

This is the art of rational measurement, calculation or discovering of the *ad-just-ed things*, Finnis uses ‘*arights*’³⁸, and all its adjusted actions, objects, benefits, burdens and persons. This is a rational process of trying to place ourselves, inside or within what is the real, inherent, and internal situation or position between two persons “mediated by” or “related through” the just things, the owed action, or simply by the *dignity-as-ius*. The adjusted behavior, the adjusted *things* to be given back, appears in practical reason as the end of the action to be performed, or as “the good to be done”. Consequently, the rational discovering implies the personal commitment—in conscience—to act in that direction.

Therefore, UDHR’s Article 1 could be reformulate as the rational art and the ethical commitment within the conscience of discovering the real entitlements, the inherent requirements, and the internal behaviors that are owed or adjusted in a specific situation related to dignity of all human beings, in order to establish a proper, worthy and human relationship between persons.

³⁸ Cf. Finnis, *Natural Law and Natural Rights*..., p. 206. “One could say that for Aquinas ‘jus’ primarily means ‘the fair’ or ‘the what’s fair’; indeed, if one could use the adverb ‘aright’ as a noun, one could say that his primary account is of ‘arights’ (rather than of rights)”.

